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# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

**WALKING.** — Certain phrases in which this word occurs have received judicial construction.<sup>1</sup>

**WALL.** — See note 2.

**WALLS.** (See also the title PARTY WALLS, vol. 22, p. 236.) — See note 3.

**WANDERING.** — See note 4.

**WANT.** — The term "want" in itself is ambiguous, being commonly used to mean "wish" or "desire," and as frequently "need" or "require."<sup>5</sup>

**1. Walking Out of Bounds.** — A statute declared sureties for a prisoner liable "if the prisoner walk out of said bounds." In *Howard v. Blackford*, 3 N. J. L. 352, it was held that a mere casual stepping out of bounds was not within the provision, and the court said: "The question then will be, what is *walking* out of the bounds, according to the true meaning of the act? And I think the plainest rules of construction tell us that it can be no other than such *walking* out as, before the passing of the act, would have been an escape; a *walking* out by which the plaintiffs would have been damned, for which they would have had their action against the sheriff, and he against the prisoner. And this is the import of the phrase in the act concerning sheriffs. There it is said if the sheriff suffer the prisoner to *walk* out of the prison, it shall be an escape." See also the title PRISONS AND PRISONERS, vol. 22, p. 1298.

**Walking on the Railroad Track — Accident Policy.** (See generally the title ACCIDENT INSURANCE, vol. 1, p. 284.) — A policy of insurance contained the condition that the insurance should not cover injuries happening to the insured while "*walking* or being on the roadbed or bridge of any railway." The insured stepped off a railroad train, when it came to a stop on a drawbridge at night, fell through a concealed hole in the bridge, and was killed. It was held that the case was not within the said condition, the obvious intent of which was to guard, not against a defective roadbed or railway bridge, but against danger of injury from trains passing thereon. *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262.

**2. Retire to Wall.** — See the title SELF-DEFENSE, vol. 25, p. 271.

**3. Party or Other Walls.** — The *New York* statute making it the duty of one digging to a depth of more than ten feet below the curb line, to protect "party or other *walls* standing upon or near the boundary lines," was held

not to apply to the foundations of a stoop, and, therefore, the liability for injuries to the stoop by such digging is to be determined by the rules of the common law, which do not make one digging with care on his own land liable for the fall of structures built upon the adjoining land. *Berry v. Todd*, 14 Daly (N. Y.) 451.

**Ancient Walls.** — In *Eno v. Del Vecchio*, 4 Duer (N. Y.) 63, the court said: "A party *wall* built to be used as such, and in fact used as such for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands, is an ancient *wall*, within the meaning of the word 'ancient,' as applied to lights, ways, foundations, etc., which are treated in law as being ancient lights, ways, and foundations. *Wright v. Freeman*, 5 Har. & J. (Md.) 477."

**When the Walls Shall Be Completed.** — A subscription to a college was payable "when the *walls* shall be completed." It was held that the meaning of this phrase was a question for the court, and that such subscription was payable when the *walls* were so far completed as to receive the roof on them, although the *walls* had not then been covered with mastic according to the complete designs of the building. *Worcester Medical Inst. v. Harding*, 11 Cush. (Mass.) 285.

**4. Wandering.** — In *Morris v. Jeffries*, L. R. 1 Q. B. 261, it was held that horses grazing on the side of a road with a man in charge of them, they being under his control, were not liable to be impounded as "*wandering*, straying, or lying" about the road.

**5. Want.** — *Hull v. Culver*, 34 Conn. 403. In this case the devise was as follows: "I give all my estate to my beloved husband, to use and improve during his natural life, and if he should *want*, for his support, to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." It was held,

**WANTAGE.** — See note 1.

**WANT OF EQUITY.** — See note 2.

**WANTON WANTONLY WANTONNESS.** (See also 13 ENCYC. PL. AND PR. 409, title MALICIOUS MISCHIEF; 13 ENCYC. PL. AND PR. 934, title MAYHEM; and see in this work, WILFUL, WILFULLY, ETC.) — Wanton means reckless -- without regard to the rights of others.<sup>3</sup> In an indictment, the

first, that the term *want* was to be construed as meaning "need;" second, that the devisee was not to be the judge of his need, but it was to be a case of actual necessity.

*Wanted*, as used in a statute authorizing the condemnation of land for railroad purposes, means necessary. *Tracy v. Elizabethtown, etc., R. Co., 80 Ky. 267*, the court said: "The mere fact that the appellee alleged that it desired the property was insufficient to show that there was a necessity for taking it, or that the purpose was public, as the word *wanted*, as used in the charter, is not synonymous with desired, but it was used by the legislature in the sense of necessary, as shown by the ordinary and common sense reading of the section quoted, by its use in the twelfth and fourteenth sections of the charter, and by the substitution for it of the word required in the thirteenth section, which directs that the damages for 'the use and occupation of the property required by said company,' must be assessed under oath. The company is restricted to the taking of such and so much property as is reasonably necessary to the construction or repair of its road or works, and in order to prevent it from becoming its own judge, the issue presented by the appellants should have been heard and determined by the Circuit Court, and if the company had failed to show the necessity, or the public nature of the use according to the rule herein laid down, the court should have refused to confirm the verdict."

**Wants and Needs.** — A testator gave his property to his wife, and in the event of there being more than should be necessary for "her *wants* and needs" she was to give a certain sum to a designated person. In construing this provision the court in *Clark v. Hill, 98 Tenn. 300*, said: "The words *wants* and needs cannot, in the construction in which they are used, simply mean such wants and needs as are to be satisfied by consumption, but they must be construed also in connection with an unlimited power of disposition and enjoyment. The entire terms of her holding and use must be construed together, and as a whole."

1. In *Graham v. Eisner, 28 Ill. App. 276*, it is said: "It appears also in the evidence, from the report of the government gaugers of this whiskey, that what is known as *wantage* accounted for fully one-half, if not more, of the loss claimed by appellant. *Wantage* covers what is lost by evaporation in the storage of whiskey and what soaks into the barrels."

2. **Want of Equity.** — In *Patterson v. Turner, 62 Ga. 677*, it is said: "*Want of equity* is a phrase which has two meanings. A bill may want equity because it presents a good case for a court of law, or because it presents no case at all. Used in the former sense, the point is made that the complainant, by his

own showing, does not need the aid of a court of equity; used in the latter, it signifies that he is entitled to no redress in any court."

3. **Wanton.** — *Tatum v. State, 66 Ala. 465*.

**Wanton Act.** — A *wanton* act is one characterized by extreme recklessness, foolhardiness, or heartlessness; malicious; recklessly disregarding of the right or of consequences. *Polykranas v. Krausz, 73 N. Y. App. Div. 583*; *Watts v. South Bound R. Co., 60 S. Car. 74*; *Brasington v. South Bound R. Co., 62 S. Car. 3-5*.

In *State v. Brigman, 94 N. Car. 888*, it is said: An "illegal act is *wanton* when it is needless for any rightful purpose; without adequate legal provocation, and manifests a reckless indifference to the interests and rights of others."

A *wanton* act is one committed in disregard of the rights of another, in a reckless spirit, or under circumstances which evince a lawless, wicked, or mischievous intent. *Thomas v. State, 14 Tex. App. 201*.

**Wanton or Obscene Language.** — A city ordinance provided a penalty, "if any person shall address any *wanton* or obscene language to another, or exhibit any *wanton*, lewd, or obscene gestures or conduct." It was held that the expression "*wanton* or obscene language" is here equivalent to lewd or lascivious language, and that the words "long-legged son of a bitch," "long-legged pup," and "damned son of a bitch," do not come within the ordinance. *Sutton v. McConnell, 46 Wis. 269*.

**Wanton Disturbance.** — The mere fact of a man being instructed to deliver papers at the house of a third person, is no answer to a complaint against him, under 10 & 11 Vict. Stat., c. 89, § 28, charging him with having "wilfully and *wantonly*" disturbed the party and his family by violently knocking and ringing at the door at an unreasonable hour of the night. In *Clarke v. Hoggins, 11 C. B. N. S. 545, 103 E. C. L. 545*, the court said: "The question submitted to us virtually is, whether he was absolved by his employment by Mr. Hiatt from the consequences of his acts. The answer to that question obviously must be in the negative. That the appellant acted wilfully is clear. He rang so violently that he broke the bell-wire. The only element remaining is the wantonness. I agree with Mr. Smith that *wantonly* means not having a reasonable cause. Here we come to the kernel of the case — whether one, having a lawful right to come to another's house, has a right to stop there at a late hour at night, knocking and ringing violently, though he knows that the inmates do not choose to admit him, or to receive what he brings. That answers itself. Wantonness consists in the doing that which will annoy another and which the party doing it knows will produce no results to himself. I think the magistrates could come to no other conclusion than they have done; and that



term "wantonly" has been held to imply turpitude; that the act done is of a wilful, wicked purpose.<sup>1</sup> Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others.<sup>2</sup> Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights;<sup>3</sup> it has also been defined as the conscious failure by one charged

the question which they have put to us is capable of receiving only one answer."

**Wanton and Cruel—Divorce.** (See also the title DIVORCE, vol. 9, p. 723.) — Mere neglect of a husband to support his wife and family for a long period of years has been held not to be such gross, *wanton*, or cruel neglect as would sustain a libel for divorce. *Peabody v. Peabody*, 104 Mass. 195.

**Wanton Killing of Animals.** (See also the title MALICIOUS MISCHIEF, vol. 19, p. 643.) — Under the statute declaring a person guilty of a misdemeanor "who unlawfully or *wantonly* kills, disables, disfigures, destroys, or injures any horse," or other domestic animal particularly named (Alabama Code, § 4409), unlike the preceding section (4408), which relates to malicious injury to animals, malice towards the owner is not an ingredient of the offense. The statute is aimed against intentional acts, unlawfully or *wantonly* done, from which injury to the animal results, although there may not have been a specific intent to kill, disable, or injure it. In *Tatum v. State*, 66 Ala. 467, Brickell, C. J., said: "The statute on which the accusation is founded is not directed against malicious mischief, or malicious injuries to property. The preceding section of the code is aimed at injuries of that kind; and this section, at *wanton* or unlawful injuries to certain domestic animals. Of this offense, malice is not an element. If the wrong done was malicious — if it was with the intent to injure the owner of the animal, it would be of the class of injuries enumerated in the preceding section. Under this section it is enough that the injury is inflicted unlawfully — in violation of, or contrary to, law; or *wantonly* — that is, without regard to the rights of the owner." See also *Reedy v. State*, 22 Tex. App. 272; *Lane v. State*, 16 Tex. App. 172; *Payne v. State*, 17 Tex. App. 40; *Welch v. Durand*, 36 Conn. 182.

**Wanton Injury to Personal Property.** — Where a barrel of whiskey is without the stamps or brands required by law, the mere possession of it gives no title; and a revenue officer who seizes such a barrel concealed on private premises, and in good faith destroys it, is not guilty of a misdemeanor under 1 North Carolina Code, § 1082, prohibiting "*wanton* and wilful injuries to personal property." *North Carolina v. Vanderford*, 35 Fed. Rep. 282.

**1. Wantonly.** — *North Carolina v. Vanderford*, 35 Fed. Rep. 282; *State v. Massey*, 97 N. Car. 465.

A statute forbade the "wilfully, maliciously, or *wantonly* tearing down, mutilating, defacing, or injuring any building standing or being upon the land of another, or held in trust." In construing this provision, the court, in *Werner v. State*, 93 Wis. 266, said: "*Wantonly*, as thus used, may be defined as the reckless disregard of the lawful rights of the owner of the building — a heedlessness of the necessary results of the act complained of."

**Wantonly Bringing Suit.** — In *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 418, it is said: "By *wantonly* bringing a suit, as contradistinguished in this section from bringing it in bad faith, I presume the legislature must have intended the institution of a suit, by an executor or administrator, without probable cause, or where he has not exercised ordinary care and diligence in ascertaining whether there was any just cause of action."

**Unlawfully.** (See also UNLAWFULLY, ante.) — An indictment for a violation of North Carolina Code, § 985, as amended by c. 66, Laws of 1885, which fails to allege that the act of the defendant was done "*wantonly* and wilfully," is fatally defective, and the use of the words unlawfully, maliciously, and feloniously will not supply the lack of the essential descriptive terms. *State v. Morgan*, 98 N. Car. 641.

**Instruction to Jury** — In an action for assault and battery, the trial court instructed that to enable the plaintiff to recover he must have been *wantonly* assaulted. On appeal to the Supreme Court, that court, by SeEVERS, J., said: "The court instructed the jury, in substance, as the defendant claims, that in order to entitle the plaintiff to recover they must find that he was unlawfully, *wantonly*, and wilfully assaulted; and it is insisted that the evidence does not justify the verdict. The evidence clearly shows that the shooting was wilful, as distinguished from accidental. The defendant purposely fired the pistol. He so testifies; and if such act was not excusable it was unlawful. But it is said the word *wanton* means 'malicious,' and that there is no evidence of malice. No such meaning can or should be given to the word *wanton* as used by the court. At most, the jury were required to determine whether the assault was wilful and intentional, or justifiable or excusable. In fact, the only question under the evidence was whether the assault was excusable, and this was fairly submitted to the jury, and with their finding we cannot interfere." *Brantz v. Marcus*, 73 Iowa 64.

**2. Trauerman v. Lippincott**, 39 Mo. App. 479.

**3. Wantonness.** — *Welch v. Durand*, 36 Conn. 182; *State v. Brigman*, 94 N. Car. 888, quoting *Bouv. L. Dict.*

In *Welch v. Durand*, 36 Conn. 182, it is said: "*Wantonness* is action without regard to the rights of others."

In *Harward v. Davenport*, 105 Iowa 592, it is said: "*Wantonness* is defined to be a 'licentious act by one man towards the person of another, without regard to his rights,' and may include the element of recklessness."

In *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 542, it is said: "*Wantonness* is reckless sport, wilfully unrestrained action, running immoderately into excess."

**Wantonness Means Not Having a Reasonable Cause.** — *Clarke v. Hoggins*, 11 C. B. N. S. 545, 103 E. C. L. 545.



with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure.<sup>1</sup>

**Wantonness Distinguished from Inadvertence.**—

In *Watts v. South Bound R. Co.*, 60 S. Car. 67, it is said: "A charge that an act was recklessly and *wantonly* done or omitted indicates much more than mere inadvertence and implies that the wrongdoer has a mind or spirit which, though adverting to its duty and the consequences of its breach, yet in unbridled license disregards the same. The language imports a conscious failure to observe due care from which evil intent may be inferred." See also *Brasington v. South Bound R. Co.*, 62 S. Car. 325.

1. **Wantonness.**—*Birmingham R., etc., Co. v. Bowers*, 110 Ala. 331; *Birmingham R., etc., Co. v. Pinckard*, 124 Ala. 372.

**Active or Passive.**—That *wantonness* may apply to an omission to act, see *Linsley v. Bushnell*, 15 Conn. 225; *Welch v. Durand*, 36 Conn. 182.

In *Cobb v. Bennett*, 75 Pa. St. 330, 15 Am. Rep. 752, the court, by Agnew, C. J., said: "Indeed, the question upon the charge comes

down to this. Is it *wantonness* when a mariner, warned of a net, seeing the light marking its position, and requested to avoid it, yet indifferent to the interests of the fisherman, keeps on his course, when a reasonable pursuit of his voyage would not be prejudiced by avoiding the net? **Wantonness** is reckless sport, wilfully unrestrained action, running immoderately into excess. If a man will do an injury, when he may reasonably avoid doing so without inconvenience to himself, can it be said he is blameless? Is it not worse than *wantonness*, is it not rather malice, when he may, without prejudice to the reasonable enjoyment of his own right, desist from an injury to another and yet will persist in committing it? Now, unless we deny this proposition we cannot reverse. If there were anything exceptional in the facts or contradictions of the evidence, it was in the power of the defendant to ask specific instructions upon the precise state of the facts, as appearing on either side."

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**I. SCOPE OF TITLE.** — The rights, duties, and liabilities of belligerent and of neutral nations during a state of war have been extensively treated in a preceding title of this work.<sup>1</sup> It is the purpose of this article to discuss those matters incident to a condition of war as affecting a belligerent nation and its citizens, excluding all considerations in regard strictly to international relations. The construction and application of statutes passed with reference to a particular war, and under circumstances not common to wars in general, are properly within the scope of this article. The Acts of Congress passed in regard to the American civil war are of such a character, and have been a prolific source of litigation, and to these acts and the decisions arising therefrom the greater part of this title is devoted.

**II. DEFINITION AND CLASSIFICATION.** — War Has Been Defined elsewhere in this work as a contest between nations or states, or between parties in the same state, carried on by force of arms.<sup>2</sup>

**Classification.** — The various classes of war have been considered elsewhere in this work.<sup>3</sup>

**III. COMMENCEMENT AND EXISTENCE** — 1. **Power to Make War.** — The right to make war belongs to the sovereign power alone.<sup>4</sup> In *England* this power is vested in the Crown;<sup>5</sup> in the *United States*, in Congress.<sup>6</sup> This does not, however, prevent the President from repelling an invasion even though there has been no express declaration of war by Congress.<sup>7</sup>

**Nature of Power.** — In *England* the power to declare or to recognize war is executive; but in the *United States* the power vested in Congress, which includes the right to recognize or declare insurrection as existing war, is legislative.<sup>8</sup>

2. **Declaration.** — The requirement which formerly existed, that a formal declaration of war should be made before the commencement of hostilities, is not regarded as essential. The present custom is to issue a proclamation of the existence of war for the information of the subjects of the country issuing it and of neutral nations.<sup>9</sup>

3. **Existence.** — The fact of the existence of war and the date of its commencement will be determined by the political power.<sup>10</sup>

1. See the title *INTERNATIONAL LAW*, vol. 16, p. 1121.

2. See the title *INTERNATIONAL LAW*, vol. 16, p. 1140.

3. See the title *INTERNATIONAL LAW*, vol. 16, p. 1140.

4. **Power to Make War.** — *U. S. v. Schooner Active*, (U. S. Cir. Ct.) 3 Wheel. Crim. (N. Y.) 266, 24 Fed. Cas. No. 14,420.

5. *People v. McLeod*, 25 Wend. (N. Y.) 575.

6. See U. S. Const., art. 1, § 8. See also *People v. Smith*, (U. S. Cir. Ct.) 3 Wheel. Crim. (N. Y.) 100, 27 Fed. Cas. No. 16,342; *Perkins v. Rogers*, 35 Ind. 124; *People v. McLeod*, 25 Wend. (N. Y.) 575.

**What Included.** — The power to declare war includes the power to prosecute it by all means

and in any manner in which war may be legitimately prosecuted. *Miller v. U. S.*, 11 Wall. (U. S.) 268.

7. **Repelling Invasion.** — *People v. Smith*, (U. S. Cir. Ct.) 3 Wheel. Crim. (N. Y.) 100, 27 Fed. Cas. No. 16,342; *Prize Cases*, 2 Black. (U. S.) 635; *Leathers v. Commercial Ins. Co.*, 2 Bush (Ky.) 296.

8. *Leathers v. Commercial Ins. Co.*, 2 Bush (Ky.) 296.

9. **Declaration of War.** — See the title *INTERNATIONAL LAW*, vol. 16, p. 1140.

**In the American Civil War** no declaration of war was ever made, but the President recognized its existence by proclaiming a blockade. *Matthews v. McStea*, 91 U. S. 7.

10. **Existence of War.** — *Blackburne v. Thomp-*



**Existence Not Presumed.** — A state of peace and the continuance of treaties must be presumed by all courts of justice until the contrary is shown; and this is *presumptio juris et de jure* until the national power of the country in which such court sits officially declares the contrary.<sup>1</sup>

**Judicial Notice.** — The courts will take judicial notice of its existence and the time of its commencement and close as so determined by the political power.<sup>2</sup>

**IV. EFFECT ON EXISTING RIGHTS, REMEDIES, AND LIABILITIES — 1. In General.** — The effect of war upon the existing rights and liabilities of parties, who thereby become separated by the line of belligerency, is necessarily treated wherever those separate rights and liabilities have been treated, and reference is made for a discussion of the principles involved to the various titles throughout this work. Attention is directed below to some of the more important questions.

**2. Agencies.** — The existence of war *ipso facto* dissolves all commercial agencies which require for their existence commercial intercourse between the belligerents. On the other hand, those agencies which do not require such intercourse, such as limited agencies for the preservation of property and collection of debts, are not terminated.<sup>3</sup>

**3. Interest.** — Where the existence of war prevents the enforcement of an action for the principal, it also operates to suspend the running of interest.<sup>4</sup> But there is no abatement where there is no obstacle in the way of its payment, as where the parties are not residents of territories hostile to one another,<sup>5</sup> and where the makers were not prevented from being at the place of payment.<sup>6</sup>

**4. Contracts of Life Insurance.** — Contracts of life insurance entered into prior to the American civil war, between parties afterwards separated by the belligerent lines, were not abrogated but only suspended by the state of war, and this suspension extended to the payment of premiums on dates occurring

son, 15 East 81; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *U. S. v. Anderson*, 9 Wall. (U. S.) 56; *Grossmeyer's Case*, 4 Ct. Cl. 1; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *State v. Burgess*, 23 La. Ann. 225; *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593, 98 Am. Dec. 471. But see *Nelson v. Manning*, 53 Ala. 549.

**Date of Commencement of Civil War.** — See *Gooding v. Varn*, Chase (U. S.) 286; *The Protector*, 12 Wall. (U. S.) 700; *Adger v. Alston*, 15 Wall. (U. S.) 555; *Batesville Institute v. Kauffman*, 18 Wall. (U. S.) 151; *Bigler v. Waller*, Chase (U. S.) 316, 3 Fed. Cas. No. 1,404; *Culliton's Case*, 5 Ct. Cl. 627; *Chesapeake, etc., R. Co. v. U. S.*, 19 Ct. Cl. 300; *Burge v. U. S.*, 23 Ct. Cl. 356; *Perkins v. Rogers*, 35 Ind. 124; *Bell v. Louisville, etc., R. Co.*, 1 Bush (Ky.) 404.

**Date of Commencement of War with Spain.** — *The Pedro*, 175 U. S. 354.

**1. Presumption.** — *People v. McLeod*, 25 Wend. (N. Y.) 483, 37 Am. Dec. 328.

**2. Judicial Notice.** — See the title JUDICIAL NOTICE, vol. 17, p. 907. And see *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593, 98 Am. Dec. 471.

But not that civil law was suspended in a certain county. *Smart v. Mason*, 2 Heisk. (Tenn.) 223.

**3. Agencies.** — *United States.* — *Botts v. Crenshaw*, Chase (U. S.) 224; *Anderson v. Cape Fear Bank*, Chase (U. S.) 535; *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72; *Montgomery's Case*, 5 Ct. Cl. 648; *Cramer's Case*, 6 Ct. Cl. 381; *Quigley's Case*, 13 Ct. Cl. 367. But see *U. S. v. Lapene*, 17 Wall. (U. S.) 601.

*Georgia.* — *Howell v. Gordon*, 40 Ga. 302.

*New York.* — *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54; *Sands v. New York L. Ins. Co.*, 59 Barb. (N. Y.) 556.

*North Carolina.* — *Blackwell v. Willard*, 65 N. Car. 555.

*Tennessee.* — *Conley v. Burson*, 1 Heisk. (Tenn.) 145.

*Virginia.* — *Hale v. Wall*, 22 Gratt. (Va.) 424, approving *Ward v. Smith*, 7 Wall. (U. S.) 447; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

See *Fisher v. Krutz*, 9 Kan. 501.

See the title AGENCY, vol. 1, p. 1228, where the subject is fully treated.

**Liability of Agent for Property Taken by Vis Major.** — *Wilkinson v. Williams*, 35 Tex. 181.

**4. Running of Interest Suspended.** — *Brown v. Hiatt*, 15 Wall. (U. S.) 177; *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310; *Foxcraft v. Nagle*, 2 Dall. (Pa.) 132; *Conn v. Penn. Pet. (C. C.)* 496; *Selden v. Preston*, 11 Bush (Ky.) 191; *Brewer v. Hastie*, 3 Call (Va.) 22; *Lacy v. Stamper*, 27 Gratt. (Va.) 42; *Walker v. Beauchler*, 27 Gratt. (Va.) 511; *Fred v. Dixon*, 27 Gratt. (Va.) 541. But see *Shortridge v. Macon*, Chase (U. S.) 136. See the title INTEREST, vol. 16, p. 1069, for a full treatment of the cases.

**5. Parties Not Enemies.** — *Jarrett v. Ludington*, 9 W. Va. 333; *Kent v. Chapman*, 18 W. Va. 485.

**6. Makers Not Prevented from Being at Place of Payment.** — *Yeaton v. Berney*, 62 Ill. 61.

**Rule Applicable When Payment to Belligerent Directly.** — *Haggard v. Conkwright*, 7 Bush (Ky.) 16.

within the period of war, which payments would be a breach of the rule against commercial intercourse.<sup>1</sup> However, it has been held that where the agent is in the hostile territory and was appointed prior to the breaking out of hostilities, the agency was not revoked, and payments to the agent were valid,<sup>2</sup> especially where the company was a foreign one.<sup>3</sup>

**5. Statute of Limitations.** — The time during which a state of war exists is not to be computed against a plaintiff who is thereby prevented from prosecuting his suit, although no provision is made in the statute for such a contingency. This exception to the statute is limited to parties affected by such a condition of affairs, and affects only causes of action between the citizens of different belligerents or citizens of the same state whose courts are closed. It also extends to claims of the government against citizens.<sup>4</sup>

**6. Partnerships.** — The breaking out of war operates to dissolve commercial partnerships between the citizens of the belligerents, because such business relations then become unlawful.<sup>5</sup>

**7. Judicial Proceedings** — *a. SUSPENSION OF REMEDY.* — War does not deprive an individual of his right or demand entirely, but only suspends it during the continuance of hostilities, and until the courts of justice are open to him so that he may enforce it. The right remains unaffected, and upon the termination of hostilities the remedy is restored.<sup>6</sup>

*b. SUITS BY AND AGAINST ALIEN ENEMY* — (1) *Right of Alien Enemy to Sue.* — As a general rule an alien enemy is not allowed to maintain a suit in the courts of the country with which he is at the time in hostility. This is a personal disability of temporary duration, which is founded upon reason and policy, and is removed upon the end of hostilities.<sup>7</sup> But one who leaves a

**1. Contracts of Life Insurance.** — *Janson v. Driefontein Consol. Mines*, (1902) A. C. 484; *Hillyard v. Mutual Ben. L. Ins. Co.*, 35 N. J. L. 415; *Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741; *Mutual Ben. L. Ins. Co. v. Atwood*, 24 Gratt. (Va.) 497; *New York L. Ins. Co. v. Hendren*, 24 Gratt. (Va.) 546; *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. (Va.) 630. See the title LIFE INSURANCE, vol. 19, p. 52.

**2. Agent in Hostile Territory Prior to War.** — *Sands v. New York L. Ins. Co.*, 59 Barb. (N. Y.) 556.

**3. Foreign Company.** — *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54; *Robinson v. International L. Assur. Soc.*, 52 Barb. (N. Y.) 450.

**4. Statute of Limitations.** — *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Brown v. Hiatt*, 15 Wall. (U. S.) 177; *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310; *Selden v. Preston*, 11 Bush (Ky.) 191; *Kahnweiler v. Anderson*, 78 N. Car. 133; *Wall v. Robson*, 2 Nott & M. (S. Car.) 498. See the title LIMITATION OF ACTIONS, vol. 19, p. 217, where the subject is fully treated.

**West Virginia Test Oath Laws — Acts 1872-73, c. 28.** — *Stuart v. Greenbrier County*, 16 W. Va. 95.

**5. Partnerships** — *United States.* — *The William Bagaley*, 5 Wall. (U. S.) 377; *Planter's Bank v. St. John*, 1 Woods (U. S.) 588; *Cramer's Case*, 7 Ct. Cl. 302; *Douglas's Case*, 14 Ct. Cl. 1.

*Louisiana.* — *Williams v. Gay*, 21 La. Ann. 110.

*Maryland.* — *Dorsey v. Dorsey*, 30 Md. 522.

*New York.* — *Woods v. Wilder*, 43 N. Y. 164; *New Orleans Bank v. Matthews*, 49 N. Y. 12;

*McStea v. Matthews*, 50 N. Y. 166; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

*Virginia.* — *Booker v. Kirkpatrick*, 26 Gratt. (Va.) 145; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

See also the title PARTNERSHIP, vol. 22, p. 202.

**6. Suspension of Remedy** — *England.* — *Janson v. Driefontein Consol. Mines*, (1902) A. C. 484. *United States.* — *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310; *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *Masterson v. Howard*, 18 Wall. (U. S.) 99.

*Connecticut.* — *Semmes v. City F. Ins. Co.*, 36 Conn. 543.

*Indiana.* — *Perkins v. Rogers*, 35 Ind. 124.

*Kentucky.* — *Louisville, etc., R. Co. v. Buckner*, 8 Bush (Ky.) 277; *Selden v. Preston*, 11 Bush (Ky.) 191.

*Louisiana.* — *Ledoux v. Buhler*, 21 La. Ann. 130.

*Maryland.* — *Dorsey v. Dorsey*, 30 Md. 522. *New York.* — *Harden v. Boyce*, 59 Barb. (N. Y.) 425.

*Pennsylvania.* — *Wilcox v. Henry*, 1 Dall. (Pa.) 69; *Hoare v. Allen*, 2 Dall. (Pa.) 102; *Foxcraft v. Nagle*, 2 Dall. (Pa.) 132.

*Tennessee.* — *Rice v. O'Keefe*, 6 Heisk. (Tenn.) 638.

*Texas.* — *Spencer v. Brower*, 32 Tex. 663.

*Virginia.* — *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

**Revenue Laws Suspended.** — *Lewis v. Hearne*, 34 Tex. 383.

**Citizens of Tennessee Could Sue in Georgia.** — *Edmonson v. Union Bank*, 33 Ga. 91.

**Guardian Must Account on Termination of War.** — *Lamar v. Micou*, 112 U. S. 452, affirmed on rehearing 114 U. S. 218.

**7. Right of Alien Enemy to Sue** — *England.* —



hostile territory on the opening of the war because he did not approve of the war which was being waged by the people whom he left is not disabled from suing in the courts of the country to which he remained loyal, and which was the other party to the war.<sup>1</sup>

(2) *Liability of Alien Enemy to Be Sued* — (a) *In General*. — It seems a settled principle of law that an alien enemy may be sued in the courts of the hostile country during the continuance of hostilities whenever he can be reached by process.<sup>2</sup>

(b) *Personal Judgment*. — But a personal judgment cannot be validly rendered against a defendant across the line of belligerency, who has no actual notice of the proceedings, and who could not respond to constructive notice.<sup>3</sup>

(c) *Proceedings in Rem*. — The existence of war does not have the effect of depriving a debtor of proceeding *in rem* for the collection of a debt from a creditor who is in the enemy's country, and notice may be had by order of publication.<sup>4</sup>

c. *SALES UNDER MORTGAGE OR DEED OF TRUST*. — Sales during the war under mortgages and deeds of trust, while the debtor was within the lines of the enemy, have been held void on the ground that the debtor could not legally pay, nor the creditor legally receive, the debt.<sup>5</sup> But there are contrary

Janson *v.* Driefontein Consol. Mines, (1902) A. C. 484.

*United States*. — Mumford *v.* Mumford, 1 Gall. (U. S.) 366; The Ship Emulous, 1 Gall. (U. S.) 563; Chappelle *v.* Olney, 1 Sawy. (U. S.) 401; Johnson *v.* Thirteen Bales Goods, 2 Paine (U. S.) 639; Crawford *v.* The William Penn, Pet. (C. C.) 106.

*Illinois*. — Seymour *v.* Bailey, 66 Ill. 288.

*Indiana*. — Knöfel *v.* Williams, 30 Ind. 1; Perkins *v.* Rogers, 35 Ind. 124.

*Maryland*. — Dorsey *v.* Kyle, 30 Md. 512; Dorsey *v.* Thompson, 37 Md. 27.

*Missouri*. — De Jarnette *v.* De Giverville, 56 Mo. 440.

*New York*. — Bell *v.* Chapman, 10 Johns. (N. Y.) 183; Jackson *v.* Decker, 11 Johns. (N. Y.) 418.

*Pennsylvania*. — Wilcox *v.* Henry, 1 Dall. (Pa.) 69.

*West Virginia*. — Haymond *v.* Camden, 22 W. Va. 180; Stephens *v.* Brown, 24 W. Va. 234.

**The Question Whether a Plaintiff Shall Be Excluded** from the courts as an alien enemy depends not so much upon whether he has a legal citizenship in the enemy's country at the beginning of hostilities, which he may resume when they cease, as on the question where his actual residence is during the war, and whether, if he be allowed to recover his dues, the probable effect will be to place the amount within reach of the enemy. Zacharie *v.* Godfrey, 50 Ill. 186, 99 Am. Dec. 506.

**An Alien Enemy in a Country Not under Letters of Safe Conduct** or under the protection of the government cannot sue in the courts. Johnson *v.* Thirteen Bales Goods, 2 Paine (U. S.) 639.

In Tennessee, by the Act of the Legislature passed on the 8th of May, 1861, it was enacted "that no person in any nonslaveholding state, their agents or attorneys in this state, shall have power to sue for or collect any moneys owing to, or any property claimed by, citizens of any such state in the state of Tennessee during hostilities between Tennessee and the federal government." By necessary implication the citizens of slaveholding states or their attor-

neys were allowed to collect debts without restraint. Rice *v.* O'Keefe, 6 Heisk. (Tenn.) 638.

**1. Person Leaving Confederate States Because of Loyalty May Sue in Loyal State**. — Zacharie *v.* Godfrey, 50 Ill. 186.

**2. Liability of Alien Enemy to Be Sued** — *United States*. — Lee *v.* Rogers, 2 Sawy. (U. S.) 549; McVeigh *v.* U. S., 11 Wall. (U. S.) 259; Masterson *v.* Howard, 18 Wall. (U. S.) 99.

*Illinois*. — Mixer *v.* Sibley, 53 Ill. 61; Seymour *v.* Bailey, 66 Ill. 288.

*Maryland*. — Dorsey *v.* Thompson, 37 Md. 27.

*Missouri*. — De Jarnette *v.* De Giverville, 56 Mo. 440.

*Tennessee*. — Rodgers *v.* Dibrell, 6 Lea (Tenn.) 69.

**Right of Alien Enemy to Defend Suit**. — The provision of the Federal Constitution declaring that "no person shall be deprived of life, liberty, or property without due process of law," is applicable to alien enemies, and gives them the right, when proceeded against by legal process, to appear in person or by counsel, whom they have a right to employ, and to introduce evidence and make defense. Buford *v.* Speed, 11 Bush (Ky.) 338.

**Subjecting Real Estate to Payment of Debt Contracted Prior to War and Secured by Mortgage**. — Seymour *v.* Bailey, 66 Ill. 288.

**3. Personal Judgment**. — Livingston *v.* Jordan, Chase (U. S.) 454; Brooke *v.* Filer, 35 Ind. 402; Selden *v.* Preston, 11 Bush (Ky.) 191; Rockhold *v.* Blevins, 6 Baxt. (Tenn.) 115; Grinnan *v.* Edwards, 21 W. Va. 347; Haymond *v.* Camden, 22 W. Va. 180; Herring *v.* Lee, 22 W. Va. 661; Sturm *v.* Fleming, 22 W. Va. 404; Stephens *v.* Brown, 24 W. Va. 234.

**4. Proceedings in Rem**. — Jenkins *v.* Hannan, 26 Fed. Rep. 657; Johns *v.* Slack, 2 Hughes (U. S.) 467; Mixer *v.* Sibley, 53 Ill. 61; Willard *v.* Boggs, 56 Ill. 163; Harper *v.* Ely, 56 Ill. 179; Seymour *v.* Bailey, 66 Ill. 288; Selden *v.* Preston, 11 Bush (Ky.) 191; Dorsey *v.* Thompson, 37 Md. 25. *Contra*, Grinnan *v.* Edwards, 21 W. Va. 347.

**5. Sale under Mortgage or Deed of Trust**. — Dean *v.* Nelson, 10 Wall. (U. S.) 158; Lasere

decisions which hold such sales valid.<sup>1</sup>

**V. WAR ACTS — 1. Nonintercourse Acts — a. INTRODUCTORY.** — The rule of the law of nations is that upon the breaking out of hostilities all unlicensed commercial intercourse is prohibited between the belligerents which is inconsistent with the state of war, the rule being based on the enemy relation, which cannot be changed by individuals, but only by the sovereign power. Trading with an enemy, therefore, or with the citizens or subjects of an enemy without a license, is illegal.<sup>2</sup> Should such intercourse be permitted, it would tend to strengthen the enemy, his facilities for conveying intelligence and correspondence, and the law will not permit the citizen to subject himself to such temptation to swerve from his duty to his country.<sup>3</sup>

**Commencement of Suspension.** — Commercial intercourse is usually suspended from the time war is declared or formally recognized as existing, without any express declaration of the sovereign on the subject.<sup>4</sup>

**b. HISTORICAL.** — Upon the breaking out of hostilities, statutes are often passed forbidding all commercial intercourse with the enemy, and making all property used in such intercourse liable to forfeiture. Several of these acts were passed during the early part of the existence of the United States, and are only of historical importance now.<sup>5</sup>

*v. Rochereau*, 17 Wall. (U. S.) 437; *Kanawha Coal Co. v. Kanawha, etc.*, Coal Co., 7 Blatchf. (U. S.) 391; *Walker v. Beauchler*, 27 Gratt. (Va.) 511.

**1. Contrary Decisions.** — *Washington University v. Finch*, 18 Wall. (U. S.) 106; *Willard v. Boggs*, 56 Ill. 163; *Seymour v. Bailey*, 66 Ill. 288; *Bush v. Sherman*, 80 Ill. 160; *Dorsey v. Dorsey*, 30 Md. 522; *De Jarnette v. De Giverville*, 56 Mo. 440; *Black v. Gregg*, 58 Mo. 565; *Martin v. Paxson*, 66 Mo. 260; *Mitchell v. Nodaway County*, 80 Mo. 257.

**2. Law of Nations — England.** — *Janson v. Driefontein Consol. Mines*, (1902) A. C. 484.

**United States.** — *The William Bagaley*, 5 Wall. (U. S.) 377; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *McKee v. U. S.*, 8 Wall. (U. S.) 163; *U. S. v. Lane*, 8 Wall. (U. S.) 185; *Prize Cases*, 2 Black (U. S.) 687; *Planters' Bank v. St. John*, 1 Woods (U. S.) 588; *U. S. v. Six Boxes Arms*, 1 Bond (U. S.) 446; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *The Schooner Rapid*, 1 Gall. (U. S.) 295, 8 Cranch (U. S.) 155; *The Rugen*, 1 Wheat. (U. S.) 62; *Conner v. The Bark Coosa*, Newb. Adm. 393; *Ensley's Case*, 6 Ct. Cl. 282; *Craft's Case*, 12 Ct. Cl. 178; *Hart's Case*, 15 Ct. Cl. 414.

**Connecticut.** — *Semmes v. City F. Ins. Co.*, 30 Conn. 543.

**Illinois.** — *Connecticut Mut. L. Ins. Co. v. Hall*, (Ill.) 7 Am. L. Reg. N. S. 606.

**Iowa.** — *Hill v. Baker*, 32 Iowa 302.

**Louisiana.** — *Hennen v. Gilman*, 20 La. Ann. 241; *Noblem v. Milborne*, 21 La. Ann. 641; *Overby v. Overby*, 21 La. Ann. 493.

**Maryland.** — *Dorsey v. Dorsey*, 30 Md. 522; *Jackson Ins. Co. v. Stewart*, (Md.) 6 Am. L. Reg. N. S. 732.

**Massachusetts.** — *Kershaw v. Kelsey*, 100 Mass. 561.

**Mississippi.** — *Mims v. Armstrong*, 42 Miss. 429; *Shotwell v. Ellis*, 42 Miss. 439.

**Missouri.** — *De Jarnette v. De Giverville*, 56 Mo. 440.

**New Jersey.** — *Hillyard v. Mutual Ben. L. Ins. Co.*, 35 N. J. L. 415.

**New York.** — *Harden v. Boyce*, 59 Barb. (N.

Y.) 425; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

**Tennessee.** — *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594; *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719; *Graham v. Merrill*, 5 Coldw. (Tenn.) 622.

**Virginia.** — *Billgerry v. Branch*, 19 Gratt. (Va.) 393; *Small v. Lumpkin*, 28 Gratt. (Va.) 832; *Tucker v. Watson*, (Va.) 6 Am. L. Reg. N. S. 220.

**West Virginia.** — *Wright v. Graham*, 4 W. Va. 430.

See also the title INTERNATIONAL LAW, vol. 16, p. 1121.

**Trade with a Neutral Port** is not illegal, notwithstanding the enemy derives benefit thereby, unless it be carried on in connection with or subservient to hostile interests and policy. The *Ship Liverpool Packet*, 1 Gall. (U. S.) 513.

**3. Reason for Rule.** — *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719; *Coppell v. Hall*, 7 Wall. (U. S.) 542; *Matthews v. McStea*, 91 U. S. 7.

**4. Suspension Dates from Beginning of War.** — *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72; *Jackson Ins. Co. v. Stewart*, 1 Hughes (U. S.) 310; *Harden v. Boyce*, 59 Barb. (N. Y.) 425; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

**5. War with France — Acts of 1798, 1799, and 1800.** — *Murray v. Schooner Charming Betsey*, 2 Cranch (U. S.) 64; *Little v. Barreme*, 2 Cranch (U. S.) 170; *Sands v. Knox*, 3 Cranch (U. S.) 499.

**Acts of 1809 — Intercourse with France or Great Britain, Colonies or Dependencies.** — *Clark v. U. S.*, 3 Wash. (U. S.) 101; *The Edward*, 1 Wheat. (U. S.) 261; *The New York*, 3 Wheat. (U. S.) 59; *The Ship Ann Maria*, 1 Paine (U. S.) 256; *U. S. v. 1960 Bags Coffee*, 8 Cranch (U. S.) 398; *U. S. v. The Brigantine Mars*, 8 Cranch (U. S.) 417; *U. S. v. The Ship Fanny*, 9 Cranch (U. S.) 181; *Ten Hogsheads Rum*, 1 Gall. (U. S.) 188; *The Brig Rose*, 1 Gall. (U. S.) 211; *U. S. v. The Schooner Mars*, 1 Gall. (U. S.) 237; *The Ship Richmond v. U. S.*, 9 Cranch (U. S.) 102.

Under an act suspending intercourse with a foreign country, or its colonies or dependencies,

**c. ACT OF JULY 13, 1861 — (1) *In General.*** — After the beginning of the war between the states of the Union, an act was passed July 13, 1861, declaratory of the principles of international law, which prohibited commercial intercourse between the inhabitants of the territory then in insurrection and those of the territory not in insurrection,<sup>1</sup> except so far as licensed by the President, who alone had the power to license such intercourse,<sup>2</sup> and military authorities had no power under the Act of 1861 to license commercial intercourse between belligerents.<sup>3</sup>

**Authority of the President.** — Under this act the President was empowered to designate the states in insurrection, and at different times proclamations were issued under the act declaring what states, and parts of states, were in insurrection, and the prohibition of commercial intercourse therewith.<sup>4</sup> The power of the President to license intercourse was taken away by a subsequent act, except in limited cases caused by the necessities of loyal persons within the lines of actual occupation by the military forces of the United States.<sup>5</sup>

it is for the United States to decide whether an island is independent or not, and until such decision is made, or the foreign country relinquishes its claim, the courts must consider the ancient state of things existing. *Clark v. U. S.*, 3 Wash. (U. S.) 101.

**Right to Make Harbor.** — Under the Non-intercourse Act of 1809, a vessel sailing from Great Britain, without a knowledge of the war between that country and the United States, had a right to lie off the coast of the United States to receive instructions from her owners in New York, and, if necessary, to drop anchor, and in case of a storm to make harbor, and if prevented by a mutiny of her crew from putting out to sea again might wait in the waters of the United States for orders. *U. S. v. The Ship Fanny*, 9 Cranch (U. S.) 181.

**Voluntary Arrival with Intent to Unload — *Arrival Prima Facie Evidence.*** — *Schooner Mary*, 1 Gall. (U. S.) 206; *Schooner Boston*, 1 Gall. (U. S.) 239. And see *U. S. v. The Nancy*, 3 Wash. (U. S.) 231.

**The Nonintercourse Act of April 18, 1818.** — *The Pitt*, 8 Wheat. (U. S.) 371; *The Frances and Eliza v. Coates*, 8 Wheat. (U. S.) 398.

**Bond Required.** — *The Edward*, 1 Wheat. (U. S.) 261; *The Ship Richmond v. U. S.*, 9 Cranch (U. S.) 102.

**Acts of 1820 and 1823 — British Colonial Possessions.** — *U. S. v. An Open Boat*, 5 Mason (U. S.) 120, 232.

**"Resident."** — The term "resident" in non-intercourse acts prohibiting commercial intercourse with foreign countries does not apply to one temporarily in the United States for a particular purpose. *U. S. v. The Schooner Penelope*, 2 Pet. Adm. 438.

**1. Act of July 13, 1861 — *United States.*** — 12 Stat. at L. 257; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *The Reform*, 3 Wall. (U. S.) 617; *Ouachita Cotton*, 6 Wall. (U. S.) 521; *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72; *Walker v. U. S.*, 106 U. S. 413.

*Iowa.* — *Hill v. Baker*, 32 Iowa 302.

*Louisiana.* — *Noblom v. Milborne*, 21 La. Ann. 641; *Noblom v. Swords*, 21 La. Ann. 647; *Webster v. Mahoney*, 22 La. Ann. 593.

*Missouri.* — *Charles v. McCune*, 57 Mo. 166.

*New York.* — *Woods v. Wilder*, 43 N. Y. 164.

*Tennessee.* — *Dillard v. Alexander*, 9 Heisk.

(Tenn.) 719; *Graham v. Merrill*, 5 Coldw. (Tenn.) 622.

**Construction of Act.** — It is a revenue statute, not penal, and should be liberally construed so as to accomplish its object. *U. S. v. One Hundred and Twenty-nine Packages*, (Mo. 1862) 2 Am. L. Reg. N. S. 419.

**Residence Question of Intention.** — Whether a person becomes an "inhabitant" or a "resident" of a country to which he comes, within the meaning of a law prohibiting intercourse between the inhabitants and residents thereof and those of another country, depends chiefly upon intention. *U. S. v. The Schooner Penelope*, 2 Pet. Adm. 438.

**Gold Coin Within Act.** — *U. S. v. A Canoe*, etc., 5 Hughes (U. S.) 490; *U. S. v. 4000 American Gold Coin*, Woolw. (U. S.) 217; *Gay's Gold*, 13 Wall. (U. S.) 358, *affirming* *U. S. v. Gay's Gold*, 1 Woods (U. S.) 55.

**Gold Intended for Personal Use.** — *U. S. v. 4000 American Gold Coin*, Woolw. (U. S.) 217.

**2. License by the President.** — *The Reform*, 3 Wall. (U. S.) 617; *The Sea Lion*, 5 Wall. (U. S.) 630; *Ouachita Cotton*, 6 Wall. (U. S.) 521; *Coppell v. Hall*, 7 Wall. (U. S.) 542; *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72; *Hamilton v. Dillin*, 21 Wall. (U. S.) 73; *Walker v. U. S.*, 106 U. S. 413; *Mansfield v. McLearn*, 22 La. Ann. 216; *Snell v. Dwight*, 120 Mass. 9; *Charles v. McCune*, 57 Mo. 166.

**3. Military Authorities Could Not License Intercourse.** — *Ouachita Cotton*, 6 Wall. (U. S.) 521; *Coppell v. Hall*, 7 Wall. (U. S.) 542; *McKee v. U. S.*, 8 Wall. (U. S.) 163; *Ensley's Case*, 6 Ct. Cl. 282; *Mansfield v. McLearn*, 22 La. Ann. 216.

**4. Authority of President.** — 12 Stat. at L. 1262; 12 Stat. at L. 1263; 13 Stat. at L. 730; *Ouachita Cotton*, 6 Wall. (U. S.) 521; *Ensley's Case*, 6 Ct. Cl. 282; *U. S. v. One Hundred and Twenty-nine Packages*, (Mo. 1862) 2 Am. L. Reg. N. S. 419.

**West Virginia Excepted.** — *Hill v. Baker*, 32 Iowa 302.

**Kentucky.** — In deference to the Union sentiment of a large body of her citizens, Kentucky was excepted from the operation of the non-intercourse laws. *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719.

**5. Limitation of President's Power.** — Act of



(2) *Constitutionality of Act.* — The imposition of taxes or fees as conditions to such intercourse did not make them repugnant to the provisions of the Constitution that "no tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."<sup>1</sup>

(3) *Construction of Act and Proclamation.* — The Act of 1861, and the proclamation issued in accordance therewith, were aimed at every species of private commercial transaction which would add to the resources of the Confederate states, and such transactions were void thereunder.<sup>2</sup> In terms this act was limited to the territory occupied by the belligerents, and to transactions between the loyal states and those in insurrection.<sup>3</sup> The act did not, therefore, have any effect upon contracts between citizens and subjects of the Confederate states;<sup>4</sup> or upon contracts between citizens of the loyal states, or between such citizens and citizens of the territory excepted from the operation of the act, both parties being on the same side of the belligerent lines, and no intercourse between the different sections resulting.<sup>5</sup> Nor did the act apply to nonresi-

July 2, 1864, 13 Stat. at L. 377; Walker's Case, 12 Ct. Cl. 408.

1. *Act Constitutional.* — Hamilton v. Dillin, 21 Wall. (U. S.) 73; Folsom's Case, 4 Ct. Cl. 366.

2. *Construction of Act and Proclamation* — United States. — Habricht v. Alexander, 1 Woods (U. S.) 413; U. S. v. Steamboat Henry C. Homeyer, 2 Bond (U. S.) 217; U. S. v. Lapene, 17 Wall. (U. S.) 601; Dillon's Case, 5 Ct. Cl. 586; Ensley's Case, 6 Ct. Cl. 282.

Georgia. — Bartow County v. Newell, 64 Ga. 699.

Illinois. — Mixer v. Sibley, 53 Ill. 61.

Indiana. — Perkins v. Rogers, 35 Ind. 124.

Iowa. — Hill v. Baker, 32 Iowa 302.

Kansas. — Fisher v. Krutz, 9 Kan. 501.

Louisiana. — Marchand v. Coyle, 18 La. Ann. 632; McWilliams v. Bryan, 21 La. Ann. 211; Overby v. Overby, 21 La. Ann. 493; Noblom v. Swords, 21 La. Ann. 647; Irwin v. Levy, 24 La. Ann. 302.

Mississippi. — Mims v. Armstrong, 42 Miss. 429; Shotwell v. Ellis, 42 Miss. 439.

New York. — Sands v. New York L. Ins. Co., 59 Barb. (N. Y.) 556; Woods v. Wilder, 43 N. Y. 164.

Tennessee. — Rhodes v. Summerhill, 4 Heisk. (Tenn.) 204.

Texas. — Whitis v. Polk,\* 36 Tex. 602.

Virginia. — Billgerry v. Branch, 19 Gratt. (Va.) 393.

"The Act of Congress and the proclamations of the President upon which the defendant relies in this case are in terms limited to the prohibition of commercial intercourse, and the conveyance or transmission of goods and merchandise between territories occupied by the two belligerents; and thus clearly manifest the intention of the government, in accordance with what we have seen to be the general law of nations, that commercial intercourse, and commercial intercourse only, should be prohibited. They clearly do not extend to agreements made in the enemy's territory between two persons being there, for the leasing of real estate therein, the payment of rent there out of the products of the land, or the de-

livery of and payment for personal property already upon the demised premises and to be used thereon." Kershaw v. Kelsey, 100 Mass. 561.

*Loyal Citizen Involuntarily Detained* — What Transactions Valid. — Spain's Case, 5 Ct. Cl. 598; Ealer's Case, 5 Ct. Cl. 708.

*Buying and Selling by Agent in Confederate State Held Valid.* — Mayer's Case, 3 Ct. Cl. 249.

*Lease of Plantation Valid.* — Kershaw v. Kelsey, 100 Mass. 561.

*Transfer of Real Estate.* — Shaw v. Carlile, 9 Heisk. (Tenn.) 594.

3. *Limited to Territory of Belligerents.* — Kershaw v. Kelsey, 100 Mass. 561; Shaw v. Carlile, 9 Heisk. (Tenn.) 594; Bond v. Owen, 7 Baxt. (Tenn.) 340.

*A Contract for the Sale of Land Situated Within the Federal Lines* at the time of the original contract, where were the domicils of the parties, is not invalid by reason of the non-intercourse acts of Congress in the laws governing the intercourse of belligerents, although at the time of the execution of the deed the sites of the property and the residence of the parties were within the Confederate lines. Brown v. Gardner, 4 Lea (Tenn.) 145.

*The Proclamation of August 10, 1861*, only amounted to permission to people of occupied territory to trade with the United States. Shaw v. Carlile, 9 Heisk. (Tenn.) 594.

4. *Transactions Between Residents of Different Confederate States Valid.* — Furman's Case, 5 Ct. Cl. 579; Craft's Case, 12 Ct. Cl. 178; Haggard v. Conkwright, 7 Bush (Ky.) 16; Bond v. Owen, 7 Baxt. (Tenn.) 340; Dillard v. Alexander, 9 Heisk. (Tenn.) 719. See Faulkner's Case, 5 Ct. Cl. 612; Shaw v. Carlile, 9 Heisk. (Tenn.) 594.

*A Mortgage Made in Confederate Territory to a Loyal Citizen Is Not Necessarily Prohibited.* — Carson v. Dunham, 121 U. S. 421.

5. *Parties in Union Lines.* — Briggs v. U. S., 143 U. S. 346, reversing 25 Ct. Cl. 126; Morris v. Poillon, 50 Ala. 403; Haggard v. Conkwright, 7 Bush (Ky.) 16; Hawver v. Seibert, 4 W. Va.

dent aliens, whose intercourse is lawful as long as it is impartial and not intended to violate a blockade or siege, or to deal in contraband of war.<sup>1</sup>

**The Occupation of Territory** by the Union forces had to be complete, and more than that resulting from mere raids. Thus, persons residing in a district raided and occupied by the opposing armies alternately were not prevented by the act from acquiring valid title to property in the Confederate lines.<sup>2</sup>

**Violation of Act.** — The act prohibits all acts designed to carry on unlicensed intercourse between the belligerents, and is violated not only when a vessel has sailed, but the moment the goods are started on land towards their forbidden destination.<sup>3</sup>

(4) *Commencement of Suspension.* — Commercial intercourse between the belligerents did not become illegal until the passage of the act and the issuance of the proclamation thereunder, and transactions entered into prior to that time were valid.<sup>4</sup>

(5) *Enforcement of Act.* — The secretary of the treasury was invested with a sound discretion to make rules and regulations for the enforcement of the act, which were not subject to revision or reversal,<sup>5</sup> and which he could enforce by penalties.<sup>6</sup> All commercial intercourse must be in accordance with the terms and conditions of the act, and when carried on in accordance with the license was lawful.<sup>7</sup>

(6) *Termination of Act.* — The act could only apply to times of hostility, and when the war ended and the forces of the Confederate states had surrendered themselves and their arms, and had been imprisoned or paroled, a "condition of hostility" did and could no longer exist. The reason for the law ceased, and the statute expired by force of its own terms.<sup>8</sup>

**Date of Termination.** — As under the act the President was authorized to declare certain states in a state of insurrection, he was impliedly authorized to declare the insurrection at an end, so long as Congress did not otherwise provide, and its termination in different sections dated from his proclamation.<sup>9</sup>

586. See *Dillard v. Alexander*, 9 Heisk. (Tenn.) 719.

1. Did Not Apply to Nonresident Aliens. — *La Plante's Case*, 6 Ct. Cl. 311.

**Trade with Neutral.** — *Devot v. Marx*, 19 La. Ann. 491.

2. **Occupation Must Be Complete.** — *Cartwright's Case*, 8 Ct. Cl. 465.

**Effect as to Persons.** — *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594.

3. **Violation of Act.** — *U. S. v. One Hundred and Twenty-nine Packages*, (Mo, 1862) 2 Am. L. Reg. N. S. 419.

4. **Commencement of Suspension.** — *Matthews v. McStea*, 91 U. S. 7, affirming 3 Daly (N. Y.) 349; *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *U. S. v. The William Arthur*, 3 Ware (U. S.) 276; *McCormick v. Arnspiger*, 38 Tex. 569.

An insurrection is not in the legal sense war, so as to render all commercial intercourse and contracts between the antagonistic citizens illegal, until it is recognized as such by the established government. *Leathers v. Commercial Ins. Co.*, 2 Bush (Ky.) 296, 92 Am. Dec. 483.

5. **Regulations by the Secretary of the Treasury.** — *Ouachita Cotton*, 6 Wall. (U. S.) 521; *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72; *Snell v. Dwight*, 120 Mass. 9; *Hughes v. Oaks*, 59 Pa. St. 32.

The act cannot be construed as allowing intercourse to be resumed by individuals at will, as fast and as far as the Union armies succeeded

in occupying insurrectionary territory. *Hamilton v. Dillin*, 21 Wall. (U. S.) 73.

6. **Enforcement by Penalties.** — *U. S. v. The Schooner Francis Hatch*, (Md. 1864) 4 Am. L. Reg. N. S. 289; *Hughes v. Oaks*, 59 Pa. St. 32.

7. **Terms of Act Must Be Complied with.** — *U. S. v. Lane*, 8 Wall. (U. S.) 185; *M'Lean v. The William Penn*, 3 Wash. (U. S.) 484; *Cones's Case*, 8 Ct. Cl. 421; *Black's Case*, 8 Ct. Cl. 461; *U. S. v. One Hundred Barrels Cement*, (Mo. 1862) 3 Am. L. Reg. N. S. 735; *Graham v. Merrill*, 5 Coldw. (Tenn.) 622.

Where parties contracted within the lines of the United States forces, to come into an insurgent state to gather a crop of cotton and transport it through the Federal lines, and provided in such contract that clearances, licenses, or permits were to be obtained for the purpose, it was evident that the parties did not intend to violate the law, but to comply with it, and the contract was valid. *Shacklett v. Polk*, 51 Miss. 378.

**Presumption from Grant of Permit by Proper Treasury Agent.** — *Butler v. Maples*, 9 Wall. (U. S.) 766; *U. S. v. Weed*, 5 Wall. (U. S.) 62.

8. **Termination of Act.** — *U. S. v. One Thousand Five Hundred Bales Cotton*, 16 Pittsb. Leg. J. (Pa.) 130, 27 Fed. Cas. No. 15,957; *Bond v. Owen*, 7 Baxt. (Tenn.) 340.

9. *Seimes v. City F. Ins. Co.*, 6 Blatchf. (U. S.) 445; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *U. S. v. One Hundred and Twenty-nine Packages*, (Mo, 1862) 2 Am. L. Reg. N. S. 419.

(7) *Forfeitures under Act.*—The act, although terminated by the end of hostilities, was not a temporary act, but was a general law, without any limitation as to its duration, and forfeitures incurred thereunder during the war could be enforced after its termination.<sup>1</sup>

**Enforcement of Forfeiture.**—The forfeitures declared in section five of the act could be enforced only by a seizure of the property, as declared in section nine. The sections are to be construed together.<sup>2</sup>

*d. ACT OF MAY 20, 1862.*—The Act of May 20, 1862, supplementary to the Act of July 13, 1861, authorized the secretary of the treasury to prohibit the transportation of any goods, wares, and merchandise, of whatever character and whatever might be their ostensible destination, whether by land or water, in all cases in which he might have reason to believe that they were intended for any place in the possession or under the control of the insurgents, or that there was immediate danger that they might fall into their possession or under their control. He was also authorized to make such rules and regulations as were necessary to carry out the object of the law, and all property transported or attempted to be transported in violation of the act or the rule of the secretary was to be forfeited to the United States.<sup>3</sup>

**Licenses under Act.**—Licenses to trade under the Act of 1861 were controlled by this act, and were restricted to permission to trade with persons not within the prohibition of this act.<sup>4</sup> The secretary of the treasury had the same rights and duties under this act that he had under the former act.<sup>5</sup>

**Forfeitures.**—Forfeitures under this supplemental act had to be pursued by seizure as in the former act.<sup>6</sup>

*e. ACT OF JULY 2, 1864.*—Another act was passed on July 2, 1864, in regard to commercial intercourse between the loyal and insurrectionary states.<sup>7</sup>

**Agent to Purchase.**—The act authorized the secretary of the treasury, with the assent of the President, to authorize agents to purchase the products of the Confederate states for the United States. It did not authorize commercial intercourse except by the agents, and no civil or military authority had power to grant permission for intercourse between the sections.<sup>8</sup>

**Limitation of President's Power to License Trade.**—The ninth section of this act repealed so much of the fifth section of the Act of July 13, 1861, as authorized the President, in his discretion, to license commercial intercourse in any state or section the inhabitants of which were declared in insurrection, except so far as might be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary states within the lines of actual occu-

**The Proclamation of June 13, 1865,** annulling all restrictions previously imposed upon internal, domestic, and coastwise intercourse and trade, in the territory of the United States east of the Mississippi river, in the states theretofore declared in insurrection, took effect from the beginning of that day. *U. S. v. Norton*, 97 U. S. 164; *Lapeyre v. U. S.*, 17 Wall. (U. S.) 191.

**The Order of April 29, 1865,** removed from that date all restrictions upon commercial intercourse between Tennessee and New Orleans. *Bond v. Moore*, 93 U. S. 593.

**1. Forfeitures under Act.**—*U. S. v. Stevenson*, 3 Ben. (U. S.) 119; *The Reform*, 3 Wall. (U. S.) 617.

**The Act Only Authorized the Appropriation of Goods by the General Government,** and the owner of live stock sent through the lines from Missouri into Texas may recover from a private citizen for its conversion. *Charles v. McCune*, 57 Mo. 166.

**2. Enforcement of Forfeiture.**—*U. S. v. Stevenson*, 3 Ben. (U. S.) 119.

**3. Act of May 20, 1862.**—*U. S. v. Steamboat Henry C. Homeyer*, 2 Bond (U. S.) 217.

**4. Licenses under Act.**—*McKee v. U. S.*, 8 Wall. (U. S.) 163.

**5. Hughes v. Oaks**, 59 Pa. St. 32. See *supra*, this section, *Act of July 13, 1861*.

**Bond for Clearance.**—By Act of May 20, 1862, the secretary of the treasury was authorized to require reasonable security that goods should not be transported in vessels to any place under insurrectionary control, nor in any way to be used in giving aid or comfort to the enemy, and to establish such general regulations as he deemed necessary and proper to carry into effect the purposes of the act. And under this act it was held that a bond taken in double the value of the goods shipped was a reasonable security. *U. S. v. Mora*, 97 U. S. 413.

**6. Forfeitures.**—*U. S. v. Stevenson*, 3 Ben. (U. S.) 119.

**7. 13 Stat. at L. 376.**

**8. Construction of Act.**—*U. S. v. Lane*, 8 Wall. (U. S.) 185; *Snell v. Dwight*, 120 Mass. 9.



pation by the military forces of the United States, as indicated by published order of the commanding general of the department or district occupied; and also except so far as might be necessary to authorize persons within such lines to bring or send to market in the loyal states any products which they had produced with their own labor or the labor of freedmen, or others employed or paid by them, pursuant to rules relating thereto, which might be established under proper authority.<sup>1</sup>

**2. Embargo Laws.** — One method of suspending or interrupting commercial intercourse in time of war is by the enacting of embargo laws, which have been defined to mean "a prohibition to sail."<sup>2</sup> The object of these laws is to prevent any assistance to the growth, produce, or manufacture of the offending nation.<sup>3</sup> The laws are strictly enforced when an embargo is violated, unless it was a case of necessity, the evidence of which must be very clear and positive.<sup>4</sup> But a subject of a belligerent may withdraw his property from the country of the other within a reasonable time after the declaration of war.<sup>5</sup> And it has been held that the mere touching at a port for provisions does not constitute a violation of an embargo.<sup>6</sup>

**Importation.** — A voluntary arrival of a vessel at her port of destination constitutes an importation,<sup>7</sup> and the mere coming into port without breaking bulk is *prima facie* evidence of an importation.<sup>8</sup>

**Forfeiture.** — It seems that the loading of a vessel with the intention to violate an embargo produces a forfeiture.<sup>9</sup>

**Liability of Shipper for Freight or Damages.** — When an embargo prevents a vessel from sailing, and the cargo remains on board, the owner cannot recover from the shipper either freight or damages.<sup>10</sup>

**Cross-reference.** — The decisions concerning embargo laws arise under old acts, and are of little importance. The subject has been treated elsewhere in this work.<sup>11</sup>

**3. Confiscation Acts — a. IN GENERAL.** — The right of a nation engaged in war to confiscate property of the enemy, whether public or private, is recognized by international law. In the United States, however, it does not exist except by Act of Congress.<sup>12</sup> Congress, during the civil war, passed two acts providing for the confiscation of the property of the enemy. They are the Acts of August 6, 1861, and that of July 17, 1862. These acts are commonly spoken of as the Confiscation Acts.<sup>13</sup>

**Not Repealed by Amnesty Proclamation.** — The Act of July 17, 1862, was not repealed by the proclamation of amnesty which was issued by the Presi-

1. Limitation of President's Power to License Trade. — Cutner's Case, 6 Ct. Cl. 415.

2. Embargo Laws — Definition. — The William King, 2 Wheat. (U. S.) 148. See EMBARGO, vol. 10, p. 975.

3. Object of Laws. — U. S. v. The Nancy, 3 Wash. (U. S.) 281.

4. Strict Enforcement — Evidence of Necessity for Violation. — Brig James Wells v. U. S., 7 Cranch (U. S.) 22; The New York, 3 Wheat. (U. S.) 59; Thomson v. U. S., 1 Brock. (U. S.) 407; The Brig William Gray, 1 Paine (U. S.) 16; U. S. v. Hayward, 2 Gall. (U. S.) 485.

5. Withdrawal of Property by Subject of Belligerent. — Amory v. M'Gregor, 15 Johns. (N. Y.) 24.

6. Touching at Port for Provisions. — The Ship Ann Maria, 1 Paine (U. S.) 256.

7. Importation — Voluntary Arrival. — The Schooner Boston, 1 Gall. (U. S.) 239.

8. Prima Facie Evidence. — The Schooner

Mary, 1 Gall. (U. S.) 206; The Schooner Boston, 1 Gall. (U. S.) 239.

9. Loading with Intention to Violate. — The Schooner Juliana, 6 Cranch (U. S.) 327; U. S. v. The Paul Shearman, Pet. (C. C.) 98; Amory v. M'Gregor, 15 Johns. (N. Y.) 24.

10. No Recovery from Shipper. — Kelly v. Johnson, 3 Wash. (U. S.) 45.

11. See the title INTERNATIONAL LAW, vol. 16, p. 1138.

12. General Consideration. — U. S. v. One Thousand Seven Hundred and Fifty-Six Shares, 27 Fed. Cas. No. 15,960b, 5 Blatchf. (U. S.) 231, 27 Fed. Cas. No. 15,961; U. S. v. Stevenson, 3 Ben. (U. S.) 119, 27 Fed. Cas. No. 16,396. See also the title INTERNATIONAL LAW, vol. 16, p. 1152.

13. Confiscation Acts of Civil War. — Conrad v. Waples, 96 U. S. 279; Elgee v. Lovell, Woolw. (U. S.) 102, 8 Fed. Cas. No. 4,344; Snow v. Grace, 29 Ark. 131.

dent in the year 1868.<sup>1</sup>

**b. SCOPE AND PURPOSE.**—The Act of 1861 provided for the seizure and condemnation of property used or employed by, or with the consent of, the owner in aiding, abetting, or promoting insurrection against the government of the United States, and of property purchased, acquired, sold, or otherwise transferred with intent that the same should be so used or employed.<sup>2</sup> The purpose of the act was not to punish the owner but to weaken the insurrection.<sup>3</sup>

The Act of 1862 proceeded on an entirely different principle from that of the Act of 1861. In brief, it provided for the seizure and confiscation of the property of certain enumerated classes of the enemy: viz., those who were officers or agents of the Confederate organization, or of one of the states composing it, or commanding in its army or navy; those who, while holding property in a loyal state or territory, or in the District of Columbia, gave aid and comfort to the enemy; and those who, not being within those classes, but being in arms in support of the insurrection, refused for sixty days after the warning and proclamation of the President to return to their allegiance.<sup>4</sup> It further provided that all sales, transfers, and conveyances by those persons giving aid and comfort to the enemy, and by those in arms and refusing to return to the allegiance of the United States within sixty days after the warning and proclamation of the President, should be null and void.<sup>5</sup> The purpose of the act was not to authorize the capture of property used to promote an insurrection, for the purpose of weakening such insurrection, but to punish certain of the enemy for countenancing resistance to the United States government, by confiscating their property.<sup>6</sup>

**Operation Prospective.**—With the exception of one of the enumerated classes of persons affected by the provisions, the Act of 1862 expressly stipulated that it should apply only to future offenders; and this exception was removed by a joint resolution of the two houses of Congress.<sup>7</sup>

**c. CONSTITUTIONALITY.**—The Confiscation Acts of 1861 and of 1862 have been several times declared to be not in violation of the Constitution of the United States.<sup>8</sup> They were passed by Congress in the exercise of its war power and not in the exercise of its sovereignty or municipal power, and are not in conflict with the restrictions of the fifth and sixth amendments of the Constitution.<sup>9</sup>

**Act of 1861.**—It has been held that the Act of 1861 was passed by virtue of express authority vested in Congress by the Constitution to make rules concerning captures on land and water.<sup>10</sup>

**d. PROPERTY AFFECTED.**—The Act of 1861 provided for the confiscation of any property, of whatsoever kind or description, used for insurrectionary pur-

1. Not Repealed by Amnesty Proclamation. — Confiscation Cases, 20 Wall. (U. S.) 92.

2. Scope. — U. S. v. Huckabee, 16 Wall. (U. S.) 414; Conrad v. Waples, 96 U. S. 279; Kirk v. Lynd, 106 U. S. 315; Union Ins. Co. v. U. S., 6 Wall. (U. S.) 759; Confiscation Cases, 7 Wall. (U. S.) 454.

3. Purpose. — Kirk v. Lynd, 106 U. S. 315; Oakes v. U. S., 174 U. S. 779; Kirk v. Lewis, 4 Woods (U. S.) 100; Pasteur v. Lewis, 39 La. Ann. 5.

In *Phœnix Bank v. Risley*, 111 U. S. 129, the court says: "It is beyond question that this act was directed to the confiscation of specific property used with the consent of the owner to aid the insurrection, and had no reference to the guilt of the owner."

4. Scope. — Day v. Micou, 18 Wall. (U. S.) 156; Conrad v. Waples, 96 U. S. 279; Corbett v. Nutt, 10 Wall. (U. S.) 464.

5. Sales, etc., Void. — Wallach v. Van Riswick, 92 U. S. 202; Conrad v. Waples, 96 U. S. 279.

6. Purpose. — Kirk v. Lynd, 106 U. S. 315; Oakes v. U. S., 174 U. S. 779; Norris v. Doniphan, 4 Met. (Ky.) 385. And see Wallach v. Van Riswick, 92 U. S. 202.

7. Operation Prospective. — Conrad v. Waples, 96 U. S. 279.

8. Not in Violation of Constitution. — Tyler v. Defrees, 11 Wall. (U. S.) 331; Miller v. U. S., 11 Wall. (U. S.) 306; Semple v. U. S., Chase (U. S.) 259, 21 Fed. Cas. No. 12,661; U. S. v. Republican Banner Officers, 11 Pittsb. Leg. J. (Pa.) 153, 27 Fed. Cas. No. 16,148; Knœfel v. Williams, 30 Ind. 1.

9. Fifth and Sixth Amendments Not Violated. — Miller v. U. S., 11 Wall. (U. S.) 268.

10. Authority for Passage of Act of 1861. — Kirk v. Lynd, 106 U. S. 315; Oakes v. U. S., 174 U. S. 778.

poses with the consent of the owner.<sup>1</sup> This was held to include all descriptions of property, real or personal, on land or on water,<sup>2</sup> which was of a visible and tangible nature.<sup>3</sup>

The Act of 1862 provided for the seizure of all the estate and property, moneys, stocks, credits, and effects of the persons included within its terms.<sup>4</sup> This provision was held to comprehend not only tangible property but intangible property as well,<sup>5</sup> and by virtue of it there was seized such property as plantations,<sup>6</sup> promissory notes,<sup>7</sup> railroad stock,<sup>8</sup> and debts.<sup>9</sup>

Property Conveyed to the Confederate States for the purpose of aiding the insurrection became the property of the United States government by right of conquest, *ipso facto*; that government succeeding to all the property held by the Confederate states government. Therefore, such property was not intended to be comprehended within the Confiscation Acts.<sup>10</sup>

*e. ESTATE AFFECTED* — (1) *Act of 1861*. — The Act of 1861 provided for the confiscation of the owner's interest in property used for insurrectionary purposes.<sup>11</sup> In the case of real property the term "owner" was held to include not only the person having the fee,<sup>12</sup> but also any one holding a lesser interest, as, for example, a mortgagee.<sup>13</sup>

(2) *Act of 1862*. — The Act of 1862 provided for the confiscation of all the estate and property, money, stocks, credits, and effects of the persons thereafter named.<sup>14</sup> The provision was held to contemplate property in which the owner was not the absolute owner so far as to authorize the seizure of his interest therein,<sup>15</sup> as, for example, his interest as mortgagee<sup>16</sup> or mortgagor.<sup>17</sup>

*Provision that Heirs Should Not Be Disinherited*. — Concurrently with the passage of the Act of 1862, Congress also adopted a joint resolution explanatory of it, whereby it was resolved that no punishment or proceedings under the act should be construed to work a forfeiture of the real estate of the offender beyond his natural life.<sup>18</sup> This concurrent resolution was adopted in consequence of doubts which the President entertained respecting the power of Congress to prescribe a forfeiture of longer duration than the life of the offender, as being in conflict with the clause of the Constitution which ordains

1. 12 Stat. at L. 319.

2. *All Descriptions of Property*. — Union Ins. Co. v. U. S., 6 Wall. (U. S.) 763; U. S. v. Athens Armory, 2 Abb. (U. S.) 129, 24 Fed. Cas. No. 14,473.

"Prize and Capture" in the Act of 1861 are not used in their ordinary sense meaning capture on water as maritime prizes, but refer to property taken on land as well as on water. Union Ins. Co. v. U. S., 6 Wall. (U. S.) 763.

3. *Visible Tangible Property*. — Phoenix Bank v. Risley, 111 U. S. 125.

*Vessel and Cargo*. — The Aigburth, Blatchf. Prize Cas. 645, 1 Fed. Cas. No. 106.

*Iron Works*. — U. S. v. Huckabee, 16 Wall. (U. S.) 414.

*Real Estate*. — U. S. v. Republican Banner Officers, 11 Pittsb. Leg. J. (Pa.) 153, 27 Fed. Cas. No. 16,148.

4. *Property Affected by Act of 1862*. — Pelham v. Rose, 9 Wall. (U. S.) 103; Day v. Micou, 18 Wall. (U. S.) 156; Wallach v. Van Riswick, 92 U. S. 202.

5. *Intangible Property*. — Miller v. U. S., 11 Wall. (U. S.) 296.

6. *Plantations*. — Bragg v. Lorio, 1 Woods (U. S.) 209, 4 Fed. Cas. No. 1,800.

7. *Promissory Notes*. — Pelham v. Rose, 9 Wall. (U. S.) 103; Vogler v. Spaugh, 4 Biss. (U. S.) 288, 28 Fed. Cas. No. 16,988.

8. *Railroad Stock*. — Miller v. U. S., 11 Wall. (U. S.) 268.

9. *Debts*. — Miller v. U. S., 11 Wall. (U. S.) 296; Brown v. Kennedy, 15 Wall. (U. S.) 591; Phoenix Bank v. Risley, 111 U. S. 125.

10. *Property Conveyed to Confederate States*. — U. S. v. A Tract of Land, 1 Woods (U. S.) 475, 28 Fed. Cas. No. 16,535.

11. 12 Stat. at L. 319.

12. *Person Having Fee*. — Kirk v. Lynd, 106 U. S. 315.

13. *Mortgagee*. — Union Ins. Co. v. U. S., 6 Wall. (U. S.) 759.

14. 12 Stat. at L. 590.

15. *Interest Affected*. — Burbank v. Conrad, 27 La. Ann. 152; Risley v. Phenix Bank, 83 N. Y. 318.

16. *Interest That of Mortgagee*. — Day v. Micou, 18 Wall. (U. S.) 156.

17. *Interest That of Mortgagor*. — Avegno v. Schmidt, 113 U. S. 293.

18. *Concurrent Provision* — *United States*. — Bigelow v. Forrest, 9 Wall. (U. S.) 339; Day v. Micou, 18 Wall. (U. S.) 156, *affirming* 26 La. Ann. 718; Wallach v. Van Riswick, 92 U. S. 202; Chaffraix v. Schiff, 92 U. S. 214; Pike v. Wassell, 94 U. S. 711, 19 Fed. Cas. No. 11,164; French v. Wade, 102 U. S. 132; Kirk v. Lynd, 106 U. S. 315; Waples v. Hays, 108 U. S. 6; Avegno v. Schmidt, 113 U. S. 293, 35



that no attainer of treason shall work corruption of blood or forfeiture except during the life of the person attainted.<sup>1</sup> It was judicially decided that the act and concurrent provision must be construed together,<sup>2</sup> and that the effect was to authorize the confiscation of the owner's life estate only in property held in fee. But though the fee still remained in the owner, he had not the power to alienate the same during his life, unless the disability created by the act was removed.<sup>3</sup> At his death, however, the fee passed to his heirs by descent from the offender and not by donation from the government.<sup>4</sup>

**Estoppel.** — Though the fee could not be alienated by the offender, still if he did so by deed of warranty with covenant of seizin he and all persons claiming under him were estopped from asserting title to the property.<sup>5</sup>

(3) *Estate of Corporation.* — The Confiscation Acts did not contemplate or authorize the confiscation of the property of a corporation.<sup>6</sup>

**f. SCIENTER.** — Under the Act of 1861 property used for insurrectionary purposes was not subject to confiscation unless it was so used with the knowledge and consent of the owner.<sup>7</sup> But if such consent or knowledge was shown it was immaterial, as affecting the right to confiscate, that the offense was committed by one holding under the owner, as, for example, his lessee.<sup>8</sup>

**A Mortgagee's Interest** in property used for insurrectionary purposes was held not to be subject to confiscation where there was no proof that he had knowledge that the property was so used.<sup>9</sup>

**g. SALES, TRANSFERS, AND CONVEYANCES — Void as to Whom.** — The provision of the Act of 1862 that all sales, transfers, and conveyances of certain classes of persons therein enumerated should be null and void after a certain date, was held to mean that they should be void as to the United States, not that they should be void as to private parties.<sup>10</sup>

**An Unrecorded Sale** of real property made prior to the time when, by the Act of 1862, sales, transfers, and conveyances of certain persons were to be null and void, was not affected, though the seller was an offender within the provisions of the act.<sup>11</sup>

**Devises.** — It was assumed, but not decided, by the Supreme Court of the United States that the words "sales, transfers, and conveyances" were broad

La. Ann. 585; *Jenkins v. Collard*, 145 U. S. 546; *Confiscation Cases*, 1 Woods (U. S.) 221; *Szywauksi v. Zunts*, 20 Fed. Rep. 361.

*Kansas.* — *Dewey v. McLain*, 7 Kan. 126.

*Louisiana.* — *Slidell v. Germania Nat. Bank*, 27 La. Ann. 354.

**1. Reason for Adoption.** — *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *Wallach v. Van Riswick*, 92 U. S. 202.

**2. Construed Together.** — *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *Wallach v. Van Riswick*, 92 U. S. 202; *Shields v. Schiff*, 124 U. S. 351; *Slidell v. Huppenbauer*, 27 La. Ann. 383.

**3. Only Life Estate Subject to Confiscation.** — U. S. v. *Dunnington*, 146 U. S. 338, following *Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, and overruling *Wallach v. Van Riswick*, 92 U. S. 202. See also *Menger v. Carruthers*, 3 Kan. App. 75.

In *Wallach v. Van Riswick*, 92 U. S. 211, the court said: "It is true that in *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, and *Day v. Micou*, 18 Wall. (U. S.) 156, some expressions were used indicating an opinion that what was sold under the Confiscation Acts was a life estate carved out of a fee. The language was perhaps incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not

called upon to decide anything respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration."

**4. Fee Passed to Heirs by Descent.** — *Shields v. Schiff*, 124 U. S. 351; U. S. v. *Dunnington*, 146 U. S. 338.

**5. Estoppel.** — *Jenkins v. Collard*, 145 U. S. 546.

**6. Estate of Corporation.** — *Planters' Bank v. Union Bank*, 16 Wall. (U. S.) 496; *Risley v. Phenix Bank*, 83 N. Y. 318; *Ellis v. Phenix Nat. Bank*, 12 Daly (N. Y.) 177.

**7. Scienter.** — *Phenix Bank v. Risley*, 111 U. S. 125; U. S. v. *The William Arthur*, 3 Ware (U. S.) 276; U. S. v. 1,756 Shares Capital Stock, 5 Blatchf. (U. S.) 231, 27 Fed. Cas. No. 15,961; *Chapman v. Phenix Nat. Bank*, 85 N. Y. 437.

**8. Ground Leased to Firm Engaged in Manufacture of Arms for Confederacy.** — *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759.

**9. Mortgagee's Interest.** — *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759.

**10. Void as to Whom.** — *Corbett v. Nutt*, 10 Wall. (U. S.) 464; *Conrad v. Waples*, 96 U. S. 279; *Bates's Case*, 4 Ct. Cl. 569; *Galbraith v. McFarland*, 3 Coldw. (Tenn.) 267.

**11. Unrecorded Sale.** — *Burbank v. Conrad*, 96 U. S. 291.

enough to embrace a devise.<sup>1</sup>

**h. CONDEMNATION PROCEEDINGS — (1) By Whom Instituted — (a) Act of 1861.** — Under the Act of 1861 proceedings for confiscation of property used for insurrectionary purposes could be instituted by the attorney general of the United States, or by any district attorney for the district in which the property was situated at the time the proceedings were commenced. In such cases the proceedings were wholly for the benefit of the United States. They could also be instituted by any person filing an information with such attorney. In these cases the proceedings were for the use of such informer and the United States in equal parts.<sup>2</sup> No private person could assert himself as an informer after an officer of the government had instituted proceedings for the sole use of the government.<sup>3</sup>

**An Informer Had No Vested Interest** in the proceedings for condemnation, and the attorney for the government could deal with the case as he chose, even though he acted against the interest and objection of the informer.<sup>4</sup>

**(b) Act of 1862.** — In the Act of 1862 there was no provision for the institution of proceedings by an informer. And all the proceeds of a forfeiture went to the government.<sup>5</sup> Proceedings were begun by a seizure in accordance with an order of the President.<sup>6</sup>

**(2) Seizure — (a) In General.** — Both of the Confiscation Acts provided for the seizure of property subject to confiscation and condemnation.<sup>7</sup> Under the Act of 1862 this was the foundation of subsequent proceedings for condemnation, and was essential to give jurisdiction to the courts to decree a forfeiture.<sup>8</sup> But under the Act of 1861 there was no provision that proceedings for condemnation of the property in question should be instituted until after the same should be seized.<sup>9</sup>

**(b) Mode of Seizure.** — Under the Act of 1861 the taking of the property could be by civil process or by naval or military force.<sup>10</sup> Under the Act of 1862 an executive order of seizure was required.<sup>11</sup>

**Actual Seizure** was necessary where the thing was capable of physical possession;<sup>12</sup> but when it was not, a constructive seizure was sufficient.<sup>13</sup>

**(c) Title Not Divested.** — Seizure of the property subject to confiscation did not divest the owner of his title to the property. A judicial condemnation was necessary to effect that.<sup>14</sup>

**(3) Jurisdiction of Courts.** — Under the Act of 1861 condemnation proceedings

1. **As to Devises.** — *Corbett v. Nutt*, 10 Wall. (U. S.) 464.

2. **Persons Instituting Proceedings under Act of 1861.** — *Confiscation Cases*, 7 Wall. (U. S.) 454; *U. S. v. Huckabee*, 16 Wall. (U. S.) 414; *U. S. v. 1,756 Shares Capital Stock*, 5 Blatchf. (U. S.) 231, 27 Fed. Cas. No. 15,961.

3. **When Informer Must Have Acted.** — *Francis v. U. S.*, 5 Wall. (U. S.) 338.

4. **No Vested Interest in Informer.** — *Confiscation Cases*, 7 Wall. (U. S.) 454.

5. **No Provision for Institution by Informer.** — See *U. S. v. 1,756 Shares Capital Stock*, 5 Blatchf. (U. S.) 231, 27 Fed. Cas. No. 15,961.

6. **Begun by Seizure.** — See *infra*, this section, *h. (2) Seizure*.

7. **Seizure Provided For.** — *Miller v. U. S.*, 11 Wall. (U. S.) 294; *Pelham v. Way*, 15 Wall. (U. S.) 201; *Brown v. Kennedy*, 15 Wall. (U. S.) 597; *Confiscation Cases*, 20 Wall. (U. S.) 108; *Pike v. Wassell*, 94 U. S. 711; *U. S. v. Stevenson*, 3 Ben. (U. S.) 119; *Duncan v. U. S.*, 18 Ct. Cl. 230; *Elgee v. Lovell*, Woolw. (U. S.) 102; *Britton v. Butler*, 9 Blatchf. (U. S.) 456, 4 Fed. Cas. No. 1,903; *U. S. v. Stevenson*, 3 Ben. (U. S.) 119, 27 Fed. Cas. No. 16,396.

8. **Foundation for Subsequent Proceedings.** — *Pelham v. Rose*, 9 Wall. (U. S.) 103; *Brown v. Kennedy*, 15 Wall. (U. S.) 597; *Pike v. Wassell*, 94 U. S. 711; *U. S. v. Winchester*, 99 U. S. 376; *Oakes v. U. S.*, 174 U. S. 779; *Confiscation Cases*, 20 Wall. (U. S.) 92; *Fairfax v. Alexandria*, 28 Gratt. (Va.) 16; *Mason v. Tuttle*, 75 Va. 105.

9. **Not Foundation for Subsequent Proceedings.** — *Oakes v. U. S.*, 174 U. S. 779.

10. **Civil Process, etc.** — *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 763.

11. **Executive Order.** — *U. S. v. Winchester*, 99 U. S. 376; *Oakes v. U. S.*, 174 U. S. 779; *Duncan v. U. S.*, 18 Ct. Cl. 257.

12. **Actual Seizure.** — *Miller v. U. S.*, 11 Wall. (U. S.) 268; *Pelham v. Rose*, 9 Wall. (U. S.) 103; *Phoenix Bank v. Risley*, 111 U. S. 125; *Fairfax v. Alexandria*, 28 Gratt. (Va.) 16.

13. **Constructive Seizure.** — *Miller v. U. S.*, 11 Wall. (U. S.) 286; *Brown v. Kennedy*, 15 Wall. (U. S.) 591; *Phoenix Bank v. Risley*, 111 U. S. 125; *Fairfax v. Alexandria*, 28 Gratt. (Va.) 16.

14. **Title Not Divested.** — *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *Kirk v. Lynd*, 106 U. S. 315.

were had in the District or Circuit Courts of the United States having jurisdiction of the amount, or in admiralty in any district in which the seizure was made, or into which the property was taken and proceedings first instituted.<sup>1</sup>

Under the Act of 1862 condemnation proceedings were instituted in any District Court of the United States, or in any territorial court, or in the United States District Court for the District of Columbia, within which the property or any part thereof was found, or into which the same, if movable, was first brought.<sup>2</sup>

(4) *Form of Proceedings* — (a) *In General*. — The proceedings under the two acts of confiscation conformed to those in admiralty or revenue cases.<sup>3</sup>

(b) *Trial by Jury*. — But under both acts the claimant was entitled to a trial by jury, where the facts were in dispute, and the property seized was on land.<sup>4</sup>

(5) *Effect of Decree of Condemnation*. — The effect of the decree of condemnation was to invest the United States government with the title to the property described in the decree.<sup>5</sup>

i. *EFFECT OF PARDON*. — A full treatment of the effect of a pardon on property, within the provisions of the Confiscation Acts, will be found elsewhere in this work.<sup>6</sup>

4. *Abandoned or Captured Property Act* — *a. SCOPE AND OBJECT*. — During the civil war, on March 12, 1863, the Congress of the United States passed what was known as the Abandoned or Captured Property Act.<sup>7</sup> The act provided in substance for the collection, by certain officers of the treasury department, of all abandoned or captured property found in insurrectionary territory, except such as had been used or was intended to be used in waging war. The act further provided for a sale by such officers of the property thus collected, without judicial proceedings, and the payment of the proceeds into the treasury. Provision was then made whereby the owner of the abandoned or captured property, if he had not been guilty of aiding or abetting the insurrection, might pursue the net proceeds derived from the sale of it, in the Court of Claims, after the close of the rebellion.<sup>8</sup>

*Object of Act*. — The design of the Abandoned or Captured Property Act was to remedy defects in the Confiscation Acts.<sup>9</sup>

It Had Three Special Object in View; viz., 1st, to relieve army officers from the duty of handling and selling this captured and abandoned property, and to transfer those duties to civilians under the treasury department, as part of the revenue system; 2d, to enable a sale of the property to be made without any previous judicial order or decree of condemnation; 3d, to substitute the net proceeds for the property, and the Court of Claims for the prize courts, giving the parties a day in court after the suppression of the rebellion, when they could appear with their proofs.<sup>10</sup>

1. *Jurisdiction under Act of 1861*. — *Union Ins. Co. v. U. S.*, 6 Wall. (U. S.) 759; *U. S. v. 1,756 Shares Capital Stock, 5 Blatchf.* (U. S.) 231, 27 Fed. Cas. No. 15,961.

2. *Jurisdiction under Act of 1862*. — *Day v. Micou*, 18\* Wall. (U. S.) 156; *U. S. v. 1,756 Shares Capital Stock, 5 Blatchf.* (U. S.) 231, 27 Fed. Cas. No. 15,961.

3. *Form of Proceedings*. — *U. S. v. 1,756 Shares Capital Stock, 5 Blatchf.* (U. S.) 231, 27 Fed. Cas. No. 15,961.

*Proceedings under Act of 1862*. — *Confiscation Cases*, 20 Wall. (U. S.) 92; *Ex p. Graham*, 10 Wall. (U. S.) 541; *Tyler v. Defrees*, 11 Wall. (U. S.) 331; *U. S. v. Winchester*, 99 U. S. 372; *Semple v. U. S.*, *Chase* (U. S.) 259, 21 Fed. Cas. No. 12,661.

4. *Trial by Jury*. — *Armstrong's Foundry*, 6 Wall. (U. S.) 766; *Morris's Cotton*, 8 Wall. (U. S.) 507; *Confiscation Cases*, 20 Wall. (U.

S.) 110; *U. S. v. Athens Armory*, 2 Abb. (U. S.) 129, 24 Fed. Cas. No. 14,473; *Semple v. U. S.*, *Chase* (U. S.) 259; *Brown v. U. S.*, *McCahon* (Kan.) 229, *Woolw.* (U. S.) 198.

5. *Effect of Decree*. — *Slidell v. Huppenbauer*, 27 La. Ann. 383; *Burbank v. Semmes*, 99 U. S. 138, *affirming* 28 La. Ann. 694.

6. *Effect of Pardon*. — See the title *REPRIEVE, PARDON, AND AMNESTY*, vol. 24, at p. 590.

7. *Abandoned or Captured Property Act*. — 12 Stat. at L. 820.

8. *Scope of Act*. — *U. S. v. Winchester*, 99 U. S. 372, *affirming* 14 Ct. Cl. 13. And see *U. S. v. Padelford*, 9 Wall. (U. S.) 538.

9. *Designed to Remedy Defects in Confiscation Acts*. — *Bond v. U. S.*, 2 Ct. Cl. 529.

*Confiscation Acts*. — See *supra*, this section, 3. *Confiscation Acts*.

10. *Three Objects in View*. — *Bond v. U. S.*, 2 Ct. Cl. 529.



**Executive System for Collection of Captured Property.** — Before the passage of the Abandoned or Captured Property Act there had existed almost from the beginning of the war an executive system for the collection of property captured from the public enemies or found abandoned by them in the states in rebellion, devised and carried on conjointly by the war and treasury departments. After the passage of that act not only the proceeds of the property collected by agents under its authority, but also the proceeds of all other property of like kind previously or subsequently collected by the army, were treated as captured or abandoned property money.<sup>1</sup>

**The Validity of the Act as a law was never drawn in question.**<sup>2</sup>

**Did Not Repeal Confiscation Act.** — The Abandoned or Captured Property Act did not either expressly or impliedly repeal the Confiscation Act of July 17, 1862.<sup>3</sup>

**The Act Was Remedial** in its nature, requiring such a liberal construction as would give effect to the beneficent intention of Congress.<sup>4</sup>

**b. COLLECTION OF PROPERTY** — (1) *Nature of Property Collected* — (a) **In General.** — The act provided for the collection of all abandoned or captured property within the territory named, except such as was used or was intended to be used in waging or carrying on war against the United States, as arms, ordnance, ships, steamboats, or other water craft, and their furniture, forage, military supplies, or munitions of war.<sup>5</sup> This provision was held not to apply to real property, but to be clearly restricted to personal property, which alone could be collected and sold.<sup>6</sup> In most cases brought to the attention of the courts the property collected was cotton.<sup>7</sup>

**Property Used in Waging War.** — The exception in the act as to property used in waging war was held not to include property belonging to a loyal owner which had been seized by the Confederate government and actually used in waging war against the United States. Such a seizure did not affect the title of the owner, nor did it prevent him from recovering the proceeds derived from the subsequent capture and sale of the property by the United States government.<sup>8</sup>

**Abandoned Lands Leased.** — By an act approved July 2, 1864, it was provided that in addition to the abandoned or captured property to be received, collected, and disposed of as provided in the Act of March 12, 1863, abandoned lands, houses, and tenements within the territory named should be taken charge of and leased for periods not exceeding twelve months.<sup>9</sup>

**(b) Abandoned or Captured Property Defined.** — **Property Was Abandoned** within the meaning of the act when the lawful owner was voluntarily absent therefrom and engaged, either in arms or otherwise, in aiding or encouraging the rebellion.<sup>10</sup>

**Captured Property** within the meaning of the act was property which had been seized or taken from hostile possession by the military and naval forces of the United States.<sup>11</sup>

1. **Executive System.** — Goodman's Case, 14 Ct. Cl. 547; Hodges v. U. S., 18 Ct. Cl. 700.

2. **Validity of Act.** — Hodges v. U. S., 18 Ct. Cl. 700.

3. **Did Not Repeal Confiscation Act.** — U. S. v. Winchester, 99 U. S. 372, affirming 14 Ct. Cl. 13.

4. **Act Remedial.** — U. S. v. Anderson, 9 Wall. (U. S.) 56; U. S. v. Padelford, 9 Wall. (U. S.) 538.

5. **Nature of Property Collected.** — U. S. v. Klein, 13 Wall. (U. S.) 128; Slawson v. U. S., 16 Wall. (U. S.) 310; Gearing's Case, 3 Ct. Cl. 165.

6. **Restricted to Personal Property.** — Moore's Case, 10 Ct. Cl. 375.

7. **Cotton.** — Alexander's Cotton, 2 Wall. (U. S.) 404; U. S. v. Padelford, 9 Wall. (U. S.)

540; Byrnes's Case, 3 Ct. Cl. 195; Waltjen's Case, 3 Ct. Cl. 238; McElhose's Case, 3 Ct. Cl. 240; Bruning's Case, 3 Ct. Cl. 242; Scharfer's Case, 4 Ct. Cl. 529; Collie's Case, 9 Ct. Cl. 431.

8. **Property Seized by Confederate Government** — Wilson's Case, 4 Ct. Cl. 559.

9. **Abandoned Lands Leased.** — Moore's Case, 10 Ct. Cl. 375. In this case the court said: "The Act of 1864 is in addition to that of 1863. It added another class of property to that which the agents appointed by the secretary of the treasury were to take possession of. The two acts, being on the same subject, must be construed together."

10. **Abandoned Property Defined.** — Kimball v. Taylor, 2 Woods (U. S.) 37; Hart v. Reynolds, 1 Heisk. (Tenn.) 208.

11. **Captured Property Defined.** — In U. S. v.



**Hostile Possession.** -- From time to time during the civil war the military lines of the enemy were forced back, and, as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken out of hostile possession. Whenever, therefore, during this military occupation, enemy property found on the recovered territory was seized by the military forces in obedience to orders, it was taken from hostile possession within the meaning of that term.<sup>1</sup>

(2) *Where Property Collected.* -- Only abandoned or captured property found in territory designated as in insurrection against the lawful government of the United States by the proclamation of the President of July 1, 1862, was included within the provisions of the act.<sup>2</sup>

(3) *By Whom Collected.* -- The act provided that it should be lawful for the secretary of the treasury, from and after its passage, as he should from time to time see fit, to appoint a special agent or agents to receive and collect all property affected by its provisions.<sup>3</sup> It further provided that it should be the duty of every officer or private of the regular or volunteer forces of the United States, or any officer, sailor, or marine in the naval service of the United States upon the inland waters of the United States, who might take or receive any such abandoned property, or cotton, sugar, rice, or tobacco, from persons in the insurrectionary districts, or have it under his control, to turn the same over to the treasury agents, who should give a receipt therefor; and in case he should refuse or neglect so to do, he should be tried by a court-martial and should be dismissed from the service, or, if an officer, reduced to the ranks, or suffer such other punishment as said court should order with the approval of the President of the United States.<sup>4</sup>

**Bond Given and Books Kept.** -- The agents charged with receiving and collecting the abandoned or captured property were required to give bond with such securities and in such amounts and as often as the secretary of the treasury should require. They were also required to keep in proper books accounts of all their transactions.<sup>5</sup>

**Period of Service.** -- A circular sent to the agents by the secretary of the treasury directed that after June 30, 1865, they should not receive any abandoned or captured property unless theretofore surrendered by Confederate agents or officers.<sup>6</sup>

**c. DISPOSITION OF PROPERTY COLLECTED** -- (1) *Appropriated to Public Use.* -- It was provided by the act that any part of the goods or property received or collected by the treasury agents might be appropriated to public use on due appraisalment and certificate thereof.<sup>7</sup>

(2) *Sale of Property.* -- But instead of an appropriation to public use, the treasury agents were allowed to forward such property to any place of sale within the loyal states, as the public interest might require, to be sold. It was required that all sales so made under the statute should be at public auction to the highest bidder, and that the proceeds thereof should be paid

Padelford, 9 Wall. (U. S.) 531, the court said: "As early as the 3d of July, 1863, the secretary of the treasury, in a circular letter of instructions addressed to the supervising special agents of the department, charged with the duty of collecting abandoned and captured property under the Act of March 12, 1863, defined captured property as property 'which had been seized or taken from hostile possession by the military and naval forces of the United States.' This definition must be taken as the interpretation practically given to the act by the department of the government charged with its execution; and we think it correct." See also *Lamar v. Brown*, 92 U. S. 187; *U. S. v. Winchester*, 99 U. S. 372, affirming 14 Ct. Cl. 13.

1. **Hostile Possession.** -- *Lamar v. Browne*, 92 U. S. 187.

2. **Where Property Collected.** -- *Elgee v. Lovell, Woolw.* (U. S.) 114; *U. S. v. Winchester*, 99 U. S. 372, affirming 14 Ct. Cl. 13.

3. **By Whom Collected.** -- *McLeod v. Callicott, Chase* (U. S.) 443; *Elgee v. Lovell, Woolw.* (U. S.) 102; *U. S. v. Klein*, 13 Wall. (U. S.) 128; *Moore's Case*, 10 Ct. Cl. 375.

4. **Officers and Soldiers Receiving Property.** -- 12 U. S. Stat. at L. 821.

5. **Bond Given and Books Kept.** -- *Elgee v. Lovell, Woolw.* (U. S.) 115.

6. **Period of Service.** -- *McLeod v. Callicott, Chase* (U. S.) 443.

7. **Appropriated to Public Use.** -- *Bennett's Volume XXX.*

into the treasury of the United States.<sup>1</sup>

**Power to Warrant.** — The scope of the agent's authority under the act was limited to the specific grants of power therein named. And there was no grant, either express or implied, from which he could derive authority to bind the government in any warranty whatever, other than for title. Nor could he, of course, confer any authority on the auctioneer so to bind the government.<sup>2</sup>

**Effect of Sale.** — A sale under the act carried title to the property against all claimants.<sup>3</sup> But the proceeds of the sale remained in the hands of the government as trustee for loyal owners under the act.<sup>4</sup>

**d. CLAIMS AGAINST PROCEEDS OF PROPERTY SOLD OR RENTED** — (1) *In General* — (a) **Proceeds of Sale.** — As has already been seen, the Abandoned or Captured Property Act provided that loyal owners of abandoned or captured property which had been collected and sold by the government might bring suit against the government for the recovery of the proceeds of such sale.<sup>5</sup>

**Claims Arising Prior to Act.** — By virtue of a provision in the Act of Congress of July 2, 1864, extending the Abandoned or Captured Property Act so as to include every description of property mentioned in the Confiscation Act of July 17, 1862,<sup>6</sup> a loyal owner of abandoned or captured property, which had been seized and sold by the government without judicial condemnation, prior to the Abandoned or Captured Property Act, but subsequent to said Confiscation Act, was allowed to recover the proceeds of such sale, if such proceeds had been actually paid into the treasury and credited by the secretary of the treasury to the abandoned or captured property fund.<sup>7</sup>

(b) **Proceeds of Rent Collected.** — The provision in the Act of July 2, 1864, that treasury agents should take charge of and lease abandoned lands, houses, and tenements,<sup>8</sup> stipulated further that all money arising from the leasing of such lands, houses, and tenements, after deducting expenses, should be paid into the treasury. It was held that the provision impliedly authorized the bringing of claims against such money by loyal owners.<sup>9</sup>

(2) *When Prosecuted.* — It was expressly provided that claims arising under the Abandoned or Captured Property Act should be prosecuted within two years after the suppression of the rebellion.<sup>10</sup>

**The Purpose of the Provision,** unlike that of the statute of limitations, was not to prevent the mischief of unreasonable delay,<sup>11</sup> but to gather in one place within a limited time every claim to the proceeds of captured property, so that the government should within that time be in a condition to know, first, the sum total of those claims; and, secondly, how to resist those which might be illegal, false, or unjust.<sup>12</sup>

Case, 6 Ct. Cl. 103; *Elgee v. Lovell*, Woolw. (U. S.) 115.

1. **Sale of Property Permitted.** — *Elgee v. Lovell*, Woolw. (U. S.) 115; *Bennett's Case*, 6 Ct. Cl. 103; *Moore's Case*, 10 Ct. Cl. 375.

2. **Power to Warrant.** — *Bennett's Case*, 6 Ct. Cl. 103.

3. **Sale Carried Title.** — *U. S. v. Winchester*, 99 U. S. 372, *affirming* 14 Ct. Cl. 13.

4. **Government a Trustee.** — *Elgee v. Lovell*, Woolw. (U. S.) 118; *U. S. v. Anderson*, 9 Wall. (U. S.) 65; *U. S. v. Klein*, 13 Wall. (U. S.) 138.

5. See *supra*, this section, 4. a. *Scope and Object.*

6. **Act Extended.** — See *U. S. v. Pugh*, 99 U. S. 265.

7. **Claims Arising Prior to Act.** — *Barringer's Case*, 3 Ct. Cl. 358; *Minor's Case*, 6 Ct. Cl. 393; *Terry's Case*, 8 Ct. Cl. 277; *Jenkins's Case*, 8 Ct. Cl. 464; *Moore's Case*, 10 Ct. Cl. 375; *U. S. v. Pugh*, 99 U. S. 265.

8. See *supra*, this section, 4. b. (1) *Nature of Property Collected.*

9. **Claims Allowed Against Proceeds of Rent in Treasury.** — *Moore's Case*, 10 Ct. Cl. 378.

10. **When Claims Prosecuted.** — *Payan's Case*, 7 Ct. Cl. 400; *Green's Case*, 7 Ct. Cl. 496; *Lamar's Case*, 7 Ct. Cl. 603; *Kidd's Case*, 8 Ct. Cl. 259; *Hill's Case*, 8 Ct. Cl. 361; *Mount's Case*, 11 Ct. Cl. 509; *Hall's Case*, 11 Ct. Cl. 704; *Thomas's Motion*, 12 Ct. Cl. 273; *Hamner's Case*, 13 Ct. Cl. 7; *Hodges v. U. S.*, 18 Ct. Cl. 700; *Elgee v. Lovell*, Woolw. (U. S.) 115; *U. S. v. Klein*, 13 Wall. (U. S.) 141; *Haycraft v. U. S.*, 22 Wall. (U. S.) 81; *Chamberlain v. Stanton*, 2 Woods (U. S.) 164; *McLeod v. Callicott*, Chase (U. S.) 443.

11. **Purpose Unlike That of Statute of Limitations.** — *Green's Case*, 7 Ct. Cl. 496; *Thomas's Motion*, 12 Ct. Cl. 273.

12. **Purpose Was to Gather Together All Claims.** — *Kidd's Case*, 8 Ct. Cl. 259. And see *Green's Case*, 7 Ct. Cl. 496.

The Date of the Suppression of the Rebellion for the purpose of this act was held to be August 20, 1866, which was the date of the President's proclamation declaring the rebellion suppressed in Texas and throughout the whole of the United States.<sup>1</sup>

(3) *Where Prosecuted.*—Only the Court of Claims had jurisdiction of claims arising under the Abandoned or Captured Property Act.<sup>2</sup>

(4) *By Whom Prosecuted*—(a) *In General.*—It was provided that any person claiming to have been the owner of the abandoned or captured property sold might prosecute the claim.<sup>3</sup>

(b) *Citizens.*—All citizens of the United States were entitled to prosecute claims arising under the Abandoned or Captured Property Act, whether residing in a loyal state or in insurrectionary territory.<sup>4</sup>

(c) *Aliens.*—The right to prosecute claims was not confined to citizens of the United States. Aliens also were allowed to prosecute under the Abandoned or Captured Property Act.<sup>5</sup> It was provided, however, by a later act approved July 27, 1868,<sup>6</sup> that only those aliens who were citizens or subjects of governments which permitted citizens of the United States to prosecute claims against such governments in their courts, should be allowed to prosecute claims against the United States government, under the Abandoned or Captured Property Act.<sup>7</sup> British subjects were not affected by this later act;<sup>8</sup> nor were subjects of Prussia;<sup>9</sup> nor were citizens of Switzerland,<sup>10</sup> or of France.<sup>11</sup> But citizens or subjects of the Kingdom of Hanover,<sup>12</sup> of Bavaria,<sup>13</sup> of Russia,<sup>14</sup> and of Austria were affected.<sup>15</sup>

*Effect of Act of 1868 on Pending Actions.*—The Act of 1868 provided that the question of the right of an alien to prosecute a claim against the United States should be raised by a plea of alienage filed by the defendant.<sup>16</sup> By virtue of this provision it was held that the passage of that act did not *ipso facto* work the dismissal of pending actions commenced by alien subjects affected by the act,<sup>17</sup>

1. *Date of Suppression.*—U. S. v. Anderson, 9 Wall. (U. S.) 56.

2. *Where Prosecuted.*—Gearing's Case, 3 Ct. Cl. 165; Hodges v. U. S., 18 Ct. Cl. 700; Elgee v. Lovell, Woolw. (U. S.) 115; McLeod v. Callicott, Chase (U. S.) 443.

3. *By Whom Prosecuted.*—Byrnes's Case, 3 Ct. Cl. 195.

4. *Citizens of United States.*—Bond v. U. S., 2 Ct. Cl. 534; Mayer's Case, 3 Ct. Cl. 249; U. S. v. Winchester, 99 U. S. 372, *affirming* 14 Ct. Cl. 13.

5. *Aliens.*—Byrnes's Case, 3 Ct. Cl. 195; Waltjen's Case, 3 Ct. Cl. 238; McElhose's Case, 3 Ct. Cl. 240; Bruning's Case, 3 Ct. Cl. 242.

6. *Act of 1868.*—15 Stat. at L. 243.

7. *Right Restricted.*—U. S. v. O'Keefe, 11 Wall. (U. S.) 178, *affirming* 5 Ct. Cl. 671; Mintz's Case, 4 Ct. Cl. 471; Scharfer's Case, 4 Ct. Cl. 529.

8. *British Subjects.*—U. S. v. O'Keefe, 11 Wall. (U. S.) 178, *affirming* 5 Ct. Cl. 674; Green's Case, 8 Ct. Cl. 412; Hill's Case, 8 Ct. Cl. 470; Collie's Case, 9 Ct. Cl. 431.

9. *Prussian Subjects.*—Brown's Case, 5 Ct. Cl. 571. In this case it was held that though the Kingdom of Prussia required foreigners bringing suit against the kingdom to give security for costs, this did not operate as a denial of the right to prosecute within the meaning of the Act of 1868.

10. *Citizens of Switzerland.*—Lobsiger's Case, 5 Ct. Cl. 687. In this case it appeared that by the laws of Switzerland a private citizen

could maintain an action against the government if the object of the litigation was of the value of at least three thousand francs, and that by a treaty between Switzerland and the United States, citizens of the United States were at liberty to prosecute and defend their rights before courts of justice in Switzerland in the same manner as native citizens of that government. It was held that Switzerland accorded to citizens of the United States the right to prosecute within the meaning of the Act of 1868.

11. *Citizens of France.*—Rothschild's Case, 6 Ct. Cl. 204; Dauphin's Case, 6 Ct. Cl. 221. In these cases it appeared that in France foreigners could sue the French government as the French could, with this exception, that in certain cases foreigners were required to give security. It was held that the French government accorded to citizens of the United States the right to prosecute claims against it within the meaning of the Act of 1868.

12. *Citizens of Hanover.*—Scharfer's Case, 4 Ct. Cl. 529.

13. *Natives of Bavaria.*—Wagner's Case, 5 Ct. Cl. 667.

14. *Russian Subjects.*—Mintz's Case, 4 Ct. Cl. 471.

15. *Austrian Subjects.*—Mintz's Case, 4 Ct. Cl. 471.

16. *Raised by Plea of Alienage.*—See 15 Stat. at L. 243.

17. *Effect on Pending Actions.*—Scharfer's Case, 4 Ct. Cl. 529.



and the result was that aliens who became naturalized citizens of the United States subsequent to the commencement of their suit against the government, and before the passage of the act, escaped the effect of the act,<sup>1</sup> as did also any who became citizens of the United States subsequent to the passage of the act, but before the plea of alienage was filed by the government.<sup>2</sup>

(d) **Corporations.** — Not only were natural persons, whether citizens of the United States or aliens, allowed to bring claims against the United States under the Abandoned or Captured Property Act, but artificial persons, that is, corporations, also were allowed to do so.<sup>3</sup>

(e) **Owners** — *aa. ADMINISTRATORS.* — An administrator was held to be an owner within the meaning of the Abandoned or Captured Property Act, and entitled to prosecute claims arising under it.<sup>4</sup>

*bb. ASSIGNEES.* — But an assignee of a claim was held not to be an owner within the meaning of the act,<sup>5</sup> nor could he have prosecuted his claim had he been considered an owner. This was on account of an act of Congress approved February 26, 1853,<sup>6</sup> which provided that all assignments of claims against the United States should be void.<sup>7</sup>

*cc. FACTORS.* — A factor who made advances on property consigned to him was held not to be an owner of the property within the meaning of the Abandoned or Captured Property Act, at least, beyond the extent of his lien.<sup>8</sup>

*dd. JOINT OWNERS.* — Ordinarily, if the property captured was owned by two persons jointly, they had to join in the claim arising out of the sale of such property by the government.<sup>9</sup> If, however, one of them was disabled from suing by reason of the fact that he had given aid and comfort to the rebellion, the other was allowed to maintain a separate action to recover his share of the proceeds.<sup>10</sup>

**Partners** were joint owners of property purchased with the partnership fund,<sup>11</sup> but not of property purchased with the funds of one of the parties after the dissolution of the firm and during liquidation proceedings, though bought in the name of the firm.<sup>12</sup>

*ee. TRUSTEES.* — A trustee was an "owner" and entitled to prosecute claims against the proceeds of abandoned or captured property sold.<sup>13</sup>

(5) **Proof Necessary** — (a) **In General.** — The Abandoned or Captured Property Act provided that the claimant should make out his case to the satisfaction of the court. This was held to mean that the facts should be established by legal and competent testimony, in the same manner that was usually practiced in courts of justice, and that such testimony should be taken before a competent officer or magistrate, on legal notice to the solicitor of the United States, under the solemnity of an oath, and subject to a cross-examination

1. **Naturalization Before Passage of Act.** — *Bulwinkle's Case*, 4 Ct. Cl. 395; *Mintz's Case*, 4 Ct. Cl. 471.

2. **Naturalization Before Plea of Alienage Filed.** — *Scharfer's Case*, 4 Ct. Cl. 529; *Wagner's Case*, 5 Ct. Cl. 637.

3. **Corporations.** — *U. S. v. Home Ins. Co.*, 22 Wall. (U. S.) 99. In this case the corporation, which was an insurance company, was created by the legislature of a state which was in armed rebellion. It was held that the corporation was a valid one notwithstanding.

4. **Administrator.** — *Carroll v. U. S.*, 13 Wall. (U. S.) 151; *Aubert's Case*, 3 Ct. Cl. 88; *Taylor's Case*, 5 Ct. Cl. 701.

5. **Assignee Not an Owner.** — *U. S. v. Gillis*, 95 U. S. 417.

6. **Act of 1853.** — 10 Stat. at L. 17.

7. **All Assignments Void.** — *U. S. v. Gillis*, 95

U. S. 407; *Erwin v. U. S.*, 97 U. S. 392; *Cote's Case*, 3 Ct. Cl. 64.

**Assignee in Bankruptcy** not an assignee within the meaning of act. *Erwin v. U. S.*, 97 U. S. 392.

8. **Factors.** — *U. S. v. Villalonga*, 23 Wall. (U. S.) 35.

9. **General Rule as to Joint Owners.** — *Fain's Case*, 4 Ct. Cl. 237; *Richmond's Case*, 7 Ct. Cl. 533; *Meldrim's Case*, 7 Ct. Cl. 595.

10. **One Disabled from Suing.** — *Fain's Case*, 4 Ct. Cl. 237; *Meldrim's Case*, 7 Ct. Cl. 595.

11. **Property Purchased with Partnership Fund.** — *Miller's Case*, 4 Ct. Cl. 288. And see *Douglas's Case*, 14 Ct. Cl. 1.

12. **Property Bought with Individual Funds.** — *Low's Case*, 7 Ct. Cl. 515.

13. **Trustees.** — *Stoddart's Case*, 6 Ct. Cl. 340; *Meriwether's Case*, 13 Ct. Cl. 259.

under such rules as the court had prescribed.<sup>1</sup>

(b) **Property Captured and Proceeds in Treasury.** — The claimant was obliged to show that property was abandoned or captured, and sold, and that the proceeds of the sale were paid into the treasury.<sup>2</sup>

(c) **Ownership.** — It was necessary for the claimant to establish his ownership of property, the proceeds of which he sought to recover;<sup>3</sup> but he was only obliged to prove his ownership at the time of its abandonment or capture,<sup>4</sup> and not from a time before the rebellion.<sup>5</sup>

**Sufficiency of Evidence.** — The evidence of ownership required was at least equal to that necessary to sustain an action of trespass or trover.<sup>6</sup>

**Bona Fide Ownership.** — The ownership must have been a *bona fide* one, not collusive or colorable. The claimant was obliged to show not only that he purchased the property, but that he did so in the regular course of business and not in fraud of the act or with a view of speculating upon the justice of the government. Ownership was not genuine wherever one individual sold and the other purchased to prevent the property from being seized by, and forfeited to, the United States.<sup>7</sup>

**Unauthorized Sale by Agent.** — An unauthorized sale of property by an agent to the Confederate government was held not to affect the right of the principal, who subsequently, and prior to the capture and sale of it by the United States government, repudiated the transaction, to maintain a suit for the proceeds.<sup>8</sup>

**Joint or Several Ownership.** — If the claimant was a joint owner of the property captured and sold, he was obliged to show the amount of his interest in such property.<sup>9</sup> Where captured property belonging to several owners was partially burnt, each owner was allowed to recover his proportion of the proceeds, derived from the sale of what was saved, on establishing what that proportion was.<sup>10</sup>

(d) **Right to Proceeds.** — The claimant had to prove to the satisfaction of the Court of Claims his right to the proceeds of the sale,<sup>11</sup> and that such right

1. **To Satisfaction of Court.** — *Bond v. U. S.*, 2 Ct. Cl. 532.

2. **Capture and Sale and Proceeds Paid into Treasury.** — *Byrnes's Case*, 3 Ct. Cl. 195; *Hudnal's Case*, 3 Ct. Cl. 291; *West's Case*, 3 Ct. Cl. 341; *Rudolph's Case*, 3 Ct. Cl. 356; *Mott's Case*, 3 Ct. Cl. 363; *Lynch's Case*, 3 Ct. Cl. 392; *Ealer's Case*, 4 Ct. Cl. 372; *Lowry's Case*, 4 Ct. Cl. 377; *Habersham's Case*, 4 Ct. Cl. 433; *Hunt's Case*, 4 Ct. Cl. 438; *Crussell's Case*, 4 Ct. Cl. 533; *Mintz's Case*, 4 Ct. Cl. 471; *Furman's Case*, 5 Ct. Cl. 579; *Headman's Case*, 5 Ct. Cl. 640; *Geiffuss's Case*, 5 Ct. Cl. 697; *Cattel's Case*, 6 Ct. Cl. 278; *Henry's Case*, 6 Ct. Cl. 389; *Minor's Case*, 6 Ct. Cl. 393; *Daniels's Case*, 7 Ct. Cl. 447; *Martin's Case*, 7 Ct. Cl. 450; *Price's Case*, 7 Ct. Cl. 567; *Carroll's Case*, 7 Ct. Cl. 589; *Austell's Case*, 7 Ct. Cl. 599; *Douglass's Case*, 7 Ct. Cl. 604; *Terry's Case*, 8 Ct. Cl. 277; *Cones's Case*, 8 Ct. Cl. 329; *Johnson's Case*, 8 Ct. Cl. 454; *Dent's Case*, 8 Ct. Cl. 474; *Boyd's Case*, 9 Ct. Cl. 419; *Douglas's Case*, 11 Ct. Cl. 655; *Thomas's Motion*, 12 Ct. Cl. 273; *Arkansas Cotton Cases*, 12 Ct. Cl. 638; *U. S. v. Crussell*, 14 Wall. (U. S.) 1; *Spencer v. U. S.*, 91 U. S. 577, *affirming* 8 Ct. Cl. 288; *U. S. v. Ross*, 92 U. S. 281; *Intermingled Cotton Cases*, 92 U. S. 651; *U. S. v. Pugh*, 99 U. S. 265.

3. **Ownership.** — *U. S. v. Ross*, 92 U. S. 281; *Elgee v. Lovell, Woolw.* (U. S.) 102; *U. S. v. Anderson*, 9 Wall. (U. S.) 65; *Carroll v. U. S.*,

13 Wall. (U. S.) 153; *Elgee Cotton Cases*, 22 Wall. (U. S.) 180; *Bond v. U. S.*, 2 Ct. Cl. 532; *Brown's Case*, 3 Ct. Cl. 119; *Barringer's Case*, 3 Ct. Cl. 360; *Bramhall's Case*, 4 Ct. Cl. 51; *Crussell's Case*, 4 Ct. Cl. 533; *Craft's Case*, 12 Ct. Cl. 178; *Arkansas Cotton Cases*, 12 Ct. Cl. 638; *Hodges v. U. S.*, 18 Ct. Cl. 700.

4. **Ownership at Time of Capture.** — *U. S. v. Gillis*, 95 U. S. 407; *Carroll v. U. S.*, 13 Wall. (U. S.) 151; *Wayne's Case*, 4 Ct. Cl. 426.

5. **Not from Time Before Rebellion.** — *Wayne's Case*, 4 Ct. Cl. 426.

6. **Sufficiency of Evidence.** — *Bond v. U. S.*, 2 Ct. Cl. 532.

7. **Bona Fide Ownership.** — *Bond v. U. S.*, 2 Ct. Cl. 532; *Bramhall's Case*, 4 Ct. Cl. 51; *Wayne's Case*, 4 Ct. Cl. 426.

8. **Unauthorized Sale by Agent.** — *Taylor's Case*, 5 Ct. Cl. 701.

9. **Joint Ownership.** — *Fain's Case*, 4 Ct. Cl. 237; *Headman's Case*, 5 Ct. Cl. 640.

10. **Several Owners.** — *O'Keefe's Case*, 5 Ct. Cl. 674. In this case it was held that one of the several owners could not disclaim his share of the other.

11. **Right to Proceeds.** — *Elgee v. Lovell, Woolw.* (U. S.) 115; *Carroll v. U. S.*, 13 Wall. (U. S.) 153; *Elgee Cotton Cases*, 22 Wall. (U. S.) 180; *Bond v. U. S.*, 2 Ct. Cl. 532; *Bramhall's Case*, 4 Ct. Cl. 51; *Moore's Case*, 10 Ct. Cl. 375; *Meriwether's Case*, 13 Ct. Cl. 259; *Hodges v. U. S.*, 18 Ct. Cl. 700.



existed at the time of the petition filed in the Court of Claims.<sup>1</sup>

(c) **No Aid or Comfort Given** — *aa. IN GENERAL.* — The claimant was obliged to show not only his ownership in the property sold and his right to the proceeds, but also that he had given no aid or comfort to the rebellion,<sup>2</sup> at any time,<sup>3</sup> voluntarily.<sup>4</sup> It was not enough that there was no proof that he was disloyal. He was obliged, in order to recover, to establish his claim by direct and positive proof of loyalty.<sup>5</sup>

**Alien Claimant.** — Though the claimant was an alien he was obliged to show that he did not give aid and comfort to the rebellion.<sup>6</sup> But he was not obliged to show that he had any sympathy with or loyalty to the cause of the United States.<sup>7</sup>

*bb. WHAT WAS GIVING AID AND COMFORT.* — The aid and comfort meant by the act were not confined to acts which under the Constitution and laws would constitute treason. Any acts voluntarily committed which tended to assist, countenance, abet, or encourage the rebellion were a bar to claimant's recovery.<sup>8</sup> It was held to be giving aid or comfort to the rebellion, to go as surety on the official bond of a Confederate officer in the military service of the Confederate states, though done from motives of personal friendship to the principal,<sup>9</sup> or to buy property from the Confederate government, knowing that the money paid for it would go to aid the rebellion,<sup>10</sup> or to sell saltpetre to the Confederacy, knowing that it was to be used in the manufacture of gunpowder.<sup>11</sup> But it was held not to be giving aid or comfort to the rebellion, to obey unwillingly and reluctantly, though without direct compulsion, an order of a Confederate commander directing every able-bodied man, capable of bearing arms, to turn out and resist the approach of the United States forces,<sup>12</sup> or unwillingly to pay taxes assessed to help carry on the rebellion,<sup>13</sup>

1. **Time of Existence.** — *Carroll v. U. S.*, 13 Wall. (U. S.) 151.

2. **No Aid or Comfort Given.** — *Elgee v. Lovell*, Woolw. (U. S.) 116; *U. S. v. Anderson*, 9 Wall. (U. S.) 65; *Carroll v. U. S.*, 13 Wall. (U. S.) 151; *Elgee Cotton Cases*, 22 Wall. (U. S.) 180; *Bond v. U. S.*, 2 Ct. Cl. 532; *Foley's Case*, 3 Ct. Cl. 53; *Kuper's Case*, 3 Ct. Cl. 74; *Gearing's Case*, 3 Ct. Cl. 165; *Hancock's Case*, 3 Ct. Cl. 177; *McKay's Case*, 3 Ct. Cl. 181; *Igoc's Case*, 3 Ct. Cl. 226; *Lane v. U. S.*, 8 Ct. Cl. 567; *Armstrong's Case*, 3 Ct. Cl. 243; *Claussen's Case*, 3 Ct. Cl. 253; *Mott's Case*, 3 Ct. Cl. 363; *Hilborn's Case*, 3 Ct. Cl. 270; *Donnelly's Case*, 3 Ct. Cl. 276; *Hudnal's Case*, 3 Ct. Cl. 291; *Potter's Case*, 3 Ct. Cl. 390; *Lynch's Case*, 3 Ct. Cl. 392; *Fennerty's Case*, 3 Ct. Cl. 437; *Bramhall's Case*, 4 Ct. Cl. 51; *Stark's Case*, 4 Ct. Cl. 280; *Miller's Case*, 4 Ct. Cl. 288; *Ealer's Case*, 4 Ct. Cl. 372; *Quinby's Case*, 4 Ct. Cl. 417; *Hayden's Case*, 4 Ct. Cl. 475; *Zellner's Case*, 4 Ct. Cl. 480; *Crussell's Case*, 4 Ct. Cl. 533; *Wilson's Case*, 4 Ct. Cl. 559; *Armstrong's Case*, 5 Ct. Cl. 623; *Headman's Case*, 5 Ct. Cl. 640; *Koester's Case*, 5 Ct. Cl. 642; *Patterson's Case*, 6 Ct. Cl. 40; *Witkowski's Case*, 6 Ct. Cl. 406; *Austell's Case*, 7 Ct. Cl. 599; *Mcriwether's Case*, 13 Ct. Cl. 259.

3. **Must Never Have Given Aid or Comfort.** — *Elgee Cotton Cases*, 22 Wall. (U. S.) 180; *Bond v. U. S.*, 2 Ct. Cl. 529.

4. **Voluntary Aid or Comfort Meant.** — *U. S. v. Padelford*, 9 Wall. (U. S.) 531; *Bond v. U. S.*, 2 Ct. Cl. 534; *Ayers's Case*, 4 Ct. Cl. 422; *Koester's Case*, 5 Ct. Cl. 642.

5. **Direct and Positive Proof of Loyalty.** — *Dothage's Case*, 4 Ct. Cl. 208.

6. **Alien Claimant.** — *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Waltjen's Case*, 3 Ct. Cl. 238; *Bruning's Case*, 3 Ct. Cl. 242; *Harrison's Case*, 6 Ct. Cl. 323; *Medway's Case*, 6 Ct. Cl. 421; *Hill's Case*, 8 Ct. Cl. 470; *Collie's Case*, 12 Ct. Cl. 648.

7. **Sympathy or Loyalty.** — *Byrnes's Case*, 3 Ct. Cl. 195.

8. **Aid and Comfort Meant.** — *Bond v. U. S.*, 2 Ct. Cl. 529. See the title **TREASON**, vol. 28, p. 457.

9. **Surety on Official Bond.** — *U. S. v. Padelford*, 9 Wall. (U. S.) 531. In this case the claimant was on the official bonds of two commissaries and one quartermaster.

10. **Buying Property from Confederate Government.** — *Sprott v. U. S.*, 20 Wall. (U. S.) 459.

11. **Selling Saltpetre to Confederacy.** — *Carlisle v. U. S.*, 16 Wall. (U. S.) 147.

12. **Unwillingly Taking Up Arms Against United States Forces.** — *Ayers's Case*, 4 Ct. Cl. 422.

13. **Unwillingly Paying Taxes.** — *Bond v. U. S.*, 2 Ct. Cl. 529. In this case the court says: "Where the great body of inhabitants of a section or district rebel against the constituted authorities, individuals are not required to resist where such resistance would be futile and unavailing. It would be merely to invoke destruction upon themselves, without any corresponding benefit to their country. When a loyal resident or citizen of the insurgent territory pays the taxes which the usurping government assesses upon him, and the contributions it levies, he does so because the demand comes backed by a power and force which he cannot withstand and which it would be madness and folly to resist."

or to buy property with Confederate money.<sup>1</sup>

**Blockade Running.** — An alien engaged in blockade running was held not to be necessarily giving aid and comfort to the rebellion, within the meaning of the Abandoned and Captured Property Act.<sup>2</sup> Whether he was or was not was held to depend upon the nature of the cargo that was being carried.<sup>3</sup>

*cc.* **WHOSE LOYALTY PROVEN.** — It was sufficient for the claimant, unless he was suing in a representative character, to show that he was himself loyal. It was not necessary to trace his title to the property captured through a loyal source.<sup>4</sup>

**Claimant an Administrator.** — If the claimant was an administrator or executor, and the property was captured during the life of the intestate, it was necessary to show the loyalty of the intestate, but the loyalty of the distributees of the estate or of the claimant was immaterial.<sup>5</sup> If, on the other hand, the property was captured after the death of the intestate, it was not necessary to show the loyalty of the intestate, but it was necessary to show the loyalty of the claimant.<sup>6</sup>

**Claimant a Trustee.** — Where property belonging to a trust estate was captured the trustee, who brought suit for the proceeds, was not required to make proof of his own loyalty, for his legal estate was but a device of the law to protect the rights of others. But he was required to make proof of the loyalty of the beneficiaries under the trust.<sup>7</sup>

*dd.* **PRESUMPTIONS — Of Loyalty.** — Residence of a claimant in a loyal state during the rebellion was held to be *prima facie* evidence of loyalty.<sup>8</sup> But residence in a state declared by the President to be in rebellion against the United States, if voluntary, was, by the terms of an Act of Congress approved June 25, 1868, declared to be *prima facie* evidence that the party gave aid and comfort to the rebellion.<sup>9</sup> This presumption was held not to attach, however, to one who was temporarily in the insurrectionary district at the beginning of the war, and, being aged, infirm, and poor, was unable to leave;<sup>10</sup> nor was it held to attach to one who was prevented by Confederate authorities from leaving the insurrectionary district.<sup>11</sup>

**Of Neutrality.** — The residence of an alien claimant in a foreign country during the entire period of the rebellion was held to raise a *prima facie* presumption that he had maintained his neutrality.<sup>12</sup>

*ee.* **EFFECT OF GENERAL AMNESTY PROCLAMATION.** — The General Amnesty Proclamation of December 25, 1868, practically relieved most, if not all, claimants from making proof of loyalty,<sup>13</sup> but it did not comprehend a person dying before it took effect, so as to relieve his administrator from being obliged to

1. **Buying Property with Confederate Money.** — Wayne's Case, 4 Ct. Cl. 426.

2. **Blockade Running by Alien.** — Collie's Case, 9 Ct. Cl. 431.

3. **Nature of Cargo Determined Question.** — In Collie's Case, 12 Ct. Cl. 648, the aid and comfort consisted in running through the blockade munitions of war and running out quantities of cotton which, when sold in England, furnished the Confederate authorities with large credits.

4. **Tracing Title Through Loyal Source.** — U. S. v. Anderson, 9 Wall. (U. S.) 56; Wayne's Case, 4 Ct. Cl. 426.

5. **Loyalty of Intestate Shown.** — Aubert's Case, 3 Ct. Cl. 84; Mims's Case, 4 Ct. Cl. 521; Wilson's Case, 4 Ct. Cl. 559; Deeson's Case, 5 Ct. Cl. 626; Tayloe's Case, 5 Ct. Cl. 701.

6. **Loyalty of Administrator Shown.** — Carroll v. U. S., 13 Wall. (U. S.) 151.

7. **Claimant a Trustee.** — Stoddart's Case, 6 Ct. Cl. 340; Meriwether's Case, 13 Ct. Cl. 259.

8. **Presumptions of Loyalty.** — Hill's Case, 8 Ct. Cl. 470. And see Turner's Case, 3 Ct. Cl. 400, where the presumption was held to exist, notwithstanding the claimant, though residing in a loyal state, owned and worked a plantation in Louisiana.

9. **Presumption of Disloyalty.** — Fain's Case, 4 Ct. Cl. 239; Wayne's Case, 4 Ct. Cl. 426; Zellner's Case, 4 Ct. Cl. 480; Foster's Case, 5 Ct. Cl. 412; Spain's Case, 5 Ct. Cl. 598.

10. **Prevented from Leaving by Age, etc.** — Spain's Case, 5 Ct. Cl. 598.

11. **Prevented by Confederate Authorities from Leaving.** — Foster's Case, 5 Ct. Cl. 412.

12. **Presumption of Neutrality.** — Hill's Case, 8 Ct. Cl. 470.

13. **General Amnesty Proclamation.** — U. S. v. Padelford, 9 Wall. (U. S.) 531; Armstrong v. U. S., 13 Wall. (U. S.) 154; Pargoud v. U. S., 13 Wall. (U. S.) 156; Witkowski's Case, 7 Ct. Cl. 393; Carroll's Case, 7 Ct. Cl. 589; Meriwether's Case, 13 Ct. Cl. 266.

establish his loyalty.<sup>1</sup>

(b) *Recovery of Net Proceeds.* — If the claimant of the proceeds of abandoned or captured property, which had been sold, was successful in establishing his claim, he recovered the residue of the proceeds from the sale of his property, after the deduction of any purchase money which might have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.<sup>2</sup>

*Judgment for Specific Sum.* — The Court of Claims had authority not only to determine whether the claimant was entitled to receive the proceeds of his property, but to render judgment for a specific sum.<sup>3</sup>

2. **PERSONAL LIABILITY OF AGENT MAKING ILLEGAL SEIZURE.** — An unwarranted seizure of property under the Abandoned or Captured Property Act by the treasury agent, acting in good faith and under color of his office, did not make him liable to a personal action by the owner of the property illegally seized.<sup>4</sup>

**VI. MARTIAL LAW — 1. Definition.** — Martial law has a much wider scope and application than military law. Military law consists of rules prescribed by a sovereignty, providing for the government and discipline of the troops, and applies only to persons in the military and naval service of the government.<sup>5</sup> Martial law, when once established, applies to citizens and soldiers alike.<sup>6</sup> There are no fixed rules, or even a definite practice, of martial law, as in the case of military law. It is not law in the proper sense of the word, but rests upon the judgment and will of the military commander, to be exercised as the exigencies of the moment require.<sup>7</sup>

2. **Proclamation.** — It is the province of the department of a government which wages war to proclaim martial law when the occasion for its exercise arises.<sup>8</sup> The power of proclamation is properly in the legislature,<sup>9</sup> but the power may, it has been said, be exercised by the executive when and where the civil power is suspended by force, though in such cases only. In all other times and places the civil power is supreme and excludes martial law — excludes government by the war power.<sup>10</sup> The power to proclaim martial law may, be used in a civil rebellion as well as in public wars, and in putting down an armed insurrection the state must determine for itself the degree of force the situation calls for.<sup>11</sup> Even in time of peace martial law may be

1. **Persons Dying Before Proclamation Took Effect.** — *Meldrim's Case*, 7 Ct. Cl. 595.

2. **Recovery of Net Proceeds.** — *Elgee v. Lovell*, Woolw. (U. S.) 102; *Reynolds's Case*, 3 Ct. Cl. 197; *Moore's Case*, 10 Ct. Cl. 375.

**Cotton Tax Deducted from Gross Proceeds.** — *U. S. v. O'Grady*, 22 Wall. (U. S.) 641; *Quinby's Case*, 4 Ct. Cl. 417.

**Illegal Expenses Not Deducted from Gross Proceeds.** — *Bynum's Case*, 8 Ct. Cl. 440; *Houston's Case*, 8 Ct. Cl. 446. And see *Gaither's Case*, 3 Ct. Cl. 191.

3. **Judgment for Specific Sum.** — *U. S. v. Anderson*, 9 Wall. (U. S.) 56.

4. **Personal Liability for Illegal Seizure.** — *McLeod v. Callicott*, Chase (U. S.) 443.

5. **Distinction Between Martial Law and Military Law.** — *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159. And see *Ex p. Bright*, 1 Utah 145. See also the title **MILITARY LAW**, vol. 20, p. 615.

6. **Martial Law Applies to Citizens and Soldiers Alike.** — And. L. Dict.; *In re Egan*, 5 Blatchf. (U. S.) 319; *Johnson v. Jones*, 44 Ill. 142; *Griffin v. Wilcox*, 21 Ind. 370; *Com. v. Shortall*, 206 Pa. St. 165.

And an alien, entering the district governed

by martial law, is under its control equally with citizens. *U. S. v. Diekelman*, 92 U. S. 520.

7. **Rests on Will of Commander.** — *In re Egan*, 5 Blatchf. (U. S.) 319; *U. S. v. Diekelman*, 92 U. S. 520; *Johnson v. Jones*, 44 Ill. 142; *Com. v. Shortall*, 206 Pa. St. 165; *Finlayson Martial Law* 107. See also 1 Bl. Com. 413.

8. **Proclamation.** — *Pomeroy Const. Law*, § 714; 2 *Winthrop Military Law* 41; *Halleck Internat. Law* 373; *Johnson v. Duncan*, 3 Mart. (La.) 530. See also 8 Op. Atty.-Gen. 367.

9. **In Legislature.** — *Johnson v. Duncan*, 3 Mart. (La.) 530.

10. **In Executive.** — *Griffin v. Wilcox*, 21 Ind. 370. See *Johnson v. Jones*, 44 Ill. 142; *In re Kemp*, 16 Wis. 382.

11. **In Civil Rebellion.** — *Luther v. Borden*, 7 How. (U. S.) 1; *Com. v. Shortall*, 206 Pa. St. 165. And see *Johnson v. Jones*, 44 Ill. 142.

"The True Test in case of civil war would seem to me to be, whether the civil authorities are able, by the ordinary legal process, to preserve order, punish offenders, and compel obedience to the laws. If they are, then the military commander has no jurisdiction; if, on the other hand, through the disloyalty of the



declared to a qualified extent.<sup>1</sup>

**3. Exercise.** — Powers under martial law are exercised by the commander solely on his personal responsibility to his government or superior officer.<sup>2</sup> They must not be exercised for purposes of oppression.<sup>3</sup> Martial law cannot legalize crime because committed by an army officer.<sup>4</sup> It cannot suspend the Constitution as the guardian of the person and property of non-combatants.<sup>5</sup> And Congress cannot by retrospective law deny redress for the wrongful invasion of person or property.<sup>6</sup>

**4. Place — Where War Actually Raging.** — Martial law is permitted to prevail on the actual theatre of military operations, in time of war, as an unavoidable necessity.<sup>7</sup>

**In Remote Districts.** — Martial law may also be enforced by a government in a district remote from the theatre of military operations, so far as may be necessary to the public safety, where that cannot be secured by the power of the civil law. This is an exercise of constitutional power, resulting from the power to wage war.<sup>8</sup>

**Where No War Prevails.** — In a district or state where no war prevails and the jurisdiction of the civil courts is undisturbed, neither the government nor the President can enforce martial law.<sup>9</sup>

**5. Effect.** — Martial law may supersede the civil law, or be exercised concurrently with it, the civil being permitted by mere military sufferance, or as a matter of convenience, where it does not interfere with or is subservient to the war power.<sup>10</sup>

**Where War Is Being Actually Waged,** martial law necessarily suspends and dis-

civil magistrates or the insurrectionary spirit of the people the laws cannot be enforced and order maintained, then martial law takes the place of civil law, wherever there is a sufficient military force to execute it." Dixon, C. J., in *In re Kemp*, 16 Wis. 359.

**1. In Time of Peace.** — *Com. v. Shortall*, 206 Pa. St. 165. See also *Johnson v. Duncan*, 3 Mart. (La.) 530.

**2. Exercise.** — *In re Egan*, 5 Blatchf. (U. S.) 319; *Johnson v. Jones*, 44 Ill. 142. And see *Despan v. Olney*, 1 Curt. (U. S.) 306.

**3. Without Oppression.** — *Luther v. Borden*, 7 How. (U. S.) 1; *McLaughlin v. Green*, 50 Miss. 453.

**What Is Duress.** — The order of a military commander, in time of war, after martial law has been declared, requiring an act to be performed by a citizen which is contrary to his inclination, constitutes duress, though no threats or demonstrations were used at the time the act was performed. *Olivari v. Menger*, 39 Tex. 76.

**A Military Commander May,** under the powers of the martial law, arrest or detain any person, whether citizen or alien, giving aid or information to the enemy, or, when the emergency requires it, seize or destroy the private property of a citizen. *Johnson v. Jones*, 44 Ill. 142.

**But the Citizens** adhering to a belligerent power or the common soldiery cannot, without authority of law or the order of their military commander, arrest, imprison, or use violence towards citizens not arrayed in hostility to their cause. *Cochran v. Tucker*, 3 Coldw. (Tenn.) 186.

**4. Cannot Legalize Crime.** — What the United States Constitution and the state laws denounce as a crime martial law does not legalize. *Com. v. Palmer*, 2 Bush (Ky.) 570.

**5. Martial Law Cannot Suspend the Constitution**

as the guardian of the person and property of a private citizen who is not an enemy to the government, and has been guilty of no hostile act. *Corbin v. Marsh*, 2 Duv. (Ky.) 193.

**6. Congress Cannot Deny Redress.** — *Johnson v. Jones*, 44 Ill. 142.

**7. Where War Actually Raging.** — *Ex p. Milligan*, 4 Wall. (U. S.) 2; *U. S. v. Dickelman*, 92 U. S. 520; *Johnson v. Jones*, 44 Ill. 142; *McLaughlin v. Green*, 50 Miss. 453.

It is limited to the theatre of active military operations. *McLaughlin v. Green*, 50 Miss. 453; and to its immediate vicinity, *In re Kemp*, 16 Wis. 359.

**Necessity.** — In *Griffin v. Wilcox*, 21 Ind. 370, it is said that a citizen cannot, without an Act of Congress, be subjected to martial law, except upon necessity, occasioned by force, actually existing, or immediately threatened, at the time and place where martial law is exercised.

**Necessity Must Be Shown.** — And the person exercising it must affirmatively show the necessity. *In re Egan*, 5 Blatchf. (U. S.) 319.

**8. In Remote Districts.** — *Johnson v. Jones*, 44 Ill. 142. See also *Ex p. Milligan*, 4 Wall. (U. S.) 2. But see *In re Kemp*, 16 Wis. 359, *contra*.

**9. Where No War Prevails.** — *Milligan v. Hovey*, 3 Biss. (U. S.) 13; *Ex p. Milligan*, 4 Wall. (U. S.) 2; *Johnson v. Jones*, 44 Ill. 142.

And if a person is arrested in such a community, and deprived of his liberty by order of the President of the United States as commander-in-chief, and as incident to a state of war, without legal process, for alleged disloyal practices therein, such arrest will be unlawful, and the parties making it will be liable to an action therefor. *Johnson v. Jones*, 44 Ill. 142.

**10. Effect.** — Bl. L. Dict.; *Griffin v. Wilcox*, 21 Ind. 370.

places the ordinary laws of the land, so far as they are in conflict with the martial law.<sup>1</sup> And acts done by the military authorities are not justiciable by the ordinary tribunals.<sup>2</sup> But martial law does not necessarily suspend the local law or administration.<sup>3</sup> Some civil tribunals may be permitted to pursue their ordinary course in a district in which martial law has been proclaimed.<sup>4</sup>

**6. Duration.** — Being the result of absolute necessity in time of war, martial law terminates with the necessity.<sup>5</sup>

**No Formal Revocation** of a state of martial law is necessary for its discontinuance. When the emergency ceases the status is deemed to cease.<sup>6</sup>

**VII. MILITARY OR PROVISIONAL GOVERNMENT — 1. Definition.** — Military government is not to be confused with martial law. The former is the dominion exercised by the conquering power over the territory and inhabitants of the enemy's country upon its conquest and occupation.<sup>7</sup> It is incident to the occupation of an enemy country.<sup>8</sup>

**2. Establishment.** — Temporary government and laws for a territory seized and occupied by the United States in time of war may be established by the President, in the exercise of his constitutional power.<sup>9</sup>

**3. Character and Effect.** — The Occupying Power May Establish Such Laws of Its Own, and recognize only such laws of the subdued country, as it sees fit. The private relations of the people, however, the ordinary laws of contract, and the rights of property remain unchanged, except so far as they may conflict with any regulations which the occupying authority may ordain.<sup>10</sup>

**1. Suspends Ordinary Laws in Conflict with It.** — *In re Egan*, 5 Blatchf. (U. S.) 319; *Johnson v. Jones*, 44 Ill. 142.

**2. Marais v. General Officer**, (1902) A. C. 109.

**3. Does Not Necessarily Suspend Local Law.** — *Winthrop Military Law* 42; *McLaughlin v. Green*, 50 Miss. 453.

Act of Congress March 3, 1863, declaring murder and other offenses committed in time of war or rebellion by persons in the military service punishable by courts martial or military commission, is constitutional, but the jurisdiction does not divest United States courts of concurrent jurisdiction. *People v. Gardiner*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 143.

But this would not apply in a seceding state, where the local law would give place to the martial law. *Tennessee v. Hibdon*, 23 Fed. Rep. 795, following *Coleman v. Tennessee*, 97 U. S. 513.

**4. Civil Jurisdiction Permissive.** — *Marais v. General Officer*, (1902) A. C. 109.

Martial law is not inconsistent with the administration of justice between the citizens in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees are binding on the parties. *Kimball v. Taylor*, 2 Woods (U. S.) 37.

**5. Duration.** — *In re Egan*, 5 Blatchf. (U. S.) 319; *Johnson v. Jones*, 44 Ill. 142.

It can only prevail until the laws can have their free course. *In re Egan*, 5 Blatchf. (U. S.) 319; *McLaughlin v. Green*, 50 Miss. 453; *Isbell v. Farris*, 5 Coldw. (Tenn.) 426.

**6. No Formal Revocation Necessary.** — *Winthrop Military Law* 42.

**7. Military Government — Definition.** — 2 *Winthrop Military Law* 38; *Pomeroy's Const. Law*, § 712; *Cross v. Harrison*, 16 How. (U. S.) 164; *U. S. v. Reiter*, 4 Am. L. Reg. N. S. 534, 27 Fed. Cas. No. 16,146; *Rutledge v. Fogg*, 3

*Coldw. (Tenn.)* 554; *Isbell v. Farris*, 5 *Coldw. (Tenn.)* 426; *Hefferman v. Porter*, 6 *Coldw. (Tenn.)* 391. See also *Com. v. Shortall*, 206 Pa. St. 165.

**8. Incident to Occupation.** — *Hefferman v. Porter*, 6 *Coldw. (Tenn.)* 391; *Dillard v. Alexander*, 9 *Heisk. (Tenn.)* 719. And see the title *INTERNATIONAL LAW*, vol. 16, p. 1157.

**9. Establishment.** — It was within the power of the President during the civil war to institute temporary governments within the hostile territory occupied by the federal troops. *Texas v. White*, 7 Wall. (U. S.) 700; *Burke v. Tregre*, 22 La. Ann. 629; *Rutledge v. Fogg*, 3 *Coldw. (Tenn.)* 554.

**Provisional Courts.** — And to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the state or the United States. *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *The Grapeshot*, 9 Wall. (U. S.) 129; *Mechanics'*, etc., *Bank v. Union Bank*, 22 Wall. (U. S.) 276; *Burke v. Tregre*, 22 La. Ann. 629.

And a court established by proclamation of the commanding general on the occupation of a city by the government forces will, in the absence of proof to the contrary, be presumed to have been authorized by the President. *Mechanics'*, etc., *Bank v. Union Bank*, 22 Wall. (U. S.) 276; *Rutledge v. Fogg*, 3 *Coldw. (Tenn.)* 554; *Hefferman v. Porter*, 6 *Coldw. (Tenn.)* 391. But see *Walt v. Thomasson*, 10 *Heisk. (Tenn.)* 151.

**10. Character and Effect.** — *U. S. v. Rice*, 4 *Wheat. (U. S.)* 246; *U. S. v. Percheman*, 7 *Pet. (U. S.)* 51; *Cross v. Harrison*, 16 *How. (U. S.)* 164; *Leitensdorfer v. Webb*, 20 *How. (U. S.)* 176; *Coleman v. Tennessee*, 97 U. S. 509; *Ketchum v. Buckley*, 99 U. S. 188; *Jeffries v. State*, 39 Ala. 655; *Rutledge v. Fogg*, 3 *Coldw. (Tenn.)* 554. See also *Wheat. on Int. L.* (8th ed.), p. 432, note; *Dow v. Johnson*, 100 U. S. 158; *Hawkins v. Filkins*, 24 Ark. 286;



**Local Civil Courts** may be left in the exercise of their jurisdiction, or they may be suspended and military courts or other civil tribunals substituted for them.<sup>1</sup>

**Local Officers.** — The legally constituted officers in the conquered territory may be dispossessed and others appointed in their stead, whose acts, within the sphere of their authority, are valid and binding.<sup>2</sup>

**Effect on Revenue Laws.** — The provisional government may impose duties and levy and collect taxes, and give the power to levy and collect such taxes to municipalities;<sup>3</sup> and taxes assessed, *flagrante bello*, may be collected after the occupation has ceased.<sup>4</sup>

**Power of Governor.** — So far as he is vested with power by the conquering government, the authority of the military governor is supreme,<sup>5</sup> and a court of equity has no jurisdiction to correct his orders on the ground of error.<sup>6</sup>

**He May Appoint Judges** and give them power to terminate pending causes.<sup>7</sup>

**But His Powers Are Limited** by his authority from his government.<sup>8</sup>

**And District Commanders** must act within the limits of their authority from their government, otherwise their acts are without validity.<sup>9</sup>

**Effective Only by Superior Force.** — And as regards the conquered, the principle of the law of war gives effect to the orders of the commander of an invading army, so far only as they can be and are enforced by the means at his disposal and no further.<sup>10</sup>

**No Prejudice on Account of Obedience.** — But no person under the sway of such a government can be prejudiced in any way by yielding it obedience.<sup>11</sup>

**4. Duration.** — The duration of a military government necessarily depends upon the will of the conquering power.<sup>12</sup> The courts organized by such pro-

State *v.* Heath, 20 La. Ann. 518; McClelland *v.* Shelby County, 32 Tex. 17.

**Personal and Property Rights.** — While in matters purely political and for the preservation of the public order very large discretion was given by the reconstruction laws to the military commanders in those states that had been in insurrection, absolute power over personal and property rights was not given. They could not, for example, set aside and vacate the judgment of a court in a civil suit. Welborn *v.* Mayrant, 48 Miss. 652.

A military commander has no power to impair the obligation of a contract any more than has a state. Kibler *v.* Bridges, 3 S. Car. 44.

A commander of a military district has no authority, as such, to issue an order to the sheriff of a county requiring him to place a person in possession of a plantation and personal property which were at the time in possession of another person. Whalen *v.* Sheridan, 17 Blatchf. (U. S.) 9.

**1. Local Civil Courts.** — Rutledge *v.* Fogg, 3 Coldw. (Tenn.) 554; Heffernan *v.* Porter, 6 Coldw. (Tenn.) 391; State *v.* Hall, 6 Baxt. (Tenn.) 3. And see *Ex p.* Hewitt, 3 Am. L. Rev. 382, 12 Fed. Cas. No. 6,442; Government *v.* M'Gregory, 14 Mass. 499; Broughton *v.* Haywood, 61 N. Car. 380; Cosgrove *v.* Butler, 1 S. Car. 241; Johnson *v.* State, 33 Tex. 570; Grant *v.* Chambers, 34 Tex. 573; Daniel *v.* Hutcheson, 86 Tex. 51; Tweedy *v.* Briggs, 31 Tex. 74; *Ex p.* Bright, 1 Utah 145.

**2. Existing Officers May Be Superseded.** — Cronin *v.* Patrick County, 89 Fed. Rep. 79; State *v.* Hall, 6 Baxt. (Tenn.) 3.

**3. To Impose Duties.** — Under the war power the President, as commander in chief, and the military commander have power to impose duties upon imports and exports to and from

an occupied enemy country, and duties thus imposed are legally exacted till the ratification of a treaty of peace, when the right ceases. Dooley *v.* U. S., 182 U. S. 222; Armstrong *v.* U. S., 182 U. S. 243. See Downes *v.* Bidwell, 182 U. S. 244. See also the title INTERNATIONAL LAW, vol. 16, p. 1157, note 3.

**To Levy and Collect Taxes.** — Sharpleigh *v.* Surdam, 1 Flipp. (U. S.) 472; Rutledge *v.* Fogg, 3 Coldw. (Tenn.) 554.

**To Give Power to Municipal Authorities.** — Rutledge *v.* Fogg, 3 Coldw. (Tenn.) 554.

**4. Taxes Assessed May Be Collected After Occupation Ceases.** — Rutledge *v.* Fogg, 3 Coldw. (Tenn.) 554. See also Clegg *v.* State, 42 Tex. 605.

**5. Power of Governor.** — McClelland *v.* Shelby County, 32 Tex. 17. See also Purviance *v.* Broward, 15 Fla. 374.

**6. Orders Not Reviewable in Equity.** — Thomas *v.* Raymond, 4 S. Car. 347.

**7. To Appoint Judges.** — Lanfear *v.* Mestier, 18 La. Ann. 497.

**8. Powers Limited by Supreme Government.** — State *v.* Jennings, 15 Rich. L. (S. Car.) 42; Warren *v.* Lagrone, 12 S. Car. 45; Raymond *v.* Thomas, 91 U. S. 712.

**9. District Commanders Must Act Within Limits of Authority.** — Walt *v.* Thomasson, 10 Heisk. (Tenn.) 151.

A military commandant of a district has no power to order a judge to dismiss a prosecution for felony pending in court. State *v.* McLane, 31 Tex. 260.

**10. Effective Only by Superior Force.** — Varner *v.* Arnold, 83 N. Car. 206.

**11. Lay *v.* O'Neil**, 29 La. Ann. 722.

**12. See** Leitensdorfer *v.* Webb, 20 How. (U. S.) 176; Leachman *v.* Musgrove, 45 Miss. 511; Grant *v.* Chambers, 34 Tex. 573; Richmond Mayoralty Case, 19 Gratt. (Va.) 673.

visional governments retain their jurisdiction so long as a state of war exists, and may cease to have a legal existence only when new courts are organized to take their places. And judges appointed by a provisional military government continue to hold their office after the expiration of that government until the incoming government declares otherwise.<sup>1</sup>

**WARD.** — See the title *GUARDIAN AND WARD*, vol. 15, p. 16.

**WAREHOUSE RECEIPTS.** — See the title *WAREHOUSES AND WAREHOUSEMEN*, *post*.

**1. Courts and Judges.** — *U. S. v. Reiter*, 4 Am. L. Reg. N. S. 534, 27 Fed. Cas. No. 16,146; *Ex p. Ortiz*, 100 Fed. Rep. 955; *Leachman v. Musgrove*, 45 Miss. 511.

The courts organized by the provisional government and by the reconstruction acts did not cease to have a legal existence after the adoption of the constitution of 1869, and a district judge remained in office till his successor was appointed and qualified. *Johnson v. State*, 33 Tex. 570; *Grant v. Chambers*, 34 Tex. 573; *Daniel v. Hutcheson*, 86 Tex. 51; *Daniel v.*

*Blake*, (Tex. Civ. App. 1893) 23 S. W. Rep. 242.

**Indictments Found** under the provisional government are valid, and are to be carried on under the present government. *State v. Jarvis*, 63 N. Car. 556.

**Temporary Municipal Officers** appointed by military orders under the reconstruction acts had no authority to appoint subordinates for a longer period than their own tenure of office. *Augusta v. Ramsey*, 43 Ga. 140. And see *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673.

# WAREHOUSES AND WAREHOUSEMEN.

BY H. O'B. COOPER.

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### CROSS-REFERENCES.

*For matters of PROCEDURE, see the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 22, p. 1064.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BAGGAGE*, vol. 3, p. 528; *BAILMENTS*, vol. 3, p. 732; *BILLS OF LADING*, vol. 4, p. 507; *CARRIERS OF GOODS*, vol. 5, p. 154; *CONFUSION OF GOODS*, vol. 6, p. 592; *EXPRESS COMPANIES*, vol. 12, p. 542; *FACTORS OR COMMISSION MERCHANTS*, vol. 12, p. 625; *FACTORS' ACTS*, vol. 12, p. 614; *FIRE INSURANCE*, vol. 13, p. 86; *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 839; *SALES*, vol. 24, p. 1018; *WHARVES AND WHARFINGERS*, *post*.



**I. DEFINITIONS — 1. Warehouse.** — A warehouse is a place used by the occupant for the storage of goods,<sup>1</sup> and the term is synonymous with storehouse.<sup>2</sup>

**2. Warehouseman.** — A warehouseman is one who receives and stores goods as a business for a compensation or profit.<sup>3</sup>

**3. Cold Storage.** — The term cold storage means a storehouse or storeroom used for the preservation of perishable goods, where the temperature is kept at a low degree, but above the freezing point;<sup>4</sup> but evidence is admissible to show that the term in a particular business means a temperature at or below the freezing point.<sup>5</sup>

**4. Freezer.** — A freezer is a place for the preservation of meat, where the temperature is kept below the freezing point.<sup>6</sup>

**II. BONDED WAREHOUSES.** — This subject has been fully treated in another part of this work, to which reference is made.<sup>7</sup>

**1. Warehouse Defined.** — *Owen v. Boyle*, 22 Me. 47.

**Cellar.** — A cellar under a shop, in which the proprietor kept such goods as he had no occasion to expose for sale, was held to be a warehouse within 7 & 8 Geo. IV., c. 29, § 15, in *Reg. v. Hill*, 2 M. & Rob. 458.

See also *Reg. v. Halliday*, 21 Ont. App. 42, holding that a cellar in a brewery where beer is stored, is a warehouse.

**Granary.** — A granary used for keeping and preserving farming utensils was held to be a warehouse in *Ray v. Com.*, 12 Bush (Ky.) 397.

**Opera House.** — An opera house, used for the storage and safekeeping of stage properties between the occasions when it is used for entertainment, is embraced by the term "warehouse" in section 1164 of the *Kentucky* statutes, providing a punishment for breaking into warehouses with intent to steal. *Hunter v. Com.*, (Ky. 1899) 48 S. W. Rep. 1077.

**Shed.** — A shed open on two sides, and having a roof, used for the storage of goods, was held to be a warehouse within the acts 2 & 3 Wm. IV., c. 45, § 27. *Watson v. Cotton*, 5 C. B. 51, 57 E. C. L. 51.

**Railroad Car.** — A railroad car in which goods are shipped and in which they are left intact is not a warehouse. *Hipp v. Southern R. Co.*, 50 S. Car. 129.

**By Constitution and Statute of Illinois,** a place of storage is not a public warehouse, unless it is conducted by one in the business of receiving goods for storage for a consideration. *Ward v. American Trust, etc., Bank*, 71 Ill. App. 20; *Howe v. Munson*, 65 Ill. App. 674.

**Under Kentucky Statute.** — The terms "warehouse" and "storehouse," as used in the fourth section of the sixth article of chapter 29, General Statutes, mean any house, not an office, or a shop, or a room in a steamer or other boat, in which goods, wares, and merchandise are usually deposited for safekeeping or for sale. *Ray v. Com.*, 12 Bush (Ky.) 397.

**Under Oregon Statute.** — A warehouse, within the meaning of the Oregon statute (§§ 4201-4207, Hill's Code), is a place where any of the commodities enumerated therein are received in storage for the owner by some person or corporation engaged in the general business of receiving such goods in store for compensation or profit. *State v. Stockman*, 30 Oregon 36.

**Act of 10 & 11 Wm. III., c. 23.** — In *Howard's Case*, 1 Foster's Crown L. 77, it was held that

the word "warehouses" in 10 & 11 Wm. III., c. 23, which was an act punishing burglary, etc., in shops, warehouses, etc., meant "not mere repositories for goods, but such places where merchants and other traders keep their goods for sale in the nature of shops and whither customers go to view them." See also *Rex v. Godfrey*, 1 Leach C. C. 287; *Reg. v. Amos*, 5 Cox C. C. 222, T. & M. 423.

**Charge for Storage as Evidence.** — Evidence that the proprietor of a warehouse was in the habit of receiving grain for compensation, and that a notice was posted on the warehouse that storage would be charged after a certain date, is competent to prove that it was a public warehouse. *Yockey v. Smith*, 81 Ill. App. 556, affirmed 181 Ill. 564.

**2. "Warehouse" and "Storehouse" Synonymous.** — *State v. Watson*, 141 Mo. 338; *State v. Sprague*, 149 Mo. 409. See *Constable v. National Steamship Co.*, 154 U. S. 51.

**3. Warehouseman Defined.** — *Bucher v. Com.*, 103 Pa. St. 528.

In contemplation of the *Pennsylvania Warehouse Act*, a warehouseman must be another than the owner of the goods. *Moors v. Jagode*, 195 Pa. St. 163.

**Under the Organic Law of Illinois,** one doing business by storing property for a compensation in an elevator is a public warehouseman. *National Bank v. Langan*, 28 Ill. App. 401.

And a buyer and shipper of grain, who also stores it for others, in a city of less than one hundred thousand inhabitants, is the keeper of a public warehouse of Class B, within section 2 of the Warehouse Act, Rev. Stat. of 1874, p. 820. *Snydacker v. Blatchley*, 177 Ill. 506.

**Under the Kentucky Statute,** only such persons as keep a warehouse for the storage of goods and are engaged in that business are warehousemen. *Mechanics' Trust Co. v. Dandridge*, (Ky. 1896) 37 S. W. Rep. 288.

**Receipt of Goods for Sale on Commission at a warehouse and delivery to the purchaser,** with no undertaking to store for hire, do not make the owners warehousemen proper. *White v. Boyd*, 124 N. Car. 177.

**4. Definition of Cold Storage.** — *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158.

**5. In Particular Business.** — *Behrman v. Linde*, 47 Hun (N. Y.) 530.

**6. Freezer.** — *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158.

**7. See the title REVENUE LAWS,** vol. 24, pp. 912, 918.

**III. CONSTITUTIONALITY OF LAWS AUTHORIZING AND REGULATING — 1. As Taking Property Without Due Process of Law.** — The regulation of the charges for storage is not in violation of the constitutional guaranty for the protection of private property.<sup>1</sup>

**2. As Taking Private Property for Public Use.** — And an act providing for the erection of public grain warehouses or elevators on or near the right of way of railroads, and for condemnation proceedings in connection therewith, is constitutional.<sup>2</sup>

**3. As Lawful Exercise of Police Power.** — An act fixing the maximum charges for storage of grain is a legitimate exercise of the police power of the state over a public interest,<sup>3</sup> but a requirement that transportation companies shall turn over to a public warehouseman all property not called for within thirty days after notice of its arrival is not a lawful exercise of police power.<sup>4</sup>

**4. As Denying Equal Protection of the Laws.** — An act which regulates warehouses on the right of way of railroads, to the exclusion of those not so situated, is not an unreasonable classification, and does not amount to a denial of the equal protection of the laws.<sup>5</sup>

**5. As Denying Right to Trial by Jury.** — An act providing that warehousemen shall not be defendants to actions concerning title or possession of stored goods unless they claim some right other than a lien for storage charges, is unconstitutional, as it deprives a plaintiff of the right to trial by jury, and ousts all the courts of jurisdiction in such cases.<sup>6</sup>

**6. As Conferring Exclusive Privileges.** — Any attempt in the charter of a warehouse corporation to release it from liability for all damages unless stipulated in its receipt, confers exclusive privileges, and is void.<sup>7</sup>

**7. As Interfering with Interstate Commerce.** — An act for the regulation of public warehouses, and the warehousing and inspection of grain, is not repugnant to the Federal Constitution as interfering with interstate commerce,<sup>8</sup> nor is one which requires a license.<sup>9</sup>

**8. As Contrary to Public Policy.** — A provision that all warehousemen shall insure the grain of others at their own expense does not make an act unconstitutional as contrary to public policy.<sup>10</sup>

**IV. PUBLIC NATURE OF WAREHOUSE.** — Although a private warehouseman is under no legal obligation to allow the use of his warehouse to every applicant,<sup>11</sup> yet public warehouses are public agencies and their proprietors pursue a public employment,<sup>12</sup> and goods must be received for a reasonable hire, when

**1. Regulation of Storage Charges.** — *Brass v. North Dakota*, 153 U. S. 391; *Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460. See *infra*, this title, V. *Inspection of Grain*.

It was held in *Pannell v. Louisville Tobacco Warehouse Co.*, 68 S. W. Rep. 662, 23 Ky. L. Rep. 2423, that sections 4799, 4801, and 4803 of the *Kentucky* statutes, providing that the buyer shall pay for all the tobacco he gets, and that the warehouseman shall account for all the tobacco he is paid for, at a compensation of two dollars per hogshead from the owner, are not unconstitutional on the ground that the reduction amounts to a taking of private property for public use without just compensation. This act was repealed by the Act of March 29, 1902.

**2. Taking Private Property.** — *Stewart v. Great Northern R. Co.*, 65 Minn. 515.

**3. Police Power.** — *Brass v. North Dakota*, 153 U. S. 391; *Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460.

**4. State v. Chicago, etc., R. Co.**, 68 Minn. 381, 64 Am. St. Rep. 482.

**5. Equal Protection of Law.** — *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452.

**6. Trial by Jury.** — *Cottew v. Dube*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 632.

**7. Exclusive Privileges.** — *Motley v. Southern Finishing, etc., Co.*, 122 N. Car. 347.

**8. Interstate Commerce.** — *Brass v. North Dakota*, 153 U. S. 391; *Munn v. Illinois*, 94 U. S. 113.

**9. Act Requiring License.** — *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452.

**10. Public Policy.** — *Brass v. North Dakota*, 153 U. S. 391.

**11. Bogert v. Haight**, 20 Barb. (N. Y.) 251. See *Brass v. North Dakota*, 153 U. S. 391.

**12. Public Agencies.** — *Munn v. Illinois*, 94 U. S. 113; *Hannah v. People*, 108 Ill. 77; *Central Elevator Co. v. People*, 174 Ill. 203; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192.

**Warehousing and Compressing Cotton Not Public Employment at Common Law.** — "The busi-

a warehouseman has a monopoly.<sup>1</sup> What is a reasonable charge may be determined by the legislature,<sup>2</sup> and the warehouseman has no right to select his own customers,<sup>3</sup> nor to do anything inconsistent with the impartial discharge of his duties to the public.<sup>4</sup>

**How Determined.** — It is from the nature and character of the business that the law holds property or services to be submitted to the public use, and the mere incorporation of a private company for carrying on a compress and warehouse business does not constitute a submission to public use,<sup>5</sup> nor does a warehouseman make such a submission by combination with other warehousemen, although he is enabled to exact thereby unreasonable charges.<sup>6</sup>

**License to Enter on Premises.** — A warehouseman, by holding himself out to be public, as such, extends a license to all persons having business with him to enter upon the premises, which may be terminated in case of particular persons by reasonable notice, after which an entry is a trespass.<sup>7</sup>

**V. INSPECTION OF GRAIN.** — The right to pass inspection laws arises under the police power, and they are not unconstitutional as imposing burdens upon

ness of warehousing and compressing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the state to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public. *Coggs v. Bernard*, 2 Ld. Raym. 909; 2 *Parsons on Contracts*, p. 139; *Story on Bail*, § 442." *Moore, C. J., in Ladd v. Southern Cotton Press, etc., Co.*, 53 Tex. 172.

In *Minnesota*, a warehouseman who stores no grain but his own, and who buys at the warehouse when the grain is delivered and weighed, is engaged in a business of such a public character as to require a license, under chapter 148, Gen. Laws 1895. *State v. W. W. Cargill Co.*, 77 Minn. 223, affirmed 180 U. S. 452.

**What Constitutes Public Warehouse under Missouri Statute.** — A warehouse for the storage of grain by the owner, and in which parts are leased for the storage of grain of others, which is kept separate and for which receipts are not issued, is not a "public warehouse" within the Missouri Act of June 22, 1889, nor does the mixing of different loads of his own wheat by the lessee of part of a warehouse make it public within the act. *State v. Smith*, 114 Mo. 180.

**Lease of Wharf under City Charter.** — An authorized lease under charter by a city of a part of a public wharf for the erection and maintenance of a warehouse is not void on the ground that the property is to be used for private purposes. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192.

**How Authorized in Indiana.** — In Indiana only such corporations as are authorized by the law under which they are organized to be public warehousemen can avail themselves of the provisions of sections 8704, 8719, Burns' Rev. Stat. 1894, and hence a company not authorized by such law cannot be authorized to do business as a public warehouseman by the county auditor upon petition, under section 8704. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

**Right to Close under Kentucky Act.** — Under the Kentucky Act of January 2, 1852, establishing tobacco inspectors in Louisville, temporary

and permanent owners of warehouses there had the right to close upon giving sixty days' written notice to the city council of such intention. *Lane v. Kasey*, 1 Met. (Ky.) 410.

**1. Monopoly.** — *Allnutt v. Ingalls*, 12 East 527.

**2. Legislature May Regulate Charges.** — *Munn v. Illinois*, 94 U. S. 113; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192. See *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 45 N. J. Eq. 50.

**Business Adjunct to Compressing Cotton.** — Where a compress company carries on the business of warehouseman as adjunct to the main business of compressing cotton, it is under no obligation to store cotton not designed to be compressed, on the same terms as cotton designed to be both stored and compressed. *Seeligson v. Taylor Compress Co.*, 56 Tex. 219.

**3. Cannot Select Customers.** — *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490.

**4. In Illinois warehousemen have no right, under the Act of April 25, 1871 (Rev. Stat. 1874, p. 820), to store their own grain in their own warehouses, issuing receipts therefor to themselves as private individuals, as it enables them to build up a monopoly and destroy competition.** *Central Elevator Co. v. People*, 174 Ill. 203.

And the Act of May 26, 1897 (Laws of 1897, p. 302), amending the above act by making it lawful for the owners, lessees, or managers of certain warehouses to store their grain and mix it with the grain of others, and to purchase their receipts, upon notice to the chief inspector of the county, was held unconstitutional. *Hannah v. People*, 198 Ill. 77.

**5. Ladd v. Southern Cotton Press, etc., Co.**, 53 Tex. 172, in which it was said that the legislature might declare a warehouse business *publici juris* if the facts and circumstances justified it and the good of society required it, but the courts could not treat it so in advance of the legislature.

**6. Combination with Other Warehousemen.** — *Ladd v. Southern Cotton Press, etc., Co.*, 53 Tex. 172; *Seeligson v. Taylor Compress Co.*, 56 Tex. 219.

**7. License to Enter.** — *Bogert v. Haight*, 20 Barb. (N. Y.) 251.



trade, nor as unjustly discriminating in favor of one class at the expense of another, as long as they are reasonable.<sup>1</sup>

**Delegation of Authority.** — The legislature, which has the power to regulate the inspection of grain, may delegate its authority to a commission, which may prescribe fees and regulate them from time to time,<sup>2</sup> but it does not intend that the power shall be used for the private gain of the members of the commission.<sup>3</sup>

**VI. WAREHOUSEMAN'S BOND.** — The bond of a licensed warehouseman is conditioned upon the faithful performance of his duty, and the obligation is one of indemnity.<sup>4</sup> Under a statute requiring a bond of warehousemen to keep their warehouses in good condition and repair, it is not necessary to execute a new bond upon removal to a new warehouse.<sup>5</sup>

**VII. CONTRACT OF STORAGE — 1. In General — Implied Contract.** — Where a warehouseman receives goods in the course of his business, in the absence of express contract, an implied contract of storage arises,<sup>6</sup> which presumption must be overcome by proof,<sup>7</sup> and the burden is on the plaintiff.<sup>8</sup>

**Breach of Contract.** — If a warehouseman refuses or acknowledges his inability to store goods according to contract, it is unnecessary to put him in default in order to hold him liable.<sup>9</sup>

**Construction of Contract.** — A contract of storage, which provides that the charges are to be omitted if the goods are sold by a certain time, and if not then the charges will accrue, contemplates a storage beyond the named date,<sup>10</sup> and the striking from a contract of the provisions as to the rate of storage has been

**1. Constitutionality.** — *People v. Harper*, 91 Ill. 357.

**Not Within Inhibition of Illinois Constitution.** — Although a statute for the inspection of grain is in a certain sense local and special, it is not within the inhibition of any provision of the Illinois constitution; local laws are only prohibited in the enumerated cases in section 22, art. 4, and "laws for the inspection of grain" are not included. *People v. Harper*, 91 Ill. 357.

**2. Delegation of Authority.** — *People v. Harper*, 91 Ill. 357.

**3. Jones v. Board of Trade**, 52 Kan. 95.

**Private Inspection.** — The *Missouri* Act of June 22, 1889, providing for the organization of public warehouses and for the regulation of the warehousing and inspection of grain therein, does not prevent private inspection in a district containing no warehouses within the act, although inspectors have been appointed there by authority of the act. *State v. Smith*, 114 Mo. 180.

**Discontinuance of Inspection under Virginia Statute.** — Under the Virginia tobacco inspection law, 2 Rev. Code, c. 220, which provided in section 3 that "in case any warehouse \* \* \* shall not, in the space of three succeeding years, receive a sufficient quantity of tobacco to pay the inspectors' salaries and rents of the warehouses, the inspection" should be discontinued unless supported at private expense, it was held that the provision was for the protection of the state, and directory, and the inspection was not *ipso facto* discontinued because of the failure for three years to pay expenses, where the inspectors had been regularly recommended and appointed and no steps had been taken to discontinue the inspection. *Auditor v. Dugger*, 3 Leigh (Va.) 241.

**4. Obligation of Bond.** — *State v. Sullivan*, 99 Mo. App. 616.

**5. Bailey v. Wood**, 69 S. W. Rep. 1103, 24 Ky. L. Rep. 801.

**6. Implied Contract — Massachusetts.** — *Gay v. Bates*, 99 Mass. 263.

*Minnesota.* — *Rettner v. Minnesota Cold-Storage Co.*, 88 Minn. 352.

*Missouri.* — *J. I. Case Flow Works v. Union Iron Works*, 56 Mo. App. 1; *State v. Sullivan*, 99 Mo. App. 616.

*New York.* — *Lichtenstein v. Jarvis*, 31 N. Y. App. Div. 33, *affirmed* 164 N. Y. 601; *Sutherland v. Albany Cold Storage, etc., Co.*, 171 N. Y. 269, *affirming* 55 N. Y. App. Div. 212. See *Oswego Bank v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634.

But an agreement for the use of a store for a certain period for the storage, repair, and sale of pianos, at a stipulated sum per month, payable at the expiration of each month, is not a contract of bailment and gives the owner of the store no lien on the property for the rental. *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292.

**Private Warehouseman.** — "In the absence of all agreement on the subject, the inference would be, in case of storage of grain by a private warehouseman, that he would keep it in the condition in which he receives it, and if mixed with his grain, by consent of the owner, that it shall remain with such warehouseman until demanded." *Walker, J., in Ives v. Hartley*, 51 Ill. 520.

**7. Devereaux v. Fleming**, 53 Fed. Rep. 101.

**8. Burden of Qualifying on Plaintiff.** — *Gay v. Bates*, 99 Mass. 263.

**9. Breach of Contract.** — *Allen v. Steers*, 39 La. Ann. 186.

**10. Construction of Contract.** — *Cushman v. Hayes*, 46 Ill. 145.



construed to alter its character in connection with other circumstances, as a contract of storage.<sup>1</sup>

**2. Gratuitous Bailment.** — The deposit of goods in a railroad warehouse without any agreement as to charges, although the depositor expected to pay something for the accommodation and told the agent that it would save him storage, is a gratuitous bailment.<sup>2</sup>

**Evidence.** — A judgment for storage charges is conclusive evidence, in an action for conversion between the same parties, that the storage was not to be gratuitous.<sup>3</sup>

**3. Whether Bailment or Sale** — *a. IN GENERAL* — **Affected by Custom.** — It is competent for the parties to contract with reference to a well-known custom, recognized by both, although no mention of it is made in the receipt,<sup>4</sup> but evidence of custom is inadmissible where the depositor was ignorant of it.<sup>5</sup>

*b. OPTION OF DEPOSITOR.* — But where the depositor has the option, either to demand redelivery or to sell to the warehouseman,<sup>6</sup> or to whomsoever he pleases, the contract is one of bailment,<sup>7</sup> which is not changed by limiting the right to demand the market price to a certain date.<sup>8</sup> So, it is a bailment when he has the right to demand the redelivery of his own property or other of like quality.<sup>9</sup>

*c. OPTION OF WAREHOUSEMAN.* — Where the warehouseman has the option either to deliver the same quantity and quality of grain, or to pay the market price, the contract is one of sale,<sup>10</sup> but if the option may be exercised only when the receipt is presented, the terms must be complied with, and prior to such time it is a bailment,<sup>11</sup> and where, possessing such option, he has used the grain, he is regarded as having exercised the option, and is treated as a purchaser.<sup>12</sup>

*d. BAILMENTS.* — If the specific article which is stored is to be returned upon demand, unchanged in form,<sup>13</sup> and if the depositor declines to sell upon delivery to the warehouse, but takes a ticket for it, the contract is a bailment.<sup>14</sup> So, the storage of property subject to the warehouseman's charges,<sup>15</sup> and at the owner's risk of fire, is a bailment;<sup>16</sup> as is a deposit under an agreement

1. In *Murray v. Pillsbury*, 59 Minn. 85, a receipt which had the printed provisions as to rate of storage stricken out, was held to give the warehouse authority to sell and not to be a contract of storage.

2. **Gratuitous Bailment.** — *Whiting v. Chicago*, etc., R. Co., 5 Dak. 90.

3. *Merritt v. Peirano*, 10 N. Y. App. Div. 563.

4. **Affected by Custom.** — *Buyck v. Schwing*, 100 Ala. 355; *Lyon v. Lenon*, 106 Ind. 567; *Hughes v. Stanley*, 45 Iowa 622.

5. **Admissibility of Evidence.** — *Larson v. Johnson*, 42 Ill. App. 198. See *Backus v. Lawbaugh*, (Iowa 1901) 86 N. W. Rep. 298.

6. **Option of Depositor.** — *Andrews v. Richmond*, 34 Hun (N. Y.) 20; *James v. Plank*, 48 Ohio St. 255.

Thus where the depositors of wheat expected either to sell to warehousemen or to secure a like quantity and quality on demand and payment of charges, it was held that no intention to part with their title was inferable, and the transaction was a bailment. *Tobin v. Portland Flouring Mills Co.*, 41 Oregon 269.

**Contra.** — *Lawlor v. Nicol*, 12 Manitoba 224; *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101.

7. *Schindler v. Westover*, 99 Ind. 395.

8. **Limitation of Right to Demand Market Price.** — *McGrew v. Thayer*, 24 Ind. App. 578.

9. *Lyon v. Lenon*, 106 Ind. 567.

**10. Warehouseman's Option.** — *Lyon v. Lenon*, 106 Ind. 567; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Gibb v. Townsend*, 4 Ohio Cir. Dec. 96, 9 Ohio Cir. Ct. 409; *McCabe v. McKinstry*, 5 Dill. (U. S.) 509; *Rahilly v. Wilson*, 3 Dill. (U. S.) 420, 20 Fed. Cas. No. 11,532, reversing 5 Chicago Leg. N. 217, 20 Fed. Cas. No. 11,531; *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101; *Barnes v. McCrea*, 75 Iowa 267, 9 Am. St. Rep. 473; *O'Dell v. Leyda*, 46 Ohio St. 244. See *Johnston v. Browne*, 37 Iowa 200; *Andrews v. Richmond*, 34 Hun (N. Y.) 20.

11. *State v. Rieger*, 59 Minn. 151.

12. **Exercise of Option.** — *Bucher v. Com.*, 103 Pa. St. 528.

13. **Return of Specific Article.** — *McCabe v. McKinstry*, 5 Dill. (U. S.) 509.

A receipt in the following form: "Received in store from A by same for same, not transferable without notice, and not accountable for loss by fire, 132 bush., 43 lbs. corn, in store till 1st May, at 2 cents — B," was held a bailment by which the specific property was to be redelivered. *Pribble v. Kent*, 10 Ind. 325, 71 Am. Dec. 327.

14. **Depositor's Declining to Sell.** — *Weiland v. Krejnick*, 63 Minn. 314.

15. **Storage Subject to Charges.** — *Marks v. Cass County Mill, etc.*, Co., 43 Iowa 146.

16. **At Owner's Risk.** — *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359; *Miller v.*

that storage should be charged after a certain date, and that the property was to remain subject to the control of the owner.<sup>1</sup> The storage of wheat free at owner's risk until he was ready to sell, when it was expected that the warehouseman would buy, but if sold to another he was to deliver, there being no agreement that the warehouseman was to have any control of it, other than its possession when in storage, is a bailment.<sup>2</sup> An agreement for the use of a store, in common with the owner, for the storage, repair, and sale of pianos, at a stipulated sum per month, payable at the expiration of each month, is not a contract of bailment, and the owner has no lien for the rental.<sup>3</sup>

*e. SALES.* — The delivery of goods to a warehouseman under an agreement that he may use it as he sees fit, and shall pay its market price when the depositor demands it, is a sale;<sup>4</sup> especially where no storage was ever charged.<sup>5</sup> And an agreement to receive for wheat deposited a designated amount of flour and bran is a sale,<sup>6</sup> as is the receipt of grain in railroad cars by a warehouseman under an agreement that it should be paid for in twenty or thirty days.<sup>7</sup> But the mere provision in a receipt of a warehouseman, engaged in storing goods, as well as buying and selling, directing the holder to "present this at office," does not raise a presumption of sale in the absence of other circumstances.<sup>8</sup>

*f. EVIDENCE.* — Although between the parties parol evidence is admissible to show whether a sale or a bailment was intended by the receipt,<sup>9</sup> yet where the depositor claims ignorance of a custom, evidence in rebuttal, of a contract with another, is not admissible to show the agreement with the depositor.<sup>10</sup> Evidence that the warehouseman was not paid for insurance on an amount of grain equal to the depositor's is inadmissible, as it only furnishes an inference to be drawn from a conclusion of the insurance company that it was not the depositor's property.<sup>11</sup>

**4. Termination of Contract.** — Where the bailment is gratuitous, it may be terminated at any time by notice,<sup>12</sup> and where there is no express contract as to its length, it is a continuing contract until terminated, either by removal of the goods by the depositor, or by notice from the warehouseman to do so.<sup>13</sup> Although the contract provides for storage at a certain rate per month until the depositor sells, yet this may be terminated on notice when the necessity arises, and is not an indefinite contract at the will of the depositor.<sup>14</sup>

State, 144 Ind. 401; *O'Dell v. Leyda*, 46 Ohio St. 244.

Where a warehouseman kept grain separate from other grain, and the receipt read: "Bought of A. for B. to be delivered at his elevator, according to sample, wheat No. 3, at owner's risk as to fire," it appearing that the warehouseman offered to buy it a few days prior to its destruction by fire, it was held a bailment, not a sale. *Irons v. Kentner*, 51 Iowa 88, 33 Am. Rep. 119.

**1. Storage After Certain Time — Control of Owner.** — *Yockey v. Smith*, 181 Ill. 564, 72 Am. St. Rep. 286.

**2. No Control by Warehouseman.** — *O'Dell v. Leyda*, 46 Ohio St. 244. See *infra*, this title, *Storage in Mass.*

**3. Trust v. Pirsson**, 1 Hilt. (N. Y.) 292.

**4. Right of Warehouseman to Use.** — *Ives v. Hartley*, 51 Ill. 520; *Cloke v. Shafroth*, 137 Ill. 393, 31 Am. St. Rep. 375; *Richardson v. Olmstead*, 74 Ill. 213; *Loneragan v. Stewart*, 55 Ill. 44; *Lyon v. Lenon*, 106 Ind. 567; *Reherd v. Clem*, 86 Va. 374.

In *Ives v. Hartley*, 51 Ill. 520, an owner stored wheat in the private warehouse of a miller, with grain used for milling, under an agreement "to take market price when he

sees fit to sell," nothing being said about storing. The miller stated the price he was paying, and the owner asked if he would take the wheat and pay him for it when called for. After destruction by fire, the miller agreed to pay, and the owner accepted flour in part payment. It was held that the circumstances implied a sale.

**5. No Storage Charged.** — *Weiland v. Sunwall*, 63 Minn. 320.

**6. Payment of Wheat in Flour.** — *Woodward v. Semans*, 125 Ind. 330, 21 Am. St. Rep. 225.

**7.** *Woodward v. Boone*, 126 Ind. 122.

**8.** *James v. Plank*, 48 Ohio St. 255. See *infra*, this title, *Storage in Mass.*

**9. Parol Evidence.** — *McCabe v. McKinstry*, 5 Dill. (U. S.) 509.

**10.** *Backus v. Lawbaugh*. (Iowa 1901) 86 N. W. Rep. 298.

**11.** *Backus v. Lawbaugh*, (Iowa 1901) 86 N. W. Rep. 298.

**12. Gratuitous Bailment.** — *Knight v. Beckwith Commercial Co.*, 6 Wyo. 500.

**13. Continuing Contract.** — *Sutherland v. Albany Cold Storage, etc., Co.*, 171 N. Y. 269, reversing 55 N. Y. App. Div. 212.

**14. Contract for Storage until Goods Sold.** — *Cushman v. Hayes*, 46 Ill. 145.

**VIII. STORAGE IN MASS — 1. In General.** — Upon the storage of grain in mass it is the warehouseman's duty to be able to deliver upon demand to the depositors an equal amount of the same quality deposited, without regard to when and where he may have procured it,<sup>1</sup> and the receipt holders have only the obligation of the warehouseman for proper storage and delivery; the receipt gives no lien on the warehouseman's property. The depositors retain no control over the identical grain deposited,<sup>2</sup> and cannot assert title against an innocent purchaser,<sup>3</sup> but may claim the substituted grain as their own,<sup>4</sup> and where only the amount of a depositor is left after shipment from the mass, it is the absolute property of the depositor.<sup>5</sup>

**2. Effect — Tenants in Common.** — The storage of grain in a warehouse in a common mass of the same grade, in accordance with a custom of the trade, makes the depositors tenants in common, each having such proportion of undivided interest therein as the amount stored bears to the whole mass,<sup>6</sup> and in case of loss, the depositors share it *pro rata* according to the equitable interest of each.<sup>7</sup> If a depositor receives more than his *pro rata* share after a loss, he must account to the other depositors for the excess.<sup>8</sup> The warehouseman may be a tenant in common by storing his grain in the mass, his interest being limited to the excess above the amount called for by the outstanding receipts, which he may dispose of as his own,<sup>9</sup> but if he sells in excess of his deposits, the balance belongs to the depositors and he is liable for the deficiency,<sup>10</sup> as is a depositor who disposes of another depositor's share.<sup>11</sup>

**3. Separation Unnecessary to Pass Title.** — If the warehouseman accepts an order, or executes a receipt, for part of a common mass of grain, actual separation is unnecessary in order to pass title, when the intention to do so is clear.<sup>12</sup>

**1. In General.** — *Baker v. Born*, 17 Ind. App. 422.

**Minnesota Statute — Authority to Sell.** — A provision in a warehouse receipt issued under § 7646, Gen. Stat. 1894, that the property may be mingled with other property of the same kind, or transferred to other warehouses or elevators, does not confer authority on the warehouseman to sell the property described therein. *State v. Cowdery*, 79 Minn. 94.

**Receipt Gives No Lien.** — *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397.

**2. No Control over Identical Grain.** — *Best v. Muir*, 8 N. Dak. 44.

**3. Innocent Purchaser's Title Good.** — *Preston v. Witherspoon*, 109 Ind. 457, 58 Am. Rep. 417.

**4. Right to Substituted Grain.** — *O'Dell v. Leyda*, 46 Ohio St. 244.

**5. Young v. Miles**, 20 Wis. 615. See *Young v. Miles*, 23 Wis. 643.

**6. Tenants in Common — Illinois.** — *Low v. Martin*, 18 Ill. 286; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397, 41 Ill. 344, 89 Am. Dec. 386.

**Indiana.** — *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359.

**Iowa.** — *Sexton v. Graham*, 53 Iowa 181; *Nelson v. Brown*, 53 Iowa 555; *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648.

**Massachusetts.** — *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154.

**Minnesota.** — *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. Rep. 209.

**Ohio.** — *O'Dell v. Leyda*, 46 Ohio St. 244.

**Oregon.** — *Brown v. Northcutt*, 14 Oregon 529. See *Tobin v. Portland Flouring Mills Co.*, 41 Oregon 269.

**7. Loss Shared Pro Rata.** — *Dows v. Ekstrone*,

1 McCrary (U. S.) 434; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397, 41 Ill. 344, 89 Am. Dec. 386; *Brown v. Northcutt*, 14 Oregon 529.

**8. Brown v. Northcutt**, 14 Oregon 529.

**9. Warehouseman Tenant in Common.** — *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. Rep. 209.

**Deposit by Warehouseman of More than His Share in Another Warehouse — Receipt Stubs as Evidence.** — By shipping the wheat of depositors to another warehouse without their consent, where it is commingled, the latter warehouseman is a tenant in common with the depositors, and a party to the transactions recorded in the receipt book containing the stubs of depositors' receipts, and they are admissible as books of original entry. *Tobin v. Portland Flouring Mills Co.*, 41 Oregon 269.

**10. Sale by Warehouseman of Depositor's Grain.** — *Cloke v. Shafroth*, 137 Ill. 393, 31 Am. St. Rep. 375; *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359; *Sexton v. Graham*, 53 Iowa 181.

**11. Howe v. Munson**, 65 Ill. App. 674.

**12. Actual Separation Unnecessary.** — *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777; *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498. See *Cloke v. Shafroth*, 137 Ill. 393, 31 Am. St. Rep. 375.

In *Keeler v. Goodwin*, 111 Mass. 490, where an order was given upon a warehouseman for a portion of a large quantity of corn lying in bulk, it was held that no title passed until the contract was made effectual, either by actual separation or by appropriation to the use and credit of the purchaser, in the usual mode of transacting the business of the warehouse. See also *infra*, this title, XII. 6. c. *For Goods in Mass.*



**4. Whether Bailment or Sale — Older View.** — It was formerly the rule that, although the mere mixing of similar grades of grain of different depositors did not alter the relation of bailor and bailee, the identical grain being kept,<sup>1</sup> this became a sale when the warehouseman shipped the grain away on his own account, assuming a liability dischargeable only by payment in other grain or in money,<sup>2</sup> and delivery under an agreement that the grain could be disposed of and the contract complied with by the return of the same amount of a similar grade was also a sale.<sup>3</sup>

**Modern Rule.** — It is now firmly established by statute and judicial decisions that grain deposited in public warehouses, to be mingled with other grain of like grade, is a bailment, although the warehouseman mingles his own grain therewith and ships from the common mass on his own account. But he must keep on hand at all times a sufficient amount to satisfy the outstanding receipts of the depositors.<sup>4</sup>

**IX. DUTIES AND LIABILITIES — 1. As to Warehouse and Premises — a. APPROACH TO WAREHOUSE.** — It is the duty of a warehouseman to provide a reasonably safe means of approach to his warehouse, and he is liable for injury resulting from a dangerous place therein, although the way has been safely used by many others.<sup>5</sup>

**b. CONSTRUCTION OF BUILDING.** — Although a warehouseman is under no obligation to make his building secure from all possible contingencies, yet it must be reasonably and ordinarily safe against common and ordinary occurrences, and he is liable where injury results from a lack of reasonable skill and diligence in its construction.<sup>6</sup> It is not necessary that it should be fireproof,<sup>7</sup>

**1. Older View.** — *Nelson v. Brown*, 44 Iowa 455, 53 Iowa 555; *Arthur v. Chicago*, etc., R. Co., 61 Iowa 648.

**2. Nelson v. Brown**, 44 Iowa 455. See *Nelson v. Brown*, 53 Iowa 555.

**3. Sale.** — *Fishback v. Van Dusen*, 33 Minn. 111; *National Exch. Bank v. Wilder*, 34 Minn. 149; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623. See *Lawlor v. Nicol*, 12 Manitoba 224; *Johnston v. Browne*, 37 Iowa 200.

**4. Modern View — Illinois.** — *Snydacker v. Blatchley*, 177 Ill. 506; *Yockey v. Smith*, 181 Ill. 564, 72 Am. St. Rep. 286; *German Nat. Bank v. Meadowcroft*, 4 Ill. App. 630; *National Bank v. Langan*, 28 Ill. App. 401; *Arding v. Wright*, 38 Ill. App. 98.

*Indiana.* — *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430; *Lyon v. Lenon*, 106 Ind. 567; *Woodward v. Semans*, 125 Ind. 330, 21 Am. St. Rep. 225; *Baker v. Born*, 17 Ind. App. 422; *McGrew v. Thayer*, 24 Ind. App. 578. See *Bottenberg v. Nixon*, 97 Ind. 106.

*Iowa.* — *Sexton v. Graham*, 53 Iowa 181.

*Kansas.* — *Bryan v. Congdon*, 54 Kan. 109; *Moses v. Teetors*, 64 Kan. 149.

*Michigan.* — *Erwin v. Clark*, 13 Mich. 10.

*Minnesota.* — *National Exch. Bank v. Wilder*, 34 Minn. 149; *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. Rep. 209.

*Ohio.* — *O'Dell v. Leyda*, 46 Ohio St. 244.

*Oregon.* — *McBee v. Caesar*, 15 Oregon 62.

See *supra*, this section, *Effect — Tenants in Common*; also *supra*, this title, *Contract of Storage*.

"It would certainly involve consequences which the commercial public has not anticipated if it should be held that upon a storage of grain in a public warehouse the property therein passes to the warehouseman and becomes liable to execution for his debts, and subject to such disposition by him as an owner

may make of his own property." *Per Bailey*, P. J., in *German Nat. Bank v. Meadowcroft*, 4 Ill. App. 630.

**5. Approaches.** — *Buckingham v. Fisher*, 70 Ill. 121; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205.

**Private Warehouse.** — The owner of a private warehouse, having a narrow space between it and the river, over which teams pass to receive grain, is under no obligation to provide guards to prevent the teams from falling in the water, or to provide hitching posts, where he is not acting under any license or statutory authority. *Buckingham v. Fisher*, 70 Ill. 121.

**6. Construction of Building.** — *Cowles v. Pointer*, 26 Miss. 253; *Neal v. Wilmington*, etc., R. Co., 8 Jones L. (53 N. Car.) 482; *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731; *Walden v. Finch*, 70 Pa. St. 460; *Moulton v. Phillips*, 10 R. I. 218, 14 Am. Rep. 663. See *Wilson v. Kelly*, 52 Ill. App. 124.

**Construction According to Custom.** — In *De-ro-sia v. Winona*, etc., R. Co., 18 Minn. 133, it was held that the keeping of a watchman, and lights, and the construction and arrangement of the warehouse in accordance with the usual custom were not conclusive of ordinary care, but should be given proper weight by the jury.

**Lease of Building Unsuitable for Heavy Storage — Stipulation Against Liability.** — If the owner of a warehouse knows it is unfitted for heavy storage, upon leasing it to one who needs a building suited for such storage he should stipulate in his lease against such storage to protect himself from liability for damage by collapse of the building. *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731.

**7. Fireproof.** — *Chicago*, etc., R. Co. v. *Scott*,

1 Ill. 111.

**Wooden Warehouse Near Railroad.** — The plac-



or burglar-proof,<sup>1</sup> or "frost-proof," although he expresses an opinion to that effect.<sup>2</sup> And he is not liable when injury results from a defect unknown to him which could not have been discovered by the use of ordinary care,<sup>3</sup> nor where the depositor inspects the building and considers it a fit place for his goods.<sup>4</sup> He may also assent to storage of goods in a house of different material and structure from what the contract contemplated.<sup>5</sup>

**Negligence Presumed.** — When goods are destroyed by collapse of the building from no external violence, negligence of the warehouseman is presumed.<sup>6</sup>

**c. DUTY TO PROVIDE WATCHMAN.** — If the warehouse is very insecure the warehouseman should provide competent watchmen,<sup>7</sup> but the keeping of a watchman in accordance with custom is not conclusive of ordinary care, though it should be given proper weight by the jury.<sup>8</sup> Evidence is admissible to show that the former owner had not employed a watchman for many years,<sup>9</sup> and where the value of the property stored averages about five hundred dollars, the failure to provide a night watchman is not negligence as a matter of law.<sup>10</sup>

**2. As to Goods Stored** — *a. GENERAL RULE AS TO DUTY OF WAREHOUSEMAN* — (1) *Statement of Rule — Ordinary Care.* — In the protection and care of property intrusted to them, it is the duty of warehousemen to use ordinary care, which is such care and diligence as ordinarily prudent persons in that business are accustomed to exercise towards such property, or in the care of their own property under similar circumstances,<sup>11</sup> and, as a corollary of the

ing of goods in a wooden shed near tracks, upon which a wood-burning engine was run, is evidence of negligence to be submitted to jury. *Barron v. Eldredge*, 100 Mass. 455.

**1. Burglar-proof.** — *Kansas City, etc., R. Co. v. Patten*, 3 Kan. App. 338; *Grossman v. Fargo*, 6 Hun (N. Y.) 310.

**2. Frost-proof.** — *Hallock v. Mallett*, 55 N. Y. Super. Ct. 265. In this case it was held that the statement by the warehouseman that the building was free and safe from frost, being as frost-proof as brick, iron, and mortar could reasonably be expected to make it, and that there was no danger of goods therein freezing, was an expression of opinion, and not a warranty.

**3. Unknown Defect.** — *Moulton v. Phillips*, 10 R. I. 218, 14 Am. Rep. 663.

**4. Building Inspected by Depositor.** — *Parker v. Union Ice, etc., Co.*, 59 Kan. 626, 68 Am. St. Rep. 383.

**5. Consent to Different Building.** — *Hatchett v. Gibson*, 13 Ala. 587. See *Gibson v. Hatchett*, 24 Ala. 201.

**6. Negligence Presumed.** — *Kaiser v. Latimer*, 40 N. Y. App. Div. 149; *Foster v. Pacific Clipper Line*, 30 Wash. 515.

**7. Building Insecure.** — *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132.

**8. Keeping Watchman Not Conclusive of Ordinary Care.** — *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133.

**9. Custom of Former Owner.** — *Seals v. Edmondson*, 71 Ala. 509.

**10. Night Watchman — Property Worth Five Hundred Dollars.** — *Pike v. Chicago, etc., R. Co.*, 40 Wis. 583.

**11. Ordinary Care** — *England.* — *Cailiff v. Danvers*, Peake N. P. (ed. 1795) 114; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256, 44 L. J. Q. B. 107; *Harper v. Jones*, 4 Vict. L. R. (Australia) 536. See *Lamare v. London, etc., Docks Co.*, 39 L. T. N. S. 330.

*Canada.* — *Dunn v. Prescott Elevator Co.*, 26 Ont. App. 389.

*United States.* — *White v. Colorado Cent. R. Co.*, 3 McCrary (U. S.) 559; *Backus v. Start*, 13 Fed. Rep. 69.

*Alabama.* — *Hatchett v. Gibson*, 13 Ala. 587; *Jones v. Hatchett*, 14 Ala. 743; *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209; *Seals v. Edmondson*, 71 Ala. 509; *Davis v. Hurt*, 114 Ala. 146. See *Moore v. Mobile*, 1 Stew. (Ala.) 284.

*Arkansas.* — *Burr v. Daugherty*, 21 Ark. 559; *Pacific Express Co. v. Wallace*, 60 Ark. 100.

*California.* — *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268; *Taussig v. Bode*, (Cal. 1901) 64 Pac. Rep. 108.

*Connecticut.* — *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158.

*Delaware.* — *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392.

*Georgia.* — *Cunningham v. Franklin*, 48 Ga. 531. See *Smith v. Frost*, 51 Ga. 336.

*Illinois.* — *Myers v. Walker*, 31 Ill. 353; *St. Louis, etc., R. Co. v. Montgomery*, 39 Ill. 335; *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132; *Buckingham v. Fisher*, 70 Ill. 121; *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281; *Sibley Warehouse, etc., Co. v. Durand, etc., Co.*, 200 Ill. 354; *Mayer v. Brensinger*, 74 Ill. App. 475. See *Spangler v. Eicholtz*, 25 Ill. 297.

*Indiana.* — *Cincinnati, etc., Air Line R. Co. v. McCool*, 26 Ind. 140. See *Reamer v. Davis*, 85 Ind. 201.

*Iowa.* — See *Francis v. Dubuque, etc., R. Co.*, 25 Iowa 60, 95 Am. Dec. 769.

*Kansas.* — *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333; *Kansas City, etc., R. Co. v. Patten*, 3 Kan. App. 338.

*Kentucky.* — *Macklin v. Frazier*, 9 Bush (Ky.) 3; *Garvey v. Crouch*, 35 S. W. Rep. 273, 18 Ky. L. Rep. 84.

*Louisiana.* — *McCullom v. Porter*, 17 La. Ann. 89; *Schwartz v. Baer*, 21 La. Ann. 601.

*Maryland.* — *Merchants, etc., Transp. Co. v. Story*, 50 Md. 4, 33 Am. Rep. 293.

*Massachusetts.* — *Barron v. Eldredge*, 100 Mass. 455; *Lane v. Boston, etc., R. Co.*, 112

above duty, a warehouseman is liable for his own negligence, or that of his servants in the course of their employment,<sup>1</sup> although the goods would have been destroyed without his fault, even though the previous damage had not

Mass. 455; *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684; *Cox v. Central Vermont R. Co.*, 170 Mass. 129; *Lamb v. Western R. Corp.*, 7 Allen (Mass.) 98; *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.) 448; *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423; *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132; *Thomas v. Boston, etc., R. Corp.*, 10 Met. (Mass.) 472, 43 Am. Dec. 444.

*Minnesota*.—*Minnesota Butter, etc., Co. v. St. Paul Cold-Storage Warehouse Co.*, 75 Minn. 445, 74 Am. St. Rep. 515.

*Mississippi*.—*Merchants' Wharfboat Assoc. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76; *Merchants' Wharf-Boat Assoc. v. Smith*, (Miss. 1887) 3 So. Rep. 249.

*Missouri*.—*Ducker v. Barnett*, 5 Mo. 97; *Holtzclaw v. Duff*, 27 Mo. 392; *Gashweiler v. Wabash, etc., R. Co.*, 83 Mo. 112, 53 Am. Rep. 558; *E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258; *Bush v. St. Louis, etc., R. Co.*, 3 Mo. App. 62.

*New Hampshire*.—See *Brown v. Grand Trunk R. Co.*, 54 N. H. 535.

*New York*.—*Burnell v. New York Cent. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Madan v. Covert*, 42 N. Y. Super. Ct. 135, affirmed in 81 N. Y. 629; *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508; *Grieve v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 518; *Byrne v. Fargo*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 543; *Lynch v. Kluber*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 601; *Bush v. Miller*, 13 Barb. (N. Y.) 481; *Bogert v. Haight*, 20 Barb. (N. Y.) 251; *Titsworth v. Winnegar*, 51 Barb. (N. Y.) 148; *Arent v. Squire*, 1 Daly (N. Y.) 347; *Reed v. Crowe*, 13 Daly (N. Y.) 164; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292; *Smith v. Simms*, (C. Pl. Gen. T.) 51 How. Pr. (N. Y.) 305; *Grossman v. Fargo*, 6 Hun (N. Y.) 310; *Golden v. Romer*, 20 Hun (N. Y.) 438; *Knapp v. Curtis*, 9 Wend. (N. Y.) 60; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143.

*North Carolina*.—*Young v. Wilmington, etc., R. Co.*, 116 N. Car. 932; *Motley v. Southern Finishing, etc., Co.*, 122 N. Car. 347, 124 N. Car. 232, 126 N. Car. 339; *Lyman v. Southern R. Co.*, 132 N. Car. 721; *Morehead v. Brown*, 6 Jones L. (51 N. Car.) 367; *Neal v. Wilmington, etc., R. Co.*, 8 Jones L. (53 N. Car.) 482.

*Ohio*.—*Taylor v. Secrist*, 2 Disney (Ohio) 299. See *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623.

*Oklahoma*.—*Walker v. Eikleberry*, 7 Okla. 599.

*Pennsylvania*.—*Tower v. Grocers' Supply, etc., Co.*, 159 Pa. St. 106; *McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247; *Doyle v. Mays*, (Pa. 1887) 6 Cent. Rep. 185. See *Forstythe v. Walker*, 9 Pa. St. 148.

*South Carolina*.—*Wardlaw v. South Carolina R. Co.*, 11 Rich. L. (S. Car.) 337.

*Tennessee*.—*Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586; *Stewart v. Gracy*, 93 Tenn. 314. See *Waller v. Parker*, 5 Coldw. (Tenn.) 476; *Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.) 356.

*Texas*.—*Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Texas, etc., R. Co. v. Schneider*, 1 Tex. App. Civ. Cas., § 118; *Texas, etc., R. Co. v. Morse*, 1 Tex. App. Civ. Cas., § 412; *Texas, etc., R. Co. v. Weaver*, 3 Tex. App. Civ. Cas., § 60.

*Vermont*.—*Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349.

*Virginia*.—See *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Rea v. Trotter*, 26 Gratt. (Va.) 585.

*Wisconsin*.—*Dimmick v. Milwaukee, etc., R. Co.*, 18 Wis. 471; *Pike v. Chicago, etc., R. Co.*, 40 Wis. 583.

**Admission of Liability—Offer of Compromise.**—A letter from the warehouseman containing a proposal of compromise is not admissible in an action against the warehouseman as an admission of his liability. *Gay v. Bates*, 99 Mass. 263. See *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

**Discovery of Heating in Bin of Corn—No Examination of Rest.**—When shortly after a large quantity of corn is stored the warehouseman discovers that one bin has become heated, which he stays, but makes no examination of the rest, which becomes damaged, he is liable for not using the care and diligence required of him. *Dunn v. Prescott Elevator Co.*, 4 Ont. L. Rep. 103.

**Admissibility of Evidence.**—On the question of reasonable and ordinary care, evidence of the proximity of the warehouse to a refining establishment is inadmissible under an allegation that the warehouseman "failed and neglected to exercise reasonable care of said flour while so stored." *E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258.

**1. Liable for Negligence.**—*Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31, 97 Am. Dec. 74; *Kaiser v. Latimer*, 9 N. Y. App. Div. 36; *O'Connor v. Moody*, 90 N. Y. App. Div. 440. See *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467.

**Not Liable for Loss by Act of God in Absence of Negligence.**—*American Brewing Assoc. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538.

**Negligent Use of Tackle by Agent.**—When a warehouseman employed another to remove goods from his warehouse, who used his own tackle and men, and one of the men was injured by the careless use of the tackle, the warehouseman was held liable. *Randleson v. Murray*, 8 Ad. & El. 109, 35 E. C. L. 342.

**Negligence of Servant of Consignee.**—A warehouseman is not liable for negligence of the servant of a consignee in removing goods from the warehouse. *Reamer v. Davis*, 85 Ind. 201.

occurred.<sup>1</sup> Thus it has been held that the storage of powder in a warehouse was a want of ordinary care.<sup>2</sup>

(2) *Interpretation and Modification of Rule.*—What constitutes ordinary care is determined with reference to the surrounding facts and circumstances at the time,<sup>3</sup> but is not affected by the financial condition of the warehouseman.<sup>4</sup> It varies in different localities,<sup>5</sup> with the nature and value of the goods,<sup>6</sup> and may be modified by custom<sup>7</sup> or contract.<sup>8</sup>

**Goods in Bonded Warehouse.**—The degree of diligence required is not modified by the storage of goods in a bonded warehouse.<sup>9</sup>

**Unprecedented Emergencies.**—Warehousemen are not bound to take precautionary measures to prevent injury from unprecedented emergencies, where they could not have been reasonably anticipated.<sup>10</sup>

(3) *Specific Applications of Rule*—(a) **Destruction of Goods by Fire.**—As a General Rule a warehouseman is not liable for the destruction of goods by fire, not due to his negligence, or that of his agents in the course of their employment,

1. Powers v. Mitchell, 3 Hill (N. Y.) 545.

2. **Storage of Powder in Warehouse.**—White v. Colorado Cent. R. Co., 3 McCrary (U. S.) 559. See Gibson v. Hatchett, 24 Ala. 201.

But in Collins v. Alabama G. S. R. Co., 104 Ala. 390, where a warehouse was destroyed by fire, the court said: "The fact that the defendant had in its warehouse at the time one thousand two hundred pounds of powder, is not of itself such evidence of negligence as entitles the plaintiff to recover. While it may be said that the keeping of large quantities of explosive material in a building in a populous town or city may be a nuisance, yet the fact whether it is such or not must depend on the locality, quantity of the material stored, and the circumstances. Negligence in keeping it, or in the manner of its keeping, is requisite to impose a liability to answer in damages for injuries caused by an accidental explosion or fire, which it is incumbent on the party affirming to prove."

3. **Interpretation of Rule.**—Backus v. Start, 13 Fed. Rep. 69; Sutherland v. Albany Cold Storage, etc., Co., 55 N. Y. App. Div. 212.

**Floating Warehouses.**—The keeping of a floating warehouse in the water requires greater skill than keeping a warehouse on land. Hamilton v. Elstner, 24 La. Ann. 455.

4. **Financial Condition of Warehouseman.**—Denver, etc., R. Co. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76.

5. **Varies According to Locality.**—Collins v. Alabama G. S. R. Co., 104 Ala. 390; Morehead v. Brown, 6 Jones L. (51 N. Car.) 367.

**Evidence of Care Usual in Vicinity.**—As bearing on the question of ordinary care, a warehouseman may show that he exercised the same degree of care that other warehousemen in the vicinity usually exercised in relation to such property. Cass v. Boston, etc., R. Co., 14 Allen (Mass.) 448.

**Standard of City Varies from That of Country.**—"The standard of ordinary care varies necessarily in different localities. One degree of diligence would be required for the city and a less or greater for the country, depending on a great variety of circumstances." Colt, J., in Cass v. Boston, etc., R. Co., 14 Allen (Mass.) 448.

6. **Nature and Value of Property.**—Barron v. Eldredge, 100 Mass. 455.

"A man will not be expected to take the same care of a bag of oats, as of a bag of dollars; of a bale of cotton, as of a box of diamonds, or other jewelry; of a load of wood, as of a box of rare paintings; of a rude block of marble, as of an exquisite sculptured statue." Hatchett v. Gibson, 13 Ala. 587.

"In determining what is reasonable care, the nature of the commodity, its liability to injury from exposure to rain, the kind of weather at the time it arrived, the usual mode of storing or piling on the levee, and the ordinary manner of protecting such property out of doors, are circumstances to be considered by the jury; for what would be deemed ordinary care in reference to lead, pig-iron, or other articles of commerce not easily injured by exposure, would be gross negligence in reference to flour, grain, hemp, or other produce affected by dampness and requiring greater attention." Richardson, J., in Holtzclaw v. Duff, 27 Mo. 392.

**Sensitive Nature of Flour—Chemical Odors.**—A warehouseman is presumed to know the ordinary nature and qualities of flour, and it is not necessary that the depositor should have notified him of its sensitive nature to recover for its damage by chemical odors. Sibley Warehouse, etc., Co. v. Durant, etc., Co., 200 Ill. 354.

7. **Modification by Custom.**—Jones v. Hatchett, 14 Ala. 743; Morehead v. Brown, 6 Jones L. (51 N. Car.) 367.

8. **Modification by Contract.**—Gashweiler v. Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558. See *infra*, this section, *Limitation of Liability*.

9. **Goods in Bonded Warehouse.**—Macklin v. Frazier, 9 Bush (Ky.) 3. See also the title REVENUE LAWS, vol. 24, p. 883.

**The Act of March 28, 1854 (10 U. S. Stat. at L., 270)** extending the warehousing system by establishing private bonded warehouses and providing that goods deposited should be at the exclusive risk of the owner or importer, does not release the warehouse keeper from the exercise of ordinary care. Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581.

10. **Unprecedented Emergencies.**—Backus v. Start, 13 Fed. Rep. 69; American Brewing Assoc. v. Talbot, 141 Mo. 674, 64 Am. St. Rep. 538; Knapp v. Curtis, 9 Wend. (N. Y.) 60.



where due diligence has been exercised for their safety,<sup>1</sup> and the burden of showing neglect of the warehouseman or his agents is upon the plaintiff;<sup>2</sup> but it is necessary for the warehouseman to show that the depositor's property was destroyed, and the presumption does not arise where the custom was to ship such property out of the state almost as soon as it was received.<sup>3</sup> In

**1. Non-negligent Fires — United States.** — *White v. Colorado Cent. R. Co.*, 3 McCrary (U. S.) 559.

*Alabama.* — *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390.

*Indiana.* — *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359; *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430; *Bottenberg v. Nixon*, 97 Ind. 106.

*Iowa.* — *Dierkson v. Cass County Mill, etc.*, Co., 42 Iowa 38; *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648.

*Kansas.* — *Union Pac. R. Co. v. Moyer*, 40 Kan. 184, 10 Am. St. Rep. 183.

*Massachusetts.* — *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423; *McCullom v. Porter*, 17 La. Ann. 89; *Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31, 97 Am. Dec. 74; *Barron v. Eldredge*, 100 Mass. 455; *Cox v. Central Vermont R. Co.*, 170 Mass. 129. See *Stevens v. Boston, etc., R. Co.*, 1 Gray (Mass.) 277.

*Minnesota.* — *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133.

*Mississippi.* — *Merchants' Wharf-Boat Assoc. v. Smith*, (Miss. 1887) 3 So. Rep. 249; *Merchants' Wharf-Boat Assoc. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76; *Merchants' Wharf-Boat Assoc. v. Livingston*, (Miss. 1887) 3 So. Rep. 251.

*New York.* — *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118; *Liberty Ins. Co. v. Central Vermont R. Co.*, 19 N. Y. App. Div. 509.

*North Carolina.* — *Turrentine v. Wilmington, etc., R. Co.*, 100 N. Car. 375, 6 Am. St. Rep. 602.

*Oklahoma.* — *Walker v. Eikleberry*, 7 Okla. 599.

*Tennessee.* — *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586.

**Fire at Night — Failure of Servants to Rescue Goods.** — In *Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31, 97 Am. Dec. 74, when the servants of a warehouseman neglected to rescue goods from a burning warehouse in the night-time, not being present in the scope of their employment, the warehouseman was held not liable.

**Refusal to Allow Depositor to Remove Goods.** — When a warehouseman refused to allow a depositor to enter the warehouse and remove his goods, when there was a fire near by, deeming it unwise in the exercise of his best judgment to open the doors and expose the goods of others to danger of sparks and depredations, thinking the fire would be extinguished with no damage to the house, he is not liable for the subsequent destruction of the goods by the fire. *Turrentine v. Wilmington, etc., R. Co.*, 100 N. Car. 375, 6 Am. St. Rep. 602.

**Hot Box Unpacked Near Warehouse.** — Where in an action against a railroad company as a warehouseman for the value of goods destroyed by fire, it appeared that smoking packing from a hot box on a car of the defendant's train was

left upon the ground within three feet of the warehouse platform at a time when a strong wind was blowing in that direction, evidence that inflammable material had been permitted to accumulate around and under the platform is admissible on the question of negligence, in the absence of any other theory as to the origin of the fire, which was discovered thirty minutes after the hot box was unpacked opposite that point. *Whiting v. Chicago, etc., R. Co.*, 5 Dak. 90.

**When Building Was Almost Sure to Burn.** — When it appears that half an hour before the building caught fire, it was almost certain that it would catch fire, and that from its highly inflammable materials, its age, the nearness of other combustible materials, and the direction of the wind, it must be a prey to the flames, and that the company could have saved a great part of the property by proper and timely effort, they are liable for the loss of goods destroyed. *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132.

**2. Burden of Proof on Plaintiff — California.** — *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164.

*Illinois.* — *Chicago, etc., R. Co. v. Kendall*, 72 Ill. App. 105.

*Louisiana.* — *McCullom v. Porter*, 17 La. Ann. 89.

*New York.* — *Liberty Ins. Co. v. Central Vermont R. Co.*, 19 N. Y. App. Div. 509; *Grieve v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 518; *Lamb v. Camden, etc., R., etc., Co.*, 46 N. Y. 271, 7 Am. Rep. 327.

*North Carolina.* — *Lyman v. Southern R. Co.*, 132 N. Car. 721.

*Texas.* — *Texas, etc., R. Co. v. Morse*, 1 Tex. App. Civ. Cas., § 414; *Texas, etc., R. Co. v. Capps*, 2 Tex. App. Civ. Cas., § 36; *Texas, etc., R. Co. v. Weaver*, 3 Tex. App. Civ. Cas., § 60.

**Contra.** — In *Wardlaw v. South Carolina R. Co.*, 11 Rich. L. (S. Car.) 337, when goods were destroyed by fire, it was held no error for the court to charge that it was right to require the company to show how the fire occurred; and that in the absence of such proof the jury could hold them liable.

**Evidence as to Time of Arrival of Fire Company.** — When the fire which destroyed a warehouse did not originate therein, it is not competent to ask a witness how long, from the condition of the warehouse, the fire had been burning when the fire company arrived. *Lyman v. Southern R. Co.*, 132 N. Car. 721. See *infra*, this section, *Burden of Proof*.

**3. Warehouseman Must Show Destruction of Plaintiff's Property — Presumption.** — *Marshall v. Andrews*, 8 N. Dak. 364.

**Evidence of Destruction.** — In an action against a warehouseman for the value of five barrels of whiskey, alleged to have been destroyed by fire, there was evidence that out of eighty or ninety barrels ten were saved, but there was no evidence to show that they were not of the serial numbers indicated in the plaintiff's petition. The evidence was held insufficient to



considering the danger of fire, which an ordinarily prudent man should guard against, it is not such danger as merely might occur, but such as ordinarily would occur.<sup>1</sup> The question of negligence should not be submitted to the jury when there is no evidence as to the origin of the fire,<sup>2</sup> yet when a warehouse is exposed to sparks of passing locomotives, evidence of the condition of the building and its surroundings is admissible.<sup>3</sup>

**Representation that Building Is Fireproof.** — If a depositor is induced to store goods with a warehouseman because of his representation that the building is fireproof, the warehouseman is liable for loss by fire due to his failure to provide such warehouse,<sup>4</sup> or for storage in a different house not fireproof,<sup>5</sup> and his liability is not affected by the fact that the depositor was in the warehouse after beginning to deliver the goods.<sup>6</sup> Whether it was the intention of a warehouseman to deceive the public with reference to his building being fireproof, is for the jury.<sup>7</sup>

**In Determining Whether a Warehouse Is Fireproof** a witness may describe a fireproof warehouse, and may show how the one in question was built; and he may also state that a fireproof warehouse, which was exposed to the same fire, was not burned, and the special efforts by which it was saved.<sup>8</sup>

(b) **Goods Lost or Stolen.** — When the inability of the warehouseman to deliver is due to the fact that the goods have been lost or stolen, he is not liable unless he has failed to exercise ordinary care.<sup>9</sup> The warehouseman must show

prove that the plaintiff's barrels were burned. *Louisville, etc., R. Co. v. Idleman*, (Ky. 1900) 57 S. W. Rep. 237.

1. *Merchants' Wharf-Boat Assoc. v. Smith*, (Miss. 1887) 3 So. Rep. 249. See *Merchants' Wharf-Boat Assoc. v. Livingston*, (Miss. 1887) 3 So. Rep. 251.

In *Merchants' Wharf-Boat Assoc. v. Smith*, (Miss. 1887) 3 So. Rep. 249, it was held no error to charge the jury that in considering whether a reasonably prudent warehouseman would have kept goods in proximity to an oil-mill, they could not take in consideration any source of danger except "such as could reasonably have been apprehended as likely, in the ordinary course of events, to first directly or indirectly cause the oil-mill to burn, and then that the fire would proceed" to the warehouse and destroy the goods.

2. **When Negligence Not for Jury.** — *Tower v. Grocers' Supply, etc., Co.*, 159 Pa. St. 106.

3. **When Evidence Admissible.** — *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164; *Nichols v. Smith*, 115 Mass. 332.

**Sparks from Passing Engine.** — Where a warehouse was destroyed by fire, the evidence was that it was caused by sparks from defendant's passing engine, which ignited cotton on the platform; that the engine passed at an unusual rate of speed, and, when opposite the warehouse, emitted a large quantity of sparks, and that the fire was discovered immediately afterwards. Held sufficient proof of negligence. *Texas, etc., R. Co. v. Wever*, 3 Tex. App. Civ. Cas., § 61.

4. **Building Represented as "Fireproof."** — *Hatchett v. Gibson*, 13 Ala. 587; *Gruel v. Yetter*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 851; *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824.

5. **Storage in Different Place.** — *Vincent v. Rafter*, 31 Tex. 77, 98 Am. Dec. 516, where the action was defended on the ground that the goods were delivered by mistake to the

wrong consignee, and that it was the custom in such case to leave them where they were delivered. The defense was held insufficient, it appearing that the mistake was discovered, and that the real consignee had taken possession, but had not removed the goods.

6. **Depositor in Warehouse While Delivering Goods.** — *Hatchett v. Gibson*, 13 Ala. 587.

7. **Question for Jury.** — *Dietz v. Yetter*, 34 N. Y. App. Div. 453.

8. **Evidence Whether Building Was Fireproof.** — *Hatchett v. Gibson*, 13 Ala. 587.

Where, in a claim against a warehouseman for the loss of goods by fire, the question was whether the warehouse was fireproof, a witness who states that he does not know what constitutes a fireproof warehouse, but knows what is regarded as such in that locality, which he described particularly, and which description was rejected by the court, may state that the warehouse does not conform to that description. *Hatchett v. Gibson*, 13 Ala. 587.

9. **Goods Lost or Stolen Without Negligence** — *Alabama*. — *Moore v. Mobile*, 1 Stew. (Ala.) 284.

*Indiana*. — *Cincinnati, etc., Air-Line R. Co. v. McCool*, 26 Ind. 140.

*Louisiana*. — *Thomas v. Darden*, 22 La. Ann. 413.

*Massachusetts*. — *Lamb v. Western R. Corp.*, 7 Allen (Mass.) 98; *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.) 448.

*New York*. — *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143. See *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508; *Williams v. Holland*, (C. Pl. Gen. T.) 22 How. Pr. (N. Y.) 137; *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Madan v. Covert*, 42 N. Y. Super. Ct. 135, affirmed 81 N. Y. 629.

**Consideration for Jury.** — The jury may consider that a door was left open several hours, as one of the surrounding facts in connection

the loss of the goods, and the manner of their loss, with reasonable certainty,<sup>1</sup> but there can be no recovery unless the plaintiff proves that it occurred through the negligence of the warehouseman.<sup>2</sup> The obligation to exercise ordinary care is coextensive with actual and continued possession of property, and if it is lost without fault of the warehouseman, he is under no obligation to go in pursuit, or to incur any expense of time, labor, or money in endeavoring to find or regain it.<sup>3</sup>

(c) **Loss by Leakage.** — If the contents of barrels stored with a warehouseman have been diminished by leakage he is not liable unless the owner shows it was due to the bailee's negligence,<sup>4</sup> and this is especially true where the leakage was due to defective barrels.<sup>5</sup>

**Failure to Inspect.** — Whether it is the duty of the warehouseman to inspect casks to detect leakage depends upon the contract of storage, and notice on the face of the receipt that loss by leakage is at the owner's risk is a part of the contract, and it is the duty of the bailor to inspect.<sup>6</sup>

(d) **Damage by Rats.** — When the warehouseman has taken the customary precautions to prevent injury from rats, such as keeping cats or terrier dogs in the building, he is not liable for such injury.<sup>7</sup>

(e) **Goods in Cold Storage.** — In the absence of express contract, a cold storage company impliedly contracts to keep the ordinary cold storage temperature for the preservation of the property received,<sup>8</sup> and it may be shown by a newspaper advertisement that the company announced that a uniform temperature would be kept.<sup>9</sup> The proper temperature for the preservation of a specific article does not vary in different places, and expert evidence that a certain temperature was proper in one place is admissible.<sup>10</sup> Where perishable goods are damaged while in cold storage negligence cannot be assumed from

with the question of ordinary care. *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508.

When the evidence admitted the inference that the thief entered during the day and concealed himself, and stole during the night, it was held proper for the jury to consider whether common prudence called for a special watchman at the door, and for a search for lurking thieves at time of closing. *Madan v. Covert*, 42 N. Y. Super. Ct. 135, affirmed in 81 N. Y. 629.

**1. Manner of Loss.** — *Geo. C. Bagley Elevator Co. v. American Express Co.*, 63 Minn. 142; *Clafin v. Meyer*, 75 N. Y. 263, 31 Am. Rep. 467; *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Clark v. Spence*, 10 Watts (Pa.) 335. See *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508.

Thus a warehouseman, who defends on the ground of theft of goods, cannot escape liability on the vague and general statements of witnesses that soldiers encamped near by, and others, were commonly believed to be stealing the cotton; that the door of the warehouse could easily have been forced by them, the goods taken out, and the door replaced so as not to be discovered. *Thomas v. Darden*, 22 La. Ann. 413.

**Agent's Belief of Burglary — Admissibility of Evidence.** — When it was intimated on trial that goods had been stolen, the agent in whose charge they were may be asked if the warehouseman made any effort to trace the burglary, as tending to show that the witness did not believe the goods had been stolen. *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508.

**The Owner of a Trunk Is a Competent Witness** as to its contents, which are necessary or convenient to a traveler, upon its loss by a warehouseman. *Clark v. Spence*, 10 Watts (Pa.) 335.

**2. Burden of Proof on Plaintiff.** — *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Clafin v. Meyer*, 73 N. Y. 260, reversing 43 N. Y. Super. Ct. 1. See *infra*, this section, *Burden of Proof*.

**3. Sessions v. Western R. Corp.**, 16 Gray (Mass.) 132.

**4. Loss from Leakage.** — *Taussig v. Bode*, 134 Cal. 260, 86 Am. St. Rep. 250.

**5. Defective Barrels.** — *Taussig v. Bode*, (Cal. 1901) 64 Pac. Rep. 108.

**6. Inspection of Casks.** — *Taussig v. Bode*, 134 Cal. 260, 86 Am. St. Rep. 250. See *supra*, this title, *Inspection of Goods*, and *infra*, this section, *Duty to Inspect Contents*.

**7. Damage by Rats.** — *Caillif v. Danvers*, *Peake N. P.* (ed. 1795) 115; *Taylor v. Secrist*, 2 Disney (Ohio) 299.

**8. Goods in Cold Storage.** — *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158; *Sutherland v. Albany Cold Storage, etc., Co.*, 171 N. Y. 269, reversing 55 N. Y. App. Div. 212.

**Knowledge by Depositor of Temperature.** — In *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158, it was held that a depositor who knew that the plant was a cold storage one and not a freezer could not recover for damages due to the high temperature.

**9. Advertisement of Temperature in Newspaper.** — *Rettner v. Minnesota Cold-Storage Co.*, 88 Minn. 352.

**10. Proper Temperature.** — *Wilson v. F. C. Linde Co.*, 47 N. Y. App. Div. 327.

the mere fact of the damage, but the negligent acts or omissions causing it must be affirmatively proven. It is unnecessary, however, to prove a specific act as having produced moisture which was the cause of damage.<sup>1</sup>

**Evidence of Condition.**—Where articles supposed to be liable to undergo or to be actually undergoing deterioration were received for storage, it is not necessary for the owner to show, in order to recover for damage, that they were not affected when received, but only that they were classed as sound by the usual and ordinary tests of commerce.<sup>2</sup>

**The Best Evidence** of the condition of goods is the testimony of those who handled them, and not memoranda for the information of the bookkeeper.<sup>3</sup>

(4) **How Ordinary Care Determined.**—What constitutes ordinary care and diligence is a question to be determined by the jury, in view of the surrounding circumstances, where there is evidence upon which to submit to them such an issue,<sup>4</sup> but in the absence of such evidence it becomes a question of law to be determined by the court,<sup>5</sup> as it does if the proof shows affirmatively that loss was not caused by any want of proper care and diligence.<sup>6</sup>

(5) **Burden of Proof**—(a) **General Rule.**—It may be safely stated as a general rule that the burden of proving negligence is upon the plaintiff, in an action against a warehouseman for negligence damage to, or loss of, goods.<sup>7</sup>

**Who Competent as Expert.**—One who has been in the apple business for ten or fifteen years, and who has been in cold-storage warehouses for three seasons, is competent to give an opinion as to the required temperature. *Wilson v. F. C. Linde Co.*, 47 N. Y. App. Div. 327.

**1. Negligence Must Be Proven.**—*Leidy v. Quaker City Cold Storage, etc., Co.*, 180 Pa. St. 323. See *infra*, this section, **Burden of Proof**.

**2. Evidence of Condition.**—*Marks v. New Orleans Cold Storage Co.*, 107 La. 172, 90 Am. St. Rep. 285.

**3. Best Evidence.**—*Adams v. Sullivan*, 100 Ind. 8.

**4. Question for Jury**—*Illinois*.—*Chicago, etc., R. Co. v. Scott*, 42 Ill. 132.

*Massachusetts*.—*Nealand v. Boston, etc., R. Co.*, 161 Mass. 67; *Barron v. Eldredge*, 100 Mass. 455.

*Mississippi*.—*Merchants' Wharfbboat Assoc. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76.

*Missouri*.—*American Brewing Assoc. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538; *Bush v. St. Louis, etc., R. Co.*, 3 Mo. App. 62. *New York*.—*Grieve v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 518; *Wilson v. F. C. Linde Co.*, 47 N. Y. App. Div. 327; *Fairfax v. New York Cent., etc., R. Co.*, 43 N. Y. Super. Ct. 18; *Smith v. Simms*, (C. Pl. Gen. T.) 51 How. Pr. (N. Y.) 305.

*Pennsylvania*.—*Doyle v. Mays*, (Pa. 1887) 7 Atl. Rep. 747; *Tower v. Grocers Supply, etc., Co.*, 159 Pa. St. 106; *Leidy v. Quaker City Cold Storage, etc., Co.*, 180 Pa. St. 323.

**Evidence Admissible.**—Evidence which tends to divert the attention of the jury from the real issue—the degree of care enjoined upon the warehouseman and whether he exercised it—should be excluded. *Seals v. Edmondson*, 71 Ala. 509.

**Defective Stove.**—When it appears that from the defective condition of a stove in the warehouse, known to the warehouseman, live coals dropped on the floor and ignited it, and that the fire which destroyed the warehouse origi-

nated near the stove, the question of negligence is properly for the jury. *Grieve v. New York Cent., etc., R. Co.*, 25 N. Y. App. Div. 518.

**5. Question of Law.**—*American Brewing Assoc. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538. See *Leidy v. Quaker City Cold Storage, etc., Co.*, 180 Pa. St. 323.

**6. Fairfax v. New York Cent., etc., R. Co.**, 43 N. Y. Super. Ct. 18.

**7. Burden of Proof—England.**—*Gilbart v. Dale*, 5 Ad. & El. 543, 31 E. C. L. 393.

*United States*.—*Backus v. Start*, 13 Fed. Rep. 69.

*Alabama*.—*Seals v. Edmondson*, 71 Ala. 509; *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390.

*California*.—*Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268; *Taussig v. Bode*, (Cal. 1901) 64 Pac. Rep. 108.

*Georgia*.—*Cunningham v. Franklin*, 48 Ga. 531.

*Iowa*.—*Denton v. Chicago, etc., R. Co.*, 52 Iowa 161, 35 Am. Rep. 263.

*Louisiana*.—*Babcock v. Murphy*, 20 La. Ann. 399.

*Massachusetts*.—*Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684; *Murray v. International Steamship Co.*, 170 Mass. 166, 64 Am. St. Rep. 290; *Lamb v. Western R. Corp.*, 7 Allen (Mass.) 98.

*Missouri*.—*E. O. Stanard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258.

*New York*.—*Golden v. Romer*, 20 Hun (N. Y.) 438; *Williams v. Holland*, (C. Pl. Gen. T.) 22 How. Pr. (N. Y.) 137; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118; *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Oderkirk v. Fargo*, 61 Hun (N. Y.) 418; *Kaiser v. Latimer*, 9 N. Y. App. Div. 36; *Liberty Ins. Co. v. Central Vermont R. Co.*, 19 N. Y. App. Div. 509; *Mautner v. Terminal Warehouse Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 729.

*North Carolina*.—*Young v. Wilmington, etc., R. Co.*, 116 N. Car. 932.



(b) **When Negligence Presumed.** — Although the burden of proving negligence is upon the plaintiff, yet if the warehouseman upon demand fails or refuses to redeliver, or delivers the property in a damaged condition, it establishes a *prima facie* case of negligence, and the burden is upon the warehouseman to excuse his default by showing that it is not due to any want of ordinary care on his part;<sup>1</sup> and in such case, when he alleges due care, if the evidence is equally balanced the plaintiff will recover.<sup>2</sup> The rule applies to a warehouseman who succeeds to the original bailee's business and assumes custody of the stored property.<sup>3</sup> If the warehouseman accounts for the loss or injury in any manner consistent with the exercise of ordinary care, the plaintiff's duty is to assume the burden of showing negligence.<sup>4</sup>

b. **DUTY TO INSPECT CONTENTS.** — It is no part of the duty of a warehouseman to inspect goods delivered to him, and he is not liable upon redelivery of the identical packages received if the contents are not what his receipt indicates.<sup>5</sup>

c. **DUTY TO STORE IN WAREHOUSE CONTRACTED FOR.** — If goods are stored in a different warehouse from the one agreed upon, or are removed without the owner's direction or knowledge, and are there damaged, the warehouseman is liable,<sup>6</sup> and where the warehouseman fails to keep at the place of

*Pennsylvania.* — *Clark v. Spence*, 10 Watts (Pa.) 335.

*Tennessee.* — *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586.

1. **Prima Facie Negligence** — *Alabama.* — *Seals v. Edmondson*, 71 Ala. 509; *Davis v. Hurt*, 114 Ala. 146.

*California.* — *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164; *Taussig v. Bode*, 134 Cal. 260, 86 Am. St. Rep. 250.

*Connecticut.* — *Boies v. Hartford, etc., R. Co.*, 37 Conn. 272, 9 Am. Rep. 347.

*Illinois.* — *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189; *Parry v. Squair*, 79 Ill. App. 324.

*Indiana.* — *Holt Ice, etc., Co. v. Arthur Jordan Co.*, 25 Ind. App. 314.

*Louisiana.* — *Schwartz v. Baer*, 21 La. Ann. 601.

*Massachusetts.* — *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.) 448.

*Minnesota.* — *Geo. C. Bagley Elevator Co. v. American Express Co.*, 63 Minn. 142.

*Missouri.* — *Thompson v. St. Louis, etc., R. Co.*, 59 Mo. App. 37; *American Brewing Assoc. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538.

*New York.* — *Arent v. Squire*, 1 Daly (N. Y.) 347; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Kaiser v. Latimer*, 9 N. Y. App. Div. 36; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143; *Abecasis v. Gray*, 43 N. Y. Super. Ct. 573; *Reed v. Crowe*, 13 Daly (N. Y.) 164; *Bush v. Miller*, 13 Barb. (N. Y.) 481; *Golden v. Romer*, 20 Hun (N. Y.) 438; *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508; *Lichtenstein v. Jarvis*, 31 N. Y. App. Div. 33, *affirmed* in 164 N. Y. 601; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Lynch v. Kluber*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 601; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Oswego Bank v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Madan v. Covert*, 42 N. Y. Super. Ct. 135, *affirmed* in 81 N. Y. 629; *Fair-*

*fax v. New York Cent., etc., R. Co.*, 43 N. Y. Super. Ct. 18; *Williamson v. New York, etc., R. Co.*, 56 N. Y. Super. Ct. 508; *Lockwood v. Manhattan Storage, etc., Co.*, 28 N. Y. App. Div. 68; *Mautner v. Terminal Warehouse Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 729. See *Willard v. Bridge*, 4 Barb. (N. Y.) 361.

*North Dakota.* — *Marshall v. Andrews*, 8 N. Dak. 364.

*Pennsylvania.* — *Hoeveller v. Myers*, 158 Pa. St. 461.

2. **Evidence Equal in Weight.** — *Foster v. Pacific Clipper Line*, 30 Wash. 515.

3. **Successor in Business.** — *Isler v. F. C. Linde Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 465.

4. **Resumption of Proof by Plaintiff.** — *Holt Ice, etc., Co. v. Arthur Jordan Co.*, 25 Ind. App. 314; *Lichtenhein v. Boston, etc., R. Co.*, 11 Cush. (Mass.) 70; *Geo. C. Bagley Elevator Co. v. American Express Co.*, 63 Minn. 142; *American Brewing Assoc. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538; *Mautner v. Terminal Warehouse Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 729.

5. **Inspection of Contents.** — *Dean v. Driggs*, 137 N. Y. 274, 33 Am. St. Rep. 721; *Hale v. Milwaukee Dock Co.*, 23 Wis. 276, 99 Am. Dec. 169. See *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603. See *supra*, this section, *Loss by Leakage*.

"It is known and understood that the business of a warehouseman is not that of an inspector of property delivered to him, nor is he an insurer of the contents of packages. It is no part of the duty of the defendant as a warehouseman to have property inspected or its quality warranted, and no proceedings are supposed to take place to enable a warehouseman to become acquainted with the contents of packages, for the very reason that in his business it is unimportant what such contents are." *Per Peckham, J.*, in *Dean v. Driggs*, 137 N. Y. 274, 33 Am. St. Rep. 721.

6. **Storage in Wrong Warehouse.** — *Lilley v. Doubleday*, 7 Q. B. D. 510, 51 L. J. Q. B. 310; *St. Losky v. Davidson*, 6 Cal. 643.



deposit either the identical grain left for storage, or an equal quantity of the grain of like kind and quality, there can be no recovery of storage charges. The requirement is not satisfied by keeping the grain in another warehouse at a different place from the one contemplated at the time of bailment.<sup>1</sup>

**3. When Liability Arises.** — The liability of the warehouseman arises when the goods are received in his possession and control, and it is his duty to exercise ordinary diligence in removing them to the place of storage,<sup>2</sup> but there can be no recovery unless it is established that the goods were received by the warehouseman.<sup>3</sup> And the warehouseman is not liable for injuries received prior to the receipt of the goods.<sup>4</sup>

**4. Limitation of Liability** — *a.* BY CONTRACT. — A warehouseman may by contract limit his liability to the extent that such liability may be limited.<sup>5</sup> He may protect himself from loss or deterioration caused by inherent qualities of the goods, or by defects in the casks containing them,<sup>6</sup> but he cannot excuse himself for fraud or want of good faith.<sup>7</sup> To exempt a warehouse from liability for loss from causes enumerated in the receipt, the loss must result from the excepted causes,<sup>8</sup> but a notice that goods are held "at owner's sole risk, and subject to the usual warehouse charges," does not free the warehouseman from the liability to take reasonable care.<sup>9</sup> Nor is a misdelivery excused by an agreement that goods of the depositor are "at his risk of fire, loss, or injury in the warehouse."<sup>10</sup>

*b.* BY CONTRIBUTORY NEGLIGENCE OF BAILOR. — If the owner of goods, knowing that the warehouseman is prevented from caring for the property, neglects to protect it when it is in a position of danger, he cannot hold the warehouseman liable;<sup>11</sup> and the responsibility of the latter may be reduced if the bailor interferes and directs where the goods are to be placed in the warehouse.<sup>12</sup> The storage of goods without contract and after careful inspection of the building precludes the owner from recovering for damages due to natural causes which he knew were occurring;<sup>13</sup> but his mere acquiescence in the delay of the warehouseman in shipping will not preclude a recovery for loss by fire, unless he had notice of the particular danger to which the property was subjected by its retention.<sup>14</sup>

*c.* GOODS TAKEN UNDER JUDICIAL PROCESS. — A warehouseman may excuse his failure to deliver property of a depositor by showing that it has been taken under judicial process, and that he gave due notice to the depositor,<sup>15</sup> or made reasonable efforts to do so.<sup>16</sup> But he is not liable for failure to give notice

**1. Storage Charges.** — *McSherry v. Blanchfield*, (Kan. 1904) 75 Pac. Rep. 121.

**2. When Liability Arises.** — *Thomas v. Day*, 4 Esp. 262; *Burr v. Daugherty*, 21 Ark. 559; *Armfield v. Humphrey*, 12 Ill. App. 90; *Jeffersonville R. Co. v. White*, 6 Bush (Ky.) 251; *Ducker v. Barnett*, 5 Mo. 97; *Leber v. Stores*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 804; *Dunn v. Prescott Elevator Co.*, 26 Ont. App. 389; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516. See *Titsworth v. Winnegar*, 51 Barb. (N. Y.) 148; *Merritt v. Old Colony*, etc., R. Co., 11 Allen (Mass.) 80.

**3.** *Young v. Seattle Transfer Co.*, 33 Wash. 225.

**4. Injuries Prior to Receipt.** — *Sage v. Gittner*, 11 Barb. (N. Y.) 120.

**5. Liability Limited by Contract.** — *Marks v. New Orleans Cold Storage Co.*, 107 La. 172, 90 Am. St. Rep. 285.

**6.** *Taussig v. Bode*, 134 Cal. 260, 86 Am. St. Rep. 250.

**7. Want of Good Faith.** — *Gashweiler v. Washash, etc.*, R. Co., 83 Mo. 112, 53 Am. Rep. 558.

**8. Excepted Causes.** — *Hunter v. Baltimore Packing, etc., Co.*, 75 Minn. 408.

Under a contract to deliver goods "damage by elements excepted," a warehouseman is liable for damages from a fire of incendiary origin. *Pope v. Farmers' Union, etc., Co.*, 130 Cal. 139, 80 Am. St. Rep. 87.

**9.** *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256, 44 L. J. Q. B. 107.

**10.** *Collins v. Burns*, 63 N. Y. 1. See *infra*, this section, *Liability for Conversion* — *Misdelivery*.

**11. Contributory Negligence of Bailor.** — *Smith v. Frost*, 51 Ga. 336.

**12.** *Harper v. Jones*, 4 Vict. L. R. (Australia) 536.

**13.** *Sturtevant v. Albany Cold Storage, etc., Co.*, 55 N. Y. App. Div. 212.

**14.** *Merchants' Wharftboat Assoc. v. Heidingsfelder*, 64 Miss. 678.

**15. Goods Taken under Process.** — *Mechanics', etc., Ins. Co. v. Kiger*, 103 U. S. 352; *Mortimore v. Ragsdale*, 62 Miss. 86; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145. See *Central Sav. Bank v. Garrison*, 2 Mo. App. 58.

**16. Notice to Depositor.** — *Glass v. Hauser*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 661.

if he had no knowledge of the proceedings,<sup>1</sup> and he is not liable to the pledgee of the receipt upon delivering the property to another claimant in accordance with the judgment in a proceeding to which the pledgee and the depositor were parties;<sup>2</sup> but in case of the issuance of a negotiable receipt for goods that have been attached, on entering judgment the court should require security to protect the warehouseman from liability to an innocent purchaser of the certificate.<sup>3</sup> It has been held that the defense that the goods were replevied is insufficient when it did not appear that it was under valid legal process, or whether subsequently applied to the benefit of the plaintiff, where the seizure was made, or that notice was given.<sup>4</sup>

*d. GOODS TAKEN BY MILITARY AUTHORITIES.* — In the absence of negligence a warehouseman is not liable for goods taken or destroyed by the military authorities.<sup>5</sup>

**5. Liability for Conversion** — *a. DEMAND NECESSARY* — Upon Whom Demand May Be Made. — The demand upon a warehouseman necessary to support conversion against him upon refusal to deliver is sufficient when made upon the manager,<sup>6</sup> or the agent in charge, with whom the contract of storage was made;<sup>7</sup> but a demand upon the agent's minor son, at the place of business of such agent, which was not the warehouse, is insufficient.<sup>8</sup>

**When Sufficient.** — An order for the "balance" of goods on hand is sufficient, in the absence of agreement or usage to the contrary;<sup>9</sup> and where the receipt stipulated for delivery on its presentation, the presentation and receipt of part of the goods is a sufficient demand for the whole, when an extension of time for the delivery of the balance was given for the benefit of the warehouseman.<sup>10</sup>

**Demand Unnecessary.** — But where the warehouse is closed, with no one in charge on whom demand could be made, and it not appearing that the warehouseman had another warehouse in the state, it is not necessary to show demand.<sup>11</sup>

*b. FAILURE OR REFUSAL TO DELIVER* — (1) *Generally.* — As a general rule the failure or refusal of a warehouseman, after proper demand, to deliver the property stored to the one entitled thereto constitutes conversion, and trover will lie,<sup>12</sup> unless he shows that the failure is not due to his

1. **No Knowledge of Process.** — *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 394.

2. **Pledgee and Depositor Party to Proceeding.** — *State Nat. Bank v. Bryant*, 49 La. Ann. 467.

3. **Negotiable Receipt — Indemnity.** — *Roudebush v. Hollis*, 21 Pa. Co. Ct. 324.

4. *Glass v. Hauser*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 780.

5. **Armed Force.** — *Patten v. Baggs*, 43 Ga. 167; *Eabcock v. Murphy*, 20 La. Ann. 399; *Yale v. Oliver*, 21 La. Ann. 454; *Schwartz v. Baer*, 21 La. Ann. 601; *Britton v. Aymar*, 23 La. Ann. 63; *McCrane v. Wood*, 24 La. Ann. 406. See *Abraham v. Nunn*, 42 Ala. 51; *Waller v. Parker*, 5 Coldw. (Tenn.) 476.

In *Smith v. Frost*, 51 Ga. 336, where a warehouseman was prevented from taking proper care of stored goods, which had been thrown from the warehouses into the streets by the military authorities, and the buildings used for hospitals, it was held that he was not liable.

**Sale for Confederate Currency to Prevent Seizure by Union Troops.** — If property was stored with a warehouseman under agreement that he should take the best possible care with a view to its safety and to preserve it from seizure by Union troops, and should have authority to sell for Confederate money if he had good reason to apprehend its seizure, he is not liable for so

selling it in the exercise of his best judgment. *Rea v. Trotter*, 26 Gratt. (Va.) 585.

6. **Demand on Manager.** — *Baumann v. Jefferson*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 147.

7. **Demand on Agent.** — *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37.

8. **Demand on Agent's Minor Son.** — *Ferch v. Victoria Elevator Co.*, 79 Minn. 416.

9. *Porter v. Hills*, 114 Mass. 106.

10. **Delivery of Part on Presentation of Receipt.** — *Juillard v. Baer*, 21 La. Ann. 603.

11. **When Demand Unnecessary.** — *Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1.

12. **Failure to Deliver.** — *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137; *Pribble v. Kent*, 10 Ind. 325, 71 Am. Dec. 327; *Brown v. Noel*, (Ky. 1889) 52 S. W. Rep. 849; *Wallace v. Minneapolis, etc., Elevator Co.*, 37 Minn. 464; *Towne v. St. Anthony, etc., Elevator Co.*, 8 N. Dak. 200; *Marshall v. Andrews*, 8 N. Dak. 364.

**To Innocent Purchaser of Fraudulent Title.** — The refusal of a warehouseman to deliver goods to an innocent purchaser, upon discovering that the owner had been induced by fraud to instruct warehouseman to transfer them to order of vendor, is conversion, the purchaser having obtained a statement from the warehouseman

fault,<sup>1</sup> as where the goods were taken by the mistake of a third person without the knowledge or implied assent of the warehouseman;<sup>2</sup> and in such case the owner cannot give evidence of a usage among warehousemen of taking receipts on delivery of goods.<sup>3</sup>

**Qualification of Rule.** — But the mere failure of the warehouseman to deliver is not such conversion as will support trover, where he sets up no hostile title to that of the bailor, has not appropriated the property to his own use or that of a third person, and has not exercised any dominion over it inconsistent with the bailment.<sup>4</sup> He has also the right to demand either the receipt or indemnity from an alleged purchaser, and his refusal to deliver without such protection is not *per se* a conversion.<sup>5</sup>

**Assumpsit for Breach of Contract.** — Although trover might lie against a warehouseman for failing to deliver goods on demand, assumpsit will also lie for damages due to the breach of the contract.<sup>6</sup>

(2) **Title in Third Person.** — A warehouseman may refuse to deliver goods to the depositor if the property belongs to another,<sup>7</sup> as where a receipt was taken in the name of an agent with notice to the warehouseman of the true owner;<sup>8</sup> but he takes upon himself the risk of that title, and depends upon it at his peril.<sup>9</sup>

(3) **Conflicting Claims — Right to Interpleader.** — Where there are conflicting claims, the warehouseman may properly retain the property for a brief period until he can in good faith investigate the facts as to the real ownership of the property, but he is liable for detaining it after a reasonable time where indemnity is offered.<sup>10</sup> In the absence of statute, a warehouseman whose lien for charges is not disputed, and who has no interest of his own to protect other than to be relieved from liability to two or more claimants, none of whom claim title through him, is not entitled to an interpleader, but must defend himself at law.<sup>11</sup> But there are some dicta to the con-

that the goods were held to his order. *Henderson v. Williams*, (1895) 1 Q. B. 521.

**Failure Caused by Assignor — Liability of Assignor to Warehouseman.** — If the assignor of a receipt to an innocent purchaser for value, by taking from the warehouseman a portion of the goods, makes him liable to the assignee for its value, the assignor is liable to the warehouseman. *Michel v. Ware*, 3 Neb. 229.

**Gratuitous Bailment — Failure to Pay Charges No Defense.** — Where wheat was stored under agreement that it should be held without charge subject to order of depositor, and it was sold by the warehouseman, in an action on the contract for refusal to deliver, it is no defense that the depositor failed to pay storage charges, as the most he could claim was a reasonable deduction after notice that storage would be charged. *Leonard v. Dunton*, 51 Ill. 482, 99 Am. Dec. 568.

**When Provision in Receipt for Its Presentation, and Identification of Holder Complied with.** — A storage receipt contained the following clauses: "No goods delivered without a written order or presentation of original receipt," and "Goods will not be delivered to any person unless fully identified and authorized to receive them." Upon demand of the vendee of the goods, the original receipt being present, and the vendee being accompanied by the agent of the owner who stored the goods, for the purpose of identification, the warehouseman was not justified in refusing possession, and written order was not necessary. *Willner v. Morrell*, 40 N. Y. Super. Ct. 222.

*Bottenberg v. Nixon*, 97 Ind. 106; *Oswego*

*Bank v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634. See *supra*, this section, *Burden of Proof, When Negligence Presumed*.

2. *Lichtenhein v. Boston, etc., R. Co.*, 11 Cush. (Mass.) 70.

3. **Evidence of Usage.** — *Lichtenhein v. Boston, etc., R. Co.*, 11 Cush. (Mass.) 70.

4. **Qualification of Rule.** — *Davis v. Hurt*, 114 Ala. 146.

5. **Receipt or Indemnity.** — *Patten v. Baggs*, 43 Ga. 167.

**Claimant Must Show Title.** — An admission by the warehouseman that the plaintiff seemed to be the owner of the goods, but that his title was defective, will not estop him from requiring the plaintiff to show title. *Patten v. Baggs*, 43 Ga. 167.

6. *Leonard v. Dunton*, 51 Ill. 482, 99 Am. Dec. 568.

7. **Title in Third Person.** — *Ogle v. Atkinson*, 5 Taunt. 759, 1 E. C. L. 255.

8. *Gates v. Thede*, 91 Ill. App. 603.

9. *Wallace v. Minneapolis, etc., Elevator Co.*, 37 Minn. 464; *Mullins v. Chickering*, 110 N. Y. 513.

10. *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511.

11. *Bartlett v. Sultan*, 23 Fed. Rep. 257.

"The bill is a pure bill of interpleader, and presents the common case of a bailee who seeks to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to the bailor. The authorities are decisive against his right to maintain an interpleader. It is sufficient to refer to *Crawshay v. Thornton*, 2 Myl. & C. 1; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Morristown First Nat.*



trary.<sup>1</sup> If the warehouseman is a wrongdoer as to either of the claimants to the property, he is not entitled to maintain a bill of interpleader,<sup>2</sup> and under the *Pennsylvania* statute, unless his petition for such bill disclaims interest in the subject-matter, it will be dismissed, although he alleges that he is a stakeholder.<sup>3</sup>

*c. MISDELIVERY* — (1) *Generally*. — A warehouseman is liable for conversion of property where, without authority, he delivers it, either negligently, intentionally, or by mistake, to one not entitled to it,<sup>4</sup> and he is liable although the mistake is not the result of any want of ordinary care or prudence on his part,<sup>5</sup> but he is not liable if the misdelivery is superinduced by the laches of the owner,<sup>6</sup> and where it was not the custom to take receipts a warehouseman who succeeded to another's business was held not guilty of negligence when he delivered to the wrong person according to the directions of the first warehouseman.<sup>7</sup>

**Delivery to True Owner.** — The warehouseman may deliver to the true owner, although the receipt has not been indorsed and delivered, but the burden is on the warehouseman to show that the delivery was to the one entitled to possession.<sup>8</sup>

*Bank v. Bininger*, 26 N. J. Eq. 345. The hardship of the case has frequently been adverted to by the authorities; and in *England* a remedy has been given by statute. *Com. Law Proc.*, Act 1860, § 12. See *Attenborough v. London, etc., Dock Co.*, 3 C. P. D. 377, 450." *Wallace, J.*, in *Bartlett v. Sultan*, 23 Fed. Rep. 257.

**By Statute in England.** — Although a warehouseman has issued warrants for goods, which have been indorsed, and delivered as security, if the original owner notifies the warehouseman that he was defrauded by them, and not to give up the goods, the warehouseman is entitled to an interpleader under Act of 1 & 2 Will. IV., c. 58, § 1; 23 & 24 Vict., c. 126, § 12. *Attenborough v. London, etc., Dock Co.*, 3 C. P. D. 450, 47 L. J. C. Pl. 763.

**1. Dicta Contrary.** — *Banfield v. Haeger*, 45 N. Y. Super. Ct. 428.

It was said in *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511, that if the warehouseman was so embarrassed by the conflicting claims to the property that he could not safely deliver the property to the depositor, even with bond of indemnity, he could have relieved himself of all responsibility by a suit in equity, in the nature of bill of interpleader, against the claimants.

**2.** *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Hatfield v. McWhorter*, 40 Ga. 269.

**3.** *De Zouche v. Garison*, 140 Pa. St. 430.

In *Clowes v. Hughes*, 3 Pa. Super. Ct. 561, it was said that a warehouseman, who was protected by statute, volunteered too much when he elected to decide between the conflicting claimants to the property.

**4. England.** — *Devereux v. Barclay*, 2 B. & Ald. 702.

*Alabama.* — *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209.

*Illinois.* — *Icoria, etc., R. Co. v. Buckley*, 114 Ill. 337; *Brink's Chicago City Express Co. v. Hendricks*, 104 Ill. App. 154.

*Kentucky.* — *Jeffersonville R. Co. v. White*, 6 Bush (Ky.) 251.

*Massachusetts.* — *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154.

*Missouri.* — *Dufour v. Mephram*, 31 Mo. 577.

*New York.* — *Willard v. Bridge*, 4 Barb. (N. Y.) 361; *Paskinska v. Selt*, (N. Y. City Ct.

*Gen. T.*) 20 Misc. (N. Y.) 665. See *Oswego Bank v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634.

*Rhode Island.* — *Fifth Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112.

**Delivery of Receipt Acknowledging to Hold for One Without Title.** — *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

**Delivery on Forged Order.** — When warehousemen deliver goods upon a forged order they are liable to the owner for conversion. *Union Credit Bank v. Mersey Docks, etc.*, (1899) 2 Q. B. 205.

**Deposit by Wife — Delivery to Husband.** — Where a wife deposits goods and takes a receipt, a delivery of the goods to the husband without return of the receipt makes the warehouseman liable. *Markoe v. Tiffany*, 26 N. Y. App. Div. 95.

**Negligent Misdelivery.** — In an action against a warehouseman for misdelivery of goods the facts were that the owner paid the charges, gave his receipt, and stated that he would send a team for them in a day or two, and that subsequently the warehouseman delivered the goods to the wrong persons, who came in a wagon, without any inquiry as to their authority or identity. It was held proper to submit to the jury the evidence as determining whether the warehouseman was guilty of negligence. *Oderkirk v. Fargo*, 61 Hun (N. Y.) 418.

**Depositor Unknown No Defense.** — Upon the sale of goods by a warehouseman it is his duty to see that the proceeds are paid to the consignor or his authorized agent. It is no defense, when such proceeds are negligently paid to the wrong person, that the consignor was unknown personally to the warehouseman. *Irvin v. Phelps*, 45 S. W. Rep. 659, 20 Ky. L. Rep. 242.

**5. Mistake Although Due Care Exercised.** — *Lichtenhein v. Boston, etc., R. Co.*, 11 Cush. (Mass.) 70.

**6. Laches of Owner.** — *Bush v. St. Louis, etc., R. Co.*, 3 Mo. App. 62.

**7. Delivery According to Directions of Predecessor in Business.** — *Parker v. Lombard*, 100 Mass. 405.

**8. Delivery to True Owner.** — *Mortimore v. Ragsdale*, 62 Miss. 86.

(2) *Mortgaged Property.* — A warehouseman is liable for delivering mortgaged property, which has been stored, to the holder of the receipt although he has no actual notice of the mortgage, if it was duly recorded,<sup>1</sup> and he has no right to demand indemnity of the mortgagee as a condition to delivery, when the mortgagee finds the property in his possession.<sup>2</sup>

(3) *Notice of Adverse Claim or Title.* — The delivery of goods by a warehouseman to the depositor, after receiving notice of the adverse claim or title of another therein, renders the warehouseman liable for conversion,<sup>3</sup> and on the other hand he is not liable to such person if he delivers the property or the proceeds from its sale to the depositor prior to notice of the adverse right.<sup>4</sup> But the mere giving a credit to the depositor in the warehouseman's books does not amount to a payment, and the latter is liable to the owner of an interest in the property sold, although he had no notice of such interest.<sup>5</sup>

**As Garnishees.** — Warehousemen have such custody and control of goods stored as to make them garnishees,<sup>6</sup> and they are liable for delivery after service of garnishment papers by a creditor of the depositor.<sup>7</sup>

*d. WRONGFUL SALE OR REMOVAL* — **Sale.** — As a general rule the sale of the property bailed by a warehouseman in violation of his contract renders him liable for conversion, and the rule is not affected by the subsequent destruction of the warehouse by fire.<sup>8</sup> This is of frequent application where grain is deposited in mass,<sup>9</sup> and in such case, where the warehouseman sells beyond his share, the depositors may follow the grain into the hands of the purchaser.<sup>10</sup> He is liable in any event when he sells in violation of an agreement not to sell under any circumstances,<sup>11</sup> and when he sells under belief that the goods have been abandoned.<sup>12</sup> But when there is immediate danger of damage or destruction of the goods, he may sell without notice to the owner.<sup>13</sup>

**Removal.** — If the warehouseman takes the goods of the depositor away for the purpose of contesting the title, this is a conversion.<sup>14</sup> And by statute in some states it is a crime for the warehouseman to dispose of the property bailed, in any manner, without the return of the receipt, or the written consent of the holder.<sup>15</sup>

1. **Mortgaged Property.** — *Hudmon v. Du Bose*, 85 Ala. 446; *Phillip Best Brewing Co. v. Pillsbury*, etc., *Elevator Co.*, 5 Dak. 62; *Nichols v. Barnes*, 3 Dak. 148.

2. **Indemnity.** — *Banfield v. Haeger*, 45 N. Y. Super. Ct. 428.

3. **Notice of Adverse Interest.** — *Mortimore v. Ragsdale*, 62 Miss. 86; *Mohr v. Langan*, 162 Mo. 474, 85 Am. St. Rep. 503; *Wheeler*, etc., *Mfg. Co. v. Brookfield*, 68 N. J. L. 478; *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400; *Clowes v. Hughes*, 3 Pa. Super. Ct. 561.

4. **Delivery Prior to Notice.** — *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593; *Fields v. Blane*, 37 S. W. Rep. 850, 18 Ky. L. Rep. 675; *Hazard v. Abel*, (Buffalo Super. Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 413; *Towne v. St. Anthony*, etc., *Elevator Co.*, 8 N. Dak. 200.

5. *Phelps v. Barkley*, (Ky. 1897) 40 S. W. Rep. 384.

6. **As Garnishees.** — *Rowdebush v. Hollis*, 21 Pa. Co. Ct. 324.

7. *Smith v. Picket*, 7 Ga. 104, 50 Am. Dec. 385.

8. **Wrongful Sale.** — *McGinn v. Butler*, 31 Iowa 160.

**Clerk Not Liable.** — The clerk who makes an improper sale under the direction of the warehouseman is not liable. *Stafford v. Mercer*, 42 Ga. 556.

**Custom of Warehouseman.** — Although it is the

custom of the warehouseman to ship away all grain at a certain time, the depositor is not estopped by such custom if he had no knowledge of it. *McBee v. Caesar*, 15 Oregon 62.

9. *Dierkson v. Cass County Mill*, etc., Co., 42 Iowa 38. See also *supra*, this title, *Storage in Mass.*

10. **Right to Follow Grain.** — *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. Rep. 209; *Young v. Miles*, 20 Wis. 615. See *Young v. Miles*, 23 Wis. 643.

11. **Contract Not to Sell.** — *Rea v. Trotter*, 26 Gratt. (Va.) 585.

12. **Goods Considered Abandoned.** — *Creson v. Ward*, 66 Ark. 209.

13. **Immediate Danger of Damage.** — *Jordan v. Shireman*, 28 Ind. 136; *Rea v. Trotter*, 26 Gratt. (Va.) 585.

**The Indiana Act** of March 25, 1879, p. 231, was not supplemental to the Act of March 9, 1875, p. 172, prohibiting the removal of goods except to preserve them. *State v. Miller*, 140 Ind. 168.

14. *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun (N. Y.) 389.

15. *Hanchett v. Chicago First Nat. Bank*, 25 Ill. App. 274; *State v. Stevenson*, 52 Iowa 701; *State v. Rieger*, 59 Minn. 151; *Rice v. Madelia Farmers Warehouse Co.*, 78 Minn. 124; *Miller v. Hirschberg*, (Oregon 1894) 37 Pac. Rep. 85; *Bucher v. Com.*, 103 Pa. St. 528. See the statutory provisions in the several states.

**The Statutory Provision** does not prevent the warehouseman from recovering in assumpsit for shipping without such assent, when he supposed the consignee had the receipts and would deliver them.<sup>1</sup>

**The Criminal Intent** is inferred from the shipping away of the goods,<sup>2</sup> but the warehouseman may show in defense that for a number of years the prosecutor had delivered large amounts of grain to him which had always been bought with the understanding that the market price would be paid on demand.<sup>3</sup>

**Tort Waived and Assumpsit Brought.** — In case of conversion by wrongful sale the depositor may waive the tort and sue in assumpsit for the money received,<sup>4</sup> and the action must be for the price received and not the value of the property sold.<sup>5</sup>

**Evidence.** — The statements of the warehouseman at the time of removal as to the ownership of the property are admissible in an action for conversion as part of the *res gestæ*,<sup>6</sup> but if a sale is made by written invoice and bill of sale, the writing is the best evidence of title, and parol evidence is inadmissible until the writing is accounted for.<sup>7</sup>

**6. Termination of Liability.** — Upon the delivery of the goods to the one entitled to receive them the liability of the warehouseman ends,<sup>8</sup> and upon the termination of the contract he is under no obligation to keep the goods, but may deposit them in a warehouse at the risk and expense of the owners, subject to any lien he may have for charges prior to removal.<sup>9</sup>

**7. Measure of Damages** — *a.* **BREACH OF CONTRACT TO STORE.** — In case of a breach of contract for storage, the measure of damages is the difference between the contract price and the price actually paid.<sup>10</sup>

*b.* **ISSUANCE OF FRAUDULENT RECEIPT.** — In case of the issuance of a fraudulent receipt by a warehouseman's agent to a *bona fide* holder, the measure of damages is the amount paid for the receipt.<sup>11</sup>

*c.* **RETURN OF DAMAGED PROPERTY.** — When the property bailed is returned in a damaged condition, the measure of damages is the difference between the market price in good condition and its value in the damaged condition,<sup>12</sup> although the bailment was continued after knowledge that damage

In *Illinois* an exception exists in case of sudden danger by section 143, c. 114, Rev. Stat., and section 125 of the Criminal Code. *Hanchett v. Chicago First Nat. Bank*, 25 Ill. App. 274.

The *Iowa* statute (§ 4088, Code 1873) was designed to protect third persons as well as the one to whom the receipt was issued; hence, in an indictment thereunder, evidence that the shipment was made with the knowledge and consent of the owner was immaterial. *State v. Stevenson*, 52 Iowa 701.

The *Minnesota* Act, § 6, c. 86, Laws of 1876, was not repealed by section 415 of the Penal Code. *State v. Rieger*, 59 Minn. 151.

And by section 2600, subd. 3, of the Gen. Stat. 1894, an action may be brought against the defaulting directors, officers, or members of a warehouse corporation. *Rice v. Madelia Farmers Warehouse Co.*, 78 Minn. 124.

1. *Miller v. Hirschberg*, (Oregon 1894) 37 Pac. Rep. 85.

2. **Criminal Intent.** — *State v. Humphreys*, 43 Oregon 44.

3. *Bucher v. Com.*, 103 Pa. St. 528.

4. **Tort Waived.** — *Ives v. Hartley*, 51 Ill. 520.

5. **Action for Price Received.** — *Cushman v. Hayes*, 46 Ill. 145; *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359.

6. *Garoutte v. Williamson*, 108 Cal. 135.

7. *Patten v. Baggs*, 43 Ga. 167.

8. **Delivery to Owner.** — *The R. G. Winslow*, 4 Biss. (U. S.) 13.

**Goods Not in Warehouse — Payment of Charges by Owner.** — Where goods consigned by boat in care of a warehouseman were not delivered because of ice in the channel, and were left on board, the warehouseman advancing the carrier's charges, and removing part of the goods to the warehouse, upon the payment by the owner to the warehouseman of his charges and advances, the latter was held not liable thereafter for any injury to the goods in the boat. *Titworth v. Winnegar*, 51 Barb. (N. Y.) 148.

9. **Termination of Contract.** — *Hazeltine v. Weld*, 73 N. Y. 156.

10. **Breach of Storage Contract.** — *Allen v. Steers*, 39 La. Ann. 586.

**Contract Made by Commission Merchant — Defense.** — It is no defense to an action against a warehouseman by a commission merchant for breach of contract for storage to contend that the contract was not entered into by the plaintiff on his own account, but for the benefit of his customer. *Allen v. Steers*, 39 La. Ann. 586.

11. **Fraudulent Receipt.** — *Fletcher v. Great Western Elevator Co.*, 12 S. Dak. 643.

12. **Return of Damaged Property.** — *Hyde v. Mechanical Refrigerating Co.*, 144 Mass. 432; *Motley v. Southern Finishing, etc., Co.*, 122 N. Car. 317.



had occurred.<sup>1</sup>

**Expense of Repairs.** — The warehouseman is liable for the expense of repairing articles recovered in a damaged condition,<sup>2</sup> and evidence of such cost is admissible when followed up by evidence that the charges are reasonable.<sup>3</sup>

**d. RETURN OF DIFFERENT PROPERTY.** — When a warehouseman violates his contract by returning new corn for old, the amount of his liability is estimated by the difference between the value of the old and the new.<sup>4</sup>

**e. CONVERSION OR NEGLIGENT DESTRUCTION OF PROPERTY** — (1) *In General.* — In case of the conversion or negligent destruction of the property, the measure of the warehouseman's liability is generally stated to be the market value at the time<sup>5</sup> in the place where the damage occurred,<sup>6</sup> but there can be no doubt that interest from such time is also an item of damage.<sup>7</sup> It has been intimated that in case of conversion, the value of the property should be considered to be its highest value between the conversion and the trial.<sup>8</sup> Where no evidence is offered as to the value of the goods there can be no recovery, except nominal damages.<sup>9</sup>

(2) *Goods Pledged as Collateral Security.* — The measure of damage, in case the goods were pledged as collateral security for a loan, is the amount of the loan, with interest,<sup>10</sup> and the pledgee of the receipt may also recover attorney's fees in addition, promised him in the contract creating the debt, provided the recovery is not in excess of the value of the property.<sup>11</sup>

**1. Continuance of Bailment After Knowledge of Damage.** — *Holt Ice, etc., Co. v. Arthur Jordan Co.*, 25 Ind. App. 314.

**2. Cost of Repairs.** — *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131.

**3. Evidence of Cost.** — *Lynch v. Kluber*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 601.

**4. Return of Different Property.** — *Kansas Elevator Co. v. Harris*, 6 Kan. App. 89.

**5. Market Value of Property — England.** — *Henderson v. North Eastern R. Co.*, 9 W. R. 519; *Henderson v. Williams*, (1895) 1 Q. B. 521; *Lilley v. Doubleday*, 7 Q. B. D. 510, 51 L. J. Q. B. 310, 44 L. T. N. S. 814.

*Illinois.* — *Cushman v. Hayes*, 46 Ill. 145; *Leonard v. Dunton*, 51 Ill. 482, 99 Am. Dec. 568; *Western Union Cold Storage Co. v. Ermeling*, 73 Ill. App. 394.

*Indiana.* — *Pribble v. Kent*, 10 Ind. 325, 71 Am. Dec. 327.

*Kansas.* — *Kansas Elevator Co. v. Harris*, 6 Kan. App. 89.

*Massachusetts.* — *Stevens v. Boston, etc., R. Co.*, 1 Gray (Mass.) 277.

*Minnesota.* — *Dolliff v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466.

*New York.* — *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Richmond v. Brewster*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 400.

*Tennessee.* — *Merchants Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520.

**Expert Estimates.** — The plaintiff is not limited in his recovery to the lowest estimate by his expert witness. *Markoe v. Tiffany*, 26 N. Y. App. Div. 95.

**Value of Second-hand Furniture.** — In determining the value of second-hand furniture evidence may be admitted as to its cost, its condition, and its depreciation from use. *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131.

**Insufficient Evidence of Value.** — In an action against a warehouseman for the value of the goods, the plaintiff testified that they were

worth \$380.24, and shortly afterwards that they were worth \$363.05, and later that they cost \$328.24. The only evidence as to their value at time of demand was his testimony that they were a little more valuable when purchased than at time of trial, and that when demanded they were worth the same. This evidence was held an insufficient basis for a verdict of \$263.05. *Glass v. Hauser*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 780.

**6. Value at Place of Damage.** — *Adams v. Sullivan*, 100 Ind. 8.

**7. Interest an Item of Damage — Georgia.** — *Garrard v. Dawson*, 49 Ga. 434.

*Illinois.* — *Dole v. Olmstead*, 41 Ill. 344, 89 Am. Dec. 386.

*Iowa.* — *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *Dierkson v. Cass County Mill, etc., Co.*, 42 Iowa 38; *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648.

*Massachusetts.* — *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154.

*Mississippi.* — *Hattiesburg Compress Co. v. Johnson*, 81 Miss. 731.

*New York.* — *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Willard v. Bridge*, 4 Barb. (N. Y.) 361.

*North Dakota.* — *Towne v. St. Anthony, etc., Elevator Co.*, 8 N. Dak. 200.

**8. Highest Value Before Trial.** — *Willard v. Bridge*, 4 Barb. (N. Y.) 361; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Stephenson v. Price*, 30 Tex. 715.

**9. Nominal Damages.** — *State v. Sullivan*, 99 Mo. App. 616.

**No Evidence of Value.** — *Towne v. St. Anthony, etc., Elevator Co.*, 8 N. Dak. 200.

**10. Goods Pledged to Secure Loan.** — *Corn Exch. Bank v. American Dock, etc., Co.*, 163 N. Y. 332; *Fifth Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112.

**11. Attorney's Fees** — *Planter's Rice Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 574.

(3) *Goods Without Market Value.* — The measure of damages in case of the conversion of personal property having no market value is the cost of replacing it and the value to the owner for a particular use,<sup>1</sup> and evidence is admissible as to such value.<sup>2</sup>

*f. EXPENSE OF RECOVERING LOST PROPERTY.* — It is no part of the duty of a depositor of goods to seek them when lost by the warehouseman, but if he makes such recovery, the warehouseman is chargeable with the expense, as he is then entitled to credit for the property recovered.<sup>3</sup>

**X COMPENSATION OF WAREHOUSEMEN** - 1. *In General.* — When goods are received by a warehouseman for storage in the usual course of business, in the absence of a special contract, an agreement is implied to pay reasonable charges, such as warehousemen of equal capacity and facility are entitled to,<sup>4</sup> although the warehouseman did not know the identity of the owner until possession was demanded.<sup>5</sup> And where there has been an immemorial custom not to change the rate on goods in storage, only the rate customary at the time of storage can be collected.<sup>6</sup> Where the depositor knows the charges of the warehouseman, he cannot refuse to pay on the ground that they are unreasonable.<sup>7</sup>

2. *Who Liable.* — In addition to the lien of a warehouseman on the goods for his storage charges, there is a personal liability on the depositor,<sup>8</sup> and he is liable, although an agent, unless he discloses his agency upon depositing the goods. But if the warehouseman ascertains the agency subsequent to the bailment, and elects to hold the principal, he is bound by his election.<sup>9</sup>

*Purchaser of Goods in Warehouse.* — The purchaser of goods in a warehouse is not liable for storage charges accrued prior to the purchase, unless he agrees to become liable,<sup>10</sup> but he is liable when he purchases the receipt with notice that the goods are subject to storage charges.<sup>11</sup>

*Transferee of Receipt.* — The transferee of a warehouse receipt which shows the rate of storage, who claims to be the owner of the property, is liable for the storage.<sup>12</sup> Thus, when he takes possession by giving notice to the warehouse-

1. *Property Having No Market Value.* — *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825.

2. *Evidence Admissible.* — *State v. Sullivan*, 99 Mo. App. 616.

*Annotations and Transpositions on Sheet Music.* — Where sheet music was converted by a warehouseman, evidence was properly admitted to show special value to the owner because of annotations and transpositions. *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825.

3. *Expense of Recovering Lost Property.* — *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131.

4. *Compensation — In General.* — *Devereux v. Fleming*, 53 Fed. Rep. 401; *Lehman v. Skelton*, 46 Ala. 310; *Rea v. Trotter*, 26 Gratt. (Va.) 585; *Graves v. Smith*, 14 Wis. 5, 80 Am. Dec. 762. See *Dixon v. Central of Georgia R. Co.*, 110 Ga. 173; *Gay v. Bates*, 99 Mass. 263.

*Charge for Resale Not Extortion.* — In *Bailey v. Wood*, 69 S. W. Rep. 1103, 24 Ky. L. Rep. 801, it was held that section 3398 (1898) of the *Commonwealth v. High* (Ky. 1898), and one per cent. commission to warehousemen from the dealer for receiving, storing, inspecting, coopering, and selling tobacco, covers only the items specifically referred to, and that an additional charge of two dollars for resale was not an extortion under section 3400 (1899a).

*Rate Less than Maximum Allowed by Law.* — There is no legislation in *Illinois* depriving a warehouseman of the right to make their

charges less than the maximum fixed by law. *Nelson v. Board of Trade*, 58 Ill. App. 399.

5. *Identity of Owner.* — *Lehman v. Skelton*, 46 Ala. 310.

6. *Custom Not to Change Rate.* — *Garmany v. Rust*, 35 Ga. 108.

7. *Knowledge of Charges.* — *Seeligson v. Taylor Compress Co.*, 56 Tex. 219.

*Deduction for Loss from Cleaning.* — Knowledge in part of depositor that it was the custom of the warehouse to deduct a certain per cent. as indemnity for loss from cleaning makes him liable therefor, it being a proper charge within a provision in the receipt for delivery "in payment of all charges." *Lone Star Elevator Co. v. English*, (Tex. Civ. App. 1895) 30 S. W. Rep. 706.

8. *Depositor Personally Liable.* — *Garrard v. Moody*, 48 Ga. 96.

9. *Liability of Agent.* — *Garrard v. Moody*, 48 Ga. 96.

10. *Purchaser of Goods in Warehouse.* — *Lehman v. Skelton*, 46 Ala. 310.

11. *Purchaser with Notice* — *Cole v. Tyng*, 24 Ill. 99, 76 Am. Dec. 735.

Provision in a receipt that the goods would be delivered on payment of the government tax and "all other amounts due," gives no notice of a lien other than for proper warehouse charges. *New York State Bank v. Waterhouse*, 70 Conn. 76, 66 Am. St. Rep. 82.

12. *Transferee of Receipt.* — *Driggs v. Dean*, 2 N. Y. App. Div. 124.

man and requests bills for past storage, he thereby impliedly contracts to pay for subsequent storage.<sup>1</sup>

**The Holder of a Receipt as Collateral Security** has a qualified title and may obtain the property upon payment of storage, but is not necessarily bound for the storage. If he takes actual or constructive possession, he is liable therefor, but an examination of the property to ascertain its character and condition is not the assumption of possession over it.<sup>2</sup>

**3. Entire Contract.** — An agreement to store for a certain time for a certain sum is an entire contract, and if the subject of the bailment is accidentally destroyed before the expiration of the contract, no recovery can be had for storage, and if advances have been made on account of storage, the warehouseman must return such amount.<sup>3</sup>

**4. Goods Held to Enforce Lien.** — Where goods, stored under a contract to deliver upon payment of charges, are held under a warehouseman's lien, the charges continue until paid.<sup>4</sup>

**5. Goods Damaged or Destroyed — In General.** — A custom of warehousemen not to collect storage until the removal of the goods does not prevent the collection of charges due, upon their accidental destruction,<sup>5</sup> and the warehouseman's claim for storage is not affected by his having to pay the value of the damaged property,<sup>6</sup> or by the theft of a portion of the goods by his servant.<sup>7</sup> Where perishable goods are rendered worthless by the failure of a storage company to keep the proper temperature, it is not entitled to storage,<sup>8</sup> but the contrary has been held.<sup>9</sup>

**Counterclaim.** — Where a depositor's goods are damaged by improper storage, the amount of the damage may be counterclaimed against a claim for storage,<sup>10</sup> but the claim for storage cannot be compensated by an unliquidated claim for damages.<sup>11</sup>

**6. Goods Held After Notice to Remove.** — If, after terminating the contract of storage, the warehouseman does not remove the goods, upon the failure of the depositor to do so in a reasonable time, he is entitled to the market rate of storage after such default,<sup>12</sup> and the rule applies where the goods were held gratuitously, under no contract for storage.<sup>13</sup>

**7. Tender of Charges — When Unnecessary.** — Upon the refusal of the warehouseman to deliver the goods because of a claim against the owner not connected with them, a formal tender of charges is not necessary prior to maintaining an action against the warehouseman;<sup>14</sup> and it is not necessary where the warehouse is closed with no one in charge, and it does not appear that the

**1. Possession by Notice — Request for Bill.** — *Driggs v. Dean*, 87 Hun (N. Y.) 319.

**2. Receipt Held as Collateral.** — *Driggs v. Dean*, 167 N. Y. 121.

**3. Entire Contract.** — *Cunningham v. Kenney*, 105 Cal. 118, 45 Am. St. Rep. 30; *Archer v. McDonald*, 36 Hun (N. Y.) 194.

**4. Goods Held to Enforce Lien.** — *Devereux v. Fleming*, 53 Fed. Rep. 401, *distinguishing* *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; *Ridenback v. Tuck*, (Supm. Ct. App. T.) 85 N. Y. Supp. 352.

**5. Accidental Destruction.** — *Jones v. Chaffin*, 102 Ala. 382.

**6. Payment of Damages.** — *Marks v. New Orleans Cold Storage Co.*, 107 La. 172, 90 Am. St. Rep. 285; *Western Union Cold Storage Co. v. Ermeling*, 73 Ill. App. 394.

**7. Theft by Servant.** — *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143.

**8. Failure to Keep Proper Temperature.** — *Greenwich Warehouse Co. v. Maxfield*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 308.

**9. Contra.** — *Western Union Cold Storage Co. v. Ermeling*, 73 Ill. App. 394.

**10. Counterclaim.** — *Low v. Martin*, 18 Ill. 286; *Greenwich Warehouse Co. v. Maxfield*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 308.

**11. Unliquidated Claim.** — *Marks v. New Orleans Cold Storage Co.*, 107 La. Ann. 172, 90 Am. St. Rep. 285.

**12. Termination by Notice.** — *Hazeltine v. Weld*, 73 N. Y. 156. In this case the warehouseman notified the owner that upon his failure to remove the goods before a certain day the rate of storage would be sixteen times higher than the original rate, but it was held that no contract would be implied to pay such high rate.

**13. Gratuitous Storage.** — *Hartley v. Hitchcock*, 1 Stark. 408, 2 E. C. L. 158; *Myers v. Walker*, 31 Ill. 353.

**14. Tender Unnecessary.** — *Scott v. Jester*, 13 Ark. 437; *Wall v. De Mitkiewicz*, 9 App. Cas. (D. C.) 109; *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun (N. Y.) 389.



owner had another warehouse in the state.<sup>1</sup>

**A Tender of the Warehouse Charges Is Necessary** in order for the holder of the receipt to recover damages for delay in delivery of the goods.<sup>2</sup>

**Waiver.** — It is competent for the warehouseman to waive statutory provisions as to formal tender of charges, and tickets,<sup>3</sup> as where he refuses to deliver on any other ground than the nonpayment of the charges.<sup>4</sup>

**XI. LIEN OF WAREHOUSEMAN — 1. In General** — *a.* **AT COMMON LAW.** — At common law warehousemen had a specific, not a general, lien on property stored with them for their proper charges in connection with the specific bailment, and the consequent right to retain possession of it until the charges were paid.<sup>5</sup>

*b.* **BY STATUTE.** — This lien is also given by statute,<sup>6</sup> and in *New York* is a general lien, covering general accounts against the owner for the charges and expenses specified in the act.<sup>7</sup>

**2. Who Entitled to Lien.** — In the absence of agreement or statute, the lien upon goods for the storage charges extends only to cases of those engaged in the business of public warehousemen, and not to mere volunteers, or to cases of private storage,<sup>8</sup> or when the bailment is gratuitous.<sup>9</sup>

**3. Priority of Lien — Lien of Landlord.** — The lien of a warehouseman and factor for advances on a crop stored by a tenant is superior to the lien of the landlord for rent and of a merchant for fertilizer, when the warehouseman had no notice of them.<sup>10</sup> When, however, the landlord has a lien for advances to

1. **Warehouse Closed.** — *Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1.

2. **Tender Necessary.** — *Marks v. New Orleans Cold Storage Co.*, 107 La. Ann. 172, 90 Am. St. Rep. 285.

3. **Waiver.** — *Wallace v. Minneapolis, etc., Elevator Co.*, 37 Minn. 464.

4. *Tarbell v. Farmer's Mut. Elevator Co.*, 44 Minn. 471.

**Estopped on Appeal.** — Where the warehouseman denied the plaintiff's title and right to possession, he is estopped on appeal from claiming that the plaintiff made an insufficient tender. *Anderson v. Portland Flouring Mills Co.*, 37 Oregon 483, 82 Am. St. Rep. 771.

5. **At Common Law.** — *Scott v. Jester*, 13 Ark. 437; *Low v. Martin*, 18 Ill. 286; *Cole v. Tyng*, 24 Ill. 99, 76 Am. Dec. 735; *Alden v. Carver*, 13 Iowa 253, 81 Am. Dec. 430; *Shingleur-Johnson Co. v. Canton Cotton Warehouse Co.*, 78 Miss. 875, 84 Am. St. Rep. 655; *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292; *Stallman v. Kimberly*, 121 N. Y. 393, 53 Hun (N. Y.) 531, 23 Abb. N. Cas. (N. Y.) 241; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254.

A custom which gives a public warehouseman a general lien for dues, advances, or expenses upon goods, not confined to goods which are the property of the person who employed or retained the warehouse keeper, but extending to all goods stored by him in his own name, whether his property or not, is unreasonable, unjust, and cannot be supported in law. *Leuckhart v. Cooper*, 3 Scott 521, 6 L. J. C. Pl. 131, 2 Hodges 150, 3 Bing. N. Cas. 99, 32 E. C. L. 55.

**Attached Property Stored by Constable — Discharge of Writ.** — *J. I. Case Plow Works v. Union Iron Works*, 56 Mo. App. 1.

6. **By Statute.** — *Dixon v. Central of Georgia R. Co.*, 110 Ga. 173; *Marks v. New Orleans Cold Storage Co.*, 107 La. 172, 90 Am. St. Rep.

285; *Industrial Loan Assoc. v. Saul*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 188; *Reidenback v. Tuck*, (Supm. Ct. App. T.) 85 N. Y. Supp. 352; *W. W. Kimball Co. v. Payne*, 9 Wyo. 441. See the statutes of the various states.

7. **New York.** — *Stallman v. Kimberly*, 121 N. Y. 393; *Stallman v. Kimberly*, 53 Hun (N. Y.) 531, 23 Abb. N. Cas. (N. Y.) 241; *Baumann v. Post*, 16 Daly (N. Y.) 385, 26 Abb. N. Cas. (N. Y.) 134; *Laws of 1885*, c. 526, § 1.

8. **Who Entitled.** — *In re Kelly*, 18 Fed. Rep. 528; *Alt v. Weidenberg*, 6 Bosw. (N. Y.) 176; *Lyungstrandh v. William Haaker Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 387; *Merritt v. Peirano*, 10 N. Y. App. Div. 563; *Rivara v. Ghio*, 3 E. D. Smith (N. Y.) 264.

It seems that the effect of the *New York* statute (c. 526, *Laws of 1885*), which gives a lien only to the warehouseman, or persons lawfully engaged exclusively in the business of storing goods, wares, and merchandise for him, is to deny a lien to those storing goods who do not come within the terms of the statute. *Merritt v. Peirano*, 10 N. Y. App. Div. 563.

**By Statute in Wyoming.** — A mercantile corporation, storing goods under circumstances which entitle it to compensation, is entitled to a lien under § 1471, *Rev. Stat. of Wyoming*, although not in the regular business of warehouseman. *Knight v. Beckwith Commercial Co.*, 6 Wyo. 500.

**Contra.** — Where a tenant leaves goods upon the landlord's premises, and the landlord notifies all parties interested that he will claim a lien for storage if the goods are not removed, he is entitled to such lien as against the tenant upon failure to remove, although not a statutory warehouseman. *Schneider v. Dayton*, 111 Mich. 396.

9. **Gratuitous Bailment.** — *Knight v. Beckwith Commercial Co.*, 6 Wyo. 500.

10. **Priority.** — *Clark v. Dobbins*, 52 Ga. 656.

the tenant, the wrongful taking of the crop by the tenant and placing it in storage does not give the warehouseman a superior lien.<sup>1</sup>

**Lien of Carrier.** — When a carrier places goods, against which he has a lien for freight, in a warehouse, the lien of the warehouseman takes precedence.<sup>2</sup>

**Lien of Mortgagor.** — The liens of a chattel mortgage and of a warehouseman are common-law liens, and the one first obtained takes priority.<sup>3</sup> Thus, when mortgaged property is stored without the authority of the mortgagee, the lien of the latter is prior to that of the warehouseman.<sup>4</sup>

**4. Waiver and Loss of Lien — Presumption.** — Although the presumption of law is against a waiver by a warehouseman of his lien, and the intent to do so must be established by the one asserting it,<sup>5</sup> yet where the warehouseman permits the depositor to remove the goods, it will be presumed that the lien has been waived or abandoned, unless the warehouseman's conduct is satisfactorily explained.<sup>6</sup> But by such conduct he does not forfeit his right to hold the depositor personally bound.<sup>7</sup>

**Reliance upon Personal Credit.** — If the warehouseman receives goods under agreement that the owner may withdraw them at will without payment of storage, relying upon his personal credit, no lien for storage exists.<sup>8</sup>

**Taking Possession under Legal Process.** — The taking of possession by a sheriff of goods in a warehouse under an attachment against the warehouseman, terminates his lien, and no interest of the latter remains in the sheriff's hands which can be subjected to sale.<sup>9</sup> But if the warehouseman refuses to deliver goods to the sheriff upon levy, unless paid his charges, and agrees to act as keeper for a compensation, this does not amount to a waiver of his lien.<sup>10</sup>

**Refusal to Deliver for Other Reasons than Nonpayment of Storage.** — If the warehouseman refuses to deliver goods to the owner for any other reason than that the storage charges were not paid, he waives his lien.<sup>11</sup>

**Various Causes of Loss or Waiver.** — A warehouseman loses his lien by accepting the promissory note of the owner for the charges;<sup>12</sup> by stating to one about to take possession under attachment, who offers to pay charges, that there are no charges;<sup>13</sup> by making, subsequent to storage, a special agreement for a particular mode of payment, or for payment at a particular time or period;<sup>14</sup> and by agreement to accept a certain sum as accrued storage on the sale of

1. *Brown v. Noel*, (Ky. 1899) 52 S. W. Rep. 849.

2. **Carrier's Lien.** — *Powers v. Sixty Tons of Marble*, 21 La. Ann. 402.

3. **Mortgagor's Lien.** — *Baumann v. Post*, 16 Daly (N. Y.) 385, 26 Abb. N. Cas. (N. Y.) 134.

4. *Vette v. Leonori*, 42 Mo. App. 217. See *infra*, this section, *Extent of Lien*.

5. **Presumption.** — *J. I. Case Plow Works v. Union Iron Works*, 56 Mo. App. 1.

6. **Parting with Possession.** — *Robinson v. Larabee*, 63 Me. 116.

7. **Depositor Personally Liable.** — *Cole v. Tyng*, 24 Ill. 99, 76 Am. Dec. 735.

8. **Reliance upon Personal Credit of Depositor.** — *Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co.*, 49 Neb. 869; *Dunham v. Pettee*, 1 Daly (N. Y.) 112; *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292.

"Where it appears from the course of dealing of the warehouseman or by the agreement of the parties, that the goods stored will be delivered without requiring the immediate payment of the storage, the warehouseman relying on the personal credit of the parties, there is no lien, because such a course of dealing is inconsistent with an implied agreement at the time of the deposit that the property is not to

be taken away unless the storage is paid." *Daly, F. J.*, in *Dunham v. Pettee*, 1 Daly (N. Y.) 112.

9. *Hanchett v. Chicago First Nat. Bank*, 25 Ill. App. 274, reversed upon other grounds in *Chicago First Nat. Bank v. Hanchett*, 126 Ill. 499.

10. **Refusal to Deliver — Agreement to Be Keeper.** — *Robinson v. Columbia Spinning Co.*, 31 N. Y. App. Div. 238.

11. **Refusal to Deliver — Unpaid Storage Not Alleged.** — *Boardman v. Sill*, 1 Campb. 410, note; *Scott v. Jester*, 13 Ark. 437; *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun (N. Y.) 389; *Holbrook v. Wight*, 24 Wend. (N. Y.) 160, 35 Am. Dec. 607. See *Weeks v. Goode*, 6 C. B. N. S. 367, 95 E. C. L. 367, and note.

12. **Acceptance of Promissory Note.** — *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367.

13. **Statement that There Were No Charges.** — *Blackman v. Pierce*, 23 Cal. 508.

14. **Special Agreement as to Payment.** — *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292.

"The distinction that there can be no lien where the day or time for payment is regulated and fixed by the parties, is as old as the year books, and it is manifest that the law could not be otherwise." *Daly, J.*, in *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292.

goods he waives his lien, except as to such sum.<sup>1</sup> But the false and fraudulent issuance of warehouse receipts for grain does not cause the warehouseman to lose his lien for storage on other grain, where the transactions are separate.<sup>2</sup>

**Revival of Lien.** — A lien which has been lost is not revived by the subsequent accidental recovery of possession by the warehouseman,<sup>3</sup> and a subsequent agreement for storage in a different place is not a waiver of the forfeiture, unless such is the intention of the parties.<sup>4</sup>

**5. Extent of Lien** — *a. COEXTENSIVE WITH POSSESSION.* — The lien is coextensive with exclusive possession and control of the property by the warehouseman,<sup>5</sup> and is incapable of assignment.<sup>6</sup>

*b. WHAT CHARGES COVERED* — (1) *In General.* — The lien of a warehouseman which is for his reasonable charges only<sup>7</sup> is not a general one for debts or charges not connected with the position of warehouseman;<sup>8</sup> it does not cover a debt due by the agent of the principal,<sup>9</sup> nor services of the warehouseman in cleaning an article in storage,<sup>10</sup> and if a receiver stores the property of one a stranger to the proceedings, the owner's title is not subject to a lien for the storage.<sup>11</sup>

(2) *Carrier Charges.* — In the absence of a contract or custom, the lien does not extend to transportation charges advanced on the goods,<sup>12</sup> but if a known and established custom gives a lien in such case, the warehouseman may advance reasonable charges and hold the goods subject to the carrier's lien for the sum advanced.<sup>13</sup> The lien exists when a carrier deposits the goods with instructions to collect back charges,<sup>14</sup> and when the purchaser of a receipt is put on notice that the goods are subject to "charges."<sup>15</sup>

**1. Compromise of Storage Due.** — Board of Trade v. Buckingham, 65 Ill. 72.

**2. False Receipts.** — Low v. Martin, 18 Ill. 286.

**3. Revival — Accidental Recovery of Possession.** — Hale v. Barrett, 26 Ill. 195, 79 Am. Dec. 367.

**4. Agreement to Store in Different Place.** — Robinson v. Larrabee, 63 Me. 116.

**5. Exclusive Possession and Control.** — Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co., 49 Neb. 869; Tittsworth v. Winnegar, 51 Barb. (N. Y.) 148.

**Right to Remove Before Storage Due.** — An agreement to permit the tenant under an expiring lease to leave his goods *in statu quo* for an agreed sum payable monthly, with no right to retain goods to the end of the month and no right to demand payment on removal reserved by the contract, creates no lien on the goods for unpaid storage. Webster v. Keck, 64 Neb. 1.

**6. Cannot Be Assigned.** — Hanchett v. Chicago First Nat. Bank, 25 Ill. App. 274.

**7. Reasonable Charges.** — Schumacher v. Chicago, etc., R. Co., 108 Ill. App. 520; J. I. Case Plow Works v. Union Iron Works, 56 Mo. App. 1.

**8. Charges Not Connected with Position.** — J. M. Atherton Co. v. Ives, 20 Fed. Rep. 894.

**Charges for Handling Goods in Markets — Mississippi Code.** — By section 2682 of the Mississippi Code of 1892, giving a lien to those aiding in the preparation of goods for market, a warehouseman has no lien for storage and other charge incident to the handling of goods in market. Shingleur-Johnson Co. v. Canton Cotton Warehouse Co., 78 Miss. 875, 84 Am. St. Rep. 655.

**Removal of Goods Damaged by Fire — Equitable Lien.** — Where a warehouseman is required by

the city to remove from the premises goods damaged by fire, he has no equitable lien for such expense upon a fund raised by the sale of part of the goods by the insurance company, which has paid the full amount of the policies and taken possession of the property. Savannah Steam Rice Mill Co. v. Hull, 103 Ga. 831.

**9. Debt Due by Agent.** — Wesling v. Noonan, 31 Miss. 599.

**Advances to Ostensible Owner — Kentucky Statute.** — Under the Ohio statutes (§§ 3214-18), the ostensible owner of merchandise consigned to a warehouseman, or a known agent in charge, has power, in the absence of notice that the shipper is not the actual owner, to create in favor of the consignee a lien thereon for advances. Sidwell v. Cincinnati Leaf Tobacco Warehouse Co., (Ky. 1901) 65 S. W. Rep. 436.

**10. Cleaning Article in Storage.** — Reidenback v. Tuck, (Supm. Ct. App. T.) 85 N. Y. Supp. 352.

**11. Storage by Receiver — Property of Stranger.** — Vette v. Leonori, 42 Mo. App. 217. See *supra*, this section, *i. In General*.

**12. No Contract or Custom.** — Bass v. Upton, 1 Minn. 408.

**13. Existence of Custom.** — Sage v. Gittner, 11 Barb. (N. Y.) 120.

**Delivery Without Payment.** — When the warehouseman possessing the lien by custom delivered the property at the owner's request, without requiring immediate payment, it was held that suit might be brought to recover the amount advanced to the carrier. Sage v. Gittner, 11 Barb. (N. Y.) 120.

**14. Deposit by Carrier with Instructions to Collect.** — Alden v. Carver, 13 Iowa 253, 81 Am. Dec. 430.

**15. Notice to Purchaser of Receipt.** — Security Bank v. Minneapolis Cold Storage Co., 55 Minn.



*c. RESIDUE OF SINGLE BAILMENT.*—After the delivery of part of goods held under a single contract of bailment, the warehouseman may hold the residue for all the charges, if the ownership of the whole is in the same person,<sup>1</sup> but when the goods of different persons are shipped under one bill of lading, the goods of one cannot be held for the charges due on the goods of another without his consent.<sup>2</sup>

*d. MORTGAGED PROPERTY.*—A warehouseman is not entitled to retain mortgaged property to enforce his lien for charges where it was stored in violation of the provisions of the mortgage without the mortgagee's consent,<sup>3</sup> and the rule applies although the goods remained in the mortgagor's possession, storage being necessary for their preservation, and the mortgagee was informed of the storage afterwards; no promise can be implied from his silence.<sup>4</sup> And even after default in the mortgage, the neglect of the mortgagee to take possession does not make the mortgagor his agent, so as to bind him for storage, when the mortgagor stores the property without his consent.<sup>5</sup>

*Right of Warehouseman to Contest Validity.*—A warehouseman in possession of chattels, with the right of sale in the enforcement of his lien, stands in the position of a judgment creditor, and may deny the validity of a mortgage on the property without obtaining judgment.<sup>6</sup>

**6. Enforcement of Lien by Sale.**—It is generally provided by statute that a warehouseman may enforce his lien by a sale of the property, and while the provisions are not usually mandatory, if he elects to sell under the statute he must comply with its requirements or the sale will be illegal;<sup>7</sup> and the lien should be enforced in a reasonable time after the right to sue accrues.<sup>8</sup> The requirements, however, may be waived by an agreement of the parties to a sale in a different manner,<sup>9</sup> but an arbitrary insertion in the receipt will not be deemed a waiver.<sup>10</sup>

*Notice of Sale.*—Before the warehouseman can legally sell in enforcing his

107. See *supra*, this title, *Compensation of Warehouseman—Who Liable*.

1. **Goods Deposited under Single Contract.**—*Devereux v. Fleming*, 53 Fed. Rep. 401; *Schumacher v. Chicago*, etc., R. Co., 108 Ill. App. 520; *Barker v. Brown*, 138 Mass. 340; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254.

2. **Goods of Different Owners under One Bill of Lading.**—*Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367.

3. **Mortgaged Property.**—*Baumann v. Jefferson*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 147; *Allen v. Becket*, (Supm. Ct. App. T.) 84 N. Y. Supp. 1009. See *Singer Mfg. Co. v. Becket*, (Supm. Ct. App. T.) 85 N. Y. Supp. 391.

**Duty to Search Title.**—"Warehouses are doubtless a great public convenience, but security of title to property is paramount to that. The inconvenience of requiring a warehouseman to make search in the proper office for chattel mortgages before taking property for storage is not greater than it is to a person buying them, and it is safe to say that the purchasers of goods exceed warehousemen by a thousand fold." *Per Bookstaver, J.*, in *Baumann v. Post*, 16 Daly (N. Y.) 385, 26 Abb. N. Cas. (N. Y.) 134.

**Entitled to Possession Without Giving Bond.**—"I am not aware of the existence of any legal requirement that a mortgagee, finding the mortgaged property to which he has a right of possession placed surreptitiously in a warehouse, is bound to give the warehouse keeper a bond

of indemnity." *Curtis, C. J.*, in *Banfield v. Haeger*, 45 N. Y. Super. Ct. 428.

4. *Storms v. Smith*, 137 Mass. 201.

5. **Storage After Default.**—*Baumann v. Post*, 16 Daly (N. Y.) 385, 26 Abb. N. Cas. (N. Y.) 134; *Eisler v. Union Transfer, etc., Co.*, 16 Daly (N. Y.) 456.

6. **Denial of Validity.**—*State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381; *Industrial Loan Assoc. v. Saul*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 188.

7. **Sale of Goods.**—*Jeffries v. Snyder*, 110 Iowa 359; *Robinson v. Wappans*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 199; *Sand v. Rosenagel*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 666. See *Morgan v. Murtha*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 438.

**Exemplary Damages—Iowa Statute.**—Under a statute allowing exemplary damages against a warehouseman for selling stored goods except to enforce his lien, he is not liable for mere failure to observe all legal requirements in a *bona fide* attempt to enforce the law. *Jeffries v. Snyder*, 110 Iowa 359.

**Under Laws of Minnesota of 1889, c. 199, § 1**, the right to sell ceases as soon as enough is realized to pay the charges and expenses of sale, and all articles sold after that are illegally sold, and the warehouseman is liable for conversion. *Jesurun v. Kent*, 45 Minn. 222.

8. **Sale in Reasonable Time.**—*Morgan v. Murtha*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 438.

9. **Agreement of Parties.**—*State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381.

10. **Arbitrary Insertion in Receipt.**—*Sand v.*

lien, notice must be given the owner,<sup>1</sup> which is not waived by the arbitrary insertion in the receipt of a waiver of notice by the owner;<sup>2</sup> and whether notice was properly posted is a question for the jury.<sup>3</sup>

**Distribution of Proceeds.**—After payment of charges, the residue of the sale belongs to the owner,<sup>4</sup> and if the warehouseman has unlimited authority to sell he is liable to account only for the price received.<sup>5</sup> If his charges are greater than the value of the goods at the time of sale, the warehouseman is not liable to the owner for any of the proceeds.<sup>6</sup>

**Effect of Invalid Sale.**—When the warehouseman's charges are a first lien, it is not affected by an invalid sale of the property to himself in attempting to enforce his lien.<sup>7</sup>

**XII. WAREHOUSEMAN'S RECEIPT**—1. **Who May Issue.**—Only those engaged in the business of storing goods for profit, or their duly authorized agents, have power to issue technical warehouse receipts.<sup>8</sup> But where the agent issues a receipt to himself, or where the holder is otherwise put on notice as to his

Rosenagel, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 666.

1. **Notice to Owner.**—*Stewart v. Naud*, 125 Cal. 596.

**Iowa Statute.**—By c. 107, of the Acts of the 26th General Assembly of Iowa, it was provided that a warehouseman could sell for the non-payment of storage for more than three months, on notice to the owner prior to the expiration of three months from the receipt of the goods. It was held that under this statute notice was sufficient if given before sale, and after the expiration of the three months. *Jeffries v. Snyder*, 110 Iowa 359.

**The Negligence of a Warehouseman in Not Noting the Address of the depositor of goods**, as requested, will not excuse the failure to notify him of the sale of his goods for storage charges because the warehouseman did not know his address. *Stewart v. Naud*, 125 Cal. 596.

2. **Waiver.**—*Sand v. Rosenagel*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 666.

3. **Proper Posting—Question for Jury.**—*Jeffries v. Snyder*, 110 Iowa 359.

4. *Boilvin v. Moore*, 22 Ill. 318.

5. *Richmond v. Brewster*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 400.

6. *Gerold v. Guttle*, 106 Ill. App. 630.

7. **Invalid Sale.**—*Gerold v. Guttle*, 106 Ill. App. 630.

8. **Public Warehouseman.**—*Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 192; *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Bell, etc., Co. v. Kentucky Glass-Works Co.*, (Ky. 1898) 48 S. W. Rep. 440; *Valley Nat. Bank v. Frank*, 12 Mo. App. 460; *Thorne v. Wilmington First Nat. Bank*, 37 Ohio St. 254, *distinguishing* *Gibson v. Chillicothe Branch of State Bank*, 11 Ohio St. 311; *Shepardson v. Cary*, 29 Wis. 34; *Geilfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 143.

A receipt given to the owner of an oil refinery by his superintendent for a quantity of crude and refined petroleum which was not set apart, and where there was no change of possession, is not a warehouse receipt under chapter 326, *New York Laws of 1885*. *Yenni v. McNamee*, 45 N. Y. 614.

**Manager of Railroad.**—A receipt by the manager of a railroad company to the company for its rolling stock, with an indorsement that he holds the property to secure a note of the com-

pany to a third person, is not a warehouse receipt, and its indorsement passes no interest in the property. *Mechanics' Trust Co. v. Dandridge*, (Ky. 1896) 37 S. W. Rep. 288.

**Employee of Fictitious Warehouse.**—A warehouse receipt issued by the employee of a fictitious warehouse conveys no title as against one holding actual possession of the goods for advances made. *Traders' Nat. Bank v. Thomas Kent Mfg. Co.*, 186 Pa. St. 556, 65 Am. St. Rep. 876.

**The Pennsylvania Act of September 24, 1866**, P. L. (1867) 1363, making warehouse receipts negotiable by indorsement and delivery, applies only to receipts issued from a *bona fide* warehouse. *Traders' Nat. Bank v. Thomas Kent Mfg. Co.*, 186 Pa. St. 556, 65 Am. St. Rep. 876; *Moors v. Jagode*, 195 Pa. St. 163.

The receipts cannot be issued by the weighmaster without authority. *Peoples' Bank v. Gayley*, 92 Pa. St. 518; *People's Bank v. Troutman*, 9 W. N. C. (Pa.) 54; *Troutman v. Peoples' Bank*, 12 Phila. (Pa.) 276, 34 Leg. Int. (Pa.) 136.

**Virginia Statute Declaratory of Common Law.**—The Virginia Code of 1887, §§ 1791 and 1792, as amended by the Acts of 1895–6, p. 516, providing for the issuance of warehouse receipts, and providing certain penalties for the issuance of licensed warehouse receipts by one not the keeper of a regularly licensed warehouse, does not abrogate the rule of the common law that the delivery of a warehouse receipt of a public warehouseman not licensed, vests title in the goods, but is merely declarative of the common law as to licensed warehouses under the statute. *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579.

**Signature as "Warehouseman."**—The signature of the manager of a mill to a receipt for the owner as "warehouseman" does not make it a warehouseman's receipt. *Steaubli v. Blaine Nat. Bank*, 11 Wash. 426.

**Mining and Manufacturing Corporation.**—A mining and manufacturing corporation not authorized by law to be a warehouseman, and not receiving goods on storage, does not become a warehouseman upon issuing alleged receipts for its own goods to secure creditors, the goods being stored in the place where they are manufactured. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

want of authority, the warehouseman is not liable thereon unless authority is shown.<sup>1</sup> Whether a warehouseman is estopped to deny the validity of a receipt, which was issued by his agent, in the hands of a *bona fide* purchaser, is a question for the jury.<sup>2</sup> A receipt may be issued by a member of a partnership operating a warehouse, and although it perpetrates a fraud upon the other partner, this does not affect its validity in the hands of a *bona fide* purchaser for value.<sup>3</sup>

**2. Form — Definition.** — A warehouseman's receipt has been defined to be "a written simple contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay the compensation for that service."<sup>4</sup>

**Compliance with Statute.** — Unless the statutes require a particular form for warehouse receipts, it is not necessary that they should have any special form, to operate as such,<sup>5</sup> but it is essential to their validity, however informal they may be, that they show that the goods are held for storage.<sup>6</sup> A receipt which fails to comply with the requirement that it shall designate the property by distinguishing marks, is not sufficient, and the trademark of a firm is not a

**Sampler's Receipt.** — A ticket given by a sampler of grain, appointed by the board of trade, stating the kind of grade of grain inspected, is not a warehouse receipt within the meaning of the *Illinois* statute. *Peoria, etc., R. Co. v. Buckley*, 114 Ill. 337.

**Corporation Receiving Property for Its Own Use** — *Kentucky Code*, § 4768. — *Bell, etc., Co. v. Kentucky Glass Works Co.*, 106 Ky. 7.

**By Owner of Elevator Without License.** — *Mercer Nat. Bank v. Hawkins*, 104 Ky. 171.

**By Warehouse in Joint Possession of Owner and Government.** — *Marks v. Bridges*, 106 Tenn. 540.

**Weighmaster's Tickets.** — *Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 192; *Cathcart v. Snow*, 64 Iowa 584.

**1. Issuance by Agent to Himself.** — *Planters' Rice-Mill Co. v. Olmstead*, 78 Ga. 586; *New York Nat. Banking Assoc. Bank v. American Dock etc., Co.*, 143 N. Y. 559; *Hanover Nat. Bank v. American Dock, etc., Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721; *Corn Exch. Bank v. American Dock, etc., Co.*, 149 N. Y. 174; *Troutman v. People's Bank*, 12 Phila. (Pa.) 276, 34 Leg. Int. (Pa.) 436.

**Bookkeeper Without Authority.** — *Cleveland Nat. Bank v. Bryant*, (Tenn. Ch. 1899) 54 S. W. Rep. 73.

**Forged Order After Termination of Agency.** — *McNear v. Bourn*, 122 Cal. 621.

**2. Estoppel Question for Jury.** — *Hanover Nat. Bank v. American Dock, etc., Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721.

**3. By One Member of Firm.** — *Farmer v. Etheridge*, 69 S. W. Rep. 761, 24 Ky. L. Rep. 640.

**4. Receipt Defined.** — *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603.

**A Written Conveyance of wheat as a sale by way of mortgage to secure advances is not a warehouse receipt.** *Snydacker v. Blatchley*, 177 Ill. 506.

**Surrender Certificates**, stating that holders of elevator tickets have surrendered them, and that they represent a certain number of bushels of wheat "free on the track" for shipment, are not warehouse receipts under the *Minnesota Act* of March 3, 1876. *Greenleaf v. Dows*, 8 Fed. Rep. 550.

**5. No Special Form Required.** — *Harris v. Bradley*, 2 Dill. (U. S.) 284.

**Indiana Statute.** — A receipt reciting: "Received of A. 126 bu. 20 lbs. wheat, test 59 weight at stored per bushel. Fire and heating at owner's risk," is a substantial compliance with Rev. Stat. 1894, § 8721 (Rev. Stat. 1881, § 6542), providing that every warehouseman shall, on demand, give a receipt for goods "setting forth the brand, quality, quantity, kind, and description thereof, which shall be designated by some mark." *Miller v. State*, 144 Ind. 401.

**Under the Pennsylvania Act** of September 24, 1866, P. L. (1867) 1363, a receipt is sufficient in form where it purports to be issued by a warehouseman, and to be for goods in storage, deliverable at the order of the depositor and on return of the receipt. *Trademen's Nat. Bank v. Thomas Kent Mfg. Co.*, 186 Pa. St. 556, 65 Am. St. Rep. 876.

**6. Goods Held for Storage.** — *Harris v. Bradley*, 2 Dill. (U. S.) 284; *McClain v. Merchants' Warehouse Co.*, (C. C. A.) 115 Fed. Rep. 295, affirming 112 Fed. Rep. 787; *Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 192.

"Received in store for account of A., 3000 sacks of corn. (Signed) B." is a good receipt, which is assignable or negotiable and passes title on indorsement and delivery. *Harris v. Bradley*, 2 Dill. (U. S.) 284.

**Acceptance of Order.** — The acceptance of an order by a warehouseman drawn upon him renders it equivalent to a warehouse receipt. *Michel v. Ware*, 3 Neb. 229.

**Notification that Goods Are at Warehouse for Delivery.** — A postal card addressed to the owner of goods, by a warehouse company, upon the back of which it is stated that "the merchandise designated below is now at these warehouses, subject to your order, on payment of the freight and charges due thereon. Merchandise not removed within ten days of date will be stored subject to tariff of charges, and it is understood is at the owner's risk as to loss or damage by fire, unless insured through this company," is not a valid warehouse receipt. *McClain v. Merchants' Warehouse Co.*, (C. C. A.) 115 Fed. Rep. 295, affirming 112 Fed. Rep. 787.



compliance with the statute unless there are no other articles in the warehouse with the same trademark.<sup>1</sup> But if no penalty is provided for failure to give the distinguishing marks, such a receipt is not void in the hands of an assignee for value.<sup>2</sup> If the receipt does not comply with the statute in stating the condition and quality of the commodity, and the terms and conditions on which it is received, as to the depositor, the receiver is not a warehouseman.<sup>3</sup>

**3. Duplicate Receipts.** — If a warehouseman issues duplicate receipts for the same goods, the earliest prevails, and the later are illegal,<sup>4</sup> but as between the warehouseman and the holder of the illegal receipts they are valid.<sup>5</sup> The illegal receipts become valid the instant the prior receipts are returned and canceled,<sup>6</sup> and even when they are not canceled, but reissued.<sup>7</sup> Upon the substitution of new receipts for old ones, the intervention of a few weeks between the issuance of the new ones and the cancellation of the old ones will not make the former invalid.<sup>8</sup> Although a warehouseman is forbidden to issue a duplicate receipt without the consent of the holder of the first receipt, the latter is estopped if he gives the warehouseman authority to sell.<sup>9</sup>

**4. Pledge of Receipt** — *a.* **BY DELIVERY.** — It is well settled that the owner of goods in a warehouse may pledge them by transferring the warehouse receipt, which is a symbolical delivery of the property, and gives the pledgee such special property therein as will entitle him to recover possession.<sup>10</sup> But to render such pledge valid as against the creditors of the pledgor, the receipts must be valid warehouse receipts, and must have been issued in compliance with statutory provisions, when they exist.<sup>11</sup>

**1. Distinguishing Marks.** — *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555, 29 Am. Rep. 418.

**2. Not Void in Hands of Assignee.** — *Hoffman v. Schoyer*, 143 Ill. 598.

**3. Failure to Comply with Statute.** — *State v. Humphreys*, 43 Oregon 44.

**4. Duplicate Receipts.** — *Block v. Oliver*, 102 Ky. 269; *Roche v. Crigler*, 67 S. W. Rep. 273, 23 Ky. L. Rep. 2378; *Martin v. His Creditors*, 14 La. Ann. 394.

**5. Between the Parties.** — *Block v. Oliver*, 102 Ky. 269.

**6. Cancellation of First Receipt.** — *Roche v. Crigler*, 67 S. W. Rep. 273, 23 Ky. L. Rep. 2378.

**7. Reissuance.** — *Block v. Oliver*, 102 Ky. 269.

**8. Substitution.** — *Doherty v. Merchants' Nat. Bank*, (Ky. 1899) 52 S. W. Rep. 832.

**9. Authority to Sell.** — *Farmer v. Gregory*, 78 Ky. 475.

**10.** See the title **PLEDGE AND COLLATERAL SECURITY**, vol. 22, p. 857. See also *Blydenstein v. New York Security, etc., Co.*, (C. C. A.) 67 Fed. Rep. 469; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98; *Hoyt v. Hartford F. Ins. Co.*, 26 Hun (N. Y.) 416.

"A person to whom a warehouse receipt has been transferred by indorsement and delivery, as collateral security, is vested with a qualified title which gives him the right to take possession of the property upon the surrender and cancellation of the receipt. The right that he acquires is not an absolute title, for the owner may redeem and the right of possession is subject to the liens of the warehouseman for storage." *Per Haight, J.*, in *Driggs v. Dean*, 167 N. Y. 121.

**Delivery** is an essential act to constitute title to a warehouse receipt. *Roche v. Crigler*, 67 S. W. Rep. 273, 23 Ky. L. Rep. 2378.

**Alabama Act.** — The provisions of section 6

of the Alabama Act of Feb. 28, 1881, that warehouse receipts for cotton may be transferred by indorsement, and that the transferee shall be deemed to be the owner of the property so far as to give validity to any pledge, lien, or transfer created by him, are permissive, and the transfer of a special property and constructive possession by delivery without indorsement may be made thereunder, so as to create a valid pledge as between the parties, and as to third persons not having prior or intervening rights. *Alabama State Bank v. Barnes*, 82 Ala. 607.

**In Kentucky by Act of March 6, 1869**, warehouse receipts are negotiable and transferable by indorsement, with like liability as bills of exchange, and with like remedy thereon, and a receipt for goods of a warehouseman or consignee, if pledged, is a symbolical delivery of the property it purports to represent. *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555, 29 Am. Rep. 418.

**Clause Excepting Liability for Floods** — The delivery of receipts as collateral security for advances, which contain a clause that in case of "flood" the property is at the risk of the "owner," is a pledge. *British Columbia Bank v. Marshall*, 11 Fed. Rep. 19.

**11.** See the title **PLEDGE AND COLLATERAL SECURITY**, vol. 22, p. 857.

**Warehouseman Must Have Had Possession.**

To make a pledge of receipts valid, they must have been issued by one having actual possession of the property so as to make it a constructive delivery. *In re Rodgers*, (C. C. A.) 125 Fed. Rep. 160.

A receipt is not ineffectual because the property was in the warehouse of the pledgor, provided it is rented by a regular warehouseman, who has actual and exclusive custody of the property. *Rome Bank v. Haselton*, 15 Lea (Tenn.) 216.

**b. NOTICE TO WAREHOUSEMAN.** The transfer of a receipt as collateral security operates as a delivery of the goods for that purpose, and places them beyond the control of the transferrer, as between the transferee and the warehouseman, without notice to the latter.<sup>1</sup>

**c. DESIGNATION OF PROPERTY PLEDGED.**—Where property is pledged by the transfer of a warehouse receipt, it must definitely and sufficiently designate the property.<sup>2</sup> If the articles are not identified so as to entitle the pledgee to the possession of the specific article pledged, the pledgor may substitute other articles of the same kind without affecting the security,<sup>3</sup> and the pledgee is entitled only to recover what may be on hand for the depositor in the warehouse.<sup>4</sup> But if the property referred to is especially known to the warehouseman, the pledgee is entitled to the identical articles, and the warehouseman is liable if he delivers them without the pledgee's order.<sup>5</sup>

**d. RIGHTS OF PLEDGEE**—(1) *Title of Pledgee*—**Bona Fide Holder.**—The passing of a warehouse receipt into the hands of an innocent holder for value, prior to notice of an adverse claim to the goods, constitutes the pledgee a *bona fide* purchaser,<sup>6</sup> who acquires a good title, although the pledgor was insolvent when the goods were purchased and failed to pay for them,<sup>7</sup> and although they were obtained from the owner by fraud.<sup>8</sup> And when the owner puts it in the power of another to pledge the goods or the receipt for them to a *bona fide* purchaser, the latter takes a good title, and the owner cannot recover them.<sup>9</sup>

**Louisiana Statute.**—A warehouse receipt not paraphrased: "For hypothecation," etc., as required by section 2 of the Louisiana Act No. 72, of 1876, cannot serve as the subject of a pledge; nor can it be validly pledged without the affidavit required by section 4 of the act. *Gragard's Succession*, 106 La. 298; *Gragard's Succession*, 106 La. 305.

In *Louisiana* a warehouse receipt is not the ordinary warehouse receipt of commerce, but is a technical instrument, governed as to its issuance and as to its pledge by statute; and a material departure from the provisions of the statute, either in the form in which the receipt is issued, or in the manner in which it is given in pledge, is fatal to the validity of the pledge of such a receipt. *Gragard's Succession*, 106 La. 298. See *infra*, this section, *Effect of Receipt*—*For Warehouseman's Goods*; and *Receipt for Goods Not in Store*.

**1. Notice.**—*Friedman v. Peters*, 18 Tex. Civ. App. 11. See *Cincinnati First Nat. Bank v. Bates*, 1 Fed. Rep. 702.

**2. Goods in Different Warehouse**—**Pledge Invalid.**—*Cochran v. Ripy*, 13 Bush (Ky.) 495.

The pledge of a warehouse receipt for "18000 bushels of No. 1 white and No. 2 red winter wheat or its equivalent in flour," is not too indefinite. *Merchants', etc., Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465.

In *Minnesota* the pledge of an elevator receipt for grain "in our system of elevators," without designation of particular elevators, is valid as to the grain specified therein stored in elevators in that state, and such receipt is not so indefinite and uncertain as to make it void. *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98.

**3. Substitution of Property.**—*Hoffman v. Schoyer*, 143 Ill. 598; *New York Security, etc., Co. v. Lipman*, 157 N. Y. 551. See *Rome Bank v. Haselton*, 15 Lea (Tenn.) 216.

**4. State Nat. Bank v. Bryant**, 49 La. Ann. 467.

**5. Articles Known to Warehouseman.**—Fifth

*Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112.

**6. Bona Fide Holder.**—*Buffalo City Bank v. Easton Boot, etc., Co.*, 187 Pa. St. 30, 6 Northam. Co. Rep. (Pa.) 248.

**Promissory Note Past Due Good Consideration.**—The delivery of a promissory note past due in consideration of the transfer of a receipt, makes the holder a *bona fide* purchaser if he has no notice of fraud. *Paddon v. Taylor*, 44 N. Y. 371.

**Statements of Superintendent of Warehouse.**—When the agent of the *bona fide* holder for value of a warehouse receipt goes to the warehouse to inspect the goods, and is informed by the superintendent that it is there all right, but cannot be seen, the holder is not estopped from claiming to have parted with his money in good faith. *Corn Exch. Bank v. American Dock, etc., Co.*, 163 N. Y. 332.

**7. Insolvency of Pledgor.**—*Hoyt v. Baker*, (Supm. Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 405.

**8. Goods Fraudulently Obtained.**—*Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208.

When the pledgee of a receipt, taken to secure advances, by the fraud of the pledgor is induced to give a delivery order for the goods, which are deposited with an innocent party with power of sale to secure advances, and the goods are sold, the original pledgee cannot recover from the latter who obtained them *bona fide* and for good consideration. *Babcock v. Lawson*, 5 Q. B. D. 284, affirming 4 Q. B. D. 304.

**Goods Acquired Subsequent to Receipt.**—Where a receipt was given for property fraudulently purchased, some of which was subsequently received, the transferee of such receipt with notice to secure advances is entitled to hold so much of the property as was in the warehouse at the time of the advances. *McCombie v. Spader*, 1 Hun (N. Y.) 193.

**9. Possession Left with Another.**—*Geddes v. Bennett*, 6 La. Ann. 516; *Farmers' Packing Co.*

**Notice of Defects in Receipt.** But if the pledgee takes with notice of equities, he acquires only such interest as the pledgor may have.<sup>1</sup>

(2) *Extent of Lien.* — The relation of pledgee does not give a general lien to cover debts or charges not connected with the position of the pledgee for the specific purpose,<sup>2</sup> and the transfer of a non-negotiable receipt as security only pledges the goods, and does not affect an existing lien thereon.<sup>3</sup>

(3) *To Sue.* — The pledgee of a warehouse receipt may maintain an action in his own name for the property represented when on demand the warehouseman fails to deliver,<sup>4</sup> and the burden of showing that the pledgee has received the proceeds of the goods rests on the warehouseman.<sup>5</sup>

**5. Negotiability** — *a. IN GENERAL.* — There is some confusion in the cases as to the effect of the transfer of a warehouse receipt, which is sometimes spoken of as negotiable, and again more accurately as *quasi*-negotiable, but all the cases sustain the proposition that in the absence of statute it stands for the property represented therein, and its transfer operates as a constructive delivery, having the same effect as if the property itself had been delivered, and the warehouseman becomes the bailee of the holder.<sup>6</sup> This is especially

*v. Brown*, 87 Md. 1; *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333; *Voorhis v. Olmstead*, 66 N. Y. 113. See *Hazard v. Fiske*, 83 N. Y. 287.

**Advances by Commercial Correspondent — Fraud of Principal.** — In *Moors v. Kidder*, 106 N. Y. 32, affirming 34 Hun (N. Y.) 534, it was held that where a commercial correspondent advances his own money or credit for the purchase of property, and takes the bill of lading in his own name, looking to the property for the means of reimbursement, he is not a pledgee, but is the owner of the property, until the mover in the transaction pays the purchase price. And where he lets his principal have the papers, indorsed in blank, for the sole purpose of enabling him to enter and warehouse them on account of the owner, and the principal takes a warehouse receipt in his own name, and then obtains a loan from one who relies on his representations and the warehouse receipt, the latter cannot hold the property against the owner. *Rapallo, Earl, and Peckham, JJ., dissenting.*

**1. Notice of Equities.** — *Rahilly v. Wilson*, 5 Chicago Leg. N. 217, 20 Fed. Cas. No. 11,531, affirmed in 3 Dill. (U. S.) 420, 20 Fed. Cas. No. 11,532.

**Alabama Code.** — If the pledgee of a non-negotiable receipt takes it with notice on its face that the pledgor did not own the property, but only an interest therein, such interest is not the kind that section 1178 of the Alabama Code of 1878 (§ 4222, Code of 1896) intends to secure and protect in the indorsee. *Commercial Bank v. Lee*, 99 Ala. 493.

**Receipt to "Agent."** — The word "agent" in a warehouse receipt made out in favor of such agent, who pledged it to a bank to secure an individual loan, is sufficient to put the bank upon inquiry, and it is liable to the principal for the proceeds of the sale, although the receipt is negotiable by statute. *Thurber v. Cecil Nat. Bank*, 52 Fed. Rep. 513.

**2. Extent of Lien.** — *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894.

**Equitable Lien — Irregularities in Receipt.** — When the holder of receipts regular upon their face pledges them to innocent *bona fide* parties,

and then assigns for the benefit of creditors, as against the assignee and general creditors, the pledgees are entitled to an equitable lien on the goods in the warehouse although no legal lien was created because of irregularities in the issuance of the receipt. *Union Trust Co. v. Trumbull*, 137 Ill. 146.

**3. Non-negotiable Receipt.** — *Vogelsang v. Fisher*, 128 Mo. 386.

**4. Right to Sue.** — *Cincinnati First Nat. Bank v. Bates*, 1 Fed. Rep. 702; *Harris v. Bradley*, 2 Dill. (U. S.) 285; *Citizens' Banking Co. v. Peacock*, 103 Ga. 171; *Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1.

**5. Burden of Proof.** — *Citizens' Banking Co. v. Peacock*, 103 Ga. 171.

**6. England.** — See *Keyser v. Suse*, Gow 58, 5 E. C. L. 461; *Zwinger v. Samuda*, 7 Taunt. 265, 2 E. C. L. 265; *Lucas v. Dorrien*, 7 Taunt. 278, 2 E. C. L. 278.

**United States.** — *Gibson v. Stevens*, 8 How. (U. S.) 384; *Harris v. Bradley*, 2 Dill. (U. S.) 284; *M'Neil v. Hill, Woolw.* (U. S.) 96; *Mechanics', etc., Ins. Co. v. Kiger*, 103 U. S. 352; *Cincinnati First Nat. Bank v. Bates*, 1 Fed. Rep. 702; *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894; *Rahilly v. Wilson*, 5 Chicago Leg. N. 217, 20 Fed. Cas. No. 11,531, affirmed 3 Dill. (U. S.) 420, 20 Fed. Cas. No. 11,532.

**Alabama.** — *Allen v. Maury*, 66 Ala. 10; *Alabama State Bank v. Barnes*, 82 Ala. 607.

**Arkansas.** — *Newport Bank v. Hirsch*, 59 Ark. 225.

**California.** — *Horr v. Barker*, 8 Cal. 609; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647.

**Colorado.** — *Spangler v. Butterfield*, 6 Colo. 356.

**Connecticut.** — *New York State Bank v. Waterhouse*, 70 Conn. 76, 66 Am. St. Rep. 82.

**Georgia.** — *Planters' Rice-Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 574; *Zellner v. Mobley*, 84 Ga. 746, 20 Am. St. Rep. 390; *Citizens Banking Co. v. Peacock*, 103 Ga. 171.

**Illinois.** — *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *Ward v. American Trust, etc., Bank*, 71 Ill. App. 20; *Broadwell v. Howard*, 77 Ill. 305; *German Nat. Bank v. Meadowcroft*, 4 Ill. App. 630. See *Western Union R. Co. v. Wagner*, 65 Ill. 197.



true where notice has been given the warehouseman of the transfer,<sup>1</sup> and the legal effect is not impaired by a recital in the receipt that the depositors have "a lien thereon for the full cost of the same."<sup>2</sup>

**When Delivery Is Restricted to the Bailor Personally** by the terms of the receipt, the transfer of the receipt does not pass a good title without his consent,<sup>3</sup> nor as against an attaching creditor prior to notice of the transfer to the warehouseman.<sup>4</sup>

**b. STATUTORY PROVISIONS.**—In some states statutes have been passed making receipts negotiable for certain purposes, such as to give validity to a pledge or lien,<sup>5</sup> under which the transferee is entitled to all the remedies of

*Indiana.*—*Toner v. Citizens' State Bank*, 25 Ind. App. 29.

*Kentucky.*—*Newcomb v. Cabell*, 10 Bush (Ky.) 460.

*Massachusetts.*—*De Wolf v. Gardner*, 12 Cush. (Mass.) 19, 59 Am. Dec. 165.

*Mississippi.*—*Shingleur-Johnson Co. v. Canton Cotton Warehouse Co.*, 78 Miss. 875, 84 Am. St. Rep. 655.

*Missouri.*—See *Erie, etc., Dispatch v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172.

*New York.*—*Commercial Bank v. Colt*, 15 Barb. (N. Y.) 506; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; *Paddon v. Taylor*, 44 N. Y. 371.

*Ohio.*—*Toledo Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408; *Cleveland v. Shoeman*, 40 Ohio St. 176.

*Oregon.*—*Solomon v. Bushnell*, 11 Oregon 277, 50 Am. Rep. 475; *Gill v. Frank*, 12 Oregon 507, 53 Am. Rep. 378; *Adamson v. Frazier*, 40 Oregon 273.

*Pennsylvania.*—*Keil v. Harris*, (Pa. 1886) 5 Cent. Rep. 865.

*Tennessee.*—*Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104.

*Texas.*—*Friedman v. Peters*, 18 Tex. Civ. App. 11.

*Vermont.*—*Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226.

*Virginia.*—*Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579.

*Wisconsin.*—*Shepardson v. Cary*, 29 Wis. 34; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603.

**Equitable Estoppel.**—It was said in *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, that the doctrine that a warehouse receipt vested the legal title to and possession of the property represented in a *bona fide* purchaser or pledgee for value, did not rest upon the theory of a symbolical delivery, but upon the principles of equitable estoppel.

**The Purchase by a Warehouseman of Grain Stored with Him** for another, and with his money, and the taking up of the vendor's receipt and issuance of a new receipt to the new owner, renders the grain exempt from execution against the warehouseman. *Broadwell v. Howard*, 77 Ill. 305.

**Lost Receipt—Right of Owner.**—The owner of a lost receipt is entitled to the goods without indemnifying the warehouseman, as it has not that quality of negotiable paper which enables a *bona fide* holder to recover though the owner has not parted with his title. *Clay v. Gage*, 1 Tex. Civ. App. 661.

**Assignment of Private Warehouse Receipt—Quasi-negotiable.**—The assignor of a private

warehouse receipt, which is *quasi-negotiable*, is not bound by a verbal agreement between the parties of which he had no notice. *Northrop v. Chicago First Nat. Bank*, 27 Ill. App. 527.

**In Illinois** it was provided by section 24 of the Act of April 25, 1871, that the transfer by indorsement of a warehouse receipt was merely a valid transfer of the property represented. *Canadian Bank of Commerce v. McCrea*, 106 Ill. App. 281.

**Under § 1178 of the Alabama Code** the indorsement of a non-negotiable receipt operated as a manual delivery of the goods, and was not a guaranty of title. *Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38.

**1. Notice of Transfer.**—*Spangler v. Butterfield*, 6 Colo. 356; *Warren v. Milliken*, 57 Me. 97; *Central Sav. Bank v. Garrison*, 2 Mo. App. 58.

Thus in *Michel v. Ware*, 3 Neb. 229, where the warehouseman acknowledged on an order drawn on him that he would deliver the property upon presentation of the order, an assignee in good faith, without notice that the assignor had withdrawn part of the goods, was held entitled to the entire quantity called for.

**2. Gibson v. Chillicothe Branch of State Bank**, 11 Ohio St. 311.

**3. Delivery to Bailor Personally.**—*Gill v. Frank*, 12 Oregon 507, 53 Am. Rep. 378.

**4. Attaching Creditor Without Notice.**—*Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433.

**5. Alabama.**—*Dothan Bank v. Dawsey*, 137 Ala. 584.

*Illinois.*—*Sargent v. Central Warehouse Co.*, 15 Ill. App. 553.

*Minnesota.*—*Security Bank v. Minneapolis Cold Storage Co.*, 55 Minn. 107; *Dolliff v. Robins*, 83 Minn. 498, 85 Am. St. Rep. 466.

*Washington.*—*Yarwood v. Happy*, 18 Wash. 246.

*Wisconsin.*—*Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603.

"1878 G. S., c. 124, § 17, does not make bills of lading and warehouse receipts 'negotiable' in the proper sense of the term, or put them on the footing of promissory notes and bills of exchange, but was intended merely to prescribe the mode of transferring or assigning such instruments, and to provide that their transfer should for certain purposes be equivalent to actual transfer and delivery of the property itself." *Per Mitchell, J.*, in *Security Bank v. Minneapolis Cold Storage Co.*, 55 Minn. 107.

**In Illinois** it has been held that receipts issued by others than those designated as public warehousemen by statute, are *quasi-negotiable*. *Northrop v. Chicago First Nat. Bank*, 27 Ill.

the holder,<sup>1</sup> while in others statutes have been enacted giving them full negotiability.<sup>2</sup>

*c. MODE OF TRANSFER.*—Although in some states statutes have been passed making receipts negotiable in a greater or less degree, upon delivery by indorsement, nevertheless the delivery of such receipts without indorsement operates as a delivery of the property.<sup>3</sup>

App. 527. It has also been held that the statute in relation to negotiable instruments (Hurd's Stat. 1881, c. 114, § 142) did not comprehend warehouse receipts. *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281.

**Effect of Blank Indorsement.**—The purchaser of a receipt indorsed in blank is only authorized to write over such indorsement a contract of mere assignment of legal title; the statute gives no other effect to it. *Mida v. Geissmann*, 17 Ill. App. 207.

**Under the Special Act of February 14, 1863,** incorporating the Chicago Dock Company, power was given to issue negotiable receipts which gave the holder absolute property to the goods mentioned therein. *Chicago Dock Co. v. Foster*, 48 Ill. 507. See also the statutes of the various states.

**1. Entitled to Remedies.**—*Dothan Bank v. Dawsey*, 137 Ala. 584; *Sargent v. Central Warehouse Co.*, 15 Ill. App. 553; *Dolliff v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466.

**Contract of Insurance Passes.**—On a transfer of a storage receipt, stating that the charges of the storage are to cover loss by fire, the contract of insurance also passes. *Thompson v. Thompson*, 78 Minn. 379.

**2. England.**—*Tennant v. Union Bank*, (1894) A. C. 31.

*California.*—*Bishop v. Fulkerth*, 68 Cal. 607; *Garoutte v. Williamson*, 108 Cal. 135; *Goldstone v. Merchants Ice, etc., Storage Co.*, 123 Cal. 625.

*Indiana.*—*Toner v. Citizens' State Bank*, 25 Ind. App. 29 (§ 8722 Burns's Stat. 1894).

*Kentucky.*—*Greenbaum v. Megibben*, 10 Bush (Ky.) 419; *Collins v. Rosenham*, (Ky. 1897) 43 S. W. Rep. 726; *Theis v. Canmann*, (Ky. 1900) 59 S. W. Rep. 1093; *Early Times Distillery Co. v. Earle*, (Ky. 1900) 56 S. W. Rep. 13. But see *Louisville First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198.

*Maryland.*—*State v. Bryant*, 63 Md. 66.

*Missouri.*—*Union Sav. Assoc. v. St. Louis Grain Elevator Co.*, 81 Mo. 341; *Erie, etc., Dispatch v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172.

*New York.*—*Chicago First Nat. Bank v. Dean*, (N. Y. Super. Ct. Tr. T.) 27 Abb. N. Cas. (N. Y.) 281, 137 N. Y. 110; *Driggs v. Dean*, 87 Hun (N. Y.) 319; *Whitlock v. Hay*, 58 N. Y. 484; *Brooks v. Hanover Nat. Bank*, 26 Fed. Rep. 301.

*Oregon.*—*State v. Koshland*, 25 Oregon 178; *Anderson v. Portland Flouring Mills Co.*, 37 Oregon 483, 82 Am. St. Rep. 771.

*Pennsylvania.*—*Brooks v. Western Nat. Bank*, 16 W. N. C. (Pa.) 298; *Roudebush v. Hollis*, 21 Pa. Co. Ct. 324; *Exchange Bank v. Uhlman-Goldsborough Co.*, 18 Pa. Co. Ct. 252; *Bucher v. Com.*, 103 Pa. St. 528; *Rosenham v. Batjer*, 154 Pa. St. 544.

*Tennessee.*—*Rome Bank v. Haselton*, 15 Lea (Tenn.) 216; *Marks v. Bridges*, 106 Tenn. 540.

**Notice of Charges Due.**—Although receipts may be conceded to be negotiable if they carry upon their face notice that the goods will only be surrendered upon payment of certain indefinite charges, they are not, strictly speaking, negotiable, and it is the duty of the purchaser to inquire, and failing to do so he must suffer the consequences. *Stein v. Rheinstrom*, 47 Minn. 476.

**Not a Guarantor of Title.**—Even in a state where by statute warehousemen's receipts have been made negotiable, the warehouseman is not a guarantor of the title. *Mechanics', etc., Ins. Co. v. Kiger*, 103 U. S. 352.

**Under the Kentucky Statute** making receipts negotiable, an assignee of receipts for goods in bonded warehouse after the lapse of a year, the *United States* statute requiring withdrawal after a year, is put on notice and takes subject to equities. *Van Schoonhoven v. Curley*, 86 N. Y. 187.

**Under the Missouri Statute** (Wag. Stat. 220, §§ 6, 7) both delivery and indorsement are necessary for negotiability, and receipts payable to bearer, and not indorsed, are not negotiable. *Erie, etc., Dispatch v. St. Louis Cotton Compress Co.*, 6 Mo. App. 172; *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333.

A negotiable warehouse receipt within the meaning of the *Missouri* Rev. Stat. of 1879, c. 11, is one given for goods stored or deposited, and an agreement to ship goods in store is not within the statute. *Union Sav. Assoc. v. St. Louis Grain Elevator Co.*, 81 Mo. 341.

**Maryland Statute.**—A receipt by one engaged in the canning business, for goods canned, and which were to remain in his possession subject to order of purchaser, is not a negotiable warehouse receipt within the meaning of § 1, c. 202, Md. Act of 1876. *State v. Bryant*, 63 Md. 66.

**Presumption of Negotiability under California Act.**—Under the California Act of 1878 (Stat. 1878, p. 949), providing that goods shall be delivered in case of negotiable receipts only on delivery and indorsement, and in case of non-negotiable receipts upon written order of holder, there is no presumption of negotiability, but where an order is made by the holder of receipts upon a warehouseman, the implication is that the receipts were non-negotiable. *Goldstone v. Merchants' Ice, etc., Storage Co.*, 123 Cal. 625.

See also the statutes of the various states.

**3. Alabama.**—*Danforth v. McElroy*, 121 Ala. 106; *Weil v. Ponder*, 127 Ala. 296.

But under section 2099 of the *Alabama* Code, an indorsement of a warehouse receipt, though payable to transferor, is necessary to convey the legal estate. *Alabama State Bank v. Barnes*, 82 Ala. 607. See also *Lehman v. Marshall*, 47 Ala. 362.

*Indiana.*—*Toner v. Citizens' State Bank*, 25 Ind. App. 29.

*Minnesota.*—*State v. Loomis*, 27 Minn. 521.

**6. Effect of Receipt** — *a. CONFLICT OF LAWS.* — In construing warehouse receipts, and the effect of their indorsement, in a different state from the one in which they were issued and in which the property was stored, the law of the latter state governs, it being the place of performance.<sup>1</sup>

*b. FOR GOODS NOT IN STORE.* — A warehouse receipt is a nullity as to goods not *in esse* when the receipt was given,<sup>2</sup> and as to goods not in possession,<sup>3</sup> and under the *Oregon* statute prohibiting the issuance of receipts for goods not in store, a receipt need not be negotiable in form in order for the warehouseman to be criminally liable.<sup>4</sup> But although a statute prohibits the issuance of receipts for goods not received, this does not prevent the warehouseman from being estopped to deny such receipt in the hands of a *bona fide* holder for value, which was issued by his authorized agent;<sup>5</sup> and, also, when he acknowledges notice of its assignment to a pledgee prior to the loan by writing thereon.<sup>6</sup> Evidence that a warehouseman on one occasion had given a receipt prior to the receipt of the goods, is improper to show that he had done so on a different occasion.<sup>7</sup>

*c. FOR GOODS IN MASS.* — It is probably the better doctrine, recognized in the majority of jurisdictions, that a receipt for a portion of property, stored in mass with the property of the same kind, transfers title, without separation or segregation.<sup>8</sup> But the contrary rule has been recognized.<sup>9</sup>

*d. FOR WAREHOUSEMAN'S GOODS.* — By the weight of authority a warehouseman having property of his own stored in his warehouse may, in the absence of statute, issue receipts therefor, and pledge them as collateral security for his own debt by delivery of the receipt,<sup>10</sup> but the pledge is not good as against subsequent *bona fide* purchasers of the goods, unless there has been an actual or symbolical delivery thereof.<sup>11</sup> In *Indiana*, however, a public

*Pennsylvania.* — *Sloan v. Johnson*, 20 Pa. Super. Ct. 643.

*Wisconsin.* — *Rice v. Cutler*, 17 Wis. 351, 84 Am. Dec. 747.

See the title *SALES*, vol. 24, p. 1084.

**Purchase by Warehouseman.** — On the purchase of a receipt by the warehouseman who issued it, indorsement to him is not necessary to pass title. *Baker v. Troy Compress Co.*, 114 Ala. 415.

**1. Conflict of Laws.** — *Farmer v. Etheridge*, (Ky. 1902) 69 S. W. Rep. 761; *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98; *Chicago First Nat. Bank v. Dean*, (N. Y. Super. Ct. Tr. T.) 27 Abb. N. Cas. (N. Y.) 281; *Inglis v. Robertson*, (1898) A. C. 616.

**2. Goods Not in Store.** — *Ward v. American Trust, etc.*, Bank, 71 Ill. App. 20.

In *American Pig Iron Storage Warrant Co. v. Sinnemahoning Iron, etc., Co.*, 205 Pa. St. 403, Dean, J., in commenting on the Warehouse Act of September 24, 1866, P. L. (1867) 1363, said that "while the act hedges around the owner of the warrant with almost every possible protection, he must run the risk of the warehouseman issuing a warrant upon goods that never were legally put in his possession by a landlord who has a prior right of lien."

**3. Goods Not in Possession.** — *In re Rodgers*, (C. C. A.) 125 Fed. Rep. 169; *Union Trust Co. v. Trumbull*, (Ill. 1890) 23 N. E. Rep. 355.

**4. State v. Koshland**, 25 Oregon 178.

**5. Bona Fide Holder.** — *Fletcher v. Great Western Elevator Co.*, 12 S. Dak. 643.

**6. Planters Rice-Mill Co. v. Merchants Nat. Bank**, 78 Ga. 574.

**7. McCombie v. Spader**, 1 Hun (N. Y.) 193.

**8. Goods in Mass.** — *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777; *Merchants, etc.*, Bank *v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465; *National Exch. Bank v. Wilder*, 34 Minn. 149; *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Hoyt v. Hartford F. Ins. Co.*, 26 Hun (N. Y.) 416.

The sale of an entire lot of barrels on storage to different purchasers by orders on the warehouseman, who gave them new receipts and made the proper entries upon his books, is a sufficient delivery of possession without separation. *Horr v. Barker*, 8 Cal. 603.

Specification of property in receipt as "50,000 pounds assorted bar iron, made at Vulcan Works in Hamilton Co., Tenn.," is sufficient, though stored in mass with similar property, and not capable of identification by mark or otherwise. *Rome Bank v. Haselton*, 15 Lea (Tenn.) 216. See *supra*, this title, *Storage in Mass.*

**9. Contra.** — *Mercer Nat. Bank v. Hawkins*, 104 Ky. 171; *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555, 29 Am. Rep. 418. See *Union Trust Co. v. Trumbull*, (Ill. 1890) 23 N. E. Rep. 355.

**10. Receipt for Warehouseman's Goods.** — *Alabama State Bank v. Barnes*, 82 Ala. 607; *Merchants' etc.*, Bank *v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465; *National Exch. Bank v. Wilder*, 34 Minn. 149; *Eggers v. National Bank of Commerce*, 40 Minn. 182; *Milliorn v. Clow*, 42 Oregon 169. See *Fishback v. Van Dusen*, 33 Minn. 111.

**11. Delivery Essential.** — *Milliorn v. Clow*, 42 Oregon 169.



warehouseman has no authority to issue receipts for his own property in possession to secure an indebtedness, unless there is a statute expressly authorizing it.<sup>1</sup> By statute in *Iowa*,<sup>2</sup> and *Missouri*,<sup>3</sup> such receipts are declared invalid; while under the *Wisconsin* statute, although the receipt is good as between the immediate parties, it is void as to subsequent purchasers for value even with notice of the receipt.<sup>4</sup> It seems that they are also prohibited by statute in *Nebraska* and *South Dakota*.<sup>5</sup> In *Kentucky*,<sup>6</sup> and *Virginia*,<sup>7</sup> by statute a warehouseman may issue receipts for his own goods. A statute in *Maryland*,<sup>8</sup> and one in *Minnesota*,<sup>9</sup> have been held not to apply to cases of persons not warehousemen, who issue receipts for their own property, so as to give them validity thereunder. Such a receipt has been held to be a chattel mortgage as between the parties, and not a warehouse receipt operating as a pledge.<sup>10</sup>

**Receipt by Agent for His Own Goods.** — The authority of an agent to issue receipts for goods deposited does not give him authority to issue receipts in his own power, even for goods actually deposited,<sup>11</sup> but the issuance of a negotiable receipt as security by the manager of a warehouse, who had such authority, for grain he represented he owned therein, makes the warehouse liable on the receipt.<sup>12</sup>

**e. ESTOPPEL** — (1) *Of Warehouseman* — (a) *Of Right to Issue Receipts.* — Although a warehouseman cannot avoid the performance of his agreement in the receipt by contending that he did not own the warehouse, and had no right to issue the receipt,<sup>13</sup> yet if he is not a warehouseman he may assert such fact prior to the passage of the receipt into the hands of an innocent holder for value.<sup>14</sup>

(b) *To Deny Title.* — As a general rule, by the issuance of a receipt a warehouseman is estopped to deny the title of his bailor or of a *bona fide* holder of the receipt.<sup>15</sup> This rule, however, does not apply where the warehouseman

1. *Indiana.* — *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302. See also *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98.

In *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, it was said that a receipt issued by a warehouse upon its own property, in its own possession, and delivered as a pledge to secure a debt, was not a technical warehouse receipt, and even if it created a lien between the parties, would be void as to all other persons, under section 6638, Burns's R. S. 1894.

**Private Warehousemen.** — In *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302, the court said that it might be true "that a private warehouseman is authorized by section 5 of the Act of 1879, p. 231, being section 8724, Burns's R. S. 1894 (6545, Horner's R. S. 1897), to issue warehouse receipts for his own property actually in store and under his control at the time of giving the receipt."

A private warehouseman, who takes out a permit for a warehouse in class B, and issues receipts for his own property in storage, does not come within the provisions of the *Indiana* Act of March 9, 1875 (1 Davis, 1876, p. 927), and the transferee acquires no title as to other creditors. *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174.

2. *Iowa.* — *Sexton v. Graham*, 53 Iowa 181. See *Swedish-American Nat. Bank v. Gardner, First Nat. Bank*, 89 Minn. 98.

3. *Missouri.* — *Conrad v. Fisher*, 37 Mo. App. 352.

4. *Under the Wisconsin Statute* a receipt by a warehouseman for his own property in his pos-

session as security for money is good only between immediate parties; and as against subsequent purchasers for value from warehouseman, even with notice of receipt, it is void. *Shepardson v. Green*, 21 Wis. 539. See *Shepardson v. Cary*, 29 Wis. 34.

5. *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98.

6. *Kentucky.* — *Cochran v. Rippey*, 13 Bush (Ky.) 495; *Ferguson v. Northern Bank*, 14 Bush (Ky.) 555, 29 Am. Rep. 418.

7. *Virginia.* — *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579.

8. *Maryland.* — *Thurber v. Oliver*, 26 Fed. Rep. 224.

9. *Minnesota.* — *Fishback v. Van Dusen*, 33 Minn. 111.

10. **Chattel Mortgage.** — *Farmers, etc., Nat. Bank v. Lang*, 87 N. Y. 209.

11. **Agent's Authority.** — *Hanover Nat. Bank v. American Dock, etc., Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721.

12. **Negotiable Receipt by Manager.** — *Citizens' Bank v. Capital Elevator Co.*, 9 Kan. App. 144.

13. **In General.** — *Collins v. Rosenham*, 43 S. W. Rep. 726, 19 Ky. L. Rep. 1445.

14. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

15. **Estoppel to Deny Title.** — *Stonard v. Dunkin*, 2 Campb. 344; *M'Neil v. Hill, Woolw. (U. S.)* 96; *Babcock v. People's Sav. Bank*, 118 Ind. 212; *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Peebles v. Farrar*, 73 N. Car.

**Estoppel of Firm upon Issuance of Receipt by One Member.** — *Griswold v. Haven*, 25 N. Y. 595,

issues by mistake a duplicate receipt, and the holder of the second receipt attempts to hold him liable after having to surrender the goods to the holder of the prior receipt.<sup>1</sup> And when the goods of an intestate are deposited with a warehouseman, on the appointment of an administrator the warehouseman is not estopped to deny the title of the depositor, and may deliver to the one entitled to possession.<sup>2</sup>

(c) **By Recitals in Receipt — Generally.** — It may be stated as a general rule that if a warehouseman makes statements in his receipt relating to matters that are or should be within his knowledge, he is estopped from denying them although erroneous, but he is not concluded as to things not open to inspection and not visible.<sup>3</sup>

**As to Taxes.** — If the receipts state that the goods are in "free warehouses," when they are in bonded warehouses subject to the government tax,<sup>4</sup> or if the warehouseman pays such tax and issues his receipt with the words "tax paid" stamped thereon,<sup>5</sup> he is estopped from claiming such taxes against an innocent holder for value.

**As to Contents of Packages and Quality of Goods.** — By describing in his receipt the outward appearance and marks on barrels, the warehouseman warrants the correctness of the description and that there is nothing which would reasonably lead to any suspicion that the contents were not what they were represented to be.<sup>6</sup> And a misdescription of the grade of wheat in receipts, intended by the parties to cover wheat actually in store, will not affect the holder's title as between the parties;<sup>7</sup> nor is the warehouseman estopped from delivering to the purchaser the identical wheat stored, by such misdescription in the memorandum.<sup>8</sup>

82 Am. Dec. 380. See also *Commercial Bank v. Colt*, 15 Barb. (N. Y.) 506.

**Receipt for Specific Number of Barrels — Want of Segregation.** — In action against warehouseman for conversion of goods, he is estopped to set up want of segregation as a defense when he has received for a specific number of barrels. *Goodwin v. Scannell*, 6 Cal. 541.

**Property Not Paid For.** — A warehouseman cannot escape liability on his receipt to an innocent purchaser for value, without showing that the holder had notice of an agreement that the property had not been paid for, and that it should not be delivered until paid for. *Collins v. Rosenham*, 43 S. W. Rep. 726, 19 Ky. L. Rep. 1445.

**Warehouse as Garnishee — Negotiable Receipts.** — When a warehouseman is served with a writ of attachment as garnishee and makes certificate that he is in possession of defendant's grain for which negotiable receipts were issued, he is not estopped from showing that the grain had been delivered to the transferee; it was not his duty to amend his certificate or notify the plaintiff on learning of the transfer of the receipt, and he is not estopped from defending on the ground of delivery when attempted to be held liable for the grain. *Adamson v. Frazier*, 40 Oregon 273.

1. **Duplicate Receipts.** — *Toledo Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408.

2. **Goods of Intestate.** — *Thorne v. Tilbury*, 3 H. & N. 534. See *supra*, this section, *For Goods Not in Store*.

3. **In General.** — *Dean v. Driggs*, 137 N. Y. 274, 33 Am. St. Rep. 721; *Hale v. Milwaukee Dock Co.*, 23 Wis. 276, 99 Am. Dec. 169; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603.

4. **"Free Warehouses."** — *Chicago First Nat. Bank v. Dean*, (N. Y. Super. Ct. Tr. T.) 27 Abb. N. Cas. (N. Y.) 281, 137 N. Y. 110.

5. **"Tax Paid."** — *New York State Bank v. Waterhouse*, 70 Conn. 76, 66 Am. St. Rep. 82.

6. *Dean v. Driggs*, 137 N. Y. 274, 33 Am. St. Rep. 721. In this case the warehouseman gave a receipt for barrels, giving their number and marks, which he described as "Portland cement," in accordance with such a stamp thereon. Delivery of the identical barrels received was refused by the receipt holder, because they contained clay or mortar which was practically worthless. In an action against the warehouseman it was held that he had not warranted the contents, but only that barrels of that description had been received, and that he was not liable.

"**Mess Pork.**" — A warehouse receipt acknowledged the receipt "for account of bearer fifty-four barrels mess pork, deliverable on return of this receipt and payment of storage." The warehouseman tendered the identical barrels in performance of his contract, but it was refused because they contained salt, and not pork. In action against warehouseman it was held that the words "mess pork" were descriptive, and in the absence of fraud, misrepresentation, or negligence in giving receipt, nothing more could be demanded of him. *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603.

7. **Misdescription of Grade.** — *Herrick v. Barnes*, 78 Minn. 475. See *National Exch. Bank v. Wilder*, 34 Minn. 149.

8. **Purchaser of Memorandum — Offer to Deliver Identical Wheat.** — A warehouseman received wheat under an agreement "to safely store and keep the said wheat in his said warehouse until a return thereof should be demanded," and upon

(2) *Of Owner of Goods.*—If the owner of goods, by his acquiescence, negligence, or laches, permits the receipt to pass into the hands of an innocent purchaser for value, he is estopped to claim adversely to such holder.<sup>1</sup> He is also estopped to rely upon the receipt as containing the contract of storage when he sues upon an oral contract, and not upon the receipt.<sup>2</sup> So, where he fraudulently disposes of property covered by receipts, and substitutes like property for it, he is estopped to deny the substitution, although done without the knowledge of the receipt holders.<sup>3</sup> But when he pledges his receipt to secure an accommodation note given by the pledgor, he is not estopped from claiming title against a *bona fide* holder without notice as collateral security for the pledgor's debts.<sup>4</sup>

*f. EFFECT AS EVIDENCE.*—(1) *Of What Facts Evidence.*—(a) *Of Title.*—In the hands of the holder a warehouseman's receipt is *prima facie* evidence of title to the property mentioned in it,<sup>5</sup> but it must appear to have been issued by the warehouseman or under his authority,<sup>6</sup> and the burden of rebutting this presumption is on the defendant.<sup>7</sup> The presumption is not rebutted

receipt of each load issued a memorandum for so many bushels of "No. 2 wheat." The wheat was of an inferior grade, and was kept separate. The memorandum was transferred to the purchaser, who knew nothing of the quantity and quality of the wheat except what appeared therein. Upon tender of charges and demand the warehouseman tendered the identical wheat, which was refused. Held, that the warehouseman was not estopped by memorandum from showing quality, and that tender and offer of identical wheat was sufficient offer to perform contract. *Robson v. Swart*, 14 Minn. 371, 100 Am. Dec. 238. See *supra*, this section, *For Goods Not in Store*.

1. *Estoppel of Owner.*—*Danforth v. McElroy*, 121 Ala. 106; *Warren v. Milliken*, 57 Me. 97; *McBee v. Caesar*, 15 Oregon 62; *Troutman v. People's Bank*, 12 Phila. (Pa.) 276, 34 Leg. Int. (Pa.) 436; *Miller v. Browarsky*, 130 Pa. St. 372.

*Indorsement of Negotiable Receipt.*—*Rosenham v. Batjer*, 154 Pa. St. 544.

*The Bona Fide Purchaser of a Receipt for Value* acquired a good title as against the owner of the property, although the latter was paid by worthless checks. *Hide, etc., Nat. Bank v. West*, 20 Ill. App. 61.

*As Between Parties Goods Reclaimed When Consideration Invalid.*—*Hide, etc., Nat. Bank v. West*, 20 Ill. App. 61.

2. *Suit on Oral Contract.*—Where the depositor sues the warehouseman on the oral contract of storage, and not on the receipt, he cannot rely upon the receipt as presenting the contract under which he claims to recover. *Hughes v. Stanley*, 45 Iowa 622.

3. *Substitution by Owner.*—*Hoffman v. Schoyer*, 143 Ill. 598.

4. *Commercial Nat. Bank v. Bemis*, 177 Mass. 95.

5. *Of Title.*—*Lehman v. Marshall*, 47 Ala. 362; *Baker v. Troy Compress Co.*, 114 Ala. 415; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Mortimore v. Ragsdale*, 62 Miss. 86; *Rea v. Trotter*, 26 Gratt. (Va.) 585; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. Rep. 603.

*The Stipulation in a Receipt* that the property of the depositors is held "subject to their order, for advances of money on the same," was held not to convert the receipt into a pledge,

and render the property liable for the warehouseman's debts. *Cool v. Phillips*, 66 Ill. 217.

*Effect of Fraudulent Alteration After Delivery.*—*Martin v. His Creditors*, 14 La. Ann. 394.

*Receipt in Name of Agent—Delivery Unindorsed.*—When goods are purchased by an agent for a third person, the taking of receipts in name of agent, who delivers them to the real owner without indorsement, does not make them admissible in evidence as showing title in another than plaintiff. *Alabama G. S. R. Co. v. Clark*, 136 Ala. 450.

*Nontransferable Receipts in Name of Third Person.*—Where the owner of goods deposited in a warehouse has nontransferable receipts made out in the name of a third person, but keeps the receipts, the latter has no right to the goods without delivering the receipt. *Lowrie v. Salz*, 75 Cal. 349.

*Under the Minnesota Act* of March 3, 1876, a receipt to an actual depositor, which states that he has deposited with an elevator a certain quantity of a certain grade of wheat, "to be carried at the convenience of the railroad company to St. Paul or Minneapolis for storage or delivery," constitutes *prima facie* evidence of title to the grain mentioned. *Greenleaf v. Dows*, 3 McCrary (U. S.) 27.

*Surrender Certificates—Minnesota Act.*—Surrender certificates stating that holders of elevator tickets have surrendered them and that they represent a certain number of bushels of wheat "free on the track" for shipment, are not warehouse receipts and no evidence under Minnesota Act of March 3, 1876, of title in the holder to wheat in elevator as against holder of statutory receipts. *Greenleaf v. Dows*, 3 McCrary (U. S.) 27, 8 Fed. Rep. 550.

6. *By Authorized Agent.*—Where warehouse receipts are signed and issued by another under the personal supervision of the warehouseman, they are admissible in evidence. *Alabama G. S. R. Co. v. Clark*, 136 Ala. 450.

*By Partnership.*—In an action against a warehouse partnership, warehouse receipts not shown to have been executed by the partnership or under its authority are inadmissible in evidence to show title. *Citizens Banking Co. v. Peacock*, 103 Ga. 171.

7. *Burden of Rebutting.*—*Mortimore v. Ragsdale*, 62 Miss. 86.



by proving that the transferrer of the receipt to the plaintiffs was the defendants' agent, acting for them as real owners, but being permitted to keep the goods in storage in his own name.<sup>1</sup>

**The Stubs Kept by a Warehouseman** are not evidence against the receipt-holders, without proof of knowledge by the holder that they were made in accordance with the receipts to which they refer,<sup>2</sup> and the stub of a negotiable receipt, while it may show to whom the receipt was issued, does not prove its ownership several years after issuance.<sup>3</sup>

(b) **Of Delivery.** — One who does not claim under a warehouse receipt cannot introduce it in evidence to show the amount of goods delivered.<sup>4</sup> If a depositor accepts in good faith memorandum slips or tickets, not in the form of statutory receipts, they are admissible, in connection with evidence to identify and make them certain, to prove delivery of the goods.<sup>5</sup>

(c) **Of Condition of Goods.** — Receipts given by draymen or teamsters, containing recitals as to the condition of the goods, are inadmissible as evidence, in the absence of authority on their part to make such admissions.<sup>6</sup>

(d) **Of Storage Charges.** — A receipt which recites that the rates of storage "shall not exceed four cents for six months" fixes the rate of storage and not its duration,<sup>7</sup> but a receipt is not admissible to show that the storage is due, in an action for the goods, if the warehouseman claims that the plaintiff has no title.<sup>8</sup>

(2) *Admissibility of Parol Evidence to Vary or Contradict* — **General Rule.** — Although the primary function of a warehouseman's receipt is merely to acknowledge possession of the goods, yet it sometimes is given the additional character of a contract. If it is simply a receipt it may be explained by parol, but if it is a contract it stands on the footing of other contracts in writing and cannot be varied or contradicted by parol evidence.<sup>9</sup>

**Read According to Intention or Custom.** — Although when a warehouse receipt is a contract it cannot be varied by parol, yet it may read according to the intention of the makers,<sup>10</sup> and may be interpreted by commercial usage and custom.<sup>11</sup>

**Instances.** — Parol evidence is admissible to show whether the transaction was a bailment or sale if the receipt is ambiguous;<sup>12</sup> to explain an uncertainty as to the identical property embraced;<sup>13</sup> to show that although executed by an agent it is the contract of the principal;<sup>14</sup> to show that an indorsement

1. *Horr v. Barker*, 8 Cal. 609.

2. **Stubs of Receipts.** — *Roche v. Crigler*, 67 S. W. Rep. 273, 23 Ky. L. Rep. 2378.

3. **Stub of Negotiable Receipt.** — *Louisville, etc., R. Co. v. Idleman*, (Ky. 1900) 57 S. W. Rep. 237.

4. *Wyatt v. Henderson*, 31 Oregon 48.

5. *Kramer v. Northwestern Elevator Co.*, (Minn. 1904) 98 N. W. Rep. 96.

6. **Condition of Goods.** — *Central Warehouse Co. v. Sargeant*, 40 Ill. App. 438; *Sibley Warehouse, etc., Co. v. Durand, etc., Co.*, 200 Ill. 354.

7. *Thompson v. Thompson*, 78 Minn. 379.

8. *Wyatt v. Henderson*, 31 Oregon 48.

9. **Admissibility of Parol Evidence.** — *Leonard v. Dunton*, 51 Ill. 482, 99 Am. Dec. 568; *Pribble v. Kent*, 10 Ind. 325, 71 Am. Dec. 327; *Marks v. Cass County Mill, etc., Co.*, 43 Iowa 146; *Lowe v. Young*, 59 Iowa 364; *Thompson v. Thompson*, 78 Minn. 379.

In case the instrument embraces both a receipt and a contract, the receipt may be varied by parol, while the contract cannot be. *Tarbell v. Farmers' Mut. Elevator Co.*, 44 Minn. 471.

**Section 7646 of the General Statutes of Minnesota** requiring that a written receipt, specifying certain facts, shall be delivered when grain is deposited, does not prohibit the subsequent modification of the receipt by an independent verbal agreement. *Thompson v. Thompson*, 78 Minn. 379.

10. **Intention of Parties.** — *Providence Warehouse Co. v. Providence, etc., R. Co.*, 19 R. I. 423.

Thus, where the receipt merely stated that the goods were to be kept in cold storage, evidence is admissible to show that the agreement was for a certain temperature. *Behrman v. Linde*, 47 Hun (N. Y.) 530.

11. **Interpreted by Custom.** — *Pribble v. Kent*, 10 Ind. 325, 71 Am. Dec. 327; *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359.

12. **To Explain Ambiguity.** — *Reherd v. Clem*, 86 Va. 374.

13. **To Explain Uncertainty.** — *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104.

14. **Contract of Principal.** — *Anderson v. Portland Flouring Mills Co.*, 37 Oregon 483, 82 Am. St. Rep. 771.

and delivery was merely for the purpose of giving an agent possession;<sup>1</sup> to show a custom to make transfers without indorsement;<sup>2</sup> to show that a warehouse company knew of the fraudulent issuance of receipts by its agent;<sup>3</sup> to show that a receipt was signed by an employee after his discharge when there was evidence of notice of the discharge;<sup>4</sup> and to show a custom among purchasers not to rely upon the recitals of a receipt as to the contents or quality of goods, which was relied on merely for custody, but to require a packer's receipt, or to inspect.<sup>5</sup>

**XIII. INSURANCE OF BAILOR'S PROPERTY — 1. In General.** — An open, floating insurance policy issued to a warehouseman covers the property of a depositor of the character and description specified, although it was not on deposit at the date of insurance, and extrinsic evidence is admissible to show who is concerned.<sup>6</sup> If a warehouseman under a general policy receives enough money to pay the depositor, in a suit by the depositor alone, the conditions of other policies held by the warehouseman are immaterial.<sup>7</sup>

**2. Warehouseman's Insurable Interest.** — In another title in this work it has been shown that a warehouseman has an insurable interest in goods deposited with him to their full value, and is liable to the depositor for moneys collected on policies covering his goods.<sup>8</sup>

**3. Duty of Warehouseman to Insure — a. BY CUSTOM.** — A warehouse company, which receives, under a policy broad enough to cover the goods of a depositor, an amount only covering its loss, is not charged with a trust for the benefit of the depositor in the absence of proof that it was his duty by custom to insure his goods.<sup>9</sup> But if he insures according to custom in an amount sufficient to cover all loss, and compromises with the insurer for an insufficient amount, he is liable to the owner for the loss thereby resulting.<sup>10</sup> Such a custom may be superseded by an agreement not to insure,<sup>11</sup> and the warehouseman is not liable for failure to insure if he notifies the owner that he has not done so, and holds the goods at his risk, and the owner acquiesces.<sup>12</sup>

**b. BY CONTRACT.** — Where goods are stored under an agreement that the warehouseman shall insure, he is liable in case of loss,<sup>13</sup> but this contract must be proved where he receives an amount only covering his own loss, under a policy broad enough to cover all the goods in the warehouse.<sup>14</sup> An agreement to insure the goods of a depositor is for the whole value of the goods,<sup>15</sup> but if the warehouseman fails to carry insurance under such agreement he is not an

**1. Effect of Indorsement and Delivery.** — Lowery v. Davidson, 44 Ga. 38.

**2. Transfer Without Indorsement.** — Whitney v. Tibbitts, 17 Wis. 359.

**3. Knowledge of Agent's Fraud.** — Corn Exch. Bank v. American Dock, etc., Co., 163 N. Y. 332.

**4. Issuance by Agent After Discharge.** — McNear v. Bourn, 122 Cal. 621.

**5. Effect of Recitals.** — Hale v. Milwaukee Dock Co., 23 Wis. 276, 99 Am. Dec. 169. See Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

**6. Effect of Floating Policy.** — Morotock Ins. Co. v. Cheek, 93 Va. 8, 57 Am. St. Rep. 782.

**7. Conditions of Other Policies.** — Souls v. Lowenthal, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 186.

**Admissibility of Parol Evidence.** — Parol evidence is admissible to show that a policy of insurance taken out by a warehouseman, which stipulated that it was "On hay in bale, their own, or held by them in trust, or on commission, or sold and not delivered," did not cover a depositor's hay, as the contract was not be-

tween the parties to the action, and the rule that such evidence is inadmissible to vary a contract does not apply. Pittman v. Harris, 24 Tex. Civ. App. 503.

**8.** See the title FIRE INSURANCE, vol. 13, p. 155.

**9. By Custom.** — Pittman v. Harris, 24 Tex. Civ. App. 503.

**Evidence of Custom.** — Evidence that it was the custom of all warehousemen to insure cotton received is admissible in an action for the value of cotton destroyed by fire. Hamilton v. Moore, 94 Ga. 707.

**10. Compromise with Insurer.** — Southern Cold Storage, etc., Co. v. Dechman, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**11. Agreement Not to Insure.** — Cottrell v. Branin, (Ky. 1892) 20 S. W. Rep. 703.

**12. Notice of No Insurance.** — Western Dist. Warehouse Co. v. Hayes, 97 Ky. 16.

**13. Agreement to Insure.** — Dawson v. Waldheim, 80 Mo. App. 52; Keller v. Smith, 59 Minn. 203.

**14. Proof of Contract.** — Pittman v. Harris, 24 Tex. Civ. App. 503.

**15. Effect of Agreement.** — Lancaster Mills v.

insurer, and is only liable for loss from his failure to insure; hence, if the owner is indemnified by other insurance, he is not liable in case of loss.<sup>1</sup> The statement in the receipt, "all cotton stored with us fully insured," does not alone constitute an agreement to insure;<sup>2</sup> but the statement that the storage charges should cover loss by fire only, raises by implication a contract of insurance against such loss, which may be destroyed by a subsequent agreement removing the charges;<sup>3</sup> and if the depositor relies upon the statement of the warehouseman that his goods are covered by general policies, and does not take out special insurance, he may recover in case of loss.<sup>4</sup> There can be no recovery, however, where an action by the warehouseman against the insurer was defeated by a receipt given at the depositor's request, stating that the goods were held to a time anterior to the fire, the warehouseman having complied with his contract.<sup>5</sup> An agreement to have the depositor's goods insured in his own name is not complied with by taking out general insurance in the name of the warehouse, and the warehouse is not entitled to be reimbursed for premiums.<sup>6</sup>

**4. Ratification by Bailor.** — Where it is a custom or rule of trade for a warehouseman to insure goods of depositors, it is not necessary for them to ratify the action of a warehouseman in insuring the goods, in order to be entitled to the benefit of the insurance,<sup>7</sup> but the depositor cannot claim the benefit of a policy, the provisions of which were broad enough to cover his property, where the warehouseman was under no obligation to insure, unless he adopts the action of the warehouseman and gives him notice before the force of the policy as a policy on the depositor's property has been impaired.<sup>8</sup> This ratification may be made after the loss by fire.<sup>9</sup>

**5. Removal of Goods Insured.** — If a warehouseman stores goods, upon which the owner has insurance, in a different place from the one contracted for, thereby causing him to lose the benefit of the policy, the warehouseman is liable,<sup>10</sup> as also when he fails to notify the owner, as per agreement, upon the removal from the warehouse in which they had been placed to another warehouse.<sup>11</sup> But if the owner knew in any way of such removal a sufficient time before the fire to have procured the consent of the insurer, or to have obtained new insurance, he cannot recover for his neglect to do so.<sup>12</sup>

**6. Double Insurance.** — Where there is double insurance on the property stored in a warehouse, the insurers are liable *pro rata* for its loss,<sup>13</sup> but the owner is not entitled to a portion of the insurance collected by the warehouseman on policies covering all the goods, without showing that he was not indemnified by other insurance.<sup>14</sup>

**7. Distribution of Proceeds.** — Upon the insurance of depositors' goods with those of the warehouseman, and their destruction by fire, the depositors share ratably with him in the insurance paid, less the premium, and the fact that one

Merchants' Cotton-Press Co., 89 Tenn. 1, 24 Am. St. Rep. 586.

**1. Not an Insurer.** — Lancaster Mills v. Merchants' Cotton-Press Co., 89 Tenn. 1, 24 Am. St. Rep. 586; Deming v. Merchants' Cotton-Press, etc., Co., 90 Tenn. 306.

**2. Statement in Receipt.** — Atwater v. Hannah, 116 Ga. 745; Zorn v. Hannah, 106 Ga. 61.

**3. Agreement Removing Charges for Insurance.** — Thompson v. Thompson, 78 Minn. 379.

**4. Reliance on Statement of Warehouseman.** — Souls v. Lowenthal, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 186.

**5. Recovery Defeated by Depositor.** — Cole v. Favorite, 69 Ill. 457.

**6. Failure to Insure in Name of Depositor.** — Henderson Warehouse Co. v. Brand, 105 Ga. 217.

**7. Ratification by Bailor.** — Southern Cold

Storage, etc., Co. v. Dechman, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**8. Warehouseman under No Obligation to Insure.** — Pittman v. Harris, 24 Tex. Civ. App. 503.

**9. Ratification After Loss.** — Southern Cold Storage, etc., Co. v. Dechman, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**10. Deposit in Wrong Warehouse.** — Lilley v. Doubleday, 7 Q. B. D. 510.

**11. Failure to Notify Owner of Removal.** — Conover v. Wood, 48 Minn. 438.

**12. Knowledge of Removal.** — Brigham v. Wood, 48 Minn. 344.

**13. Double Insurance.** — Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Hough v. People's F. Ins. Co., 36 Md. 398.

**14. Indemnified by Other Insurance.** — Friedman v. Woods Motor Vehicle Co., (C. C. A.) 123 Fed. Rep. 413.



of the depositors has paid the warehouseman for insurance does not make him entitled to the value of his goods, but he should be reimbursed for the insurance paid, and then share as stated above.<sup>1</sup> And where a part of the contents of a warehouse, insured under a general policy, were saved and sold, the proceeds being distributed among the insured, in computing the liability of the insurer to a depositor who had specific insurance the proportion due to his property in such distribution should be deducted.<sup>2</sup>

**WARES.** — See note 3.

**WARNING.** (See also the title TRESPASS, vol. 28, p. 600.) — See note 4.

**WARRANT.** — The term "to warrant" is used as an equivalent of "to guarantee."<sup>5</sup>

**WARRANTED.** (See also the title WARRANTY, *post*, p. 126.) — See note 6.

1. **Distribution of Proceeds.** — *Boyd v. McKee*, 99 Va. 72.

2. **Proceeds of Sale of Goods Saved.** — *Hough v. People's F. Ins. Co.*, 36 Md. 398.

3. **Goods, Wares, and Merchandise.** (See also GOODS, vol. 14, p. 1079; MERCHANT — MERCHANTILE — MERCHANDISE, vol. 20, p. 579; and title VERBAL AGREEMENTS, vol. 29, p. 795.) — A statute forbade the transportation of goods, *wares*, and merchandise intended for any place in the possession or under the control of insurgents. In construing this provision the court, in *Gay's Gold*, 12 Wall. (U. S.) 362, said: "The word 'chattel' in its ordinary signification, includes every species of property which is not real estate or freehold (2 Kent Com. 342), and the words 'goods, *wares*, and merchandise' are undoubtedly used in this statute to express the same meaning."

4. **Warning — Trespass.** — In *Watson v. State*, 63 Ala. 21, it is said: "It is not the mere wrongful entry that the statute punishes, but such an entry after *warning* against it by the possessor within six months next preceding such entry. The *warning* is no more than notice to the defendant to abstain from the wrongful entry. It is not required to be in writing, but there is a propriety in reducing it to writing, for there will then be more certain and enduring evidence of its terms. It is of

the same nature as a notice to quit, given by a landlord to his tenant, which may be written or verbal."

5. **Warrant.** — *Douthitt v. Hudson*, 4 Ala. 112. See also the title WARRANTY, *post*.

6. **Warranted.** — In *Snow v. Schomacker Mfg. Co.*, 69 Ala. 116, it is said: "The president of the plaintiff corporation, in his testimony before the jury, stated 'that the word *warranted* in the circulars and the catalogues merely meant *warranted* to be a piano.' According to this, the language should be read, 'Every piano *warranted* [to be a piano] for five years.' This, to say the least of it, is a strange use of language. But we need not pursue this inquiry further. \* \* \* We cannot think that the word *warranted*, without more, is definite enough to cover and guarantee the style or grade of the instrument. That must be determined by the purchaser. We think the true meaning is, that with reasonable and proper treatment and handling, it will not break or give way in five years. In other words, that it has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale."

**Warranted to Depart with Convoy.** — See *Gordon v. Morley*, 2 Stra. 1265. And see the title MARINE INSURANCE, vol. 19, p. 1018.

# WARRANTS.

BY BASIL JONES.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* the titles *COMMITMENTS*, vol. 4, p. 566; *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 344; *SCHOOLS*, vol. 19, p. 230; *SEARCH WARRANTS*, vol. 19, p. 323; *WARRANTS*, vol. 22, p. 1071.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to the subject of *Warrants of Arrest*, see the following titles in this work: *ARREST*, vol. 2, p. 832; *BAIL (IN CIVIL CASES)*, vol. 3, p. 587; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *EXTRADITION*, vol. 12, p. 590; *FALSE IMPRISONMENT*, vol. 12, p. 719; *SEARCHES AND SEIZURES*, vol. 25, p. 143; *SHERIFFS AND CONSTABLES*, vol. 25, p. 658; *UNITED STATES COMMISSIONERS*, vol. 29, p. 181.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to the subject of *Warrants*, see the title *MUNICIPAL SECURITIES*, vol. 21, p. 13.

**I. DEFINITION.** — The term "warrant," in its most comprehensive sense, means a writ or precept from competent authority, in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage if he does it.<sup>1</sup> While the word may be applied not inaptly to process in civil as well as in criminal cases, as a general rule its use is restricted to such writs as authorize the taking of the body of the defendant to answer a criminal charge.<sup>2</sup>

**II. WARRANT OF ARREST** — 1. *Definition.* — A warrant of arrest is a writ or precept issued by a magistrate, justice, or other competent authority, addressed

1. *Definition.* — *People v. Wood*, 71 N. Y. 371; *State v. Buechler*, 10 S. Dak. 156. 2. *Belv v. Smith*, 91 Tex. 221.



to a sheriff, constable, or other officer, commanding him to arrest the body of the person therein named, and bring him before the magistrate or court to answer, or to be examined, touching some offense which he is charged with having committed.<sup>1</sup>

**2. Issuance** *a. WHO MAY ISSUE.* — The officers who may issue warrants of arrest are designated by the statutes of the several states. Ordinarily the power is conferred on justices of the peace, corporation officers clothed by law with the powers of a justice of the peace, and the judges of certain courts.<sup>2</sup>

*b. THE COMPLAINT* — (1) *In General.* — The party who knows or suspects that a public offense has been committed, goes before a justice of the peace, or other officer competent to issue warrants of arrest, together with such witnesses as he may produce, and lays before him his information and that of his companions, setting forth the grounds on which the application for a warrant is based.<sup>3</sup>

(2) *By Whom Made.* — The complaint may be made by any person who knows or has information of the commission of an offense. Sometimes it is preferred as a pleading by the prosecuting attorney or by some other officer designated by statute for the exercise of that office.<sup>4</sup>

**By Incompetent Person.** — It is not quite clear, on the authorities, whether a person

**1. Warrant of Arrest Defined.** — Black's L. Dict.

**Statutory Definitions.** — See Ala. Code (1896) § 5208; Code Crim. Pro. N. Y., § 151. And see generally the statutory provisions of the several states.

**Alias Warrants.** — Where an original affidavit and warrant commencing a prosecution has been lost, and cannot be found after diligent search, the officer who issued the original warrant and before whom the affidavit was made has authority and power to issue an alias warrant. *Clayton v. State*, 122 Ala. 91. And see ALIAS WRIT, vol. 2, p. 52.

**2. Judge of Court of Record.** — *Election Court*, 204 Pa. St. 92.

**Circuit Judge.** — *People v. Copely*, 4 Crim. L. Mag. 187.

**District Judge.** — *Hyde v. Malley*, 121 Mass. 388; *Com. v. Brusie*, 145 Mass. 117; *Com. v. Lynn*, 154 Mass. 405.

**Justice of the Peace.** — *Perry v. Johnson*, 37 Conn. 32.

A warrant for an offense within the jurisdiction of a justice of the peace, under the *North Carolina Act of 1868-1869*, c. 178, sub-c. 4, § 6, may be issued by a justice who does not reside in the township where the offense was committed, but it must be returned before and tried by a justice who does reside in such township. *State v. Hawes*, 65 N. Car. 301.

**City Attorney.** — Where the charter of a city provides that "process should be deemed to be issued by the city court when signed and issued by the judge, clerk, or city attorney," the attorney's signature to a warrant for the arrest is the act of the court, and the case is not affected by the fact that he has, as attorney, signed and issued the complaint. *State v. Dibble*, 59 Conn. 168.

**Notary Public.** — *Harper v. State*, 109 Ala. 66.

But a warrant issued by a notary public as *ex officio* a justice of the peace, after the expiration of his term of office, has no legal validity, and does not authorize an arrest by an officer in whose hands it is placed, unless facts are shown which are sufficient to uphold the

acts of the notary as an officer *de facto*. *Cary v. State*, 76 Ala. 78.

**Clerk of Court.** — *State v. Schweiter*, 27 Kan. 505; *In re Siebert*, 61 Kan. 112; *State v. Johnson*, 8 Kan. App. 269; *Bryan v. Stewart*, 123 N. Car. 92; *In re Durant*, 60 Vt. 176.

**Clerks Pro Tem.** — Under Stat. Mass. 1893, c. 396, §§ 6, 44, clerks *pro tempore* of district courts, where the office of clerk is established by law, may receive complaints, administer to the complainants the oath required thereto, and issue warrants. A warrant so issued on a complaint made to the court is the warrant of the court and not of the clerk, if it is returnable to the court of which he is clerk. This statute is not unconstitutional either under the federal Constitution or under the declaration of rights of Massachusetts. *Com. v. Posson*, 182 Mass. 339.

**3. Complaint.** — See generally the statutes of the several states, the title INDICTMENTS, INFORMATION, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 344 *et seq.*, and the title ARREST, in this work, vol. 2, p. 840.

**4. Who May Make.** — See the title INDICTMENTS, INFORMATION, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 466.

**Approval by District Attorney.** — As to whether jurisdiction is conferred to issue a warrant in a case in which the warrant is issued on the sworn complaint of a private citizen, which is not approved in writing by a United States district attorney, as required by Act of May 28, 1896 (Rev. Stat. U. S., Supp. (1892-1901), c. 252, § 19), even when the complaint is presented to the commissioner by an assistant United States district attorney, *quære*. *U. S. v. Sapinkow*, 90 Fed. Rep. 654.

**Under Rev. Stat. Mo. 1899, § 2750.** the issuance of a warrant of arrest on an information of other than the prosecuting attorney is not authorized unless the justice with whom the affidavit is filed is satisfied that the accused is about to escape or has no known place of permanent residence or property in the county likely to restrain him from leaving. That such a warrant was issued on the representation of

rendered incompetent generally, as a witness, on account of the conviction of an infamous offense, can prefer a valid complaint.<sup>1</sup> In one instance, where neither a complaint in writing nor on oath was deemed indispensable, a party arrested under a warrant founded on the affidavit of one legally incompetent as a witness, was enlarged on his own recognizance, but the court refused to quash the prosecution.<sup>2</sup>

**Accomplice.** — An accomplice may legally be a complainant, but as to how far the justice should act on his unsupported testimony, no rule can be laid down; he must be guided by circumstances.<sup>3</sup>

(3) **Form and Requisites** — (a) **In General.** — The form and requisites of the complaint are discussed elsewhere.<sup>4</sup>

**Charging Offense.** — The complaint should charge that the offense has been committed by the defendant.<sup>5</sup> While the accusation contained in the affidavit must be specific and particular, the affidavit need not be more so than is necessary to uphold the warrant.<sup>6</sup>

(b) **Necessity of Showing Probable Cause** — *aa. IN GENERAL.* — By the federal constitution, the warrant may not issue, except upon "probable cause supported by oath or affirmation." Similar provisions are found in the constitutions or statutes of the several states.<sup>7</sup> It has been said that all process for the arrest

a third person that the prosecuting attorney desired it to be issued does not validate the warrant. *McCaskey v. Garrett*, 91 Mo. App. 354.

**Reasons for Making Complaint.** — The secret reasons of prosecuting witnesses for making complaints cannot be inquired into for the purpose of invalidating the warrants. *Holton v. Bimrod*, 61 Kan. 13.

1. **Incompetent Persons.** — See *Rex v. Moore*, Lee t. Hardw. 176; *Skipp v. Harwood*, Willes 291; *Walker v. Kearney*, 2 Stra. 1148. See also the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 453.

2. *State v. Killet*, 2 Bailey L. (S. Car.) 289.

3. **Accomplices.** — In *Rex v. Steward*, 2 B. & Ad. 12, 22 E. C. L. 16, criminal information was granted on the sole testimony (uncontradicted) of a *particeps criminis*. In *Rex v. Peach*, 1 Burr. 548, it was refused. But these cases are clearly distinguishable. In the former the offense was against public policy, as bribery in the election of an alderman, who, by virtue of that office, would be a justice of the peace. The matter involved in the second case was private fraud, and all of the parties stood in the same relation to each other in respect to the offense complained of. This distinction was deemed all important by Lord Tenterden, C. J., who delivered the opinion in the former case.

4. **Form and Requisites.** — See the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 467.

**Sufficiency of Complaint.** — The Municipal Court Act (Sp. Laws 1889, c. 34, § 17) which provides that where an offender in the custody is brought before the court without process the clerk shall enter on the records a brief statement of the offense with which he is charged, this to stand as a complaint unless the court shall direct a more formal complaint to be made, does not violate constitutional provision which requires that the accused shall be informed of the nature and cause of the accusation. *State v. Messolongitis*, 74 Minn. 165.

**Oral Complaint.** — *Pruitt v. Judge*, 16 Ala.

705; *Smith v. State*, 73 Ala. 11; *Laney v. State*, 109 Ala. 34; *State v. Killet*, 2 Bailey L. (S. Car.) 289.

In *New York* the law does not require the information to be reduced to writing previously to issuing the warrant. *Matter of Boswell*, (Ct. Sess.) 34 How. Pr. (N. Y.) 347; *Payne v. Barnes*, 5 Barb. (N. Y.) 465. And the failure of the magistrate to reduce the complaint of the prosecutor to writing before issuing the warrant will not constitute the prosecutor a trespasser. *Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445.

**Written Complaint Essential.** — *Com. v. Barhight*, 9 Gray (Mass.) 113.

**Signature by Complainant.** — *Com. v. Barhight*, 9 Gray (Mass.) 113; *People v. Winness*, (Ct. Gen. Sess.) 3 N. Y. Crim. 89.

5. **Charging Offense.** — *Garnett v. Guynn*, 7 Kan. App. 414. See also generally the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 472 *et seq.*

6. *Vandever v. State*, 1 Marv. (Del.) 209; *Dickson v. State*, 62 Ga. 583; *Williams v. State*, 107 Ga. 693; *Brown v. State*, 109 Ga. 570.

**Laying Time.** — *State v. Brooks*, 33 Kan. 708. See also INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 511 *et seq.*

**Signature.** *People v. McDaniels*, 141 Cal. 113. See also the title INDICTMENTS, INFORMATIONS AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 468.

**Amendment of Complaint.** — *Dillard v. State*, 137 Ala. 106. See also the title AMENDMENTS, 1 ENCYC. OF PL. AND PR. 700.

7. **Probable Cause.** — *Const. U. S.*, Amendment 4. See *People v. Staples*, 91 Cal. 23; *Ex p. Dimmig*, 74 Cal. 164; *Myers v. People*, 67 Ill. 503; *Vannatta v. State*, 31 Ind. 210; *State v. Gleason*, 32 Kan. 245; *Com. v. Farrell*, 8 Gray (Mass.) 463; *Turner v. People*, 33 Mich. 363; *People v. Heffron*, 53 Mich. 527; *Haskins v. Ralston*, 69 Mich. 63, 13 Am. St. Rep. 376; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y.) 468; *Payne v. Barnes*, (Supm. Ct. Spec. T.) 5 Barb. (N. Y.) 465; *Miller v. U. S.*, 8 Okla. 315.

of a person is not included in the word "warrant," as used in the constitutions. A *capias*, or writ of arrest in a civil action, is not a warrant in that sense, and it issued at common law, as a matter of course, without oath. A warrant, within the meaning of these constitutional provisions, is an authority for the arrest of a person on a criminal charge, with a view to his commitment and trial thereon. The arrest of a person on a charge of insanity, for the purpose of his commitment to an insane asylum, is, strictly speaking, an arrest neither in a civil nor a criminal proceeding, but is one *sui generis*; at the same time, it partakes more of the character of the latter than of the former, and ought not to be allowed otherwise than on information on oath.<sup>1</sup>

**Finding by Clerk Not Essential.** — Where an information states an offense and is sworn to positively by some person, it is sufficient of itself to authorize the clerk to issue a warrant for the arrest of the defendant without any finding by the clerk or other person of probable cause to believe the defendant guilty.<sup>2</sup>

**bb. AFFIDAVIT ON INFORMATION AND BELIEF** — **aaa. In General.** — Before the warrant can lawfully issue, the magistrate must have evidence of the offender's guilt. A bare statement of the facts and circumstances on information and belief only, without giving any sufficient ground on which to base the belief, is insufficient.<sup>3</sup> An affidavit made solely on information derived from others, whose names are not given, by a person who swears that he has reason to believe, and does believe, that a certain person, naming him, has committed

**Sufficiency of Showing.** — In *Territory v. Cutinola*, 4 N. Mex. 160, it was held that an information filed by the district attorney *ex officio* will authorize the issuance of a warrant both at common law and under the constitution, and the oath of office of the district attorney is a sufficient compliance with the Fourth Amendment to the Constitution of the *United States*, providing that no warrant shall issue but upon probable cause supported by oath or affirmation; and if he files the information as district attorney it is not necessary for him to state in the body of the information that he files it on his oath of office. See also *State v. Sickie*, *Bray*, (Vt.) 132.

The requirement of the constitution that no warrant shall issue without probable cause, reduced to writing and supported by oath or affirmation, is *prima facie* satisfied and complied with when an information charging a public offense is filed by the county attorney; and such an information is *prima facie* the statement of probable cause under oath. *State v. Clancy*, 20 Mont. 498.

**Sufficiency of Affidavit under N. Y. Statute.** — *People v. Nowak*, (Supm. Ct. Gen. T.) 7 N. Y. Crim. 69, 1 Silv. Sup. (N. Y.) 411.

**Oath and Jurat.** — See the title INDICTMENTS, INFORMATION, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 463. See also *Hunter v. State*, 102 Ind. 428; *State v. Brooks*, 33 Kan. 708; *Com. v. Farrell*, 8 Gray (Mass.) 463; *Matter of Boswell*, (Ct. Sess.) 34 How. Pr. (N. Y.) 347; *State v. Killet*, 2 Bailey L. (S. Car.) 289; *State v. J. H.*, 1 Tyler (Vt.) 444.

1. *Sprigg v. Stump*, 7 Sawy. (U. S.) 289.

2. *State v. Brooks*, 33 Kan. 708; *In re Siebert*, 61 Kan. 112.

3. **Information and Belief** — *United States*. — *U. S. v. Collins*, 79 Fed. Rep. 65; *U. S. v. Sapinkow*, 90 Fed. Rep. 654.

*Alabama*. — *Noles v. State*, 24 Ala. 672; *Sims v. State*, 137 Ala. 79; *Streater v. State*, 137 Ala. 93; *Monroe v. State*, 137 Ala. 88.

*California*. — *People v. Smith*, 1 Cal. 9; *Ex p. Dimmig*, 74 Cal. 164; *Ex p. Spears*, 88 Cal. 642.

*Illinois*. — *Housh v. People*, 75 Ill. 487.

*Kansas*. — *Atchison v. Bartholow*, 4 Kan. 124; *State v. Montgomery*, 8 Kan. 351; *Thompson v. Higginbotham*, 18 Kan. 44; *Matter of Donnelly*, 30 Kan. 191; *Harrison v. Beard*, 30 Kan. 533; *Matter of Lewis*, 31 Kan. 71; *State v. Babbitt*, 32 Kan. 254; *State v. Gleason*, 32 Kan. 245; *State v. Brooks*, 33 Kan. 710; *State v. Longton*, 35 Kan. 376.

*Michigan*. — *People v. Heffron*, 53 Mich. 527; *Curnow v. Kessler*, 110 Mich. 10.

*Nevada*. — *Ex p. Buncel*, 25 Nev. 426.

*New York*. — *Blythe v. Tompkins*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 468; *People v. McIntosh*, (Supm. Ct. Gen. T.) 5 N. Y. Crim. 38; *Wilson v. Robinson*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 110; *Matter of Rothaker*, (Supm. Ct.) 11 Abb. N. Cas. (N. Y.) 122; *Blodgett v. Race*, 18 Hun (N. Y.) 132; *Comfort v. Fulton*, 39 Barb. (N. Y.) 56; *People v. McGerr*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 471.

*North Carolina*. — *Welch v. Scott*, 5 Ired. L. (27 N. Car.) 72.

*Oklahoma*. — *Miller v. U. S.*, 8 Okla. 315.

*Pennsylvania*. — *Com. v. Clement*, 8 Pa. Dist. 705.

*Texas*. — *Smith v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 436.

*Wisconsin*. — *State v. Dale*, 3 Wis. 795.

In *Massachusetts*, while a complaint and information on oath that the complainant has probable cause to suspect that the accused has committed the offense charged is not a complaint made with such reasonable and sufficient certainty as to be the ground of a conviction and sentence, yet it seems that such a complaint is sufficient for the purpose of causing the party to be arrested and examined before an inferior tribunal, and committed or bailed to answer to an indictment or other proper form



an offense, describing it, is not a sufficient compliance with this provision of the constitution. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based and on which the belief or suspicion is founded.<sup>1</sup>

**Affidavit in Positive Form.** — But an objection to a warrant that the person who verified the complaint had no knowledge of the facts except such as was based on rumor, hearsay, information and belief is properly overruled without the admission of evidence thereon where the affidavit was made in positive form.<sup>2</sup>

**Common Rumor.** — A warrant issued on common rumor and report of the guilt of the accused, though it recites that there was danger of his escaping before witnesses could be summoned to enable the judge to issue it on oath, is illegal.<sup>3</sup>

**bbb. Examination of Witnesses.** — A warrant based on a complaint made on information and belief is valid where the prosecutor was examined orally before its issuance.<sup>4</sup> And where the warrant recites the examination of the prosecutor on oath, it will be presumed that sufficient evidence was adduced to authorize the issuance of the warrant, though the written complaint purports to have been solely on information and belief.<sup>5</sup>

**c. TIME OF ISSUANCE — Issue in Vacation.** — The clerk may issue a warrant in vacation for the arrest of a person against whom an indictment has been found.<sup>6</sup> Also a warrant issued in term time is valid though not delivered to the officer until vacation.<sup>7</sup>

**Issuance on Sunday.** — A warrant of arrest is not void because it is issued on Sunday.<sup>8</sup>

**d. FORMS AND REQUISITES.** — The caption, direction, description of offender, description of offense, the direction as to the return, the signature and seal of the warrant have been discussed elsewhere.<sup>9</sup>

of charge in another court. *Com. v. Phillips*, 16 Pick. (Mass.) 211.

And in *Maine* it is held that if a positive charge, verified by the complainant's oath, according to the best of his knowledge and belief, is made in the complaint before a magistrate, it will authorize him to issue a warrant. *State v. Hobbs*, 39 Me. 212.

**1. Insufficient Affidavit.** — *U. S. v. Tureaud*, 20 Fed. Rep. 621; *Matter of Rule of Ct.*, 3 Woods (U. S.) 502.

In the case last cited the court laid down the following rule: "No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States, upon mere belief or suspicion of the person making such charge, but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

**2.** *Holton v. Bimrod*, 8 Kan. App. 265; *State v. Dugan*, 52 Kan. 23; *State v. Carey*, 56 Kan. 84.

Where the complaint charges the accused in positive terms with the commission of a crime, the addition of the words that "the affiant verily believes the defendant guilty of the facts charged" will not render the complaint invalid as not being sworn to positively. *Brown v. State*, 16 Neb. 658.

**3. Rumor.** — *Conner v. Com.*, 3 Binn. (Pa.) 38.

**4. Oral Examination.** — *People v. Row*, (Mich. 1904) 98 N. W. Rep. 13.

**5.** *People v. Whipple*, 108 Mich. 587; *Curnow v. Kessler*, 110 Mich. 10.

If the person making the complaint does not know the facts constituting the offense, other witnesses must be examined who do know them. *Ex p. Dimmig*, 74 Cal. 164; *People v. Heffron*, 53 Mich. 527. See also *Curnow v. Kessler*, 110 Mich. 10.

**6. Time of Issuance.** — *In re Durant*, 60 Vt. 176.

**Issuance Before Filing of Information.** — Under Rev. St. Mo., 1899, § 2750, where the necessity arises of the issuance of a warrant of arrest before the filing of an information by the prosecuting attorney, this necessity should be evidenced either by the entry on justice's docket or by the indorsement on the writ, or by some other writing equally efficacious. *McCasky v. Garrett*, 91 Mo. App. 354.

**7. Delivery in Vacation.** — *Kent v. Miles*, 69 Vt. 370.

**Warrant Dated After Complaint.** — *Donahoe v. Shed*, 8 Met. (Mass.) 326.

**8. Issue on Sunday.** — *Parish v. State*, 130 Ala. 92. See also the titles SUMMONS AND PROCESS, 20 ENCYC. OF PL. AND PR. 1108, and SUNDAYS AND HOLIDAYS, 20 ENCYC. OF PL. AND PR. 1106.

**9. Form and Requisites.** — See the title WARRANTS, 22 ENCYC. OF PL. AND PR. 1071 *et seq.*

**Direction to Private Person.** — *Com. v. Blair*, County Jail Warden, 8 Pa. Dist. 159; *Com. v. Baird*, 21 Pa. Co. Ct. 488; *McClain v. Lawrence County*, 14 Pa. Super. Ct. 276.

**c. EXECUTION.** — The principles in regard to the execution generally of warrants of arrest have been set out in another part of this work.<sup>1</sup>

**Execution on Sunday.** — Criminal warrants may be executed on the Sabbath.<sup>2</sup>

**f. RETURN.** — The officer must make return of the warrant, with his doings thereunder.<sup>3</sup>

**g. DISPOSITION OF PRISONER.** — The statutes usually provide that the officer making the arrest shall take the defendant before the issuing magistrate, or, in the event of his absence or inability to act, then before the nearest or most accessible magistrate in the same county.<sup>4</sup>

**3. Bench Warrant.** — A bench warrant is a process issued by the court itself, or "from the bench," for the attachment or arrest of a person, either in case of contempt or after indictment found, or to bring in a witness who does not obey the subpoena. It is so called to distinguish it from warrants granted by justices of the peace, police magistrates, and other inferior officers.<sup>5</sup> Bench warrants should not be granted unless it is necessary that the party charged should be at once taken into custody.<sup>6</sup>

**Compelling Appearance of Witnesses.** — The court will not issue a bench warrant to bring up a witness, although it is sworn that he is keeping out of the way collusively, and that his evidence is so material to the prosecution that the

**Altered or Blank Warrants.** — See the title ARREST, vol. 2, p. 905.

In *Matter of Way*, 41 Mich. 299, printed forms of complaints, filled out by inserting names and dates, and containing general allegations only, sworn to as a matter of form by a policeman, were disapproved by the court, as failing to meet the constitutional requirement of probable cause to support a warrant.

**1. Execution.** — See the title ARREST, vol. 2, p. 832 *et seq.*

**Execution Beyond County Limits.** — In *Texas* a warrant of arrest cannot be executed beyond the county in which it is issued except in cases specially enumerated in the Code of Crim. Pro., art. 237-38. In none of these exceptions can a justice of the peace order a warrant executed beyond the limits of his county, but a warrant must be directed to some suitable officer of his county; failing in this a warrant is not legal. *Toliver v. State*, 32 Tex. Crim. 444. See also the title ARREST, vol. 2, p. 862 *et seq.*

**2. Sunday.** — See the title SUNDAYS AND HOLIDAYS, 20 ENCYC. OF PL. AND PR. 1196. See also *Com. v. De Puyter*, 16 Pa. Co. Ct. 589.

**3. Return.** — *Com. v. Boon*, 2 Gray (Mass.) 74. See also the title ARREST, vol. 2, p. 867, and the title WARRANTS, 22 ENCYC. OF PL. AND PR. 1085.

**Manner of Making.** — It is not made a condition precedent to the right of a deputy sheriff holding a warrant for the arrest of a person charged with the commission of a crime in the parish of the magistrate issuing the warrant to arrest the party charged in another, that he should have first complied with the provisions of section 1085 of the Revised Statutes of 1876 as to making a return on a copy of the warrant of arrest, still retaining the original warrant. *State v. Aucoin*, 111 La. 51.

**Supply of Return.** — In *Fisher v. Hamilton*, 49 Ind. 341, it was held that a warrant issued by a justice of the peace, and returned "served as commanded and the defendant is present," shows the arrest of the party.

**4. Disposition of Prisoner.** — See generally the statutes of the several states, and *Ex p. Brani-*

*gan*, 19 Cal. 133; *Ex p. Hung Sin*, 54 Cal. 102; *People v. Navagh*, (Supm. Ct. Gen. T.) 4 N. Y. Crim. 289; *People v. Chapman*, (Supm. Ct. Gen. T.) 30 How. Pr. (N. Y.) 202; *People v. Frink*, 41 Hun (N. Y.) 123; *People v. Clews*, 77 N. Y. 39. See also N. Y. Code Crim. Pro., (1901), §§ 151, 158, 164; California Pen. Code, §§ 814, 821, 824; the title ARREST, vol. 2, p. 866, and the title WARRANTS, 22 ENCYC. OF PL. AND PR. 1085 *et seq.*

**Massachusetts Statute.** — By the provisions of Massachusetts Statutes of 1850, c. 314, the jurisdiction of justices of the peace, in the examination and trial of persons charged with criminal offenses, was taken away and the same was transferred to certain new officers called trial justices, leaving to justices of the peace only the authority to receive complaints and issue warrants for the arrest of alleged criminal offenders, returnable before any of the trial justices of the same county. A warrant issued by a justice of the peace, after this act took effect, directing the officer to bring the defendant "before A, or some other justice of the peace, within and for the county" (A being a trial justice as well as a justice of the peace) authorizes the officer to arrest the defendant and take him before A as a trial justice, but not before any other trial justice. *Stetson v. Packer*, 7 Cush. (Mass.) 562.

A warrant issued by a trial justice to an officer, under Massachusetts Statutes of 1876, c. 162, in which he is directed to "make due return of this warrant," does not authorize him to return it to another trial justice. *Com. v. Certain Intoxicating Liquors*, 130 Mass. 29.

**Misdemeanors.** — A warrant of commitment for a misdemeanor is void where it directs that the prisoner be committed for the trial by the County Court instead of by the justice issuing the warrant, where by statute justices of the peace are given exclusive original jurisdiction of all misdemeanors occurring within their jurisdiction. *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795.

**5. Bench Warrants.** — Black's L. Dict.

**6. Reg. v. Whittaker**, 2 F. & F. 1.

case cannot go on without him, but will postpone the trial to allow the witness's recognizances to be estreated on his nonappearance when called.<sup>1</sup>

4. **Search Warrants.** — The law relating to search warrants has been treated elsewhere in this work.<sup>2</sup>

5. **Warrants of Commitment.** — This matter has been fully discussed elsewhere.<sup>3</sup>

6. **Warrant of Extradition.** — The issue of warrants for persons charged with crime and the duties and powers of officers thereunder are discussed elsewhere in this work.<sup>4</sup>

7. **Escape Warrant.** — In certain cases a warrant known as an escape warrant is issued for the recapture of prisoners who have escaped from custody.<sup>5</sup>

**III. SCHOOL WARRANTS OR ORDERS — 1. Nature and Effect — As Payment.** — The order or draft made by the school board for the payment of indebtedness incurred by it is intended as a conditional payment of the debt.<sup>6</sup> The receipt by a creditor of the school district of an order of the school commissioners on the disbursing officer of the school funds does not, however, constitute a satisfaction of the debt. It is merely a *prima facie* recognition of the debt for which it is given, and a voucher to the trustee for its payment. It is, like a check on a bank, only a means of payment. The holder of the order may never present it, or may lose his right under it by neglecting to present it until his debt is barred by the statute of limitations. Until he does present it to the disbursing officer, the funds in the hands of the latter on which it is drawn still belong to the school district, and may legally be paid out in satisfaction of other orders as they are presented.<sup>7</sup> So the statutory provision that when a judgment has been obtained against a school district, it shall be paid from the proper fund by an order on the treasurer, does not constitute the mere drawing of the order and the delivery thereof to the judgment creditor a payment or satisfaction of the judgment, but the judgment rendered remains in force and constitutes the evidence of indebtedness due from the district to the judgment creditor.<sup>8</sup>

**Intention of Parties.** — When the order is intended and understood by the parties as payment, the claim is, on receipt thereof, liquidated and adjusted, and nothing remains to be done but to receive the money from the treasurer. So after the delivery of the warrant the district cannot be garnished for the amount contained in the warrant.<sup>9</sup>

**Effect on Original Claim.** — The issue of a warrant creates no new debt and adds nothing to the force of the original claim.<sup>10</sup> So an order drawn on the treasurer for the payment of a judgment does not constitute an instrument evidencing in itself a cause of action against the district. The judgment rendered remains in force and constitutes the evidence of indebtedness due from the district to the judgment creditor, and the order cannot therefore be held to be any independent cause of action against the district.<sup>11</sup>

2. **Consideration.** — The officer charged with the duty of countersigning warrants has the right to satisfy himself that the claim for which a warrant is drawn is valid.<sup>12</sup> But the holders of school warrants are not required to establish the consideration thereof to the treasurer's satisfaction on presen-

1. Reg. v. Crawford, 6 Cox C. C. 481. See also the title WITNESSES, 22 ENCYC. OF PL. AND PR. 1325.

2. See the title SEARCHES AND SEIZURES, vol. 25 p. 143.

3. See the title COMMITMENTS, 4 ENCYC. OF PL. AND PR. 566.

4. See the title EXTRADITION, vol. 12, p. 590.

5. See the title ESCAPE, vol. 11, p. 258. See also Jones v. Timberlake, 6 Rand. (Va.) 678.

6. **Warrant as Payment.** — Canby v. Board of Education, 19 W. Va. 93.

7. Gallatin Bank v. Baber, 6 Lea (Tenn.) 273.

8. Richards v. Independent School-Dist., 46 Fed. Rep. 460.

9. Seymour v. Over-River School Dist., 53 Conn. 508. See generally the title PAYMENT, vol. 22, p. 513.

10. **Effect on Cause of Action.** — Capital Bank v. School Dist. No. 53, 1 N. Dak. 470.

11. Richards v. Independent School-Dist., 46 Fed. Rep. 460.

12. **Consideration.** — Stockwell v. Township



tation.<sup>1</sup> The settlement of a disputed claim between a school district and a claimant is a good consideration for an order of the district to pay a sum of money agreed in the settlement to be paid in satisfaction of the claim.<sup>2</sup>

**Failure of Consideration.** — Even though a warrant is issued in every respect in conformity with the statute, the failure or want of consideration therefor is a good defense against the assignee.<sup>3</sup>

**3. Issuance** — *a. POWER TO ISSUE* — (1) *In General.* — The statutes provide what persons shall have power to issue warrants.<sup>4</sup>

**Notice of Powers of Officers.** — The powers and duties of the officers of school districts being defined by statute, one who deals with them is charged with the knowledge and the nature and the extent thereof.<sup>5</sup>

(2) *Power of Board of Trustees* — **Necessity of Meeting.** — In order that a warrant or order may be binding on the district it must have been issued not merely under the authority of the several members of the board acting separately, but must have been authorized by the majority of the board jointly and in legal session. The consent of the several members of the board separately is not sufficient to bind the district.<sup>6</sup> So a single officer of the school district cannot bind the district by acts not authorized by the board or by the majority of the members thereof when convened and acting as a board. A district therefore is not bound by the acknowledgment of a debt by the director, or by the mere promise made by him that the debt shall be paid.<sup>7</sup>

**Notice of Meeting Essential.** — The board cannot meet in legal session so that a warrant issued by it shall be valid unless the time for the meeting is provided for by law, or unless each member of the board has notice of the meeting in time to be present.<sup>8</sup> But the fact that an order was authorized at a specially called meeting of the board of directors of which the members were not notified does not render it invalid, provided all the members were in attendance at the meeting; and their presence will be presumed in the absence of allegations to the contrary.<sup>9</sup>

**Sanction of Majority.** — An order to the superintendent of schools to draw a requisition on the county auditor against the school fund which is drawn by

Board, 22 Mich. 341; *Burns v. Bender*, 36 Mich. 195.

1. *Pierce v. Edington*, 38 Ark. 150.

2. **Sufficiency.** — *Everts v. District Tp.*, 77 Iowa 37, 14 Am. St. Rep. 264.

A warrant issued by the defendant school district to the plaintiff school district as the result of a settlement by which the plaintiff was to receive certain delinquent taxes due on the territory of the defendant, is based on a sufficient consideration. The fact that the plaintiff had collected and retained a part of such taxes would not estop it to sue on the warrant, though the defendant might set up a counterclaim for the amount so collected. *District Tp. v. District Tp.*, 52 Iowa 153.

3. **Failure.** — *Boardman v. Hayne*, 29 Iowa 339.

4. **Issuance.** — See the statutes of the several states.

Under the *Rhode Island School Act*, the commissioner of public schools has no authority to draw orders, but he is authorized merely to confirm or reverse the decisions of the school committee. *Randall v. Wetherell*, 2 R. I. 120.

5. *School Directors v. Greenville First Nat. Bank*, 3 Ill. App. 349; *Shepherd v. District Tp.*, 22 Iowa 595; *Boardman v. Hayne*, 29 Iowa 339; *School Dist. No. Two v. Stough*, 4 Neb. 357.

6. **Issue by Board.** — *Mincer v. School Dist.*

No. 31, 27 Kan. 253; *Kane v. School Dist.*, 48 Mo. App. 408.

Under the *Missouri* statute, in order to issue a school warrant binding on the district for the purchase of supplies, it is requisite that the directors meet as a board with one of their number as clerk, then as a body make the purchase and order the warrant drawn in conformity to the requirements of the statute, all of which must be evidenced by the record of the meeting. *State v. Lawrence*, 178 Mo. 350. See also *Johnson v. School Dist.*, 67 Mo. 319.

**Individual Action of Officers.** — Where the statute imposes on the district board the duty of providing necessary fuel for the school, payment of a warrant drawn for such purpose is properly refused by the treasurer, though the warrant was issued by the clerk and countersigned by the director, where the board of directors had never held a meeting or had any joint action in reference to the acceptance of the wood delivered by the plaintiff, as the action of the clerk and director was merely their individual and separate action and not that of the board. *Doyle v. Gill*, 59 Wis. 518.

7. *Markey v. School Dist. No. 18*, 58 Neb. 479.

8. **Notice of Meeting.** — *Mincer v. School Dist. No. 31*, 27 Kan. 253.

9. *Hanna v. Wright*, 116 Iowa 275.

the concurrence of two only of the three trustees, one of the two concurring trustees being interested in the order and therefore incompetent to act, is void for the want of the sanction of a competent majority of the board.<sup>1</sup>

**Delegation of Power.** — The power given the board of directors of a township to issue orders against the school fund cannot be delegated by the board, but must be executed in person.<sup>2</sup>

**De Facto Officers.** — When a warrant is drawn by those who are *de facto* directors of the public school of a particular district, the treasurer, on whom it is drawn, cannot set up as a defense that the directors were not elected, and had not qualified as directors.<sup>3</sup>

**b. TIME OF ISSUANCE.** — Where a statute provides that it shall not be lawful to issue warrants for certain purposes until the schedule has been drawn and filed with the treasurer, a warrant drawn before the filing of the schedule is void when drawn, and one holding such a warrant cannot recover thereon even though he be a *bona fide* purchaser.<sup>4</sup>

**Issue Before Indebtedness Incurred.** — Also where it is required by statute that the board of directors shall audit and allow all just claims against the district and that no order shall be drawn until the claim for which it is drawn has been audited and allowed, an order which is issued in advance of the existence of any claims against the district and which has not been so audited and allowed is invalid.<sup>5</sup> The trustee of the school township has no power to bind the township by contract for school supplies, unless supplies suitably and reasonably necessary have been actually delivered to and received by the township.<sup>6</sup> So where a school-district board entered into a contract for the erection of a school house, and issued orders in payment thereof before any work was done, never having been authorized by a vote of the district so to do, and the school house was not erected, although the board had secured a bond from the contractors for the faithful performance of the contract in an action by an indorsee of the orders, the district was not liable.<sup>7</sup>

**c. MANNER OF ISSUANCE** — (1) *In General.* — The statutes of the several states provide the manner in which the warrant should be issued.

**Compliance with the Statute Essential.** — In order that warrants may be valid and binding on the district, they must have been issued in compliance with the terms of the statute defining how and under what circumstances warrants may be issued.<sup>8</sup>

(2) *Formal Requisites* — (a) *In General.* — The statutes of the several states prescribe the formal requisites to be complied with in issuing the warrant.

**Issuance of Warrant for Teacher's Salary.** — Where it is declared by statute that

**1. Majority Essential.** — *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327.

An order which is signed by two persons, as members of a board of trustees composed of three members, is not valid, where one of the persons so signing is neither *de jure* nor *de facto* a member of the board. *Mincer v. School Dist.* No. 31, 27 Kan. 253.

**2. Delegation of Power.** — *Glidden v. Hopkins*, 47 Ill. 525. See generally the title PUBLIC OFFICERS, vol. 23, pp. 365, 366.

**3. De Facto Officers** — *Miahle v. Fournet*, 13 La. Ann. 607. See generally the title DE FACTO OFFICERS, vol. 8, p. 771.

**4. Time of Issuance.** — *School Directors v. Greenville First Nat. Bank*, 3 Ill. App. 352.

**5. Issue Before Incurring Debt.** — *National State Bank v. Independent Dist.*, 39 Iowa 490.

**6. Before Delivery of Supplies.** — *Union School Tp. v. Crawfordsville First Nat. Bank*, 102 Ind. 464; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210.

**7. School Dist. No. Two v. Stough**, 4 Neb. 357.

**8. Statutory Provisions as to Manner of Issuance.** — *Farmers', etc., Nat. Bank v. School Dist. No. 53*, 6 Dak. 255; *School Directors v. Greenville First Nat. Bank*, 3 Ill. App. 349; *Clark v. School Directors*, 78 Ill. 474; *Miller v. White River School Tp.*, 101 Ind. 503; *Burns v. Bender*, 36 Mich. 195; *Canby v. Board of Education*, 19 W. Va. 93.

Thus if the school board make a contract for the erection of a school house without the direction of the inhabitants of the district and without their consent, as required by law, and the inhabitants have not ratified in any way the action of the board in contracting for the school house or issuing the warrants, warrants so issued are void and cannot be enforced. *Farmers', etc., Nat. Bank v. School Dist. No. 53*, 6 Dak. 255.

**Warrant Issued Without Proper Authorization.** — A warrant issued in pursuance of an order

no person not holding a lawful certificate of qualification can be employed to teach, and that any contract in violation of this provision is void, warrants issued to pay for the services of a teacher who does not hold such certificate are void.<sup>1</sup> A statutory requirement that the warrant drawn for the salary of any teacher should be accompanied by a statement of the number of children taught, etc., is, however, merely directory, and not intended to be a necessary adjunct of the warrant, without which it cannot be paid.<sup>2</sup>

**Harmless Irregularity.** — A mere clerical error in dating the time of audit of the claim is not sufficient to defeat the validity of the warrant.<sup>3</sup>

(b) **Direction.** — In order that the treasurer's warrant on a school district may be valid, it must be directed to the person whom the statute prescribes.<sup>4</sup>

(c) **Specifying Fund.** — Unless the order is drawn on the specific fund which is liable for the purpose for which the order is drawn, payment thereof is properly refused by the treasurer, though he has in his hands funds for other purposes sufficient to pay the warrant.<sup>5</sup>

(d) **Stating Purpose for Which Drawn.** — The provision of the statute that in all orders against the school fund the purpose for which or the account on which it is drawn must be stated, is mandatory, and cannot in any case be dispensed with.<sup>6</sup>

(e) **Payee.** — In *Michigan* an order drawn on the township treasurer by the director, and countersigned by the moderator of a school district, payable to a certain person, or bearer, is void on its face. The director has no power to draw any order on the township treasurer for any money of the district in his hands, payable to any one but the district assessor, who is the disbursing officer of the district.<sup>7</sup>

(f) **Signature.** — The signatures which are essential to the validity of a warrant are fixed by statute.<sup>8</sup> In an action on a warrant or order it should be shown that the persons signing the warrant or order are the proper officers, as the court cannot take notice of that fact.<sup>9</sup>

**d. PURPOSES FOR WHICH ISSUED — School Building.** — It being within the power of township trustees to enter into a binding contract for the erection of school houses, an order of the board of trustees signed by the clerk and president of the board directing the payment of a certain sum in payment for the building of a school house is valid, and the holder may sue thereon.<sup>10</sup>

**Supplies and Furniture.** — Warrants issued to pay for the necessary furniture are valid though the statute does not expressly authorize the issuance of a warrant for such purposes, this power being deemed to be granted incidentally, as its exercise is necessary for the performance of the general powers contained in the statute.<sup>11</sup>

is invalid, when not issued with the authority of the board of directors, even though the order on which it was based is valid. *Hanna v. Wright*, 116 Iowa 275; *Johnson v. School Corp.*, 117 Iowa 319.

1. **Requisites Generally.** — *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26. See also *Tolman v. Marlborough*, 3 N. H. 57.

2. *Miahle v. Fournet*, 13 La. Ann. 607.

3. **Error in Date of Audit.** — *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919.

4. **Direction.** — *Kane v. School Dist.*, 48 Mo. App. 408.

5. **Fund.** — *Canby v. Board of Education*, 19 W. Va. 93; *State v. Slavan*, 11 Wis. 153.

6. **Purpose.** — *Glidden v. Hopkins*, 47 Ill. 525.

Where the statute merely provides that the township collector is to pay school moneys only on the order of the district clerks, which order shall specify the object for which it was given,

an order of the district clerk specifying the object for which it was given is a sufficient compliance with the requirements of the statute, and it is immaterial that it fails to specify yearly taxes out of which it is to be paid. *Zimmerman v. Mathe*, 49 N. J. L. 45.

7. **Payee.** — *Fractional School Dist. No. 4 v. Mallary*, 23 Mich. 111.

8. **Signature.** — See the statutes of the several states. See also *Faulk v. McCartney*, 42 Kan. 695; *Burns v. Bender*, 36 Mich. 195; *State v. Dickerman*, 16 Mont. 278; *State v. Morton*, 51 S. Car. 323.

9. *Miller v. Jacobs*, 70 Wis. 122. See also *Canby v. Board of Education*, 19 W. Va. 93.

**Mandamus to Obtain Signature.** — *Burns v. Bender*, 36 Mich. 195.

10. **Building.** — *Heal v. Jefferson Tp.*, 15 Ind. 431.

11. **Supplies.** — *Capital Bank v. School Dist. No. 85*, 6 Dak. 248.

Though the law commits to school trustees



**For Borrowed Money.** — The directors of a school district have power to borrow money to discharge a debt which has been legitimately created, and are authorized to pledge the credit of the district for that purpose. They cannot, however, make the obligation evidencing such a debt bear a higher rate of interest than six per cent.<sup>1</sup>

**Burden of Proof.** — When an action is brought on an order drawn on the contingent fund for a purpose not indispensable to the operation of the school, the burden of proof is on the plaintiff to show the existence of any fact which rendered the purpose necessary.<sup>2</sup> But where the officers of a school district purchase school furniture and goods and issue a warrant in payment therefor, the owner of the warrant is not required to allege that the furniture and goods were such as the board was authorized to purchase. If the board were not authorized to purchase the articles, this would be a good defense against the warrant, but the burden of alleging and proving the fact is on the defendant.<sup>3</sup>

**e. EXCEPTION TO ISSUANCE.** — Where the statute provides that the warrants drawn by the trustees shall be audited by the board of county commissioners acting as a board of audit, any taxpayer may appear before the board and except to any warrants drawn by the trustee being audited and issued in whole or in part.<sup>4</sup>

**f. MANDAMUS TO COMPEL ISSUANCE.** — The issuance, signing, or countersigning of a warrant on the proper fund may be compelled by mandamus where the claim has been duly allowed or when it clearly appears that it is properly due and payable.<sup>5</sup>

**4. Validity — a. PRESUMPTION OF VALIDITY.** — In an action by the owner of an order issued by the school district the order is presumptively valid and is *prima facie* evidence that a valid claim against the district has been presented and allowed.<sup>6</sup> Also it will be presumed that the board performed its duty through its proper members and in accordance with the statutory provisions requiring the indorsement of the warrant to be by the president and

the exclusive right to judge of what supplies are necessary and proper for the use of the schools, persons who contract with the trustee are bound to take notice that he is a public agent, who can exercise only such power in the way of contracting debts as is conferred on him by law. Persons who, before delivering supplies contracted for, accept an obligation which purports to bind the corporation for a debt which they know it does not owe, and which contains recitals on its face which both parties know are untrue, take the chance that all the conditions exist which are necessary to confer authority on the township trustee to contract a debt; or that the township trustee, who has contracted for supplies which his township did not need, may yet refuse to accept goods which were ordered in violation of his duty as a public officer. If the township, through its proper officer, refuses, as it should, to accept goods contracted for under such circumstances, which if accepted would or might create an unauthorized debt, the corporation cannot be held liable. *Boyd v. Mill Creek School Tp.*, 114 Ind. 210.

**Vote of District Required.** — The school directors of a district township have no power to bind the district by a contract for the purchase of school apparatus, unless they are authorized by the vote of the electors, where the statute provides that the directors shall make all contracts, purchases, and payments necessary to carry out a vote of the district. *Manning v. District Tp.*, 28 Iowa 332.

**1. Loan.** — *Austin v. District Tp.*, 51 Iowa 102.

**2. Burden of Proof.** — *Wolf v. Independent School Dist.*, 51 Iowa 432; *Monticello Bank v. District Tp.*, 51 Iowa 350.

Where no supplies were needed, and none were accepted by the township, the party seeking to enforce a contract against the township for a debt contracted by the township trustee takes the burden of showing that all the conditions existed which conferred authority on the trustee to contract the debt, or that the situation is such as to make the corporation liable notwithstanding its refusal to accept the goods. Where this is not shown there can be no recovery on a certificate given in payment for such supplies. *Boyd v. Mill Creek School Tp.*, 114 Ind. 213.

**3. Buffalo School Furniture Co. v. School Dist.**, 7 Kan. App. 796.

**4. Exception by Taxpayer.** — *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919.

**5.** See the title *MANDAMUS*, vol. 10, p. 785.

**6. Validity Presumed.** — *Meyer v. School Dist. No. 31*, 4 S. Dak. 420; *Farmers', etc., State Bank v. School Tp.*, 118 Iowa 540; *Rochford v. School Dist. No. 11*, (S. Dak. 1903) 97 N. W. Rep. 747.

**Where it Appears on the Face of the Order** that it was drawn for a purpose for which orders might lawfully be drawn by the trustees, the presumption is that in drawing the order they are performing their duty and that the

secretary of the board of audit, where proof is made of the persons composing the board and the stamp on the warrant bears the name of one of them as president and one as secretary.<sup>1</sup> School warrants issued by a school board under the provisions of the statute in payment of necessary appendages for a school house during the time a school is taught, are *prima facie* valid claims against a school district; and, in the absence of evidence to the contrary, the law will presume that they were lawfully issued, and that they were duly presented and allowed at a regular meeting of the district, if such presentation and allowance were necessary.<sup>2</sup>

**Effect of Finding of Board.** — Where the statute provides for the determination by the board of audit of all the questions which are involved in regard to the validity of the warrant, the determination of the board is, in the absence of fraud or mistake, conclusive of all such questions passed on by it until set aside by direct proceeding.<sup>3</sup>

**Rebutting Presumption.** — The impeachment of the validity of the warrants by showing that the school officers were not properly authorized to execute them is a matter of defense.<sup>4</sup> This apparent validity may be impeached by showing that the officers issuing them are not properly authorized.<sup>5</sup>

**b. WARRANTS IN EXCESS OF AMOUNT AUTHORIZED — Under Constitutional and Statutory Provisions.** — A constitutional provision limiting the amount of indebtedness which may be incurred by any county or other political or municipal corporation applies to school districts, and orders issued in excess thereof are invalid.<sup>6</sup> Also warrants issued in excess of the limitation of indebtedness which school districts are authorized by statute to contract, are void.<sup>7</sup>

**Issuance in Excess of Amount Authorized by District.** — An indebtedness contracted by the directors of a township in excess of the limit fixed by the township for the indebtedness is illegitimate.<sup>8</sup>

**Bona Fides No Defense.** — In an action against a school district to recover on the warrant, the good faith on the part of the district officers or their action in acknowledging the validity of the warrant will not prevent the district from interposing the defense that the warrants were in excess of the constitutional limitation, nor prevent taxpayers of the district from intervening and insisting on the invalidity of the warrant if the officers of the district refuse to interpose that defense.<sup>9</sup>

**Burden of Proof.** — In an action on an order the burden is on the defendant district to show that the indebtedness which the money was used in paying was in excess of the limit fixed by the township to the cost of the contract

order is valid. *Brown v. Fitcher*, (Minn. 1903) 97 N. W. Rep. 416.

1. *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919.

2. *Edinburg American Land, etc., Co. v. Mitchell*, 1 S. Dak. 593.

3. *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919.

4. **Rebutting Presumption.** — *Meyer v. School Dist. No. 31*, 4 S. Dak. 420; *Wolf v. Independent School Dist.*, 51 Iowa 432; *Brown v. Fitcher*, (Minn. 1903) 97 N. W. Rep. 416; *Edinburg American Land, etc., Co. v. Mitchell*, 1 S. Dak. 593.

5. *Edinburg American Land, etc., Co. v. Mitchell*, 1 S. Dak. 593.

6. **Issue in Excess of Debt Limit.** — *Winspear v. District Tp.*, 37 Iowa 542; *National State Bank v. Independent Dist.*, 39 Iowa 490.

7. *Farmers', etc., Nat. Bank v. School Dist. No. 53*, 6 Dak. 255; *Edinburg American Land, etc., Co. v. Mitchell*, 1 S. Dak. 593; *School*

*Dist. No. 3 v. Western Tube Co.*, 5 Wyo. 185.

A statute which authorizes the district to impose such tax as may be necessary to discharge any debts or liabilities of the district lawfully incurred does not extend the power to tax the district beyond the limit fixed in the other provisions limiting the amount of tax for a specified purpose. *Kane v. School Dist.*, 52 Wis. 502.

**School Warrants Paid by County Tax.** — Where the warrants issued by a school board are to be paid by the levy of a school tax, such warrants create a county indebtedness and may be issued only in such amount as, when taken in connection with the county indebtedness already existing, will not exceed the limitation imposed on the county by statute. *Territory v. High School*, 13 Okla. 605.

8. *Austin v. District Tp.*, 51 Iowa 102.

9. *Farmers' Sav. Bank v. Independent School Dist.*, 122 Iowa 99.

for which it was issued.<sup>1</sup>

*c. WARRANTS PAYABLE IN THE FUTURE.* — In the absence of statutory authority the board has no power to issue warrants payable at a future date and bearing interest, and warrants so issued are void and not enforceable.<sup>2</sup> It seems that the board and voters of the district combined cannot make a valid contract binding the future resources of the district by a contract payable out of funds not intended to be raised by taxation during the current year, except by taking such proceedings in the particular case authorized as are necessary under the statutory provision to make a loan in behalf of the district.<sup>3</sup> Also where by a constitutional provision or statute it is declared that no school district shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, a treasurer's warrant which purports to bind a school district two years in the future, the treasurer being directed to pay it about two years after date, is void as an attempt to pledge the future credit of the district, where it is shown that there is no money on hand at the time of the issuance of the warrant to pay it nor any provision therefor in that fiscal year.<sup>4</sup>

*Warrant Indorsed Payable in Future.* — School orders which by an indorsement on the back are made payable one year after date, are orders to pay out of the funds which necessarily cannot be in the treasurer's hands until after the next tax levy, and in anticipation of the revenues of the school district for the ensuing year, and as such are prohibited by the statute.<sup>5</sup>

*Warrants on Contingent Fund.* — But a statutory provision authorizing school townships to purchase supplies of a certain character and to provide by the levy of contingent funds therefor authorizes the township to purchase such property and to levy and provide the fund and meet the amount of the purchase even though there is no contingent fund on hand at the time the order is made.<sup>6</sup>

*As Exercise of Power to Borrow Money.* — The officers of a school district have no power to borrow money, except by issuing bonds and selling the same in the manner provided by statute, and the officers cannot circumvent the statute by issuing warrants and selling them and investing the proceeds.<sup>7</sup>

*Burden of Proof.* — Where the warrant is void unless issued when there is money in the treasury applicable to its payment, it is necessary for the person issuing to recover thereon, to prove affirmatively that it was so issued.<sup>8</sup>

1. *Burden of Proof.* — *Austin v. District Tp.*, 51 Iowa 102.

2. *Payable in Future.* — *School Dist. No. Two v. Stough*, 4 Neb. 357; *State v. Sabin*, 39 Neb. 570; *Andrews v. School Dist.*, 49 Neb. 420; *Markey v. School Dist. No. 18*, 58 Neb. 479; *Kellogg v. School Dist. No. 10*, 13 Okla. 285; *Coler v. Sterling*, 15 S. Dak. 415. *Compare Buffalo School Furniture Co. v. School Dists.*, 7 Kan. App. 796.

3. *Kane v. School Dist.*, 52 Wis. 502.

4. *Kane v. School Dist.*, 48 Mo. App. 408.

Where the statute provides that it shall not be lawful for any state officer to draw a warrant or check for any public debt except upon money then actually to his credit on that account in the hands of some bank or public officer, or to issue any certificate of indebtedness, warrants which are in excess of the funds apportioned to the district at the time they are drawn and warrants drawn to become due at a future day are void. *Loan, etc., Bank v. Shealey*, 62 S. Car. 337.

5. *Scott v. School Directors*, 103 Wis. 280.

6. *Warrant on Contingent Fund.* — *Hanna v. Wright*, 116 Iowa 275; *Johnson v. School Corp.*, 117 Iowa 319.

*Under Iowa Code of 1873, § 1729*, a school board could not draw warrants against the contingent fund for the amount in excess of unappropriated money on hand, but the provision of the Code of 1897, § 2783, which omits the express limitation contained in the former statute, authorizes the purchase of school supplies to a specified amount, and does not prohibit the drawing of an order for such purpose against the contingent fund. *Farmers', etc., State Bank v. School Tp.*, 118 Iowa 540.

7. *Kellogg v. School Dist. No. 10*, 13 Okla. 285.

School orders which, by an indorsement, are made payable one year after date, and are issued in terms in payment for material and labor, cannot be held valid as an exercise of the power to borrow money. *Scott v. School Directors*, 103 Wis. 280.

8. *Burden of Proof.* — *Board of Education v. Foley*, 88 Ill. App. 470.



**d. VALIDATION BY STATUTE.** — The legislature may validate warrants issued by a school district without authority, by conferring power on the district to issue such warrants.<sup>1</sup>

**e. RATIFICATION.** — A contract made by the school district, which it might lawfully have made when authorized by the electors at their annual meeting, becomes binding on the district after ratification by the electors, and a warrant issued in payment of the obligation so incurred is valid even though the contract was originally made without requisite authority.<sup>2</sup>

**Warrant Illegally Issued.** — It being beyond the power of the board of school directors to ratify an illegal act of a preceding board, the fact that the board has recognized the validity of an illegal order by paying interest thereon, and that the township treasurer has promised to pay the order when in funds, does not render it valid.<sup>3</sup>

**Warrant in Excess of Authorized Indebtedness.** — So warrants issued in payment of the contract, which is void by reason of the amount to be expended under such contract being in excess of that which the district was authorized by statute to use for such purpose, are void, and they cannot be validated by the subsequent ratification of the contract by the inhabitants of the district.<sup>4</sup>

**Failure to Observe Prerequisite Conditions.** — A warrant given in payment of a contract is void where the contract is entered into by the officers of the school district without the observance of the conditions prerequisite to making a valid contract, and the warrant is not validated by a subsequent attempted ratification of the contract by the district, as such a ratification is not in the power of the district.<sup>5</sup>

**Ratification by Use.** — If a school district has the power to charge the property of the district for expenditures made by the district and its officers in former years, for the payment of which they had not levied a tax as provided by law, it would seem that such charge can only be made by showing that the district has approved and ratified the former expenditure; and the only way such ratification and approval could be shown would be by a vote of the electors of the district at some regular meeting, approving the expenditure and directing payment of the same. The mere fact that the district officers had paid a portion of the expenditure out of the funds of the district would not be sufficient to bind the district for the unpaid balance.<sup>6</sup> So the fact that articles, purchased under a contract made by the contractors acting separately and not at the regular meeting of the board, were used in the school for which they were purchased, does not amount to a ratification by the district of the acts of such directors nor impose any obligation on it under a warrant issued in payment for the goods so purchased.<sup>7</sup> But where a contract made by the

**1. Validating Statutes.** — *Shaffer v. School Dist. No. 1*, 8 Kan. App. 751.

But where an order is issued in violation of the constitutional provision it cannot be rendered valid by statutory enactment. *National State Bank v. Independent Dist.*, 39 Iowa 490.

Nor does a statutory provision validating orders previously issued render valid an order issued subsequent to its enactment. *National State Bank v. Independent Dist.*, 39 Iowa 490.

**2. Ratification by Electors.** — *Everts v. District Tp.*, 77 Iowa 37, 14 Am. St. Rep. 264.

**3. Illegality in Inception.** — *Glidden v. Hopkins*, 47 Ill. 525.

As the inhabitants of the school district cannot by their unanimous action impose an obligation on the district, they cannot therefore ratify and validate an invalid contract made by the directors, but such contracts are valid only when made in the manner prescribed by law. *Kane v. School Dist.*, 48 Mo. App. 408; *Johnson v. School Dist.*, 67 Mo. 321.

**4. Capital Bank v. School Dist. No. 53**, 1 N. Dak. 479. See also *Farmers', etc., Nat. Bank v. School Dist. No. 53*, 6 Dak. 255.

**5. Markey v. School Dist. No. 18**, 58 Neb. 479.

Thus where the statute provides that the site of the school house shall be selected and designated by the voters of the district, the site so selected to be purchased by the voters, the action of the school board in selecting a site and erecting thereon a school house without the authority given by the inhabitants of the district, the land not being owned by the district, is unauthorized, and warrants issued for the payment for a house so erected are not valid, and the inhabitants have no power to ratify the illegal act of the board. *Farmers', etc., Nat. Bank v. School Dist. No. 53*, 6 Dak. 255.

**6. Implied Ratification.** — *Kane v. School Dist.*, 52 Wis. 502.

**7. Kane v. School Dist.**, 48 Mo. App. 408; *Johnson v. School Dist.*, 67 Mo. 321.

officers of the district is brought before the voters of the district at the annual meeting following, and no objection is made thereto, and the goods for which it was made are delivered, accepted, and used, and payments are made, and a settlement being made by the giving of the warrant, the contract is sufficiently adopted and ratified by the district, and the holder of the warrant, which calls for interest, may recover the unpaid interest thereon.<sup>1</sup>

**5. Transfer** — *a*. **NEGOTIABILITY.** — It is well settled that school warrants though in form negotiable have not the incidents and qualities of negotiable paper according to the law merchant which prevents an inquiry into its fraudulent character or its consideration when in the hands of innocent holders for value before maturity. The holders of these warrants are in no better situation than the payee, and are subject to all defenses which might have been made against the party to whom they are originally issued.<sup>2</sup> But where by statute the equities to which non-negotiable instruments are subject in the hands of assignees are limited to those equities and defenses existing in favor of the maker at the time of the indorsement, the assignee may recover on warrants issued to a contractor in part payment for a school building in the course of erection, the agent of the district having estimated, in accordance with the terms of the contract, that such was the proportionate value of the work completed, and his estimate having been approved by the trustees before the issuance of the warrant, even though the contractor failed thereafter to complete the erection of the building, thereby causing the district additional expense.<sup>3</sup>

*b*. **ENFORCEMENT BY TRANSFEREE.** — According to the rule in some jurisdictions, a school order or warrant is so far negotiable that it may be transferred by indorsement and delivery, or by delivery only, so as to invest in the indorsee the legal title and thus enable him to maintain in his own name an action thereon.<sup>4</sup> In others, it is considered that orders drawn by a president of a board of school directors on the treasurer of a school district, under the school law, are not negotiable bills or orders, but mere warrants for the payment of money to the persons to whom they are issued, to be disbursed

**1. Haney School Furniture Co. v. School Dist. No. 1,** (Mich. 1903) 94 N. W. Rep. 726.

Where at the regular meeting of the board of directors following the giving of an order issued for and on behalf of the school township, the order is in effect approved and confirmed and the property contracted for is accepted and used by the township, the township is liable thereon even though the warrant subsequently given in pursuance of the order is invalid, as the warrant does not supersede the order. *Johnson v. School Corp.*, 117 Iowa 319.

**2. Negotiability** — *United States*. — *School Dist. Tp. v. Lombard*, 2 Dill. (U. S.) 493, 21 Fed. Cas. No. 12,478.

*California*. — *Shakespear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327.

*Georgia*. — *Germania Bank v. Trapnell*, 118 Ga. 578.

*Illinois*. — *Newell v. School Directors*, 68 Ill. 514.

*Indiana*. — *Davis v. Steuben School Tp.*, 19 Ind. App. 694.

*Iowa*. — *Boardman v. Hayne*, 29 Iowa 339; *National State Bank v. Independent Dist.*, 39 Iowa 490.

*Nebraska*. — *School Dist. No. Two v. Stough*, 4 Neb. 357.

*New Hampshire*. — *Tolman v. Marlborough*, 3 N. H. 57.

*North Dakota*. — *Goose River Bank v. Wil-*

*low Lake School Tp.*, 1 N. Dak. 26; *Capital Bank v. School Dist. No. 53*, 1 N. Dak. 479.

*Oklahoma*. — *Kellogg v. School Dist. No. 10*, 13 Okla. 285.

*Pennsylvania*. — *Livingston v. School Board*, 15 Pa. Super. Ct. 358.

*South Carolina*. — *Loan, etc., Bank v. Shealey*, 62 S. Car. 337.

*Tennessee*. — *Gallatin Bank v. Baber*, 6 Lea (Tenn.) 273.

*Wyoming*. — *School Dist. No. 3 v. Western Tube Co.*, 5 Wyo. 185.

**3. Long Beach School Dist. v. Lutge**, 129 Cal. 409.

**4. Suit by Transferee.** — *Shakespear v. Smith*, 77 Cal. 638; 11 Am. St. Rep. 327; *Germania Bank v. Trapnell*, 118 Ga. 578; *Newell v. School Directors*, 68 Ill. 514; *Johnson v. School Corp.*, 117 Iowa 319.

**The Texas Act of August 7, 1876**, which was intended to secure to teachers rights growing out of services rendered by them, inures also to the benefit of persons to whom such claims have been assigned. *Caldwell County v. Harbert*, 68 Tex. 321.

**Evidence of Title.** — The possession of a warrant payable to the order of another than the plaintiff is not sufficient evidence of title in the latter in an action to enforce the collection of the warrant, but the ownership must be proven. *School Dist. v. Reeve*, 56 Ark. 68.

by the treasurer under authority of law. They therefore do not authorize a subsequent holder to maintain suit in his own name, as on a promissory note, bill, or order. They do not possess the ordinary properties of a mere contract, but are a statutory means of drawing the public money out of the hands of the legal custodian of the funds of the district.<sup>1</sup>

**6. Interest.** — The rate of interest which school orders will draw is regulated by statutes in the different states.<sup>2</sup> Interest from the time of demand may be allowed in granting mandamus for the payment of a school order when it is such a settled demand as would sustain a recovery of interest at law.<sup>3</sup>

Under the Tennessee Statute, the order does not bear interest as against the district.<sup>4</sup>

**7. Payment** — *a. IN GENERAL.* — It is the duty of the treasurer of a school district to pay from funds in his hands as treasurer, orders properly drawn.<sup>5</sup> If there is an insufficient amount of funds he must indorse that fact on the warrant.<sup>6</sup>

**To Whom Made.** — The treasurer has no authority to make payments of district moneys, even to the assessor, except on the warrant prescribed by the statute; and no payment not authorized by warrant is a valid official payment, such as to preclude the district from holding him responsible for moneys lawfully in his hands. Payments made otherwise than in the prescribed mode are made in his own wrong, and cannot diminish the fund for which he is responsible.<sup>7</sup>

**b. PRESENTATION AND FILING.** — It is no defense to an action on an order that the order was never presented to the board for payment.<sup>8</sup>

**Filing.** — Where the statute requires that the orders shall be filed as pre-

**1. Power to Sue Denied.** — *Northumberland First Nat. Bank v. Rush School Dist.*, 81\* Pa. St. 307; *Central School Supply House v. School Board*, 9 Pa. Super. Ct. 110. See also *Livingston v. School Board*, 15 Pa. Super. Ct. 358.

**Rights of Equitable Plaintiff.** — A warrant having been assigned, as alleged by use plaintiff, in a suit brought, not on the warrant, but on the contract back of it, the equitable plaintiff is entitled to have left to the jury the question whether the legal plaintiff has been paid in full, there being no defense on the merits, and the jury should have been instructed that no formal assignment was necessary because equity presumed that to be done which ought to have been done. *Central School Supply House v. School Board*, 9 Pa. Super. Ct. 110.

Under the Michigan statute, a warrant or school order drawn by the director of the school district on the township treasurer to pay to the assessor, who is the disbursing officer of the district, a specified sum, the duties of these officers being defined by statute, is not a negotiable instrument, but the paying and receiving of the money are official acts performed by these public officers in the execution of public trusts, and the treasurer is under no obligation to pay the money to any other person than the assessor named in the warrant, even though the latter indorses the warrant as payable to bearer. *Fox v. Shipman*, 19 Mich. 218; *Burns v. Bender*, 36 Mich. 195; *School Dist. No. 9 v. School Dist. No. 5*, 40 Mich. 551.

So the assignee of school-district orders due from one district to another cannot enforce their collection by mandamus, but must proceed through his assignor. *People v. Board of Education*, 41 Mich. 547.

**2. Rate of Interest.** — See the various local codes and statutes in the United States.

**Orders Exceeding Legal Rate of Interest.** —

Where the rate of interest is limited to six per cent. and orders are issued bearing ten per cent., and payments are made on them and the balance due is renewed at six per cent., the sum due is to be found by computing the original principal sum at six per cent. and subtracting all payments made. *Austin v. District Tp.*, 51 Iowa 102; *Phelps v. District Tp.*, 90 Iowa 53.

**3.** *Martin v. Tripp*, 51 Mich. 184.

**4.** *Gallatin Bank v. Baber*, 6 Lea (Tenn.) 273.

**5. Duty to Pay.** — *Pierce v. Edington*, 38 Ark. 150; *Leonard v. State*, (Neb. 1903) 93 N. W. Rep. 988.

In Michigan the assessor of a school district is the lawful treasurer and depository of school-district funds, and all moneys must pass through his hands and be paid out by him on proper orders. A town treasurer can pay school moneys only to the school-district assessor, and then only on the warrant of the proper district officers. *School Dist. No. 9 v. School Dist. No. 5*, 40 Mich. 551.

**6.** *Pierce v. Edington*, 38 Ark. 150.

**Mandamus to Compel Levy.** — *Canby v. Board of Education*, 19 W. Va. 93.

**7. Proper Payee.** — *Burns v. Bender*, 36 Mich. 195.

Money can be drawn from the treasury of a school district only by orders on the treasurer signed by the director and countersigned by the moderator. *State v. Bloom*, 19 Neb. 562.

**8. Presentation.** — *Johnson v. School Corp.*, 117 Iowa 319.

A statute providing for the investigation of outstanding certificates and their payment by the special levy provided for that purpose, and that all such claims as are not presented and acknowledged on in pursuance of the statute



sented, the mere filing of an order which has been forged, in the office of the county superintendent, does not constitute a guaranty of the genuineness of the order and that it will be paid in due course of time, but the filing mark simply indicates that the paper was filed in the office at the time named, and does not create any additional liability in regard to the order.<sup>1</sup>

**c. FUND FROM WHICH PAYABLE.** — In case of a warrant drawn on the funds of one school township in excess of the funds in the hands of the treasurer for such township, he cannot pay the same and be allowed a credit for the excess out of the funds belonging to any other township. To allow this to be done would be taking the money of one township and applying it without authority to the benefit of another.<sup>2</sup>

**"Fund Not Otherwise Appropriated."** — Where the orders are drawn on the town treasurer for debts incurred for school purposes, and made payable "out of any moneys in the school fund not otherwise appropriated," such orders are not payable out of a special fund, and the presumption is that the school officers have performed their duty in raising money for the support of the schools.<sup>3</sup>

**Payment from Funds of Subsequent Year.** — Unless prohibited by law, a warrant regularly and legally issued and approved may be paid out of the funds of a year subsequent to that in which the warrant was issued, if the fund apportioned to the district issuing the warrant was deficient in the preceding year.<sup>4</sup>

**Funds for Colored Schools.** — The *Missouri* school law neither in terms nor by necessary intendment requires that the tax provided for the support of colored schools shall be kept distinct from the funds of the district, but the warrants for the payment of teachers of white and colored schools in the same district are to be drawn upon the teachers' funds of such district.<sup>5</sup>

**d. ORDER OF PAYMENT.** — The holder of a school order who has reduced his claim to judgment is not entitled to be preferred to other holders of similar orders whose claims have not been reduced to judgment, in the collection of his claim out of the general fund raised by the district, but he is required to take such fund *pro rata* with the other creditors. Such holder may, however, by mandamus compel the levy of the special taxes for the payment of his judgment, if the district does not levy a tax to the maximum authorized.<sup>6</sup>

**e. EXTENSION OF TIME OF PAYMENT.** — Where the order fixes no date

shall be barred from all benefit or advantage thereunder, merely bars claims not so presented from the benefits provided by the statute and does not affect the validity of claims not so presented. So a valid claim which was not presented under the statute by reason of having been mislaid is nevertheless enforceable. *Douglas v. Downing*, (Miss. 1891) 9 So. Rep. 297.

**Time for Presentment.** — The provisions contained in Mansf. Dig. Ark., § 6255, that school warrants shall be void unless presented to the treasurer within sixty days, has been repealed by Acts 1885, p. 107. *School Dist. v. Reeve*, 56 Ark. 68.

**1. Filing.** — *Fresno Nat. Bank v. Hawkins*, 93 Cal. 551, 27 Am. St. Rep. 221.

**2. Funds Liable.** — *State v. Cook*, 72 Mo. 496. See also *Saunders v. State*, 1 Ohio Cir. Dec. 596.

By the *Tennessee Statutes*, all claims except those created in 1873 may be considered as falling within the Acts of July 5, 1870, and should be paid by the county trustee out of the school fund before it is prorated among the districts. The orders of 1873 may be paid out of the funds of the district in which the ser-

vices were rendered. *Gallatin Bank v. Baber*, 6 Lea (Tenn.) 273.

**3. Brown v. School Directors**, 77 Wis. 27.

**4. Payment from Funds of Subsequent Year.** — *Culberson v. Gilmer Bank*, 20 Tex. Civ. App. 565.

Under *Tex. Rev. Stat., Art. 3959*, prohibiting the trustees of districts in making contracts with teachers from creating a deficiency debt against the district, a warrant for teacher's salary though regularly and legally issued does not constitute a valid demand against the funds apportioned for the support of the schools for a subsequent year. *Collier v. Peacock*, 93 Tex. 255.

**Proof of Excess of Funds.** — Under the provisions of the *Mississippi* constitution and statutes, in order that the one holding a county warrant may recover thereon in a year subsequent to that in which the warrant was issued, he must show that there is an excess of funds in the treasury over what is necessary to meet the expenses of the latter year. *Foote v. Brown*, 60 Miss. 155.

**5. Colored Schools.** — *State v. Thompson*, 64 Mo. 26.

**6. Priority.** — *Chase v. Morrison*, 40 Iowa 620.

for its payment, but is merely made payable out of the moneys belonging to the fund on which it is drawn, it is competent for the payee to stipulate that the time for payment shall be extended for a specified period, and the fact that the stipulation is not signed by the officers of the district does not render it invalid.<sup>1</sup>

*f. WHAT CONSTITUTES PAYMENT.* — Where school-township officers issue a school-township warrant in payment of a contract for furniture, and on the next day, and before any transfer of said warrant, issue school-township bonds for the amount of such warrant to the payee named in such warrant, who accepts and retains the same, the receipt and acceptance of such bonds constitutes a payment or an accord and satisfaction of such school warrant.<sup>2</sup>

*g. INJUNCTION BY TAXPAYER.* — The payment by the county treasurer of a school warrant issued by a board of directors in payment of services in repairing the school house, rendered by themselves to the district, may be enjoined at the suit of a citizen and taxpayer, though the amount involved is trivial and no one else could be procured to render the services, where contracts of that character are expressly forbidden by statute.<sup>3</sup>

*h. MANDAMUS TO COMPEL PAYMENT.* — As a general rule mandamus will lie to compel the payment of a warrant properly drawn.<sup>4</sup>

**8. Action on Warrant** — *a. IN GENERAL.* — The remedy by mandamus to compel the payment of an order properly drawn on the treasurer of a school district is not exclusive, but the holder may maintain an action thereon against the school district.<sup>5</sup>

**Effect of Reorganization.** — Where after the warrant has been given the districts composing the townships are reorganized into independent districts, judgment may be rendered thereon against the several independent districts composing the former township, and the court may apportion the amount of the judgment between them.<sup>6</sup> But an action cannot be maintained solely against the independent district composed of the same territory, which was made by the sub-district where the services are rendered for which the warrant was given. In such a case each of the independent districts embracing the territory of the original township is liable for the debts of the township in proportion to the value of the property of the district to which it succeeded, and all may be united as defendants.<sup>7</sup>

*b. LIABILITY OF OFFICERS.* — Where the directors of the township sign an order individually, the transactions being on behalf of the township, and their intention being to bind the township, they are not liable individually, but the order so executed is the obligation of the township.<sup>8</sup>

**1. Extension of Time.** — *Meyer v. School Dist.* No. 31, 4 S. Dak. 420.

**2. Payment.** — *Green v. Hughitt School Tp.*, 5 S. Dak. 452. See generally the title PAYMENT, vol. 22, p. 513.

**3. Injunction.** — *Miller v. Sullivan*, 32 Wash. 115.

A taxpayer may maintain an action to restrain the payment of an illegal warrant of the district without making the holder of the warrant a party to such action. *Kellogg v. School Dist.* No. 10, 13 Okla. 285.

**4.** See the title MANDAMUS, vol. 19, p. 790.

**5. Actions on Warrants.** — *School Dist. v. Reeve*, 56 Ark. 68; *Cross v. District Tp.*, 14 Iowa 28.

But where the township system of school government exists, an action on an order drawn by the town board of school directors upon the town treasurer, payment of which has been refused for any reason, cannot be maintained

against the town. *Miller v. Jacobs*, 76 Wis. 122.

**6. Where District Is Reorganized.** — *Independent School Dist. v. District Ct.*, 48 Iowa 182.

**7.** *Knoxville Nat. Bank v. Independent Dist.*, 40 Iowa 612.

**8. Individual Liability.** — *Germania Bank v. Trapnell*, 118 Ga. 578; *Hanna v. Wright*, 116 Iowa 275; *Johnson v. School Corp.*, 117 Iowa 319; *Bailey v. Tompkins*, 127 Mich. 74. See also the title PUBLIC OFFICERS, vol. 23, p. 380.

**Liability as Guarantors.** — See *Germania Bank v. Trapnell*, 118 Ga. 578; *Bailey v. Tompkins*, 127 Mich. 74.

**Benefits Accepted by Township.** — Where the school directors signing the order as individuals acted for the township and the township accepted the benefits of the contract, in the absence of fraud, it should be held liable on the contract even though the contract was contrary

**Upon Failure to Pay.** — If there are funds in the hands of the proper officer applicable to the payment of the order, and he fails or refuses to pay the same to the payee on demand, it is the right of the payee to proceed against the officer and his sureties by notice and motion for the recovery of the amount of said order. And it is the duty of the payee in such case to so proceed after the delivery of the order to him, unless the officer and his sureties are notoriously insolvent and the legal proceeding authorized against them would be fruitless.<sup>1</sup>

**For Application of Funds.** — Where the collector pays out the school moneys on the orders drawn in compliance with the statutory requirements, he is in no wise responsible for the application which the trustees have made of the money.<sup>2</sup>

**Defenses.** — Directors of schools in drawing orders on the treasurer of the township, for the payment of moneys, stand on a very different footing from private individuals; they are the agents constituted by law for the proper disbursement of the funds belonging to the inhabitants of the school districts; and therefore, when sued upon orders issued by them unlawfully, they are not deprived of presenting a successful defense by any rule of law in reference to the execution and putting into circulation of negotiable paper by individuals or private corporations.<sup>3</sup>

**c. TENDER OF RESCISSION.** — Where the certificate on which the action is predicated originated in an unlawful and corrupt conspiracy to defraud the township, it is not necessary, in order to defeat recovery thereon, that the township should have offered to restore the supplies for which the certificate was given, nor does its action in failing to offer to restore the property and rescind the contract render it liable for the actual value of the property received and retained.<sup>4</sup>

**d. ESTOPPEL.** — Where the board issues a warrant in payment of certain services before the services have been performed and consents to the transfer thereof by the payee, it is estopped to insist that the failure of the payee to complete the work for which the warrant was given deprives the assignee of his right to recover on the warrant.<sup>5</sup> But where an order or certificate of indebtedness is issued in the name of the township, without any consideration whatever therefor, such order or certificate is invalid and void, and cannot be enforced against such township. If the holder of such order or certificate forbear to sue the township thereon on the agreement of the trustee, or his successor in office, to pay the same at a future date, or as soon as it has the necessary funds on hand, such agreement will not bind the township, nor estop it from pleading the want of consideration as a sufficient defense to any suit against it upon such order or certificate.<sup>6</sup>

**The Representations of the District Officers** as to the legality of the claim for which a warrant is issued do not estop the district.<sup>7</sup>

to the public policy and though ratification or adoption of the contract by the board in the regular session is of no effect. *Johnson v. School Corp.*, 117 Iowa 319, *distinguishing Boardman v. Hayne*, 29 Iowa 339; *Mills v. Collins*, 67 Iowa 164; *Western Pub. House v. District Tp.*, 84 Iowa 101. And see *supra*, this section, 4. *e. Ratification.*

**1. Liability of Disbursing Officers.** — *Canby v. Board of Education*, 19 W. Va. 93.

**Successive Officers.** — Where a warrant has been presented by the holder to each trustee for several successive years and payment thereon has been erroneously refused, the money being appropriated for other school purposes, the holder is not obliged to look to the personal liability of the first trustee who received sufficient

funds to pay the order afterwards presented, but may abandon the right acquired by the previous presentation and look to the liability of the last trustee to whom presentation was made. Under these circumstances no interest should be allowed either way. *Gallatin Bank v. Baber*, 6 Lea (Tenn.) 273.

**2.** *Zimmerman v. Mathe*, 49 N. J. L. 45.

**3. Defenses.** — *School Directors v. Greenville First Nat. Bank*, 3 Ill. App. 349.

**4. Rescission.** — *Kittinger v. Monroe School Tp.*, 3 Ind. App. 411; *Boyd v. Mill Creek School Tp.*, 124 Ind. 193.

**5. Estoppel.** — *Meyer v. School Dist. No. 31*, 4 S. Dak. 420.

**6.** *Axt v. Jackson School Tp.*, 90 Ind. 101.

**7.** *Goose River Bank v. Willow Lake School*



*c. DEFENSES* — (1) *In General* — *Laches of Payee*. — If the money in the hands of the sheriff applicable to the payment of the order is lost by reason of the insolvency of the custodian thereof and his sureties, after the order is delivered to the payee, and the payee is in default in failing to exercise reasonable diligence in the premises, the loss must be borne by him and not by the taxpayers of the school district.<sup>1</sup>

*Misconduct of Payee*. — The exaction of extra compensation by the teacher from the parents of children is a good ground of complaint to the directors, but does not constitute a defense to the payment of the warrant drawn by them.<sup>2</sup>

*Misconduct of Officer*. — The fact that a county treasurer, in a settlement with one of the sureties on his general bond, has misappropriated school funds and paid them to him, can furnish no defense in a suit against the county to enforce payment of school claims audited, allowed, and required to be paid by statute, even though such surety is one of the several plaintiffs in the suit.<sup>3</sup>

*Ultra Vires*. — In an action to enforce the payment of warrants which were issued without the knowledge or consent of the district, and which were in excess of the maximum allowed by law to be levied and collected in any one year, and created a present liability which it was beyond the power of the school district or school board to incur, the school district may set up its lack of power under the law by which it is created to issue such warrants.<sup>4</sup>

(2) *Limitation of Action*. — The statute of limitations runs against school warrants,<sup>5</sup> and in an action to recover on a school order the statute of limitations may be relied on either by the school commissioners or the trustees, subject to be avoided by a new promise as in other cases.<sup>6</sup> The action is ordinarily barred in five years after maturity.<sup>7</sup> The statute does not run against a school claim during the period of its recognition by the county as a valid claim, but only after its disallowance.<sup>8</sup>

*f. EVIDENCE* — *Certificate of Trustee*. — The certificate given by a township trustee acknowledging the receipt of certain supplies and certifying the indebtedness of the township therefor, is properly admitted as evidence.<sup>9</sup>

*Tp.*, 1 N. Dak. 26. See also *Tolman v. Marlborough*, 3 N. H. 57.

1. *Laches*. — *Canby v. Board of Education*, 19 W. Va. 93.

2. *Misconduct*. — *Miahle v. Fournet*, 13 La. Ann. 607.

3. *Caldwell County v. Harbert*, 68 Tex. 321.

4. *Ultra Vires*. — *Farmers', etc., Nat. Bank v. School Dist. No. 53*, 6 Dak. 255.

5. *Limitation of Action*. — *School Dist. v. Cromer*, 52 Ark. 454; *Crudup v. Ramsey*, 54 Ark. 168.

6. *Gallatin Bank v. Baber*, 6 Lea (Tenn.) 273.

7. *Buffalo School Furniture Co. v. School Dist.*, 7 Kan. App. 796.

*Under South Dakota Comp. Laws*, § 5535, providing that part 2 of the code, which includes chapter 6, the statute of limitations, shall be applicable to a proceeding under the chapter which relates to mandamus, etc., a proceeding in mandamus to compel a school treasurer to accept in payment of school taxes an order on such treasurer, not under seal, and payable at a date several years after its issuance, must be commenced within six years of the maturity of the order, under Comp. Laws, § 4850, limiting action on contract to six years, notwithstanding Laws S. Dak. 1891, c. 14, § 80, making school warrants receivable for taxes, which was passed after the former act, does not ex-

cept warrants barred by limitation. *Coler v. Sterling*, 15 S. Dak. 415.

*Effect of Extension of Time*. — Where, by stipulation, time for the payment of an order is extended for a certain period, the statute of limitations does not commence to run until the expiration of the period, although the interest thereon is not paid annually as specified in the agreement. *Meyer v. School Dist. No. 31*, 4 S. Dak. 420.

8. *When Statute Commences*. — *Caldwell County v. Harbert*, 68 Tex. 321.

9. *Evidence*. — *Jackson School Tp. v. Hadley*, 59 Ind. 534.

Where the statute requires that the board of county commissioners, acting as a board of audit, shall audit all warrants drawn by the trustees and investigate the propriety thereof, and state on the face of each warrant that it admitted and approved the amount for which allowed, the stamp of the board is evidence that the validity of the warrant has been determined. *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919.

*Warrant*. — Where it appears that the contract for which a warrant was issued was lawfully made by the school district, the warrant is competent evidence of the debt, though void as a warrant for want of proof that it was issued in accordance with statutory requirements. *Board of Education v. Foley*, 90 Ill. App. 494.

**Register of Orders.** — The register kept by the secretary of the district township, in accordance with the statute, showing the number of each order, and the date, name of the person in whose favor drawn, the fund on which drawn, the purpose for which drawn, and the amount, is admissible as tending to show the extent of the indebtedness of the township.<sup>1</sup>

**Tax List.** — The tax list of the county is admissible in evidence to show the indebtedness of the school district in an action on a school order, the defense to which is that the district was indebted in excess of the constitutional limitation. In this connection evidence may be introduced to show the value of land assessed, but upon which no valuation has been placed.<sup>2</sup>

**IV. MISCELLANEOUS WARRANTS** — **1. Death Warrant.** — The law relating to death warrants is discussed elsewhere in this work.<sup>3</sup>

**2. Press Warrant.** — In England, a press warrant is a commission from the Crown authorizing the impressment of seafaring men into the royal navy.<sup>4</sup> There, the power to impress seamen has been a matter of dispute, and submitted to with great reluctance; but it is claimed by some authorities to be part of the common law.<sup>5</sup> As this power forms no part of the common law as adopted by the American colonies, being contrary to the spirit and genius of republican institutions, such warrants are unknown here.<sup>6</sup>

**3. Reclamation Warrant.** — A reclamation warrant is a warrant drawn by the trustees of the reclamation district and approved by the board of supervisors of the county against funds in the county treasury, collected by assessments levied upon the reclamation district.<sup>7</sup>

**4. Warrant to Sue and Defend.** — In old English practice, a special warrant from the Crown authorizing a party to appoint an attorney to sue or defend for him.<sup>8</sup> A special authority, given by a party to his attorney, to commence a suit, or to appear and defend a suit in his behalf. These warrants are now disused, though formal entries of them upon the record were long retained in practice.<sup>9</sup>

**5. Dividend or Interest Warrant.** — This is a check drawn by a joint-stock company upon its bankers, directing them to pay a specified sum of money to a shareholder or his order.<sup>10</sup>

**6. Warrant in Bankruptcy.** — Under the Bankruptcy Act of 1898, § 69, the judge, upon satisfactory proof being made that a bankrupt against whom an involuntary petition has been filed has committed an act of bankruptcy, or is neglecting his property, or permitting it to deteriorate, may issue a warrant to the marshal to seize and hold the property until further order of the court. This does not authorize the court to issue a warrant to the marshal to take the property out of the possession of a third person holding it under a claim of right or title.<sup>11</sup> The provision was not intended as a general attachment proceeding, but only as a statutory remedy for the seizure of property fraudulently conveyed by the alleged insolvent debtor. It is not to be considered a summary proceeding against any one except the alleged bankrupt, or against any property except that which is in his own hands or those of his acknowledged agents.<sup>12</sup>

**7. Landlord's Warrant.** — This is a warrant from a landlord to a constable

1. *Register*. — *Wormley v. Dist. Tp.*, 45 Iowa 666; *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919.

2. *Tax List*. — *Wormley v. District Tp.*, 45 Iowa 666.

3. See the title SENTENCE AND PUNISHMENT, vol. 24, p. 328.

4. 1 Bl. Com. 418; 1 Russell on Crimes (9th ed.) 822.

5. *Broadfoot's Case*, 18 How. St. Tr. 1323; 1 Bl. Com. 418.

6. *Cooley's Const. Lim.* (6th ed.) 363.

7. *National Bank v. Greenlaw*, 134 Cal. 673. See also the title DRAINS AND SEWERS, vol. 10, p. 220.

8. *Burrill's L. Dict.* See also the title WARRANTS OF ATTORNEY, *post*.

9. *Burr. Pr.* 39.

10. *Anderson's L. Dict.* See also the title DIVIDENDS, vol. 9, p. 679.

11. *In re Rockwood*, 91 Fed. Rep. 363. See generally the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630.

12. *In re Kelly*, 91 Fed. Rep. 504.

or other person to levy upon the goods and chattels of his tenant, and make public sale of the same, in order to constrain the tenant to pay rent, or to observe some other condition in the contract for occupancy.<sup>1</sup>

8. **Other Miscellaneous Warrants.** — Elsewhere in this work will be found a discussion of possessory warrants,<sup>2</sup> state warrants,<sup>3</sup> municipal warrants,<sup>4</sup> land warrants,<sup>5</sup> tax warrants,<sup>6</sup> warrants of attachment,<sup>7</sup> and distress warrants.<sup>8</sup>

1. Anderson's L. Dict. See also the titles DISTRESS, vol. 9, p. 617; LANDLORD AND TENANT, vol. 18, p. 149; LEASES, vol. 18, p. 593, and the title DISTRESS, 7 ENCYC. OF PL. AND PR. 20.

2. See the title POSSESSORY WARRANTS, vol. 22, p. 1033.

3. See the title STATES, vol. 26, p. 472 *et seq.*

4. See the title MUNICIPAL SECURITIES, vol. 21, p. 13.

5. See the title STATE AND PUBLIC LANDS, vol. 26, p. 197.

6. See the title TAXATION, vol. 27, p. 567.

7. See the title ATTACHMENT, vol. 3, p. 181, and the title ATTACHMENT, 3 ENCYC. OF PL. AND PR. 1.

8. See the title DISTRESS, vol. 9, p. 617, and the title DISTRESS, 7 ENCYC. OF PL. AND PR. 20.



# WARRANTS OF ATTORNEY.

BY BASIL JONES.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *JUDGMENTS*, vol. 11, p. 796.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the titles *JUDGMENT NOTES*, vol. 17, p. 752; *JUDGMENTS AND DECREES*, vol. 17, p. 756.

**I. DEFINITIONS — 1. Warrant of Attorney.** — A warrant of attorney is an instrument in writing, addressed to one or more attorneys therein named, authorizing them generally to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.<sup>1</sup>

**Judgment Notes.** — Where such a warrant, or any other power of attorney to confess judgment, is contained in a promissory note, the note is termed a judgment note.<sup>2</sup>

**2. Warrant to Sue and Defend.** — A warrant to sue and defend is an authority given by the party to his attorney to commence a suit or to appear and defend a suit in his behalf.<sup>3</sup>

**II. POWER TO GIVE AND RECEIVE — 1. In General.** — The competency of the parties to give or receive the warrant of attorney to confess judgment is governed as a general rule by the same principles which obtain in regard to principals and agents generally. These questions have been discussed elsewhere in this work.<sup>4</sup>

**1. Warrant of Attorney Defined.** — *Bouv. L. Dict.* See also *Treat v. Tolman*, (C. C. A.) 113 Fed. Rep. 892, citing 28 AM. AND ENG. ENCYC. OF LAW (1st ed.) 685; *Evans v. Fearne*, 16 Ala. 689; *Teel v. Yost*, 128 N. Y. 400.

In *England* a warrant of attorney is an authority, addressed to one or more attorneys therein mentioned, authorizing them to appear in either of the courts of Westminster, and to confess a judgment in favor of some particular person in an action of debt, and usually contains a stipulation not to bring any writ of error or to file a bill in equity, so as to delay him. It was resorted to for compromise or to secure to a creditor priority over others. See *Rankin v. Lawrence*, 4 Rich. L. (S. Car.) 267.

**Power of Attorney Distinguished.** — A power of attorney is an instrument by which the authority of attorney in fact or private attorney is set forth. By attorney in fact is meant one who is given authority by his principal to do a particular act not of a legal character. A warrant of attorney is an instrument authorizing an attorney at law to appear in an action on behalf of the maker or to confess judgment against him. *Treat v. Tolman*, (C. C. A.) 113 Fed. Rep. 892. See also the title *POWER OF ATTORNEY*, vol. 22, p. 1084.

**Cognovit Distinguished.** — The warrant of attorney differs from a cognovit in that the former is given before the commencement of any action and is under seal, whereas the latter is

given after the action is brought and is not under seal. See *Bouv. L. Dict.*, and the title *COGNOVIT*, 4 ENCYC. OF PL. AND PR. 560.

**2.** See the title *JUDGMENT NOTES*, vol. 17, p. 752.

**3.** See *Burr. L. Dict.* See also the title *APPEARANCES*, 2 ENCYC. OF PL. AND PR. 675 *et seq.*

**4. Competency of Parties.** — See the title *AGENCY*, vol. 1, pp. 939, 945.

**Authority Given by Statute** to a party to appear without citation and confess judgment also authorizes him to grant a warrant to an attorney to confess judgment for him, and judgment rendered upon such a warrant of attorney is valid. *Parker v. Poole*, 12 Tex. 86.

**Warrant by Public Officer.** — *Gere v. Cayuga County*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 255.

**Warrant from Father to Son.** — *Collins v. Cronin*, 117 Pa. St. 35; *Brown's Appeal*, 86 Pa. St. 524.

**Warrant to State.** — *State v. Love*, 1 Ired. L. (23 N. Car.) 264.

**Power of Prothonotary under Pennsylvania Statute.** — See *Hope v. Everhart*, 70 Pa. St. 231; *Connay v. Halstead*, 73 Pa. St. 354; *Richards v. Richards*, 135 Pa. St. 239; *Whitney v. Hopkins*, 135 Pa. St. 246.

**Power of Attorney to Confess or Accept Confession.** — See the title *ATTORNEY AND CLIENT*, vol. 3, p. 368.

**Transferee of Judgment Note.** — The question of the power of transferees of a note to confess judgment under a warrant of attorney accompanying the note has been discussed elsewhere in this work.<sup>1</sup>

**Agent Representing Adverse Party.** — The rule that an agent cannot bind his principal where he represents interests adverse to the principal, does not prevent an attorney or a creditor from acting as attorney in fact of the debtor to confess judgment upon the debt where the debtor knew that the attorney represented the creditor in the matter.<sup>2</sup> If an attorney authorized by the warrant of attorney executed by the defendant appears and confesses judgment against him, and at the same time, acting as the plaintiff's attorney, files a declaration on which such judgment is confessed, the remedy of the defendant for such irregularity must be sought in the court where the judgment was rendered.<sup>3</sup>

**Statutory Prohibition.** — In some jurisdictions judgment by confession on warrant of attorney is not allowed.<sup>4</sup> Where this is the case the prohibition extends also to powers of that nature given by parties residing out of the state and who are out of the state at the time of the execution.<sup>5</sup>

**2. Married Women.** — At Common Law a married woman had no power to give a warrant of attorney to confess judgment.<sup>6</sup> So she cannot give a warrant to confess judgment for her husband's debts.<sup>7</sup> If husband and wife execute a bond and warrant of attorney to confess judgment, judgment cannot be entered against them jointly, because the warrant of the wife is void; nor against the husband alone, because that is not in pursuance of the warrant.<sup>8</sup>

**Sole Trader.** — Also where a *feme covert*, sole trader, gave a bond and a warrant of attorney to enter up judgment, on which the plaintiff afterwards took out execution, the court set the judgment aside as having been entered up without authority.<sup>9</sup>

**Under Statutes.** — The extent of her powers in this regard, under statutory enactment, must be determined by the provisions of the statutes of the several states regulating the powers of married women. If the contract with regard to which the warrant was given is such as she is capacitated to make and for which she may be sued as if she were sole, then the judgment confessed by her under the warrant is valid.<sup>10</sup> On the other hand, if the contract is such as a married woman is incapacitated to enter into, her confession of judgment upon the contract is a nullity, subject to be vacated. Her capacity to confess judgment depends upon and is coexistent with her capacity to contract.<sup>11</sup>

**1. Transferee.** — See the title JUDGMENT NOTES, vol. 17, p. 752. See also National Exch. Bank v. Wiley, (Neb. 1902) 92 N. W. Rep. 582; Overton v. Tyler, 3 Pa. St. 346; Jenks v. Hendley, 6 Phila. (Pa.) 518, 25 Leg. Int. (Pa.) 52.

**2. Agent of Adverse Party.** — Wassell v. Rear-son, 11 Ark. 705; Rapley v. Price, 11 Ark. 715.

**3. Burton Tp. v. Tuttle,** 30 Ohio St. 62.

**4. Prohibitory Statutes.** — Hamilton v. Schoenberger, 47 Iowa 385; Hay v. Cole, 11 B. Mon. (Ky.) 70; O'Hara v. Lannier, 1 B. Mon. (Ky.) 100; Hudson v. McMahon, (Ky. 1899) 50 S. W. Rep. 259; Ball v. Poor, 81 Ky. 26; Aultman, etc., Co. v. Mead, 109 Ky. 583; Dial v. Farrow, 1 Spears L. (S. Car.) 114; Rankin v. Lawrence, 4 Rich. L. (S. Car.) 267.

**5. Hamilton v. Schoenberger,** 47 Iowa 385; Rankin v. Lawrence, 4 Rich. L. (S. Car.) 267.

**6. Married Women — At Common Law.** — Read v. Jewson, 4 T. R. 362, note; Faithorne v. Lee, 6 M. & S. 73; Stanley v. Stanley, 7 Ch. D. 589; Tanner v. State, 92 Ala. 53; Patton v. Stewart, 19 Ind. 234; Travis v. Willis, 55 Miss. 557; Koechling v. Henkel, 144 Pa. St. 215; Cordray v. Galveston, (Tex. Civ. App. 1894) 26 S. W.

Rep. 245. See also the titles HUSBAND AND WIFE, vol. 15, p. 785; JUDGMENTS AND DECREES, vol. 17, p. 766; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 367.

**7. For Husband's Debts.** — Edwards v. Edwards, 29 La. Ann. 597. And see Real Estate Invest. Co. v. Roop, 132 Pa. St. 496, where it was held that, though the fact of coverture did not appear upon the record, a judgment confessed by a married woman, to secure the repayment of money borrowed by her to aid her husband in his business, was void as to her.

**8. Mendenhall v. Springer,** 3 Harr. (Del.) 87. Compare Shallcross v. Smith, 81 Pa. St. 132, wherein it was held that in such a case the bond was the husband's alone, and judgment as to him should not be stricken off.

**9. Sole Trader.** — Read v. Jewson, 4 T. R. 362, note.

**10. Statutory Provisions.** — Tanner v. State, 92 Ala. 53; Koechling v. Henkel, 144 Pa. St. 215; Cordray v. Galveston, (Tex. Civ. App. 1894) 26 S. W. Rep. 245. See also Singer Mfg. Co. v. Cole, 11 Pa. Co. Ct. 214; Real Estate Invest. Co. v. Roop, 132 Pa. St. 496.

**11. Tanner v. State,** 92 Ala. 53.



Where the judgment against a married woman is invalid in the first instance, it will not become binding by revival, on the principle of estoppel.<sup>1</sup>

**Power to Take.** — A *bona fide* judgment, confessed under a warrant of attorney by the husband to his wife to secure the wife's separate estate, will not be treated as void because of the legal unity of the parties.<sup>2</sup>

**Warrant Given or Received Before Coverture.** — Judgment may be entered up against the husband and wife on a warrant of attorney given by the wife while a *feme sole*.<sup>3</sup> And on a bond and warrant given to a married woman before coverture, judgment may be entered after her marriage in favor of herself and husband.<sup>4</sup>

**Liability of Separate Estate.** — As the separate estate of a married woman which she is restricted from anticipating cannot either directly or indirectly be made the subject of a security, a warrant to confess judgment given to a person entitled to a mortgage debt by a husband and wife is of no effect so far as regards such a separate estate of the wife, and a charging order cannot be obtained upon funds in court constituting the separate estate, after judgment recovered against the husband and wife upon the warrant.<sup>5</sup>

**Antenuptial Debts.** — She may confess judgment for her debts contracted before marriage.<sup>6</sup>

**Effect of Divorce.** — A judgment on a warrant of attorney given by a *feme covert* will be set aside although she had been divorced *a mensa et thoro*.<sup>7</sup>

**3. Infants.** — An infant's warrant of attorney to confess judgment against him is voidable,<sup>8</sup> and the court will not confirm it, even though it appears to have been given by the infant with knowledge of its invalidity and for the purpose of collusion.<sup>9</sup>

**Proof of Infancy.** — To entitle a defendant to relief on the ground of infancy, from a judgment signed on a warrant of attorney, given by him for the price of goods supplied by the plaintiff, the defendant at the time acting as if he were of age, he must clearly prove his infancy. Merely swearing that he is an infant of the age of twenty years, and giving an extract from a register of births, is not sufficient.<sup>10</sup>

**Warrant by Infant and Another.** — Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand against the other parties.<sup>11</sup>

**4. Joint Debtors.** — A judgment cannot be confessed by one of several joint debtors so as to bind the debtors not joining in the confession.<sup>12</sup>

1. Dorrance v. Scott, 3 Whart. (Pa.) 309, 39 Am. Dec. 509.

In Crenshaw v. Julian, 26 S. Car. 283, 4 Am. St. Rep. 719, it was held that a confession of judgment by a married woman, which had been twice revived by default, became valid, an intervening constitution making the doctrine of estoppel apply to a married woman, notwithstanding her coverture.

2. Power of Wife to Take. — Thomas v. Mueller, 106 Ill. 42; Williams's Appeal, 47 Pa. St. 307.

But in Countz v. Markling, 30 Ark. 17, it was held that a judgment by confession, rendered against a husband in favor of the wife, is void.

3. Before Coverture. — Perrier v. Henchey, 1 Alc. & Nap. 185; Higginbottom v. Higginbottom, 8 Dowl. 126, 1 W. W. & H. 407; Hartford v. Mattingly, 2 Chit. 117, 18 E. C. L. 269; Anonymous, Lofft 329. See also Pocock v. Fry, 8 Dowl. 126, 1 W. W. & H. 408.

4. Sheble v. Cummins, 1 Browne (Pa.) 253.

5. Stanley v. Stanley, 7 Ch. D. 589.

6. Travis v. Willis, 55 Miss. 557.

7. Faithorne v. Lee, 6 M. & S. 73.

8. Infants. — Bennett v. Davis, 6 Cow. (N. Y.) 393; Knox v. Flack, 22 Pa. St. 337; Lutes v. Thompson, 5 Pa. Co. Ct. 451. See also the title AGENCY, vol. 1, p. 941.

9. Saunderson v. Marr, 1 H. Bl. 75.

10. Weaver v. Stokes, 4 Dowl. 724.

11. Motteux v. St. Aubin, 2 W. Bl. 1133; Eicke v. Nokes, 4 M. & S. 585, 30 E. C. L. 362.

12. Joint Debtors. — See the title JUDGMENTS AND DECREES, vol. 17, p. 766. See also Chapin v. Thompson, 20 Cal. 681.

In New York one or more joint debtors may confess judgment for the joint debt, and where all the joint debtors do not unite in the confession such judgment is not a bar to an action against all the joint debtors upon the same demand. New York Code Civ. Pro., § 1278; Kantrowitz v. Kulla, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 321; Harbeck v. Pupin, 55 Hun (N. Y.) 335.

In Pennsylvania, on a joint warrant of attorney, the prothonotary may enter judgment against the surviving obligors. Croasdell v. Tallant, 83 Pa. St. 193. But if in such case judgment is entered against all the obligors,

5. **Partnership.** — The power of one member of a partnership to bind the partnership by a confession of judgment has been discussed elsewhere in this work.<sup>1</sup>

6. **Corporations.** — As an incident of its power to sue and be sued a corporation may give a warrant of attorney to confess judgment.<sup>2</sup> Such warrants may also be given by the officers or agents of the corporation when duly authorized so to do.<sup>3</sup> Upon a confession of judgment by a corporation, the court in which the action is pending must, of necessity, judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question, and is not open to collateral attack.<sup>4</sup>

**Presumption of Authority.** — Where a promissory note and warrant of attorney are executed in the name and under the seal of the corporation, it will be presumed that such instruments were executed by the authority of the corporation.<sup>5</sup>

**Warrant Given Before Dissolution.** — A warrant given to a bank for the entry of judgment may be used by the trustees authorized by statute to close the affairs of the bank, after its charter has expired.<sup>6</sup>

**III. FORMAL REQUISITES** — 1. **Strict Compliance with Statute.** — On the ground of public policy the courts are not disposed to extend the power of confessing judgment under and by virtue of warrants of attorney beyond the provisions of the statute and the decisions in the adjudicated cases;<sup>7</sup> and in order that the warrant and the proceedings thereunder may be valid, statutory provisions must be strictly complied with.<sup>8</sup> On compliance with the statute there can be no further exactions.<sup>9</sup>

**When Statute Applies.** — The statutes regulating these judgments do not apply where an action is regularly commenced and in which process is issued and served.<sup>10</sup>

**Warrants for Extraterritorial Use.** — A statutory provision as to the form of warrants is a mere regulation of the practice and does not prohibit the making, in one state, of such warrants of attorney for use in other states in the form that is legal in their courts.<sup>11</sup>

**Effect of Change in Statute.** — Where the statute in force regulating the manner

it is irregular and will be set aside. *Lewis v. Ash*, 2 Miles (Pa.) 110.

1. See the title **PARTNERSHIP**, vol. 22, p. 155. See also *Brutton v. Burton*, 1 Chit. 707, 18 E. C. L. 209; *Uhlendorf v. Kaufman*, 41 Ill. App. 373; *Browne v. Cassem*, 74 Ill. App. 306.

A judgment recovered upon a warrant of attorney given to an individual member of a partnership firm will, if given to secure a debt due to the firm, belong to the firm; and the person to whom such warrant is given will hold the judgment as trustee for the copartnership. *Chapin v. Clemitson*, 1 Barb. (N. Y.) 311.

2. **Warrant by Corporation.** — See the title **CORPORATIONS**, vol. 7, pp. 784, 854. See the title **JUDGMENTS AND DECREES**, vol. 17, p. 766.

3. *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45; *Adams v. Cross Wood Printing Co.*, 27 Ill. App. 313; *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308, 19 Am. St. Rep. 533; *Nimocks v. Cape Fear Shingle Co.*, 110 N. Car. 20.

In *Oregon* confession of judgment must be made by the person who at the time sustains

such a relation to the corporation as would authorize the service of a summons upon him. *Miller v. Bank of British Columbia*, 2 Oregon 291; *Miller v. Oregon City Paper Mfg. Co.*, 3 Oregon 24.

4. *White v. Crow*, 17 Fed. Rep. 98.

5. *McDonald v. Chisholm*, 131 Ill. 273.

6. *Martin v. Belmont Bank*, 13 Ohio 250.

7. **Compliance with Statute Essential.** — *Little v. Dyer*, 138 Ill. 272.

8. *Bonnell v. Weaver*, 5 Biss. (U. S.) 22, 3 Fed. Cas. No. 1,630; *Schuster v. Rader*, 13 Colo. 335; *Burns v. Nash*, 23 Ill. App. 552; *McPheeters v. Campbell*, 5 Ind. 107; *Edgar v. Greer*, 10 Iowa 279; *Eakin v. Smith*, 21 N. J. L. 97; *Allen v. Smillie*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 156; *Liberty Grotto v. Meade*, 11 Pa. Co. Ct. 340; *Bacon v. Raybould*, 4 Utah 357.

9. *Johnston v. Glasgow*, 5 Ark. 311; *Marbury v. Pace*, 29 La. Ann. 557; *Jewett v. Fink*, 47 Wis. 446.

10. *Crouse v. Derbyshire*, 10 Mich. 479, 82 Am. Dec. 51; *Hoguet v. Wallace*, 28 N. J. L. 524; *Chestnut v. Pollard*, 77 Tex. 86.

11. *Hendrickson v. Fries*, 45 N. J. L. 555.

in which the power under the warrant may be enforced has been changed before the entry of judgment under the warrant, the mode of entering judgment thereunder must be in accordance with the subsequent statute, as such enactment relates to a remedy, and the manner in which this remedy may be pursued is subject to the will of the legislature, in so far as nothing is done to impair the obligation of contracts.<sup>1</sup>

**Presumptions.** — The warrant of attorney having been in general use at common law,<sup>2</sup> the fact that the statute has regulated the mode of proceeding does not convert the proceeding thereunder into one of such a special statutory character that the same presumptions do not obtain as in the case of ordinary judgments of superior courts of general jurisdiction.<sup>3</sup>

**2. Explicit Grant of Authority.** — It is an established principle that the authority given by warrant of attorney to confess a judgment against the donor without process must be clear and explicit.<sup>4</sup> So a writing which merely states that the signor proposes to go on a person's security for costs and fine in case of his conviction, does not sufficiently confer authority for that purpose.<sup>5</sup> Also a warrant of attorney attached to several of a series of notes granting authority to confess judgment upon such notes and upon any other written evidence of debt already made or to be made, does not authorize the confession of judgment upon the notes to which the warrant is not attached, even though they are of even date with the warrant.<sup>6</sup>

**Verbal Authority.** — A mere verbal authority to enter judgment does not constitute the power of attorney to confess judgment.<sup>7</sup>

**3. Designation of Person Authorized.** — The warrant should contain the designation of a person by whom it is to be exercised, either by name or description.<sup>8</sup>

**Confession by Other than Specified Attorney.** — A warrant authorizing confession by a specified attorney or any other attorney, authorizes a confession by another attorney in addition to the one specified.<sup>9</sup> So where authority is given in the warrant to a certain attorney "or any attorney of any court of record," to confess judgment, the power to confess is not limited to the specified attorney, and a foreign judgment rendered on such warrant will be presumed as rendered by the consent of the donor, though the attorney by whom it is confessed is not the one specified in the warrant.<sup>10</sup>

1. *McPheeters v. Campbell*, 5 Ind. 107; *Allen v. Parker*, 11 Ind. 504.

2. *Valley of Virginia Ins. Co. v. Barley*, 16 Gratt. (Va.) 363.

3. *Bush v. Hanson*, 70 Ill. 483.

4. **Explicit Grant of Power.** — *Chase v. Dana*, 44 Ill. 262; *Tucker v. Gill*, 61 Ill. 236; *Frye v. Jones*, 78 Ill. 632; *Keith v. Kellogg*, 97 Ill. 147; *Campbell v. Goddard*, 117 Ill. 251; *Gardner v. Bunn*, 132 Ill. 403; *Whitney v. Bohlen*, 157 Ill. 571; *Graves v. Whitney*, 49 Ill. App. 435; *Manufacturers, etc., Bank v. St. John*, 5 Hill (N. Y.) 497; *Spence v. Emerine*, 46 Ohio St. 433; *Grubbs v. Leon*, 62 Tex. 426; *Sloane v. Anderson*, 57 Wis. 123; *Pirie v. Stern*, 97 Wis. 150. See also *infra*, this title, *Exercise of Power* — *Warrant Strictly Pursued*.

The authority of one who confesses judgment for another must always be proved, otherwise the judgment is void. *Conery v. Rotchford*, 34 La. Ann. 520; *Sherrard v. Nevius*, 2 Ind. 241, 52 Am. Dec. 508; *Jarrett v. Andrews*, 19 Ind. 403.

A deed of conveyance to the grantee, his heirs and assigns, with full covenants of warranty and seizin, conveying lands to him to be held in trust for the use and benefit of the grantor, with power to control and convey and

manage for the use of the grantor and for the payment of his debts, accompanied by a power of attorney authorizing such grantee and attorney to collect the debts of the grantor, gives such trustee and attorney no power to confess judgment. *Hoppock v. Cray*, (N. J. 1891) 21 Atl. Rep. 624.

But a warrant of attorney to "enter" judgment authorizes the attorney to confess judgment, especially where it was clearly intended to clothe him with that power. *Mason v. Smith*, 8 Ind. 73.

Also a warrant of attorney to appear in an action and confess judgment therein is a sufficient authority to agree to an amicable action. *Van Beil v. Shive*, 17 Phila. (Pa.) 104, 41 Leg. Int. (Pa.) 154.

5. *Giddens v. Crenshaw County*, 74 Ala. 471.

6. *Frye v. Jones*, 78 Ill. 627.

7. *Siskiyou County Bank v. Hoyt*, 132 Cal. 81.

8. **Person Authorized.** — *Patton v. Stewart*, 19 Ind. 233; *Rabe v. Heslip*, 4 Pa. St. 139.

9. *Patton v. Stewart*, 19 Ind. 233.

10. *Van Norman v. Gordon*, 172 Mass. 576.

Where the warrant authorized S., or any other attorney, to confess judgment, it was held that a confession by both S. & B., attorneys, was good. *Patton v. Stewart*, 19 Ind. 233.



**Indefinite Grant.** — It may also be given to "any attorney" of some court or in a particular state.<sup>1</sup>

**4 Certainty of Sum.** — It is essential to the validity of the warrant that it should be for a certain and definite sum or a sum which is susceptible of computation.<sup>2</sup> So a warrant which authorizes the complainant to confess judgment from time to time thereunder for rent which may then be due by the terms of the lease is sufficiently definite where the amount of the rent is fixed by the lease and susceptible of exact computation.<sup>3</sup> And where a warrant of attorney contains two separate and distinct provisions, one of them being sufficiently definite and certain to authorize a confession of judgment thereunder, judgment confessed as to such portion of the warrant is valid and enforceable, even though no judgment can be had as to the other provision by reason of its uncertainty.<sup>4</sup>

**Ratification.** — A power to confess judgment which is invalid by reason of lack of definiteness and certainty in the instrument may be ratified by the person signing the warrant, and such ratification will estop him from setting up its invalidity. So where the signor of a warrant of attorney to confess judgment obtains a postponement of the sale of his property on his promise to pay a part of the judgment at a specified time and the residue at another time, this act constitutes a ratification of the power of attorney to confess judgment and renders it valid though it was defective by reason of indefiniteness and uncertainty.<sup>5</sup>

**5. Consent of Creditor** — *a.* **NECESSITY FOR.** — It is essential in order that the judgment entered under a warrant authorizing a confession shall be valid, that the warrant was given and judgment confessed with the consent, either express or implied, of the creditor, or that it was subsequently ratified by him; otherwise it is void.<sup>6</sup>

*b.* **PRESUMPTION OF ASSENT.** — Where the creditor subsequently gives his positive consent to the act of the debtor it will be presumed that he

A warrant of attorney authorizing "any attorney of any court of record" to confess judgment can be executed by an attorney in partnership with the attorney signing the declaration for the holder of the note. *Blanck v. Medley*, 63 Ill. App. 211.

**1. Person Not Specified.** — *Cooper v. Shaver*, 101 Pa. St. 549.

It is not necessary that the warrant of attorney should be directed to any attorney in particular. It is sufficient if it is directed only generally to any citizen of New Jersey. *Burroughs v. Condit*, 6 N. J. L. 300.

A provision in a lease authorizing any attorney to appear for the lessee and confess judgment in ejectment is a sufficient warrant of attorney. *Betz v. Valer*, 15 Phila. (Pa.) 324, 39 Leg. Int. (Pa.) 190.

"Any attorney" will not include a prothonotary or clerk. *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 66 Md. 511. See also *infra*, this title, *Exercise of Power* — *Place of Exercise*.

**2. Sum Certain.** — *Little v. Dyer*, 138 Ill. 272; *Fortune v. Bartolomei*, 164 Ill. 51; *Scott v. Mantonya*, 164 Ill. 473; *Connay v. Halstead*, 73 Pa. St. 354; *Bennett v. Haley*, 142 Pa. St. 253; *Cobb v. Yetter*, 4 Pa. Co. Ct. 293. See generally the title JUDGMENTS, 11 ENCYC. OF PL. AND PR. 981.

**Amount Dependent on Equities.** — Where a warrant of attorney confers a power to confess judgment for the amount due on the note, and

that amount is dependent upon certain equities between the parties growing out of a contemporaneous disagreement between them, these equities must be adjusted before the authority of the attorney to confess judgment is complete. And this is true even though the note on its face is for a specified amount. *Dilley v. Van Wie*, 6 Wis. 209.

**Power of Court to Determine Amount.** — The extent of the court's power in determining facts requiring proof outside of the warrant of attorney and its execution is limited to making computation of the amount due and to taking an account or proof of collateral facts for the purpose of enabling the court to render the judgment to carry it into effect. *Fitzgerald v. Wiggins*, 6 Ohio Dec. (Reprint) 1201, 12 Am. L. Rec. 476.

**3. Fortune v. Bartolomei**, 164 Ill. 51; *Scott v. Mantonya*, 164 Ill. 473.

**4. Fortune v. Bartolomei**, 164 Ill. 51.

**5. Giddens v. Crenshaw County**, 74 Ala. 471.

**6. Creditor's Consent.** — *Lowenstein v. Caruth*, 59 Ark. 588; *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66; *Haggerty v. Juday*, 58 Ind. 154; *Kennard v. Carter*, 64 Ind. 31; *Chapin v. McLaren*, 105 Ind. 563; *Farmers, etc., Bank v. Mather*, 30 Iowa 283; *Mercer v. James*, 6 Neb. 406; *Flanagan v. Continental Ins. Co.*, 22 Neb. 235; *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627; *Ingersoll v. Dyott*, 1 Miles (Pa.) 245. See also the title JUDGMENTS AND DECREES, vol. 17, p. 767.

assented thereto in the first instance.<sup>1</sup> It is also presumed where the judgment is for the creditor's benefit.<sup>2</sup> The consent of the creditor may be presumed from the record where nothing appears to the contrary thereon.<sup>3</sup> To entitle him to have the judgment set aside, he must make it appear to the justice that he has been prejudiced by such confession.<sup>4</sup> So the creditor's consent, if not affirmatively shown on the transcript, will be presumed from the fact that he procured a satisfaction of his judgment.<sup>5</sup>

**RATIFICATION.** — Where the creditor claims under such a warrant and attempts to enforce it, his action constitutes a ratification, as between the parties, and, by relation, the judgment, as to them, is considered as valid from the date of its entry.<sup>6</sup>

**Sufficiency.** — The mere knowledge of the creditor, of the debtor's act, and silence, do not constitute a ratification of the act, but are only evidence thereof.<sup>7</sup> But knowledge and consent on the part of the creditor's attorney are sufficient.<sup>8</sup>

**Effect as to Rights of Third Persons.** — A subsequent ratification, however, though binding between the parties, cannot affect rights acquired by other parties prior to the ratification.<sup>9</sup> So a judgment rendered on a confession under a warrant without the knowledge of the creditor is void where the purpose of the granting of such warrant was to prevent another creditor, who the debtor knew was about to attach, from satisfying his attachment out of the debtor's property.<sup>10</sup>

**Consent of Third Persons.** — But a bond with warrant of attorney to confess judgment, given to a creditor for an amount which includes his own debt and that of certain other creditors, is valid, if they sanction the transaction and he agrees to account them, although they are not named in the bond.<sup>11</sup>

**6. Consideration.** — A warrant given by a stepfather to a third person for goods vested in trustees for the benefit of his infant children will not be set aside for want of consideration.<sup>12</sup> Nor will a court of law interfere where a party gives a warrant of attorney to another without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith.<sup>13</sup>

**Illegal Consideration.** — A warrant will not be upheld, however, where it is given by express agreement for an illegal consideration. So a warrant of attorney by express agreement given for the purpose of putting an end to a criminal investigation before the magistrate, is void.<sup>14</sup> Also a warrant of attorney given by an attorney to induce a party to stay proceedings against him on a rule for striking him off the roll, is illegal and void, and the court will direct it to be taken off the file and canceled.<sup>15</sup> But it will not set aside a warrant of attorney given to secure a debt, on the ground that it was obtained from the defendant by a threat of prosecution for felony, unless it distinctly appears that there was an agreement by the plaintiff, either express or necessarily implied, to abstain from prosecuting upon the security being given.<sup>16</sup>

**7. Warrant Executed in Foreign State.** — Judgment will not be allowed on a warrant executed in another state where the laws of the state in which the

1. Assent Presumed. — *McCalmont v. Peters*, 13 S. & R. (Pa.) 196.

2. *Flanagan v. Continental Ins. Co.*, 22 Neb. 235; *McCalmont v. Peters*, 13 S. & R. (Pa.) 196.

3. *Kennard v. Carter*, 64 Ind. 31.

4. *Flanagan v. Continental Ins. Co.*, 22 Neb. 235.

5. *Mercer v. James*, 6 Neb. 406.

6. Ratification. — *Lowenstein v. Caruth*, 59 Ark. 588; *Wilcoxson v. Burton*, 27 Cal. 228.

7. *Haggerty v. Juday*, 58 Ind. 154.

8. *Chapin v. McLaren*, 105 Ind. 563.

9. Rights of Third Persons. — *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66.

10. *Ryan v. Daly*, 6 Cal. 238; *Wilcoxson v. Burton*, 27 Cal. 228.

11. *Nickerson v. Hazel*, 1 Houst. (Del.) 176.

12. Consideration. — *Gay v. Hall*, 13 Jur. 124.

13. *Dukes v. Saunders*, 1 Dowl. 522.

14. Illegality. — *Ex p. Critchley*, 10 Jur. 112.

15. *Kirwan v. Goodman*, 9 Dowl. 330.

16. *Ward v. Lloyd*, 6 M. & G. 785, 46 E. C. L. 785.

judgment is sought do not recognize such warrants,<sup>1</sup> or where the warrant does not sufficiently comply with the statutory requirements of the latter.<sup>2</sup>

**IV. EXERCISE OF POWER — 1. Warrant Strictly Pursued — a. IN GENERAL.** — It is well settled that the authority to confess a judgment under a warrant of attorney must be strictly pursued, and the instrument delegating such a power will not be interpreted as granting authority to do any acts beyond those authorized in terms, or those which are necessary to carry into effect the power expressly given.<sup>3</sup> A warrant of attorney to confess judgment cannot be enlarged by writing into it the laws of the nature of which the donor is not charged with knowledge. Therefore if the power to confess judgment is conferred upon any attorney of any court of record, its terms cannot be enlarged in another state so as to authorize a prothonotary to confess judgment, even if the laws of the state where the judgment was rendered expressly permit a prothonotary to act whenever any attorney is authorized to do so.<sup>4</sup>

**Omissions of Parties.** — So the court cannot supply any omissions of parties.<sup>5</sup>

**As to Person in Whose Favor Confession May Be Made.** — Under the rule of strict construction, a warrant which authorizes confession of judgment in favor of the lessor of certain property does not authorize the confession of judgment in favor of the assignee of the reversion. This is true, even though the right to the covenants of the lease passed to the grantee of the reversion, if the warrant contains no express provision to that effect.<sup>6</sup> And where a warrant of attorney authorizes a person to enter up judgment against the defendant, and the defeasance states that the warrant is given to secure payment to that person, his heirs, etc., judgment cannot be entered upon it by his executrix, as it only authorized the testator himself to enter up judgment.<sup>7</sup>

**Purpose for Which Confession May Be Had.** — A clause in a lease containing a warrant of attorney to confess judgment against the lessee in an amicable action of ejectment and expressly providing that no recovery of possession by proceedings under the warrant shall deprive the lessor of any action or remedy

1. *Hamilton v. Schoenberger*, 47 Iowa 385.

2. *Com. v. Peterson*, 1 Pa. L. J. Rep. 482, 3 Pa. L. J. 154.

3. **Strict Construction** — *England*. — *Henshall v. Matthew*, 1 Dowl. 217.

*United States*. — *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287.

*California*. — *Chapin v. Thompson*, 20 Cal. 681.

*Delaware*. — *Mendenhall v. Springer*, 3 Harr. (Del.) 87.

*Illinois*. — *Roundy v. Hunt*, 24 Ill. 598; *Waterman v. Jones*, 28 Ill. 54; *Chase v. Dana*, 44 Ill. 262; *Tucker v. Gill*, 61 Ill. 236; *Frye v. Jones*, 78 Ill. 632; *Keith v. Kellogg*, 97 Ill. 147; *Campbell v. Goddard*, 117 Ill. 251; *Holmes v. Parker*, 125 Ill. 478; *Gardner v. Bunn*, 132 Ill. 403; *Whitney v. Bohlen*, 157 Ill. 571; *Baldwin v. Freyendall*, 10 Ill. App. 106; *Graves v. Whitney*, 49 Ill. App. 435; *Shepherd v. Wood*, 73 Ill. App. 486; *Bernstein v. Curran*, 99 Ill. App. 179.

*New Jersey*. — *Reed v. Bainbridge*, 4 N. J. L. 400; *Hunt v. Chamberlin*, 8 N. J. L. 336.

*New York*. — *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 500; *Craighead v. Peterson*, 72 N. Y. 270.

*Ohio*. — *Spence v. Emerine*, 46 Ohio St. 433; *Fitzgerald v. Wiggins*, 6 Ohio Dec. (Reprint) 1201, 12 Am. L. Rec. 476; *Lewis v. Moon*, 1 Ohio Cir. Dec. 116; *Drake v. Simpson*, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236.

*Pennsylvania*. — *Patterson v. Pyle*, (Pa. 1889) 17 Atl. Rep. 6; *Mutual Guarantee Bldg., etc., Assoc. v. Fallen*, 21 Pa. Co. Ct. 617; *Ellis v. Ambler*, 11 Pa. Super. Ct. 406; *Jenks v. Hendley*, 6 Phila. (Pa.) 518, 25 Leg. Int. (Pa.) 52.

*Texas*. — *Grubbs v. Leon*, 62 Tex. 426; *Strasburger v. Heidenheimer*, 63 Tex. 5; *Morris v. Bank of Commerce*, 67 Tex. 602; *Cordray v. Galveston*, (Tex. Civ. App. 1894) 26 S. W. Rep. 245.

*Wisconsin*. — *Dilley v. Van Wie*, 6 Wis. 209; *Richards v. Globe Bank*, 12 Wis. 692; *Reid v. Southworth*, 71 Wis. 288; *Pirie v. Stern*, 97 Wis. 150; *Kahn v. Lesser*, 97 Wis. 217.

See also *supra*, this title, *Formal Requisites — Strict Compliance with Statute*.

4. *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287.

5. *Henshall v. Matthew*, 1 Dowl. 217; *Spence v. Emerine*, 46 Ohio St. 433.

6. *Jenks v. Hendley*, 6 Phila. (Pa.) 518, 25 Leg. Int. (Pa.) 52.

7. *Henshall v. Matthew*, 1 Dowl. 217.

The court will not allow judgment to be entered up on a warrant of attorney at the instance of an executor, where the testator only has been mentioned in the warrant, although it is stated in the defeasance that the executors and administrators might enter up judgment in the event of a certain sum not being paid. *Foster v. Clagget*, 6 Dowl. 524.



against the lessee for rent or damages or for the breach of any covenant contained in the lease, does not authorize the assessment of money damages for rent in arrears.<sup>1</sup>

**Compliance with Conditions Attached.** — So when the warrant of attorney has a special agreement attached to it that no execution shall be levied except upon the premises described in a mortgage accompanying it, it may be answered, in a suit upon the bond or original consideration, that the mortgage of the defendant has been fraudulently rendered unavailable to him; but the plaintiff cannot make use of this warrant of attorney and repudiate the special agreement upon which it was given.<sup>2</sup>

**b. LIMITATIONS OF RULE — Obvious Intention Effectuated.** — The rule that the power to confess a judgment must be clearly given and strictly pursued, otherwise the judgment may be set aside at the instance of the defendant, like all other rules, has its reasonable limitations, and must not be applied with such strictness as to defeat the obvious intentions of the party granting the power.<sup>3</sup> Like other instruments, its real meaning must be ascertained from a consideration of the entire instrument; and the plain intent of the parties is not to be defeated by a technical informality that creates no doubt as to the evident purpose.<sup>4</sup> This rule is not, however, to be interpreted as conferring on the attorney any implied authority outside of the written power to confess judgment.<sup>5</sup>

**Irregularities and Omissions.** — Mere irregularity in the wording of the warrant is not sufficient to defeat its validity if the purpose for which it is given otherwise clearly appears.<sup>6</sup>

**Blanks in Warrant.** — So a judgment confessed is not void for want of jurisdiction of the parties if the terms of the warrant indicate an intention to authorize the confession, notwithstanding a failure to fill blanks intended to be filled with words giving fuller expression to the intention.<sup>7</sup> Thus, where it appears that the warrant was on a printed blank and, inadvertently, the date was not filled in when the instrument was executed, a judgment confessed thereunder will not be void where the date can be ascertained from the note which the warrant accompanies and to secure which it was given.<sup>8</sup> Also where blanks in a printed form of warrant accompanying a note are filled in by the attorney with the name of the signor of the note, the validity of the warrant is not thereby affected, and the court may enter up judgment thereunder. In case the warrant is improperly filled the remedy of the signor is against the attorney.<sup>9</sup> Though the warrant of attorney fails to state against whom judgment may be confessed, yet, where such clearly appears to be the design of the signors of the power, confession of judgment is authorized

1. *Ellis v. Ambler*, 11 Pa. Super. Ct. 406.

2. *Snevely v. Tarr*, 1 Phila. (Pa.) 220, 8 Leg. Int. (Pa.) 126.

3. **Intention of Parties Effected.** — *Keith v. Kellogg*, 97 Ill. 147; *Holmes v. Parker*, 125 Ill. 478; *Findlay First Nat. Bank v. Trout*, 58 Ohio St. 347.

4. **Rule of Interpretation.** — *Drake v. Simpson*, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236.

5. *Cordray v. Galveston*, (Tex. Civ. App. 1894) 26 S. W. Rep. 245.

6. **Irregularities.** — *Holmes v. Bemis*, 124 Ill. 453; *Holmes v. Parker*, 125 Ill. 478; *Patterson v. Indiana*, 2 Greene (Iowa) 492.

7. **Blanks in Warrant.** — *Findlay First Nat. Bank v. Trout*, 58 Ohio St. 347. See also *Links v. Mayer*, 22 Ill. App. 489.

8. *Richards v. Globe Bank*, 12 Wis. 692.

So where a note and warrant are included in one instrument, the fact that the blank spaces,

in which the person giving the power should be indicated, are left unfilled, does not invalidate the power, which will be considered as given by the maker of the note. *Packer v. Roberts*, 140 Ill. 9.

But the warrant is insufficient where it is uncertain what should be inserted. *Chase v. Dana*, 44 Ill. 262; *Morris v. Bank of Commerce*, 67 Tex. 602.

9. *Sweesey v. Kitchen*, 80 Pa. St. 160.

**Under the Pennsylvania Act of 1806**, which requires that the obligation to which the warrant of attorney is annexed shall be signed by the person signing the warrant, judgment cannot be entered against the person signing the warrant where such person and the signor of the bond are different, although the warrant authorizes the confession of judgment against the person signing it in an action of debt brought against the signor of the bond. *Liberty Grotto v. Meade*, 11 Pa. Co. Ct. 340.

against the makers of the note to which it is attached.<sup>1</sup> So the failure of the warrant to state in whose favor judgment may be confessed does not render it void for uncertainty where the note and warrant are written together over one signature and the authority is conferred to confess judgment for the sum stated in the note. In such an instance it will be deemed that the payee of the note is the one in whose favor the judgment is to be confessed and the warrant will be available to him or to his administrators.<sup>2</sup>

**Ambiguous Language.** — If the language of the warrant of attorney in question is ambiguous, it should be construed most favorably for the beneficiary therein and against the parties who executed it.<sup>3</sup>

**2. Place of Exercise.** — If the warrant shows on its face that it was intended to be used only in a certain state, judgment cannot be confessed thereon in another state.<sup>4</sup> So a bond or warrant of attorney executed by two persons, one residing in one state and another residing in a second state, the warrant being addressed to a specified attorney of a court of the former state, or an attorney "of any court there or elsewhere, or to another prothonotary of any of the said courts," does not authorize the confession of judgment thereon in a third state.<sup>5</sup>

**In Foreign State.** — The warrant of attorney may be so drawn as to authorize a confession of judgment in a foreign state.<sup>6</sup>

**Place Not Designated.** — The decisions are not in harmony as to the validity of a general warrant authorizing a confession by any attorney in any state. According to one view a general power executed in a state authorizing the entry of judgment in any court of record does not authorize the entry of judgment in another state.<sup>7</sup> Such a warrant is deemed void on the ground of "comprehensive uncertainty."<sup>8</sup> Other authorities hold that a warrant authorizing a confession of judgment in any court of record may be executed in any state in the Union.<sup>9</sup> Even though such a warrant cannot be given extraterritorial effect<sup>10</sup> it is nevertheless sufficient to sustain a judgment entered in a court of the state in which the warrant is executed on confession of an attorney of such court.<sup>11</sup>

**3. Option as to Manner of Exercise.** — Where the warrant authorizes a thing to be done, generally, without any limitation as to the manner of doing it, and it may be lawfully done in any one of several ways, the donee of the power may execute it in any one of the ways authorized by the warrant.<sup>12</sup>

**4. Demand.** — If the defeasance on a warrant of attorney states that it is given to secure the payment of a sum on demand, and, in case default shall be made, then judgment to be entered up and execution issue, an actual demand must be made; and a proposal to settle amicably does not amount to such a demand.<sup>13</sup> There must be an actual demand upon the person capable of giving a substantial answer therefor, and demand made on an insane person is not sufficient to authorize the entry of the judgment.<sup>14</sup>

**5. Time for Confession — Under Statutory Provision.** — Where the statute provides the time within which the power granted by the warrant must be exer-

1. *Leish v. Cromwell*, 4 Ohio Dec. (Reprint) 32, *Cleve. L. Rec.* 38.

2. *Drake v. Simpson*, 11 Ohio Dec. (Reprint) 854, 30 *Cinc. L. Bul.* 236.

3. *Shepherd v. Wood*, 73 Ill. App. 486.

4. *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497; *Davis v. Packer*, 4 Ohio Cir. Dec. 347, 8 Ohio Cir. Ct. 107; *Pirie v. Stern*, 97 Wis. 150.

5. *Manufacturers', etc., Bank v. Boyd*, 3 Den. (N. Y.) 257; *Manufacturers', etc., Bank v. St. John*, 5 Hill (N. Y.) 497.

6. *Van Norman v. Gordon*, 172 Mass. 576.

7. **Place Not Specified.** — *Davis v. Packer*, 4 Ohio Cir. Dec. 347, 8 Ohio Cir. Ct. 107; *Mc-*

*Clure v. Bowles*, 5 Ohio Dec. 288. See also *supra*, this title, *Formal Requisites — Designation of Person Authorized*.

8. *Carlin v. Taylor*, 7 Lea (Tenn.) 666.

9. *Pirie v. Stern*, 97 Wis. 150. See also *Van Norman v. Gordon*, 172 Mass. 576; *Athens First Nat. Bank v. Garland*, 109 Mich. 515.

10. *Carlin v. Taylor*, 7 Lea (Tenn.) 667.

11. *Athens First Nat. Bank v. Garland*, 109 Mich. 515; *McClure v. Bowles*, 5 Ohio Dec. 288.

12. *Keith v. Kellogg*, 97 Ill. 147.

13. **Demand.** — *Nicholl v. Bromley*, 2 Brod. & B. 464, 6 E. C. L. 230.

14. *Capper v. Dando*, 2 Ad. & El. 458, 29 E. C. L. 142.

cised, in order that a valid judgment may be entered thereunder, this provision must be complied with.<sup>1</sup>

**Limitations.** The effect of the lapse of time upon the right to enter judgment under the warrant is a matter of statutory regulation.<sup>2</sup>

**Under Provision in Warrant.** — Where the date is specified for the payment of the amount which the warrant is given to secure, execution cannot be sued out on the warrant before the date thus stipulated.<sup>3</sup>

**Upon Specified Contingency.** — When a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note before it is due, the record must show that the specified contingency has happened, otherwise a judgment is unwarranted.<sup>4</sup>

**Judgment Notes.** — In the case of warrants given to secure the payment of negotiable notes, confession is sometimes authorized before maturity and sometimes only after maturity. In the absence of any provision in the warrant as to the time for making the confession, judgment can only be confessed after the maturity of the note.<sup>5</sup>

**Effect of Extension of Note.** — A judgment confessed before the expiration of an extension of the note is valid.<sup>6</sup>

**6. Amount for Which Made.** — The amount for which the attorney is authorized to confess judgment is the extent of his powers, and he cannot confess judgment for a greater sum than that stipulated in the warrant.<sup>7</sup>

**General Statements.** — General expressions in the warrant must be controlled by the particular provisions therein. So where a warrant authorizes the confession for a specified amount and for specified purposes, the grantee's power to confess judgment is controlled by these provisions and he cannot confess judgment thereunder for an indebtedness incurred before the execution of the warrant and not included in its provisions.<sup>8</sup> Even though the warrant authorizes confession of judgment for the amount appearing to be due, the attorney will, however, be held to the authority only to confess judgment for the amount actually due.<sup>9</sup> So a confession of judgment in a lease for a term certain has reference to the rent for that particular term only, and does not authorize the entry of judgment for rent accruing after the expiration of the term certain where the tenant has held over.<sup>10</sup> A judgment

1. **When Enforceable.** — *Eakin v. Smith*, 21 N. J. L. 97.

2. See the statutes of the several states. See also *Jones v. Knight*, 1 Chit. 743, 18 E. C. L. 218; *Appleton v. Bond*, 1 Chit. 744, 18 E. C. L. 219; *Hulke v. Pickering*, 2 B. & C. 555, 9 E. C. L. 177; *Clark v. Hopkins*, 7 Johns. (N. Y.) 556.

**Under Pennsylvania Statute.** — *Lorah v. Nissley*, 9 Lanc. L. Rev. 177; *Kempner v. Laney*, 14 Phila. (Pa.) 646, 37 Leg. Int. (Pa.) 126.

3. *Hiscocks v. Kemp*, 3 Ad. & El. 676, 30 E. C. L. 182.

4. *Roundy v. Hunt*, 24 Ill. 598.

Where the warrant of attorney is given to secure a certain sum to be paid by instalments, with interest on specified days, the person to whom it was given being authorized to enter up judgment thereon immediately, but no execution to be issued until default made in the payment of the sum with interest, by the instalments and in the manner provided, execution may issue for the whole on default in payment of the first instalment. *Leveridge v. Forty*, 1 M. & S. 707.

5. See the title JUDGMENT NOTES, vol. 17, p. 753. See also *Holbird v. Anderson*, 5 T. R. 235; *Shepherd v. Wood*, 73 Ill. App. 486; *Black v. Pattison*, 61 Miss. 599; *Osborn v. Rogers*, 112

N. Y. 573; *Forrester v. Strauss*, (Supm. Ct. Spec. T.) 21 Civ. Pro. (N. Y.) 166; *Lewis v. Moon*, 1 Ohio Cir. Dec. 116; *Drake v. Simpson*, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236.

6. *Alldritt v. Morrison First Nat. Bank*, 22 Ill. App. 24.

7. **Amount.** — *Mutual Guarantee Bldg., etc., Assoc. v. Fallen*, 21 Pa. Co. Ct. 617; *Cordray v. Galveston*, (Tex. Civ. App. 1894) 26 S. W. Rep. 245.

**The Pennsylvania Act of February 24, 1806**, conferring certain powers on the prothonotary with regard to the confession and judgment under warrant of attorney to confess a judgment, only authorizes him to enter a judgment without the agency of an attorney in the way specified in the act, that is, for the amount which from the face of the instrument may appear to be due. This probably embraces a case where the sum due can be ascertained by calculation from the face of the writing. *Connay v. Halstead*, 73 Pa. St. 354.

8. *Chapin v. Clementson*, 1 Barb. (N. Y.) 311; *Bennett v. Haley*, 142 Pa. St. 253.

9. *Dilley v. Van Wie*, 6 Wis. 209; *Sloane v. Anderson*, 57 Wis. 123; *Reid v. Southworth*, 71 Wis. 288.

10. *Smith v. Pringle*, 100 Pa. St. 275.



entered upon a bond and warrant of attorney, under the act directing the mode of entering judgments upon bonds with warrants of attorney to confess judgments, is not void, although the warrant authorizes the confession of the judgment for the sum mentioned in the condition of the bond and the judgment is entered for the amount of the penalty which is double the former amount.<sup>1</sup>

**V. REVOCATION — 1. In General.** — As a general rule the warrant of attorney to confess a judgment is not revocable, and in such case the court will grant leave to enter the judgment even though the grantor attempts to revoke it.<sup>2</sup> The law regards a warrant of attorney, attached to commercial paper, as a valuable security in the hands of the creditor. He has such interest therein, as a means to expedite his remedy, as to forbid its revocation by any act of the debtor. This interest of the creditor in the warrant of attorney makes it an instrument *inter partes*, and subjects it to the familiar canon of construction that requires it to be effectuated, rather than defeated, if this can be done by any fair and rational construction of the language employed.<sup>3</sup> So a warrant of attorney by a debtor to the attorney for the creditor empowering him to confess judgment for the debt in order to avoid costs of the suit, is made upon a valid consideration and coupled with an interest and is therefore irrevocable by the principal or by mere lapse of time.<sup>4</sup> In *Pennsylvania*, while a warrant of attorney to confess judgment as used in connection with notes is not revocable, it is not a power coupled with an interest, but is one which has grown up under the common and statute law.<sup>5</sup> But the warrant is revocable where it is unsupported by a consideration, or not given as a security for a debt, or to render a security effectual.<sup>6</sup> It is proper to show by parol the actual consideration for a confession of judgment.<sup>7</sup> Where the defendant indorsed on a warrant a written request to enter up judgment against him, for whatever demand the plaintiff might have against him, to the satisfaction of the justice, and the next day desired the justice not to enter the judgment, on the ground that he had since discovered that the plaintiff demanded more than was due to him, it was held that such a consent or request was revocable.<sup>8</sup>

**Confession After Debt Is Barred.** — Where an attorney is empowered to confess judgment on a debt, and he fails to do so until the debt is barred, inasmuch as the subject-matter of the power is not extinguished by the limitation, the power is not thereby revoked.<sup>9</sup>

**Revocation Not Presumed.** — A judgment against the maker of a note, by confession under a warrant of attorney in the note expressly waiving errors of procedure, will not be set aside because such judgment was obtained more than six years after the date of the power or maturity of the note, there being no presumption that the power had been revoked.<sup>10</sup>

**2. Death or Disqualification of Parties** — *a. OF GRANTOR.* — A power of attorney though coupled with an interest and in form irrevocable, is revoked by the death of the party making it.<sup>11</sup> Also where a warrant of attorney is

1. *Den v. Zellers*, 7 N. J. L. 153.

2. **Revocation.** — *Evans v. Fearne*, 16 Ala. 689; *McPheeters v. Campbell*, 5 Ind. 107; *Wood v. Hopkins*, 3 N. J. L. 263.

3. *Drake v. Simpson*, 11 Ohio Dec. (Report) 854, 30 Cinc. L. Bul. 236.

4. *Wassell v. Reardon*, 11 Ark. 705; *Rapley v. Price*, 11 Ark. 715.

5. *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

6. *Evans v. Fearne*, 16 Ala. 689, 50 Am. Dec. 197.

7. *Wolf v. Kohr*, 133 Pa. St. 13.

8. *Gale v. Chase*, 3 Johns. (N. Y.) 147.

9. *Wassell v. Reardon*, 11 Ark. 705.

10. *Cross v. Moffat*, 11 Colo. 210. And see *Morris v. Hannick*, 10 Phila. (Pa.) 571, 31 Leg. Int. (Pa.) 230.

11. **Death of Grantor.** — *Spooner v. Sandilands*, 1 Y. & C. Ch. 390; *Watson v. King*, 4 Campb. 272; *Wood v. Hopkins*, 3 N. J. L. 263; *Milnor v. Milnor*, 9 N. J. L. 93.

A judgment entered against a defendant, whom the record shows to have been dead at the time of entry, will be stricken off. *Tobias v. Dorsey*, 2 W. N. C. (Pa.) 15.

**Parol Evidence of Death.** — Parol evidence is admissible as to the precise time of the day on which judgment was entered by warrant of attorney, in order to avoid it, by proof of the

executed by two persons, upon the death of one of them judgment cannot be entered up against the other.<sup>1</sup> In *Pennsylvania*, however, under the statutory enactments, upon the death of one of the makers of such a warrant, even though the warrant may be treated as joint, judgment may be entered against the survivors.<sup>2</sup> But where one who has joined a bond as surety for another afterwards gives a warrant of attorney to the creditor authorizing him to take and keep possession of certain lands until the payment of the debt, the power operates as a charge which does not determine as to freehold lands so conferred by the death of the party giving it.<sup>3</sup>

**Insanity of Grantor.** — The fact that the person granting the warrant while in full possession of his faculties, subsequently becomes insane, does not revoke the warrant.<sup>4</sup>

**b. OF GRANTEE.** — If the warrant of attorney is granted as a personal authority to a certain one, it dies with him and cannot be put in force by his executors or administrators, and this is true even though it also contains a clause of release of errors to him, his executors or administrators.<sup>5</sup> If, however, the warrant gives to an individual, his executors and administrators, power to enter up judgment, the right survives upon his death.<sup>6</sup> Judgment on such a warrant cannot be entered, after the obligee's death, in his name, but may be in that of his executors.<sup>7</sup>

**Right of Surviving Grantee.** — If the warrant is to confess judgment to more than one, the death of one of such persons does not revoke the warrant, but judgment may be entered up by the survivor.<sup>8</sup>

**c. OF CREDITOR.** — The death of the person in whose favor the warrant authorizes judgment to be confessed does not destroy the power of the warrant.<sup>9</sup> And even though no mention is made of the survivors, judgment may, nevertheless, be entered up at the suit of the survivors, where the warrant is given for a joint debt due to them.<sup>10</sup> In such a case the survivor may enter up judgment in his own name.<sup>11</sup>

**VI. TERMINATION — By Exercise of Power.** — When judgment has once been entered under a warrant of attorney authorizing confession the power is exhausted, and a second judgment cannot be thereafter entered under the same power.<sup>12</sup> A warrant which authorizes the attorney to confess a judgment or judgments, authorizes a second judgment only where the first one is imperfect and not where a valid and subsisting judgment has previously been confessed on the warrant.<sup>13</sup> But where a judgment entered under the warrant has been set aside by reason of the death of the grantee this does not prevent a second judgment being entered up thereon in the name of the administrator.<sup>14</sup>

**Effect of Reversal by Appellate Court.** — A judgment by confession on an insufficient power is not, after it has been reversed in the Appellate Court, a bar to another suit on the same cause of action, though it was, upon reversal, remanded to, and at the time the second action was commenced, was nomi-

prior death of the defendant. *Lanning v. Pawson*, 38 Pa. St. 480.

1. *Raw v. Alderson*, 7 Taunt. 453, 2 E. C. L. 451.

2. *Croasdell v. Tallant*, 83 Pa. St. 193.

3. *Spooner v. Sandilands*, 1 Y. & C. Ch. 390.

4. *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

5. **Death of Grantee.** — *Short v. Coglin*, 1 Anstr. 225.

6. *Edwards v. Holiday*, 9 Dowl. 1023.

7. *Guyer v. Guyer*, 6 Houst. (Del.) 430; *Gealy v. Gealy*, 26 Pittsb. Leg. J. N. S. (Pa.) 153.

8. *Johnson v. Jenkins*, 1 Dowl. 367; *Harper v. Jackson*, 1 Hurl. & W. 214; *Spong v. Tucker*, 1 Y. & J. 206; *Futcher v. Smith*, 2 W. Bl. 1301; *Fendall v. May*, 2 M. & S. 76.

9. **Death of Creditor.** — *Drake v. Simpson*, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236.

10. *Build v. Wightman*, 1 Dowl. 545.

11. *Hind v. Kingston*, 6 Dowl. 523.

12. **Termination of Power.** — *Campbell v. Canon*, Add. (Pa.) 267; *Manufacturers', etc., Bank v. Cowden*, 3 Hill (N. Y.) 461; *Ulrich v. Voneida*, 1 P. & W. (Pa.) 245; *Adams v. Bush*, 5 Watts (Pa.) 289; *Martin v. Rex*, 6 S. & R. (Pa.) 296; *Meff v. Barr*, 14 S. & R. (Pa.) 166; *Ely v. Karmany*, 23 Pa. St. 214; *Philadelphia v. Johnson*, 208 Pa. St. 645; *Fairchild v. Camac*, 3 Wash. (U. S.) 558, 8 Fed. Cas. No. 4,610.

13. *Fairchild v. Camac*, 3 Wash. (U. S.) 558, 8 Fed. Cas. No. 4,610.

14. *Guyer v. Guyer*, 6 Houst. (Del.) 430.

nally pending in, the court below.<sup>1</sup> The reversal places the case and the rights of the parties in the same condition as if the first decree had not been rendered. The intention of the power has not been carried out, consequently the object is not accomplished, and the authority is not exhausted by the first act.<sup>2</sup>

**Extension of Time of Payment.** — The extension of the note upon which power of attorney has been given to confess judgment does not abrogate the power to confess judgment thereon.<sup>3</sup>

**VII. THE JUDGMENT** — 1. **In General** — **Requisites of Valid Judgment.** — The general requisites of a valid judgment by confession under a warrant of attorney do not differ from those of other judgments by confession. These requisites are discussed elsewhere in this work.<sup>4</sup>

2. **Jurisdiction.** — A judgment by confession without action, on a warrant of attorney or otherwise, though founded on an agreement of the parties, is as much a judicial act as an ordinary judgment in an action, and it is essential that the court should have jurisdiction of the subject-matter.<sup>5</sup> A fraudulent act of the payee in concealing the fact that judgment entered under the warrant has been paid, and the appearance, at his procurement and without the maker's knowledge or consent, of an attorney, confers no jurisdiction on the court, and judgment entered up under such circumstances is void.<sup>6</sup>

**Jurisdiction Not Conferred by Consent.** — Authority granted by the warrant upon any attorney of any court of record to confess judgment does not authorize a confession of judgment in a court which has not jurisdiction, as the consent of the donor cannot confer jurisdiction upon the court.<sup>7</sup>

**Who May Question.** — A judgment entered in one court, by virtue of a warrant of attorney authorizing the entry of such judgment in a court of concurrent jurisdiction, will not be set aside as erroneous at the instance of a subsequent judgment creditor.<sup>8</sup>

**Estoppel to Question Jurisdiction.** — Where the defendants come and move the court to vacate the judgment, and afterwards voluntarily consent to the dismissal of such motion, they will not be afterwards allowed on error to allege a want of jurisdiction in the court of the persons of the defendants.<sup>9</sup>

**Warrant as Evidence.** — The warrant of attorney may be introduced in evidence in a collateral proceeding as a part of the record for the purpose of overthrowing jurisdiction of the court.<sup>10</sup>

**Presumptions.** — When a party submits himself to the jurisdiction of a competent court and confesses judgment, and the court enters judgment for the amount admitted to be due, it will be presumed that all the preliminary steps necessary to confer jurisdiction have been taken.<sup>11</sup> Also, where a judgment is confessed upon a warrant of attorney in a foreign state, it will be presumed that the court entering the judgment had jurisdiction to enter it and that its

1. *Huner v. Doolittle*, 3 *Greene* (Iowa) 76; *Edgar v. Greer*, 10 *Iowa* 279.

2. *Huner v. Doolittle*, 3 *Greene* (Iowa) 76.

3. **Effect of Extension.** — *Towle v. Gonter*, 5 *Ill. App.* 409; *Alldritt v. Morrison First Nat. Bank*, 22 *Ill. App.* 24.

4. See the title **JUDGMENTS AND DECREES**, vol. 17, p. 764, and the title **JUDGMENTS**, 11 *ENCYC. OF PL. AND PR.* 973.

5. **Jurisdiction.** — *Caley v. Morgan*, 114 *Ind.* 350. See generally the titles **JUDGMENTS AND DECREES**, vol. 17, p. 756; **JURISDICTION**, vol. 17, p. 1039; and the titles **JUDGMENTS**, 11 *ENCYC. OF PL. AND PR.* 842; and **JURISDICTION**, 12 *ENCYC. OF PL. AND PR.* 114.

**Jurisdiction of Justice of the Peace.** — See *Alberty v. Dawson*, 1 *Binn.* (Pa.) 105.

6. *Danville First Nat. Bank v. Cunningham*, 48 *Fed. Rep.* 510.

7. *Oil City v. McAbey*, 74 *Pa. St.* 249.

8. *Hauer's Appeal*, 5 *W. & S.* (Pa.) 473.

9. *Marsden v. Soper*, 11 *Ohio St.* 503.

10. *Bannon v. People*, 1 *Ill. App.* 496. See also *Osgood v. Blackmore*, 59 *Ill.* 261.

Although it is unnecessary to set out the warrant or its proof on the record, the judgment must show that the authority was verified, and sufficient to authorize the particular judgment. *Brown v. Little*, 9 *Ala.* 416.

In the absence of any showing of a meritorious defense, it has been held that the appellate court will presume that a judgment by confession was rightfully entered, although no warrant of attorney appears in the record. *Gibboney v. Gibboney*, 2 *Ill. App.* 322.

11. **Jurisdiction Presumed.** — *Osgood v. Blackmore*, 59 *Ill.* 261; *Caley v. Morgan*, 114 *Ind.* 350.



proceedings in so doing were regular and in accordance with law.<sup>1</sup>

**3. Joint or Several Judgment.** — It is well settled that where the warrant of attorney is joint it does not authorize a several judgment against one of the makers.<sup>2</sup> So a warrant of attorney given by two persons authorizing the confession of judgment in an action brought "against us," will not authorize the confession and entry of judgment against one of the parties even though the other is dead at the time the judgment is entered.<sup>3</sup> Also a warrant of attorney executed by two persons, authorizing attorneys to appear "for us and each of us," and to receive a declaration "for us and each of us" in an action of debt, etc., and, after judgment entered up, "for us and in our name, and as our act and deed," to execute a release of errors, etc., is joint only, and not joint and several.<sup>4</sup> And where a warrant of attorney provides that judgment may be entered up against two or either of them, judgment may be entered up against one only.<sup>5</sup> Judgment cannot be entered up against two defendants on a warrant of attorney purporting to be an authority to confess a judgment against three persons, one of whom afterwards refuses to execute.<sup>6</sup> But a warrant of attorney to confess judgment on a note executed by several persons payable to the order of two of the makers is sufficiently complied with where judgment is confessed against all of the makers except those to whose order the note is payable.<sup>7</sup> Where a joint warrant of attorney is entered into by two persons and the plaintiff stipulates in writing that he will not proceed against them unless he apprehends failure, if one fails he may immediately enforce his judgment against the other.<sup>8</sup> Where all of the notes were executed at one time, several being payable to the same person and the causes of action being such as might lawfully be joined in one suit, the power given under a warrant of attorney attached to each of the notes is not restricted to actions brought severally upon each note, but may be exercised where the several causes of action are joined.<sup>9</sup>

**4. On Lost or Stolen Warrant.** — Judgment may be entered on a note and warrant of attorney which has been duly executed and lost or stolen.<sup>10</sup> But a provision in a promissory note authorizing any attorney to appear for the maker in any competent court at any time and confess judgment in favor of the owner or holder of the note, waiving service and agreeing that execution may issue at once, does not authorize an attorney so appearing in an *ex parte* proceeding, where the note has been lost, to substitute or establish the lost instrument.<sup>11</sup>

**5. Amount** — *a.* **IN GENERAL.** — If the judgment is for an amount greater than that authorized by the warrant of attorney it is void as to such excess.<sup>12</sup>

1. *Van Norman v. Gordon*, 172 Mass. 576.

2. **Joint Judgment.** — *Harris v. Wade*, 1 Chit. 322, 18 E. C. L. 96; *Gee v. Lane*, 15 East 592; *Dalrymple v. Fraser*, 2 C. B. 698, 52 E. C. L. 698; *Weintraute v. Solomon*, 2 Marv. (Del.) 371; *Mayer v. Pick*, 192 Ill. 561; *Kloechner v. Schafer*, 110 Ill. App. 391; *O'Hara v. Lannier*, 1 B. Mon. (Ky.) 101; *Hunt v. Chamberlin*, 8 N. J. L. 336; *Manufacturers, etc., Bank v. St. John*, 5 Hill (N. Y.) 497; *Kahn v. Lesser*, 97 Wis. 217.

On a joint and several warrant of attorney given by two, judgment was signed against one only, but as the attorneys were authorized to enter up judgment against both, the court allowed it to be done. *Stoveld v. Eade*, 2 M. & S. 361, 28 E. C. L. 287.

**In Pennsylvania.** — In *Croasdell v. Tallant*, 83 Pa. St. 193, it was held, where the note read "we, or either of us, promise to pay" and the warrant of attorney stated that "we empower any attorney \* \* \* to appear for us and confess judgment against us," that the obliga-

tion was joint and several and that even though the obligation was treated as joint the court would not, in view of the statutory enactments of the state, be bound by the English precedents regulating the construction of such an obligation and power.

3. *Gee v. Lane*, 15 East 592; *Hunt v. Chamberlin*, 8 N. J. L. 336.

4. *Dalrymple v. Fraser*, 2 C. B. 698, 52 E. C. L. 698.

5. *Jordan v. Farr*, 2 Ad. & El. 437, 29 E. C. L. 137.

6. *Haris v. Wade*, 1 Chit. 322, 18 E. C. L. 96.

7. *Knox v. Winsted Sav. Bank*, 57 Ill. 330.

8. *Partridge v. Fraser*, 7 Taunt. 307, 2 E. C. L. 307.

9. *Odell v. Reynolds*, (C. C. A.) 70 Fed. Rep. 656.

10. **Loss or Theft of Warrant.** — *Bauer v. Rihs*, 4 Pa. Dist. 583.

11. *Strasburger v. Heidenheimer*, 63 Tex. 5.

12. **Amount.** — See the title JUDGMENTS, 11 ENCYC. OF PL. AND PR. 1012.

But signing judgment for an amount larger than that mentioned in the warrant is only an irregularity which may be waived by the laches of the defendant.<sup>1</sup> Although the judgment confessed under the warrant is in excess of the amount actually due the creditor at the time of judgment, still, if under the contract to secure which the warrant is given, the creditor has incurred an indebtedness to the full amount of the judgment, the judgment will be allowed to stand.<sup>2</sup>

**Evidence to Determine Amount Inadmissible.** — Where the judgment is rendered by the clerk in vacation he acts only as a ministerial officer and cannot determine the amount from evidence, but must enter the judgment for the amount confessed.<sup>3</sup>

**Judgment for Less Sum.** — A judgment confessed under a warrant of attorney in a tax collector's bond must be for the whole penal sum, and one confessed for a less sum will be stricken off and execution set aside, and leave given to enter judgment for the full penal sum.<sup>4</sup> Although the court will exercise a general equitable control over judgments entered upon bond and warrant of attorney, it cannot, on motion, relieve against a mistake in the agreement upon which such a judgment is entered up, by which the judgment covers a smaller amount of indebtedness than it was the intention of the parties to secure.<sup>5</sup>

**b. INTEREST.** — Even though a warrant of attorney makes no mention of interest on the principal, if the defeasance does, the court will allow execution to be issued for the principal and interest.<sup>6</sup> If the warrant authorizes the entry of judgment for double the amount actually due, the creditor is entitled to interest.<sup>7</sup> Also where a warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon.<sup>8</sup>

**c. ATTORNEY'S FEES.** — A stipulation in the warrant by which the debtor agrees to pay the fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings for the collection of the debt, rests upon a sufficient consideration and is a valid agreement.<sup>9</sup> But where the statute provides that the plaintiff before the judgment is obtained by confession must swear that the debt for which it is to be confessed is justly and honestly due, attorney's fees for the securing of such a judgment cannot be included in the judgment, as the debt does not accrue until after the rendition of the judgment.<sup>10</sup> That judgment was confessed for a smaller attorney's fee than that authorized by the warrant does not render the judgment invalid.<sup>11</sup>

**Reasonableness.** — If the warrant merely stipulates that the attorney shall receive a reasonable fee but does not fix the amount, it is to be fairly construed as conferring upon the court the power of determining the reasonableness of the fee and does not authorize the attorney to fix the amount of the fee.<sup>12</sup> The fact that an attorney's fee fixed at a specified per cent. of the

1. *Stopford v. Fitzgerald*, 11 Jur. 454.

2. *McDonald v. Chisholm*, 131 Ill. 273.

3. *Tucker v. Gill*, 61 Ill. 236; *Campbell v. Goddard*, 117 Ill. 251.

4. **Judgment for Smaller Sum.** — *Com. v. Evans*, 8 Pa. Co. Ct. 665. And see *Den v. Zellers*, 7 N. J. L. 153.

5. *Chapin v. Clemitson*, 1 Barb. (N. Y.) 311.

6. **Interest.** — *Shipton v. Shipton*, 1 Dowl. 518; *Atkinson v. Jones*, 2 Ad. & El. 439, 29 E. C. L. 137.

7. *Tunstall v. Trappes*, 3 Sim. 299.

8. *Chalk v. Walton*, 5 M. & G. 573, 44 E. C. L. 303.

9. **Attorney's Fees.** — *Ball v. Miller*, 38 Ill. 110; *Campbell v. Goddard*, 117 Ill. 251, 123 Ill.

220; *Weigley v. Matson*, 125 Ill. 64; *Lemon v. Longabaugh*, 4 Pa. Co. Ct. 546.

10. *Sweeney v. Stroud*, 55 N. J. L. 97.

11. *Kellogg v. Keith*, 4 Ill. App. 386, affirmed 97 Ill. 147; *Towle v. Gontor*, 5 Ill. App. 409.

12. *Campbell v. Goddard*, 117 Ill. 251, 123 Ill. 220.

So where a client confesses judgment for two thousand five hundred dollars, in favor of his attorney for professional services, and the confession merely states that the attorney had rendered services of the reasonable value of two thousand five hundred dollars, the receiver of the client is entitled to inquire into the justness of the attorney's bill and reduce the judgment in case of overcharge. *Seligman v. Franco-*

amount is included in the warrant and judgment, does not render them void as to creditors when the fee as stipulated is reasonable in amount.<sup>1</sup>

**Insolvent Debtor.** — Although attorney's fees included in a judgment confessed by an insolvent in favor of certain creditors who have knowledge of his insolvency are fraudulent as to his other creditors,<sup>2</sup> yet where the insolvent's assets are not sufficient to pay the judgment without the attorney's fees, the other creditors, not being harmed thereby, cannot complain.<sup>3</sup>

**Payment of Debt Before Judgment.** — The payment by the debtor of the claim at maturity relieves him from liability for attorney's fees authorized to be included in the judgment.<sup>4</sup>

*d.* **COSTS.** — Unless the warrant so provides, a judgment which includes costs is irregular.<sup>5</sup>

**What Included.** — Where the plaintiff brought an action upon an annuity deed and subsequently took a warrant of attorney for the sum due, containing the provision that if within a certain time the annuity was not paid he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the nonpayment of the annuity, he is not thereby authorized to take out execution for the costs of the original action.<sup>6</sup>

**6. Operation and Effect.** — A judgment entered under a warrant of attorney until set aside or reversed, has all the qualities and effects of a judgment on a verdict. It concludes and estops the parties thereto and their privies.<sup>7</sup> The courts of law exercise an equitable jurisdiction over judgments rendered by them upon warrants of attorney,<sup>8</sup> and will not allow them to be made the means of effecting fraud to the prejudice of the debtor or third persons.<sup>9</sup>

**Confirmation.** — An office confession of judgment is not final, but must afterwards come before the court for confirmation.<sup>10</sup>

**Merger.** — The warrant of attorney is merely collateral security, but when judgment is entered up the debt is merged.<sup>11</sup>

**7. Judgment of Foreign State.** — A judgment rendered in one state on a warrant of attorney is entitled to full faith and credit in another.<sup>12</sup> And a judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on in another state, as a judgment on adversary proceedings.<sup>13</sup> But where the note and warrant of attorney accompanying are executed in one state and judgment thereon is rendered in another state against a resident of a third state, the judgment so rendered will not be recognized in the third state if the warrant under which the judgment was confessed is void under the laws of the third

American Trading Co., (Supm. Ct. Gen. T.) 17 Civ. Pro. (N. Y.) 342. And see *McAllister's Appeal*, 59 Pa. St. 204.

1. *Pirie v. Stern*, 97 Wis. 150.

2. *Hulse v. Mershon*, 125 Ill. 52.

3. *Young v. Clapp*, 147 Ill. 176.

4. *Moore's Appeal*, 110 Pa. St. 433.

5. **Costs.** — *Page v. South*, 2 Dowl. & L. 108.

6. *Delane v. Mott*, 2 Chit. 423, 18 E. C. L. 385.

7. **Operation and Effect.** — See generally the title **JUDGMENTS AND DECREES**, vol. 17, p. 756.

In legal effect there is no difference between the entry of judgment on a warrant of attorney for the debt and entry of judgment in ejectment. *Livezey v. Pennock*, 2 Browne (Pa.) 321; *Philadelphia v. Johnson*, 208 Pa. St. 645.

It is a well-established principle that a confession of judgment taken and recorded in the usual form confesses or admits the law as well as the facts to be against the party confessing. *Fitzgerald v. Wiggins*, 6 Ohio Dec. (Reprint) 1201, 12 Am. L. Rec. 476.

**Judgment Entered by Prothonotary.** — "A

judgment entered by the prothonotary under a power contained in the instrument, is a judicial act, and by the words of the Act of 1806, has the same force and effect as a judgment confessed by an attorney or given in open court in term time." *St. Bartholomew's Church v. Wood*, 61 Pa. St. 96.

8. *Odell v. Reynolds*, (C. C. A.) 70 Fed. Rep. 656; *Lake v. Cook*, 15 Ill. 353; *Wyman v. Yeomans*, 84 Ill. 403.

9. *Martin v. Martin*, 3 B. & Ad. 934, 23 E. C. L. 221; *Harrod v. Benton*, 8 B. & C. 217, 15 E. C. L. 202; *De Medina v. Grove*, 10 Jur. 428.

10. See *Bass v. Estill*, 50 Miss. 300.

11. *Norris v. Aylett*, 2 Campb. 329; *Bell v. Banks*, 3 M. & G. 258, 42 E. C. L. 141; *Mohawk Bank v. Van Horne*, 7 Wend. (N. Y.) 117; *Byles on Bills* (8th ed.), § 239.

12. **Foreign Judgment.** — *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611; *Nicholas v. Farwell*, 24 Neb. 180; *Teel v. Yost*, 128 N. Y. 387; *Sipes v. Whitney*, 30 Ohio St. 69; *Coleman v. Waters*, 13 W. Va. 278.

13. *Snyder v. Critchfield*, 44 Neb. 66.



state.<sup>1</sup> And a judgment entered in one state, upon a warrant of attorney contained in a note, without notice to the defendant, may, when sued on in another, be attacked for fraud and duress in the procurement of the note, since the defendant has never had his day in court.<sup>2</sup> Whether a warrant of attorney is sufficient, under the laws of another state, to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state.<sup>3</sup>

**8. Relieving Against Judgment — a. IN GENERAL.** — The power of the court to relieve from a judgment by confession on appeal, or by opening the judgment on behalf of the defendant, or by vacating it at the instance of creditors has been discussed elsewhere.<sup>4</sup> The judgment may be valid though founded on an unauthorized instrument. So a judgment by confession in forcible entry, entered upon a warrant of attorney contained in a lease duly executed under seal by the lessee, is valid, though the lease was executed by an unauthorized agent on the part of the lessor, the plaintiff.<sup>5</sup> That the judgment confessed was not such as was authorized by the warrant of attorney is not a ground of objection for third persons, but only for the defendant therein.<sup>6</sup>

**b. GROUNDS FOR RELIEF — Fraud.** — Fraud is one of the special grounds on which relief will be granted.<sup>7</sup>

**Want of Consideration.** — The fact that the judgment was without consideration is not sufficient to authorize relief from the judgment if it was confessed with the intent to defraud creditors.<sup>8</sup>

**Failure to Comply with Statute.** — Nor where there is a substantial failure to comply with the statute<sup>9</sup> other than a mere irregularity.<sup>10</sup> The remedy of a defendant for irregularity in entering judgment under a statute should be sought in the court where the judgment was rendered.<sup>11</sup> If a judgment has been entered under such a power without complying in all substantial particulars with the statutory provisions, the enforcement of the judgment may be enjoined upon principles of equity at the suit of a third person prejudiced thereby, and an execution in advance of the entry of judgment under the warrant will be postponed in favor of a junior execution or attachment creditor who has regularly made a levy based upon valid proceedings.<sup>12</sup> If it is entered on a *narr.* reciting the warrant, but without any appearance for the defendant, or formal confession of judgment, it will be set aside as irregular.<sup>13</sup>

**Failure to Comply with Conditions inserted in or appended to the warrant is also ground for setting aside the judgment.**<sup>14</sup>

**Levy for Excessive Amount.** — The assignee of a person who has given a warrant of attorney and has subsequently become bankrupt may have the execution on the warrant set aside if the grantee of the warrant has levied execution

1. *Carlin v. Taylor*, 7 Lea (Tenn.) 666.

2. *Trebilcox v. McAlpine*, 62 Hun (N. Y.)

317. And see *Spier v. Corll*, 33 Ohio St. 236.

3. *Snyder v. Critchfield*, 44 Neb. 66.

4. See the title JUDGMENTS AND DECREES, vol. 17, p. 824 *et seq.*, and the title JUDGMENTS, 11 ENCYC. OF PL. AND PR. 1018 *et seq.*

5. *Johnson v. Crane*, 22 Ill. App. 366.

6. *Farwell v. Huston*, 151 Ill. 239.

7. See the title JUDGMENTS AND DECREES, vol. 17, p. 827. See also *Harrod v. Benton*, 8 B. & C. 217, 15 E. C. L. 202; *Young v. Clapp*, 147 Ill. 176; *Hide, etc.*, Nat. Bank v. Rehm, 27 Ill. App. 172; *Dougherty's Estate*, 9 W. & S. (Pa.) 189; *Bunn v. Ahl*, 29 Pa. St. 387; *Adams v. Bachert*, 83 Pa. St. 524; *Unangst v. Good-year, etc.*, Mfg. Co., 141 Pa. St. 127.

8. *Shallcross v. Deats*, 43 N. J. L. 177.

9. *Stein v. Good*, 115 Ill. 93; *Edgar v. Greer*, 10 Iowa 282; *Thompson v. Hintgen*, 11 Wis.

112. See also the title JUDGMENTS, 11 ENCYC. OF PL. AND PR. 1025. And see *supra*, this title, *Formal Requisites—Strict Compliance with Statute.*

10. *De Riemer v. De Cantillon*, 4 Johns. Ch. (N. Y.) 85.

In *Adam v. Arnold*, 86 Ill. 185, it was held no ground for setting aside the judgment that the note sealed and payable at a particular place was described in the declaration as unsealed and payable generally.

11. *Gardner v. Bunn*, 132 Ill. 403; *Sipes v. Whitney*, 30 Ohio St. 69.

12. *Schuster v. Rader*, 13 Colo. 335.

13. *Lytle v. Colts*, 27 Pa. St. 193.

14. See *Harwood v. Hildreth*, 24 N. J. L. 51; *Inman v. Griswold*, 1 Cow. (N. Y.) 199; *Wood v. Bagley*, 12 Ired. L. (34 N. Car.) 83; *Secor v. Shippey*, 7 Pa. Co. Ct. 555; *Weaver v. McDevitt*, 21 Pa. Super. Ct. 597.

thereunder for a greater sum than that authorized by the warrant.<sup>1</sup>

**EFFECT OF WAIVER IN WARRANT — Waiver of Service.** — Judgment entered on a warrant of attorney which expressly permits it without process is not within the provisions of the *Ohio* statute requiring the issue of summons as a condition precedent to the taking of judgment.<sup>2</sup> Also when the warrant authorizes the waiving of process and the release of all errors, any defect in the verification of the petition, on a proceeding in error, will be deemed to have been waived.<sup>3</sup>

**Failure to Authorize Waiver as to All of Parties.** — A warrant bearing date subsequent to the commencement of the suit and referring to it and authorizing the attorney to confess judgment in the case then pending as to two of the parties, authorizes a confession against one of such named parties even though he has not been served with process, and there is not an express waiver of process but merely a substantial waiver of service.<sup>4</sup>

**Release of Errors.** — But when a release of errors is incorporated in the warrant of attorney, this will waive all irregularities.<sup>5</sup> So the provision in a warrant of attorney expressly releasing all errors intervening in entering a judgment is conclusive against the person granting it, where the court has jurisdiction to enter the judgment, and power is granted under the warrant to confess the judgment.<sup>6</sup> And where a judgment was entered on a warrant of attorney for the correct amount honestly due, the fact that the attorney waived the defendants' appeal, which he was not authorized by the warrant to do, is no ground for setting aside the judgment, no equitable ground being shown.<sup>7</sup> But where the warrant authorized the entry of judgment upon an evidence of indebtedness for the sum named therein, or for so much as shall appear to be due according to the tenor and effect thereof, and it appears according to the tenor and effect of the evidence of indebtedness that all remedy thereon has been barred and all right of recovery extinguished, the attorney has no power to waive the defense of the bar of the statute, nor can he waive any defense the defendants may have by admitting any matter which the plaintiff may choose to put in his complaint.<sup>8</sup> Nor does a warrant of attorney in the ordinary form authorizing the attorney to enter up judgment in the principal's name and to execute a release of all errors authorize a release of errors in process of outlawry.<sup>9</sup>

**VIII. WARRANT TO SUE AND DEFEND.** — Formerly, attorneys were required to be appointed by warrant and to file their powers in court. This practice has long since been disused, however, and mere parol authority is considered sufficient, the presumption being that the attorney appearing is regularly authorized. The necessity of such a warrant seems never to have been recognized in the *United States*.<sup>10</sup>

1. *Bell v. Tidd*, 6 Jur. 59.

2. **Waiver of Process.** — *Athens First Nat. Bank v. Garland*, 109 Mich. 515.

The right to be served with citation before judgment, is one that may be waived by the maker of a note, desiring to confess judgment thereon, at the time of the execution of the note, and such waiver may be afterwards enforced against him according to his agreement. *Stein v. Brunner*, 42 La. Ann. 772.

3. *Sidney First Nat. Bank v. Reed*, 31 Ohio St. 435.

4. *Varnum v. Runion*, 1 McLean (U. S.) 413, 28 Fed. Cas. No. 16,892.

5. **Release of Errors.** — *Groll v. Gegenheimer*, 147 Pa. St. 162.

6. *Krickow v. Pennsylvania Tar Mfg. Co.*, 87 Ill. App. 653; *Boyles v. Chytraus*, 175 Ill. 370.

7. *Hansen v. Schlesinger*, 125 Ill. 230.

8. *Kahn v. Lesser*, 97 Wis. 217.

9. *Solomon v. Graham*, 5 El. & Bl. 309, 85 E. C. L. 309.

10. **Warrant to Sue and Defend** — *United States*. — *U. S. Bank v. Roberts*, 4 Conn. 323, 2 Fed. Cas. No. 934; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 740.

*Alabama*. — *Gaines v. Tombeckbee Bank*, Minor (Ala.) 50; *Lucas v. Georgia Bank*, 2 Stew. (Ala.) 147.

*Delaware*. — *State v. Houston*, 3 Harr. (Del.) 20.

*Illinois*. — *Leslie v. Fischer*, 62 Ill. 118.

*Iowa*. — *Savery v. Savery*, 8 Iowa 217.

*Kentucky*. — *M'Alexander v. Wright*, 3 T. B. Mon. (Ky.) 191.

*Maine*. — *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; *Bridgton v. Bennett*, 23 Me. 420.

*Maryland*. — *Henck v. Todhunter*, 7 Har. & J. (Md.) 275.

*Massachusetts*. — *Field v. Undivided Land*, 1 Cush. (Mass.) 11.

*Michigan*. — *Farmers', etc., Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457; *O'Flynn v. Eagle*, 7 Mich. 306.

*Minnesota*. — *Farrington v. Wright*, 1 Minn. 241.

*Mississippi*. — *McKiernan v. Patrick*, 4 How. (Miss.) 335; *Hardin v. Ho-yo-po-nubby*, 27 Miss. 567.

*New Hampshire*. — *Manchester Bank v. Fellows*, 28 N. H. 302; *Stevens v. Fuller*, 55 N. H. 143.

*New York*. — *Hirshfield v. Landman*, 3 E. D. Smith (N. Y.) 208; *Silkman v. Boiger*, 4 E. D. Smith (N. Y.) 236; *Howard v. Howard*,

(Supm. Ct.) 11 How. Pr. (N. Y.) 80; *People v. Murray*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 71, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 152, *affirmed* 138 N. Y. 635.

*North Carolina*. — *Johnson v. Sikes*, 4 Jones L. (49 N. Car.) 70.

*Pennsylvania*. — *Lynch v. Com.*, 16 S. & R. (Pa.) 368; *Danville, etc., R. Co. v. Rhodes*, 180 Pa. St. 157; *Com. v. Serfass*, 5 Pa. Co. Ct. 130.

*South Carolina*. — *Hellman v. McWhennie*, 3 Rich. L. (S. Car.) 364.

*Wisconsin*. — *Walker v. Rogan*, 1 Wis. 597.

See also the title ATTORNEY AND CLIENT, vol. 3, p. 345, and the title APPEARANCES, 2 ENCYC. OF PL. AND PR. 675 *et seq.*



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#### CROSS-REFERENCE.

See the title *IMPLIED WARRANTIES*, vol. 15, p. 1210.

**I. GENERAL SCOPE OF THE SUBJECT.** — The term "warranty" is used in several distinct connections: in insurance law, to indicate an undertaking on the part of the insured that certain alleged facts are as he represents them to be; in the law of real property, to indicate a covenant on the part of the grantor in the conveyance to protect the title conveyed to his vendee; in the law of sales of personal property, to indicate a collateral undertaking on the part of the seller as to the quality of or title to the subject of the sale. Warranties of this last character may be either express or implied. This article is confined to a consideration of the law relating to express warranties in sales of personal property, and throughout the article the word "warranty" is used



as meaning an express warranty unless a different meaning is plainly indicated.<sup>1</sup>

**II. DEFINITION.** — A warranty in a sale of personal property is a statement or representation made by the seller, contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character or quality of, or the title to, the goods or article sold, and by which the seller promises or undertakes that certain facts are, or shall be, as he represents them. The warranty is express when created by the apt and explicit statements of the seller; it is implied when the law derives it by implication or inference from the nature of the transaction or the relative situations or circumstances of the parties.<sup>2</sup>

The Terms "Warranty" and "Representation" Are Not Synonymous; a warranty is always a representation, but the converse is not necessarily true, the former being the more comprehensive term.<sup>3</sup>

**III. GENERAL NATURE AND ELEMENTS OF THE CONTRACT** — 1. **Is a Collateral Undertaking.** — A warranty is not one of the essential elements of a sale, though it is a usual accompaniment; when it exists it is therefore a mere collateral undertaking,<sup>4</sup> though it forms a part of the completed contract<sup>5</sup> and constitutes a material feature of the consideration inducing the purchase.<sup>6</sup>

An Affirmation or Representation as to an Essential Element of the contract is, therefore, not a warranty, as, for example, a statement as to the existence of the thing sold or its identity.<sup>7</sup> And there is authority for the view that since the

1. See the titles COVENANTS, vol. 8, p. 97; IMPLIED WARRANTIES, vol. 15, p. 1210; INSURANCE, vol. 16, p. 919; LIFE INSURANCE, vol. 19, p. 62.

2. **Warranty Defined.** — In *Chanter v. Hopkins*, 4 M. & W. 404, Lord Abinger defined a warranty thus: It "is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it." And this is declared, in the case of *Stuckey v. Bailey*, 3 F. & F. 1, to be "the best definition" yet given.

*California* Civil Code, § 1763, defines a warranty to be "an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future." See *Harley v. Golden State, etc., Iron Works*, 66 Cal. 238.

For other definitions, substantially in accord with that given in the text, see *Dorr v. Fisher*, 1 Cush. (Mass.) 273; *Carter v. Black*, 46 Mo. 384; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753.

"The word 'warranty' has been used in such a great variety of senses, and the decisions thereon have been so anomalous, that, as a distinguished jurist has said, 'an attempt to arrive at a satisfactory conclusion about any principle supposed to be established by them would be hopeless if not absurd.' Gibson, C. J., in *McFarland v. Newman*, 9 Watts (Pa.) 55, 34 Am. Dec. 497." *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906.

"A warranty consists in representations and statements of and concerning the condition and quality of personal property, the subject of sale, made by the person making the sale to induce and bring it about." *Pemberton v. Dean*, 88 Minn. 60, 97 Am. St. Rep. 503.

3. An instruction that the jury must find for the defendant (the purchaser) if the cow sold to him was "represented and warranted" to be a breeder is not erroneous as requiring some-

thing more than a warranty. *Palmer v. Mt. Sterling Nat. Bank*, (Ky. 1892) 18 S. W. Rep. 234.

4. **Collateral Undertaking.** — *Reynolds v. Palmer*, 21 Fed. Rep. 439, note; *Morris v. Bradley Fertilizer Co.*, (C. C. A.) 64 Fed. Rep. 55; *Bayon v. Vavasour*, 10 Mart. (La.) 61; *Strawbridge v. Warfield*, 4 La. 20; *Behn v. Burness*, 3 B. & S. 751, 113 E. C. L. 751, 9 Jur. N. S. 620. See also the title SALES, vol. 24, p. 1028.

5. *Hogins v. Plympton*, 11 Pick. (Mass.) 99; *Stryker v. Crane*, 33 Neb. 690.

6. *Allen v. Hooker*, 25 Vt. 137.

7. **Representation as to Essential Element.** — See *Reynolds v. Palmer*, 21 Fed. Rep. 439, note; *Rose v. Hurley*, 39 Ind. 78. See also *Strawbridge v. Warfield*, 4 La. 20.

In *Chanter v. Hopkins*, 4 M. & W. 404, it was said by Lord Abinger: "If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead, it is a nonperformance of it. So if a man were to order copper for sheathing ships, that is, a particular copper, prepared in a particular manner; if the seller sends him a different sort, in that case he does not comply with the contract, and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so." See also *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Columbian Iron Works, etc., Co. v. Douglas*, 84 Md. 44, 57 Am. St. Rep. 362; *Ricketts v. Hays*, 13 Ind. 181; *McConnell v. Jones*, 19 Ind. 328.

There are cases which speak of an implied or express warranty of the existence of the thing sold. But, as seen from the reasoning of Lord Abinger just quoted, such intimations are erroneous. See *Terry v. Bissell*, 26 Conn.

transfer of the absolute or general property in the thing sold is an essential element in every sale, an undertaking by the seller that he has power to make the transfer of title is not, properly speaking, a warranty.<sup>1</sup>

**2. Distinguished from Conditions.** — The warranty, being a collateral undertaking, is to be distinguished from a condition. A breach of a condition avoids the entire contract or prevents its becoming executed, while a breach of warranty properly affords ground only for an action for damages when the contract has become executed.<sup>2</sup> There is an apparently irreconcilable conflict of authority as to the distinction between warranties and conditions and as to the rights and obligations of the parties thereunder. Much of the confusion has arisen from the fact that what are generally considered in the *United States* as warranties that the article shall be of the kind or species contracted for were, prior to the passage of the "Sales of Goods" Act, in *England*, and are, in some of the courts of the *United States*, treated as conditions precedent.<sup>3</sup>

**Regarded as a Condition Subsequent.** — In some jurisdictions the warranty has been regarded as a condition subsequent, a breach of which will authorize the buyer to treat the contract as at an end. But this view has been adopted rather for the purpose of justifying the buyer's remedy by rescission than because of any principle of logical arrangement or consistency.<sup>4</sup> In *England* the doctrine prevails that, in sales by description, it is a condition precedent to any obligation on the part of the buyer, that the articles delivered shall answer the description.<sup>5</sup> But this view, while it has been recognized by some text writers, is opposed to the weight of authority in the *United States*.<sup>6</sup>

**3. Distinguished from Independent Agreements.** — An undertaking contained

23; *Lincoln v. New Orleans Express Co.*, 45 La. Ann. 729; *Chapin v. Dobson*, 78 N. Y. 82, 34 Am. Rep. 512.

1. *Columbian Iron Works, etc., Co. v. Douglas*, 84 Md. 44, 57 Am. St. Rep. 362.

2. **Distinguished from Conditions.** — See the titles *CONDITIONAL SALES*, vol. 6, p. 436; *CONDITIONS*, vol. 6, p. 499; and the following cases: *Accumulator Co. v. Dubuque St. R. Co.*, (C. C. A.) 64 Fed. Rep. 70; *Maxwell v. Lee*, 34 Minn. 511; *J. I. Case Threshing Mach. Co. v. Smith*, 16 Oregon 381. Compare *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

In *Dorr v. Fisher*, 1 Cush. (Mass.) 274, the court, by Shaw, C. J., after defining a warranty as a collateral undertaking, said: "It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor, and notwithstanding such warranty, or any breach of it, the vendee may hold the goods and have a remedy for his damages by action."

The defendant bought of the plaintiffs, at a certain price, four hundred and thirteen bales of wool, to arrive *ex Stige*, or any vessel they may be transhipped in, and subject to the wool not being sold in New York before a certain time. "The wool to be guaranteed about similar to samples in [the brokers'] possession, and if any dispute arises, it shall be decided by the selling brokers, whose decision shall be final." The wool turned out not about similar to the sample, and the brokers, after protest from the defendant, awarded that the defendant should take it at a certain abatement. It was held that, as the contract was for the sale of specific goods, the guaranty was not a condition, but only a warranty, that the brokers had the power

to award as they had, and the defendant was bound to take the wool accordingly. *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447.

**A Stipulation that the Article Sold Shall Pass Inspection**, when inserted in a contract of sale, is nothing more than a warranty of the soundness of the article, and does not change the sale into an executory contract which is not to take effect until the performance of a condition. *Gibson v. Stevens*, 8 How. (U. S.) 384.

3. *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906; *Carleton v. Lombard*, 149 N. Y. 147.

In *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 565, where a machine sold was warranted to do certain work, the warranty was regarded as a condition precedent to the existence of any liability on the part of the buyer although he had already given his notes for the purchase money. See also *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *J. I. Case Threshing Mach. Co. v. Smith*, 16 Oregon 382.

4. See *Dorr v. Fisher*, 1 Cush. (Mass.) 274; *Boardman v. Spooner*, 13 Allen (Mass.) 361, 90 Am. Dec. 196; *Bryant v. Isburgh*, 13 Gray (Mass.) 607, 74 Am. Dec. 655. See also *infra*, this title, *Remedies for Breach of Warranty — Rescission*.

5. See *Bowes v. Shand*, 2 App. Cas. 455, 46 L. J. Q. B. 561; *Nichol v. Godts*, 10 Exch. 191, 23 L. J. Exch. 314. See also *Benjamin on Sales* (4th Am. ed.), § 600; *Winsor v. Lombard*, 18 Pick. (Mass.) 60; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Columbian Iron Works, etc., Co. v. Douglas*, 84 Md. 44, 57 Am. St. Rep. 362.

6. See *infra*, this title, *Warranty in Particular Sales — Sales by Description*. See also the title *IMPLIED WARRANTIES*, vol. 15, p. 1223.

in an independent agreement is not a warranty, for the reason that it is not a part of the contract of sale.<sup>1</sup> Thus, an agreement in writing, made by the seller of a machine, that he would keep it in repair for a specified period free of charge, is not a warranty nor a condition precedent or subsequent, for a breach of which the buyer would be entitled to rescind, but is a mere independent undertaking, for a breach of which the buyer's remedy is an action for damages.<sup>2</sup>

**4. Distinguished from Fraud.**—There is a clear distinction between an action for a breach of warranty and one for a fraudulent representation; in the one the cause of action is *ex contractu* purely, while in the other it is *ex delicto*.<sup>3</sup> In actions of the latter character a wilful intent to mislead or deceive is an essential element of the right to recover,<sup>4</sup> while in the former no such element is necessary and the good faith of the warrantor is immaterial;<sup>5</sup> indeed, it seems that evidence of fraud is incompetent, as being

**1. Independent Agreements.**—*DeWitt v. Berry*, 134 U. S. 306; *McConnell v. Jones*, 19 Ind. 328.

A writing of the vendor reading, "We agree to put on board the brig C. two hundred dozen good fine wine \* \* \* and send the same to H. at New Orleans," and acknowledging receipt of the purchase money, is not a warranty that the wine shall be "good fine wine," but a mere agreement to ship; it is not a part of the contract of sale, but an independent agreement which presupposes a sale already made. *Hogins v. Plympton*, 11 Pick. (Mass.) 100. Compare *Redlands Orange Growers' Assoc. v. Gorman*, 161 Mo. 203, holding that a provision in the contract of sale whereby the seller agrees to ship the goods "not later than" a specified day is a warranty.

**2.** *Lamson Consol. Store Service Co. v. Conyngham*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 428. See also *Accumulator Co. v. Dubuque St. R. Co.*, (C. C. A.) 64 Fed. Rep. 70.

**3. Fraud.**—*Montreal Bank v. Thayer*, 7 Fed. Rep. 622; *Brooke v. Cole*, 108 Ga. 251; *Wallace v. Wren*, 32 Ill. 146; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Weimer v. Clement*, 37 Pa. St. 147, 78 Am. Dec. 411.

"The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests upon contract, while fraud or fraudulent representations have no element of contract in them, but are essentially a tort. When judges or law writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous." *Rose v. Hurley*, 39 Ind. 81.

**If the Action, in Form, Is for Fraud or Deceit** there can be no recovery upon proof merely of a breach of warranty. *Scott v. Holland*, 132 Ala. 389; *Brooke v. Cole*, 108 Ga. 251. See also *Brush v. Smith*, 111 Iowa 217.

**4.** *Brooke v. Cole*, 108 Ga. 251; *Humbert v. Larson*, 89 Iowa 258; *Mizell v. Sims*, 39 Miss. 331; *McGlade v. McCormick*, 57 N. J. L. 430; *Klipstein v. Raschein*, 117 Wis. 248. See also the title **FRAUD AND DECEIT**, vol. 14, p. 85.

**5. Good Faith of Seller Not Material—Proof of Scienter Unnecessary.**—*England.*—*Williamson v. Allison*, 2 East 446; *Dowding v. Mortimer*, 2 East 450, note.

*United States.*—*Shippen v. Bowen*, 122 U. S. 575; *Schuchardt v. Allen*, 1 Wall. (U. S.) 359.

*Alabama.*—*Wren v. Wardlaw, Minor* (Ala.) 363, 12 Am. Dec. 60. See also *Scott v. Holland*, 132 Ala. 389.

*Connecticut.*—*Bartholomew v. Bushnell*, 20 Conn. 271, 52 Am. Dec. 338.

*Delaware.*—*Tyre v. Causey*, 4 Harr. (Del.) 425; *Cummins v. Ennis*, (Del. 1903) 56 Atl. Rep. 377.

*Georgia.*—*Burge v. Stroberg*, 42 Ga. 89.

*Illinois.*—*Wallace v. Wren*, 32 Ill. 146.

*Kentucky.*—*Tyler v. Moody*, 111 Ky. 191, 98 Am. St. Rep. 406; *Bedford v. Megibben*, (Ky. 1890) 13 S. W. Rep. 1082.

*Maryland.*—*Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110, 25 Am. Dec. 276; *Adler v. Robert Portner Brewing Co.*, 65 Md. 27.

*Massachusetts.*—*Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103.

*Minnesota.*—*Brown v. Doyle*, 69 Minn. 543.

*Mississippi.*—*McKee v. Jones*, 67 Miss. 405; *Williams v. Harris*, 2 How. (Miss.) 627; *McLeod v. Tutt*, 1 How. (Miss.) 288.

*Nebraska.*—*Farmer's, etc., Bank v. Upham*, 37 Neb. 417.

*New Jersey.*—*Becker v. Atchason*, (N. J. 1903) 56 Atl. Rep. 172, *distinguishing* *Searing v. Lum*, 5 N. J. L. 785; *Allen v. Wanamaker*, 31 N. J. L. 370.

*New York.*—*Brisbane v. Parsons*, 33 N. Y. 332; *Ross v. Mather*, 47 Barb. (N. Y.) 582; *Lewis v. Doyle*, 13 N. Y. App. Div. 291; *Wood v. Anthony*, 79 N. Y. App. Div., 111; *Hafner v. McCaffrey*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 138.

*North Carolina.*—*Smith v. Williams*, 1 Law Repos. (4 N. Car.) 263.

*Ohio.*—*Gartner v. Corwine*, 57 Ohio St. 246.

*Pennsylvania.*—*Vanleer v. Earle*, 26 Pa. St. 277.

*South Carolina.*—*Martin v. Howil*, 2 Treadw. (S. Car.) 750.

*Tennessee.*—*Richardson v. Marshall County*, 100 Tenn. 346.

*Texas.*—*Norris v. Parker*, 15 Tex. Civ. App. 117; *Sanders v. Britton*, (Tex. Civ. App. 1808) 47 S. W. Rep. 550, *reversing* 45 S. W. Rep. 209.

*Vermont.*—*Vail v. Strong*, 10 Vt. 457.

*Virginia.*—*Trice v. Cockran*, 8 Gratt. (Va.) 442, 56 Am. Dec. 151.



immaterial, in an action for a breach of warranty.<sup>1</sup> Representations made at the time of the sale which are sufficient to constitute a warranty are not deprived of their force and effect as such by the fact that they were fraudulent or were wilfully false.<sup>2</sup> On the other hand, a buyer may maintain an action based on a fraudulent representation made by the seller, although such representation was not such as would amount to a warranty.<sup>3</sup>

Where the Same Representation Constitutes Both a Fraud and a Warranty, the buyer may pursue his remedy by an action in tort for the fraud or he may waive the fraud and sue in contract for a breach of the warranty,<sup>4</sup> but he may not recover for both.<sup>5</sup> If both are alleged and only a breach of warranty is proven, he may recover for the latter.<sup>6</sup>

**5. Is Not a Contract of Indemnity or Guaranty.** — A warranty is an undertaking as to the soundness or quality of the goods sold and not a promise of indemnity against loss on a resale; and the seller becomes liable for a breach immediately upon the occurrence of it without proof of actual loss on a resale.<sup>7</sup> Similarly, a warranty is not a guaranty in the sense that there can be no cause of action until the expiration of the time for which the guaranty is to run.<sup>8</sup>

**6. Consideration for Warranty — A Warranty, Like Other Agreements,** is not valid unless supported by a consideration. When it is made at the time of the sale, it is a part of the entire contract, and the price paid for the subject of the sale constitutes the consideration for it.<sup>9</sup>

The Warranty Need Not Be Made at the Exact Time of Sale; if it is made at any time before the completion of the contract and so as to form a part of the whole transaction, the price paid for the thing sold will afford a valid consideration.<sup>10</sup>

*Wisconsin.* — *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916.

*Compare Hubby v. Stokes*, 22 Tex. 217 ("sound \* \* \* to the best of my knowledge").

The scienter need not be proven though it is alleged in the declaration. *Gresham v. Postan*, 2 C. & P. 540, 12 E. C. L. 250.

**Under Special Statutory Provisions** with respect to a particular class of warranties, a different rule may prevail. See *Snowden v. Waterman*, 100 Ga. 588, *applying* Ga. Civ. Code, § 3555.

1. See *infra*, this title, *Evidence*.

In an action for a breach of warranty in the sale of a house, it is improper to instruct the jury as to what would constitute fraud in such a sale; the question of fraud is one with which the jury has nothing to do in such a case. *Wallace v. Wren*, 32 Ill. 146.

2. *Burge v. Stroberg*, 42 Ga. 89; *Carter v. Abbott*, 33 Iowa 180; *Waterbury v. Russell*, 8 Baxt. (Tenn.) 159. See also *Nations v. Love*, (Tex. Civ. App. 1894) 26 S. W. Rep. 232.

3. *Oregon Imp. Co. v. Roach*, 57 N. Y. Super. Ct. 228; *Pinney v. Andrus*, 41 Vt. 631. See also *Stewart v. Coesvelt*, 1 C. & P. 23, 11 E. C. L. 305.

4. *Shippen v. Bowen*, 122 U. S. 575; *Burge v. Stroberg*, 42 Ga. 89; *Hughes v. Funston*, 23 Iowa 259; *Bedford v. McGibben*, (Ky. 1890) 13 S. W. Rep. 1082; *Hillman v. Wilcox*, 30 Me. 170; *Waterbury v. Russell*, 8 Baxt. (Tenn.) 159; *Vail v. Strong*, 10 Vt. 457; *Williamson v. Allison*, 2 East 446.

**The Purchaser of a Patent Right** may rely upon the representations of the seller as to what is covered by the patent, and if there is no patent for a part of that which the vendor exhibits to the vendee as an invention, there is fraud

rather than a breach of warranty. *Rose v. Hurley*, 39 Ind. 78.

5. *Brush v. Smith*, 111 Iowa 217.

6. *Brown v. Doyle*, 69 Minn. 543; *Gartner v. Corwine*, 57 Ohio St. 246.

7. *Muller v. Eno*, 14 N. Y. 597.

8. *Accumulator Co. v. Dubuque St. R. Co.*, (C. C. A.) 64 Fed. Rep. 70.

9. **Consideration.** — *Standard Underground Cable Co. v. Denver Consol. Electric Co.*, (C. C. A.) 76 Fed. Rep. 422; *Wightman v. Carlisle*, 14 Vt. 296; *Curtis v. Moore*, 15 Wis. 134 (a case of exchange). See also *Cummins v. Ennis*, (Del. 1903) 56 Atl. Rep. 377.

10. **Time of Warranty.** — *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328; *Douglass v. Moses*, 89 Iowa 40, 48 Am. St. Rep. 353; *McGaughey v. Richardson*, 148 Mass. 608; *Webster v. Hodgkins*, 25 N. H. 128; *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584; *Crossman v. Johnson*, 63 Vt. 333.

A warranty made after part payment of the price, but before delivery of the article sold, is valid without proof of a new consideration. *Douglass v. Moses*, 89 Iowa 40, 48 Am. St. Rep. 353.

In *Lynsey v. Selby*, 2 Ld. Raym. 1120, Lord Holt said: "If, upon a treaty about buying certain goods, the seller warrants them, the buyer takes time for a few days, and then gives the seller his price, though the warranty was before the sale, yet this will be well, because the warranty was the ground of the treaty; and this is *warrantizando vendidit*." See this *quoted with approval* in *Wilmot v. Hurd*, 11 Wend. (N. Y.) 585, where it was held that if a vendor, while the parties are negotiating for the sale, offers to warrant an article, the warranty will be binding, although

Where a written warranty is given a day or two after the sale, in pursuance of an oral promise made at the time of the sale, the consideration for the sale will extend to the written warranty and support it.<sup>1</sup>

**A Warranty Made After the Sale** is invalid unless supported by some new consideration; the consideration already given, *i. e.*, the price, is exhausted by the transfer of the property in the thing sold and cannot be relied upon to support a subsequent independent warranty.<sup>2</sup> But a compromise of differences between the parties arising out of the original warranty and the mutual agreement to enter into a new contract are a sufficient consideration to support a warranty contained in the new contract.<sup>3</sup> There is nothing in the general rule just stated which precludes parties who have discovered that their agreement has not been correctly expressed in the written instrument they have executed, or who desire for any other reason to change it, from correcting the instrument by mutual consent so as to make it conform to the actual agreement reached, and no new consideration for a warranty thus added is necessary.<sup>4</sup>

**A Warranty May Be Transferred** from the article originally sold to another which, by agreement of the parties, has been substituted for it, and the original consideration will support the warranty as applicable to the new article.<sup>5</sup>

**IV. WARRANTY OF TITLE.**—Owing to the generally accepted rule in favor of an implied warranty of title in every sale of personality,<sup>6</sup> instances of express warranty of title are less frequent. The security afforded by an express warranty can hardly be more, and may be less, than that afforded by the warranty which the law implies. The same general rules with reference to affirmations by the seller apply in this connection as in the case of other express warranties.<sup>7</sup>

**V. WARRANTY OF FUTURE SOUNDNESS.**—It was laid down by an early

the sale does not take place until some days afterward.

1. *Spalding v. Conant*, 146 Mass. 292; *Collette v. Weed*, 68 Wis. 428.

The seller of an article, who has inserted a warranty of the same in a receipted bill thereof, cannot, in an action against him on the warranty, give evidence of a prior bargain for a sale of the thing at the same price without warranty, for the purpose of showing that the warranty was without consideration. *Davis v. Ball*, 6 Cush. (Mass.) 505, 53 Am. Dec. 53.

2. **Subsequent Warranty Requires New Consideration**—*England*.—*Roscorla v. Thomas*, 3 Q. B. 234, 43 E. C. L. 713.

*United States*.—*Morris v. Bradley Fertilizer Co.*, (C. C. A.) 64 Fed. Rep. 55.

*Delaware*.—*Burton v. Young*, 5 Harr. (Del.) 233.

*Georgia*.—*Baldwin v. Daniel*, 69 Ga. 782; *Brooks v. Matthews*, 78 Ga. 739.

*Illinois*.—*Towell v. Gatewood*, 3 Ill. 22, 33 Am. Dec. 437.

*Indiana*.—*Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 711.

*Kansas*.—*Da Lee v. Blackburn*, 11 Kan. 190.

*Kentucky*.—*Burdit v. Burdit*, 2 A. K. Marsh. (Ky.) 143.

*Maine*.—*White v. Oakes*, 88 Me. 367.

*Massachusetts*.—*Hoens v. Plympton*, 11 Pick. (Mass.) 97; *McGaughey v. Richardson*, 148 Mass. 608.

*Minnesota*.—*Aultman v. Kennedy*, 33 Minn. 339.

*Mississippi*.—*Munn v. Perkins*, 1 Smed. & M. (Miss.) 412.

*New York*.—*Brewster v. Countryman*, 12 Wend. (N. Y.) 446.

*North Carolina*.—*McDugald v. McFadgin*, 6 Jones L. (51 N. Car.) 89.

*North Dakota*.—*Fletcher v. Nelson*, 6 N. Dak. 94.

*Vermont*.—*Bloss v. Kittridge*, 5 Vt. 28.

*Wisconsin*.—*Morehouse v. Comstock*, 42 Wis. 626. See also *Congar v. Chamberlain*, 14 Wis. 258.

**Contract under Seal.**—Where the old rule, that a consideration is presumed conclusively in the case of contracts under seal, obtains, a warranty under seal, though given some time after the sale, cannot be attacked for want of consideration. *Wilson v. Ferguson*, Cheves L. (S. Car.) 190; *McCeney v. Duvall*, 21 Md. 166.

3. *Plano Mfg. Co. v. Kesler*, 15 Ind. App. 110; *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328; *Bless v. Nichols, etc., Co.*, 113 Iowa 373; *Dake Engine Mfg. Co. v. Hurley*, 99 Mich. 16; *Hansen v. Gaar*, 63 Minn. 94; *Collette v. Weed*, 68 Wis. 428. See also *Porter v. Pool*, 62 Ga. 238.

4. *Stoudenmeier v. Williamson*, 29 Ala. 558; *Spalding v. Conant*, 146 Mass. 292. See also *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328.

5. *Sandwich Mfg. Co. v. Kelly*, 26 Ill. App. 324.

6. See the title IMPLIED WARRANTIES, vol. 15, p. 1215.

7. See *Cheatham v. Wilber*, 1 Dak. 321; *Loane v. Anderson*, 60 Ind. 122; *Lambert v. Harbert*, 87 Iowa 186 (a case of warranty by one partner of a partnership's title to certain shares of stock); *Burgess v. Wilkinson*, 13 R.

authority<sup>1</sup> that a warranty can apply only to matters existing at the time the sale or warranty is made and cannot be so extended as to embrace future events or conditions. But this view is not sound, for while it is true that a warranty is ordinarily confined to the state of affairs existing at the time of the sale and is to be so construed in the absence of a clear understanding to the contrary,<sup>2</sup> it is well settled that a future event may be warranted and that a warranty will be construed as embracing future conditions when its terms plainly indicate that such was the intention of the parties.<sup>3</sup> The seller may warrant the quality of the article sold for a specified period; in such a case, the warranty will be held to extend to defects occurring within that period but not afterward.<sup>4</sup>

The Provisions of the Statute of Frauds are to be considered in determining the validity and effect of oral warranties which embrace future conditions.<sup>5</sup>

Representations as to Future Events Are More Apt to Be Construed as Mere Expressions of Opinion, particularly where, from the nature of the circumstances, such statements are necessarily matters of opinion and could not be made as matters of fact.<sup>6</sup>

**VI. WARRANTY IN EXECUTORY CONTRACTS OF SALE.** — While warranties usually exist only in executed contracts of sale, they are not necessarily confined to them.<sup>7</sup> It is not essential to the validity of the warranty that the article to which it relates shall be in existence;<sup>8</sup> in an executory contract for the sale of goods to be manufactured, an express agreement that they shall correspond in quality to certain other goods is a warranty of quality for a breach of which the buyer may recover damages without returning or offering to return the goods.<sup>9</sup> Properly speaking, however, there can be no effective

I. 646 (affirmation of ownership treated as a warranty); *Medina v. Stoughton*, 1 Salk. 210; *Adamson v. Jarvis*, 4 Bing. 66, 13 E. C. L. 343; *Sims v. Marryat*, 17 Q. B. 281, 79 E. C. L. 281 (a case of warranty of title to copy-right).

The Words, "I Warrant and Defend," used in a sale of personalty, have been held to be not a covenant of title, but merely for quiet enjoyment. *Cowan v. Silliman*, 4 Dev. L. (15 N. Car.) 46. See also *Shober v. Robinson*, 2 Murph. (6 N. Car.) 33. Compare *Duff v. Ivy*, 3 Stew. (Ala.) 140; *Livingston v. Arrington*, 28 Ala. 424.

1. **Future Conditions or Events.** — In 3 Bl. Com. (3d ed.) 165, it is said that "the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*; as that a horse is sound at the buying of him, not that he will be sound two years hence."

2. See *infra*, this title, *Construction and Interpretation of Warranties*.

3. **Warranty of Future Quality Valid.** — *Hawley v. Brumagim*, 33 Cal. 394 (as to the value of stock at a certain future date); *Flash v. American Glucose Co.*, 38 La. Ann. 4; *Zinn v. Hyatt*, 60 Mo. App. 627 (warranty of future capacity of a horse); *Times Pub. Co. v. North Carolina Steel, etc., Co.*, 114 N. Car. 224 (warranty that certain stock will be worth par within a year); *Eden v. Parkison*, 2 Dougl. 735 (Blackstone's rule disapproved by Lord Mansfield). See also *Richardson v. Mason*, 53 Barb. (N. Y.) 601 (warranty in sale of cows that they were all "coming in" during the following spring); *Congar v. Chamberlain*, 14 Wis. 258 (warranty of fruit trees).

4. *Snow v. Schomacker*, 69 Ala. 111, 44 Am.

Rep. 509; *Blodget v. Detroit Safe Co.*, 76 Mich. 538.

5. **A Usage of Trade** among tobacco dealers in a certain locality, in all sales of a particular brand, of warranting the article to remain sound and merchantable for the space of four months after the sale, is not unreasonable, and when once established becomes an essential part of a contract of sale of that article. *Fatman v. Thompson*, 2 Disney (Ohio) 482.

5. *Nicholls v. Nordheimer*, 22 U. C. C. P. 48. See the title **VERBAL AGREEMENTS**, vol. 29, p. 795.

6. A statement with reference to an untried stallion that he "will make his mark as a breeder" will be construed as a mere prediction and not a warranty. *Roberts v. Applegate*, 153 Ill. 210.

7. **Executory Contracts** — *Polhemus v. Heiman*, 45 Cal. 573; *Halley v. Folsom*, 1 N. Dak. 326. See also *Dike v. Reitlinger*, 23 Hun (N. Y.) 241.

There can be no difference between an executory contract to sell and deliver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter. *Kent v. Friedman*, 101 N. Y. 616. Compare *Osborn v. Gantz*, 60 N. Y. 540, where it is said that a warranty, properly speaking, is an incident of a completed sale and has no place as a contract having present vitality and force in an executory agreement of sale.

8. *Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289.

9. *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42; *Brigg v. Hilton*, 11 Daly (N. Y.) 335, 99 N. Y. 517, 52 Am. Rep. 63; *Parks*



warranty, *i. e.*, a warranty that will serve as the basis of an action, without a completed sale; if the purchaser reject the property because it is not of the quality specified, he may have an action on the contract for a failure to deliver, but he can have no action upon the warranty. There can be no breach of warranty if the title never vests in the purchaser.<sup>1</sup>

An Agreement to Deliver "in Good Order" certain specified goods constitutes a warranty as to their condition at the time of the contemplated delivery, and is valid though the contract is executory merely.<sup>2</sup>

Upon Sales of Goods "to Arrive," it is presumed that the parties intended that the arrival of goods of the quality and quantity prescribed by the contract should constitute a condition precedent to the existence of any obligations on the part of either party, so that if the goods fail to arrive the contract is avoided *in toto*.<sup>3</sup> But this rule creates a presumption merely; if it plainly appears that the seller intended his undertaking as a warranty, or that such was the understanding of the parties, the seller will be liable on the warranty if the goods fail to arrive in proper quantity or of proper quality, and the buyer's acceptance of them as delivered will not constitute a bar to his action for damages for the breach.<sup>4</sup>

Upon a Sale of Goods "Now on Passage and Expected to Arrive" at a specified date, the same rule prevails; there is a warranty that the goods are on passage, and the buyer may have an action for a breach of it, where it appears that the goods were never on passage.<sup>5</sup>

**VII. EXPRESS AND IMPLIED WARRANTIES DISTINGUISHED.** — A warranty is express when created by the oft and explicit statements of the seller, either orally or in writing; it is implied when the law derives it by implication or inference from the nature of the transaction or the relative situation or circumstances of the parties.<sup>6</sup>

An Express Warranty Precludes an Implied Warranty arising out of the same contract, even when the first relates to one quality and the other is sought to be implied

*v. Morris Ax, etc., Co.*, 54 N. Y. 586; *Kent v. Friedman*, 101 N. Y. 616; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753; *Halley v. Folsom*, 1 N. Dak. 326, *distinguishing* *Osborn v. Gantz*, 60 N. Y. 540.

1. *Halley v. Folsom*, 1 N. Dak. 326. See also *Osborn v. Gantz*, 60 N. Y. 543.

2. *Polhemus v. Heiman*, 45 Cal. 573, 50 Cal. 438. *Compare* *Lawton v. Keil*, 61 Barb. (N. Y.) 558, where it appeared that in a parol agreement for the sale of a certain amount of "sound corn," to be delivered, the seller stated that he had just bought the corn from a third person as sound corn and would sell it as such. It was held that this statement was nothing more than a mere representation and did not amount to a warranty which would sustain an action for damages.

3. Goods "to Arrive." — *Hawes v. Lawrence*, 4 N. Y. 345, *affirming* 3 Sandf. (N. Y.) 193; *Shields v. Pettie*, 4 N. Y. 122, *affirming* 2 Sandf. (N. Y.) 262; *Rogers v. Woodruff*, 23 Ohio St. 636, 13 Am. Rep. 276; *Boyd v. Siffkin*, 2 Campb. 326; *Johnson v. Macdonald*, 9 M. & W. 600.

"The conclusion to which we must come, after a careful examination of these cases, is \* \* \* that if the article contracted for does not arrive, either from the vessel being lost or other cause by accident, and without any fraud or fault of the vendor, the contract is at an end. The contract \* \* \* is merely an agreement for the sale and delivery of the ar-

ticles named, at a future period when they shall arrive. It is in the nature of a condition, and not a warranty." *Neldon v. Smith*, 36 N. J. L. 154.

4. *Higginson v. Weld*, 14 Gray (Mass.) 165; *Dike v. Reitlinger*, 23 Hun (N. Y.) 241; *Chapin v. Dobson*, 78 N. Y. 83, 34 Am. Rep. 512; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Simond v. Braddon*, 2 C. B. N. S. 324, 89 E. C. L. 324.

The exact form of the contract is not material where the meaning or purport is plain. *Johnson v. Macdonald*, 9 M. & W. 600.

5. *Gorrissen v. Perrin*, 2 C. B. N. S. 681, 89 E. C. L. 681; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447. See also *Chapin v. Dobson*, 78 N. Y. 83, 34 Am. Rep. 512. *Compare* *Hawes v. Lawrence*, 4 N. Y. 345, *affirming* 3 Sandf. (N. Y.) 193; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276. In this last case, the contract recited, "Sold R. one thousand sacks coarse L salt \* \* \* to arrive by 15th of November." It was held that this did not import any warranty as to the time the goods would arrive.

6. See *supra*, this title, *Definition*. See also the title IMPLIED WARRANTIES, vol. 15, p. 1212. And see *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85.

The General Term "Warranty" will ordinarily be taken as embracing both express and implied warranties. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

with respect to an entirely different quality; <sup>1</sup> so, also, an express warranty of soundness precludes the implication of a warranty that the article is fit for the purpose for which it is being bought. <sup>2</sup> But an express warranty of quality does not preclude an implied warranty as to title, and *vice versa*, <sup>3</sup> except when the seller, by express language, confines his warranty to that expressed in the contract. <sup>4</sup>

**VIII. WHAT CONSTITUTES A WARRANTY — 1. General Rule.** — No particular form or language is necessary to create a warranty; the expression "warrant" need not occur specifically, though that is the term most often used. It is the subject-matter of the statement or representation, and the circumstances under which it was made, rather than its form, which are to be considered. <sup>5</sup> Any distinct assertion or affirmation as to the quality or char-

**1. Implied Warranty Precluded by Express Warranty** — *United States*. — *De Witt v. Berry*, 134 U. S. 306.

*California*. — *Ft. Collins First Nat. Bank v. Hughes*, (Cal. 1896) 46 Pac. Rep. 272.

*Connecticut*. — *Mullain v. Thomas*, 43 Conn. 252.

*Georgia*. — *Holcombe v. Cable Co.*, 119 Ga. 466; *Johnson v. Latimer*, 71 Ga. 470; *Jackson v. Langston*, 61 Ga. 392.

*Illinois*. — *Ramming v. Caldwell*, 43 Ill. App. 175; *White v. Gresham*, 52 Ill. App. 399. See also *Thorne v. McVeagh*, 75 Ill. 81.

*Indiana*. — *Reeves v. Byers*, 155 Ind. 535; *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415; *Woodruff v. Hensley*, 26 Ind. App. 592.

*Iowa*. — *Shepherd v. Gilroy*, 46 Iowa 193. See also *Douglass v. Moses*, 89 Iowa 40, 48 Am. St. Rep. 353. Compare *Bucy v. Pitts Agricultural Works*, 89 Iowa 464.

*Michigan*. — *McGraw v. Fletcher*, 35 Mich. 104.

*Minnesota*. — *Cosgrove v. Bennett*, 32 Minn. 371; *Walter A. Wood Harvester Co. v. Ramberg*, 60 Minn. 219.

*Mississippi*. — *Dyer v. Britton*, 53 Miss. 270.

*Missouri*. — *Walter A. Wood Mowing, etc., Mach. Co. v. Bobbst*, 56 Mo. App. 427; *International Pavement Co. v. Smith, etc., Mach. Co.*, 17 Mo. App. 264.

*New Hampshire*. — *Deming v. Foster*, 42 N. H. 165.

*New York*. — *Baldwin v. Van Deusen*, 37 N. Y. 488.

*North Carolina*. — *Lanier v. Auld*, 1 Murph. (5 N. Car.) 138, 3 Am. Dec. 680.

*South Carolina*. — *Ober v. Blalock*, 40 S. Car. 31.

*Wisconsin*. — *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590. Compare *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 626.

**An Express Refusal to Warrant**, as where the seller says he will not warrant the future usefulness of the mares being sold, precludes any implied warranty on the same subject. *Burnett v. Hensley*, 118 Iowa 575.

**When the Express Warranty Is Waived** by some act of the buyer's, as where the contract stipulates that the express warranty shall only be effectual when the buyer pays for the article upon receiving it, and he fails to pay then, it seems that he may set up and rely upon the

warranty ordinarily implied by law. *Parsons Band-Cutter, etc., Co. v. Mallinger*, 122 Iowa 703.

**2.** *Dickson v. Zizinia*, 10 C. B. 602, 70 E. C. L. 602; *International Pavement Co. v. Smith, etc., Mach. Co.*, 17 Mo. App. 264. See also *Howell v. Cowles*, 6 Gratt. (Va.) 393.

A bill of sale affirming the chattels to be sound and expressly warranting the title will not be considered as expressly warranting the soundness. *Smith v. Miller*, 2 Bibb (Ky.) 616.

When a contract is for merchantable goods, and the sale is by seller's sample, which represents to the buyer a merchantable article, and discloses no defect, and the goods are accepted as according with the same, there is still an implied warranty of their being merchantable in respect to all such matters as cannot be judged by the sample, the same as there would be if the bulk had been inspected, and defects could not thereby be ascertained. *Mody v. Gregson*, 38 L. J. Exch. 12, L. R. 4 Exch. 49, 17 W. R. 176, 19 L. T. N. S. 458.

**3. Implied Warranty of Title Not Precluded by Express Warranty of Quality.** — *Castellano v. Peillon*, 2 Mart. N. S. (La.) 466; *Wells v. Spears*, 1 McCord L. (S. Car.) 421; *Hughes v. Banks*, 1 McCord L. (S. Car.) 537. See also *Wood v. Ashe*, 3 Strobb. L. (S. Car.) 64; *Houston v. Gilbert*, 3 Brev. (S. Car.) 63, 5 Am. Dec. 542; *Merriam v. Field*, 24 Wis. 640. Compare *Wren v. Wardlaw*, Minor (Ala.) 363, 12 Am. Dec. 60; *Brown v. Smith*, 5 How. (Miss.) 387. Although one may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and be able to show that there is no express covenant contrary to the implied warranty on which his action is brought. *Allen v. Potter*, 2 McCord L. (S. Car.) 323.

**4.** An express declaration by the seller that he warrants nothing but the title, will preclude any implied warranty of quality. *Boinest v. Leigneux*, 2 Rich. L. (S. Car.) 464.

**5. No Particular Form of Words Necessary — Word "Warrant" Need Not Occur** — *England*. — *Jones v. Bright*, 5 Bing. 533, 15 E. C. L. 529.

*United States*. — *Accumulator Co. v. Du-buque St. R. Co.*, (C. C. A.) 64 Fed. Rep. 70.

*Alabama*. — *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804.

*Arkansas*. — *Buckman v. Haney*, 11 Ark. 339.

acter of the thing to be sold, made by the seller during the negotiations for the sale, which it may reasonably be supposed was intended to induce the purchase and was relied on by the purchaser, will be regarded as a warranty unless accompanied by an express statement that it is not intended as such.<sup>1</sup>

*California*.—Polhemus v. Heiman, 45 Cal. 573; Moore v. McKinlay, 5 Cal. 471.

*Delaware*.—O'Neal v. Bacon, 1 Houst. (Del.) 215.

*Georgia*.—Terhune v. Dever, 36 Ga. 648.

*Illinois*.—Adams v. Johnson, 15 Ill. 345; Hawkins v. Berry, 10 Ill. 36; Wheeler v. Reed, 36 Ill. 81; Reed v. Hastings, 61 Ill. 266; Thorne v. McVeagh, 75 Ill. 81; Robinson v. Harvey, 82 Ill. 58.

*Indiana*.—Jones v. Quick, 28 Ind. 125.

*Iowa*.—Hughes v. Funston, 23 Iowa 257; Callanan v. Brown, 31 Iowa 333.

*Massachusetts*.—Henshaw v. Robins, 9 Met. (Mass.) 83, 43 Am. Dec. 367.

*Minnesota*.—Warder v. Bowen, 31 Minn. 335.

*Mississippi*.—Kinley v. Fitzpatrick, 4 How. (Miss.) 59, 34 Am. Dec. 108; Otts v. Alderson, 10 Smed. & M. (Miss.) 480.

*Missouri*.—Carter v. Black, 46 Mo. 384.

*Nebraska*.—Erskine v. Swanson, 45 Neb. 767; Patrick v. Leach, 8 Neb. 530.

*New Hampshire*.—Morrill v. Wallace, 9 N. H. 111.

*New York*.—Roberts v. Morgan, 2 Cow. (N. Y.) 438; Oneida Mfg. Soc. v. Lawrence, 4 Cow. (N. Y.) 440; Whitney v. Sutton, 10 Wend. (N. Y.) 411; Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595; Fairbank Canning Co. v. Metzger, 118 N. Y. 265, 16 Am. St. Rep. 753; Rogers v. Ackerman, 22 Barb. (N. Y.) 134; Murray v. Smith, 4 Daly (N. Y.) 277; Udell v. Sarafian, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 544; Petty v. Fish, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 739, affirming (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 828; Blakeman v. Mackay, 1 Hilt. (N. Y.) 266.

*Pennsylvania*.—Weimer v. Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Warren v. Philadelphia Coal Co., 83 Pa. St. 437; Neilson v. Wetherill, 1 Phila. (Pa.) 207, 8 Leg. Int. (Pa.) 112.

*Tennessee*.—M'Gregor v. Penn, 9 Yerg. (Tenn.) 74.

*Vermont*.—Beeman v. Buck, 3 Vt. 53, 21 Am. Dec. 571.

*Wisconsin*.—Neave v. Arntz, 56 Wis. 176.

"**I Guarantee**" is usually equivalent to "I warrant." Erskine v. Swanson, 45 Neb. 767; Paugh, etc., Co. v. Mitchell, 166 Pa. St. 577; Hazelton Boiler Co. v. Fargo Gas., etc., Co., 4 N. Dak. 365.

A guaranty that the goods sold will pass inspection is nothing more than a warranty of their soundness, and does not change the sale into an executory contract. Gibson v. Stevens, 8 How. (U. S.) 384.

**Alleged Warranty Inconsistent with Seller's Prior Statements.**—A seller may be bound by an express warranty of quality or title, distinctly made at the close of a negotiation, although he may, in the course of a previous conversation, have stated the facts differently and truly. Deming v. Foster, 42 N. H. 165; Koerber v. Jung, 33 Ill. App. 144.

1. *United States*.—English v. Spokane Commission Co., (C. C. A.) 57 Fed. Rep. 451; Accumulator Co. v. Dubuque St. R. Co., (C. C. A.) 64 Fed. Rep. 70; Shippen v. Bowen, 122 U. S. 581.

*Alabama*.—Claghorn v. Lingo, 62 Ala. 230; Riddle v. Webb, 110 Ala. 599.

*California*.—Polhemus v. Heiman, 45 Cal. 573; McLennan v. Ohmen, 75 Cal. 558.

*Delaware*.—Burton v. Young, 5 Harr. (Del.) 233.

*Georgia*.—Terhune v. Dever, 36 Ga. 648.

*Illinois*.—Thorne v. McVeagh, 75 Ill. 81; Robinson v. Harvey, 82 Ill. 58; Aultman v. Weber, 28 Ill. App. 91; Trench v. Hardin County Canning Co., 67 Ill. App. 269.

*Indiana*.—Jones v. Quick, 28 Ind. 125; H. B. Smith Co. v. Williams, 29 Ind. App. 336.

*Iowa*.—Hughes v. Funston, 23 Iowa 257; Callanan v. Brown, 31 Iowa 333; Jack v. Des Moines, etc., R. Co., 53 Iowa 399; Latham v. Shipley, 86 Iowa 543; Briggs v. M. Rumely Co., 96 Iowa 202.

*Kentucky*.—Lamme v. Gregg, 1 Met. (Ky.) 444, 71 Am. Dec. 489; Ditto v. Helm, 2 J. J. Marsh. (Ky.) 129; Dickens v. Williams, 2 B. Mon. (Ky.) 374; McClintock v. Emick, 87 Ky. 160. Compare Bacon v. Brown, 3 Bibb (Ky.) 35.

*Maine*.—Hillman v. Wilcox, 30 Me. 170; Bryant v. Crosby, 40 Me. 9; Randall v. Thornton, 43 Me. 226, 69 Am. Dec. 56; Thompson v. Morse, 94 Me. 359.

*Maryland*.—Osgood v. Lewis, 2 Har. & G. (Md.) 518, 18 Am. Dec. 317; Crenshaw v. Slye, 52 Md. 146.

*Massachusetts*.—Hastings v. Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; Stone v. Denny, 4 Met. (Mass.) 155; Brown v. Bigelow, 10 Allen (Mass.) 242; Henshaw v. Robins, 9 Met. (Mass.) 83, 43 Am. Dec. 367.

*Michigan*.—Maxted v. Fowler, 94 Mich. 106.

*Minnesota*.—Brown v. Doyle, 69 Minn. 543; Miamisburg Twine, etc., Co. v. Wohlhuter, 71 Minn. 484; J. I. Case Threshing Mach. Co. v. McKinnon, 82 Minn. 75.

*Mississippi*.—Otts v. Alderson, 10 Smed. & M. (Miss.) 476.

*Missouri*.—Danforth v. Crookshanks, 68 Mo. App. 311; Carter v. Black, 46 Mo. 384; Steel v. Brown, 19 Mo. 312.

*Nebraska*.—Erskine v. Swanson, 45 Neb. 767; Unland v. Garton, 48 Neb. 202; Burr v. Redhead, etc., Co., 52 Neb. 617.

*New Hampshire*.—Morrill v. Wallace, 9 N. H. 111.

*New York*.—Chapman v. Murch, 10 Johns. (N. Y.) 290, 10 Am. Dec. 227; Oneida Mfg. Soc. v. Lawrence, 4 Cow. (N. Y.) 440; Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 16 Am. St. Rep. 753; Blakeman v. Mackay, 1 Hilt. (N. Y.) 266; Carley v. Wilkins, 6 Barb. (N. Y.) 557; Sweet v. Bradley, 24 Barb. (N. Y.) 549; Day v. Pool, 63 Barb. (N. Y.) 506; Warren v. Van Pelt, 4 E. D.



If the affirmation was made in good faith, it is still a warranty; if made with a knowledge of its falsity, it is none the less a warranty, though it is also a fraud.<sup>1</sup>

**Warranty by Comparisons.** — Representations that the article being sold is "as good as" or better than other articles of its kind, or that it will work as well, and similar statements, are not generally treated as mere commendation, but amount to a warranty that the article is as represented.<sup>2</sup>

**The General Tendency of the Later Authorities Is to Construe Liberally,** in favor of the buyer, language used by the seller in making affirmations respecting the quality of his goods, and to treat such affirmations as warranties whenever the language used will reasonably authorize the inference that they were so understood.<sup>3</sup>

**Even When the Seller Accompanies His Representations with Words of Caution,** advising the buyer not to take the seller's word but to satisfy himself before buying, the seller is not relieved from liability for misrepresentations made by him in order

Smith (N. Y.) 202; *Money v. Fisher*, 92 Hun (N. Y.) 347; *Romeo v. Garofalo*, 25 N. Y. App. Div. 191; *Kilsby v. DeForest*, 76 N. Y. App. Div. 283; *Naylor v. McSwegan*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 255; *Jones v. Mayer*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 586; *Udell v. Sarafian*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 542.

*North Carolina.* — *Gilchrist v. Marrow*, 2 Law Repos. (4 N. Car.) 607; *Foggart v. Blackweller*, 4 Ired. L. (26 N. Car.) 238; *McKinnon v. McIntosh*, 98 N. Car. 89; *Reiger v. Worth Co.*, 130 N. Car. 268, 89 Am. St. Rep. 865.

*North Dakota.* — *Hazelton Boiler Co. v. Fargo Gas, etc., Co.*, 4 N. Dak. 365.

*Ohio.* — *Tillyer v. Van Cleave Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

*Pennsylvania.* — *Groetzing v. Kann*, 165 Pa. St. 578, 44 Am. St. Rep. 676; *Philadelphia, etc., Coal, etc., Co. v. Hoffman*, (Pa. 1886) 4 Atl. Rep. 848.

*Rhode Island.* — *Ingraham v. Union R. Co.*, 19 R. I. 356.

*South Carolina.* — *Bryce v. Parker*, 11 S. Car. 337.

*Tennessee.* — *M'Gregor v. Penn*, 9 Yerg. (Tenn.) 74; *Kearly v. Duncan*, 1 Head (Tenn.) 397, 73 Am. Dec. 179.

*Texas.* — *Blythe v. Speake*, 23 Tex. 429.

*Vermont.* — *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Richardson v. Grandy*, 49 Vt. 22; *Hobart v. Young*, 63 Vt. 363; *Drew v. Edmunds*, 60 Vt. 401, 6 Am. St. Rep. 122.

*Virginia.* — *Mason v. Chappell*, 15 Gratt. (Va.) 582; *Herron v. Dibrell*, 87 Va. 289; *Reese v. Bates*, 94 Va. 321.

*Wisconsin.* — *Smith v. Justice*, 13 Wis. 600; *Hahn v. Doolittle*, 18 Wis. 197, 86 Am. Dec. 757; *Austin v. Nickerson*, 21 Wis. 542; *Giffert v. West*, 33 Wis. 621; *Elkins v. Kenyon*, 34 Wis. 93; *Croninger v. Paige*, 48 Wis. 229; *Neave v. Arntz*, 56 Wis. 176; *Tenney v. Cowles*, 67 Wis. 596; *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916.

**Declaration that Animal Is "All Right."** — Such a declaration, made during negotiations for the sale of a horse, amounts to a warranty of his soundness. *McClintock v. Emick*, 87 Ky. 160.

Representations by a vendor of sheep that "they are all sound and right, and free from any disease," amount to a warranty if the

buyer relies upon them and is thereby induced to purchase. *Marsh v. Webber*, 13 Minn. 109. See also *Works v. Crosswell*, (Me. 1887) 10 Atl. Rep. 494; *Powell v. Chittick*, 89 Iowa 513.

A statement by the seller, referring to certain hogs, that "they are as thrifty a lot as I ever owned," amounts to a warranty of soundness. *Stevens v. Bradley*, 89 Iowa 174.

1. See *supra*, this title, *General Nature and Elements of the Contract* — *Distinguished from Fraud*. See also *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916.

**Even when the Word "Warrant" Is Used** a warranty is not necessarily created. The term is one whose meaning, in the particular case, the jury must determine from the accompanying circumstances and decide whether it was used merely in high commendation or for the purpose of creating a warranty. *Starnes v. Erwin*, 10 Ired. L. (32 N. Car.) 226.

2. *Buckman v. Haney*, 11 Ark. 339; *Aultman v. Weber*, 28 Ill. App. 91; *Stevens v. Bradley*, 89 Iowa 174; *Briggs v. M. Rumely Co.*, 96 Iowa 202; *Moore v. King*, 134 N. Y. 596, *affirming* 57 Hun (N. Y.) 224; *Pearson v. Martin*, 38 Wis. 265; *Neave v. Arntz*, 56 Wis. 174; *Winkler v. Patten*, 57 Wis. 405. See also *infra*, this title, *Evidence* — *Evidence of Comparisons*. Compare *House v. Fort*, 4 Blackf. (Ind.) 293.

3. **Liberal Construction in Buyer's Favor.** — *Sparling v. Marks*, 86 Ill. 125; *Emrick v. Merri-man*, 23 Ill. App. 24; *Stevens v. Bradley*, 89 Iowa 174; *Powell v. Chittick*, 89 Iowa 513; *McClintock v. Emick*, 87 Ky. 166; *Stone v. Denny*, 4 Met. (Mass.) 151; *Hawkins v. Pemberton*, 51 N. Y. 199, 10 Am. Rep. 595; *Hobart v. Young*, 63 Vt. 363; *Milwaukee Rice Machinery Co. v. Hamacek*, 115 Wis. 422.

**"The Law of Warranty Has Undergone Much Change** since *Chandelor v. Lopus*, Cro. Jac. 4, decided in the Exchequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar-stone was no warranty; for, it is said, every one in selling his wares will affirm that they are good, or that the horse he sells is sound; yet if he does not warrant them to be so, it is no cause of action. But latterly, courts have manifested a strong disposition to construe liberally, in favor of the purchaser, what the seller affirms about the kind and quality of his goods, and have been disposed to

to induce the purchase and which actually induced it.<sup>1</sup> But if he accompany his expressions or assurances with an express refusal to warrant, they must be regarded as mere expressions of opinion or as "dealers' talk," and not as a warranty.<sup>2</sup>

**2. Intention to Warrant a Necessary Element.** — It was laid down in a very early case that an affirmation made at the time of the sale, in regard to the character or quality of the thing sold, is a warranty, provided it appears that it was intended as such,<sup>3</sup> and this is the prevailing view now.<sup>4</sup> In determining whether the affirmation was intended as a warranty, the decisive test is whether the seller assumed to assert a fact of which the buyer was ignorant, or merely expressed an opinion or judgment upon a matter about which the seller had no special knowledge and as to which the buyer might be expected to exercise his own judgment or be equally able to form a correct opinion. In the former case there is a warranty, in the latter there is not.<sup>5</sup> The strict-

ness of such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. *Stone v. Denny*, 4 Met. (Mass.) 155; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595. And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of commendation, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty." *Hobart v. Young*, 63 Vt. 363.

1. *Hicks v. Stevens*, 121 Ill. 186. See also *Koerber v. Jung*, 33 Ill. App. 144.

2. **Representation Accompanied with Express Refusal to Warrant.** — *Fauntleroy v. Wilcox*, 80 Ill. 481; *Burnett v. Hensley*, 118 Iowa 575; *Williams v. Louisiana Lumber Co.*, 105 La. 99; *Lynch v. Curfman*, 65 Minn. 170; *Hardt v. Western Electric Co.*, 84 N. Y. App. Div. 249. See also *Henry v. Salisbury*, 14 N. Y. App. Div. 526.

3. *Pasley v. Freeman*, 3 T. R. 57, 2 Smith Lead. Cas. (8th ed.) 75. See also *Richardson v. Brown*, 1 Bing. 344, 8 E. C. L. 540.

4. **Intention to Warrant Must Appear** — *Alabama*. — *Tabor v. Peters*, 74 Ala. 96, 49 Am. Rep. 804.

*Delaware*. — *Tyre v. Causey*, 4 Harr. (Del.) 425; *O'Neal v. Bacon*, 1 Houst. (Del.) 215.

*Illinois*. — *Ender v. Scott*, 11 Ill. 35; *Adams v. Johnson*, 15 Ill. 345; *Phillips v. Vermillion*, 91 Ill. App. 133.

*Indiana*. — *House v. Fort*, 4 Blackf. (Ind.) 203; *Jones v. Quick*, 28 Ind. 125.

*Iowa*. — *McGrew v. Forsythe*, 31 Iowa 179; *Figge v. Hill*, 61 Iowa 430.

*Kentucky*. — *Bacon v. Brown*, 3 Bibb (Ky.) 35.

*Maine*. — *Hillman v. Wilcox*, 30 Me. 170; *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56.

*Maryland*. — *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42.

*Michigan*. — *Linn v. Gunn*, 56 Mich. 447; *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488.

*Minnesota*. — *Maxwell v. Lee*, 34 Minn. 511.

*Missouri*. — *Matlock v. Meyers*, 64 Mo. 531; *Smithers v. Bircher*, 2 Mo. App. 499; *Ransberger v. Ing*, 55 Mo. App. 621.

*North Carolina*. — *Henson v. King*, 3 Jones L. (48 N. Car.) 419; *Baum v. Stevens*, 2 Ired. L. (24 N. Car.) 411; *Horton v. Green*, 66 N. Car. 596.

*Pennsylvania*. — *Weimer v. Clement*, 37 Pa. St. 147, 78 Am. Dec. 411; *McFarland v. Newman*, 9 Watts (Pa.) 55, 34 Am. Dec. 497; *Herman v. Brinker*, 17 Pa. Super. Ct. 177.

*Tennessee*. — *Heeley v. Turbeville*, 11 Lea (Tenn.) 339; *M'Gregor v. Penn*, 9 Yerg. (Tenn.) 74.

*Vermont*. — *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571; *Foster v. Caldwell*, 18 Vt. 176; *Bond v. Clark*, 35 Vt. 577; *Richardson v. Grandy*, 49 Vt. 22; *Drew v. Edmunds*, 60 Vt. 408, 6 Am. St. Rep. 122.

*Compare* *Stroud v. Pierce*, 6 Allen (Mass.) 416.

**Manufacturer's Printed Warranty Remaining Attached to Article Without Retailer's Knowledge.**

— A hardware dealer bought of the manufacturer an emery wheel on which was pasted a printed card to the effect that the wheel had a speed capacity of eighteen hundred revolutions per minute. Without having observed the card, the dealer sold it to the plaintiff, making no representations whatever. It was held that there was no express warranty. *Pemberton v. Dean*, 88 Minn. 60, 97 Am. St. Rep. 503.

**Warranty Obtained by Buyer's Fraud.** — Where the contract of sale, as reached orally, was without warranty, but the buyer induced the seller to sign a written bill of sale which contained a warranty by assuring him that it was a mere form, the warranty is void and the buyer will not be allowed to rely upon it. *Rivers v. Dubose*, 10 Ala. 475. See also *Huckabee v. Albritton*, 10 Ala. 657.

The same rule has been applied where the seller voluntarily inserted in the contract a warranty of soundness under a mistaken idea that it would not bind him. *Clopton v. Martin*, 11 Ala. 187.

**5. Criterion as to Intention** — *Alabama*. — *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804.

*Illinois*. — *Reed v. Hastings*, 61 Ill. 266; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615.

*Kentucky*. — *Lamme v. Gregg*, 1 Met. (Ky.) 444, 71 Am. Dec. 480.

*Massachusetts*. — *Green v. ...*, 116

*Michigan*. — *Linn v. Gunn*, 56 Mich. 447.

ness with which the rule requiring proof of an intention to warrant is applied varies largely according to the intrinsic nature of the representation in question. If the representation be with respect to a matter which is essentially or probably one of opinion or judgment merely, an intention to warrant must be shown, no matter how positive the representation may have been.<sup>1</sup> If, however, it is a positive statement of a fact, and one upon which a buyer would naturally rely, the law will presume an intention to warrant, in the absence of proof to the contrary.<sup>2</sup> The seller may not induce a purchase by his misrepresentations and then escape liability by alleging an absence of intention to warrant.<sup>3</sup>

**When the Representations Are Made to a Third Party,** and not the buyer, proof of an intention to warrant is absolutely essential.<sup>4</sup>

**The Respective Opportunities of the Parties** for knowledge of the facts are important in determining the existence of an intention to warrant. If the sale is of property at a remote distance, which the seller knows the buyer has not seen but which he is buying on the faith of the former's representations, the law conclusively presumes an intention on the part of the seller to warrant the property to be up to such representations.<sup>5</sup> But if the property is before the buyer at the time of the sale and open to his inspection, there is no such presumption, and the intention to warrant must be shown.<sup>6</sup>

**When Proof of Intention Unnecessary.** — It is not always necessary that the buyer show an intention on the part of his seller to warrant; if the latter makes a positive affirmation as to a material fact, and the former, relying upon the truth of it, makes a purchase which he otherwise, probably, would not have made, a warranty will be presumed even in opposition to affirmative proof of the absence of an intention to warrant, upon the ground that the seller cannot be allowed to induce a purchase by such conduct and then escape responsibility by averring the absence of an intention to warrant.<sup>7</sup>

*Nebraska.* — *Halliday v. Briggs*, 15 Neb. 221.

*New York.* — *Hawkins v. Pemberton*, 51 N. Y. 199, 10 Am. Rep. 595.

*North Carolina.* — *Foggart v. Blackweller*, 4 Ired. L. (26 N. Car.) 238.

*Pennsylvania.* — *Ulmer v. Ryan*, 137 Pa. St. 366.

*Vermont.* — *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Drew v. Edmunds*, 60 Vt. 408, 6 Am. St. Rep. 122.

*Wisconsin.* — *White v. Stelloh*, 74 Wis. 435.

1. *Reed v. Hastings*, 61 Ill. 266; *Bryant v. Crosby*, 40 Me. 9; *Tenney v. Cowles*, 67 Wis. 594; *White v. Stelloh*, 74 Wis. 435. See also *Sweet v. Bradley*, 24 Barb. (N. Y.) 549.

2. **Intention Presumed.** — *McClintock v. Emick*, 87 Ky. 166; *Drew v. Edwards*, 60 Vt. 401, 6 Am. St. Rep. 122; *Hobart v. Young*, 63 Vt. 363; *Huntington v. Lombard*, 22 Wash. 202. See also *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Naylor v. McSwegan*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 255.

In *Hawkins v. Pemberton*, 51 N. Y. 202, 10 Am. Rep. 595, the court, by Earl, J., said: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing, and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or

judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not." This language is quoted with approval in a number of subsequent cases. See *McClintock v. Emick*, 87 Ky. 166; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753.

3. *Hobart v. Young*, 63 Vt. 363.

4. *Phillips v. Vermillion*, 91 Ill. App. 133. See also *Lindsey v. Lindsey*, 34 Miss. 433.

5. *Smith v. Richards*, 13 Pet. (U. S.) 26.

6. **Property Before Buyer at Time of Sale — No Presumption of Intention to Warrant.** — *House v. Fort*, 4 Blackf. (Ind.) 294; *Jones v. Quick*, 28 Ind. 125.

7. *Bryant v. Crosby*, 40 Me. 9; *Hawkins v. Pemberton*, 51 N. Y. 202, 10 Am. Rep. 595; *Hobart v. Young*, 63 Vt. 363; *Huntington v. Lombard*, 22 Wash. 202; *Smith v. Justice*, 13 Wis. 600; *Austin v. Nickerson*, 21 Wis. 542. See also *Warren v. Van Pelt*, 4 E. D. Smith (N. Y.) 202; *Dawson v. Chisholm*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 171 (sale of yacht); *Sweet v. Bradley*, 24 Barb. (N. Y.) 549; *Waterbury v. Russell*, 8 Baxt. (Tenn.) 159.

"If they [the representations] were made to influence the bargain, and did have that effect, they would be equivalent to a warranty, and the vendor bound to answer for the breach. Whether they were made innocently or fraudulently could make no difference if an injury resulted to the purchaser who relied on their truth and made the trade on the faith of this correctness. The damage to the vendee in such



**A Question for the Jury.** — The question as to what was intended by a seller's affirmations is ordinarily one for the jury, to be determined upon a consideration of all the facts and circumstances shown in evidence, except in those cases where, from the nature of the circumstances, a seller is estopped to deny an intention to warrant, or where the representation is in writing and the facts under which it was made are not in dispute.<sup>1</sup>

**3. Expressions of Opinion.** — A mere statement, by the seller, of his own opinion or belief, not amounting to a positive affirmation or statement of a fact, upon a matter about which the purchaser is to exercise his own judgment, does not amount to a warranty.<sup>2</sup> As in other cases, the precise language used is not so important in determining whether a warranty was created, as is the nature of the circumstances under which it was used. What would be a mere matter of opinion when spoken by a non-specialist may be construed as a statement of a fact when spoken by a specialist.<sup>3</sup> The statement

cases does not depend on the motives of the vendor." *Waterbury v. Russell*, 8 Baxt. (Tenn.) 162; *Hogg v. Cardwell*, 4 Sneed (Tenn.) 157.

"If a person makes a positive affirmation as to the condition of the property or utters what is equivalent to a promise as to it instead of expressing a belief merely, then such affirmation or promise amounts to a warranty and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article or merely expressed an opinion as to it." *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 262, quoting *McClintock v. Emick*, 87 Ky. 161. See also *Lamme v. Gregg*, 1 Met. (Ky.) 444, 71 Am. Dec. 489.

1. *Bacon v. Brown*, 3 Bibb (Ky.) 35; *Dunham v. Barnes*, 9 Allen (Mass.) 352; *Morrill v. Wallace*, 9 N. H. 111; *Murray v. Smith*, 4 Daly (N. Y.) 277; *Foster v. Caldwell*, 18 Vt. 176.

**2. Mere Expressions of Opinion No Warranty** — *United States*. — *Brawley v. U. S.*, 96 U. S. 168; *Shipen v. Bowen*, 122 U. S. 576; *Schroeder v. Trubee*, 35 Fed. Rep. 652.

*Alabama*. — *Ricks v. Dillahanty*, 8 Port. (Ala.) 133; *Farow v. Andrews*, 69 Ala. 96; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Bain v. Withey*, 107 Ala. 223.

*Georgia*. — *Ragsdale v. Shipp*, 108 Ga. 817.

*Illinois*. — *Towell v. Gatewood*, 3 Ill. 22, 33 Am. Dec. 437; *Hawkins v. Berry*, 10 Ill. 36; *Ender v. Scott*, 11 Ill. 35; *Carondelet Iron Works v. Moore*, 78 Ill. 65.

*Iowa*. — *Tewkesbury v. Bennett*, 31 Iowa 83 ("they appear to be sound").

*Maryland*. — *Crenshaw v. Slye*, 52 Md. 140.

*Michigan*. — *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488.

*Missouri*. — *Lindsay v. Davis*, 30 Mo. 406; *Carter v. Black*, 46 Mo. 384.

*Nebraska*. — *Patrick v. Leach*, 8 Neb. 530; *Halliday v. Briggs*, 15 Neb. 219.

*New York*. — *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Rogers v. Ackerman*, 22 Barb. (N. Y.) 134; *Hunter v. Stege*, 59 N. Y. Super. Ct. 17.

*North Carolina*. — *Osborne v. McCoy*, 107 N. Car. 730.

*Pennsylvania*. — *Jackson v. Wetherill*, 7 S. & R. (Pa.) 480.

*Vermont*. — *Wason v. Rowe*, 16 Vt. 525.

*Wisconsin*. — *Austin v. Nickerson*, 21 Wis. 542; *Tenney v. Cowles*, 67 Wis. 596; *White v. Stelloh*, 74 Wis. 435.

Declarations as to the amount of wool certain sheep would yield, and the time in which the vendee could pay for them, and whether he would have wool left after paying, are mere speculations as to the future and cannot import a warranty. It would be otherwise of declarations that such sheep were young and healthy. *Bryant v. Crosby*, 40 Me. 9.

"**I Think He Is Sound**," spoken by a seller in response to the buyer's inquiry whether the horse in question was all right, has been held not to amount to a warranty of soundness. *Lindsay v. Davis*, 30 Mo. 406. See also *Wason v. Rowe*, 16 Vt. 525.

"**He Is Bound to Be an Extra Breeder**," spoken by a seller immediately after stating to the buyer the horse's pedigree, is necessarily a mere expression of opinion and not a warranty. *Bates County Bank v. Anderson*, 85 Mo. App. 351.

**A Statement that the Horse Is "Sound, so Far as I Know,"** made by the seller's agent, is not a warranty: it is "not even an affirmation of soundness, as was the case in *Horton v. Green*, 66 N. Car. 596, in which it is said, citing *Baum v. Stevens*, 2 Ired. L. (24 N. Car.) 411, that such an affirmation of soundness does not, *per se*, amount to a warranty, but may be submitted to the jury, with attendant circumstances, to say whether the affirmation was intended as a warranty." *Osborne v. McCoy*, 107 N. Car. 730. See also *Myers v. Conway*, 62 Ind. 474.

"**I Never Warrant, but the Horse Is Sound so Far as I Know**," constitutes a warranty against any defect or unsoundness of which the seller was aware at the time. *Wood v. Smith*, 5 M. & R. 124, 4 C. & P. 45, 19 E. C. L. 267.

"**He Is About Twenty-five Years Old**, sound and healthy," coupled with an absolute guaranty of title, used in the sale of a slave, does not import a warranty of soundness. *Barnes v. Blair*, 16 Ala. 71.

3. *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Stevens v. Bradley*, 89 Iowa 174.

itself may be with respect to a matter which is, of necessity, a matter of opinion or belief merely, and in such a case no warranty will arise from even the most emphatic language,<sup>1</sup> while language which purports to state an opinion or belief merely may constitute a warranty when used with reference to a matter essentially one of fact within the knowledge of the seller,<sup>2</sup> or when made with a knowledge of its falsity and for the purpose of deceiving the buyer.<sup>3</sup>

**The Decisive Test**, in determining whether language used is a mere expression of opinion or a warranty, is whether it purported to state a fact upon which it may fairly be presumed the seller expected the buyer to rely and upon which a buyer would ordinarily rely. If the language used is of that character, the fact of reliance on the part of the buyer and the presumption of intent on the part of the seller which the law would raise in such a case<sup>4</sup> would operate to create a warranty.<sup>5</sup>

**Representations as to Value.** — Prominent among the representations made by sellers which are ordinarily to be regarded as mere expressions of opinion are those relating to the value of the property being sold. These, from their nature, are opinionative merely, and the buyer ordinarily has no right to rely upon them as a warranty.<sup>6</sup> An exception to this rule prevails, however, in cases where its value is the only quality the article sold can have, as in the case of sales of stocks or commercial paper.<sup>7</sup>

**4. Simplex Commendatio.** — Mere commendation, however unwarranted, has never, of itself, been regarded as sufficient to vitiate a sale or to sustain an action for breach of warranty. Every seller has the right to extol the quality of his wares, and much latitude has generally been allowed, the language being regarded more as an invitation to purchase than as a warranty.<sup>8</sup> There is slight

1. *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Baldwin v. Daniel*, 69 Ga. 782 (assurance that a plow "would readily sell"); *Clark v. Ralls*, 50 Iowa 275; *Stevens v. Bradley*, 89 Iowa 174; *Baker v. Henderson*, 24 Wis. 509.

2. *Reed v. Hastings*, 61 Ill. 266; *Halliday v. Briggs*, 15 Neb. 219; *Herron v. Dibrell*, 87 Va. 280.

3. **Expression of Opinion Made with Intent to Deceive.** — *Brown v. Freeman*, 79 Ala. 406; *Emrick v. Merriman*, 23 Ill. App. 24. See also the title **FRAUD AND DECEIT**, vol. 14, p. 36.

4. See *supra*, this section, *Intention to Warrant a Necessary Element*.

5. *Riddle v. Webb*, 110 Ala. 599; *Hughes v. Funston*, 23 Iowa 257; *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488; *Patrick v. Leach*, 8 Neb. 530; *Halliday v. Briggs*, 15 Neb. 219; *Titus v. Poole*, 145 N. Y. 414, *affirming* 73 Hun (N. Y.) 383; *Roe v. Bachelidor*, 41 Wis. 360. See also *Branson v. Turner*, 77 Mo. 489; *Blakeman v. Mackay*, 1 Hilt. (N. Y.) 266.

6. **Seller's Representations as to Value Not a Warranty.** — *Fauntleroy v. Wilcox*, 80 Ill. 481; *McComas v. Haas*, 93 Ind. 276 (machine represented as one "of great value and utility"); *Macdonald v. Longbottom*, 1 El. & El. 977, 102 E. C. L. 977. Compare *Emrick v. Merriman*, 23 Ill. App. 24; *Picard v. McCormick*, 11 Mich. 68; *Haven v. Neal*, 43 Minn. 315.

In the case last cited the court observed: "While, as a rule, representations as to the value of property are to be deemed matter of opinion and not of fact, yet when such representations are made in connection with others which are material as tending to establish the plaintiff's case, they should not be ruled out, but the entire statement should be received and

considered together. *Hickey v. Morrell*, 102 N. Y. 463, 55 Am. Rep. 824."

7. **When Value Is Only Quality — Stocks, etc.** — *Maxted v. Fowler*, 94 Mich. 106; *Simonds v. Cash*, (Mich. 1904) 99 N. W. Rep. 754.

**Representations as to Value Are Admissible in Evidence** as bearing upon the question of damages. *Fitzgerald v. Evans*, 49 Minn. 541. See also *Haven v. Neal*, 43 Minn. 315.

8. **Mere Commendation — "Dealers' Talk" — No Warranty — England.** — *Chandelor v. Lopus*, Cro. Jac. 4.

*Alabama.* — *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804.

*California.* — *Byrne v. Jansen*, 50 Cal. 624.

*Delaware.* — *O'Neal v. Bacon*, 1 Houst. (Del.) 215.

*Georgia.* — *Leonard v. Peeples*, 30 Ga. 61; *Florence v. Pattillo*, 105 Ga. 577. See also *Falknet v. Lane*, 58 Ga. 116.

*Illinois.* — *Leggat v. Sands' Ale Brewing Co.*, 60 Ill. 158; *Allen v. Hart*, 72 Ill. 106; *Fauntleroy v. Wilcox*, 80 Ill. 481; *Robinson v. Harvey*, 82 Ill. 58; *Harris v. Brain*, 33 Ill. App. 510; *Roberts v. Applegate*, 48 Ill. App. 178.

*Iowa.* — *Tewkesbury v. Bennett*, 31 Iowa 83; *McGrew v. Forsythe*, 31 Iowa 179.

*Maine.* — *Bryant v. Crosby*, 40 Me. 9.

*Massachusetts.* — *Kimball v. Bangs*, 144 Mass. 321.

*Michigan.* — *Worth v. McConnell*, 42 Mich. 473.

*Missouri.* — *Matlock v. Meyers*, 64 Mo. 531 ("she is a good mare").

*New York.* — *Duffany v. Ferguson*, 66 N. Y. 482; *Fanning v. International Seed Co.*, 89 Hun (N. Y.) 146.

difficulty as to the general rule in this connection, the troublesome question always being as to where lies the line of demarcation between simple commendation and assertions intended and relied on as a warranty.<sup>1</sup>

**5. At Auction Sales.** — Although somewhat more liberty is indulged the seller in praising his goods, at auction sales, any positive affirmation respecting the title to or quality of the article being sold, made with an intention of inducing a purchase, constitutes a warranty.<sup>2</sup>

**6. Buyer Must Have Relied upon Representations.** — In order that any affirmation or representation may be given the effect of a warranty, it must appear that the buyer relied on it in making the purchase,<sup>3</sup> though the fact of such reliance, alone and of itself, is not sufficient to make the representations a warranty; there are many cases in which it is to be conclusively presumed that the buyer knew or ought to have known enough not to rely upon "dealers' talk" or the praise of their goods ordinarily indulged in by sellers.<sup>4</sup> While some of the authorities have stated the rule to be that "a representation made by the vendor at the time of the sale in respect to the quality of the thing sold, which is relied on by the vendee, amounts to a warranty,"<sup>5</sup> such statements of the rule are to be regarded as intended to emphasize a

*North Carolina.* — *Starnes v. Erwin*, 10 Ired. L. (32 N. Car.) 226; *Baum v. Stevens*, 2 Ired. L. (24 N. Car.) 411.

*Texas.* — *Bruner v. Strong*, 61 Tex. 555.

*Vermont.* — *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150.

**1. Each Case to Be Determined from Its Peculiar Circumstances.** — In the following cases the language has been held to be commendation merely and not a warranty:

A statement by an auctioneer at a sale, "Here is a nice lot of young, sound sheep," *McGrew v. Forsythe*, 31 Iowa 179.

A statement, made in reply to a purchaser's inquiry as to whether the sheep were diseased, that "they appear to be healthy and are doing well." *Tewkesbury v. Bennett*, 31 Iowa 83. See also *Hunter v. Stege*, 59 N. Y. Super. Ct. 17.

The seller's representation that the threshing machine in question "is a very good machine and will do good work" is not a warranty. *Worth v. McConnell*, 42 Mich. 473.

The words "approved standard quality," applied to merchandise being sold, are another expression for "a merchantable article," and are mere commendation and not a warranty. *Cahen v. Platt*, 40 N. Y. Super. Ct. 483.

**Language Held to Be Warranty.** — Where the buyer, in a letter ordering a machine, states that it is being bought for certain work, and the seller, answering, says, "You may rely on having a first-rate machine which will do your work in a satisfactory manner," such language is not mere commendation but a distinct warranty. *Whitehead, etc., Mach. Co. v. Ryder*, 139 Mass. 366.

So also a written statement by the sellers that "we guarantee" that the machinery will do certain work and stand certain tests, is a warranty and not a mere expression of opinion. *Hazelton Boiler Co. v. Fargo Gas, etc., Co.*, 4 N. Dak. 365.

**2.** *McGrew v. Forsythe*, 31 Iowa 179; *Stevens v. Bradley*, 89 Iowa 174; *Thurber v. Hughes*, 47 N. Y. Super. Ct. 159.

The fact that the owner, prior to an auction sale of his cattle, warranted them in private to one who subsequently bought them at the

sale, while neither the notice and advertisement of the sale, nor the auctioneer, mentioned any such warranty, cannot be set up as a fraud on other bidders, in order to annul the sale. *Bronson v. Leach*, 74 Mich. 715.

**3. Reliance upon Representations an Essential Element** — *United States.* — *Calhoun v. Vechio*, 3 Wash. (U. S.) 165; *Morris v. Bradley Fertilizer Co.*, (C. C. A.) 64 Fed. Rep. 55.

*Alabama.* — *Rivers v. Dubose*, 10 Ala. 475.

*Georgia.* — *Lewis v. Bracken*, 97 Ga. 337.

*Illinois.* — *Hawkins v. Berry*, 10 Ill. 36; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Evans v. Schriver Laundry Co.*, 57 Ill. App. 150; *Phillips v. Vermillion*, 91 Ill. App. 133; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, reversing 77 Ill. App. 59.

*Indiana.* — *Lincoln v. Ragsdale*, 7 Ind. App. 354. Compare *Shordan v. Kyler*, 87 Ind. 38.

*Iowa.* — *Tewkesbury v. Bennett*, 31 Iowa 85; *Richardson v. Coffman*, 87 Iowa 121; *Rose v. Meeks*, 91 Iowa 715.

*Minnesota.* — *Torkelson v. Jorgenson*, 28 Minn. 383.

*Mississippi.* — *Lindsey v. Lindsey*, 34 Miss. 111.

*Missouri.* — *Samuels v. Guin*, 49 Mo. App. 8.

*Nebraska.* — *Halliday v. Briggs*, 15 Neb. 220; *Watson v. Roode*, 30 Neb. 264, 43 Neb. 348.

*New York.* — *Coates v. Harvey*, (Buffalo Super. Ct. Gen. T.) 10 N. Y. St. Rep. 276.

*Oregon.* — *Abilene Nat. Bank v. Nodine*, 26 Oregon 53.

*Pennsylvania.* — *Herman v. Brinker*, 17 Pa. Super. Ct. 177.

*Rhode Island.* — *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794.

*Virginia.* — *Herron v. Dibrell*, 87 Va. 289.

*Washington.* — *Huntington v. Lombard*, 22 Wash. 202.

**4.** *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804. See also *Stryker v. Crane*, 33 Neb. 690. Where it is held proper to instruct the jury that "the buyer must have had reasonable grounds to suppose the seller intended to warrant the animals sold."

**5.** See *Hahn v. Doolittle*, 18 Wis. 197, 86 Am. Dec. 757; *Neave v. Arntz*, 56 Wis. 174.



particular essential feature rather than as exhaustive or exclusive definitions. There must be something more than a mere expression of opinion or simple commendation, relied upon by the purchaser.<sup>1</sup>

**Proof of Reliance.** — The fact that the buyer relied upon the seller's representations in making the purchase need not be shown by the positive testimony of the buyer; it is sufficient if it appears from all the circumstances.<sup>2</sup> But the buyer may be asked whether, in buying, he relied upon his own judgment or upon the seller's representations.<sup>3</sup>

**The Fact that the Article Being Sold Was Not Before the Purchaser** at the time of the sale, and that he had no opportunity to inspect or examine it, may be shown as presumptive, though not conclusive, evidence that he relied upon the seller's representations;<sup>4</sup> the same is true of evidence as to the superior knowledge of the seller with regard to the merits of the article and the inability of the buyer to acquire an accurate idea of them from a mere inspection of the article.<sup>5</sup>

**It Is Not Essential that the Buyer Should Have Relied Solely upon the Representations made.** If they were material and were made as statements of a fact, the buyer may treat them as warranties, although, to some extent, he relied also upon his own judgment.<sup>6</sup>

**7. Representations Must Be Definite.** — It is another requisite to a warranty that the representations which are relied upon as establishing it must be of a definite character, and not vague and indeterminate or such as might equally well apply to every grade or quality.<sup>7</sup>

**8. Where Article Is Purchased for Particular Use.** — If the buyer purchases an article for a particular use, which is known to the seller at the time,<sup>8</sup> and the latter assures the buyer that the article is "all right" or uses equivalent language, the assurance, if relied on by the buyer, amounts to a warranty that the article in question is reasonably fit for the use for which the buyer desires it, and the seller must be presumed to have so intended it.<sup>9</sup> He can-

**1. Mere Fact of Reliance by Purchaser Not Conclusive as to Warranty.** — *Farrow v. Andrews*, 69 Ala. 96; *Lindsay v. Davis*, 30 Mo. 406.

The proper statement of the rule in this connection is that "to constitute a warranty there must not only be an affirmation by the seller respecting the quality of the article sold, but the affirmation must be made with a view of assuring the buyer of the truth of the fact asserted, and it must be received and relied upon by the buyer in making the purchase." *Halliday v. Briggs*, 15 Neb. 222; *Carter v. Abbott*, 33 Iowa 180; *Figge v. Hill*, 61 Iowa 432.

**2. J. I. Case Threshing Mach. Co. v. McKinnon**, 82 Minn. 75. See also *Wilcox v. Carson*, 29 Ill. App. 70.

**3. Milwaukee Rice Machinery Co. v. Hamacek**, 115 Wis. 422.

**4. Buyer's Inability to See Article.** — *Hicks v. Stevens*, 121 Ill. 186; *Overbay v. Lighty*, 27 Ind. 27; *Forchheimer v. Stewart*, 65 Iowa 593, 54 Am. Rep. 30.

**5. Seller's Superior Knowledge.** — *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Hicks v. Stevens*, 121 Ill. 186; *Ormsby v. Budd*, 72 Iowa 80.

**6. Ruff v. Jarrett**, 94 Ill. 475; *Hicks v. Stevens*, 121 Ill. 186; *Powell v. Chittick*, 89 Iowa 513. See also *Wilcox v. Carson*, 29 Ill. App. 70.

**7. Definiteness of Representation.** — *Wilcox v. Henderson*, 64 Ala. 535 (statement by agent that he had authority to warrant); *Falkner v.*

*Lane*, 58 Ga. 116; *Hogins v. Plympton*, 11 Pick. (Mass.) 97 (agreement to ship "good fine wine"); *Wiggin v. Butcher*, 154 Mass. 447; *Erwin v. Maxwell*, 3 Murph. (7 N. Car.) 241, 9 Am. Dec. 602; *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741.

To say that an animal is as good as the "ordinary run" of animals of that kind is not a warranty that it is highly bred or free from vices. *Zinn v. Hyatt*, 60 Mo. App. 627.

**8. Article Bought for Special Purpose.** — The rule of the text can have no application except where the seller is shown to have known, at the time of the sale, the purpose for which the article is being bought, although the contract tilizer Co., (C. C. A.) 64 Fed. Rep. 55. See also *Dounce v. Dow*, 64 N. Y. 411, 57 N. Y. 16.

**Parol Evidence Is Admissible to Prove the Seller's Knowledge** of the purpose for which the article is being bought, although the contract may be in writing. *Roe v. Batchelder*, 41 Wis. 360.

**9. England.** — *Shepherd v. Pybus*, 4 Scott N. R. 434, 3 M. & G. 868, 42 E. C. L. 452; *Jones v. Bright*, 3 M. & P. 155, 5 Bing. 533, 15 E. C. L. 529; *Crompton, etc., Loom Works v. Hoffman*, 5 Ont. L. Rep. 554.

*Alabama.* — *Troy Grocery Co. v. Potter*, 139 Ala. 359.

*Georgia.* — *Wilcox v. Hall*, 53 Ga. 635.

*Illinois.* — *Emrick v. Merriman*, 23 Ill. App. 24; *Trench v. Hardin County Canning Co.*, 67 Ill. App. 269.

not avoid the effect of such a representation by showing that he did not intend to warrant.<sup>1</sup> But if he delivers goods of the character and quality represented in the contract, the buyer cannot defeat an action for the purchase money on the ground that they were not suitable for the purpose for which he desired them.<sup>2</sup>

**9. Antecedent Representations.** — The warranty being properly a part of the contract of sale, representations made some time prior to the sale, but not such as to form a part of the executed agreement, do not amount to a warranty even though they were made for the purpose of inducing the sale; there is no consideration to support them,<sup>3</sup> and they do not enter as a part of the mutual agreement between the parties.<sup>4</sup> It is not essential, however, that the representations relied on as constituting the warranty shall have been exactly contemporaneous with the sale; it is sufficient if they were made in the course of the dealing which resulted in the consummated bargain and were in the minds of the parties when the agreement was finally reached.<sup>5</sup>

**10. Subsequent Representations.** — Representations made after the execution of the contract of sale, like those made some time before, do not constitute a part of the contract nor amount to a warranty unless it appears that it was intended by both parties that they should enter into the original contract and become a part of it.<sup>6</sup> Such representations, however, while of no effect as a

*Indiana.* — *Street v. Chapman*, 29 Ind. 142; *Zimmerman v. Druecker*, 15 Ind. App. 512.

*Iowa.* — *Latham v. Shipley*, 86 Iowa 543; *Rose v. Meeks*, 91 Iowa 715; *Briggs v. M. Rumely Co.*, 96 Iowa 202.

*Kentucky.* — *Clarke v. Johnson Foundry, etc., Co.*, (Ky. 1897) 42 S. W. Rep. 844.

*Massachusetts.* — *Whitehead, etc., Mach. Co. v. Ryder*, 139 Mass. 366.

*Minnesota.* — *Brown v. Doyle*, 69 Minn. 543.

*Missouri.* — *Creasy v. Gray*, 88 Mo. App. 454; *Maugh v. Hornbeck*, 98 Mo. App. 389.

*New York.* — *Richardson v. Mason*, 53 Barb. (N. Y.) 601; *Udell v. Sarafian*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 542; *Dounce v. Dow*, 57 N. Y. 16.

*North Carolina.* — *Reiger v. Worth Co.*, 130 N. Car. 268, 89 Am. St. Rep. 865.

*Texas.* — *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

*Vermont.* — *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150.

*Washington.* — *Huntington v. Lombard*, 22 Wash. 202.

*Wisconsin.* — *Smith v. Justice*, 13 Wis. 602; *Hahn v. Doolittle*, 18 Wis. 106, 86 Am. Dec. 757; *Elkins v. Kenyon*, 34 Wis. 93; *Roe v. Bachelder*, 41 Wis. 360; *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916.

*Compare Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428.

1. *Smith v. Justice*, 13 Wis. 600; *Austin v. Nickerson*, 21 Wis. 542.

2. *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228; *Chicago House Wrecking Co. v. Durand*, 105 Ill. App. 175; *Horner v. Parkhurst*, 71 Md. 110; *Dounce v. Dow*, 64 N. Y. 411, 57 N. Y. 16; *Kauffman Milling Co. v. Stuckey*, 37 S. Car. 7.

3. See *supra*, this title, *General Nature and Elements of the Contract—Consideration for Warranty*.

4. *Cummins v. Ennis*, (Del. 1903) 56 Atl. Rep. 377; *Byrd v. Campbell Printing Press, etc., Co.*, 90 Ga. 542; *Eldridge v. Hargreaves*,

30 Neb. 638; *Hopkins v. Tanqueray*, 15 C. B. 130, 80 E. C. L. 129, 26 Eng. L. & Eq. 254. *Compare Starke v. Dicks*, 2 Ind. App. 125.

**After an Agreement for an Exchange** of horses had been reached by the parties, and consummated by a delivery, the plaintiff returned the horse he had received, and, after rescinding the first agreement, a new bargain was made, by which the defendant sold his horse to the plaintiff for one hundred dollars. It was held that the representations and warranties made by the defendant on the first bargain did not enter into and form a part of the second, so as to constitute a defense to an action for fraud or breach of warranty. *Shull v. Ostrander*, 63 Barb. (N. Y.) 130.

**5. Representations a Warranty Though Made Prior to Sale.** — *Harris v. Mullins*, 32 Ga. 704, 79 Am. Dec. 320; *Chace v. Nichols*, 56 Hun (N. Y.) 647, 9 N. Y. Supp. 878; *Falconer v. Smith*, 18 Pa. St. 130, 55 Am. Dec. 611; *Way v. Martin*, 140 Pa. St. 499; *Crossman v. Johnson*, 63 Vt. 333; *Percival v. Oldacre*, 18 C. B. N. S. 398, 114 E. C. L. 398.

**Reference to a Previous Letter.** — Where, in negotiating a sale, the seller refers to a letter written by his agent to the buyer and specifies that the goods shall be in accordance with the representations there made, the letter is a part of the agreement and constitutes a warranty. *Albany, etc., Iron, etc., Co. v. Lundberg*, 121 U. S. 451.

**6. Subsequent Representations Not a Warranty.** — *Brooks v. Matthews*, 78 Ga. 739; *Vogel v. Scott*, 66 Ill. 426; *Munn v. Perkins*, 1 Smed. & M. (Miss.) 412; *Morehouse v. Comstock*, 42 Wis. 626. *Compare Savage v. Eakins*, 31 Ill. App. 267; *Douglass v. Moses*, 89 Iowa 40, 48 Am. St. Rep. 353.

In *Erwin v. Maxwell*, 3 Murph. (7 N. Car.) 241, 9 Am. Dec. 602, when the purchase money for a horse was about to be paid, the vendee asked the vendor if the horse was sound, and the vendor replied in the affirmative. It was held that this reply did not constitute a war-

warranty, may operate as a subsequent and distinct undertaking by the seller if supported by a valuable consideration,<sup>1</sup> or render the seller liable if they amounted to a fraud.<sup>2</sup>

**A Written Warranty Gratuitously Given After the Sale** will not supersede or affect an oral and different warranty given at the time of the sale,<sup>3</sup> nor will such a parol warranty be affected by a written warranty which was never actually agreed upon by the parties, but which was delivered, with other papers, by the seller to the buyer, and did not come to the buyer's knowledge for some time.<sup>4</sup>

**The Fact that a Written Contract Embodying the Terms Orally Agreed upon Was Drawn up after the Sale** does not make the warranties therein contained "subsequent representations" within the meaning of the general rule.<sup>5</sup>

**11. Where Buyer Has Opportunity to Inspect.** — While the fact that the buyer had an opportunity to examine the goods sold is not material when there is a specific warranty covering the defect complained of,<sup>6</sup> it is a circumstance to be considered in determining whether representations made during the negotiations constitute a warranty or were merely words of commendation.<sup>7</sup> Where abundant opportunity to examine and inspect the goods before the sale is afforded to the buyer, the maxim of *caveat emptor* will be applied as to all defects which a reasonable inspection would have disclosed, and he assumes the risk of such defects unless they are covered by clear and

ranty, as it was not sufficiently express, and was made after the sale had been consummated. But in the case of *Tuttle v. Brown*, 4 Gray (Mass.) 457, 64 Am. Dec. 80, where the purchaser of a cow said to the vendor, after the sale, "You said the cow was all right?" to which the vendor replied, "Well, she is all right," it was held that there was sufficient evidence of a warranty made at the time of the sale. And in *Smilie v. Hobbs*, 64 N. H. 75, where the proof was that after the sale of an article by the vendor's agent, but before payment, the vendee claimed that the agent warranted its durability, which claim the vendor neither admitted nor denied, but received the purchase-money, it was held that it was sufficient to authorize a finding that a warranty had been made. In each of these last two cases, the representations were in effect admissions by the vendor of the fact that a warranty had been given.

**When the Parties, Dissatisfied with the Original Contract, Agree upon a Modification** which is substantially a new agreement, the new agreement controls and there is no remedy on the original warranties. *Dake Engine Mfg. Co. v. Hurley*, 99 Mich. 16. Compare *Blaess v. Nichols, etc., Co.*, 115 Iowa 373, where it was held that if the buyer and seller make a subsequent agreement that if the machine in question doesn't work well a different machine shall be substituted, the latter agreement does not preclude an action for breach of the warranties contained in the original.

**1. Subsequent Representation Effective as a New Undertaking.** — *Douglass v. Moses*, 89 Iowa 40, 48 Am. St. Rep. 353; *Dunham v. Barnes*, 9 Allen (Mass.) 352.

Thus, in the case of *Congar v. Chamberlain*, 14 Wis. 258, A agreed to deliver fruit trees to B in time to enable B to deliver them at a certain point before they should be injured by freezing, but he delivered them at so late a period that B objected to receiving them. It was held that if A, for the purpose of inducing B to receive the trees, thereupon warranted

that they would not be frozen within the time required for their delivery by B at the point mentioned, and also, that if frozen, they would, upon being buried in a certain manner, come out good in the spring, such a warranty would be founded upon a consideration distinct from that of the sale, *i. e.*, B's consent to accept, and would be binding.

**2. Subsequent Representation Amounting to a Fraud.** — *Da Lee v. Blackburn*, 11 Kan. 190.

**3. Aultman v. Kennedy**, 33 Minn. 339. See also *Osborne v. Walther*, 12 Okla. 20.

**4. Valerius v. Hockspiere**, 87 Iowa 332.

**5. Collette v. Weed**, 68 Wis. 428.

**What Is a Subsequent Representation.** — A representation written in a bill of sale at the time the sale is concluded by the buyer's paying the price is not a "subsequent representation," and the seller cannot escape responsibility for a breach of it by claiming that there was a prior complete oral contract of sale which contained no warranty. *Udell v. Sarafian*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 542.

**6. Columbian Iron Works, etc., Co. v. Douglas**, 84 Md. 44, 57 Am. St. Rep. 362. See *infra*, this title, *Rule as to Obvious or Known Defects — Warranty May Embrace Obvious Defects*.

In such a case, the language of the warranty being clear, there can be no question except as to whether the buyer had waived the benefit of the warranty. *Gould v. Stein*, 149 Mass. 577, 14 Am. St. Rep. 455; *Henshaw v. Robbins*, 9 Met. (Mass.) 85, 43 Am. Dec. 367. See also *infra*, this title, *Rule as to Known or Obvious Defects*.

**The Fact that the Buyer Made a Personal Inspection Before Buying**, with a view to informing himself of the quality and condition of the property, does not affect a warranty that the property was merchantable and reasonably fit for the use intended. *Snowden v. Waterman*, 105 Ga. 384. See also *Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289; *Willings v. Consequa, Pet. (C. C.)* 301, 30 Fed. Cas. No. 17, 767; *Wilcox v. Owens*, 64 Ga. 601.

**7. Opportunity to Inspect or Actual Inspection**



express warranties.<sup>1</sup> With respect to the merchantable quality of goods sold, where the purchaser has had an opportunity to inspect them, the rule of law is that the seller may permit the purchaser to cheat himself *ad libitum*, but must not actively assist him in doing so; it is the purchaser's duty in such cases to inspect before buying.<sup>2</sup>

Where the Seller Is Guilty of Fraud in Concealing Defects,<sup>3</sup> or makes a distinct and definite warranty against all defects,<sup>4</sup> or where the defect is one not discoverable upon an inspection,<sup>5</sup> the fact of an opportunity to inspect is not material; and it is always competent to inquire whether the buyer's failure to avail himself of the opportunity to inspect was not due to the seller's assurances or persuasion.<sup>6</sup>

When the Buyer Purchases Partly upon an Examination and Test of the article sold, made by himself, but relying mainly upon the representations of the seller, who made them with the intent that they should be relied upon, the former may treat them as a warranty and recover for a breach thereof notwithstanding his own inspection and test.<sup>7</sup>

**Buyer's Duty to Inspect.** — Where the declarations of the seller with respect to the quality of or the title to the goods being sold are explicit and definite, so that there is a clear warranty, the buyer is entitled to rely upon them, and his right of action for a breach of such a warranty is not affected by his failure to test the truth of the representations before concluding the sale. The liability of the seller arises from his own misrepresentation and is not affected by the question of the diligence or negligence of the buyer.<sup>8</sup>

**an Evidential Fact.** — *Humphreys v. Comline*, 8 Blackf. (Ind.) 516.

1. *England.* — *Osborne v. Hart*, 19 W. R. 331, 23 L. T. N. S. 851.

*United States.* — *McVeigh v. Messersmith*, 5 *Cranch* (C. C.) 316.

*California.* — *Bullock v. Consumers' Lumber Co.*, (Cal. 1892) 31 Pac. Rep. 367.

*Indiana.* — *Pattison v. Jenkins*, 33 Ind. 87.

*Maryland.* — *Taymon v. Mitchell*, 1 Md. Ch. 496.

*Massachusetts.* — *Bowker v. De Long*, 141 Mass. 315.

*Minnesota.* — *Lynch v. Curfman*, 65 Minn. 170.

*Missouri.* — *Norris v. Reinstedler*, 90 Mo. App. 626.

*Nebraska.* — *Neff v. McNeeley*, 1 Neb. (unofficial) 416, 96 N. W. Rep. 150.

*New York.* — *Eaton v. Waldron*, 67 Hun (N. Y.) 551.

*Texas.* — *Ranger v. Hearne*, 37 Tex. 30; *Ricker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909; *Joy v. National Exch. Bank*, (Tex. Civ. App. 1903) 74 S. W. Rep. 325.

*Vermont.* — *Gilson v. Bingham*, 43 Vt. 410, 5 Am. Rep. 289.

*Compare* *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434.

When, after the sale of a certain number of barrels of rosin, to be delivered, the buyer goes to the place of delivery and selects the number of barrels purchased by him from a large lot, the fact that he had an opportunity to inspect the rosin before or at the time it was delivered, and did in fact select the particular barrels purchased, does not amount to a waiver of the warranty that they should be of the specific description. *Lewis v. Rountree*, 78 N. Car. 323.

The seller knew the horse being sold was a "cribber," but failed to disclose the fact to the buyer; it could have been easily discovered,

however, by looking into the animal's mouth. The buyer did not do so because, he said, he had never known a horse so young to have that fault. It was held that the buyer could not recover on the warranty. *Dean v. Morey*, 33 Iowa 120. See also *Burnett v. Hensley*, 118 Iowa 575.

2. *Armstrong v. Bufford*, 51 Ala. 410; *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434; *Biggs v. Perkins*, 75 N. Car. 397. *Compare* *Hill v. Gray*, 1 Stark. 434, 2 E. C. L. 167.

3. **Fraudulent Concealment of Defects.** — *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367; *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794 (sale of bonds); *Ranger v. Hearne*, 37 Tex. 30; *Fay Fruit Co. v. Talerico*, (Tex. Civ. App. 1902) 69 S. W. Rep. 196. See also *Harrington v. Smith*, 138 Mass. 92.

4. *Kansas City First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485. See also *Fay Fruit Co. v. Talerico*, (Tex. Civ. App. 1902) 69 S. W. Rep. 196.

5. *Brown v. Freeman*, 79 Ala. 406; *Hodgman v. State Line, etc., R. Co.*, 45 Ill. App. 395; *Cullers v. Wilson*, 2 Tex. App. Civ. Cas., § 816.

6. **Buyer's Failure to Inspect Due to Seller's Assurances.** — *Kansas City First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63.

7. *Hodgman v. State Line, etc., R. Co.*, 45 Ill. App. 395; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Powell v. Chittick*, 89 Iowa 513; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. Rep. 455; *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485; *Keely v. Turbeville*, 11 Lea (Tenn.) 339; *Huntington v. Lombard*, 22 Wash. 202. See also *Samuels v. Guin*, 40 Mo. App. 8.

8. *Thompson v. Bertrand*, 23 Ark. 730; *Kansas City First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Hale v. Philbrick*, 42 Iowa 81 (warranty

Upon the Purchase, from a Wholesale Dealer, of Goods of a Particular Quality, to be delivered at a future time, there being no warranty except that arising out of the description of the goods in the order for them, it is the duty of the purchaser to examine them and to return them or notify the seller if they are not of the quality ordered; and this must be done within a reasonable time. What is such a reasonable time is ordinarily a question for the jury; if it is the usage not to examine such goods until opened by dealers to sell to customers, and the parties deal with reference to that usage, an examination made by the dealer when he opens the package to sell to customers will be within a reasonable time, provided the goods are so offered for sale in due course of trade.<sup>1</sup>

**12. Distinguished from Words of Description.** — A distinction is to be made between affirmations intended as a warranty and those which are made merely by way of description of the article sold, or in order to identify it, and not for the purpose of warranting its quality or quantity.<sup>2</sup> A notable instance, often cited, is that where a picture was described in an invoice or catalogue as the painting of a certain master, and the statement was held to be a matter of description merely and not a warranty.<sup>3</sup>

**Words, Apparently of Description Merely, May Amount to a Warranty where the buyer**

of title); *Cook v. Gray*, 2 Bush (Ky.) 121; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. Rep. 890.

**When a Buyer Purchases for Resale** and the seller knows his purpose, the former is not bound to inspect before reselling, but may rely upon the express warranty. *Haltiwanger v. Tanner*, 103 Ga. 314.

1. *Doane v. Dunham*, 79 Ill. 131. Compare *Forcheimer v. Stewart*, 65 Iowa 593, 54 Am. Rep. 30.

In *Gentili v. Starace*, 133 N. Y. 140, the contract was for the delivery of wine known as "Prosperi's Chianti wine," which should be "in good merchantable order," and was to be "approved by the buyer within three days." The court, while holding that the provisions quoted constituted a warranty, said: "Under the circumstances of this case, where the seller was not the manufacturer, where the article sold was *in esse*, and open to inspection and examination, and where no fraud is charged nor existed, and the buyer claimed and was allowed his time to exercise his judgment, and to approve of the subject of the transaction of sale, the acceptance and retention of the goods concluded him, and there was neither warranty nor agreement by the seller which survived the transaction. The principle of this conclusion, I think, is deducible from the authorities, several of which I cite without further reference. *Parkinson v. Lee*, 2 East 314; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Dounce v. Dow*, 64 N. Y. 411."

**2. Description Intended Merely for Identification.** — *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Callender Insulating, etc., Co. v. Badger*, 30 Ill. App. 314, affirmed 33 Ill. App. 90; *Shambaugh v. Current*, 111 Iowa 121 (some cattle mentioned in a list as "thoroughbred"); *Whitman v. Freese*, 23 Me. 212; *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56; *Columbian Iron Works, etc., Co. v. Douglas*, 84 Md. 44, 57 Am. St. Rep. 362; *Maxwell v. Lee*, 34 Minn. 511; *Hawkins v. Pemberton*, 6 Robt. (N. Y.) 42; *Brown v. Baird*, 5 Okla. 133; *Fraleigh v. Bispham*, 10 Pa. St. 320, 51 Am. Dec. 486,

(tobacco described as "sweet scented"); *Ryan v. Ulmer*, 108 Pa. St. 332, 56 Am. Rep. 210; *Barrett v. Hall*, 1 Aik. (Vt.) 269; *Kleeb v. Bard*, 7 Wash. 41 (engines described as of certain horse power); *Behn v. Burness*, 3 B. & S. 751, 113 E. C. L. 751.

The certificate of a master carpenter as to the capacities of the ship being sold is to be taken as a matter of description rather than as a warranty unless an intention otherwise is made to appear. *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56. See also *Dyer v. Lewis*, 7 Mass. 284.

In *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906, the court, after declaring it impossible to deduce any definite rule in this connection, said: "The cases \* \* \* are forcible illustrations of this statement. In *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, defendants agreed to sell to plaintiff a crop of tobacco then growing, 'well cured and boxed, and in good condition.' A majority of the court held that a warranty could not be predicated upon said engagement and that the rules of law by which the rights of parties in respect to warranties are regulated were inapplicable. In *Coplay Iron Co. v. Pope*, 108 N. Y. 232, an executory agreement to sell 'No. 1 extra foundry pig iron of the Coplay Iron Co. make' was held not to be a warranty but a mere description of the article to be sold. On the other hand, the courts of the state of New York have held that in a sale of 'blue vitriol sound and in good order,' the trial court could have decided, as a question of law, that there was a warranty that it was sound and in good order (*Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595), and that a contract to sell 'pipe iron which should be of a quality suitable and proper for use in the defendant's manufacturing business \* \* \* was an express agreement or warranty that it should be of that specified or designated quality.' *Dounce v. Dow*, 57 N. Y. 16. The decision in *White v. Miller*, 71 N. Y. 129, 27 Am. Rep. 13, is to the same effect."

**3.** See *infra*, this title, *Warranty in Particular Sales — Of Pictures or Paintings*.

has no other means of ascertaining the quality of the goods and such words are not intended or needed to identify the goods; in such cases the question is largely one of intention, to be determined from all the circumstances.<sup>1</sup>

A Provision in the Contract Purporting to State the Kind of Goods being bought, as where there is a contract for coal of the same kind and quality as that furnished the preceding year, amounts to a warranty that the goods are of that kind and quality, and is not a mere description.<sup>2</sup>

Statements as to the Capacity of a Machine are not, ordinarily, mere words of description indicating its kind or size, but constitute a warranty that it is of the capacity stated.<sup>3</sup>

**13. Distinguished from Mere Stipulations.** — There may be positive affirmations by the seller as to the quality of his goods which are relied upon by the buyer, but which may not amount to a warranty because of stipulations which are annexed. Thus, where the seller states that he will recommend his goods as being of the best, and if they are not entirely satisfactory the buyer may return them, the representation, however positive, does not constitute a warranty if the contract is so worded as to give the buyer merely an option to return the goods if they are not satisfactory.<sup>4</sup> In this connection, also, belongs the distinction between statements in the contract which are a warranty and those which are mere stipulations as to the price or manner of payment or the like.<sup>5</sup>

**14. Statements in Printed Advertisements or Invoices.** — Descriptions or statements contained in written or printed invoices or advertisements are not necessarily or presumably warranties; they are more properly to be considered, generally, as mere "dealers' talk," and the burden is on the buyer to show that they meant more. It is a matter of common knowledge that dealers and traders make use of extravagant language in advertisements praising the quality of their goods, and the buyer cannot rely blindly upon such representations and insist upon them as warranties, unless other facts and conditions are proven such as are requisite in the case of verbal representations.<sup>6</sup> Nor can such printed statement ever be treated as a warranty

**1. When Description Amounts to Warranty.** — *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906; *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Edgar v. Breck, etc., Corp.*, 172 Mass. 581; *Tillyer v. Van Cleave Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99; *Joseph v. Richardson*, 2 Pa. Super. Ct. 208, 38 W. N. C. (Pa.) 487; *Bridge v. Wain*, 1 Stark. 504, 2 E. C. L. 192; *Bowes v. Shand*, 2 App. Cas. 455. See also *Bryant v. Crosby*, 36 Me. 562, 58 Am. Dec. 767.

**"For Value Received" Not Words of Description Merely.** — A written assignment of a note described it as payable in one year from date, with use for value received. It was held that the words "for value received" were not merely descriptive of the note assigned, but that, *prima facie* at least, they imported a sufficient legal consideration for the assignment; that such instrument, in describing the property assigned as "a note," must be construed as an express warranty, on the part of the assignor, that it was a valid note, and that the signers were of sufficient capacity to contract when they executed it. *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682.

**2. Zabriskie v. Central Vermont R. Co.**, 131 N. Y. 72, affirming 59 Hun (N. Y.) 623. See also *Weston v. Barnicoat*, 175 Mass. 454.

**3. Street v. Chapman**, 29 Ind. 142; *Cosgrove v. Bennett*, 32 Minn. 371; *Hazelton Boiler Co.*

*v. Fargo Gas, etc., Co.*, 4 N. Dak. 365. See also *Briggs v. M. Rumely Co.*, 96 Iowa 202. Compare *Kleebe v. Bard*, 7 Wash. 41.

**4. Stipulations.** — *Childs v. O'Donnell*, 84 Mich. 533. See also *Van Allen v. Allen*, 1 Hilt. (N. Y.) 524; *Crandall v. Haskins*, (Supm. Ct. Gen. T.) 10 N. Y. St. Rep. 107.

**5.** See *DeWitt v. Berry*, 134 U. S. 306.

**6. Advertisements, etc.** — *England*. — *Freeman v. Baker*, 2 N. & M. 446, 5 C. & P. 475, 24 E. C. L. 414, 5 B. & Ad. 797, 27 E. C. L. 194; *Taylor v. Bullen*, 5 Exch. 779, 20 L. J. Exch. 21; *Power v. Barham*, 7 C. & P. 356, 32 E. C. L. 541, 4 Ad. & El. 473, 31 E. C. L. 114; *Jendwine v. Slade*, 2 Esp. 572; *Cranston v. Marshall*, 5 Exch. 395, 19 L. J. Exch. 340.

*Arkansas*. — *Berman v. Woods*, 38 Ark. 351.

*Illinois*. — *Roberts v. Applegate*, 48 Ill. App. 176, affirmed 153 Ill. 210.

*Iowa*. — *Shambaugh v. Current*, 111 Iowa 121.

*Maine*. — *Whitman v. Freese*, 23 Me. 212.

*Maryland*. — *Gunther v. Atwell*, 19 Md. 157.

*Massachusetts*. — *Winsor v. Lombard*, 18 Pick. (Mass.) 57.

*Michigan*. — *Richey v. Daemicke*, 86 Mich. 647.

*Missouri*. — *Ransberger v. Ing*, 55 Mo. App. 621.

*New York*. — *League Cycle Co. v. Abrahams*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 548.



unless shown to have been brought to the buyer's attention.<sup>1</sup>

Such Statements May Constitute a Warranty when, to the knowledge of the seller, they are relied upon by the buyer in making the purchase, or where they are shown to have been intended as a warranty by the seller, or where they state material facts relative to essential qualities of the property advertised.<sup>2</sup> And in such a case the warranty is not repelled by the fact that a warranty as to a specific quality is made by special letter.<sup>3</sup>

**Warranty with Printed Signature.** The delivery to the buyer of a printed warranty, bearing no other signature than the printed signature of the seller, may constitute a warranty where it was delivered for the purpose of inducing the sale and was relied upon by the buyer.<sup>4</sup> And this may be true even where the paper itself contains a condition, printed on the margin, that it shall not constitute a warranty unless countersigned by the seller's agent, who had not so countersigned it.<sup>5</sup>

**15. To Whom Representations Must Be Made.** — It is not essential to the existence of a warranty that the representations constituting it shall have been made to the buyer himself; if they are made to a third party, and by him communicated to another, so as to become the basis of a purchase by the latter from the party originally making the representations, they are to be given the same effect as if they had been made directly to the buyer, and he may rely upon them as a warranty.<sup>6</sup>

*Pennsylvania.* — *Wilson v. Belles*, 22 Pa. Super. Ct. 477.

*South Carolina.* — *Sullivan v. Huff*, 24 So. Car. 348.

*Vermont.* — *Enger v. Dawley*, 62 Vt. 164.

*Compare Latham v. Shipley*, 86 Iowa 543.

**Original and Supplemental Catalogues Must Be Considered Together** where both were before the buyer, especially where the statements in the latter are particularly qualified by reference to conditions and limitations set out in the former. *Henry v. Salisbury*, 14 N. Y. App. Div. 526.

1. *Enger v. Dawley*, 62 Vt. 164.

2. *Cranston v. Marshall*, 5 Exch. 395, 19 L. J. Exch. 340; *Power v. Barham*, 7 C. & P. 356, 32 E. C. L. 541, 4 Ad. & El. 473, 31 E. C. L. 114, 1 M. & Rob. 507; *Morris v. Bradley Fertilizer Co.*, (C. C. A.) 64 Fed. Rep. 55; *Landman v. Bloomer*, 117 Ala. 312; *Wilcox v. Henderson*, 64 Ala. 541; *Sledge v. Scott*, 56 Ala. 202; *Hicks v. Stevens*, 121 Ill. 186; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317; *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367; *Grieb v. Cole*, 60 Mich. 397, 1 Am. St. Rep. 533; *Cedar Rapids First Nat. Bank v. Erickson*, 20 Neb. 580; *Wilson v. Belles*, 22 Pa. Super. Ct. 477 (catalogue); *Robson v. Miller*, 12 S. Car. 586, 32 Am. Rep. 518; *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714 (catalogue).

**In Some Cases It Has Been Ruled that Circulars, Printed and Distributed** for the purpose of inducing others to purchase the rights of the seller, and the statements therein, may be regarded as being of a more deliberate character than if made in conversation. *Hicks v. Stevens*, 121 Ill. 186; *Smilie v. Hobbs*, 64 N. H. 75.

*In Borrekens v. Bevan*, 3 Rawle (Pa.) 37, 23 Am. Dec. 85, the court, by Rogers, J., said: "From a critical examination of all the cases, it may safely be ruled that a sample or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express

warranty that the goods are what they are described or represented to be by the vendor." This language is quoted with approval in *Hawkins v. Pemberton*, 51 N. Y. 206, 10 Am. Rep. 595. See also *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Jennings v. Gratz*, 3 Rawle (Pa.) 168, 23 Am. Dec. 111.

**Letter Directing Attention to Statements in Catalogue.** — Where a manufacturer offers, by letter, to sell pianos of his own manufacture, to a party at a distance, stating the terms of the sale, and directing attention to a circular advertising the pianos, sent by the same mail, on the front page of which was printed in conspicuous manner the words, "Every piano warranted for five years," these words amount to a warranty. *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509.

**Where the Printed Statements Conform to Antecedent Oral Warranties** they may be treated as warranties. *Brown v. Russell*, 105 Ind. 46.

3. *Charter Gas Engine Co. v. Kellam*, 79 N. Y. App. Div. 231.

4. *Brown v. Russell*, 105 Ind. 46; *Cedar Rapids First Nat. Bank v. Erickson*, 20 Neb. 580. See also *Grieb v. Cole*, 60 Mich. 397, 1 Am. St. Rep. 533.

5. *Cedar Rapids First Nat. Bank v. Erickson*, 20 Neb. 580.

**A Blank Warranty with Mere Printed Signature Is Valid, Although Blanks Are Not Filled in**, where it is printed on the reverse side of an order addressed to the seller and signed by the buyer which refers to the printed warranty and reserves the full benefit of it to the buyer. *Grieb v. Cole*, 60 Mich. 397, 1 Am. St. Rep. 533.

**6. To Whom Representations Made.** — *Crocker v. Lewis*, 3 Sumn. (U. S.) 1; *Smith v. Babcock*, 2 Woodb. & M. (U. S.) 246; *Pilmore v. Hood*, 5 Bing. N. Cas. 97, 35 E. C. L. 43, 6 Scott 827, 7 Dowl. P. C. 136. See also *Mason v. Crosby*, 1 Woodb. & M. (U. S.) 342. *Compare Phillips v. Vermillion*, 91 Ill. App. 133; *Sipple v. Breen*, 1 Harr. (Del.) 16.

**Representations Made to Promoters of Corporation.** — Where the owner of a patent right, desiring to sell it, makes representations as to its intrinsic value to certain parties, who thereupon form themselves into a corporation for the purpose of utilizing the right, the representations are to be regarded as having been made to the corporation and it may sue for a breach of the warranty.<sup>1</sup>

**16. Question for Jury.** — The border line between distinct and positive affirmations on the one hand, and mere expressions of commendation on the other, is extremely shadowy, and cannot be made always to appear; the only course in such cases is to submit the matter to the jury to determine from the evidence the question of intention.<sup>2</sup> The decisive test as to whether representations by the vendor constitute a warranty is, whether the vendor so intended them, and whether the vendee purchased on the faith of them, these two questions are for the jury.<sup>3</sup> And in determining these questions the jury should not be confined to the mere language used, but should be

In the first of the above cases, Story, J., said: "No principle seems better founded than this, that if a party makes a representation to one person in respect to a sale, and that representation constitutes the basis of a subsequent sale made by the party so making the representation, to the party to whom it is communicated by the third person, it is treated in the same way as if directly made by the vendor to himself. It is by no means true that representations made to third persons are to be treated as *res inter alios acta*, if those representations have been communicated to and acted upon by another person, who places entire confidence in them. In the case of *Barden v. Keverberg*, 2 M. & W. 63, the court thought that representations, made by a married woman to third persons, that she was a *feme sole*, might, if communicated to plaintiff by such third persons, entitle him to the same benefit as if made to himself." *Crocker v. Lewis*, 3 Sumn. (U. S.) 1.

See also *infra*, this title, *Remedies for Breach of Warranty — Parties Entitled to Complain of Breach*.

**A Warranty by the Original Seller Does Not Pass to Every Subsequent Purchaser;** it cannot be said to "run with the article sold." *Prater v. Campbell*, 110 Ky. 23. See also *Pemberton v. Dean*, 88 Minn. 60, 97 Am. St. Rep. 503.

But if the buyer, upon selling to a sub-purchaser, indorses on the bill of sale containing the original warranty, "I hereby transfer the within property as herein described" and that "the property and conditions are as above described," he thereby binds himself to his purchaser by the warranties contained in such bill of sale. *Long v. Anderson*, 62 Ind. 537. *Compare Houston v. Burney*, 2 Smed. & M. (Miss.) 583.

1. *Iowa Economic Heater Co. v. American Economic Heater Co.*, 32 Fed. Rep. 737.

2. **A Question for the Jury — United States.** — *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178.

*Alabama.* — *Stevenson v. Reaves*, 24 Ala. 425; *Claghorn v. Lingo*, 62 Ala. 230; *Brown v. Freeman*, 79 Ala. 406.

*California.* — *Marshall v. Keefe*, (Cal. 1893) 34 Pac. Rep. 89.

*Georgia.* — *Terhune v. Dever*, 36 Ga. 648.

*Illinois.* — *Kankakee Stone, etc., Co. v. Ugrow*, 36 Ill. App. 448.

*Indiana.* — *Jones v. Quick*, 28 Ind. 125.

*Iowa.* — *Figge v. Hill*, 61 Iowa 430; *Hughes v. Funston*, 23 Iowa 257.

*Maryland.* — *Horner v. Parkhurst*, 71 Md. 110.

*Michigan.* — *Dake Engine Mfg. Co. v. Hurley*, 99 Mich. 16; *Croly v. Pollard*, 71 Mich. 612.

*Mississippi.* — *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59, 34 Am. Dec. 108.

*Missouri.* — *Galbreath v. Carnes*, 91 Mo. App. 512.

*Nebraska.* — *Patrick v. Leach*, 8 Neb. 530, *Halliday v. Briggs*, 15 Neb. 219.

*New York.* — *Hawkins v. Pemberton*, 51 N. Y. 199, 10 Am. Rep. 595; *Rogers v. Ackerman*, 22 Barb. (N. Y.) 134; *Riley v. Rea*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 597.

*North Carolina.* — *Foggart v. Blackweller*, 4 Ired. L. (26 N. Car.) 238.

*North Dakota.* — *Flath v. Casselman*, 10 N. Dak. 419.

*Pennsylvania.* — *McFarland v. Newman*, 9 Watts (Pa.) 55, 34 Am. Dec. 497; *Bigler v. Flickinger*, 55 Pa. St. 279; *Toner v. Zell*, 149 Pa. St. 458.

*Wisconsin.* — *Boothby v. Scales*, 27 Wis. 626.

See also the titles FRAUD AND DECEIT, vol. 14, p. 205; QUESTIONS OF LAW AND FACT, vol. 23, p. 513.

3. *McLennan v. Ohmen*, 75 Cal. 558; *Ashford v. Schoop*, 81 Mo. App. 539; *Titus v. Poole*, 145 N. Y. 414; *Ives v. Ellis*, 50 N. Y. App. Div. 390; *Toner v. Zell*, 149 Pa. St. 458; *McGregor v. Penn*, 9 Yerg. (Tenn.) 74; *Tenney v. Cowles*, 67 Wis. 596.

In *Jones v. Quick*, 28 Ind. 125, the following rules were laid down as governing cases where the property in question was open to inspection by the party contracting for it: First, No particular form of words is necessary to make a warranty, though the word "warrant" is generally used. Any assertion of the seller in respect to the property, if intended by the seller and understood by the buyer as a warranty, must be considered as such, whether the word "warrant" was made use of or not. Second, When a warranty is relied on, the question with the jury should always be, Do the words proven fairly show that they were intended and understood by the parties, at the time of the sale or exchange, as a warranty? If they do, they must be so considered.

instructed to take into account all the circumstances of the transaction.<sup>1</sup> When, however, the facts are not in dispute and the question is merely one of the construction of a written agreement, it is a matter for the court to determine.<sup>2</sup>

**IX. CONDITIONAL, LIMITED, OR QUALIFIED WARRANTIES.**—The seller may, by express provision incorporated into the contract of sale, attach such conditions or limitations to warranties given by him as he may see fit,<sup>3</sup> although conditions limiting the benefit of a general warranty are to be construed strictly in favor of the buyer.<sup>4</sup> The seller may warrant an animal to be sound, but stipulate that he shall not be liable on the warranty unless a complaint of the breach is made to him within a specified time,<sup>5</sup> or he may provide that the duration of the warranty shall be limited to a specified period.<sup>6</sup> He may qualify his warranty by excepting from it a specified defect,<sup>7</sup> or stipulate that the warranty shall be conditional upon the buyer's pursuing a prescribed course with respect to specified curable defects,<sup>8</sup> or upon his giving the seller notice of defects and an opportunity to remedy them.<sup>9</sup> A seller at wholesale may qualify a warranty of his machines by a provision that his buyer shall

**1. All the Circumstances to Be Considered.**—*McDonald Mfg. Co. v. Thomas*, 53 Iowa 558; *McClintock v. Emick*, 87 Ky. 167; *Wilmot v. Hurd*, 11 Wend. (N. Y.) 586; *Driesbach v. Lewisburg Bridge Co.*, 81\* Pa. St. 177; *Way v. Martin*, 140 Pa. St. 499.

**No Inference from Buyer's Failure to Ask a Warranty.**—A bare representation or assertion of the quality of the thing sold, if so understood or intended by the parties, will amount to a warranty; hence, where there is some evidence that such was the intention or understanding of the parties, though there was no express demand for a warranty, an instruction that "the purchaser must buy on his own responsibility or ask for a warranty" is properly refused as tending to take from the jury all consideration of the evidence of a warranty voluntarily made or arising out of the circumstances of the transaction. *Claghorn v. Lingo*, 62 Ala. 230.

**2.** *Holmes v. Tyson*, 147 Pa. St. 305.

**3. Seller May Make Warranty Conditional.**—*Massillon Engine, etc., Co. v. Selmer*, (Iowa 1903) 93 N. W. Rep. 599; *Davis v. Gosser*, 41 Kan. 414; *Heagney v. J. I. Case Threshing Mach. Co.*, (Neb. 1903) 96 N. W. Rep. 177; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 215; *Clark v. Deering*, 29 Neb. 293.

"Sound so Far as I Know," is a limited warranty and is effective only as against defects of which the seller had knowledge. *Wood v. Smith*, 5 M. & R. 124, 4 C. & P. 45, 19 E. C. L. 267; *Meyers v. Conway*, 62 Ind. 474; *Jones v. Edwards*, 1 Neb. 170.

**Warranty on Condition that Buyer Make Monthly Reports.**—Such a condition attached to the warranty of a stallion that he was sound and a good breeder has been construed only as affecting the buyer's right to exercise the special remedy mentioned in the contract—the privilege of returning the animal and receiving another in exchange—and not as affecting the buyer's ordinary remedies. *Montgomery v. Hanson*, 122 Iowa 222.

**4. Conditions or Limitations Construed in Favor of Buyer.**—See *infra*, this title, *Construction and Interpretation of Warranties—General Rule of Construction*.

**5.** *Bywater v. Richardson*, 1 Ad. & El. 508, 28 E. C. L. 135; *Best v. Osborn*, 2 C. & P. 74, 12 E. C. L. 33, R. & M. 296.

**6. Warranty Limited in Its Duration.**—*Chapman v. Gwyther*, 7 B. & S. 417, L. R. 1 Q. B. 463, 14 W. R. 671; *Wilson v. Ward*, 159 Ind. 21. See also *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509.

A condition to the effect that the horse warranted shall be returned to the seller by eleven o'clock A. M., if unsatisfactory, is complied with on the part of the buyer by a return of the horse ten hours later, where the delay is shown to have been due to the horse's lameness. *Johansmeyer v. Kearney*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 785.

A provision in a contract for the sale of certain wine, that it is "all to be in good merchantable order—the said goods to be approved by the buyer within three days after delivery," is not a warranty further than to give the buyer the time specified in which to determine whether the wine was merchantable or not. *Gentili v. Starace*, 133 N. Y. 140, affirming 14 N. Y. Supp. 764.

**A Provision that "This Guaranty to Be Null and Void After" a Named Date**, contained in the contract for the sale of a stallion, will preclude any action on the warranty begun after that date where no notice of a breach was given before that time. *Wilson v. Ward*, 159 Ind. 21.

**7. May Except Certain Defects.**—*Morrill v. Bemis*, 37 Vt. 155; *Jones v. Cowley*, 6 Dowl. & R. 533, 4 B. & C. 445, 10 E. C. L. 377; *Garment v. Barrs*, 2 Esp. 673.

**8. Warranty Conditioned upon Buyer's Pursuing Prescribed Course as to Defects or in Use of Property.**—*Landman v. Bloomer*, 117 Ala. 312; *Smith v. Borst*, 63 Barb. (N. Y.) 57. In this latter case the warranty of a horse was coupled with the condition that the buyer should treat the defect (a hunch on the leg) with salt and vinegar. It was held that the plaintiff was bound so to treat it, and that this requirement was a sufficient excuse for his refusing to try another treatment which might hazard the effect of the warranty. *Compare Milburn Wagon Co. v. Nisewarner*, 90 Va. 714.

**9.** See *infra*, this title, *Remedies for Breach*



forfeit all claim under the warranty if he sell to a customer before first settling with the seller for the machine.<sup>1</sup>

**The Condition or Limitation Must Be Contemporaneous with the Warranty;** a parol warranty cannot be restricted by a written notice or other paper accompanying the goods when delivered to the effect that they are not warranted.<sup>2</sup> If the condition is attached after the sale and warranty, the assent of the buyer for a valuable consideration must be proved.<sup>3</sup>

**In a Warranty that a Machine Will Work Well There Is Always an Implied Condition** that it shall be properly operated by a person of reasonable care and skill, and a charge to the jury which omits consideration of this condition is error.<sup>4</sup>

**Qualification of Warranty by Notice Merely.** — In the case of sales taking place at an established market, a general warranty may be qualified or limited by a mere notice which is brought to the buyer's knowledge or so posted or published as that he ought to have known of it, provided the limitations in the notice are not unreasonable.<sup>5</sup> If actual knowledge of the limitation on the part of the buyer is not shown, there must be proof of such a state of facts as will clearly charge him with notice of it in order to bind him.<sup>6</sup>

**X. WARRANTY IN PARTICULAR SALES** — 1. Sales "with All Faults." — Although a sale may have been made "with all faults," the seller is nevertheless liable for a latent defect which was known to him and which his buyer could not discover either because it was not discoverable by mere examination or because art had been used to conceal it.<sup>7</sup>

**2. Sales by Description.** — In the sale of goods by description, there is a *of Warranty — Conditions Precedent to Buyer's Right of Action — Notice of Defects.*

1. Warren, etc., Mfg. Co. v. Watson, 92 Iowa 759; Robinson v. Berkey, 111 Iowa 550. See also *infra*, this title, *Waiver of Warranty or Breach*.

**2. Parol Warranty Not Restricted by Subsequent Written Notice.** — Edgar v. Breck, etc., Corp., 172 Mass. 581; Landreth v. Wyckoff, 67 N. Y. App. Div. 145. See also Weeks v. Robert A. Johnson Co., 116 Wis. 105.

3. Moomaw v. Emerson, 80 Mo. App. 318.

4. Allington, etc., Mfg. Co. v. Detroit Reduction Co., (Mich. 1903) 95 N. W. Rep. 562. See also Johnson v. Moore, 34 Nova Scotia 85. Compare Haney-Campbell Co. v. Preston Creamery Assoc., 119 Iowa 188.

**5. Qualifying Warranty by Notice.** — In Bywater v. Richardson, 1 Ad. & El. 508, 28 E. C. L. 135, at the time of the sale of a horse at a repository, there was a board fixed to the walls of the repository having certain rules painted on it, one of which was that the warranty of soundness given should remain in force until twelve o'clock of the day following the sale, after which the sale should be complete and the vendor's liability be at an end, unless a notice accompanied by a surgeon's certificate of unsoundness should, in the meantime, be produced. The rules were not particularly referred to during the sale. The horse proved to be unsound, and the vendor knew it, but no complaint was made until after the lapse of the prescribed time. The unsoundness was of a character not likely to be immediately discovered, and the sale had been made under circumstances favorable to the concealment of the defect. It was held that the vendee had sufficient notice of the rules, and as they were not unreasonable, must be bound by them; recovery was therefore denied in an action on the warranty. See also Baglehole v. Walters, 3 Campb.

154; Hinchcliffe v. Barwick, 5 Exch. D. 177, 28 W. R. 940; Smart v. Hyde, 8 M. & W. 723, 1 Dowl. N. S. 60.

**6. Buyer's Knowledge of Limitation.** — A general warranty given upon the sale of certain seed is not affected by a stipulation on the bill therefor, printed in small type and not observed by the buyer, that the seller does not warrant any of his seed and that the buyer must return them at once if he does not wish to buy on such terms. Landreth v. Wyckoff, 67 N. Y. App. Div. 145.

**A Question for the Jury.** — In Best v. Osborn, 2 C. & P. 74, 12 E. C. L. 33, R. & M. 296, the rule is laid down by Best, C. J., that if a general warranty of a horse is proved by parol (the written contract not being forthcoming), the fact that the witness who proved it saw a notice board on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury for them to say whether this formed any part of the original contract.

**7. Sales "with All Faults."** — Mellish v. Motteux, Peake N. P. (ed. 1795) 115; Schneider v. Heath, 3 Campb. 506; Fletcher v. Bowsher, 2 Stark. 561, 3 E. C. L. 530; Taylor v. Bullen, 5 Exch. 779, 20 L. J. Exch. 21. Compare Freeman v. Baker, 5 B. & Ad. 797, 27 E. C. L. 194, 5 C. & P. 475, 24 E. C. L. 414, 2 N. & M. 446.

In Baglehole v. Walters, 3 Campb. 154, it appears to have been held that the seller of a ship "with all faults" was not liable for latent defects, unless he had used some artifice to conceal them from the buyer.

Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding that she was to be taken with all faults, without allowance for any defect whatever, and it appeared that she was only partially copper-fastened, it was held that notwithstanding the words "with all faults, without allowance

warranty that they shall answer the description, where it is given by way of indicating the character or quality of the article sold and not for the purpose of identifying it merely, and when the buyer relies upon it as a warranty. It is not an implied warranty, but is construed, under such circumstances, as constituting an express undertaking that the article shall be as described.<sup>1</sup> Such a warranty will not survive an acceptance after inspection.<sup>2</sup>

If the Sale Is by Sample and Description and the goods are warranted to conform to both, there is a breach of the warranty if they fail to come up to the description, even though they conform to the sample.<sup>3</sup>

**3. Sales on Approval Warranty of Satisfaction.** — Where the contract of sale contains a warranty that the article sold shall be satisfactory to the buyer, his determination, made in good faith, is conclusive as to whether or not the warranty has been complied with.<sup>4</sup> The same rule prevails in the case of sales made on approval.<sup>5</sup>

for any defects whatsoever," the vendor was liable as for breach of warranty. *Shepherd v. Kain*, 5 B. & Ald. 240, 7 E. C. L. 82.

**1. Description Constitutes an Express Warranty** — *England*. — *Jones v. Just*, L. R. 3 Q. B. 197, 9 B. & S. 141.

*United States*. — *Lyon v. Bertram*, 20 How. (U. S.) 149, affirming *McAll*. (U. S.) 53; *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672.

*California*. — *Flint v. Lyons*, 4 Cal. 17.

*Indiana*. — *Richmond Trading, etc., Co. v. Farquar*, 8 Blackf. (Ind.) 89.

*Iowa*. — *Forcheimer v. Stewart*, 65 Iowa 593, 54 Am. Rep. 30.

*Maine*. — *White v. Oakes*, 88 Me. 367.

*Massachusetts*. — *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. Rep. 455.

*Michigan*. — *Gutta Percha, etc., Mfg. Co. v. Wood*, 84 Mich. 452.

*New Jersey*. — *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438.

*New York*. — *Dounce v. Dow*, 64 N. Y. 411; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 269, 16 Am. St. Rep. 753; *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636.

*North Carolina*. — *Lewis v. Rountree*, 78 N. Car. 323; *Love v. Miller*, 104 N. Car. 584.

*North Dakota*. — *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. Rep. 563.

See also *supra*, this title, *What Constitutes a Warranty* — *Distinguished from Words of Description*; and the title IMPLIED WARRANTIES, vol. 15, p. 1223. And see *Winsor v. Lombard*, 18 Pick. (Mass.) 57. Compare *Neff v. McNeeley*, (Neb. 1901) 96 N. W. Rep. 150.

In *Jones v. Just*, L. R. 3 Q. B. 197, 9 B. & S. 141, *Mellor, J.*, said: "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury." In *Lewis v. Rountree*, 78 N. Car. 323, the court, in approving this statement of the rule, goes on to say: "It is not meant that words of description are always a warranty; but the cases in which that is held have all something special to take them

out of the rule, and to show that in those cases it was not so intended." See also *Whitaker v. McCormick*, 6 Mo. App. 114; *Omaha Coal, etc., Co. v. Fay*, 37 Neb. 68; *Bridge v. Wain*, 1 Stark. 504, 2 E. C. L. 192.

In *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672, the court, referring to a written contract for the sale of thirty thousand pounds of binder twine, twenty-seven thousand pounds standard and three thousand pounds of sisal, "quality guaranteed," said: "The legal import or intendment of such a contract is that the seller warrants that the article delivered shall, conformably to its description, be binder twine — that is, reasonably fit for the use for which binder twine is designed — and shall be salable or marketable under that description. That is the rational meaning, and in law the effect, of a warranty of quality, when no special quality is named and no words of limitation are used."

**2. Warranty by Description Does Not Survive Acceptance After Inspection.** — *Neff v. McNeeley*, (Neb. 1901) 96 N. W. Rep. 150.

But where the bill of parcels given designates the goods by a name well understood to the trade as indicating goods of a certain kind and quality, the designation amounts to a warranty the benefit of which is not lost to the buyer by the fact that he examined the goods at or before the sale, where they were so prepared and presented such an appearance as to deceive a skillful dealer. *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367.

**3. Miamisburg Twine, etc., Co. v. Wohlhuter**, 71 Minn. 484.

**Whether a Particular Sale Was by Sample or by Description** is a question for the jury. *Henry v. Talcott*, 175 N. Y. 385, reversing (Supm. Ct. App. T.) 76 N. Y. Supp. 1032.

**4. Buyer's Determination Conclusive.** — See *Satisfy*, vol. 24, p. 1236. See also *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188; *Weeks v. Robert A. Johnston Co.*, 116 Wis. 105; *Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278.

If a machine works unsatisfactorily when used by the buyer with all the care and skill of which he is capable, he may reject it even though it might have worked satisfactorily in the hands of a skilled operator. *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188.

**5. De Bavier v. Funke**, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 410.

If the buyer of a machine for use in a

**The Buyer Must Act in Good Faith** in determining whether the article sold is satisfactory; such a provision in the contract does not give him the right arbitrarily to reject the article without regard to its merits. If the character and quality of the article are in accordance with the terms of the contract in other respects and would satisfy any reasonable man, the buyer must accept it.<sup>1</sup>

**By an Express Agreement**, the parties may stipulate, however, that the buyer shall have the right to return the article if it does not satisfy him, whether his objection be reasonable or not; but a contract is not to be construed as granting such a right except when its terms are clear and explicit.<sup>2</sup>

**The Buyer Must Express His Disapproval Within a Reasonable Time** or within the time fixed by the contract when such a provision is inserted therein. His failure to do so amounts to an acceptance of the article and is a waiver of his right to reject the article because it is not satisfactory.<sup>3</sup>

**4. Of Horses.** — It has so long been a custom, in the sale or exchange of horses, to warrant the soundness or other qualities of the animal sold, that the courts are always inclined in such cases to construe representations made to the purchaser as a warranty.<sup>4</sup> The general rule, therefore, is that all

creamery, under a warranty that it shall be satisfactory, in good faith determines that it is not satisfactory, his right to return it is not affected by proof that creamery men in general would have regarded the work of the machine as satisfactory. *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188.

**1. Buyer Cannot Arbitrarily Reject Article Sold.** — *May v. Hoover*, 112 Ind. 455; *De Bavier v. Funke*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 410; *Hummel v. Stern*, 164 N. Y. 603, affirming 21 N. Y. App. Div. 544 (machine guaranteed to ventilate room to buyer's satisfaction). See also *Satisfy*, vol. 24, p. 1236.

**Rule Not Altered by Arbitrary Decision of Third Party.** — Where the machine, which was warranted to "work satisfactorily" was one which would work to the satisfaction of a reasonable person, the warranty is complied with even though the seller knew, at the time of the sale, that the machine was being bought under a requirement that it should be accepted by the city engineer, and this engineer or his subordinate declared it unsatisfactory. *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25.

**A Warranty that Pumps Shall Work "in a Satisfactory Manner"** only binds the seller to furnish pumps which will do good work and satisfy a reasonable person. *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25. See also *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422.

**2. Haney-Campbell Co. v. Preston Creamery Assoc.**, 119 Iowa 188 (duty of the seller and not the buyer to discover the particular defect, upon buyer's making complaint).

In *Adams Radiator, etc., Works v. Schnader*, 155 Pa. St. 394, 32 W. N. C. (Pa.) 281, Dean, J., speaking for the court, said: "The reasonable interpretation of the contract is that Schnader was to be satisfied with the heater; not the plaintiffs; not the plumber, nor other witnesses; not the jury. As is said in *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446: 'It is not enough to say that she [the defendant] ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, not the court, is entitled to judge of that. The contract was not to make one that she ought to be

satisfied with, but one she would be satisfied with.' The rule laid down by this court, in *Singerly v. Thayer*, 108 Pa. St. 291, 56 Am. Rep. 207, is to the same effect, and is clearly applicable to this contract and this evidence."

**3. Vanderbeek v. Francis**, 75 Conn. 467; *South Bend Pulley Co. v. W. E. Caldwell Co.*, (Ky. 1899) 54 S. W. Rep. 12, (Ky. 1900) 55 S. W. Rep. 208; *Potter v. Lee*, 94 Mich. 140; *Columbia Rolling Mill Co. v. Beckett Foundry, etc., Co.*, 55 N. J. L. 391; *Gentili v. Starace*, 59 N. Y. Super. Ct. 449.

**The Reasonable Time** within which the buyer must express his disapproval is that fixed by the contract where it provides therefor. *Vanderbeek v. Francis*, 75 Conn. 467; *Massillon Engine, etc., Co. v. Schirmer*, (Iowa 1903) 93 N. W. Rep. 599.

Where the buyer is allowed thirty days in which to determine whether a horse sold to him is satisfactory, and he returns it within that time, the seller, by receiving it back, waives his right to complain and is bound to restore the purchase money paid. *Maurer v. Wolff*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 202.

**4. Sales of Horses.** — *Burnham v. Sherwood*, 56 Conn. 229; *Murphy v. McGraw*, 74 Mich. 318; *Johnson v. Wallower*, 15 Minn. 472; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59, 34 Am. Dec. 108; *Crossman v. Johnson*, 63 Vt. 333; *Wood v. Smith*, 5 M. & R. 124, 4 C. & P. 45, 19 E. C. L. 267. *Compare Holmes v. Tyson*, 147 Pa. St. 305, where it appeared that, at the time of the sale, the buyer said to the seller, "I have nothing to show that you warrant this horse as you represent him;" to which the seller replied, "The horse is just the same as when you drove him on Monday." The court, following *McFarland v. Newman*, 9 Watts (Pa.) 55, 34 Am. Dec. 497, held that these words did not constitute a warranty, and were properly withdrawn from the jury.

A statement by the seller that a horse is not lame and that he would not be afraid to warrant him amounts to a warranty against lameness. *Cook v. Moseley*, 13 Wend. (N. Y.) 277.

**Misstating the Cause of an Admitted Defect.** — Under *Georgia Code*, § 2561, providing that a seller shall be considered as having warranted



material representations with reference to the character and condition of the animal, made by the seller in the course of the sale, are to be regarded as warranties, unless it can be shown affirmatively that they were not intended and not understood as such.<sup>1</sup>

The Absence of a Custom, in the Particular Locality, to give a warranty upon the sale of a horse may be shown, and in such a case the question whether a custom to warrant existed is for the jury.<sup>2</sup>

An Express Refusal to Warranty will preclude a finding that the representation constituted a warranty.<sup>3</sup> And when a seller expressly states his ignorance of the animal's age except what he has learned from the printed pedigree, his representations as to age must be regarded as mere expressions of opinion and not as a warranty.<sup>4</sup>

When the Animal Is Being Bought for Breeding Purposes and the seller knows the fact, any affirmation or representation by him as to the breeding capacity of the animal amounts to a warranty.<sup>5</sup>

**5. Of Other Live Stock.**—In the absence of proof of a local custom with respect to warranties in the sale of live stock, the usual rules of law govern. The buyer is entitled to rely upon statements made by the seller concerning the condition of the animal and to treat such statements as warranties where they are not obviously mere expressions of opinion or "dealers' talk."<sup>6</sup>

that he knows of no latent defect undisclosed, there is a breach of warranty if he states that the animal's short-windedness was due to epizootic when in fact it was caused by another disease which rendered it worthless. *Perdue v. Harwell*, 80 Ga. 150.

**1. Every Material Representation Regarded as a Warranty.**—*Burnham v. Sherwood*, 56 Conn. 229; *Hefner v. Haynes*, 89 Iowa 616; *Lamme v. Gregg*, 1 Met. (Ky.) 444, 71 Am. Dec. 489; *McClintock v. Emick*, 87 Ky. 160; *Thompson v. Morse*, 94 Me. 359; *Daniels v. Aldrich*, 42 Mich. 58; *Allen v. Swenson*, 53 Minn. 133; *Brown v. Doyle*, 69 Minn. 543; *Morgan v. Powers*, 66 Barb. (N. Y.) 35; *Chase v. Nichols*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 878; *Smith v. Justice*, 13 Wis. 600; *Vates v. Cornelius*, 59 Wis. 615; *Bergeler v. Michael*, 84 Wis. 627; *Wood v. Smith*, 4 C. & P. 45, 19 E. C. L. 267, 5 M. & R. 124; *Cave v. Coleman*, 3 M. & R. 2. *Compare McMaster v. Smith*, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 481.

Evidence that the buyer had offered the seller a certain price for the horse on condition that she was sound, and that the seller had accepted the price offered, is sufficient to go to the jury as proof of a warranty of soundness. *Quintard v. Newton*, 5 Robt. (N. Y.) 72. See also *Money v. Fisher*, 92 Hun (N. Y.) 347.

**An Assertion that a Horse Is "All Right,"** made by the seller in response to an inquiry by the buyer, is a warranty that the animal's eyes are sound. *Little v. Woodworth*, 8 Neb. 281. And see, to like effect, *Murphy v. McGraw*, 74 Mich. 318. See also *McClintock v. Emick*, 87 Ky. 160.

**"This Is Just the Horse You Want;** if you are satisfied, take him home," is not a warranty that he would not take fright at a street car, where his gentleness under such circumstances had not been discussed during the negotiations. *Meyer v. Krauter*, 56 N. J. L. 696.

Where an Auctioneer Stated that all the horses to be offered had been driven single, and that whenever a horse which it was not safe to

drive single was offered he would specify it, the failure of the auctioneer to specify certain horses as being unfit for driving single made the general warranty applicable to them. *Ingraham v. Union R. Co.*, 19 R. I. 356.

**As to Mare Being in Foal.**—To the name of a mare in a printed catalogue of horses to be sold by auction, were appended the words: "In foal to Warlock." Other mares in the same catalogue were described as having been "served by" or "stinted to" certain horses. It was held that, looking to the expressions used with respect to the other mares and to the nature of the fact represented, the words must be taken as having been intended by the parties as a warranty. *Gee v. Lucas*, 16 L. T. N. S. 357.

**2. Western v. Page**, 94 Wis. 251.

**3. Scroggin v. Wood**, 87 Iowa 497.

If the seller frankly states the existence of a particular defect no warranty can arise except from the most explicit declarations. *Zimmerman v. Morrow*, 28 Minn. 367.

**4. Dunlop v. Waugh**, *Peake N. P.* (ed. 1795) 123.

**5. Hefner v. Haynes**, 89 Iowa 616; *Lamme v. Gregg*, 1 Met. (Ky.) 444, 71 Am. Dec. 489; *Dickens v. Williams*, 2 B. Mon. (Ky.) 374. See also *Scroggin v. Wood*, 87 Iowa 497. *Compare Roberts v. Applegate*, 153 Ill. 210.

An assertion by the seller of certain cows that "they are all coming in in good season in the spring," amounts to a warranty, particularly where it appears that the seller knew, from what the buyer had said to him, that their condition in this respect was an important consideration. *Richardson v. Mason*, 53 Barb. (N. Y.) 601.

**6. Marsh v. Webber**, 13 Minn. 109 (soundness of sheep); *Hogan v. Stuart*, 11 Mont. 498; *Money v. Fisher*, 92 Hun (N. Y.) 347; *Hunt v. Van Deusen*, 42 Hun (N. Y.) 392.

**Disease Developing After Sale.**—Sheep which were apparently sound and healthy in every respect were sold and warranted sound. Two

**6. Of Harvesters.** — It has become a general practice in the sale of harvesters and similar machines to provide in the contract of sale certain requirements to be observed by the purchaser if he desires to rely upon the warranty. These stipulations are considered in another portion of this article.<sup>1</sup>

**7. Of Seed.** — One who sells seed as being of a particular variety and so describes it in the contract or bill of parcels thereby warrants it to be of the variety named.<sup>2</sup>

**8. Of Cotton.** — A contract for the sale of cotton of a certain quality, the quality being stated in the technical terms of the cotton trade, constitutes a warranty that the cotton is of the character and quality provided for by the contract. And as the true character of cotton cannot always be determined by an inspection of samples drawn from the bales in the usual way, the warranty covers latent defects and is not complied with merely by supplying cotton which is of the prescribed grade according to a particular method of inspection.<sup>3</sup>

**9. Of Pictures or Paintings.** — The question most usually arising in this connection is as to the effect of a statement in a catalogue that the paintings advertised for sale therein are the productions of the artists whose names are under them. The general rule seems to be that such a statement amounts to a warranty<sup>4</sup> except in the case of very old pictures, where an assertion as

months afterward a greater part of them died. There was nothing to connect the disease of which they died with their previous condition, but it was, in the opinion of farmers and breeders, a hereditary disease called the "goggles," and incapable of discovery until its fatal appearance. It was held that this disease was an unsoundness existing at the time of the sale, the jury being of the opinion that "it existed in the constitution of the sheep at that time." *Joliff v. Bendell*, R. & M. 136, 21 E. C. L. 397. See also *Hogan v. Shuart*, 11 Mont. 498.

**A Statement by an Auctioneer** that hogs were "as thrifty a lot as he had ever owned, and he had been in the business a good many years," amounts to a warranty of soundness. *Stevens v. Bradley*, 89 Iowa 174. See also *Powell v. Chittick*, 89 Iowa 513.

**A Statement that Cows Will "Come In"** at a certain period amounts to a warranty that they are with calf. *Kilsby v. De Forest*, 76 N. Y. purchases entirely upon the faith of it. *Brannon (N. Y.)* 601.

**An Assurance that the Animal Will Recover from an Existing Ailment** will amount to a warranty where it is positive and the buyer purchases entirely upon the faith of it. *Branson v. Turner*, 77 Mo. 489.

**A Statement that the Animal Is "All Right"** may constitute a warranty of soundness. *Money v. Fisher*, 92 Hun (N. Y.) 347. Compare *Herman v. Brinker*, 17 Pa. Super. Ct. 177.

1. See *infra*, XVII. 1. *h. Conditions Precedent to Buyer's Right of Action—Notice of Defects.*

2. *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 ("Bristol cabbage seed case"); *Van Wyck v. Allen*, 6 Daly (N. Y.) 376; *Bell v. Mills*, 68 N. Y. App. Div. 531, 78 N. Y. App. Div. 42; *Reiger v. Worth Co.*, 130 N. Car. 268, 89 Am. St. Rep. 865; *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916; *Allan v. Lake*, 18 Q. B. 560, 83 E. C. L. 560; *Carter v. Crick*, 4 H. & N. 412, 28 L. J. Exch. 238; *Wieler v.*

*Schilizzi*, 17 C. B. 619, 84 E. C. L. 619, 25 L. J. C. Pl. 89. Compare *Edgar v. Breck*, etc., Corp., 172 Mass. 581, where it was held that it was a question for the jury whether a statement by the seller that all the flower bulbs were true to name amounted to a warranty. Compare also *Gardner v. Winter*, (Ky. 1904) 63 L. R. A. 647; *Kircher v. Conrad*, 9 Mont. 191, 18 Am. St. Rep. 731.

Upon a sale of seed to a gardener, an express guaranty that the peas to be grown from them will "pick four or five days earlier than any other seed on the market" amounts to a warranty for a breach of which the buyer may recover damages. *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145.

3. *Love v. Miller*, 104 N. Car. 582, 20 Am. St. Rep. 329. This case was an action for a breach of warranty of cotton. The defendants contracted to sell and deliver to the plaintiff's order, one hundred bales of cotton, "to be of the average grade of middling and nice, good stains or tinges, and not more than one bale in four to be as low as that." The court held that this amounted to a warranty, on the principle stated in *Lewis v. Rountree*, 78 N. Car. 323; *Jones v. Just*, L. R. 3 Q. B. 197, 9 B. & S. 141. See *supra*, this section, *Sales by Description*.

4. *Power v. Barham*, 4 Ad. & El. 473, 31 E. C. L. 114, 6 N. & M. 62, 7 C. & P. 356, 32 E. C. L. 541, 1 M. & Rob. 507; *Lomi v. Tucker*, 4 C. & P. 15, 19 E. C. L. 255; *De Sewhanberg v. Buchanan*, 5 C. & P. 343, 24 E. C. L. 352.

In the first of the foregoing cases, it was held that where pictures are sold with a bill of parcels containing the words "Four pictures, Views in Venice, Canaletti," the jury may find that such a statement amounted to a warranty of their genuineness as paintings by Canaletti, he being then not a very old painter. Lord Denman observed: "Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the

to their painters must, necessarily, be the expression of an opinion merely.<sup>1</sup>

**10. Of Fertilizers.** — A dealer in fertilizers, by selling a compound as a fertilizer, thereby expressly warrants that it is capable of giving to land an additional producing capacity, under proper conditions. He does not warrant, however, that it is suited to the buyer's particular land, and if its failure to produce good results is due to the peculiar character of the soil to which the buyer applies it, or to the unusual seasons, the seller cannot be held liable as for a breach of warranty.<sup>2</sup>

The Opinion of a Chemist who has made an analysis of the fertilizer is some evidence, but not conclusive, of its suitability for the purposes which it was represented as accomplishing.<sup>3</sup>

**11. Of Stock.** — Material representations as to the value of stock or as to the nature of the corporation issuing it,<sup>4</sup> or as to the liability of the stock to assessment,<sup>5</sup> when relied on by the buyer, constitute warranties.

A Breach of a Warranty that Stock Is "Non-assessable" given by the organizers of a corporation to those whom they induce to buy stock will render the sellers liable not merely for subsequent calls made upon the stock but for such other sums as their buyers may be compelled to pay in discharge of the statutory liability for debts of the company existing when they purchased.<sup>6</sup>

**12. Of Bonds and Notes.** — One who purchases a bond honestly relying on the seller's representations that it is valid when it is in fact invalid or worthless, may recover the price paid for it, in an action for a breach of warranty, although the seller may have acted in good faith and the buyer may have had ample opportunity to examine the bond.<sup>7</sup> All material representations made

words and whether they implied a warranty of genuineness, or conveyed only a description or expression of opinion. I think their finding [that it was a warranty] was right." *Power v. Barham*, 4 Ad. & El. 473, 31 E. C. L. 114.

**1. In Case of Very Old Paintings.** — *Jendwine v. Slade*, 2 Esp. 572.

If the agent of the seller of a picture, knowing that the buyer labors under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion, the sale may be set aside as void. *Hill v. Gray*, 1 Stark. 434, 2 E. C. L. 167.

**2. Wilcox v. Hall**, 53 Ga. 635; *Hamlin v. Rogers*, 78 Ga. 631; *Walker v. Pue*, 57 Md. 155; *Robson v. Miller*, 12 S. Car. 586, 32 Am. Rep. 518; *Reese v. Bates*, 94 Va. 321. See also *Jackson v. Langston*, 61 Ga. 392, construing a particular warranty. Compare *Wilcox v. Henderson*, 64 Ala. 542, which was an action on a note given for the purchase of guano in which the defendant claimed a breach of warrant. The court held that "the charge to the jury that if they believed, from the evidence, that M., the agent of the plaintiffs, represented to the defendant that the guano was a good guano, and that, from the application and tests of its utility made by the defendant, they believed it was not a good guano, then they must find for the defendant, is objectionable. It assumes, as matter of law, that such representation by the agent would amount to a warranty. It was only evidence to be submitted to the jury, and to be weighed by them, in determining whether or not there was a warranty of the fertilizing qualities of the guano."

**3. Wilcox v. Hall**, 53 Ga. 635.

**4. Sales of Stock.** — *Titus v. Poole*, 73 Hun (N. Y.) 383, 145 N. Y. 414.

**A Warranty that the Stock Will Be Worth a Certain Price** on a future date specified and that the seller will make good any deficiency under that amount on that day is a warranty purely, and does not prevent the buyer's holding the stock for a higher price if he sees fit. *Hawley v. Brumagim*, 33 Cal. 394. See also *Times Pub. Co. v. North Carolina Steel, etc., Co.*, 114 N. Car. 224.

As to implied warranties in case of such sales, see the title STOCK AND STOCKHOLDERS, vol. 26, p. 859.

**5. Representations as to Stock Being Non-assessable.** — *Omo v. Bernart*, 108 Mich. 43.

A warranty in the sale of shares of stock, that there were no assessments about to be made on it, is not broken by the fact that shortly after the sale, the stockholders, by agreement, issued new stock to be purchased by themselves, the proceeds to be applied to the payment of the debts of the corporation. *Humphrey v. Merriam*, 46 Minn. 413.

**6. Omo v. Bernart**, 108 Mich. 43.

**7. Ripley v. Case**, 86 Mich. 261, 78 Mich. 126. See also *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241; *Handy v. Waldron*, 18 R. I. 567, 49 Am. St. Rep. 794; *Richardson v. Marshall County*, 100 Tenn. 346. See the title BILLS AND NOTES, vol. 4, p. 476.

One who gives a note and mortgage in part payment of a purchase and warrants them to be valid instruments, signed by all the parties thereto, is liable for a breach of warranty if the papers are spurious or if they are not signed by one of the parties. The fact that, after action is brought for such breach, the warrantor institutes a proceeding to cure the defect cannot help his defense. *Gabay v. Doane*, 66 N. Y. App. Div. 509.

A agreed to deliver to B, in part payment of



by the seller with respect to the nature and character of the security for the bonds or as to the existence of security, when relied on by the purchaser, constitute warranties.<sup>1</sup>

**13. Of Patents or Patent Rights.** — Any material statement by the seller of a patent as to its originality, value, or genuineness, made with a view to inducing the purchase and relied on by the buyer, constitutes a warranty;<sup>2</sup> the general rule is, to some extent, more strict upon the seller in this connection because, from the nature of the circumstances, of the buyer's limited opportunities for determining for himself the truth of the representations.<sup>3</sup>

In an Action to Recover the Price Agreed to Be Paid for a Patent Right, or for the right to manufacture and sell a patented article, the defendant, for the purpose of showing a failure or want of consideration, may show that the patent is void, and for that purpose may prove that the invention is valueless or that the patentee was not the inventor of the patented article and that it was an infringement upon a prior patent.<sup>4</sup>

## XI. RULE AS TO OBVIOUS OR KNOWN DEFECTS — 1. Are Not Ordinarily Included

a debt, the note of W, indorsed by two other persons, and afterward wrote to B this letter: "I inclose you the note of W's, indorsed as proposed, which you will please pass to my credit." It was held that this was a warranty that the indorsements on the note inclosed in the letter were genuine. *Coolidge v. Brigham*, 5 Met. (Mass.) 68, 1 Met. (Mass.) 547.

**Sale of County Warrants.** — When such warrants are sold under a warranty that they are "genuine and regularly issued," the undertaking of the seller is that they are not subject to any defense arising out of the formality of their issuance, and the warranty is broken if the warrants do not bear the county seal and are invalid on that account. *Smeltzer v. White*, 92 U. S. 390.

**1. Representations as to Security for Bonds.** — *Holbrook v. Davidson*, 59 Ga. 503; *Callanan v. Brown*, 31 Iowa 333. See also *Gompertz v. Bartlett*, 2 El. & Bl. 849, 75 E. C. L. 849, 18 Jur. 266; *Baker v. Arnot*, 5 Thomp. & C. (N. Y.) 215, 2 Hun (N. Y.) 682.

**A Statement in an Advertisement of Railroad Bonds for Sale,** that "the road is in successful operation and earning net more than the interest on all its bonds," is a representation, not that the road was earning that amount at the exact date of the advertisement or during the time it might appear in the newspaper, but that the road was then on a paying basis and was earning steadily net more than all the interest on all its bonds. *Blake v. Watson*, 45 Conn. 323, 29 Am. Rep. 683.

**2. Statements as to Value, Originality, or Genuineness of Patent Are Warranties.** — *The Electron*, 56 Fed. Rep. 304; *Nelson v. Wood*, 62 Ala. 175; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Dillman v. Nadelhoffer*, 19 Ill. App. 375; *Kingman v. Martin*, 24 Ill. App. 435; *Rose v. Hurley*, 39 Ind. 77; *Bigler v. Flickinger*, 55 Pa. St. 279; *Elkins v. Kenyon*, 34 Wis. 93; *Prideaux v. Bunnett*, 1 C. B. N. S. 613, 87 E. C. L. 613. See also the title PATENTS, vol. 22, p. 428.

The vendor of a patent match box, and of territory covered by the patent, represented to the vendee, who had himself no knowledge on the subject and no means of obtaining it, that

the territory proposed to be sold was very valuable; that other parties had made purchases, and all had done well, realizing large profits. It was held that the vendee had the right to rely on these statements, and having done so, and the statements having turned out to be false, he had a right of action to recover back the money paid for such patent right; and that whether the seller knew the falsity of his statements or was merely ignorant, could make no difference. The court said: "It will not do to say that these were simply expressions of opinion as to the value of the territory to be embraced in the patent deed. They were intended to be, and were relied upon as assurances of its value as an article of trade, and being false, it would be a reproach to the law if it did not afford the injured party redress." *Allen v. Hart*, 72 Ill. 104. See also *Croninger v. Paige*, 48 Wis. 229; *Ollivant v. Bayley*, 5 Q. B. 288, 48 E. C. L. 288, 7 Jur. 1130.

**3. Rule Peculiarly Strict Against Seller.** — In *Tabor v. Peters*, 74 Ala. 98, 49 Am. Rep. 804, the court said: "The parties to the sale, moreover, were not in a condition of relative equality touching their knowledge, or ability to judge accurately of the thing sold. The plaintiff was a specialist or an expert, being a manufacturer of such articles, and was therefore possessed of a knowledge of facts in reference to their nature, capacity, and structure, of which the defendant was both actually and professedly ignorant. In such cases, the misrepresentations of the seller will the more readily avoid the contract, and many statements, when made by him, will be deemed affirmations in the nature of fact, although they might be construed as conjectural, or matters of opinion, had they emanated from one not enjoying such opportunities of information. Such is the rule, at least, when such assertions are shown to have been falsely made, and were material inducements to the contract. *Bigler v. Flickinger*, 55 Pa. St. 283." Compare *Chalmers v. Harding*, 17 L. T. N. S. 571; *Hall v. Conder*, 2 C. B. N. S. 53, 89 E. C. L. 53, 3 Jur. N. S. 366.

**4. Cowan v. Dodd**, 3 Coldw. (Tenn.) 279; *Cowan v. Mitchell*, 11 Heisk. (Tenn.) 87;

in a Warranty. — A warranty of quality does not embrace defects which are plain and obvious to the purchaser at the time of the sale,<sup>1</sup> or which were known to him then,<sup>2</sup> unless they are expressly referred to as being included in it. Nor will the warranty ordinarily be construed as embracing defects which a most casual examination, upon receipt of the goods, would disclose; in such a case, the buyer may amply protect himself by a casual inspection and by refusing to accept.<sup>3</sup> When the property is before him during the transaction, the buyer is presumed to make some use of his senses and to exercise at least a slight degree of care, so that he is held conclusively to have purchased with full knowledge of defects which would be patent to an ordinary observer in the same situation.<sup>4</sup> In such cases, the language of the seller is more properly construed as mere "dealers' talk."<sup>5</sup>

**2. What Constitutes an Obvious Defect.** — Whether any alleged defect was obvious at the time of the sale is a question of fact to be determined by the jury except when the facts are not controverted or are too plain to admit of reasonable doubt.<sup>6</sup> Various illustrative cases are set out in the subjoined note.<sup>7</sup>

*Green v. Stuart*, 7 Baxt. (Tenn.) 419; *Rowe v. Blanchard*, 18 Wis. 441, 86 Am. Dec. 783; *Croninger v. Paige*, 48 Wis. 233.

**1. Obvious Defects Not Embraced in Warranty** — *England*. — *Liddard v. Kain*, 9 Moo. 356, 2 Bing. 183, 9 E. C. L. 373.

*United States*. — *Synnot v. Shaughnessy*, 130 U. S. 572 (sale of a mine).

*Alabama*. — *Livingston v. Arrington*, 28 Ala. 424; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Brown v. Freeman*, 79 Ala. 406; *Thompson v. Harvey*, 86 Ala. 519.

*Arkansas*. — *Jordan v. Foster*, 11 Ark. 139.

*Georgia*. — *Marshall v. Drawhorn*, 27 Ga. 275; *Skinner v. Moye*, 69 Ga. 476; *Miller v. Moore*, 83 Ga. 684, 20 Am. St. Rep. 329; *Hoffman v. Oates*, 77 Ga. 701; *Byrd v. Campbell Printing Press, etc., Co.*, 90 Ga. 542.

*Indiana*. — *House v. Fort*, 4 Blackf. (Ind.) 203 *Connorsville v. Wadleigh*, 7 Blackf. (Ind.) 102, 41 Am. Dec. 214.

*Iowa*. — *Storrs v. Emerson*, 72 Iowa 390; *Proctor v. McCoid*, 60 Iowa 153.

*Kansas*. — *Adams v. Snyder*, 8 Kan. App. 215.

*Kentucky*. — *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 587.

*Louisiana*. — *Richardson v. Johnson*, 1 La. Ann. 389; *Edwards v. Glasson*, 12 La. Ann. 586.

*Minnesota*. — *McCormick v. Kelly*, 28 Minn. 135; *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434.

*Missouri*. — *Stewart v. Dugin*, 4 Mo. 245, 28 Am. Dec. 348.

*New Hampshire*. — *Leavitt v. Fletcher*, 60 N. H. 182.

*New York*. — *Schuyler v. Russ*, 2 Cai. (N. Y.) 202; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Bennett v. Buchan*, 76 N. Y. 386; *Waerber v. Talbot*, 43 N. Y. App. Div. 180; *Studer v. Bleistein*, 115 N. Y. 316; *Gilbert Car Mfg. Co. v. Mann*, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 301.

*Pennsylvania*. — *Mulvany v. Rosenberger*, 18 Pa. St. 203.

*South Carolina*. — *Scarborough v. Reynolds*, 13 Rich. L. (S. Car.) 98; *Vanderhorst v. M'Taggart*, 2 Bay (S. Car.) 498.

*Tennessee*. — *Fisher v. Pollard*, 2 Head (Tenn.) 314, 75 Am. Dec. 740; *Long v. Hicks*, 2 Humph. (Tenn.) 305.

*Texas*. — *Williams v. Ingram*, 21 Tex. 300.

*Vermont*. — *Hill v. North*, 34 Vt. 604; *Drew v. Edmunds*, 60 Vt. 401, 6 Am. St. Rep. 122.

*Compare Pinney v. Andrus*, 41 Vt. 631.

**2. Defects Known to Buyer.** — *Ragsdale v. Shipp*, 108 Ga. 817; *Nye v. Iowa City Alcohol Works*, 51 Iowa 129, 33 Am. Rep. 121; *Day v. Mapes-Reeve Constr. Co.*, 174 Mass. 412; *McCormick v. Kelly*, 28 Minn. 135; *Zimmerman v. Morrow*, 28 Minn. 367; *Knoepker v. Ahman*, 99 Mo. App. 30; *Ketchum v. Dew*, 7 Coldw. (Tenn.) 532. *Compare Livingston v. Arrington*, 28 Ala. 424.

Where it appears that the seller told the buyer of the defects at the time of the sale, the rule that his warranty will not be construed as embracing such defects is absolute. *Adams v. Snyder*, 8 Kan. App. 245.

**3.** *Bell v. Mills*, 68 N. Y. App. Div. 531; *Dean v. Morey*, 33 Iowa 120. See also *Bierman v. City Mills Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 140.

**4.** In *Vandewalker v. Osmer*, 65 Barb. (N. Y.) 561, *Mullin, J.*, said: "It will not do to permit a vendee, having the property before him, and defects in it plainly discoverable, to close his eyes and ears and omit to use his senses, and pretend that he relied on the representations, and was thereby misled. In cases of warranty, an obvious defect is not covered by the warranty; and it is because the law requires the purchaser to examine the property with that degree of care and skill that men are generally capable of exercising in respect to property they are proposing to purchase. The same principles should apply in cases of false representation." See also *Hoffman v. Oates*, 77 Ga. 701.

**5.** *Ragsdale v. Shipp*, 108 Ga. 817.

**6.** *Birdseye v. Frost*, 34 Barb. (N. Y.) 367.

**7. Illustrative Cases — What Are Obvious Defects.** — The blindness of a horse in one eye, where the organ is entirely destroyed, is an obvious defect. *Margetson v. Wright*, 7 Bing. 603, 20 E. C. L. 255.

A horse's habit of "cribbing" is an obvious

**3. Warranty May Embrace Obvious Defects.** — The warranty may, of course, be expressed in such terms as will embrace all defects, obvious or otherwise, and when it is so expressed, the presumption of law as to obvious defects has no application.<sup>1</sup> The general rule is one of construction merely; the buyer may, if the agreement is sufficiently explicit, hold the seller liable on a warranty which he knew at the time the seller could not fulfil.<sup>2</sup>

**4. Evidence to Show Knowledge by Buyer of Defect.** — Evidence to show knowledge of the defect, on the part of the buyer, is admissible for the purpose of bringing the case within the rule that a warranty will not embrace defects which are obvious or which the buyer knew of at the time of the sale.<sup>3</sup>

**Knowledge of the Buyer's Agent** as to a defect is binding on the buyer himself, when the knowledge of the agent was acquired while negotiating the contract for his principal.<sup>4</sup> The notice to the buyer may be either actual or constructive.<sup>5</sup>

defect where it appears that it can be detected by a slight examination of the animal's mouth. *Dean v. Morey*, 33 Iowa 120.

Sourness or unsoundness in salted fish, in barrels, which may be detected by smell when the barrels are opened and examined, is a patent defect. *Vipond v. Findlay*, 7 Montreal Super. Ct. 243.

A defect in the steam chest of an engine, readily discernible upon taking off the lid, is an obvious one. *Drew v. Edmunds*, 60 Vt. 401, 6 Am. St. Rep. 122.

Purely surface indications, open to every ordinary observer, and lying along the path over which the buyers constantly passed and which must have been known to them, are not the subject of concealment or misrepresentation by the seller. *Synnott v. Shaughnessy*, 130 U. S. 572.

**Defects Held Not Obvious.** — Defects in a horse arising from disease of the kidneys or spine are not "obvious" where they are not apparent to the eye, although some symptoms of the disease are apparent but are not known to the buyer as such. *Storrs v. Emerson*, 72 Iowa 390.

In *Hill v. North*, 34 Vt. 604, it appeared that, at the time of the sale, there was a small bunch on the horse's leg which was obvious but did not then materially affect his value but which afterwards developed into a serious defect. It was held not an obvious defect.

The blindness of a horse in one eye where the organ remains apparently perfect, so that some skill and a careful examination are necessary to detect the blindness, it is not an obvious defect within the rule. *House v. Fort*, 4 Blackf. (Ind.) 296.

Where county warrants are, under the statute, void unless they bear a seal, the want of such a seal is not an obvious defect so as to prevent recovery upon a warranty of their genuineness. *Smeltzer v. White*, 92 U. S. 390.

**1. Obvious Defects May Be Included** — *England*. — *Liddard v. Kain*, 2 Bing. 183, 9 E. C. L. 373; *Margetson v. Wright*, 7 Bing. 603, 20 E. C. L. 255, 8 Bing. 454, 21 E. C. L. 342.

*Georgia*. — *Callaway v. Jones*, 19 Ga. 277; *Fletcher v. Young*, 69 Ga. 591.

*Illinois*. — *Lake View v. MacRitchie*, 134 Ill. 203.

*Indiana*. — *Kansas City First Nat. Bank v. Grindstaff*, 45 Ind. 158.

*Iowa*. — *Storrs v. Emerson*, 72 Iowa 390.

*Kentucky*. — *Shackleford v. Gooch*, 1 Bibb (Ky.) 583.

*Massachusetts*. — *Smith v. Hale*, 158 Mass. 178, 35 Am. St. Rep. 485; *Brown v. Bigelow*, 10 Allen (Mass.) 242.

*Minnesota*. — *Fitzgerald v. Evans*, 49 Minn. 541.

*Missouri*. — *Samuels v. Guin*, 49 Mo. App. 8; *June v. Falkinburg*, 89 Mo. App. 563.

*Nebraska*. — *Watson v. Roode*, 43 Neb. 348, affirming 30 Neb. 264.

*New Hampshire*. — *Denning v. Foster*, 42 N. H. 165.

*North Carolina*. — *Huyett, etc., Mfg. Co. v. Gray*, 124 N. Car. 322.

*Ohio*. — *Tillyer v. Van Cleve Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

*South Carolina*. — *Wallis v. Frazier*, 2 Nott & M. (S. Car.) 516.

*Texas*. — *McAfee v. Meadows*, (Tex. Civ. App. 1903) 75 S. W. Rep. 813; *Norris v. Parker*, 15 Tex. Civ. App. 117.

*Vermont*. — *Pinney v. Andrus*, 41 Vt. 631.

**2.** *Meyer v. Hill*, (Tex. Civ. App. 1898) 45 S. W. Rep. 333. Compare *Ketchum v. Dew*, 7 Coldw. (Tenn.) 532, which was a case in which a life tenant had undertaken to sell certain slaves and to warrant the title as absolute. It was held that equity would decline, prior to an actual dispossession of the buyer, to relieve one who bought with full knowledge of the state of the title.

"But warranties may be extended to defects, though patent. Where there is uncertainty and difficulty, and the representation is not glaringly inconsistent with the obvious condition and quality of the property, or where the results of the known defect are not apparent at the time and could not have been reasonably foreseen, the buyer may rely on the warranty or representation and not on his own judgment." *Thompson v. Harvey*, 86 Ala. 519. See also *Marshall v. Drawhorn*, 27 Ga. 275; *McCormick v. Kelly*, 28 Minn. 135.

**3. Parol Evidence of Buyer's Knowledge Admissible Though Contract Is in Writing.** — *Bennett v. Buchan*, 76 N. Y. 390; *Fisher v. Pollard*, 2 Head (Tenn.) 316, 75 Am. Dec. 740. See also *infra*, this title, *Parol Warranty Where Contract Is in Writing*. Compare *Shackleford v. Gooch*, 1 Bibb (Ky.) 583.

**4.** *Bennett v. Buchan*, 76 N. Y. 390. See also the title AGENCY, vol. 1, p. 1144.

**5.** *Bennett v. Buchan*, 76 N. Y. 390. See



**5. Limitations of General Rule.** — The general rule is apt to open the way for fraud, and the courts are usually inclined to restrict its application. It applies only to such defects as are obvious to the senses ordinarily, that is, to such defects as are discernible by an ordinary observer, having no special knowledge or skill, examining the property with a view to purchasing it.<sup>1</sup> It does not extend to defects which, though apparent to some extent, are equivocal and in their character doubtful as to whether permanent or temporary, or are mere harmless blemishes or partially developed unsoundness;<sup>2</sup> nor to defects the consequences of which cannot be determined in advance;<sup>3</sup> nor to defects which would require the exercise of special skill or care to be detected.<sup>4</sup> Nor does the general rule apply at all to express warranties of title.<sup>5</sup>

Where the Buyer Had No Opportunity to See or Inspect the Goods, the general rule has no application, and the fact that the defects were obvious is unimportant.<sup>6</sup>

Where the Purchaser Relies Entirely upon the Seller's Representations as a warranty and the seller knows the fact, it seems that the warranty will be construed as covering all defects, although they might have been seen upon inspection and the buyer, though having an opportunity to inspect; failed to do so, relying entirely upon the assurances of his seller,<sup>7</sup> although he made a partial inspection and discovered what would excite suspicion in the mind of an ordinary person.<sup>8</sup>

The Particular Defect Complained of Must Have Been Obvious; it is not enough to bring the case within the operation of the general rule to show that the buyer was aware of a particular defect, when the breach complained of relates to an entirely different defect of which he was ignorant when he bought.<sup>9</sup>

When the Seller Uses Art to Conceal and actually conceals from his purchaser

also *Williamson v. Brown*, 15 N. Y. 362; *Reed v. Gannon*, 50 N. Y. 350.

**1. Defects Not Apparent to an Ordinary Observer.** — *Jordan v. Foster*, 11 Ark. 139; *Meckley v. Parsons*, 66 Iowa 63, 55 Am. Rep. 261; *Brown v. Bigelow*, 10 Allen (Mass.) 244; *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367; *Thompson v. Botts*, 8 Mo. 710; *Parks v. Morris Ax, etc., Co.*, 54 N. Y. 586; *Birdseye v. Frost*, 34 Barb. (N. Y.) 367; *Chatfield v. Frost*, 3 Thomp. & C. (N. Y.) 357; *Hill v. North*, 34 Vt. 604; *Piney v. Andrus*, 41 Vt. 631; *Vates v. Cornelius*, 59 Wis. 615. See also *Love v. Miller*, 104 N. Car. 582.

"Where there is uncertainty and difficulty, and the representation is not glaringly inconsistent with the obvious condition and quality of the property, or where the results of the known defect are not apparent at the time and could not have been reasonably foreseen, the buyer may rely on the warranty or representation and not on his own judgment." *Thompson v. Harvey*, 86 Ala. 519. See also *Marshall v. Drawhorn*, 27 Ga. 275; *McCormick v. Kelly*, 28 Minn. 135.

**2. Doubtful Defects Not Within the Rule.** — *Huston v. Plato*, 3 Colo. 402; *Chadsey v. Greene*, 24 Conn. 562; *Fletcher v. Young*, 69 Ga. 591; *Connell v. McNeth*, 109 Mich. 329; *Shewalter v. Ford*, 34 Miss. 417; *Stucky v. Clyburn*, Cheves L. (S. Car.) 186, 34 Am. Dec. 590; *Fisher v. Pollard*, 2 Head (Tenn.) 314, 75 Am. Dec. 740; *Vates v. Cornelius*, 59 Wis. 615; *Shillitoe v. Claridge*, 2 Chitty 425, 18 E. C. L. 386.

"The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of

which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them." *Hill v. North*, 34 Vt. 604.

**3. Defects Whose Consequences Are Not Determinable in Advance.** — *Jordan v. Foster*, 11 Ark. 139; *Hook v. Stovall*, 21 Ga. 69; *Raeside v. Hamm*, 87 Iowa 720; *Fisher v. Pollard*, 2 Head (Tenn.) 314, 75 Am. Dec. 740; *McAfee v. Meadows*, (Tex. Civ. App. 1903) 75 S. W. Rep. 813; *Hill v. North*, 34 Vt. 604.

**4.** *Burton v. Young*, 5 Harr. (Del.) 233; *Storrs v. Emerson*, 72 Iowa 390; *Meckley v. Parsons*, 66 Iowa 63, 55 Am. Rep. 261; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434. See also *Tillyer v. Van Cleve Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

**5. Rule Does Not Apply to Warranty of Title.** — *Koerper v. Jung*, 33 Ill. App. 144.

**6.** *Hanks v. M'Kee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265.

**7.** *Kansas City First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Hanks v. M'Kee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265; *Vates v. Cornelius*, 59 Wis. 615. See also *Miller v. Moore*, 83 Ga. 684, 20 Am. St. Rep. 329.

**8.** *Samuels v. Guin*, 49 Mo. App. 8.

**9.** *Huston v. Plato*, 3 Colo. 402.

The Rule as to Obvious Defects Has No Application to a case where, although the buyer knew, a week prior to the sale, that the horse was lame, he supposed at the time of sale that the animal was well; and if the lameness still existed it would constitute an actionable breach of a warranty that the animal was "sound and kind." *Brown v. Bigelow*, 10 Allen (Mass.) 244.

defects which would ordinarily be obvious, the reason of the rule, and therefore the rule itself, ceases to operate;<sup>1</sup> if the seller says or does anything with an intention to divert the eye or obscure the observation of the buyer, or to mislead him, even in relation to defects ordinarily patent, he is guilty of such an act of fraud as will either render him liable for deceit or estop him, in an action on his warranty, to set up the defense that the defect complained of was an obvious one.<sup>2</sup>

**XII. AUTHORITY OF AGENT TO WARRANT — 1. General Rule.** — The question of the authority of a seller's agent to bind his principal by a warranty is one which can arise only in relation to express warranties. An implied warranty being an involuntary incident to the sale and a creature of the law, no question of an agent's power can arise. And the same principle is applicable to express warranties which amount to nothing more than the law would have implied had the parties been silent.<sup>3</sup> Whether an agent is authorized to give a warranty in a particular case must depend upon the character of his agency, the usage of trade in the locality in which the sale is made, the subject of the sale, and similar considerations. Ordinarily, a general agent vested with discretion and having authority to do what is necessary to carry out the purpose of his agency, may bind his principal by a warranty.<sup>4</sup>

**Authority to Sell Means Authority to Warrant.** — The general rule has been stated

1. *Chadsey v. Greene*, 24 Conn. 562; *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Gant v. Shelton*, 3 B. Mon. (Ky.) 423; *Richardson v. Johnson*, 1 La. Ann. 389; *Irving v. Thomas*, 18 Me. 418. Compare *Vandewalker v. Osmer*, 65 Barb. (N. Y.) 561; *Fox v. Everson*, 27 Hun (N. Y.) 355.

In *Robertson v. Clarkson*, 9 B. Mon. (Ky.) 507, the horse sold had badly diseased eyes, their character being evident upon a slight inspection. The seller, however, represented that the eyes were sore merely on account of a switch stroke inflicted some weeks previously, and that the eyes were rapidly getting well. The vendee having relied upon these representations, it was held that he might recover upon the warranty, since the horse's eyes were really diseased so that he became blind.

2. *Chadsey v. Greene*, 24 Conn. 562; *Robertson v. Clarkson*, 9 B. Mon. (Ky.) 507. See also *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367.

3. **Question Limited to Express Warranties.** — *H. B. Smith Co. v. Williams*, 29 Ind. App. 336; *Murray v. Smith*, 4 Daly (N. Y.) 280.

4. **General Agent Has Power to Warrant** — *England*. — *Fenn v. Harrison*, 3 T. R. 757, 4 T. R. 177; *Routh v. MacMillan*, 2 H. & C. 750, 10 Jur. N. S. 158; *Dingle v. Hare*, 7 C. B. N. S. 145, 97 E. C. L. 145; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 36 L. J. Exch. 147.

*United States*. — *Schuchardt v. Allen*, 1 Wall. (U. S.) 359; *Taggart v. Stanbery*, 2 McLean (U. S.) 543.

*Alabama*. — *Gaines v. McKinley*, 1 Ala. 446; *Wilcox v. Henderson*, 64 Ala. 542. See also *Skinner v. Gunn*, 9 Port. (Ala.) 305.

*Illinois*. — *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227; *Mathers v. Morris*, 95 Ill. App. 541.

*Indiana*. — *Talmage v. Bierhouse*, 103 Ind. 270; *Marion Mfg. Co. v. Harding*, 155 Ind. 648.

*Iowa*. — *Blaess v. Nichols, etc., Co.*, 115 Iowa 373; *Murray v. Brooks*, 41 Iowa 45.

*Kansas*. — *Victor Sewing-Mach. Co. v. Rheinschild*, 25 Kan. 534; *Loomis Milling Co. v. Vawter*, 8 Kan. App. 437.

*Kentucky*. — *Belmont v. Talbot*, (Ky. 1899) 51 S. W. Rep. 588; *Hille v. Adair*, 58 S. W. Rep. 697, 22 Ky. L. Rep. 742; *E. T. Kenney Co. v. Anderson*, (Ky. 1904) 81 S. W. Rep. 663.

*Maine*. — *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169.

*Minnesota*. — *McCormick v. Kelly*, 28 Minn. 135; *Parsons Band Cutter, etc., Co. v. Haub*, 83 Minn. 180; *J. I. Case Threshing-Mach. Co. v. McKinnon*, 82 Minn. 75; *Osborne v. Josselyn*, (Minn. 1904) 99 N. W. Rep. 890.

*Missouri*. — *Palmer v. Hatch*, 46 Mo. 585.

*New York*. — *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Ahern v. Goodspeed*, 72 N. Y. 108; *Manley v. Ackler*, 76 Hun (N. Y.) 546.

*North Carolina*. — *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. Car. 797.

*North Dakota*. — *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229, *applying Comp. Laws of North Dakota*, §§ 3962, 3985.

*Ohio*. — *Dayton v. Hoaglund*, 39 Ohio St. 631.

*Vermont*. — *Fay v. Richmond*, 43 Vt. 25.

*Wisconsin*. — *Boothby v. Scales*, 27 Wis. 626; *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 40; *Aultman Co. v. McDonough*, 110 Wis. 263; *Matteson v. Rice*, 116 Wis. 328 (warranty as to a building by the janitor in charge); *Waupaca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co.*, 112 Wis. 469.

**Warranty by Manager and General Superintendent of Corporation.** — *Decker v. Gutta Percha, etc., Mfg. Co.*, 61 Hun (N. Y.) 516. Compare *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

**Agent Introducing New Article.** — The rule in favor of the implied authority of a general agent applies with peculiar force to an agent who is sent out for the purpose of introducing

by some authorities to be that an agent authorized to sell property is, in the absence of any express limitation of his powers, authorized to make any declaration in regard to the property or to do any similar act which may be found necessary to effect a sale which is usual or incidental thereto, including the giving of a warranty.<sup>1</sup>

Where the Sale Is by Sample, the fact that the agent has been given samples from which to make sales creates an implied authority in the agent to guarantee that the goods will be equal to the sample.<sup>2</sup>

A Seller Who Refers the Buyer to a Third Party for Information as to the character or quality of the article about to be sold is bound by the assurances given to the buyer by such third party to the same extent as if he had given them himself.<sup>3</sup>

Different Warranties Given by Principal and Agent. — Where the agent has authority to warrant, the buyer is not limited to a warranty given by the manufacturer of the article but may rely upon that given by the agent who made the sale.<sup>4</sup>

An Agent's Promise to Remedy Defects in the article warranted will bind his principal to the same extent as a warranty given by such agent.<sup>5</sup>

Limitations upon Agent's Authority Known to Buyer. — When the seller constitutes one his agent to sell a particular article and specifies accurately the kind of warranty he is authorized to give and expressly provides that no other or different warranty shall be binding, a purchaser having knowledge of such limitations cannot enforce, against the principal, a warranty given in excess of them.<sup>6</sup> But no secret limitations upon the powers of an agent employed

a new article on the market, *e. g.*, a new brand of fertilizer. *Hille v. Adair*, (Ky. 1900) 58 S. W. Rep. 697.

1. Effect of Authority to Sell. — *Loomis Milling Co. v. Vawter*, 8 Kan. App. 437; *Reynolds v. Mayor*, 39 N. Y. App. Div. 218; *Dingle v. Hare*, 7 C. B. N. S. 145, 97 E. C. L. 145.

In *Helyear v. Hawke*, 5 Esp. 72, Lord Ellenborough said: "I think the master having intrusted the servant to sell, he is intrusted to do all that he can to effectuate the sale, and if he does exceed his authority in so doing he binds his master." The same justice expressed similar views in *Alexander v. Gibson*, 2 Campb. 555. See also *Lane v. Dudley*, 2 Murph. (6 N. Car.) 119, 5 Am. Dec. 523.

But the last three cases have been declared in *Cooley v. Perrine*, 41 N. J. L. 328, 32 Am. Rep. 210, to be no longer authority. In this case the court, by Dixon, J., in commenting on the rule stated in the text, said: "If by this were meant that the agent is intrusted with all powers proper to the making of an effectual sale, its accuracy could not be questioned. Undoubtedly, his [the agent's] authority extends to whatever is proper to be done in fixing the price, and the time and mode of payment, and the time and mode of vesting the title and delivering the chattel. All these things are incident to the sale. But if the expression mean that the agent is intrusted with all powers convenient for the purpose of inducing the purchaser to buy, even to the extent of enabling him to make collateral contracts to that end, then I think it is in violation of the settled rule that the special agent must be confined strictly to his express authority, and is in opposition to well-considered and authoritative decisions." See also *Perrine v. Cooley*, 42 N. J. L. 623.

When the Agent Employed by the Indorsee of a Bill to Get It Discounted warrants it to be a good one, his employers are bound by this act, and are liable to refund, if the acceptor afterwards dis-

honors the bill. But the rule would be otherwise if the principal, at the time of employing such agent had said that he would not warrant or indorse the note. *Fenn v. Harrison*, 4 T. R. 177.

2. *Dreyfus v. Goss*, 67 Kan. 57.

3. Seller Barred by Representations of Third Party. — *Chadsey v. Greene*, 24 Conn. 562.

In the case of *Deming v. Chase*, 48 Vt. 382, the vendor wrote to the vendee, who was negotiating with him as to the sale of a horse, that he might "trade with B., and whatever he did would be all right." It was held that the vendor was bound by B.'s warranty, and that B.'s admissions and declarations made while negotiating the bargain were admissible against him. See also *Albany, etc., Iron, etc., Co. v. Lundberg*, 121 U. S. 451.

4. *Mathers v. Morris*, 95 Ill. App. 541.

5. *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229; *McCormick Harvesting Mach. Co. v. Smith*, 9 Kulp (Pa.) 448; *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 40. See also *Snody v. Shier*, 88 Mich. 304; *infra*, this title, XVII. 2. *h. Conditions Precedent to Buyer's Right of Action.*

6. Buyer Bound by Limitations Printed in Contract of Sale. — *McCormick Harvesting Mach. Co. v. Allison*, 116 Ga. 445; *Wood Mowing, etc., Mach. Co. v. Crow*, 70 Iowa 340; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229; *Aultman v. York*, 1 Tex. Civ. App. 484. See also *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Howard v. Sheward*, L. R. 2 C. P. 148. And see the title AGENCY, vol. 1, p. 985.

A Contrary Rule has received some recognition, and it has been held that notwithstanding a clause printed after the signatures to the contract of sale that "no verbal agreement of any kind appertaining to this order will be recognized; all agreements must be in writing," the seller's agent, having an implied authority to make a new contract in writing, in order to adjust differences arising out of the



to sell an article can affect the validity of a warranty as a binding obligation upon his principal.<sup>1</sup>

**The Burden of Proof Is on the Buyer** who sets up a warranty by an agent to show the agent's express authority or such circumstances as will justify the implication of authority.<sup>2</sup>

**2. Effect of Usage.** — When It Is the Usage, in the sale of goods of the kind in question, in the market in which the sale takes place, to give a warranty, the agent is presumed to have authority to warrant.<sup>3</sup> Thus, in the sale of horses by horse dealers<sup>4</sup> or of harvesting machines,<sup>5</sup> there is a general custom to

terms of the original, may, by parol, enter into a new agreement modifying and extending the provisions of the original. *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 37. See also *E. T. Kenney Co. v. Anderson*, (Ky. 1904) 81 S. W. Rep. 663; *McCormick Harvester Mach. Co. v. Hiatt*, (Neb. 1903) 95 N. W. Rep. 627; *infra*, this title, XVII. 2. h. 5. *Notice of Defects*.

**1. Secret Limitation of Agent's Apparent Authority Ineffective.** — *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229; *Blane v. Proudft*, 3 Call (Va.) 207, 2 Am. Dec. 546; *Boothby v. Scales*, 27 Wis. 626; *Howard v. Sheward*, L. R. 2 C. P. 148.

**2. Applegate v. Moffitt**, 60 Ind. 104; *Wood Mowing, etc., Mach. Co. v. Crow*, 70 Iowa 340; *Churchill v. Palmer*, 115 Mass. 310; *Melby v. Osborne*, 33 Minn. 492; *Brady v. Todd*, 9 C. B. N. S. 592, 99 E. C. L. 592.

The record of a judgment obtained by the purchaser in an action for a false warranty against the agent who made the sale, is not, in an action by the agent against the principal to recover the amount paid on such judgment, evidence of authority from the principal to give the warranty. Evidence of such authority and of a warranty given in accordance with it must be *aliunde* such record. *Croom v. Swann*, 1 Fla. 211.

**3. Usage of Trade.** — *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Wait v. Borne*, 123 N. Y. 592; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636; *Waupaca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co.*, 112 Wis. 469; *Larson v. Aultman, etc., Co.*, 86 Wis. 281, 39 Am. St. Rep. 893; *Roche v. Pennington*, 90 Wis. 107; *Western v. Page*, 94 Wis. 251; *Alexander v. Gibson*, 2 Campb. 555; *Dingle v. Hare*, 7 C. B. N. S. 145, 97 E. C. L. 145. See also *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876, *overruling Boothby v. Scales*, 27 Wis. 626.

**4. In Sales of Horses.** — *Belmont v. Talbot*, (Ky. 1899) 51 S. W. Rep. 588; *Samuel v. Bartee*, 53 Mo. App. 587; *Alexander v. Gibson*, 2 Campb. 555; *Bank of Scotland v. Watson*, 1 Dow. 45; *Howard v. Sheward*, L. R. 2 C. P. 148; *Foster v. Smith*, 18 C. B. 156, 86 E. C. L. 156.

**Sales by Persons Not Dealers in Horses.** — The rule of the text is confined to sales by agents of dealers in horses. When an owner, who is not a dealer, authorizes his agent to sell his horse, there is no implied authority in the agent to give a warranty. The buyer assumes the risk of proving the agent's authority when he

buys upon the faith of a warranty given by him. *Brady v. Todd*, 9 C. B. N. S. 592, 99 E. C. L. 592; *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210, *affirmed* 42 N. J. L. 623; *Decker v. Fredericks*, 47 N. J. L. 469; *Scott v. McGrath*, 7 Barb. (N. Y.) 53.

The distinction is very clearly set out in the opinion of Ashhurst, J., in *Fenn v. Harrison*, 3 T. R. 757, 4 T. R. 177: "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." See also *Bank of Scotland v. Watson*, 1 Dow. 45.

The agent of the executor of an estate, in selling a horse belonging to the estate, has no implied authority to give a warranty. *Field v. Allen*, 9 M. & W. 694.

**Evidence of Limitation of Usage Not Admissible.** — Where a horse dealer, on a single occasion, employs another horse dealer, who occasionally assists in his business, to sell a horse for him, the latter has an implied authority to give a warranty of soundness; and evidence of an alleged custom among horse dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to contradict such implied authority. *Howard v. Sheward*, L. R. 2 C. P. 148, 36 L. J. C. Pl. 42, 15 W. R. 45, L. T. N. S. 183.

**Principal's Failure to Deny Agent's Authority.** — The fact that the principal, upon being charged with a breach of warranty by the buyer's attorney, replied in a letter in which he merely denied any breach of the warranty, has been held sufficient to warrant the jury in finding that the agent had authority to warrant the horse. *Miller v. Lawton*, 15 C. B. N. S. 834, 109 E. C. L. 834.

**5. In Sales of Harvesting Machines.** — *Murray v. Brooks*, 41 Iowa 45; *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 23 Am. St. Rep. 739; *Parsons Band Cutter, etc., Co. v. Haub*, 83 Minn. 180; *Osborne v. Josselyn*, (Minn. 1904) 99 N. W. Rep. 890; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229. See also *Mc-*

warrant, and an agent having power to sell has power to bind his principal by a warranty except when his authority is specially limited and the limitation is known to the buyer. The usage or custom from which the authority in the agent to warrant is to be implied must be a usage among the sellers of such articles so well settled, notorious, and uniformly recognized as to raise a fair presumption that it was known to the parties and that the sale was made with reference to it.<sup>1</sup> Such a usage is a fact to be proved as any other fact, and the question as to whether or not it existed is for the jury.<sup>2</sup> It cannot be shown, however, by proof of isolated particular instances in which it was followed by the parties.<sup>3</sup>

When the Usage Is Not to Give a Warranty or where the goods are of a kind which are not ordinarily warranted, one who is a mere agent to sell has no implied power to warrant, and any undertaking by him in the nature of a warranty cannot bind his principal in the absence of proof that such a power had been expressly conferred.<sup>4</sup> Nor can a usage be shown when its effect would be to create between the parties a new contract different, in essential particulars, from that actually made by them.<sup>5</sup>

**3. Particular Agencies.** — Auctioneers, as a rule, have no implied authority to warrant the quality or the title of goods sold by them at auction, though they may be held personally liable for a personal guaranty given upon the sale.<sup>6</sup> But, owing to the nature of the circumstances under which auction sales occur, the rule that mere "dealers' talk" will not be construed as a warranty applies with peculiar force.<sup>7</sup>

**Brokers or Commission Merchants** are within the general rule that an agent to sell has an implied power to warrant when the article sold is of a class that is

*Cormick Harvesting Mach. Co. v. Hiatt*, (Neb. 1903) 95 N. W. Rep. 627; *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 37.

**Agent May Change Terms of Contract.** — Where, upon the buyer's making complaint, the seller's agent adjusts the matter with him by offering him a new machine under a different contract, the agent is presumed to have authority to make such new agreement and to agree that it shall not affect the buyer's right of action for a breach of the warranty. *Aultman Co. v. McDonough*, 110 Wis. 263.

1. *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 447.

2. *Wait v. Borne*, 123 N. Y. 592. See also the title *USAGES AND CUSTOMS*, vol. 29, p. 363.

3. *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 447.

4. *Alabama*. — *Herring v. Skaggs*, 73 Ala. 446, 34 Am. Rep. 4 (warranty of safe as burglar proof).

*Florida*. — *Croom v. Swann*, 1 Fla. 211.

*Georgia*. — *Florence v. Patillo*, 105 Ga. 577.

*Iowa*. — *Graul v. Strutzel*, 53 Iowa 712, 36 Am. Rep. 250 (a sale of notes).

*Massachusetts*. — *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Anderson v. Bruner*, 112 Mass. 14.

*Montana*. — *Kircher v. Conrad*, 9 Mont. 191, 18 Am. St. Rep. 731 (warranty by clerk in store).

*New Jersey*. — *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210, affirmed 42 N. J. L. 623.

*New York*. — *Smith v. Tracy*, 36 N. Y. 79; *Wait v. Borne*, 123 N. Y. 592; *Bierman v. City Mills Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 140; *Pennsylvania, etc., Oil Co. v. Spitelnik*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 557;

*Ellner v. Priestley*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 535.

*Wisconsin*. — *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 877.

**5. Usage Cannot Be Shown Whereby a New and Different Contract Is Created.** — In *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726, in holding that the buyer could not introduce evidence of a usage of trade by which certain brokers were authorized to warrant, for their principals, merchandise sold by them, the court, by Bigelow, J., said: "The alleged usage \* \* \* is unauthorized by law, and cannot be regarded as valid. It contravenes the principle which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale, a stipulation or obligation which is different from, or inconsistent with, the rule of the common law on the same subject."

6. See the title *AUCTIONEERS*, vol. 3, p. 492.

**7. Auctioneer's Words of Praise Not Readily Construed as a Warranty.** — Thus, a statement by the auctioneer that he knew W. (the owner of the article being sold) well, "and he was all right, and he (the auctioneer) would warrant that his title was good," amounts to a warranty upon which recovery may be had against the auctioneer. *Dent v. McGrath*, 3 Bush (Ky.) 174. But a statement by the auctioneer to the crowd assembled around: "Here is a nice lot of young sound sheep," does not constitute a warranty, and there can be no recovery based upon it, although the sheep turned out to be diseased. *McGrew v. Forsythe*, 31 Iowa 179. See also *Woodward v. Boston*, 115 Mass. 81.

usually warranted in that market.<sup>1</sup>

**A Husband Selling the Property of His Wife** for her has implied authority to give a warranty,<sup>2</sup> and it seems that the wife, in selling property of her husband as his agent, has a similar authority.<sup>3</sup>

**One of Two Joint Owners** of a chattel cannot bind his co-owner so as to make the latter liable for false representations of the former on the faith of which a buyer purchased the chattel, unless he was expressly so authorized.<sup>4</sup>

**4. Limitations of General Rule.** — The Agent's Implied Authority Is Limited to the Article He Sells; he has no power to go further and warrant all similar articles which his principal may thereafter sell to the buyer in question.<sup>5</sup>

**If the Warranty Is an Unusual One**, not relating to the quality of the article or to a subject ordinarily embraced in a warranty, the general rule in favor of the agent's implied authority to warrant has no application.<sup>6</sup>

**The General Rule Is Confined to Representations Made by the Agent at the Time of the Sale**; statements made by him afterwards do not bind his principal even though made under such conditions as would have bound the latter had he made them himself.<sup>7</sup> Similarly, representations made by a servant who is authorized merely to deliver the article sold and to take from the buyer a receipt, are not binding on the seller.<sup>8</sup>

**5. Ratification of Unauthorized Warranty.** — A warranty given by an agent, without authority, may become binding upon his principal by the latter's subsequent ratification of it.<sup>9</sup> Such a ratification may arise from the apt and explicit language of the principal or may be implied in certain cases from indirect language or conduct,<sup>10</sup> but it is not to be implied from the mere fact that the principal accepted the price paid by the buyer, particularly when he was in ignorance of the warranty at the time of such acceptance.<sup>11</sup>

**6. Personal Liability of Agent.** — If the agent signs his own name to a written warranty or otherwise gives his personal guaranty, the buyer may hold him liable thereon although he could not have proceeded against the principal because of the agent's lack of authority to bind the principal by a warranty.<sup>12</sup>

1. See the titles *BROKERS*, vol. 4, p. 964; *FAC-TORS OR COMMISSION MERCHANTS*, vol. 12, p. 635. *Compare* *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

2. *Savage v. Eakins*, 31 Ill. App. 267.

3. *Taylor v. Green*, 8 C. & P. 316, 34 E. C. L. 407.

**The Trustee for a Married Woman**, appointed to "have and to hold" a slave to her use, has no authority to sell or transfer the property without her consent, and a warranty given by him will not bind her. *Dozier v. Freeman*, 47 Miss. 647.

4. *Holmes v. Wood*, 32 Ind. 201.

5. *Wait v. Borne*, 123 N. Y. 592.

6. *Palmer v. Hatch*, 46 Mo. 585, a case in which it was held that an agent with mere power to sell had no authority to give a warranty against the seizure of the goods (whiskey) for a violation of the revenue laws.

7. *Helyear v. Hawke*, 5 Esp. 72.

8. *Woodin v. Burford*, 2 Crompt. & M. 391, 4 Tyrw. 264; *Strode v. Dyson*, 1 Smith 400.

9. *Churchill v. Palmer*, 115 Mass. 310. See also the title *AGENCY*, vol. 1, p. 1181.

10. See the title *AGENCY*, vol. 1, p. 1195.

An agent for the sale of reapers, authorized to give a warranty, sold a machine, and warranted it after the expiration of his agency and the appointment of a new agent who was not authorized to warrant; the notes he had received in part payment he turned over to his

successor, who sent them to his principal without apprising him by whom the sale was made. The machinery proved defective and was returned to the agent who sold it. It was held that the principal, by accepting the notes and attempting to collect them, had ratified the acts of the assumed agent, and was bound by the warranty. *Eadie v. Ashbaugh*, 44 Iowa 519. *Compare* *Graul v. Strutzel*, 53 Iowa 712, 36 Am. Rep. 250.

**11. Ratification Not Implied from Seller's Mere Acceptance of Price.** — *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446; *Graul v. Strutzel*, 53 Iowa 712, 36 Am. Rep. 250 (guaranty of a promissory note); *Wood Mowing, etc., Mach. Co. v. Crow*, 70 Iowa 340; *Pennsylvania, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; *Smith v. Tracy*, 36 N. Y. 79 (warranty of bonds). *Compare* *Blaess v. Nichols, etc., Co.* 115 Iowa 373; *Plano Mfg. Co. v. Nordstrom*, 63 Neb. 123.

**The Fact that the Seller Executes the Contract of Sale** by delivering the goods sold does not operate as a ratification of the agent's unauthorized warranty where the former, in thus completing the contract, acted wholly in ignorance of the warranty given by the latter. *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636. See also *Smith v. Tracy*, 36 N. Y. 79.

12. *Croom v. Swann*, 1 Fla. 211; *Dent v. McGrath*, 3 Bush (Ky.) 174; *Argersinger v. Mac-*



**XIII. PAROL WARRANTY WHERE CONTRACT IS IN WRITING — 1. General Rule.** — There is no rule of law requiring an express warranty to be in writing; it may exist by parol, as any other agreement not within the statute of frauds.<sup>1</sup> A warranty, however, is no exception to the general rule excluding parol evidence offered to vary the terms of a written contract. If the contract of sale is in writing, its terms are conclusive as to the existence and the extent of express warranties made before or at the time of the sale, and evidence of prior or contemporaneous verbal agreements or representations is not admissible for the purpose of proving other or different warranties; the parties are presumed to have included in the written instrument all the terms of their agreement.<sup>2</sup> The general rule applies where the writing contains only a warranty

naughton, 114 N. Y. 535, 11 Am. St. Rep. 687. See also Schell v. Stephens, 50 Mo. 375.

1. Parker v. McFerrin, 103 Ala. 152; Lindsay v. Davis, 30 Mo. 406.

**2. Parol Evidence of Warranty Not Admissible Where Contract Is in Writing — England.** — Hodges v. Drakeford, 1 B. & P. N. R. 270; Rolleston v. Hibbert, 3 T. R. 406; Gardiner v. Gray, 4 Campb. 144; Chanter v. Hopkins, 4 M. & W. 399; Harnor v. Groves, 15 C. B. 667, 80 E. C. L. 667.

*United States.* — DeWitt v. Berry, 134 U. S. 306; Seitz v. Brewers' Refrigerating Mach. Co., 141 U. S. 510; Randall v. Rhodes, 1 Curt. (U. S.) 90; Chandler v. Thompson, 30 Fed. Rep. 38; Empire State Phosphate Co. v. Heller, (C. C. A.) 61 Fed. Rep. 280; Wilson v. New U. S. Cattle-Ranch Co., (C. C. A.) 73 Fed. Rep. 994; Union Selling Co. v. Jones, (C. C. A.) 128 Fed. Rep. 672 (rule considered at length).

*Alabama.* — Whitehead v. Lane, etc., Co., 72 Ala. 39.

*California.* — Johnson v. Powers, 65 Cal. 179. *Connecticut.* — Fitch v. Woodruff, etc., Iron Works, 29 Conn. 82; Galpin v. Atwater, 29 Conn. 93; Mullain v. Thomas, 43 Conn. 252.

*Georgia.* — Wyche v. Winship, 13 Ga. 208; Allen v. Young, 62 Ga. 617; Martin v. Moore, 63 Ga. 531; Patterson v. Ramspeck, 81 Ga. 808; Bullard v. Brewer, 118 Ga. 918.

*Illinois.* — Robinson v. McNeill, 51 Ill. 225; Graham v. Eisner, 28 Ill. App. 269; McMillan v. DeTamble, 93 Ill. App. 65.

*Indiana.* — McClure v. Jeffrey, 8 Ind. 79; Johnson v. McCabe, 37 Ind. 535; Rose v. Hurley, 39 Ind. 77; Reeves v. Byers, 155 Ind. 535; McCormick Harvesting Mach. Co. v. Yoeman, 26 Ind. App. 415; Woodruff v. Hensley, 26 Ind. App. 592.

*Iowa.* — Shepherd v. Gilroy, 46 Iowa 193; Mast v. Pearce, 58 Iowa 579; 43 Am. Rep. 125; Nichols v. Wyman, 71 Iowa 160; Barrett v. Wheeler, 71 Iowa 662; Bothwell v. Farwell, 74 Iowa 324.

*Kansas.* — Willard v. Ostrander, 46 Kan. 591; McMullen v. Carson, 48 Kan. 263; Farmers' Stock Breeding Assoc. v. Scott, 53 Kan. 534; Diebold Safe, etc., Co. v. Huston, 55 Kan. 104; Ehrsam v. Brown, 64 Kan. 466; Huston v. Peterson, 2 Kan. App. 315; Richardson v. Great Western Mfg. Co., 3 Kan. App. 445; Kansas Refrigerator Co. v. Pert, 3 Kan. App. 364.

*Kentucky.* — Worland v. Secrest, 106 Ky. 711; Crane v. Williamson, 111 Ky. 271; Ramsey v. Beedle, 8 Ky. L. Rep. 702.

*Louisiana.* — Buhler v. McHatten, 9 La. Ann. 192; Goodloe v. Hart, 2 La. 446.

*Maine.* — Millett v. Marston, 62 Me. 477.

*Maryland.* — Rice v. Forsyth, 41 Md. 389; Thomson v. Gortner, 73 Md. 474.

*Massachusetts.* — Salem India Rubber Co. v. Adams, 23 Pick. (Mass.) 258; Lamb v. Crafts, 12 Met. (Mass.) 353; Boardman v. Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Frost v. Blanchard, 97 Mass. 155.

*Michigan.* — McCray Refrigerator, etc., Co. v. Woods, 99 Mich. 269, 41 Am. St. Rep. 599; Nichols v. Crandall, 77 Mich. 401; Rumely v. Emmons, 85 Mich. 511; Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281; Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473; John Hutchison Mfg. Co. v. Pinch, 107 Mich. 12; Osborne v. Wigent, 127 Mich. 624.

*Minnesota.* — Jones v. Alley, 17 Minn. 292; Thompson v. Libby, 34 Minn. 374; Bradford v. Neill, 46 Minn. 347; American Mfg. Co. v. Klarquist, 47 Minn. 344.

*Missouri.* — Joliffe v. Collins, 21 Mo. 338; Lehnendorf v. Shields, 13 Mo. App. 486.

*Nebraska.* — McCormick Harvesting Mach. Co. v. Martin, 32 Neb. 723.

*New Jersey.* — Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380.

*New York.* — Mumford v. M'Pherson, 1 Johns. (N. Y.) 414, 3 Am. Dec. 339; Van Ostrand v. Reed, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Eighnie v. Taylor, 98 N. Y. 288; Lamson Consol. Store Service Co. v. Hartung, (C. Pl. Gen. T.) 18 N. Y. Supp. 143; Hungerford Co. v. Rosenstein, (C. Pl. Gen. T.) 19 N. Y. Supp. 471; McDonald v. Nuse, (Buffalo Super. Ct. Gen. T.) 12 Misc. (N. Y.) 507; Jackson v. Helmer, 73 N. Y. App. Div. 134; Chamberlain v. Van Campen, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 99; Mayer v. Dean, 54 N. Y. Super. Ct. 315, 115 N. Y. 556.

*North Carolina.* — Pender v. Fobes, 1 Dev. & B. L. (18 N. Car.) 250.

*North Dakota.* — Plano Mfg. Co. v. Root, 3 N. Dak. 165.

*Oklahoma.* — Osborne v. Walther, 12 Okla. 20.

*South Carolina.* — Wood v. Ashe, 1 Strobb. L. (S. Car.) 407; Stucky v. Clyburn, Cheeves L. (S. Car.) 186, 34 Am. Dec. 590; Smith v. McCall, 1 McCord L. (S. Car.) 220, 10 Am. Dec. 666; Parcher v. Caldwell, 2 McMull. L. (S. Car.) 329.

*Tennessee.* — McKenzie v. Kerr, 5 Sneed (Tenn.) 539; Aultman v. York, 1 Tex. Civ. App. 484.

*Vermont.* — Reed v. Wood, 9 Vt. 287; Pinney v. Andrus, 41 Vt. 631; Bond v. Clark, 35 Vt. 577.

of quality and the parol evidence relates to a warranty of title, or *vice versa*,<sup>1</sup> or where the writing contains no warranty at all.<sup>2</sup>

**Although the Warranty Is a Collateral Undertaking** in the sense that it is not one of the essential elements of the contract of sale,<sup>3</sup> it is still a part of the contract and not a separate and independent agreement within the meaning of the rule which admits parol evidence of matters collateral to, but independent of, the principal written agreement.<sup>4</sup>

**Presumption that Warranty Is by Parol.** — When a breach of warranty is set up, either as a ground for recovery of damages or by way of set-off or counterclaim, and the buyer makes no averment in his pleadings that a written warranty exists, a presumption arises that the warranty is by parol, and proof of price lists, correspondence, or other written warranties is not competent.<sup>5</sup>

**A Contract Partly in Writing and Partly Oral** is to be regarded as an oral contract, and proof of a parol warranty is admissible.<sup>6</sup> The same is true of an oral contract whereby the parties agree that the terms shall be the same as those contained in a written contract previously made between them.<sup>7</sup>

**2. Exceptions to General Rule** — *a. WHERE WARRANTY IS INDEPENDENT AGREEMENT.* — In such a case the warranty may be shown by parol although the contract of sale is in writing.<sup>8</sup> The difficult question in this connection is as to when the warranty is to be regarded as an independent agreement.<sup>9</sup>

*b. WHEN WRITING DOES NOT EMBRACE WHOLE CONTRACT.* — When it is made to appear that the written contract was not intended to, or did not

*West Virginia.* — *Johnston v. Mendenhall*, 9 W. Va. 112.

*Wisconsin.* — *Schultz v. Coon*, 51 Wis. 416, 37 Am. Rep. 839; *McQuaid v. Ross*, 77 Wis. 470; *J. I. Case Plow Works v. Niles, etc.*, Co., 90 Wis. 590.

**1. When Writing Expresses Warranty of Quality and Proof Is Offered to Show Oral Warranty of Title.** — *Mullain v. Thomas*, 43 Conn. 252; *Rodgers v. Perrault*, 41 Kan. 385; *McMullen v. Carson*, 48 Kan. 263; *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364; *Rice v. Forsyth*, 41 Md. 389; *Mumford v. McPherson*, 1 Johns. (N. Y.) 414, 3 Am. Dec. 339; *Wilson v. Marsh*, 1 Johns. (N. Y.) 503; *Pender v. Fobes*, 1 Dev. & B. L. (18 N. Car.) 250; *Wood v. Ashe*, 1 Strobb. L. (S. Car.) 407. *Compare Allen v. Potter*, 2 McCord L. (S. Car.) 323, holding that although the written contract contains only a warranty of title, the buyer may introduce proof of facts from which a warranty of quality might be created by implication.

**2. When Written Contract Contains No Warranty at All.** — *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Bullard v. Brewer*, 118 Ga. 918; *Mast v. Pearce*, 58 Iowa 579, 43 Am. Rep. 125; *Ehrsam v. Brown*, 64 Kan. 466; *Hallwood Cash-Register Co. v. Millard*, 127 Mich. 316; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Engelhorn v. Reitlinger*, 55 N. Y. Super. Ct. 485; *Powell v. Edmunds*, 12 East 6. *Compare Ruff v. Jarrett*, 94 Ill. 475; *Dempster Mill Mfg. Co. v. Fitzwater*, 6 Kan. App. 24.

**3.** See *supra*, this title, III. 1. *Is a Collateral Undertaking.*

**4.** *Thompson v. Libby*, 34 Minn. 374; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380. See also *Dutton v. Gerrish*, 9 Cush. (Mass.) 89, 55 Am. Dec. 45. *Compare Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185. See also *Chapin v. Dobson*, 78 N. Y. 78, 34 Am. Rep. 512.

**5.** *Morgan v. Gaar Co.*, 64 Ind. 213; *O'Neal v. Rumley Co.*, (Ky. 1899) 53 S. W. Rep. 521. *Compare Watson v. Roode*, 30 Neb. 264.

**It Is a Question for the Jury** whether the sale and the warranty occurred under the original agreement with the seller, which was in writing, or the subsequent verbal agreement with the seller's agent. *Olson v. Aultman Co.*, 81 Minn. 11.

**There Is No Presumption that the Contract Was in Writing**, and when the immediate issue is whether there was in fact a written contract, parol testimony bearing upon that issue cannot be excluded upon the assumption that such a writing exists. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

**6.** *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; *Smith v. O'Donnell*, 8 Lea (Tenn.) 468.

In such a case, the writing is, of course, competent evidence as far as it goes. *Tomlinson v. Briles*, 101 Ind. 538.

**7. Oral Agreement Referring to a Written Contract.** — *Aultman, etc., Co. v. Shelton*, 90 Iowa 288.

**8.** See the title *PAROL EVIDENCE*, vol. 21, p. 1089.

**9. When Parol Warranty Considered an Independent Agreement.** — *Galpin v. Atwater*, 29 Conn. 93; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512 (leading case); *Eighmie v. Taylor*, 98 N. Y. 297. See also *Englehardt v. Clanton*, 83 Ala. 336.

The fact that the written contract whereby the buyer bought a half interest in an animal contained no warranty, but provided that the buyer might purchase the other half interest within a prescribed time, does not preclude proof of an oral warranty given upon the subsequent purchase of the latter interest. *Storer v. Taber*, 83 Me. 387.

**A Written Warranty Given by an Agent on his**

in fact, embrace the entire agreement of the parties, but was a mere informal memorandum or bill of parcels, parol testimony of warranties not mentioned in the writing is admissible even though the memorandum may have embraced all the other terms of the contract.<sup>1</sup> The same is true where the writing is nothing more than a receipt for the purchase money,<sup>2</sup> or an agreement for the security of a vendor's lien,<sup>3</sup> or an order by the purchaser for the goods in question,<sup>4</sup> or a promissory note for the price in which some of the items of agreement are mentioned.<sup>5</sup> It is often the case that the agreement of sale is concluded entirely by parol and a memorandum is afterwards drawn up merely as a recital of the matters agreed on; in such cases, parol evidence is admissible for the purpose of showing a warranty contained in the oral agreement but

own personal responsibility will not necessarily preclude proof of an oral warranty given by him at the same time on behalf of his principal. *Kelly v. Clow Reaper Mfg. Co.*, 20 Minn. 88.

**1. When Writing Is a Mere Memorandum or Bill of Parcels.**—*United States*.—*Sturm v. Boker*, 150 U. S. 312; *Harris v. Johnston*, 3 Cranch (U. S.) 311.

*Alabama*.—*Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322.

*Illinois*.—*Towell v. Gatewood*, 3 Ill. 23, 33 Am. Dec. 437.

*Iowa*.—*Jackson v. Mott*, 76 Iowa 263.

*Kansas*.—*Bemis v. Becker*, 1 Kan. 226; *Irwin v. Thompson*, 27 Kan. 643.

*Kentucky*.—*Miller v. Gaither*, 3 Bush (Ky.) 152.

*Massachusetts*.—*Bradford v. Manley*, 13 Mass. 139, 7 Am. Dec. 122; *Hogins v. Plympton*, 11 Pick. (Mass.) 100; *Fletcher v. Willard*, 14 Pick. (Mass.) 464; *Winsor v. Lombard*, 18 Pick. (Mass.) 60; *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 256; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Coolidge v. Brigham*, 1 Met. (Mass.) 547; *Stacy v. Kemp*, 97 Mass. 166; *Atwater v. Clancy*, 107 Mass. 369; *Spalding v. Conant*, 146 Mass. 292.

*Michigan*.—*Richey v. Daemicke*, 86 Mich. 647.

*New Hampshire*.—*Wallace v. Rogers*, 2 N. H. 506.

*New York*.—*Filkins v. Whyland*, 24 Barb. (N. Y.) 379, affirmed 24 N. Y. 338; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Sutton v. Crosby*, 54 Barb. (N. Y.) 80; *Hope v. Smith*, 35 N. Y. Super. Ct. 458; *Cassidy v. Begoden*, 38 N. Y. Super. Ct. 180; *Lynch v. Hunneke*, 61 N. Y. Super. Ct. 235; *Curtis v. Soltau*, 16 Daly (N. Y.) 490.

*Ohio*.—*Hauser v. Curran*, 11 Ohio Dec. (Reprint) 139, 25 Cinc. L. Bul. 52.

*Tennessee*.—*Cameron v. Ottinger*, 1 Head (Tenn.) 27.

*Canada*.—*Gordon v. Waterous*, 36 U. C. Q. B. 321.

*Compare Harnor v. Groves*, 15 C. B. 667, 80 E. C. L. 667, where it was held that a writing, "Sold W. per H. twenty-five sacks whites [flour] X. S. at 68s. per sack, net," constituted the entire agreement so as to preclude the introduction of parol evidence of a warranty. See also *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652.

**Where Writing Is a Mere Bill of Parcels.**—In *Towell v. Gatewood*, 3 Ill. 23, 33 Am. Dec. 437, the writing was: "New Haven, February, 1836. A bought of B 2,951 lbs. good first and

second rate tobacco at \$4.50, \$132.79½. Received payment by the hands of K." It was signed by B. The court held that the paper was not and did not purport to be the evidence of the bargain, but was in form and effect a mere bill of parcels, a receipt for the purchase money, and as such was properly received in evidence, but that it would not preclude proof of the entire contract by parol testimony for the purpose of showing a warranty. See also *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Lamb v. Crafts*, 12 Met. (Mass.) 353; *Koop v. Handy*, 41 Barb. (N. Y.) 454. *Compare Randall v. Rhodes*, 1 Curt. (U. S.) 90.

**A Written Warranty Never in Fact Agreed upon by the Parties**, which was handed by the seller to the buyer at the time of the sale with other papers, without any knowledge on the part of either that it had been so delivered until some time afterwards, will not affect a parol warranty made at the time of the sale. *Valerius v. Hockspiere*, 87 Iowa 332.

**A Memorandum of Agreement, Signed Only by the Seller**, will not preclude proof of an oral warranty. *Curtis v. Soltau*, 16 Daly (N. Y.) 490. See also *Routledge v. Worthington Co.*, 119 N. Y. 592.

**2. Where Writing Is Merely a Receipt for Purchase Money.**—*Perrine v. Cooley*, 39 N. J. L. 449; *Filkins v. Whyland*, 24 N. Y. 338, affirming 24 Barb. (N. Y.) 379.

The receipt may, however, contain the entire contract, and where it does so parol evidence of a warranty is not admissible. *Terry v. Wheeler*, 25 N. Y. 520; *Schultz v. Coon*, 51 Wis. 416, 37 Am. Rep. 839.

**A Writing in Form of Receipt for the Goods Sold** which specifies the kinds, numbers, prices, and total value, all in the handwriting of the receiver, on which there is indorsed the payment made at the same time, constitutes a complete contract in writing so that parol evidence of a warranty is incompetent. *Schultz v. Coon*, 51 Wis. 416, 37 Am. Rep. 839.

**3. When Writing Is Mere Retention of Seller's Lien.**—*Hadley v. Bordo*, 62 Vt. 285. See also *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 23 Am. St. Rep. 739.

**4. Writing a Mere Order for Goods.**—*Jackson v. Mott*, 76 Iowa 263; *Chase v. Evarts*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 987; *Nichols v. Hail*, 6 Neb. 432. *Compare Diebold Safe, etc., Co. v. Huston*, 55 Kan. 104.

**5. Where Writing Is Merely a Note for Price.**—*Crist v. Jacoby*, 10 Ind. App. 688; *Routledge v. Worthington Co.*, 119 N. Y. 592; *Curtis v. Soltau*, 16 Daly (N. Y.) 490.



omitted from the writing through inadvertence, mistake, or fraud.<sup>1</sup>

Whether the Writing Contains the Entire Agreement is a question to be determined not merely from the face of the instrument, but from all the facts and circumstances connected with it, and is usually for the jury.<sup>2</sup> If the writing is obscure and uncertain in its provisions and does not cover the points which would ordinarily be settled between the parties in a transaction covering a similar matter, it bears on its face evidence of its incompleteness, and parol evidence is admissible to prove other warranties.<sup>3</sup>

The Nature of the Transaction Is an Important Circumstance in determining whether the writing was intended to embrace the entire agreement. The rule excluding proof of parol warranties has no application to instruments which, from their very nature, do not attempt to state the entire agreement in respect of the subject-matter, but are adapted merely to transfer title, in execution of an agreement the remaining terms of which they do not profess to show. Deeds for land, assignments of choses in action, bills of sale, indorsements of notes, and other similar instruments are of this character.<sup>4</sup>

A Writing Given by a Third Party in Pursuance of an Oral Agreement between the buyer and seller will not be presumed to contain the entire agreement of the parties, and proof of the oral agreement is admissible for the purpose of establishing a warranty then given.<sup>5</sup>

If the Contract Is Within the Statute of Frauds, it becomes immaterial whether the writing embraces the entire contract, and the rule excluding parol testimony is absolute.<sup>6</sup>

c. IN CASES OF FRAUD. — The rule excluding parol evidence of representations made by the seller at the time of the sale, where the contract of sale is in writing, does not preclude proof of such representations where these

In *Gale v. Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 23 Am. St. Rep. 739, the buyer was allowed to prove an oral warranty although the note given for the price of the machine expressly provided that "no promise or contract outside of this note will be recognized."

1. **Warranty Made Orally Omitted from Writing by Mistake or Fraud.** — *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Richards v. Fuller*, 37 Mich. 161; *Nichols v. Crandall*, 77 Mich. 401; *Barker v. Bradley*, 42 N. Y. 319, 1 Am. Rep. 522; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Chase v. Evarts*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 987; *Cassidy v. Begoden*, 38 N. Y. Super. Ct. 182; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; *Dobell v. Stevens*, 3 B. & C. 623, 10 E. C. L. 201, 5 Dowl. & R. 490.

An Illiterate Buyer who had been induced to sign a writing which was represented to him as containing the warranties already made orally, but which did not, may prove such warranties by parol. *Frohreich v. Gammon*, 28 Minn. 476. See also *Aultman v. Falkum*, 51 Minn. 562.

It Is a Question for the Jury, in the class of cases under consideration, whether the writing contains the whole agreement, and what was the nature and extent of the prior parol agreement. *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; *Bolckow v. Seymour*, 17 C. B. N. S. 107, 112 E. C. L. 107. See also *Thomas v. Hammond*, 47 Tex. 42.

2. **A Question for the Jury.** — *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; *Thomas v. Hammond*, 47 Tex. 42; *Bolckow v. Seymour*, 17 C. B. N. S. 107, 112 E. C. L. 107. See also *Ehrsam v. Brown*, 64 Kan. 466; *American Mfg. Co. v. Klarquist*, 47 Minn. 344.

Where the Representations Relied on as a Warranty Are Contained in Letters which constitute the contract of sale, proof of the surrounding facts and circumstances is admissible for the purpose of showing that no warranty was contemplated by the parties. *Stuckley v. Baily*, 1 H. & C. 405.

3. **Where Written Contract Is Incomplete on Its Face.** — *Shepherd v. Haas*, 14 Kan. 443; *St. Louis, etc., R. Co. v. Maddox*, 18 Kan. 551; *Trevidick v. Mumford*, 31 Mich. 467; *Barker v. Bradley*, 42 N. Y. 319, 1 Am. Rep. 522; *Thomas v. Nelson*, 69 N. Y. 119. See also *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Havana, etc., R. Co. v. Walsh*, 85 Ill. 58.

4. *Hahn v. Doolittle*, 18 Wis. 196, 86 Am. Dec. 757 (note and mortgage transferred by written assignment, parol proof admitted to show a warranty of the security).

An Auctioneer's Advertisement is not to be taken as stating the written conditions and terms of the sale. Parol evidence is admissible to disprove a warranty of soundness or value arising by implication from such advertisement. *Limehouse v. Gray*, 3 Brev. (S. Car.) 231. Compare *Powell v. Edmunds*, 12 East 6, in which a sale of growing timber had been made by auction, under printed conditions of sale which stated nothing as to the quantity. Lord Ellenborough held that parol evidence was not admissible to show that, at the auction, the auctioneer warranted the quantity.

5. *Adams v. Gray*, 8 Conn. 11, 20 Am. Dec. 82.

6. *Lamb v. Crafts*, 12 Met. (Mass.) 353; *Peltier v. Collins*, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; *Harnor v. Groves*, 15 C. B. 667, 80 E. C. L. 667; *McBride v. Silverthorne*, 11 U.

are shown to have been wilfully false and fraudulent and made with an intent to deceive. In such cases, however, the action is not on the warranty, but for the fraud or deceit.<sup>1</sup>

*d. OTHER EXCEPTIONS.* — In Determining the Measure of Damages, in an action for breach of a warranty in writing, parol evidence of statements and representations made by the defendant at the time of the sale as to the value of the article sold is competent as showing admissions by the seller bearing upon the amount of damages sustained.<sup>2</sup>

*Subsequent Parol Warranty.* — The general rule does not operate to exclude parol evidence of a subsequent express agreement varying the terms of the original warranty.<sup>3</sup>

*A Written Warranty Given Gratuitously After the Sale* cannot be set up as superseding an oral and different warranty given at the time of the sale unless it can be shown that the second warranty was intended by both parties to supersede and take the place of the first.<sup>4</sup>

*Parol Evidence to Show that the Defect Was Obvious,* or that the seller disclosed it to the buyer at the time of the sale, is admissible without regard to whether the contract was in writing or not.<sup>5</sup>

*Parol Evidence to Aid in Construing Warranty.* — While parol evidence is not admissible to contradict or vary the written agreement, the court may look not only to the language of the correspondence evidencing the transaction but also to the subject-matter of the agreement and the surrounding circumstances, in order to be placed, as nearly as practicable, in the position in which the contracting parties were when they entered into the agreement.<sup>6</sup>

**XIV. CONSTRUCTION AND INTERPRETATION OF WARRANTIES — 1. General Rule of Construction.** — Words used in a warranty are to be construed according to their natural import and signification; they must be presumed to have been used in their ordinary sense, that is, the sense in which they are used by

C. Q. B. 545. See also *Smith v. Shell*, 82 Mo. 215, 52 Am. Rep. 365.

1. *Esterly v. Eppelsheimer*, 73 Iowa 260; *Da Lee v. Blackburn*, 11 Kan. 190; *Huston v. Peterson*, 2 Kan. App. 315. See also *supra*, this title, III. 4. *Distinguished from Fraud*; and see the title *PAROL EVIDENCE*, vol. 21, p. 1077.

*In Action for Deceit.* — Where the contract of sale is in writing, proof of a parol warranty may be made as establishing a representation by the seller, upon which to base the action for deceit, but not otherwise. *Salem India Rubber Co. v. Adams*, 23 Pick. (Mass.) 256.

2. *Fitzgerald v. Evans*, 49 Minn. 541.

3. *Pratt's Case*, 3 Ct. Cl. 105; *Thomas v. Barnes*, 156 Mass. 581; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446; *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 37.

The rule of the text has been held to be true although the original contract of sale, made with the agent who makes the subsequent parol agreement, contained a printed clause, after the signatures of the parties, to the effect that "no verbal agreement of any kind appertaining to this order will be recognized, but all agreements must be in writing." *Bannon v. Aultman*, 80 Wis. 307, 27 Am. St. Rep. 37. Compare *Reeves v. Byers*, 155 Ind. 535.

4. *Aultman v. Kennedy*, 33 Minn. 339. See also *Valerius v. Hockspiere*, 87 Iowa 332.

*Upon a Conflict of Evidence* as to whether the written warranty was given after the sale and whether, as the buyer claimed, the oral warranty attempted to be shown was the only one

given, the questions are for the jury. *Osborne v. Walther*, 12 Okla. 20.

5. *Fisher v. Pollard*, 2 Head (Tenn.) 314, 75 Am. Dec. 740. Compare *Daniel v. McClelland*, 7 Humph. (Tenn.) 298. This latter case was an action upon a warranty contained in a written bill of sale, that the seller's title was superior to all other titles. The court held that it was not a good plea that the plaintiff was informed, at the time of the sale, that defendant would not warrant against the claim of a particular person named because such a plea could be sustained only by parol evidence.

6. *Dayton v. Hooglun*, 39 Ohio St. 671; *Aultman-Taylor Machinery Co. v. Ridenour*, 96 Iowa 638. See also *Accumulator Co. v. Dubuque St. R. Co.*, (C. C. A.) 64 Fed. Rep. 70; *Bagley, etc., Co. v. Saranac River Pulp, etc., Co.*, 135 N. Y. 626.

*Qualification of the Rule.* — "If there is uncertainty or ambiguity in the terms employed, the actual condition of things and the position in which the parties stood at the time of making the contract may be shown for the purpose of ascertaining the meaning of its terms."

\* \* \* That which may be so shown is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be thus engrafted upon it." *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672. See also *Union Stock-Yards, etc., Co. v. Western Land, etc., Co.*, (C. C. A.) 59 Fed. Rep. 49;

people generally in similar connections; and a technical meaning is not to be given them unless it is shown that the parties intended them to bear that meaning.<sup>1</sup> The construction should be such as to give, if practicable, full force and effect to every part of the warranty.<sup>2</sup> The general rule that a contract is to be construed most strongly against the party who prepared it applies in this connection.<sup>3</sup>

**The Most Salutary Rules** for the construction of contracts of warranty are, that the court shall put itself in the place of the contracting parties and then, in view of all the facts and circumstances surrounding them at the time of the making of the contract, consider what they intended by its terms; and that when the intention is manifest it shall control in the interpretation of the agreement, regardless of inapt expressions and technical rules of construction.<sup>4</sup>

**The Warranty Is Not to Be Extended Unduly by Implication from Other Parts of the Contract** in which it is contained,<sup>5</sup> but is to be read in connection with the other portions of the contract;<sup>6</sup> it is to be given such a construction as a reasonable and unprejudiced person would place upon it in view of all the surrounding circumstances, and is not to be taken as embracing, necessarily, all that the buyer might have construed it to include at the time he made the purchase.<sup>7</sup>

*Weiner v. Whipple*, 53 Wis. 298, 40 Am. Rep. 775.

1. *Pulitzer Pub. Co. v. Rumford Falls Paper Co.*, (C. C. A.) 121 Fed. Rep. 519; *Knowlton v. Oliver*, 28 Fed. Rep. 516; *Scroggin v. Wood*, 87 Iowa 497; *Gentilli v. Starace*, 133 N. Y. 140; *Troy Laundry Co. v. Henry*, 23 Oregon 232; *Manny v. Glendenning*, 15 Wis. 50; *Johnson v. Moore*, 34 Nova Scotia 85.

"Common Hard Brick," used in a warranty, mean brick of the standard implied by that term as recognized in the trade. *Day v. Mapes-Reeve Constr. Co.*, 174 Mass. 412.

**That a Jack Is Warranted to Perform** does not amount to a warranty that he is a breeder and is fully complied with if the animal "performs" on a reasonable number of mares. *Bates County Bank v. Anderson*, 85 Mo. App. 351.

**Upon a Sale of Carts** the warranty was: "We warrant all of our work to be of good material and made in workmanlike manner; in case breakage shall occur within one year by reason of defective material, we will replace all broken parts free of charge, but the agent must be cautious and use his judgment. We will not make good any breakage only such that is defective." It was held that this was a warranty of every cart; that if a breakage should occur within one year and through a defect, the seller would make it good, otherwise not; that the seller was required to replace any defective cart or part thereof or, if he failed to do so, to pay to the buyer the necessary expense of supplying it. *Watson v. Beckett*, 2 Kan. App. 232.

**2. Full Force and Effect to Be Given Every Part of Warranty.**—*Watson v. Beckett*, 2 Kan. App. 232; *Raynor v. Bryant*, 43 Kan. 492.

**3. Written Warranty Construed Most Strongly Against Party Who Prepared It.**—*Wilson v. Cooper*, 95 Fed. Rep. 628.

**4. Accumulator Co. v. Dubuque St. R. Co.**, (C. C. A.) 64 Fed. Rep. 70. See also *Dayton v. Hoogland*, 39 Ohio St. 671.

The case of *Walker v. Milner*, 4 F. & F. 745, was an action by a tradesman against the manufacturers of an iron safe, for the breach

of an alleged warranty that it was strong enough to resist all attempts that might be made to force it open. The proof was that it had been broken into by burglars more than six years after the sale and delivery, and there was some evidence that it was broken open easily, and that it was far less strong and secure than it ought to have been. It was held that the warranty, as an absolute warranty of perfect security for all time to come, was one so extensive, even if it would be valid, that it required very strong evidence of an express warranty to that extent, and was not sustained by proof of mere representations that the safe would be strong enough to resist burglars.

5. *Bancroft v. San Francisco Tool Co.*, (Cal. 1897) 47 Pac. Rep. 684; *Reeves v. Byers*, 155 Ind. 535; *Dickson v. Zizinia*, 10 C. B. 602, 70 E. C. L. 602, 15 Jur. 359.

Thus, a warranty that a reaper will "do good work" cannot be construed as equivalent to a warranty that it could be made to "work profitably and successfully." *Walter A. Wood Mowing, etc., Mach. Co. v. Field*, 8 Ind. App. 107.

**A Provision that the Seller Will, upon Being Notified of Defects, Send a Competent Man to Remedy Them**, contained in a warranty of a machine, does not bind the seller to teach the buyer how to operate the machine nor render him liable for the consequences of the buyer's ignorance as to how to operate it. *Burke v. Keystone Mfg. Co.*, 19 Ind. App. 556.

**6.** A description in the contract of sale that the monument sold is "white bronze" is not a warranty that it is of bronze when other parts of the contract explain just what "white bronze" is. *Monumental Bronze Co. v. Doty*, 99 Mo. App. 195.

7. *Dickson v. Zizinia*, 10 C. B. 602, 70 E. C. L. 602, 15 Jur. 359; *Bull v. Robison*, 10 Exch. 342, 24 L. J. Exch. 165.

**Applications of the Rule.**—Where the warranty upon a sale of a reaping machine is that the machine is a "good grain-cutting machine," upon which "two experienced binders will bind as much grain in one day as they could on the ground in two," etc., the words "experienced



Where the Warranty Is Specifically of a Particular Quality or against certain named defects, there is an implied exclusion of any warranty of other qualities or against other defects.<sup>1</sup> This is true as a rule of construction, independent of the rule heretofore stated, that an express warranty operates to exclude the warranties which the law would otherwise imply.<sup>2</sup> But when the agreement to warranty is general in its terms, the warranty will be construed as embracing all defects, whether known to the seller or not, unless they were obvious or known to the buyer at the time of the sale.<sup>3</sup>

Where Quality Is Warranted but Not Specifically Stated the legal intendment and effect of the contract is that the seller warrants that the article sold shall conform to its description, be reasonably fit for the use for which it is designed, and that it shall be salable or marketable under that description, if it be a marketable article.<sup>4</sup>

Conditions in a Printed Warranty which are designed by the seller to limit the benefits of the general warranty are to be construed most strongly against him and in favor of the buyer.<sup>5</sup>

**2. Warranty Relates to Time and Place of Sale.**—The parties may, by express agreement, fix a particular future date as the time to which the warranty shall be referred, and, in such a case, the condition of the article at the time so fixed becomes the material inquiry.<sup>6</sup> But, in the absence of such an

binders" are to be taken as meaning those accustomed to do such work and having the requisite knowledge, and not necessarily those who were experienced in binding on that particular machine. *Gammar v. Borgain*, 27 Iowa 369.

"I warrant and defend," used in the sale of a chattel, means a warranty of soundness as well as of title. *Duff v. Ivy*, 3 Stew. (Ala.) 140. Compare *Cowan v. Silliman*, 4 Dev. L. (15 N. Car.) 46.

**Tobacco Warranted to Be in "Sound Order."**—*Reynolds v. Palmer*, 21 Fed. Rep. 433.

1. *Jackson v. Langston*, 61 Ga. 392; *International Pavement Co. v. Smith, etc., Mach. Co.*, 17 Mo. App. 264.

2. See *supra*, this title, *Express and Implied Warranties Distinguished*.

**3. General Warranty Embraces All Defects.**—*Ricks v. Dillahunty*, 8 Port. (Ala.) 135; *Duff v. Ivy*, 3 Stew. (Ala.) 140; *Leopold v. Van Kirk*, 29 Wis. 548.

**The Warranty Will Ordinarily Be Construed as Embracing the Whole of the Article or Machine Sold.**—Thus, a warranty of a threshing machine embraces the carriage furnished with it for the purpose of moving it from place to place. *Gaar v. Hicks*, (Tenn. Ch. 1897) 42 S. W. Rep. 455. See also *Watson v. Beckett*, 2 Kan. App. 232.

4. *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Dushane v. Benedict*, 120 U. S. 636; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 116; *Van Winkle v. Crowell*, 146 U. S. 49; *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906; *Murchie v. Cornell*, 155 Mass. 60, 31 Am. St. Rep. 526; *Omaha Coal, etc., Co. v. Fay*, 37 Neb. 75; *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; *Hoe v. Sanborn*, 21 N. Y. 562, 78 Am. Dec. 163, 36 N. Y. 98; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570; *Merriam v. Field*, 29 Wis. 592.

**5. Conditions Limiting General Warranty Construed in Favor of Buyer.**—*Wilson v. Cooper*, 95 Fed. Rep. 628; *Montgomery v. Hanson*, 122 Iowa 222; *Parsons Band Cutter, etc., Co. v.*

*Gadeke*, 1 Neb. (unofficial) 605, 95 N. W. Rep. 850; *Best v. Osborn*, 2 C. & P. 74, 12 E. C. L. 33, R. & M. 296. See also *Tower v. Pauly*, 67 Mo. App. 632.

When a horse, sold at auction, is warranted sound and six years old, and it is one of the conditions of the sale that the horse shall be deemed sound unless it is returned in two days, this condition applies to the warranty of soundness only. Therefore, where a horse sold with such a warranty was discovered to be twelve years old, ten days after the sale, and was then offered to the seller, who refused to take him back, it was held that an action might be maintained by the buyer against the seller; and that his right to recover was not affected by his having sold the horse after offering him to the seller. *Buchanan v. Parnshaw*, 2 T. R. 745.

V. undertook to construct for C. a snowplow under a patent belonging to the latter, under a warranty of the workmanship and of the materials from his own shop but expressly excepting from the warranty the boiler and all other parts bought by C. from others. It was held that the relative capacity of the boiler (which had been bought by C. of a third party) and the engine was not embraced in the warranty. *Cyclone Steam Snowplow Co. v. Vulcan Iron Works*, (C. C. A.) 52 Fed. Rep. 920.

**Provisions with Respect to Buyer's Giving Notice of Defects, etc.** (see *infra*, XVII. 2. h. (5) *Notice of Defects*) or requiring that the machine shall be returned if it fails to work well after seller's efforts to remedy defects, do not limit the warranty that the machine is of good material and durable. *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161.

Nor will a statement printed on the form on which the contract is written, to the effect that all shipments were at the buyer's risk and that no claim would be recognized unless made within fifteen days, destroy a provision in the contract to the effect that the seller guaranteed "entire satisfaction." *Weeks v. Robert A. Johnson Co.*, 116 Wis. 105.

**6. Warranty May Relate to Condition of Article**

agreement, the warranty is always to be construed as relating to the condition of the article at the time of the sale,<sup>1</sup> that is, when the transfer of title took place and not when delivery was made.<sup>2</sup>

If the Sale Is "F. O. B." at the Seller's Place of Business, he will not be liable, on his warranty, for any deterioration of quality occurring after the shipment and while the goods were in transit unless it was due to his negligence in the manner of shipment.<sup>3</sup> The buyer may, however, in such a case, having had no opportunity of testing the quality of the goods at the place of shipment, introduce evidence as to their bad quality when they reached him, together with expert testimony to show the means used for their preservation, and that if good when shipped they ought to have remained so.<sup>4</sup>

If the Warranty Relates to the Grade of a Commodity at a Specified Market, no breach is established by proof that it was not accorded that grade at another and a different market.<sup>5</sup>

**3. Construction of Particular Classes of Warranties**—*a. OF HARVESTERS.*—Where a machine sold as a "self-binding harvester" is warranted to be capable of "cutting" a specified number of acres per day, the "cutting" must be construed as including the binding.<sup>6</sup>

**at Future Date.**—*Times Pub. Co. v. North Carolina Steel, etc., Co.*, 114 N. Car. 224. In this case there was a warranty that the stock of a certain corporation would become worth par within one year. Evidence of the value of the stock after the year was held inadmissible. See also *supra*, this title, *Warranty of Future Soundness*.

**The Words "Every Piano Warranted for Five Years,"** used in a contract of sale made by the manufacturer, amount to a warranty that each piano sold has no inherent defect, either of material or workmanship, which will cause it to break or give way within five years, but do not warrant the style or grade of the instrument. *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509.

**1. In Absence of Express Agreement Otherwise Warranty Relates to Time of Sale**—*United States.*—*Osborn v. Nicholson*, 13 Wall. (U. S.) 654.

*Alabama.*—*Brown v. Jones*, 24 Ala. 463; *Buford v. Gould*, 35 Ala. 265.

*Arkansas.*—*Haskill v. Sevier*, 25 Ark. 153.

*Illinois.*—*Luthy v. Waterbury*, 140 Ill. 664.

*Indiana.*—*Postel v. Oard*, 1 Ind. App. 252;

*Bowman v. Clemmer*, 50 Ind. 10.

*Kentucky.*—*Price v. Barr*, Litt. Sel. Cas. (Ky.) 216; *Patrick v. Swinney*, 5 Bush (Ky.) 421.

*Maine.*—*Brown v. Edwards*, 97 Me. 564.

*Maryland.*—*Merrick v. Bradley*, 19 Md. 50.

*Mississippi.*—*Blewett v. Evans*, 42 Miss. 804;

*Whitworth v. Carter*, 43 Miss. 61; *Mayfield v. Barnard*, 43 Miss. 270.

*Missouri.*—*Stamm v. Kuhlmann*, 1 Mo. App. 296.

*Tennessee.*—*Gregory v. Underhill*, 6 Lea (Tenn.) 207; *Ketchum v. Dew*, 7 Coldw. (Tenn.) 532.

*Texas.*—*Walton v. Cottingham*, 30 Tex. 772.

*Wisconsin.*—*Miller v. McDonald*, 13 Wis. 674.

*Compare* *Algier v. Black*, 32 Tex. 168; *Robinson v. Snow*, (Tex. Civ. App. 1903) 74 S. W. Rep. 328.

See also *HORSES*, vol. 15, p. 755.

**A Warranty Against All Claims "That May Arise**

**or Be Brought Against Said Boat"** embraces merely such claims or demands as existed at the time of the sale. *Moran v. Prather*, 23 Wall. (U. S.) 492. See also *McHugh v. Brown*, 33 Mich. 2.

**2.** *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451.

**3.** *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451; *Leggat v. Sands' Ale Brewing Co.*, 60 Ill. 158; *Drews v. Ann River Logging Co.*, 53 Minn. 199; *Bull v. Robison*, 10 Exch. 342.

But, "if beer be sold to be consumed at Gibraltar, the sale is an affirmation that it is fit to go so far." *Jones v. Bright*, 5 Bing. 533, 15 E. C. L. 529.

If the contract calls for the delivery of grain of a prescribed quality and condition f. o. b. at S., it is not satisfied by a delivery of such grain at B. where the contract was made, and if the quality or condition of the grain deteriorates between B. and S. there is a breach of the warranty. *Drews v. Ann River Logging Co.*, 53 Minn. 199.

**4. Evidence of Condition of Goods When Received by Buyer—When Competent.**—*Ryan v. Ulmer*, 108 Pa. St. 332, 56 Am. Rep. 210. See also *Latham v. Shipley*, 86 Iowa 543, where it is held that when the machine is defective when received by the buyer it is no defense to his action for a breach of the warranty that the machine worked well before being shipped to him and that it was delivered to the carrier in good order.

**5. Warranty as to Grade of Goods at Particular Market.**—*Nichols v. Cecil*, 106 Tenn. 457.

**6.** *Osborne v. McQueen*, 67 Wis. 392.

For cases construing particular warranties of harvesters, see *Gammar v. Borgain*, 27 Iowa 369 ("experienced binders"); *Wendall v. Osborne*, 63 Iowa 99; *Fuller v. Schroeder*, 20 Neb. 631; *Aultman v. Stiehler*, 21 Neb. 72.

**A Warranty that a Harvester Will "Work Well"** means that it will not merely do the work for which it was intended but will do it without unusual trouble, and is broken if there is too much side draft to the machine, thereby causing soreness on the horses' necks. *McCor-*

A Warranty that a Machine Will Do as Good Work as Any Other Harvester Binder must be construed as meaning any other such binder as is then in use and not such other improved machines as may be subsequently put upon the market either by the seller or others.<sup>1</sup> Such a warranty also means that the machine warranted will do the work of other machines with approximately the same expenditure, and is broken if the machine is more expensive to operate than others.<sup>2</sup>

**4. OF OTHER MACHINERY.**—Whether a warranty as to the working capacity of a machine is intended as a statement of its maximum or its average capacity must depend upon the particular language used or the nature of the machine; if the former is intended (as when a machine is warranted to press cotton at the rate of a certain number of bales per hour), the warranty is not to be construed as meaning that the machine will work at that rate every day for a season, since it is not presumed that such machines will be operated constantly at their full capacity.<sup>3</sup>

A General Warranty Will Be Construed as Applying to the Entire Machine as a whole rather than to its separate component parts, in the absence of a clear intention that a different construction should prevail.<sup>4</sup> The warranty will not, however, necessarily be construed as embracing things which are no part of the machine though they may be necessary incidents in its operation.<sup>5</sup>

A Warranty of "Good Workmanship" in the construction of a plant or machinery is to be construed as relating merely to the execution of the plan and not as embracing defects in the plan itself.<sup>6</sup>

*mick Harvesting Mach. Co. v. Russell*, 86 Iowa 556. See also *Leggoe v. Mayer*, 2 Pa. Super. Ct. 529, 39 W. N. C. (Pa.) 247.

In another case, the contract contained a provision that the machine was "warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice" to the company. It was held that the terms as stated did not confine the warranty to the condition of the machine as being "well made and durable," but embraced an undertaking that the machine would work well. *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607.

1. *Best v. Kempf*, 64 Mo. App. 460.

When an engine is sold under a warranty that it is equal or superior to any other on the market, the warranty means engines of the same general character and built under similar specifications. And it is error, upon the trial of an action for a breach of such a warranty six years after the sale, to allow the jury to compare the engine sold with other engines then on the market. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 77 Ill. App. 59.

2. **Machine Must Not Require Greater Expense in Operation.**—*Vermont Farm Mach. Co. v. Batchelder*, 68 Vt. 430.

3. **Warranty as to Maximum Capacity.**—*Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co.*, 48 Fed. Rep. 803, 2 U. S. App. 139. Compare *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575.

4. **Warranty Applies to Machine as an Entirety.**—*Raynor v. Bryant*, 43 Kan. 492; *Fairbanks v. De Lissa*, 36 Mo. App. 711 (warranty of "windmill" held to include the entire plant for furnishing water, the tank, pump, and appliances). See also *Giles v. San Antonio Foundry Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1020.

A provision in the contract of sale that a

failure of the warranty as to any part or attachment of the machine (a thresher) should not affect the buyer's liability for the price except as to such part does not apply where the defective part was bought with the rest at a gross price, but "must be limited to a part or attachment furnished at a separate fixed price." *Robinson v. Berkey*, 111 Iowa 550.

5. **Warranty of Machine Not Construed to Embrace Mere Incidents to Its Use.**—*Troy Laundry Co. v. Henry*, 23 Oregon 232 (warranty of machine held not to extend to pulleys used in its operation). See also *Cyclone Steam Snow-plow Co. v. Vulcan Iron Works*, 52 Fed. Rep. 920, 10 U. S. App. 387.

An undertaking to furnish machinery "adapted to and suitable for the boat and that would drive her from twelve to fifteen miles per hour" cannot be construed as an agreement to furnish machinery that would propel the boat "as she was" at that speed, but merely machinery adequate to propel a boat of her size at that rate; the seller is not responsible for the sufficiency of the machinery after it is put in. *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737. See also *McGraw v. Fletcher*, 35 Mich. 104.

**An Agreement to Furnish a "First Class" Machine** does not mean the best machine made by the manufacturer who makes the agreement, but means a first class machine as compared with those of like kind in general use. *Van Winkle v. Wilkins*, 81 Ga. 93, 12 Am. St. Rep. 299.

6. *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590. See also *Bancroft v. San Francisco Tool Co.*, (Cal. 1897) 47 Pac. Rep. 684.

**Furnace "Ready for Use."**—An undertaking to place in the buyer's house a furnace of a specified heating capacity and "ready for use" is to be construed as a warranty that the furnace will heat the house satisfactorily, and is broken if the furnace proves unsuitable



c. OF HORSES. — While the courts readily regard any material representation in such sales as a warranty, there is no rule of law justifying a liberal construction of the language used in favor of either party, but the words are to be given their usual and ordinary meaning.<sup>1</sup>

d. OF BREEDING CAPACITY OF ANIMALS. — Unless the peculiar language of the contract calls for a different construction, a warranty of the breeding capacity of an animal is to be construed as meaning that he is an average breeder.<sup>2</sup> And when it appears that the average in a particular breed is less than that in others, the warranty of an animal of that breed is to be interpreted in the light of that fact.<sup>3</sup>

4. Province of Court and Jury. — When the contract is in writing, the question as to the proper construction and interpretation of the writing is one for the court.<sup>4</sup> The same is true, ordinarily, where the terms of the contract, though not expressed in writing, have been clearly established.<sup>5</sup> It is the province of the jury to determine what the terms of the warranty were when they are in dispute,<sup>6</sup> and there is authority for the view that, in the case of oral contracts, it is for the jury to say whether certain representations amounted to a warranty, since, in such cases, it is often a question of the

either because it fails to supply sufficient heat or because it emits noxious gases. *Fuller-Warren Co. v. Shurts*, 95 Wis. 606.

1. See *supra*, this title, *Warranty in Particular Sales*.

**Applications of the Rule.** — A statement that "he is a good horse to work — a good substantial honest horse," cannot be construed as a warranty of soundness, but relates merely to the animal's disposition. *Hardy v. Anderson*, 7 Kulp (Pa.) 396.

A representation, made on the sale of a horse, that he is fourteen years old, is a warranty that he is no older. *Burge v. Stroberg*, 42 Ga. 89.

The statement in a note that it was given for "one black horse about seven years old, a little thick winded," is not an express warranty that the horse is sound or that the defect mentioned would not injure him. *Bullard v. Brewer*, 118 Ga. 918.

A receipt reading: "Received from A the sum of £60 for a black horse rising five years, quiet to ride and drive and warranted sound up to this date," is not a warranty that he is quiet to ride and drive. *Anthony v. Halstead*, 37 L. T. N. S. 433.

**Warranties Relating to Age or Soundness.** — A writing which recites: "Received of B. £10 for a gray four year old colt, warranted sound," is a warranty of soundness merely and not of age. *Budd v. Fairman*, 8 Bing. 48, 21 E. C. L. 217, 5 C. & P. 78, 24 E. C. L. 221.

So, where the advertisement read: "To be sold, a black gelding four years old, warranted," the statement as to age is to be regarded merely as a description and the warranty is to be construed as limited to soundness. *Richardson v. Brown*, 1 Bing. 344, 8 E. C. L. 540; *Willard v. Stevens*, 24 N. H. 271.

2. *Hefner v. Haynes*, 89 Iowa 616 ("every horse a breeder"); *Conneautville First Nat. Bank v. Robinson*, 105 Iowa 463 (a "foal-getter"); *Brown v. Doyle*, 69 Minn. 546.

But a statement, made with reference to an untried stallion, that "he will make his mark as a breeder" cannot be construed as a warranty that he is an average breeder. It is no

warranty at all. *Roberts v. Applegate*, 153 Ill. 210.

3. *Glidden v. Pooler*, 50 Ill. App. 36. In this case a Percheron stallion was warranted to be a "sure foal-getter." It being shown that stallions of the Percheron breed did not, on an average, get in foal more than five per cent. of the mares served, it was held that the warranty must be construed as having been given with that fact in view.

4. **Construction of Written Warranty a Question for the Court.** — *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56; *Stroud v. Pierce*, 6 Allen (Mass.) 416; *Brown v. Bigelow*, 10 Allen (Mass.) 244; *Halliday v. Briggs*, 15 Neb. 223; *Wason v. Rowe*, 16 Vt. 525; *Behn v. Burness*, 3 B. & S. 751, 113 E. C. L. 751.

5. *Short v. Woodward*, 13 Gray (Mass.) 86.

In *McClintock v. Emick*, 87 Ky. 167, the court said: "We are aware that some cases seem to draw a distinction between written and parol contracts, holding that if the contract be in writing, it is for the court to say whether there was a warranty; but if in parol, that is for the jury to determine. We see no reason for this distinction where it is clear, in the case of an oral contract, that the vendor has warranted the condition of the property."

6. **Province of the Jury.** — *Kankakee Stone, etc., Co. v. Ugrow*, 36 Ill. App. 448; *Tuttle v. Brown*, 4 Gray (Mass.) 457, 64 Am. Dec. 80; *Connoble v. Clark*, 38 Mo. App. 476; *Patrick v. Leach*, 8 Neb. 530; *Congar v. Chamberlain*, 14 Wis. 258; *Boothby v. Scales*, 27 Wis. 626; *Foster v. Smith*, 18 C. B. 156, 86 E. C. L. 156.

Linseed delivered to the buyer under a warranty by the seller that it was "Calcutta linseed" contained 15 per cent. of other seeds. "Calcutta linseed," at the time the contract was made, contained, as a rule, less than 3 per cent. of other seeds. It was held proper to submit to the jury whether this was such an adulteration, or admixture of foreign substances, as would alter the distinctive character of the article and prevent its being salable as "Calcutta linseed" and whether this adulteration was such as might reasonably have been

intention of the parties.<sup>1</sup>

**XV. BREACH OF WARRANTY — WHAT CONSTITUTES — 1. Of Warranty of Quality — a. IN GENERAL.** — Any Substantial Failure in the article supplied to the buyer in pursuance of the contract of sale, to come up to the quality or character fixed by the warranty constitutes a breach of the warranty, and proof of it establishes the buyer's right to an action therefor.<sup>2</sup> If there is a failure to furnish goods of the quality warranted, the warranty is broken even though goods of a similar quality and equal or greater value are furnished.<sup>3</sup> The existence of a breach of the warranty does not depend upon the fact of a pecuniary loss by the buyer.<sup>4</sup>

**Question of Fact.** — Whether there has been a breach of the warranty is largely a question of fact in every case, dependent upon the circumstances proven at the trial, and must, therefore, be left to the determination of the jury,<sup>5</sup> subject to the construction placed upon the warranty by the court.<sup>6</sup>

**No General Rule Covering All Cases May Be Formulated** beyond this, that there must be a reasonable and substantial compliance with the warranty and that a more exact compliance is not ordinarily to be insisted upon.<sup>7</sup>

**The Defect Complained of Must Be Shown to Have Existed at the Time the Warranty Was Given** or to have resulted as a natural and necessary consequence of a defect which existed, either actually or potentially, at such time, otherwise no breach

contemplated. *Wieler v. Schilizzi*, 17 C. B. 619, 84 E. C. L. 619, 25 L. J. C. Pl. 89.

**1. Where Existence of Warranty Depends on Intention or Understanding of Parties.** — *Bradford v. Bush*, 10 Ala. 386; *Duffee v. Mason*, 8 Cow. (N. Y.) 25; *Hawkins v. Pemberton*, 51 N. Y. 199, 10 Am. Rep. 595.

**The Scope and Extent of the Warranty** is peculiarly a matter for the jury where the agreement is not in writing and the testimony is conflicting. *Thornton v. Thompson*, 4 Gratt. (Va.) 121. See also *Williams v. Cannon*, 9 Ala. 348; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Figge v. Hill*, 61 Iowa 430; *Starnes v. Erwin*, 10 Ired. L. (32 N. Car.) 226.

**2. Any Substantial Failure to Comply with Warranty a Breach.** — *Walter A. Wood Mowing, etc., Mach. Co. v. Irons*, 10 Ind. App. 454; *Seiberling v. Tatlock*, 13 Ind. App. 345; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa 556; *Aultman-Taylor Machinery Co. v. Ridenour*, 96 Iowa 638; *Keystone Mfg. Co. v. Yeager*, (Ky. 1900) 55 S. W. Rep. 682; *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42; *Allington, etc., Mfg. Co. v. Detroit Reduction Co.*, (Mich. 1903) 95 N. W. Rep. 562; *Schoenberg v. Loker*, 88 Mo. App. 387; *J. R. Alsing Co. v. New England Quartz, etc., Co.*, 66 N. Y. App. Div. 473, *affirmed* 174 N. Y. 536; *Van Pub. Co. v. Westinghouse*, 72 N. Y. App. Div. 121; *Rockwell Mfg. Co. v. Cambridge Springs Co.*, 21 Pa. Co. Ct. 248; *Trapp v. New Birdsall Co.*, 109 Wis. 543.

**A Defect in Any Substantial Part of a Machine** or similar article, which prevents its working well, is a breach of the entire warranty that it will work well. *Giles v. San Antonio Foundry Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1020.

**3.** *Walker v. Gooch*, 48 Fed. Rep. 656; *Nichol v. Godts*, 10 Exch. 191, 23 L. J. Exch. 314; *Lovegrove v. Fisher*, 2 F. & F. 128.

But the acceptance of the goods so furnished will operate as a waiver of the breach when it is done with full knowledge of the facts. *R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464.

**4.** *Muller v. Eno*, 14 N. Y. 597. See also

*Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672.

There must, however, be a breach of the warranty in a substantial respect; if there is merely a partial failure of the article to come up to the warranty, which is not shown to have caused any damage to the buyer, he cannot recover. *Sharp v. Sturgeon*, 66 Mo. App. 191.

**5.** *Marshall v. Keefe*, (Cal. 1893) 34 Pac. Rep. 89; *Woodruff v. Weeks*, 28 Conn. 328 (warranty of working cattle); *Russell v. Crutenden*, 53 Conn. 564; *Lanz v. Wachs*, 50 Ill. App. 262; *Avery Planter Co. v. Rigg*, 56 Ill. App. 599; *Bodurtha v. Phelon*, 2 Allen (Mass.) 347 (warranty of horse's gentleness); *Berry v. Walter A. Wood Mowing, etc., Mach. Co.*, 62 Mo. App. 41; *Van Pub. Co. v. Westinghouse*, 72 N. Y. App. Div. 121; *Hutchinson v. Doyle*, 170 N. Y. 577; *Whitaker v. Alexander Lumber Co.*, 3 Pa. Super. Ct. 325; *Eastern Ice Co. v. King*, 86 Va. 97; *Elliott v. Puget Sound, etc., Steamship Co.*, 22 Wash. 220; *Coltherd v. Puncheon*, 2 Dowl. & R. 10, 16 E. C. L. 65 (warranty that horse is a "good drawer").

**6.** See *supra*, this title, *Construction and Interpretation of Warranties*.

**7. Reasonable Compliance with Warranty Sufficient.** — *Walker v. Gooch*, 48 Fed. Rep. 656; *Colorado Dry Goods Co. v. W. P. Dunn Co.*, 18 Colo. App. 409; *Tennessee Lumber Co. v. Garrison*, (Pa. 1888) 13 Atl. Rep. 454; *Eastern Ice Co. v. King*, 86 Va. 97.

**A Technical but Unsubstantial Compliance with the Warranty Not Sufficient.** — Thus, where rags are sold with a warranty that they are fit to be manufactured into paper, the warranty is broken if they cannot be so used without seriously endangering the health or lives of the buyer's employees. *Dushane v. Benedict*, 120 U. S. 630.

**A Warranty Given upon the Sale of Book Accounts** that they are due and unpaid is broken if they have been paid or were never in fact contracted. *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241.

**The Death of a Stallion Warranted to Be a Good**

of the warranty is proven.<sup>1</sup> An apparent exception to this rule exists, however, in cases when a vehicle or machine or like article is warranted for a specific period of time.<sup>2</sup>

When Goods Are Sold Not Only by Sample but by Description as Well,<sup>3</sup> with a warranty that they shall correspond with both the description and the sample, it is not a sufficient compliance with the warranty that the bulk of the goods corresponds with the sample; there is a breach of the warranty if they fail to meet the description, and the buyer may retain them and maintain an action on the warranty arising from the description.<sup>4</sup>

*b. AS AFFECTED BY SPECIAL PROVISIONS OF CONTRACT.* — The contract of sale may provide specifically that compliance with certain prescribed tests shall be conclusive evidence of the fulfilment of the warranty; such provisions are now frequently incorporated into contracts for the sale of various kinds of machinery.<sup>5</sup> The contract may also provide that the purchaser shall determine, within a certain length of time, whether the article furnished to him complies with the warranty, and that a failure by him to make objection within that time shall be conclusive evidence that there was no breach of the warranty.<sup>6</sup> In such a case, the buyer cannot insist upon being allowed what would otherwise be a reasonable time, but must abide by the express provisions of his contract.<sup>7</sup> Such a stipulation may, however, be waived by the seller

**Breeder** does not operate as a breach of the warranty although it occurs within two years of the sale and the agreement provided that he should not be considered as fully tested until two years had passed. *Scroggin v. Wood*, 87 Iowa 497.

**1. Defect Must Have Existed at Time of Sale.** — *Moran v. Prather*, 23 Wall. (U. S.) 492; *Bowman v. Clemmer*, 50 Ind. 10; *Hall v. Plasan*, 19 La. Ann. 11; *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691; *White v. Stelloh*, 74 Wis. 435; *Geddes v. Pennington*, 5 Dow. 164 (warranty that horse is gentle); *Bailey v. Forrest*, 2 C. & K. 131, 61 E. C. L. 131. See also *supra*, this title, *Construction and Interpretation of Warranties*.

The principle of the text has been often upheld in cases holding that a warranty that a slave is "a slave for life" is not broken by the subsequent emancipation of the negro by the act of the government abolishing slavery. *Walker v. Gatlin*, 12 Fla. 9; *Bradford v. Jenkins*, 41 Miss. 328; *Whitworth v. Carter*, 43 Miss. 61; *Wilkinson v. Cook*, 44 Miss. 367. See also *Mittelholzer v. Fullarton*, 6 Q. B. 989, 51 E. C. L. 989; *Osborn v. Nicholson*, 13 Wall. (U. S.) 654.

**2. Articles Warranted for a Specific Period.** — *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Null v. Watkins*, 60 Ill. App. 256.

**3.** See *supra*, this title, X. 2. *Sales by Description*. See also the title IMPLIED WARRANTIES, vol. 15, p. 1225.

**4. Goods Must Correspond with Both Description and Sample.** — *Miamisburg Twine, etc., Co. v. Wohlhuter*, 71 Minn. 484; *Wood v. Michaud*, 63 Minn. 478; *Morse v. Moore*, 83 Me. 473, 23 Am. St. Rep. 783; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. Rep. 455; *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. Rep. 563; *Josling v. Kingsford*, 13 C. B. N. S. 447, 106 E. C. L. 447; *Nichol v. Godts*, 10 Exch. 191, 23 L. J. Exch. 314.

Under a sale by description, the goods must

not only answer the description in fact but must be salable or merchantable under that description. *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Jones v. Just*, L. R. 3 Q. B. 197, 9 B. & S. 141.

**5. Stipulation that Certain Tests Shall Determine Whether Warranty Has Been Fulfilled.** — *Aultman v. Wykle*, 36 Ill. App. 293; *Bayliss v. Hennessey*, 54 Iowa 11; *Staver v. Rogers*, 3 Wash. 603; *Sharp v. Great Western R. Co.*, 9 M. & W. 7.

**Test Within Prescribed Time Impossible.** — Where the contract for the sale of a heating plant contained a warranty, but stipulated that the buyer should determine its sufficiency before the first day of the next year, evidence is admissible to show that there was no weather prior to that date sufficiently cold to test the plant, and that after that time, when the test was made, it failed to work as warranted. *Richardson, etc., Co. v. Independent Dist.*, 70 Iowa 573.

**6. Stipulation as to Buyer's Failure to Object Within Specified Time.** — *Potter v. Lee*, 94 Mich. 140; *Tete v. Eshler*, 11 Pa. Super. Ct. 224; *Sharp v. Great Western R. Co.*, 9 M. & W. 7. See also *Lee v. Newman*, 15 S. Dak. 642.

**Acceptance and Use After Expiration of Time Fixed for Test.** — *Compare Underwood v. Wolf*, 131 Ill. 435, 19 Am. St. Rep. 43. It was there said: "In the present case, the contract is executory; the title to the property did not vest in the purchaser until the period for making the test had passed. It has been held in some states that where the contract is thus executory, and a time is fixed for making a test, the acceptance and use of the property after such time has passed amount to a waiver of the right to claim damages for a breach of the warranty. But such is not the law in this state." See also *Prairie Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. Rep. 621.

**7. Stipulation Fixing Time Must Control.** — *Aultman v. Wykle*, 36 Ill. App. 293.



or by one to whom he has sold the purchase-money notes,<sup>1</sup> and is impliedly waived by the seller's inducing the buyer to retain the article by promises to remedy the defects or by other means.<sup>2</sup>

*c. IN SALES OF HORSES.* — The general subject of what constitutes a vice or unsoundness in horses has been considered in a prior article.<sup>3</sup> When the animal is sold for breeding purposes and is warranted as a breeder, the warranty is broken if he fails to prove an average breeder.<sup>4</sup> The question as to whether an animal is such a breeder is to be determined not merely from the actual results obtained; the class and breed to which he belongs are to be considered.<sup>5</sup>

*d. SELLER'S RIGHT TO REMEDY BREACH.* — Up to the time when the completed transfer of title and possession takes place, the seller has the right to remedy any defects for the purpose of making the article comply with his warranty.<sup>6</sup> But after such time he has no such right in the absence of a special provision therefor in the contract of sale, and the buyer may exercise his remedies for a breach of the warranty without giving the seller an opportunity to remedy defects.<sup>7</sup>

**2. Of Warranty of Title — Necessity of Eviction.** — There is a great contrariety of judicial opinion as to whether an express warranty of title in the sale of personal property is like a covenant of warranty in the sale of land and therefore not broken until an eviction of the buyer by one holding a superior title, or like a covenant of seisin which is broken as soon as made if the seller had no title to convey.<sup>8</sup> It has been held that there is a difference, in this respect, between an implied warranty of title and an express warranty, and that the former is like a covenant of seisin in the sale of realty while the latter is not broken until an actual eviction of the buyer.<sup>9</sup> But there appears to be no sound basis for this distinction.

In New York and one or two other jurisdictions, the rule is that, in order to maintain an action for a breach of warranty of title, the buyer is not obliged to wait until he has been actually dispossessed; it is enough to show that he could not withhold possession of the property without becoming a wrongdoer.<sup>10</sup>

**1. Stipulation May Be Waived.** — *Lee v. Neumen*, 15 S. Dak. 642.

**2. Implied Waiver by Seller.** — *Kenney v. Bevilheimer*, 158 Ind. 653; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Snody v. Shier*, 88 Mich. 304; *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183. See also *infra*, this title, XVI. *Waiver of Warranty or Breach*; XVII. *Remedies for Breach of Warranty*; 2. *h.* (5) (a) *Notice of Defects*.

**3.** See *HORSES*, vol. 15, p. 754. See also *Staats v. Byers*, 68 N. Y. App. Div. 634, 174 N. Y. 508; *McCann v. Ullman*, 109 Wis. 574.

**4. Horse Sold for Breeding Purposes.** — *Glidden v. Pooler*, 50 Ill. App. 36; *McCorkell v. Karhoff*, 90 Iowa 545 (warranty broken when horse scores only eight colts from fifty-five mares); *Conneautsville First Nat. Bank v. Robinson*, 105 Iowa 463; *Brown v. Doyle*, 69 Minn. 543; *Davis v. Iverson*, 5 S. Dak. 295; *Snyder v. Baker*, (Tex. Civ. App. 1896) 34 S. W. Rep. 981. See also *supra*, this title, *Construction and Interpretation of Warranties*.

**In Sale of Sheep — Pregnancy.** — The fact that ewes are pregnant is no breach of a warranty that they are in a "healthy condition." *Olsen v. Port Huron Live Stock Assoc.*, 18 Mont. 392.

**5.** *Glidden v. Pooler*, 50 Ill. App. 36.

**6.** *Black v. Herbert*, 111 Mich. 638 (warranty of grave stone to be set up in cemetery).

**7.** *Russell v. Hudson*, (Tenn. Ch. 1896) 37 S. W. Rep. 1001. See also *infra*, this title, XVII. *Remedies for Breach of Warranty — Opportunity to Remedy Defects*.

**A Provision that if There Is Anything Further Necessary** to be done, the seller will do it free of charge, contained in a contract for the sale of a furnace, does not make the existence of a breach conditional upon the seller's failing to keep his promise; there may be a breach independently of such a failure by him. *Tower v. Pauly*, 67 Mo. App. 632.

**8.** See the title *IMPLIED WARRANTIES*, vol. 15, p. 1252.

**9.** *Brown v. Smith*, 5 How. (Miss.) 396, *distinguishing* *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 218. See also *Payne v. Redden*, 4 Bibb (Ky.) 304, 7 Am. Dec. 739.

**10. Proof of Actual Eviction Unnecessary.** — *Young v. Lillard*, 1 A. K. Marsh. (Ky.) 481; *Dent v. McGrath*, 3 Bush (Ky.) 174; *Dryden v. Kellogg*, 2 Mo. App. 87; *Cahill v. Smith*, 101 N. Y. 355. Compare *O'Brien v. Jones*, 91 N. Y. 193.

"To hold that a purchaser of personal property must become a wrongdoer by withholding it from the true owner, and compel him to resort to an action for its recovery to entitle him to redress for a breach of warranty of title, would be absurd. Such a rule cannot be supported by reason or sound policy." *Bordwell*

But this view seems not always to have been adhered to.<sup>1</sup>

**The Generally Accepted Rule** is that there is no breach of the warranty of which the buyer may complain or of which he may take advantage by way of defense, in the absence of fraud, until an actual or constructive dispossession.<sup>2</sup>

**The Recovery, in Trover, of the Value of the Property Sold**, from the buyer or his personal representative, constitutes a breach of the warranty of title without regard to whether the buyer's actual possession has been interfered with<sup>3</sup> and without proof that the judgment so recovered had been paid.<sup>4</sup>

**If the Buyer Is Disposessed by a Vis Major**, there can be no recovery by him as for a breach of warranty of title in the absence of proof that the taking was under a valid claim of title superior to that of the seller.<sup>5</sup>

**Proof of the Existence of a Mortgage in force at the time of the sale under which the mortgagee has subsequently taken possession of the property by a statutory proceeding for foreclosure**,<sup>6</sup> or which the buyer was compelled, after the sale to him, to satisfy in order to avoid foreclosure proceedings,<sup>7</sup> is sufficient to justify a recovery for breach of a warranty of title.

**A Warranty of Title Embraces any After-acquired Title or right of the seller and causes it to enure to the benefit of his purchaser to whom he gave the warranty.** The seller cannot, therefore, assign, for example, his right to a patent and then buy or secure control of an older or superior patent and by this means deprive his assignee of the full benefits of his purchase.<sup>8</sup>

**When the Buyer Resells** the article sold to him under a warranty of title, he cannot recover on the warranty without showing an eviction of his purchaser

*v. Collie*, 45 N. Y. 495, affirming 1 Lans. (N. Y.) 141. See also *McGiffin v. Baird*, 62 N. Y. 329.

**The Exact Extent of the Warranty Must Be Considered**; if the seller undertakes to confer title and to give possession, there is no breach merely because, after possession given to the buyer, a third person claims the property and the buyer surrenders it to him. *Jones v. Hood*, (Tex. Civ. App. 1898) 46 S. W. Rep. 71.

**A Warranty of Title upon the Transfer of Stock** is broken where the seller had not paid it up in full. *Jamison v. Harbert*, 87 Iowa 186.

1. In *Case v. Hall*, 24 Wend. (N. Y.) 103, 35 Am. Dec. 605, the court, in holding that mere notice of an adverse claim was no breach of the warranty of title and that there must first be a recovery against the seller or buyer by the real owner, said: "In case of a breach of warranty, the measure of damages is the purchase money and interest. Now it would be highly inequitable to permit the vendee to retain the possession or enjoy the use of the property thus acquired and put his vendor at defiance. Possibly the owner may never claim and enforce his title, or if he does, the seller may settle with him." This language has since been quoted with approval. *McGiffin v. Baird*, 62 N. Y. 329; *O'Brien v. Jones*, 91 N. Y. 197. In the latter case the rule was declared to be that "when the vendee relies upon it [the warranty] he must either restore to the true owner the property in question, or be prepared to prove its loss under compulsory proceedings, or the payment of money through judgment obtained against him, or voluntarily, in answer to a claim made, and in that case must also affirmatively establish that the claimant was the true owner and that his vendor was without title."

2. **Actual Eviction Necessary.**—*Tipton v. Triplett*, 1 Met. (Ky.) 570; *Municipality No. One*

*v. Cordeviollé*, 19 La. 235; *Close v. Crossland*, 47 Minn. 500; *Storm v. Smith*, 43 Miss. 497; *Morrison v. Edgar*, 16 Mo. 411, 57 Am. Dec. 236; *Higbie v. Rogers*, (N. J. 1901) 48 Atl. Rep. 554, 63 N. J. Eq. 368; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 53 Am. Rep. 783; *Madison v. McCullough*, Rice L. (S. Car.) 38. See also *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554.

Where the title under which a buyer is dispossessed is superior to that of his seller, the breach of the warranty of title occurs upon the dispossession, and his cause of action accrues at once, in advance of the adjudication of the superiority of the dispossessor's title. *Trevino v. Hein*, 2 Tex. Civ. Cas., § 105.

3. *Defreeze v. Trumper*, 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; *Lee v. Gause*, 2 Ired. L. (24 N. Car.) 440. See also *Harris v. Rowland*, 23 Ala. 644.

4. **Proof that Judgment Had Been Paid Not Necessary.**—*Burt v. Dewey*, 31 Barb. (N. Y.) 510.

5. *Osborn v. Nicholson*, 13 Wall. (U. S.) 654 (slave emancipated); *Richardson v. Tipton*, 2 Bush (Ky.) 202 (horse forcibly taken by army officers); *Boyd v. Day*, 3 Bush (Ky.) 617. See also *Lewis v. King*, 1 Bush (Ky.) 419; *Mittelholzer v. Fullarton*, 6 Q. B. 989, 51 E. C. L. 989.

6. **Eviction of Buyer Through Foreclosure Proceedings.**—*Hodges v. Wilkinson*, 111 N. Car. 56. Compare *Close v. Crossland*, 47 Minn. 500.

7. **Satisfaction of Mortgage by Buyer to Avoid Foreclosure.**—*Cahill v. Smith*, 101 N. Y. 355; *Smith v. Ruggles*, 50 Hun (N. Y.) 606, 3 N. Y. Supp. 320.

**A Buyer with Warranty of Title May Discharge an existing lien on the property sold and claim a corresponding reduction of the price he promised to pay.** *Harper v. Dotson*, 43 Iowa 232.

8. *Curran v. Burdsall*, 20 Fed. Rep. 835.

by a superior title and also that he had been compelled to compensate his purchaser for the eviction.<sup>1</sup>

**As Against Judgment Liens.** — Where the seller, although he has no title, expressly covenants to warrant and defend the title against the claims of all persons, and the true owner sues and recovers judgment against the buyer for converting the property, the latter may recover on the covenant of warranty without having first paid the judgment.<sup>2</sup> But the lien of a judgment recovered against the buyer does not, it seems, operate as a breach of the warranty of title, unless such judgment was had in a proceeding in which the warrantor undertook to be concerned or in which he was properly notified to appear and defend.<sup>3</sup>

**XVI. WAIVER OF WARRANTY OR BREACH — 1. By Express Agreement.** — Any warranty, whether express or implied, may be waived by an express agreement on the part of the buyer fairly made,<sup>4</sup> and when such an agreement exists in writing, neither party may show any other prior or contemporaneous understanding.<sup>5</sup> An express waiver, however, is of no effect when its recitals are untrue and the buyer was induced to execute it through fraud on the part of the seller.<sup>6</sup>

**What Constitutes Such a Waiver.** — A waiver of the benefits of the warranty is not readily to be presumed, and the language relied on as constituting such a waiver must be clear and specific.<sup>7</sup> A clause in the purchase-money note given by the buyer waiving all defenses and all exemptions will not operate as a waiver of the defense of breach of express warranties,<sup>8</sup> nor will the buyer's signature to a prepared receipt, which recites that he received the article "in good order as per contract," prevent him from setting up a breach of warranty in the absence of proof that the buyer signed with full knowledge of the facts.<sup>9</sup>

**Stipulations in the Contract of Sale that Certain Conduct Shall Constitute a Waiver,** as, for example, that the buyer's failure to give notice of defects or to allow the seller an opportunity to remedy them shall be a waiver, are binding and effective according to their terms.<sup>10</sup> A common provision in this connection, used principally in the sale of harvesters, is that the retail dealer shall not sell a machine to a customer until he has first settled for the same with the manufacturer from whom he bought and that his breach of this provision of the contract shall operate as a waiver by him of all the warranties made by the manufacturer.<sup>11</sup>

1. *Terrell v. Stevenson*, 97 Ga. 570; *Boyd v. Day*, 3 Bush (Ky.) 617. See also *Myers v. Bowen*, 3 Colo. App. 537.

2. *Hersey v. Long*, 30 Minn. 114. See also *Blasdale v. Babcock*, 1 Johns. (N. Y.) 517.

3. **Judgment Lien No Breach of Warranty When Seller Not Notified.** — *De Witt v. Prescott*, 51 Mich. 298; *Buchanan v. Kauffman*, 65 Tex. 235. See also *Carleton v. Lombard*, 19 N. Y. App. Div. 297; *Cockerell v. Smith*, 1 La. Ann. 1.

The buyer is entitled to recover of the seller for the breach of an express warranty of title to personalty upon proving the recovery of a judgment against his sub-purchaser by one having an adverse title, and of another judgment against himself by his sub-purchaser, and that his seller was notified of the pendency of each suit. In such a case, if the buyer, on being informed that an adverse title to the property was set up, examines that title and expresses himself as satisfied with his own, that fact does not deprive him of his right of action against his seller on the warranty. *Harris v. Rowland*, 23 Ala. 644.

4. **Express Waiver Binding.** — *Robinson v. Berkey*, 100 Iowa 136, 62 Am. St. Rep. 549; *Aultman, etc., Co. v. Donnell*, 9 Kan. App. 813; *Wooldridge v. Royer*, 69 Md. 115; *R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464; *Aultman v. McKinney*, (Tex. Civ. App. 1894) 26 S. W. Rep. 267; *Baer's Sons Grocer Co. v. Cutting Fruit-Packing Co.*, 42 W. Va. 359. See also *Vanderbeek v. Francis*, 75 Conn. 467; *infra*, this title, XVII. 2. h. (5) (a) *Notice of Defects*.

5. *Wooldridge v. Royer*, 69 Md. 115.

6. **Waiver Procured Through Seller's Fraud.** — *Strand v. Griffith*, 97 Fed. Rep. 854, 38 C. C. A. 444.

7. **Waiver Must Be Specific.** — *Fairbanks v. De Lissa*, 36 Mo. App. 711.

8. *Osborne v. McQueen*, 67 Wis. 392. See also *Tunell v. Osborne*, 31 Minn. 343; *Osborne v. Marks*, 33 Minn. 56.

9. **Written Acknowledgment of Receipt of Article "In Good Order."** — *Fairbanks v. De Lissa*, 36 Mo. App. 711.

10. See *infra*, this title, XVII. 2. h. (5) (a) *Notice of Defects*.

11. **Stipulation that Retailer Shall "Settle for"**



2. **By Payment of Price.** — The fact that the buyer, after having used the property for some time, pays the purchase money due or executes his notes therefor does not operate as a waiver of his right of action for a breach of the warranty.<sup>1</sup> This is particularly true where, at the time of executing the notes or paying the price, the buyer expressly announces his intention to claim damages for a breach of the warranty,<sup>2</sup> or where the payment is induced by the seller's promise to remedy the defect or return a part of the purchase money,<sup>3</sup> or by the seller's assurance that the payment will not affect his own liability or the buyer's rights.<sup>4</sup>

**Harvester Before Selling to Customer.** — *Warren, etc., Mfg. Co. v. Watson*, 92 Iowa 759; *Robinson v. Berkey*, 100 Iowa 136, 62 Am. St. Rep. 549.

Such a provision, to the effect that the seller's agent shall not sell a machine until it has "been settled for by cash or note," does not preclude the agent from relying on the warranty when he bought the machine himself, giving his own note therefor, and then sold to his customer without cash or note. *Minnesota Thresher Mfg. Co. v. Wolfram*, 96 Wis. 481.

A provision that the failure of the buyer to settle for the machine at the place of delivery as required by the contract shall constitute a waiver of the warranty is binding, and the buyer cannot escape its effect by showing that the machine was delivered on his premises by the seller without anything being said as to a settlement and that the seller accepted his note for the price some time afterward. *Robinson v. Berkey*, 100 Iowa 136, 62 Am. St. Rep. 549; *Trapp v. New Birdsall Co.*, 99 Wis. 458. See also *Parsons Band-Cutter, etc., Co. v. Mallingier*, 122 Iowa 703.

1. **Payment of Price or Promise to Pay No Waiver** — *United States*. — *Ottawa Bottle, etc., Co. v. Gunther*, 31 Fed. Rep. 208; *Walker v. Gooch*, 48 Fed. Rep. 656; *Johnson v. Roy*, (C. C. A.) 112 Fed. Rep. 256.

*California*. — *Bowers Rubber Co. v. Blasdel*, (Cal. 1897) 47 Pac. Rep. 931.

*Indiana* — *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667.

*Iowa*. — *Aultman v. Wheeler*, 49 Iowa 647; *Toledo Sav. Bank v. Rathmann*, 78 Iowa 288; *Briggs v. M. Rumely Co.*, 96 Iowa 202.

*Kentucky*. — *National Oak Leather Co. v. Armour Cudahy Packing Co.*, 99 Ky. 667.

*Michigan*. — *Stoddard Mfg. Co. v. Miller*, 107 Mich. 51.

*Minnesota*. — *Osborne v. Carpenter*, 37 Minn. 331; *Osborne v. Marks*, 33 Minn. 56.

*Missouri*. — *Courtney v. Boswell*, 65 Mo. 196; *Fadley v. Smith*, 23 Mo. App. 87; *Hayner v. Churchill*, 29 Mo. App. 676; *Nauman v. Oberle*, 90 Mo. 666; *New Birdsall Co. v. Keys*, 99 Mo. App. 458.

*New York*. — *Cassady v. Horton*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 148; *Russell v. Corning Mfg. Co.*, 49 N. Y. App. Div. 610.

*Texas*. — *Aultman, etc., Co. v. Hefner*, 67 Tex. 54.

*Washington*. — *Elliott v. Puget Sound, etc., Steamship Co.*, 22 Wash. 220.

*Wisconsin*. — *Park v. Richardson, etc., Co.*, 81 Wis. 399.

*Compare* *Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co.*, (C. C. A.) 48 Fed.

Rep. 803; *Bretz v. Fawcett*, 29 Ill. App. 319; *McCormick Harvesting Mach. Co. v. Martin*, 32 Neb. 723; *Osborne v. Birdsall*, 57 N. Y. App. Div. 41; *Blue Springs Min. Co. v. McIlvian*, 97 Tenn. 225.

A buyer, on using a machine, found a part defective, and thereupon wrote to the seller for a new part, at the same time advising him that if this part was sent, he (the seller) might draw on him for the price of the machine. Later, other defects developed. It was held that his request for a new part and his subsequent payment of the price were no waiver of his rights under the warranty. *Latham v. Shipley*, 86 Iowa 543.

**When the Warranty Is that a Machine Will Do Good Work**, and the buyer after using it for two years promises unconditionally to pay for it, the promise will be considered as an admission that the warranty has been fully complied with. *Deering Harvester Co. v. Streeper*, 16 Montg. Co. Rep. (Pa.) 41, 14 York Leg. Rec. (Pa.) 36. See also *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38.

2. *Aultman v. Wheeler*, 49 Iowa 647; *Davis Provision Co. v. Fowler*, 163 N. Y. 580, *affirming* 20 N. Y. App. Div. 626.

**Remitting Amount of Price Less Damages** claimed for a breach of the warranty is no waiver. *National Oak Leather Co. v. Armour-Cudahy Packing Co.*, 99 Ky. 667.

3. **Payment Induced by Seller's Promise to Remedy Defects.** — *Kingman v. Meyer*, 70 Ill. App. 476; *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667; *Mallory Commission Co. v. Elwood*, 120 Iowa 632; *South Bend Pulley Co. v. W. E. Caldwell Co.*, (Ky. 1900) 55 S. W. Rep. 208, *affirming* (Ky. 1899) 54 S. W. Rep. 12; *Munford v. Kevil*, 109 Ky. 246; *Osborne v. Carpenter*, 37 Minn. 331; *McCormick Harvesting Mach. Co. v. McNicholas*, 66 Minn. 384; *Seymour v. Phillips*, 61 Neb. 282; *Aultman, etc., Co. v. Hefner*, 67 Tex. 54.

In *Kingman v. Meyer*, 70 Ill. App. 476, the buyer was allowed to recover damages two years after the sale and after the seller had recovered and collected a judgment on notes given for the purchase money, the giving of the notes having been induced by the seller's promise to remedy certain defects, which promise he failed to keep.

4. **Seller's Assurance that Execution of Notes Will Not Affect Warranty.** — *Harrison v. Crocker*, 30 Wis. 68.

The rule of the text is true even though the contract of sale contains a stipulation that the giving of notes should be a confession that the warranty was complied with. *Aultman v. Richardson*, 21 Ind. App. 211.

The case of *Wooldridge v. Royer*, 69 Md.

The Fact that the Buyer Makes Demands for Repairs, for which he pays upon their being made, does not amount to a waiver of his rights under the warranty.<sup>1</sup>

The Fact that the Buyer Was Aware of a Breach of the Warranty When He Paid,<sup>2</sup> or that there were evidences of a breach which ought to have put him on inquiry,<sup>3</sup> will not alter the general rule that payment of the price does not amount to a waiver of the warranty. Nor will his executing notes in renewal of prior notes given for the purchase money and his delivery of such renewal notes after knowledge of a breach of the warranty affect his right to claim a set-off on account of the breach when sued on the notes.<sup>4</sup>

Securing an Extension of Time on Notes Given for the Price does not operate as a waiver of any rights under the warranty, but it affords a valid consideration to support an actual waiver,<sup>5</sup> and such a fact, or the fact of payment or of giving notes for the price, may be submitted to the jury as an evidential fact in connection with other testimony<sup>6</sup> and as creating a presumption that the warranty had been complied with.<sup>7</sup>

**3. Buyer's Receipt and Retention of Article** — *a. WHERE CONTRACT IS EXECUTED.* — In many jurisdictions the buyer, after the contract has become an executed one, is not entitled to rescind for a breach of warranty, but is left to his remedy by an action for damages.<sup>8</sup> Where this is true, his retention of the article is compulsory, and therefore clearly is not a waiver of his rights under the warranty.<sup>9</sup> Independently of this, however, the general rule is that the buyer's receipt and retention of the article sold will not, in the absence of a specific provision to the contrary in the contract of sale, operate as a waiver of the warranty in any degree.<sup>10</sup>

113, which is sometimes cited as opposing the rule of the text, was one in which the buyer, in the notes given by him for the price, expressly waived any claim on the warranty.

**Giving Notes with Collateral Security** is no more a waiver than the giving of unsecured notes. *Aultman, etc., Co. v. Hefner*, 67 Tex. 54.

1. *Latham v. Shipley*, 86 Iowa 543.

2. *Gilmore v. Williams*, 162 Mass. 351; *Osborne v. Marks*, 33 Minn. 56 (buyer renewing notes after knowledge of breach of the warranty). Compare *Lunsford v. Malsby*, 101 Ga. 39.

3. *Nauman v. Ullman*, 102 Wis. 92.

4. *McClure v. Williams*, 65 Ill. 390; *Wheeler v. Berkeley*, 138 Ill. 153; *Elliott v. Puget Sound, etc., Steamship Co.*, 22 Wash. 220.

5. **Securing an Extension of Time on Notes a Consideration to Support an Actual Waiver.** — *Fairbanks v. Baskett*, 98 Mo. App. 53.

6. **Payment or Giving Notes an Evidential Fact for Jury.** — *Johnson v. Roy*, (C. C. A.) 112 Fed. Rep. 256; *Fairbanks v. Baskett*, 98 Mo. App. 53.

7. *Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co.*, (C. C. A.) 48 Fed. Rep. 803.

**For the Purpose of Precluding Any Inference of a Waiver arising out of the fact of payment**, the buyer may show that the payments were made by drafts which were drawn on him by the seller with bills of lading attached which he was required to pay before getting the goods. *Tillyer v. Van Cleve Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

8. See *infra*, this title, XVII. 2. b. (1) *Right to Rescind*.

9. See *Lyon v. Bertram*, 20 How. (U. S.) 149; *Miles v. Withers*, 76 Mo. App. 87.

10. **Buyer's Retention of Article No Waiver** —

*United States.* — *Reynolds v. Palmer*, 21 Fed. Rep. 433; *Walker v. Gooch*, 48 Fed. Rep. 656; *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451.

*Alabama.* — *Kornegay v. White*, 10 Ala. 255; *Frith v. Hollan*, 133 Ala. 583, 91 Am. St. Rep. 54.

*Arkansas.* — *Plant v. Condit*, 22 Ark. 454; *Weed v. Dyer*, 53 Ark. 155.

*Georgia.* — *Woodruff v. Graddy*, 91 Ga. 333, 44 Am. St. Rep. 33; *Snowden v. Waterman*, 105 Ga. 384; *Cook v. Finch*, 117 Ga. 541.

*Illinois.* — *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40; *Morris v. Wibaux*, 159 Ill. 627; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, *reversing* 77 Ill. App. 59; *McMillan v. DeTamble*, 93 Ill. App. 65.

*Indiana.* — *Ferguson v. Hosier*, 58 Ind. 438; *McCormick Harvesting Mach. Co. v. Hays*, 89 Ind. 582; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156; *Kenney v. Bevilheimer*, 158 Ind. 653; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Merchants', etc., Sav. Bank v. Fraze*, 9 Ind. App. 161; *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667.

*Iowa.* — *Aultman v. Wheeler*, 49 Iowa 647; *Short v. Matteson*, 81 Iowa 638; *Love v. Ross*, 89 Iowa 400; *Hefner v. Haynes*, 89 Iowa 616; *Elwood v. McDill*, 105 Iowa 437; *Bixby v. Denison Normal School Assoc.*, (Iowa 1899) 78 N. W. Rep. 234.

*Kansas.* — *Graff v. Osborne*, 56 Kan. 162.

*Maine.* — *Morse v. Moore*, 83 Me. 473, 23 Am. St. Rep. 783.

*Maryland.* — *Lane v. Lanty*, 27 Md. 211.

*Massachusetts.* — *Gould v. Stein*, 149 Mass. 577, 14 Am. St. Rep. 455.

*Michigan.* — *Kimball, etc., Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558; *Weston*

The Fact that the Buyer Resold the Article bought by him,<sup>1</sup> or that he had executed a chattel mortgage on it,<sup>2</sup> does not affect his right to an action for a breach of the warranty, though it operates, necessarily, as a waiver of his right to rescind.

There Is a Presumption, After the Acceptance and Retention of Goods by the Buyer, that they were of the quality and character ordered, and the burden is on him, when he claims a breach of warranty, to prove, by a preponderance of the evidence, that a breach has occurred.<sup>3</sup>

*v. Card*, 96 Mich. 373; *John A. Roebling's Sons Co. v. Winthrop Hematite Co.*, 70 Mich. 346; *Avery v. Burrall*, 118 Mich. 672. See also *Maxted v. Fowler*, 94 Mich. 106.

*Minnesota*.—*Osborne v. Marks*, 33 Minn. 56; *Osborne v. Carpenter*, 37 Minn. 331; *Gaar v. Patterson*, 65 Minn. 449; *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161.

*Mississippi*.—*Stillwell, etc., Co. v. Biloxi Canning Co.*, 78 Miss. 779.

*Missouri*.—*Ross v. Barker*, 30 Mo. 385; *Edwards v. Noel*, 88 Mo. App. 434; *Redlands Orange Growers' Assoc. v. Gorman*, 161 Mo. 203; *Martin v. Maxwell*, 18 Mo. App. 176; *Fadley v. Smith*, 23 Mo. App. 87; *Werner v. O'Brien*, 40 Mo. App. 483; *Long v. J. K. Armsby Co.*, 43 Mo. App. 253; *Danforth v. Crookshanks*, 68 Mo. App. 311; *Osborne v. Henry*, 70 Mo. App. 19; *June v. Falkinburg*, 89 Mo. App. 563; *Roth v. Continental Wire Co.*, 94 Mo. App. 236; *Fairbanks v. Baskett*, 98 Mo. App. 53; *New Birdsall Co. v. Keys*, 99 Mo. App. 458.

*Nebraska*.—*McConnell v. Lewis*, 58 Neb. 188; *Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co.*, (Neb. 1902) 91 N. W. Rep. 863; *Seymour v. Phillips*, 61 Neb. 282.

*New York*.—*Rust v. Eckler*, 41 N. Y. 488; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Kent v. Friedman*, 101 N. Y. 616; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 261, 16 Am. St. Rep. 753; *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72; *Chase v. Evarts*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 987; *Spedding v. Townsend*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 657; *Ames v. Norwich Light Co.*, 22 N. Y. App. Div. 249; *Rose v. Wells*, 36 N. Y. App. Div. 593; *Lichtenstein v. Rabolinsky*, 75 N. Y. App. Div. 66; *Bell v. Mills*, 78 N. Y. App. Div. 42; *Meagley v. Hoyt*, 88 Hun (N. Y.) 328.

*North Carolina*.—*Cox v. Long*, 69 N. Car. 7; *Lewis v. Rountree*, 78 N. Car. 323.

*North Dakota*.—*Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. Dak. 81; *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. Rep. 563.

*Ohio*.—*Fred. W. Wolf Co. v. Sheriff St. Market, etc., Co.*, 11 Ohio Cir. Dec. 582. *Compare Smith v. Sipe*, 11 Ohio Dec. (Reprint) 275, 25 Cinc. L. Bul. 394.

*Pennsylvania*.—*Wycoff v. Artley*, 142 Pa. St. 467; *Joseph v. Richardson*, 2 Pa. Super. Ct. 208, 38 W. N. C. (Pa.) 487; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85.

*Rhode Island*.—*R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464.

*Tennessee*.—*Garr v. Young*, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

*Texas*.—*Bonham Cotton Press Co. v. McKellar*, 86 Tex. 694; *Evans v. Goggan*, 5 Tex.

*Civ. App.* 129; *Hayden v. Houghton*, (Tex. Civ. App. 1894) 24 S. W. Rep. 803; *McGill v. Hall*, (Tex. Civ. App. 1894) 26 S. W. Rep. 132; *Seley v. Parker*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1026; *Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53; *Houchins v. Williams*, (Tex. Civ. App. 1894) 25 S. W. Rep. 730; *Taylor Cotton-Seed Oil, etc., Co. v. Pumphrey*, (Tex. Civ. App. 1895) 32 S. W. Rep. 225; *J. I. Case Threshing Mach. Co. v. Hall*, (Tex. Civ. App. 1903) 73 S. W. Rep. 835.

*Vermont*.—*Houghton v. Carpenter*, 40 Vt. 588; *Gilson v. Bingham*, 43 Vt. 410, 5 Am. Rep. 289.

*Wisconsin*.—*Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Morehouse v. Comstock*, 42 Wis. 626; *Osborne v. McQueen*, 67 Wis. 392; *Park v. Richardson, etc., Co.*, 81 Wis. 399; *Larsen v. Aultman, etc., Co.*, 86 Wis. 281, 39 Am. St. Rep. 803; *Nauman v. Ullman*, 102 Wis. 92; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *Aultman Co. v. McDonough*, 110 Wis. 263; *Weeks v. Robert A. Johnson Co.*, 116 Wis. 105; *Wau-paca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co.*, 112 Wis. 469.

*Compare Hercules Iron Works v. Dodsworth*, 57 Fed. Rep. 556; *C., etc., Electric Motor Co. v. Frisbie*, 66 Conn. 67; *Tryon v. Plumb*, 20 N. Y. App. Div. 530.

The Fact that the Buyer Afterwards Bought Other Similar Articles from the Seller, with knowledge of the breach of warranty of the first article, without insisting on the payment of damages for such breach, is no waiver of the breach, and the buyer may, in an action by the seller to recover the price of the later articles, claim a set-off on account of the breach of warranty in respect of the first article. *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509.

Where the Buyer Uses a Portion of the Goods (in this case, oats), and on finding them bad returns the balance pursuant to a provision in the contract that he might do so and receive a credit at the rate of the price paid, his action in so doing is no waiver of his right of action for damages caused by the breach of warranty. *Coyle v. Baum*, 3 Okla. 695.

1. *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667. But *compare Carr v. Sullivan*, 68 Hun (N. Y.) 246.

2. **Buyer Giving Chattel Mortgage on Article.**—*Fairbanks v. Baskett*, 98 Mo. App. 53 (right to set-off recognized).

3. *Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co.*, (C. C. A.) 48 Fed. Rep. 803; *Atkins v. Cobb*, 56 Ga. 86; *E. A. Moore Furniture Co. v. Sloane*, 166 Ill. 457, *affirming* 64 Ill. App. 581; *Smith v. Sipe*, 11 Ohio Dec. (Reprint) 275, 25 Cinc. L. Bul. 394; *Walker v. Taylor*, 19 Pa. Super. Ct. 39.



*b. WHERE CONTRACT IS EXECUTORY.* — The rule in this class of cases is the same as where the contract is an executed one; the buyer's receipt and retention of the article is not a waiver of his right of action for a breach of the warranty. The fact that in such cases the buyer may rescind the contract and reject the article for its failure to meet the warranty does not alter the rule; the buyer has his election whether he will rescind the contract or, by accepting and retaining the article, confine himself to his remedy by action on the warranty.<sup>1</sup> The cases sometimes cited as opposing this view are distinguishable as being either cases in which there was no warranty and the

There is no such presumption, however, where the buyer, while retaining the goods, complains to the seller of their not being up to the warranty. *Roth v. Continental Wire Co.*, 94 Mo. App. 236.

**1. Acceptance No Waiver Even in Case of Executory Contracts** — *United States*. — *Andrews v. Schreiber*, 93 Fed. Rep. 367.

*Arkansas*. — *Weed v. Dyer*, 53 Ark. 155.

*Connecticut*. — *Shupe v. Collender*, 56 Conn. 489.

*Illinois*. — *Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Peck v. Brewer*, 48 Ill. 54; *Owens v. Sturges*, 67 Ill. 366; *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40.

*Indiana*. — *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Bushman v. Taylor*, 2 Ind. App. 12.

*Massachusetts*. — *Gould v. Stein*, 149 Mass. 577, 14 Am. St. Rep. 455.

*Minnesota*. — *Haven v. Neal*, 43 Minn. 315.

*New York*. — *Day v. Pool*, 52 N. Y. 420, 11 Am. Rep. 719 (authorities reviewed); *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753; *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72; *Nash v. Weidenfeld*, 41 N. Y. App. Div. 511, *affirmed* 166 N. Y. 612; *Lichtenstein v. Rabolinsky*, 75 N. Y. App. Div. 66; *Romeo v. Garafolo*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 166; *Lesser v. Perkins*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 53; *Weber v. Demuth*, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 658.

*North Carolina*. — *Cox v. Long*, 69 N. Car. 7; *Huyett, etc., Mfg. Co. v. Gray*, 124 N. Car. 322.

*North Dakota*. — *Halley v. Folsom*, 1 N. Dak. 325.

*Ohio*. — *Fred. W. Wolff Co. v. Sheriff St. Market, etc., Co.*, 11 Ohio Civ. Dec. 582.

*Rhode Island*. — *R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464.

*Washington*. — *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. Rep. 890.

*Wisconsin*. — *Morehouse v. Comstock*, 42 Wis. 630; *Locke v. Williamson*, 40 Wis. 377. See also *Weeks v. Robert A. Johnson Co.*, 116 Wis. 105.

See also *Kimball, etc., Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558. *Compare Bennon v. St. Bernard Coal Co.*, (Ky. 1897) 39 S. W. Rep. 252; *Day v. Mapes-Reeve Constr. Co.*, 174 Mass. 412; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831; *Smith v. Servis*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 301; *Merritt v. Emery*, 12 N. Y. App. Div. 621; *Brown v. Baird*, 5 Okla. 133; *Hume v. Sherman Oil, etc., Co.*, 27 Tex. Civ. App. 366.

"In my opinion, where there is an express warranty, the purchaser, whether in an exe-

cuted or an executory sale, is not bound to return the property upon discovering the breach, even if he have the right to do so." *Day v. Pool*, 52 N. Y. 420, 11 Am. Rep. 719. See also *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63.

"There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them or to receive them and rely upon the warranty; and if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods." *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451. *Quoted and followed in Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. Rep. 563.

The early case of *Hopkins v. Appleby*, 1 Stark. 477, 2 E. C. L. 183, tried before Lord Ellenborough, opposes the rule of the text. That was an action for goods sold and delivered, warranted to be of the best quality of Spanish barilla. The defendant had accepted the article on delivery and consumed it in manufacturing, without giving notice of any defects, or offering to return it. He attempted to show that the true quality of the article was not ascertainable except by actual use and experiment; but on this point evidence was conflicting. It was held that he should have given notice of the defects at an early stage, in order that the vendor might have had an opportunity to remedy them. He was, therefore, held liable for the whole price. This case has not been followed, however, and was distinctly overruled in *Poultney v. Lattimore*, 9 B. & C. 259, 17 E. C. L. 373. In that case, the buyer neither returned the seed which had been delivered under the contract, nor gave any notice of defects, but as there was an express warranty of quality which had been broken, he was allowed to set up the breach to defeat an action by the seller for the price. See also *Fielder v. Starkin*, 1 H. Bl. 17.

buyer's only remedy was in a rescission of the contract,<sup>1</sup> or where the warranty was merely an implied one which would not survive an acceptance,<sup>2</sup> or where the contract of sale contained some special provision to the effect that an acceptance and retention of the article should have the effect of a waiver.<sup>3</sup>

Where the Defects in the Article Are Obvious or where the purchaser has had full opportunity for examination and knows of them, he must, either when he receives the goods or within what, under the circumstances, is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise, the breach of the warranty, the contract being executory, will be deemed to have been waived.<sup>4</sup>

The Buyer's Acceptance and Retention of the Article Is an Evidential Fact which may be shown by the seller as a circumstance tending to prove that there had been no breach of the warranty.<sup>5</sup> But the buyer may, in reply, show a stress of circumstances or other facts explaining why he retained and used the article

1. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *McCormick v. Sarson*, 45 N. Y. 265, 6 Am. Rep. 80; *Neaffie v. Hart*, 4 Lans. (N. Y.) 4.

2. When Warranty Is an Implied One Not Surviving Acceptance.—*Merritt v. Emery*, 12 N. Y. App. Div. 621; *Nash v. Weidenfeld*, 41 N. Y. App. Div. 511, affirmed 166 N. Y. 612; *Van Pub. Co. v. Westinghouse*, 72 N. Y. App. Div. 121; *Lifshitz v. McConnell*, 80 N. Y. App. Div. 289; *League Cycle Co. v. Abrahams*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 548; *Pennsylvania, etc., Oil Co. v. Spitelnik*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 557; *Weil v. Unique Electric Device Co.*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 527. See also *Waerber v. Talbot*, 43 N. Y. App. Div. 180; *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38; *Bull v. Bath Iron Works*, 75 N. Y. App. Div. 380.

It is only in the absence of fraud or latent defects or an express warranty of quality that the acceptance of an article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and conforms to the contract, and bars all claim for compensation on account of any defects that may exist in the article. *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Ricketts v. Hays*, 13 Ind. 181.

In Illinois, even when the warranty is implied merely, "the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, without complaint, may raise a presumption that it was of the quality contemplated by the parties but it will not preclude the party from showing and setting up the actual defect in quality and condition." *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 45; *Crabtree v. Kile*, 21 Ill. 184.

3. See *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266. See also *infra*, this section, *Special Contractual Stipulations as to Effect of Retention and Use*.

4. *Smith v. Servis*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 301; *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 630.

"Even Where the Article Sold Is Delivered for Trial and Inspection Only, the vendee must act with reasonable promptness in giving notice of objections. As was said in *McCormick Harvesting Mach. Co. v. Martin*, 32 Neb. 726, 'If, after a reasonably fair trial, the purchaser finds it does not conform to the warranty, he may re-

turn the same. If he retains it beyond a reasonable time, he will be deemed to have waived all objections to it.'" *Hazen v. Wilhelmie*, (Neb. 1903) 93 N. W. Rep. 920. See also *Moline, etc., Co., v. Pereaue*, 52 Neb. 577; *Havens v. Grand Island Light, etc., Co.*, 41 Neb. 153.

"Subject to this rule [i. e., the rule just stated in the text] it is the settled law in this state that, 'in case of a warranty, express or implied, where the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or, if sued for the price, may set up and have such damages allowed to him, by way of recoupment, from the sum stipulated to be paid.'" *Morehouse v. Comstock*, 42 Wis. 630.

5. Acceptance and Use an Evidential Fact—*Arkansas*.—*Weed v. Dyer*, 53 Ark. 155.

*Illinois*.—*Crabtree v. Kile*, 21 Ill. 184; *E. A. Moore Furniture Co. v. Sloane*, 166 Ill. 457, affirming 64 Ill. App. 581.

*Kentucky*.—*Bannon v. St. Bernard Coal Co.*, (Ky. 1897) 39 S. W. Rep. 252.

*Massachusetts*.—*Vincent v. Leland*, 100 Mass. 432; *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266.

*Minnesota*.—*McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161.

*Nebraska*.—*Clark v. Deering*, 29 Neb. 293.

*New York*.—*Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719.

*North Dakota*.—*Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. Rep. 563.

*Pennsylvania*.—*Fearl v. Hanna*, 129 Pa. St. 580.

*Texas*.—*Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53.

*Wisconsin*.—*Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737.

Compare *Hazen v. Wilhelmie*, (Neb. 1903) 93 N. W. Rep. 920; *Tryon v. Plumb*, 20 N. Y. App. Div. 530; *Ricker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909.

"The true rule is that where goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer may bring an action for the breach of the warranty immediately, without returning the goods or giving any notice to the seller; though it has been held that the failure, either to return the goods or to notify the vendor of the de-

sold.<sup>1</sup> The buyer's failure to give any notice of the breach of warranty may also be shown as tending to prove that no breach had occurred,<sup>2</sup> and his conduct in this respect, coupled with the fact of his retaining and using the article, may be such, in particular cases, as to be conclusive against his right to assert a breach of warranty.<sup>3</sup>

**C. SPECIAL CONTRACTUAL STIPULATIONS AS TO EFFECT OF RETENTION AND USE.**—Stipulations in the contract of sale to the effect that a retention or use of the article sold shall constitute a waiver of any breach of warranty are valid and are to be given effect according to their terms.<sup>4</sup> But the buyer's retention and use of the article beyond the stipulated time will not operate as a waiver of the benefits of the warranty where it was at the instance of the seller or his agent,<sup>5</sup> or where it was for the purpose of giving the seller or his

fect in quality, raises a presumption that the complaint of defective quality is not well founded." *Eastern Ice Co. v. King*, 86 Va. 102.

1. *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667; *Joseph v. Richardson*, 2 Pa. Super. Ct. 208, 38 W. N. C. (Pa.) 487; *R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464.

2. *Eastern Ice Co. v. King*, 86 Va. 102.

3. *Russell v. Murdock*, 79 Iowa 101, 18 Am. St. Rep. 348; *Frick Co. v. Morgan*, (Ky. 1902) 69 S. W. Rep. 1072; *J. I. Case Threshing Mach. Co. v. Lyons*, (Ky. 1903) 72 S. W. Rep. 356; *Potter v. Lee*, 94 Mich. 140; *Talbot Paving Co. v. Gorman*, 103 Mich. 403; *Skeen v. Springfield Engine, etc., Co.*, 34 Mo. App. 485.

The purchaser of a harvester cannot, after using the machine for two years, defend an action for the purchase money on the ground that the machine failed to do satisfactory work. *McCormick Harvesting Mach. Co. v. Martin*, 32 Neb. 723; *Osborne v. Marks*, 33 Minn. 56.

In *Hastings v. Adams*, 67 Vt. 119, it was held that the acceptance and use, by the buyer, of a mowing machine for one year, during which time he made no complaint, will bar his right to refuse to pay the note (which was made payable a year from its date) under an agreement that if the machine did not work well he need not pay the note. See also *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38, affirmed 169 N. Y. 587.

**The Retention and Use of a Machine for Two Years**, coupled with the fact that after a ten days' trial the purchaser gave his notes for the purchase money, and later wrote a letter recommending the machine, will bar him from any right to plead a breach of warranty as an offset in an action on the notes. *Frick Co. v. Morgan*, (Ky. 1902) 69 S. W. Rep. 1072.

**Breach of Warranty of Title.**—When personal property is sold with a warranty of title, the vendee cannot take advantage of a breach of the warranty to have the contract rescinded and refuse payment of the price, when he has kept the property for many years, and had the benefit thereof until it was destroyed. *Sparks v. Messick*, 65 N. Car. 440.

**4. Stipulation that Retention and Use Shall Constitute a Waiver**—*United States*.—*Hercules Iron Works v. Dodsworth*, 57 Fed. Rep. 556.

*Idaho*.—*Murphy v. Russell*, 8 Idaho 133.

*Indiana*.—*Burke v. Keystone Mfg. Co.*, 19 Ind. App. 556.

*Iowa*.—*Massillon Engine, etc., Co. v. Schirmer*, (Iowa, 1903) 93 N. W. Rep. 599.

*Minnesota*.—*Osborne v. Marks*, 33 Minn. 56; *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161.

*Missouri*.—*Berry v. Walter A. Wood Mowing, etc., Mach. Co.*, 62 Mo. App. 41.

*Nebraska*.—*McCormick Harvesting Mach. Co. v. Martin*, 32 Neb. 723; *McCormick Harvesting Mach. Co. v. Hartman*, 35 Neb. 629.

*North Dakota*.—*Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. Dak. 410; *James v. Bekkedahl*, 10 N. Dak. 120.

*Texas*.—*Hutches v. J. I. Case Threshing Mach. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 60; *J. I. Case Threshing Mach. Co. v. Hall*, (Tex. Civ. App. 1903) 73 S. W. Rep. 835.

*Wisconsin*.—*Walter A. Wood Mowing, etc., Mach. Co. v. Calvert*, 89 Wis. 640; *Kingman v. Watson*, 97 Wis. 596.

*Canada*.—*John Abell Engine, etc., Co. v. McGuire*, 13 Manitoba 454.

See also *C., etc., Electric Motor Co. v. Frisbie*, 66 Conn. 77; *Birch v. Kavanaugh Knitting Co.*, 34 N. Y. App. Div. 614, affirmed 165 N. Y. 617.

**"Using Harvester Through Harvesting Season."**

—Under a provision that such a use of the harvester shall constitute a waiver of all claims under the warranty there is no waiver when the buyer used the machine merely to cut thirty acres of grain remaining uncut when he bought. *McCormick Harvesting Mach. Co. v. Machmuller*, (Neb. 1901) 95 N. W. Rep. 507.

**5. Retention or Use at Instance of Seller No Waiver.**—*Jacobs v. Crumbaker*, 67 Ill. App. 391; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502 (buyer's retention due to misconduct of seller's agent); *Massillon Engine, etc., Co. v. Shirmer*, 122 Iowa 699; *Aultman v. Knapp*, 105 Mich. 205; *Parsons Band Cutter, etc., Co. v. Gadeke*, 1 Neb. (unofficial) 605, 95 N. W. Rep. 850; *McCormick Harvesting Mach. Co. v. Machmuller*, (Neb. 1901) 95 N. W. Rep. 507; *Walter A. Wood Mowing, etc., Mach. Co. v. Calvert*, 89 Wis. 640.

**Retention at Instance of Seller's Agent.**—

Even though the provision of the contract that a retention beyond a fixed time shall constitute a waiver is absolute and there is further provision that no agent of the seller should have power to add to or vary the contract in any further particular, an agreement between the buyer and the seller's agent whereby the former is induced to retain the article beyond the fixed



agent an opportunity to remedy defects.<sup>1</sup> Nor will the buyer's retention and use of the article be given such effect when it continued only up to the time the breach of warranty developed and became apparent, unless the provision of the contract is clearly and plainly to the effect that the warranty shall embrace only such defects as appear within the prescribed time; the stipulation under consideration applies, with respect to defects subsequently developing, only where the buyer, after discovering the defect, continues to use the article.<sup>2</sup>

The fact that, under the Contract of Sale, the Buyer Has the Privilege of Returning the Article does not make his retention thereof a waiver of the warranty, but merely furnishes a cumulative remedy,<sup>3</sup> unless the contract expressly provides that it shall have that effect. The seller may, however, expressly stipulate that, upon a breach of warranty appearing, the buyer shall return the article and receive another, and where it appears from the language used that the parties contemplated such a provision as mandatory, the buyer can maintain no action for damages for a breach of the warranty in the absence of proof of a return of the article and a demand for another.<sup>4</sup>

*d. RETENTION MAY AFFECT REMEDY ONLY.*—In most cases, the only effect of the buyer's retention and use of the article is to bar his remedy of rescission and to leave him to his action at law for damages or to his right to claim a set-off when sued for the price.<sup>5</sup> The principle is well settled that a buyer who has used the article sold, or any portion of it, longer than is reasonably necessary to determine its sufficiency cannot claim the right to rescind the contract and, by returning the article, recover the entire purchase money paid or defeat entirely an action on the purchase-money notes.<sup>6</sup>

**XVII. REMEDIES FOR BREACH OF WARRANTY — 1. Breach of Warranty of Title.**—If there is a breach of the warranty of title, the buyer may sue for a return of the purchase money paid or may maintain an action on the warranty for damages; and this latter is the proper course where the breach of warranty

period will prevent such a retention from operating as a waiver. *Holt Mfg. Co. v. Dunigan*, 22 Wash. 134; *Osborne v. Baker*, 103 Mich. 247; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229. See also *Parsons Band Cutter, etc., Co. v. Gadeke*, 1 Neb. (unofficial) 605, 95 N. W. Rep. 850; *Snody v. Shier*, 88 Mich. 304.

**Retention Due to Appointment of Receiver.**—Where the trustee in foreclosure proceedings takes charge under an order of court of property in the hands of a receiver, there is no such acceptance as will constitute a waiver of a breach of warranty. *Crook v. Baltimore, etc., R. Co.*, 80 Md. 338.

**Retention Due to Seller's Promise to Make Machine Work as Warranted** is no waiver. *Kennedy v. Bevilheimer*, 158 Ind. 653.

1. *Jacobs v. Crumbaker*, 67 Ill. App. 391; *Walter A. Wood Mowing, etc., Mach. Co. v. Calvert*, 89 Wis. 640. See also *McCormick Harvesting Mach. Co. v. Hays*, 89 Ind. 582.

2. *Osborne v. Henry*, 70 Mo. App. 19; *Walter A. Wood Mowing, etc., Mach. Co. v. Calvert*, 89 Wis. 640; *John Abell Engine, etc., Co. v. McGuire*, 13 Manitoba 454.

3. **Buyer Privileged to Return Article Not Bound to Do So.**—*Eyers v. Haddem*, 70 Fed. Rep. 648; *Hefner v. Haynes*, 89 Iowa 616; *Ellwood v. McDill*, 105 Iowa 437; *Gaar v. Patterson*, 65 Minn. 449; *Moore v. Emerson*, 63 Mo. App. 137; *Birch v. Kavanaugh Knitting Co.*, 34 N. Y. App. Div. 614, affirmed 165 N. Y. 617; *Blacknall v. Rowland*, 118 N. Car. 418.

4. **Where Contract Provides that Buyer Must**

**Return Article.**—*Kirk v. Seeley*, 63 Mo. App. 262; *Hamilton v. Northey Mfg. Co.*, 31 Ont. 468. See also *McCormick Harvesting Mach. Co. v. McNicholas*, 66 Minn. 384; *Coyle v. Baum*, 3 Okla. 695. Compare *Osborne v. Mullikin*, 88 Mo. App. 350.

5. **Retention and Use of Article Merely Defeats Remedy of Rescission.**—*Weed v. Dyer*, 53 Ark. 155; *Aultman v. Johnson*, 45 Ill. App. 313; *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. Dak. 81. Compare *Hercules Iron Works v. Dodsworth*, 57 Fed. Rep. 556; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229.

"In *Doane v. Dunham*, 65 Ill. 512, 79 Ill. 131, the distinction between executory and executed contracts was recognized, and it was held that in the former the law gives the buyer a reasonable time for making an examination of the chattels sold; that it is for the jury to determine, under all the circumstances, what is such reasonable time; that a failure to make the examination within a reasonable time may preclude the buyer from offering the property back, rescinding the contract and avoiding payment on that ground, but will not deprive him of the right to rely upon the breach of the warranty for damages. The only difference between that case and the one at bar is that there the law gives time for an examination or test, while here the contract fixes the time. The same rule, however, will apply in both cases. *Estep v. Fenton*, 66 Ill. 467." *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 45.

6. *Gammar v. Borgain*, 27 Iowa 369.

has occasioned the purchaser other damages in addition to the mere loss of the article. If the purchase money has not been paid, the breach of warranty of title will, of course, be a complete defense to an action by the seller for the price.<sup>1</sup> If the breach of warranty consists merely of an existing lien on the property, the buyer may discharge the lien and claim a corresponding deduction from the agreed price.<sup>2</sup>

**2. Breach of Warranty of Quality** — *a. GENERALLY.* — When the warranty is one relating to the quality of the goods sold, the buyer has his choice of three remedies:<sup>3</sup> if the title has not passed to him and the contract is still executory, or if the warranty was fraudulently made, he may rescind the contract and refuse to accept the goods, or, if he has already received them, he may return them or notify the seller that they are held subject to his order;<sup>4</sup> if the title has passed to the buyer, he may bring his action to recover damages for the breach or he may set up such damages by way of set-off or recoupment when sued for the purchase money.<sup>5</sup>

In the Case of an Exchange of Chattels, where there is a breach of warranty merely, the remedy is by an action on the warranty; but if there has been actual fraud or deceit, the party defrauded has his election to bring an action on the warranty or trover for the property sold by him.<sup>6</sup>

There Is No Remedy in Equity for a mere breach of warranty when no element of fraud exists.<sup>7</sup>

*b. RESCISSION* — (1) *Right to Rescind.* — The better rule is that a mere breach of warranty does not authorize a rescission of the contract of sale by the buyer after the contract has become executed; unless he can establish fraud or a previous consent by the seller to a rescission, he is left to his other remedies.<sup>8</sup> The warranty is a collateral undertaking merely and not an

1. *Harper v. Dotson*, 43 Iowa 232; *Clayton v. Scott*, 43 Vt. 553.

**Seller May Intervene and Defend** the action brought by a third party against his buyer. *Parker v. Nolan*, 37 Tex. 85. See title SALES, 19 ENCYC. OF PL. AND PR. 116.

**2. Buyer May Discharge Existing Lien.** — *Harper v. Dotson*, 43 Iowa 232.

**3. Buyer Has Choice of Three Remedies.** — *Cutter v. Powell*, 6 T. R. 320; *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122; *Poulton v. Lattimore*, 9 B. & C. 259, 17 E. C. L. 373; *Lyon v. Bertram*, 20 How. (U. S.) 149; *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451; *Cook v. Gray*, 2 Bush (Ky.) 121; *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 262; *Sloan Commission Co. v. Fry*, (Neb. 1903) 95 N. W. Rep. 862; *Kester v. Miller*, 119 N. Car. 475; *Osborne v. Walther*, 12 Okla. 20; *Osborne v. Poindexter*, (Tex. Civ. App. 1896) 34 S. W. Rep. 299; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590; *Optenborg v. Skelton*, 109 Wis. 241.

"Where the contract for the sale of goods is an executory one, and the time for examination, whether fixed by the contract or allowed by the law, has passed, the buyer may refuse to accept the goods and may return them, or he may accept them and sue for breach of warranty, or rely upon the damages for such breach in reduction of the contract price. \* \* \* If he desires to rescind the contract and return the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for examination; such right to rescind and return is waived by retaining and continuing to use the goods longer than is

necessary for a trial of them." *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 46. See also *Doane v. Dunham*, 65 Ill. 512, 79 Ill. 131; *Owens v. Sturges*, 67 Ill. 366.

**4.** In a number of jurisdictions, the remedy by rescission exists even though title has passed. See *infra*, this section, *Rescission*.

**5.** See *infra*, this section, *Right to Set Off Damages in Action for Price*. See also the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, p. 484.

**6.** *Dawson v. Pennaman*, 65 Ga. 698. See also *Thompson v. Harvey*, 86 Ala. 519; *Mars-ton v. Knight*, 29 Me. 341.

In an action for a breach of warranty of a jack, given as part payment on a sale of land wherein the plaintiff had given bond for title, taking for the balance of the purchase-money a note which he had assigned before bringing the action, it appearing that the jack was "hipped" and comparatively worthless at the time of the sale, and that the defendant had declined the plaintiff's offer to rescind the contract, it was held that the plaintiff was not restricted in his remedy to a suit for rescission, and that he was not bound, in order to maintain his action on the warranty, either to return the animal or to tender a conveyance of title to the land. *Smith v. Oldham*, 26 Tex. 533.

**7. No Relief in Equity.** — *Linn v. Gunn*, 56 Mich. 447; *Lawrence v. Vick*, 10 Humph. (Tenn.) 285.

**8. Buyer Has No Right to Rescind After Contract Executed** — *United States*. — *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *Lyon v. Bertram*, 20 How. (U. S.) 149; *Reeves v. Corning*, 51 Fed. Rep. 774; *Clark v. Wheeling Steel Works*, (C. C. A.) 53 Fed. Rep. 494.

essential part of the contract of sale,<sup>1</sup> and a mere breach of it does not, on principle, warrant a rescission of the entire agreement. In a considerable number of jurisdictions, however, a contrary view obtains, and the right to rescind after the contract has become executed is recognized to the same extent as where the contract is executory merely.<sup>2</sup>

**Right to Rescind Reserved in Contract.** — Where it is a part of the original agreement that the buyer shall have the right to return the article and to receive back the purchase money paid in case the article fails to satisfy the warranty, he may, of course, rescind for a breach of the warranty.<sup>3</sup>

*Connecticut.* — Trumbull v. O'Hara, 71 Conn. 172.

*Georgia.* — Dawson v. Pennaman, 65 Ga. 698.

*Illinois.* — Crabtree v. Kile, 21 Ill. 180.

*Indiana.* — Hoover v. Sidener, 98 Ind. 290. But compare Dill v. O'Ferrell, 45 Ind. 268.

*Kentucky.* — Lightburn v. Cooper, 1 Dana (Ky.) 273. Compare Ruby Carriage Co. v. Kremer, (Ky. 1904) 81 S. W. Rep. 251.

*Michigan.* — H. W. Williams Transp. Line v. Darius Cole Transp. Co., 129 Mich. 209, explaining Kimball, etc., Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558; Murphy v. McGraw, 74 Mich. 318.

*Minnesota.* — Merrick v. Wiltse, 37 Minn. 41; McCormick Harvesting Mach. Co. v. Fields, 90 Minn. 161; Lynch v. Curfman, 65 Minn. 170; Minneapolis Harvester Works v. Bonnalie, 29 Minn. 373. Compare McCormick Harvesting Mach. Co. v. Chesrown, 33 Minn. 32.

*Missouri.* — Bunce v. Beck, 43 Mo. 279. But compare Tall v. Chapman, 66 Mo. App. 581.

*Nebraska.* — McKee v. Wild, 52 Neb. 9. Compare Sloan Commission Co. v. Fry, (Neb. 1903) 95 N. W. Rep. 862.

*New York.* — Voorhees v. Earl, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; McCormick v. Sarsion, 45 N. Y. 265, 6 Am. Rep. 80; Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719. See also Muller v. Eno, 14 N. Y. 597; Lawton v. Keil, 61 Barb. (N. Y.) 558.

*Pennsylvania.* — Kase v. John, 10 Watts (Pa.) 107, 36 Am. Dec. 148; Houston v. Cook, 153 Pa. St. 43; Eshleman v. Lightner, 169 Pa. St. 46. Compare Youghiogheny Iron, etc., Co. v. Smith, 66 Pa. St. 340.

*South Carolina.* — Kauffman Milling Co. v. Stuckey, 37 S. Car. 7, 40 S. Car. 110. Compare Martin v. Howil, 2 Treadw. (S. Car.) 750.

*Tennessee.* — Allen v. Anderson, 3 Humph. (Tenn.) 581, 39 Am. Dec. 197.

*Texas.* — Blythe v. Speake, 23 Tex. 429; Wright v. Davenport, 44 Tex. 164; Ellis v. Tips, 16 Tex. Civ. App. 82; Aultman v. McKinney, (Tex. Civ. App. 1894) 26 S. W. Rep. 267.

*Vermont.* — West v. Cutting, 19 Vt. 536.

*Wisconsin.* — Pierce v. Carey, 37 Wis. 232; Merrill v. Nightingale, 39 Wis. 247.

**A Manufacturer Who Sells an Engine Not Made by Himself,** with a warranty that it is in good condition, and, if not found to be so, shall be placed in such condition, puts himself in a position analogous to that of one who contracts to build and furnish an engine; and an acceptance by the purchaser is conditional, and does not bind him to keep it unless it answers the warranty. Kimball, etc., Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558. But see, as

to this case, H. W. Williams Transp. Line v. Darius Cole Transp. Co., 129 Mich. 209.

**1.** See *supra*, this title, *General Nature and Elements of the Contract*.

The buyer has no right to rescind the contract of sale unless, first, the contract itself confers the right, or, second, there is fraud, or, third, there is an entire failure of consideration. Kauffman Milling Co. v. Stuckey, 37 S. Car. 7; Carter v. Walker, 2 Rich. L. (S. Car.) 40.

**2. Right to Rescind Recognized in Some Jurisdictions.** — In *Massachusetts* the right to rescind for a breach of warranty has long been recognized upon the principle announced by Shaw, C. J., that "a warranty is not strictly a condition. \* \* \* But to avoid circuitry of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money as in case of fraud." Dorr v. Fisher, 1 Cush. (Mass.) 271. See also Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122; Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103; Perley v. Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Bryant v. Isburgh, 13 Gray (Mass.) 607, 74 Am. Dec. 655; Morse v. Brackett, 98 Mass. 209. Compare Dickinson v. Lane, 107 Mass. 548.

**In Other States** the *Massachusetts* rule has been followed.

*Alabama.* — Burnett v. Stanton, 2 Ala. 181; Thompson v. Harvey, 86 Ala. 519.

*Iowa.* — Rogers v. Hanson, 35 Iowa 283; Berkey v. Lefebvre, (Iowa 1904) 99 N. W. Rep. 711; Jack v. Des Moines, etc., R. Co., 53 Iowa 399; Upton Mfg. Co. v. Huiske, 69 Iowa 561; Timken Carriage Co. v. Smith, 123 Iowa 554.

*Kansas.* — Gale Sulky Harrow Mfg. Co. v. Stark, 45 Kan. 606, 23 Am. St. Rep. 739; Kansas Refrigerator Co. v. Pert, 3 Kan. App. 364.

*Maine.* — Marston v. Knight, 29 Me. 341; Marshall v. Perry, 67 Me. 78; Milliken v. Skillings, 89 Me. 180. But compare Prentiss v. Russ, 16 Me. 30.

*Maryland.* — Hyatt v. Boyle, 5 Gill & J. (Md.) 121, 25 Am. Dec. 276; Franklin v. Long, 7 Gill & J. (Md.) 407; Horn v. Buck, 48 Md. 358.

*Mississippi.* — Jagers v. Griffin, 43 Miss. 134.

*Missouri.* — New Birdsall Co. v. Keys, 99 Mo. App. 458.

*Oklahoma.* — Osborne v. Walther, 12 Okla. 20.

**3.** McCormick Harvesting Mach. Co. v. Knoll, 57 Neb. 790.

In such cases the buyer, where he has sus-



When the Representations Constituting the Warranty Were Fraudulently Made and with the intent of defrauding the buyer, the contract may be rescinded at his election upon his discovery of the fraud.<sup>1</sup> The fraud may consist of false representations as to some positive quality of the article or in a fraudulent concealment of defects known to the seller.<sup>2</sup> As in other cases, however, the buyer is not bound to rescind; he may retain the article, affirm the contract, and maintain an action for damages for the breach of warranty.<sup>3</sup>

When the Contract Is Executory Merely, the general rule that a mere breach of warranty does not authorize the buyer to rescind the contract has no application.<sup>4</sup> When an article is ordered from a manufacturer or dealer who engages that it shall be of a certain quality or fit for certain purposes, and the article sent as such is never completely accepted by the purchaser, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial.<sup>5</sup>

The Purchaser of a Commodity to Be Subsequently Delivered in Bulk, according to a sample, has a right to return the bulk, if it proves to be not in accordance with the sample, within a reasonable time after delivery for examination and comparison.<sup>6</sup> If such a contract calls for weekly shipments, or delivery by instalments, the purchaser may rescind for a breach of warranty occurring with respect to particular instalments although he may have accepted prior deliveries made under the same contract,<sup>7</sup> provided he acts promptly upon discovery of the breach.<sup>8</sup>

When the Breach of Warranty Is Such as to Amount to a Total Failure of Consideration, as

tained injury in consequence of the breach of warranty, cannot be compelled to elect between a return of the property and damages, but may be entitled to both. The recovery of the purchase price may, in many cases, not be sufficient to make good all his losses; and the return of property which is unfit for use may be onerous and ruinous. See Kimball, etc., *Mfg. Co. v. Vroman*, 35 Mich. 325, 24 Am. Rep. 558.

1. **Fraud.**—*Slaughter v. Gerson*, 13 Wall. (U. S.) 379; *Turner v. Huggins*, 14 Ark. 21; *Sparling v. Marks*, 86 Ill. 125; *Norton v. Young*, 3 Me. 30; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230; *Sibley v. Hulbert*, 15 Gray (Mass.) 509; *Simonds v. Cash*, (Mich. 1904) 99 N. W. Rep. 754; *Miller v. Barber*, 66 N. Y. 558; *Paetz v. Stoppleman*, 75 Wis. 510. See also *Clarke v. McGetchie*, 49 Iowa 437.

2. *Montgomery v. Bucyrus Mach. Works*, 92 U. S. 257; *Alexander v. Dennis*, 9 Port. (Ala.) 174, 33 Am. Dec. 309; *Turner v. Huggins*, 14 Ark. 21; *Bridge v. Penniman*, 105 N. Y. 642, 12 N. E. Rep. 19; *Potter v. Taggart*, 54 Wis. 395.

3. **Buyer Not Bound to Rescind.**—*Marsh v. Webber*, 16 Minn. 418.

4. **Buyer May Rescind Executory Contract of Sale.**—*Laporte Imp. Co. v. Brock*, 99 Iowa 485, 61 Am. St. Rep. 245; *Field v. Kinnear*, 4 Kan. 476; *Cook v. Gray*, 2 Bush (Ky.) 121; *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 593; *Ruby Carriage Co. v. Kremer*, (Ky. 1904) 81 S. W. Rep. 251; *Noble v. Buswell*, 96 Me. 73; *Edwards v. Noel*, 88 Mo. App. 434; *Norton v. Dreyfuss*, 106 N. Y. 90; *Wilson v. Belles*, 22 Pa. Super. Ct. 477; *Okell v. Smith*, 1 Stark 107, 2 E. C. L. 49.

5. *Milliken v. Skillings*, 89 Me. 180; *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547; *Cooper v. Hall*, 22 Neb. 168; *Davis v. Hartlerode*, 37 Neb. 864; *Smith v. York Mfg.*

*Co.*, 58 N. J. L. 242; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Norton v. Dreyfuss*, 106 N. Y. 90; *Osborne v. Poindexter*, (Tex. Civ. App. 1896) 34 S. W. Rep. 299.

It is not necessary that the article be valueless in order to give the right to rescind. The buyer may refuse to accept if there is a breach of the warranty although the article may have a value. *Cooper v. Hall*, 22 Neb. 168.

6. **Delivery in Bulk — Samples.**—*Mansfield v. Trigg*, 113 Mass. 350; *Morgan v. McKee*, 77 Pa. St. 228.

The right to rescind embraces the entire article or commodity although the defect complained of may be in part only. *Smith v. York Mfg. Co.*, 58 N. J. L. 242 (sale of machinery).

One who buys a specific cargo of goods expected to arrive by a particular ship and which are to be of a prescribed quality, has the right, upon the arrival of the ship, to inspect the cargo before it is delivered to him for the purpose of ascertaining whether the warranty has been complied with; and if it has not, he may reject the cargo altogether. But if he permits the cargo to be unloaded and delivered to him, he loses his right to reject it because it is not up to the warranty. *Toulmin v. Hedley*, 2 C. & K. 157, 61 E. C. L. 157.

7. **Delivery by Instalments.**—*Norrington v. Wright*, 115 U. S. 189.

8. *Clark v. Wheeling Steel Works*, (C. C. A.) 53 Fed. Rep. 494, *distinguishing* *Norrington v. Wright*, 115 U. S. 189.

When such a contract has been partially executed by the delivery of several weekly instalments, the fact that there was a breach of the warranty in respect of some of the goods so delivered, but which the seller had made good, will not authorize a rescission of the entire contract and a refusal to accept subsequent deliveries. *Clark v. Wheeling Steel Works*, (C. C. A.) 53 Fed. Rep. 494.

where the article proves to be absolutely worthless or entirely unfit for the purpose for which it was bought, the buyer is entitled to rescind the contract and return the article and recover the price paid.<sup>1</sup>

(2) *Buyer's Duty upon Rescinding.* — The General Rules governing the duty, in the premises, of a party seeking to rescind a contract are set out elsewhere in this work,<sup>2</sup> and they are now here considered only in so far as they have a peculiar or special application to cases where a rescission is claimed on the ground of a breach of warranty.

The First Duty of the Buyer, on Rescinding, Is to Return the Article; in no case, except where the article is wholly without value,<sup>3</sup> can he retain it and have the contract rescinded, since it is a cardinal principle in the law of rescission that the parties should be placed *in statu quo*.<sup>4</sup>

The Buyer Must Act Promptly in making the rescission and in returning the article sold. He cannot rescind where he has done with it anything more than is consistent with a fair trial of it;<sup>5</sup> if he retains it for a longer time than is reasonably necessary for purposes of examination, inspection, and test, his right to rescind is lost and he will be confined to his remedy by action on the warranty.<sup>6</sup> His delay, however, is not material where the seller accepts

1. **Total Failure of Consideration.** — *Rubin v. Sturtevant*, (C. C. A.) 80 Fed. Rep. 930; *Ruby Carriage Co. v. Kremer*, (Ky. 1904) 81 S. W. Rep. 251; *H. W. Williams Transp. Line v. Darius Cole Transp. Co.*, 129 Mich. 209; *Davis v. Hartlerode*, 37 Neb. 864; *Carter v. Walker*, 2 Rich. L. (S. Car.) 40; *Kauffman Milling Co. v. Stuckey*, 37 S. Car. 7; *Young v. Cole*, 3 Bing. N. Cas. 724, 32 E. C. L. 303.

2. See the title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604.

3. **Worthless Goods Need Not Be Returned.** — *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Trippie v. McLain*, 87 Ga. 536; *M. D. Barry Saw, etc., Co. v. Campbell*, 13 Ind. App. 455; *Seley v. Parker*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1026.

See also the title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604. Compare *Massillon Engine, etc., Co. v. Schirmer*, (Iowa 1903) 93 N. W. Rep. 299.

4. **Buyer's Duty to Return Article Sold.** — *Chandler v. Thompson*, 30 Fed. Rep. 38; *Bessemer Ice Delivery Co. v. Brannen*, 138 Ala. 157; *Parsons Band Cutter, etc., Co. v. Mallinger*, 122 Iowa 703; *J. I. Case Threshing Mach. Co. v. Lyons*, (Ky. 1903) 72 S. W. Rep. 356; *Hines v. Kiehl*, 154 Pa. St. 190; *Wharton v. O'Hara*, 2 Nott & M. (S. Car.) 65; *Warner v. Wheeler*, 1 D. Chip. (Vt.) 159, 6 Am. Dec. 717; *Poor v. Woodburn*, 25 Vt. 234.

The Article Must Be Returned to the Seller and not to some other person who is not his authorized agent. *Jones v. Wessel*, 40 Neb. 116.

Thus, one who purchases a manufactured article from a dealer, taking at the same time a collateral contract of guaranty from the manufacturer, cannot, by tendering the property to the manufacturer, recover from him the money paid to the dealer for the article. *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100.

The Buyer May Refuse to Return Except upon Condition that the Purchase Money Is Refunded. — *E. T. Kenney Co. v. Anderson*, (Ky. 1904) 81 S. W. Rep. 663.

5. **Buyer Must Act Promptly.** — *Gray v. Consolidated Ice Mach. Co.*, 103 Ga. 115; *Bradley v. Palen*, 78 Iowa 126; *Nichols, etc., Co. v.*

*Caldwell*, (Ky. 1904) 80 S. W. Rep. 1099; *Jessop v. Ivory*, 158 Pa. St. 71; *Shipton v. Casson*, 5 B. & C. 378, 11 E. C. L. 254. See also *Simonds v. Cash*, (Mich. 1904) 99 N. W. Rep. 754.

Thus, where the vendee has resold the article at a profit, and delayed his offer to return it until it has come a second time into his possession, he cannot be allowed to claim a rescission of the original contract. *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122.

When a Machine Is Bought under a Warranty for One Year, the buyer may, upon discovering that it does not work as it was warranted to do, either rescind the contract by returning the machine, or sue on the warranty for the recovery of damages. But if he elects to rescind, he must do so and return the machine within a reasonable time after he discovers the breach; he has not the whole year for which the machine was warranted in which to exercise his election. *Upton Mfg. Co. v. Huiske*, 69 Iowa 557.

6. **Rescission Lost by Delay.** — *Dill v. Camp*, 22 Ala. 249; *Davis v. Dickey*, 23 Ala. 848; *Gray v. Consolidated Ice Mach. Co.*, 103 Ga. 115; *McCulloch v. Scott*, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561; *Tower v. Pauly*, 51 Mo. App. 75; *Viertel v. Smith*, 55 Mo. App. 617; *John A. Roebeling's Sons Co. v. Winthrop Hematite Co.*, 70 Mich. 346; *Clark v. Deering*, 29 Neb. 293; *Houston v. Cook*, 153 Pa. St. 43; *Coleman v. Gibson*, 1 M. & Rob. 169; *Campbell v. Fleming*, 1 Ad. & El. 40, 28 E. C. L. 29; *Jordan v. Norton*, 4 M. & W. 155; *Oxendale v. Wetherell*, 9 B. & C. 386, 17 E. C. L. 401; *Okell v. Smith*, 1 Stark. 107, 2 E. C. L. 49.

The Buyer Is Entitled to Retain the Article Long Enough to Make a Fair Test of Its Merits, and such a retention is no waiver of his right to rescind. *Keystone Implement Co. v. Leonard*, 40 Mo. App. 477; *Norton v. Dreyfuss*, 106 N. Y. 90. See also *McCormick Harvesting Mach. Co. v. Cochran*, 64 Mich. 636.

If the buyer is unable to determine the real quality of the goods delivered to him except by using part of them, such a use does not take away his right to rescind the contract as to the unused portion. *Cooper v. Hall*, 2 Neb. 170.

the return of the article and makes no objection.<sup>1</sup>

If the Article Has Been Injured While in the Buyer's Possession and through his fault, his right to rescind, even though a breach of warranty is shown, is lost.<sup>2</sup> But the right is not affected by the fact that the chattel, while in his possession, was injured without fault on his part but through an accident due to a defect inherent in the chattel.<sup>3</sup>

The Whole of the Commodity Purchased Must Be Returned; the buyer may not select from the bulk such part of it as he may regard as corresponding with the warranty and return the remainder; the rescission must be of the entire contract or not at all.<sup>4</sup> But when the goods sold are to be delivered to him by instalments, from time to time, the fact that he receives and uses some of the instalments which answer the warranty will not oblige him to accept subsequent instalments which fail to meet the warranty, and he may rescind the contract as to those.<sup>5</sup>

Actual Re-delivery to Seller Not Necessary. — By the weight of authority, it is sufficient if the buyer, after giving the seller notice of the rescission, tenders a return of the article sold; he is not bound to make an actual re-delivery to the seller,<sup>6</sup> except in cases where the contract of sale expressly provides

See also *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199.

1. *Aultman v. Miller*, 52 Kan. 60.

2. *Injury to Chattel Through Buyer's Fault Destroys Right to Rescind.* — *Aultman v. Wirth*, 54 Ill. App. 17, where a machine was allowed by the purchaser to deteriorate in value through being left exposed to the weather; *Bradley v. Palen*, 78 Iowa 126.

The rule of the text has no application where the buyer has used a small portion of the goods merely for the purpose of testing the whole quantity. *Cooper v. Hall*, 22 Neb. 170.

3. *Injury Without Fault of Buyer.* — *Head v. Tattersall*, 20 W. R. 115, 25 L. T. N. S. 631.

*Burden of Proof as to When Injury Occurred.* — *McKnight v. Nichols*, 147 Pa. St. 158. See also *Ross v. Hannan*, 19 Can. Sup. Ct. 227.

4. *Lyon v. Bertram*, 20 How. (U. S.) 149; *Morse v. Brackett*, 98 Mass. 205; *A. K. Young, etc., Mfg. Co. v. Wakefield*, 121 Mass. 91; *Sigerson v. Harker*, 15 Mo. 101; *Carpenter v. Minturn*, 65 Barb. (N. Y.) 297; *Weston v. Chamberlain*, 56 Barb. (N. Y.) 415; *Morgan v. McKee*, 77 Pa. St. 228; *Costigan v. Hawkins*, 22 Wis. 74, 94 Am. Dec. 583; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. Rep. 895.

The General Rule of the Text Is Subject to an Exception when a small portion of the goods has been used by the purchaser for the sole purpose of determining whether the warranty has been complied with and it appears that in no other way could he have determined that question. *Cooper v. Hall*, 22 Neb. 170. See also *Boeker v. Crescent Belting, etc., Co.*, 101 Mo. App. 429.

5. *When Goods Are Delivered by Instalments.* — *Norrington v. Wright*, 115 U. S. 189; *Borum v. Garland*, 9 Ala. 452; *Mansfield v. Trigg*, 113 Mass. 350; *Sigerson v. Harker*, 15 Mo. 101. Compare *Clark v. Wheeling Steel Works*, (C. C. A.) 53 Fed. Rep. 494.

6. *Tender* — *England.* — *Lewis v. Cosgrave*, 2 Taunt. 2.

*United States.* — *Thornton v. Wynn*, 12 Wheat. (U. S.) 183.

*Alabama.* — *Burnett v. Stanton*, 2 Ala. 181, *Indianā.* — *Campbell v. Wray*, 5 Ind. App. 155 (mere notice of defects held to be equivalent to a tender or return).

*Iowa.* — *Hall v. Aetna Mfg. Co.*, 30 Iowa 215; *Briggs v. M. Rumley Co.*, 96 Iowa 202.

*Kansas.* — *Champion Mach. Co. v. Mann*, 42 Kan. 372; *Osborne v. Ehrhard*, 37 Kan. 414.

*Kentucky.* — *Keystone Mfg. Co. v. Yeager*, (Ky. 1900) 55 S. W. Rep. 682.

*Massachusetts.* — *Beecher v. Mayall*, 16 Gray (Mass.) 376; *Thayer v. Turner*, 8 Met. (Mass.) 553.

*Minnesota.* — *Paulson v. Osborne*, 37 Minn. 19 (what is sufficient return); *Close v. Crossland*, 47 Minn. 500.

*Missouri.* — *Walls v. Gates*, 6 Mo. App. 242.

*Nebraska.* — *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb. 529.

*New Jersey.* — *Smith v. York Mfg. Co.*, 58 N. J. L. 242.

*Ohio.* — *Rheinstrom v. Steiner*, 69 Ohio St. 452.

*South Carolina.* — *Carter v. Walker*, 2 Rich. L. (S. Car.) 40.

In Maine, a Contrary Rule Obtains and it is not sufficient for the buyer to notify the seller of his willingness to return the goods or that they are held by him subject to the seller's orders. There must be an actual re-delivery unless the seller has previously notified the buyer that he will refuse to receive the goods. *Milliken v. Skillings*, 89 Me. 180.

Where the purchaser buys in B. and the sale is absolute and the buyer takes the article away with him, he must, in order to rescind, return the article to the seller at B. *Tyler v. Augusta*, 88 Me. 504.

*Demand for Return of Purchase-money Notes.* — When the property is sold on conditions and it is expressly stipulated that the notes given for the purchase money are to be returned in case the property does not prove to be as warranted, upon a breach of the warranty, a return of the property by the buyer is a sufficient demand for the purchase-money notes. *Fuller v. Schroeder*, 20 Neb. 631.



therefor.<sup>1</sup> He must, however, not only tender a return of the property, but the tender must be a continuing one and he must stand ready to comply with it at any time; if he afterwards uses the property, his conduct in so doing is equivalent to an acceptance which will bar his right to insist upon a rescission.<sup>2</sup>

Notice of the Rescission Must Be Given to the Seller and within a reasonable time.<sup>3</sup>

(3) *Right to Rescind No Bar to Other Remedies.* — The fact that the buyer has a right to rescind, whether that right exists because it was expressly reserved in the contract of sale<sup>4</sup> or for other reasons, does not compel him to resort to that remedy. He may still, if he so elect, and if the contract does not expressly confine his remedy to a rescission,<sup>5</sup> affirm the sale and maintain an action on the warranty for damages, or rely upon the breach of the warranty when sued for the price.<sup>6</sup> And a mere offer to return the property because it fails to comply with the warranty does not, of itself, constitute a rescission; the buyer may, after his offer has been declined, still elect to bring an action on the warranty for damages.<sup>7</sup>

c. RIGHT TO SET OFF DAMAGES IN ACTION FOR PRICE. — Where the purchase money has not been paid, the buyer may, instead of bringing an action for the breach of warranty, set up the breach by way of set-off or recoupment as a defense to an action for the purchase money. The damages sustained by him in consequence of the breach of warranty will go to reduce, *pro tanto*, the amount recoverable by the seller<sup>8</sup> and may preclude any

1. *Where Contract Specially Provides as to Manner of Return.* — *Davis v. Glosser*, 41 Kan. 414; *Heagney v. J. I. Case Threshing Mach. Co.*, (Neb. 1903) 96 N. W. Rep. 177.

Where a harvester is bought under a warranty in substance that it is "equally as good" as another kind specified, and if not, the buyer may "bring it back and get his money back," the buyer cannot rescind except upon proof that the warranty was broken and that he has actually returned the machine; proof merely that he had offered to return it and that he held it subject to the seller's order is not enough. *Ederly v. Gardner*, 9 Neb. 130; *Pitt's Sons' Mfg. Co. v. Spitznogle*, 54 Iowa 36.

2. *Tender Must Be a Continuing One.* — *Logan v. Berkshire Apartment House*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296.

3. *Notice of Rescission Necessary.* — *Lyon v. Pollard*, 20 Wall. (U. S.) 403; *Parmlee v. Adolph*, 28 Ohio St. 10.

In the case of *Foulk v. Eckert*, 61 Ill. 318, it was held, however, that where the vendee did not see the article purchased, but took it upon the faith of the vendor's representations which proved to be untrue, he was not bound to give notice of rescission in order to defend an action for the price. Nor where a machine was bought "on approval" was the vendee bound to give notice of his dissatisfaction, nor opportunity to the vendor to remedy the defects, before maintaining an action for the return of the purchase money. *Aiken v. Hyde*, 99 Mass. 183.

4. *McCormick v. Dunville*, 36 Iowa 645; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88; *Marsh v. Webber*, 16 Minn. 418; *Mandel v. Buttles*, 21 Minn. 391; *Warder v. Fisher*, 48 Wis. 338; *Park v. Richardson, etc., Co.*, 81 Wis. 399. See also *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *supra*, this title, *Special Provisions in Contract of Sale*.

5. *Contract Expressly Confining Remedy to Rescission.* — The parties may, by an express

stipulation in the contract of sale, confine the buyer's remedy to a return of the article and a recovery of the price paid. *Avery Planter Co. v. Peck*, 86 Minn. 40; *Osborne v. Mullikin*, 88 Mo. App. 350; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210; *Heagney v. J. I. Case Threshing Mach. Co.*, (Neb. 1903) 96 N. W. Rep. 175.

Such a provision, however, may be waived by the seller and is waived by his refusal to accept the article when tendered back to him *Osborne v. Mullikin*, 88 Mo. App. 350.

6. *Buyer May Waive Remedy of Rescission.* — *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40; *Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88; *New Bird-sall Co. v. Keys*, 99 Mo. App. 458; *Brown v. Weldon*, 27 Mo. App. 251; *Danforth v. Crook-shanks*, 68 Mo. App. 311; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Norton v. Dreyfuss*, 106 N. Y. 90; *Taylor v. Saxe*, 134 N. Y. 67. See also *Eyers v. Haddem*, 70 Fed. Rep. 648; *Hefner v. Haynes*, 89 Iowa 616; *Birch v. Kavanaugh Knitting Co.*, 34 N. Y. App. Div. 614, *affirmed* 165 N. Y. 617.

7. *Offer to Return May Be Withdrawn and Another Remedy Pursued.* — *Graham v. Bardin*, 1 Patt. & H. (Va.) 206.

8. *Buyer May Recoup or Set Off — England.* — *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122; *Allen v. Cameron*, 1 Crompt. & M. 832; *Lewis v. Cosgrave*, 2 Taunt. 2; *Poulton v. Lat-timore*, 9 B. & C. 259, 17 E. C. L. 373, 4 M. & R. 208.

*United States.* — *Pullman's Palace Car Co. v. Metropolitan St. R. Co.*, 157 U. S. 94; *Florence Oil, etc., Co. v. Farrar*, 109 Fed. Rep. 254, 48 C. C. A. 345; *York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144.

*Alabama.* — *Davis v. Dickey*, 23 Ala. 848; *Frith v. Holland*, 133 Ala. 583, 91 Am. St. Rep. 511.

*Arkansas.* — *Wilman v. Mizer*, 60 Ark. 281.

recovery whatever by the latter.<sup>1</sup> The buyer need not return or offer to return the property purchased,<sup>2</sup> nor is his right of set-off or recoupment affected by the fact that he has sold the property.<sup>3</sup> The right, however, exists only as against the seller or some one claiming under him with notice

*Colorado*.—*Lozier v. Hannan*, 12 Colo. App. 50.

*Georgia*.—*Wright v. Findley*, 21 Ga. 59; *Taylor v. Griswold*, 32 Ga. 569.

*Illinois*.—*Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Gibbs, etc., Mfg. Co. v. Kaszezyki*, 18 Ill. App. 623; *Cook v. Tavener*, 41 Ill. App. 642; *Newton Rubber Works v. Home Rattan Co.*, 100 Ill. App. 421.

*Indiana*.—*Lewellen v. Crane*, 113 Ind. 289; *Hillenbrand v. Stockman*, 123 Ind. 598; *Kenney v. Bevilheimer*, 158 Ind. 653; *Aultman v. Richardson*, 10 Ind. App. 413; *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667; *H. B. Smith Co. v. Williams*, 29 Ind. App. 336.

*Iowa*.—*Bixby v. Denison Normal School Assoc.*, (Iowa 1899) 78 N. W. Rep. 234; *Alpha Checkrower Co. v. Bradley*, 105 Iowa 537. *Compare Barrett v. Wheeler*, 71 Iowa 663.

*Kansas*.—*Minnesota Thresher Mfg. Co. v. Gruben*, 6 Kan. App. 665; *Graff v. Osborne*, 56 Kan. 162.

*Kentucky*.—*South Bend Pulley Co. v. W. E. Caldwell Co.*, (Ky. 1899) 54 S. W. Rep. 12, (Ky. 1900) 55 S. W. Rep. 208; *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 262.

*Maine*.—*Henkel v. Burke*, (Me. 1887) 10 Atl. Rep. 249; *Noble v. Buswell*, 96 Me. 73.

*Maryland*.—*Queen City Glass Co. v. Pittsburg Clay Pot Co.*, 97 Md. 420.

*Michigan*.—*John A. Roebling's Sons Co. v. Winthrop Hematite Co.*, 70 Mich. 346; *Avery v. Burrall*, 118 Mich. 672.

*Missouri*.—*Smith v. Steinkamper*, 16 Mo. 150; *Tall v. Chapman*, 66 Mo. App. 581; *St. Louis Brewing Assoc. v. McEnroe*, 80 Mo. App. 429; *Schoenberg v. Loker*, 88 Mo. App. 387; *June v. Falkenburg*, 89 Mo. App. 563; *New Birdsall Co. v. Keys*, 99 Mo. App. 458.

*Nebraska*.—*McConnell v. Lewis*, 58 Neb. 188; *Sloan Commission Co. v. Fry*, (Neb. 1903) 95 N. W. Rep. 862; *Snyder v. Johnson*, (Neb. 1903) 95 N. W. Rep. 692. *Compare McCormick Harvester Mach. Co. v. Gustafson*, 54 Neb. 276.

*New Jersey*.—*Higbie v. Rogers*, 63 N. J. Eq. 368.

*New York*.—*Hooper v. Story*, 155 N. Y. 171, affirming 79 Hun (N. Y.) 53; *Nash v. Weidenfeld*, 41 N. Y. App. Div. 511. *Compare Smith v. Pettee*, 70 N. Y. 13.

*North Carolina*.—*Wilson v. Hughes*, 94 N. Car. 182; *Huyett, etc., Mfg. Co. v. Gray*, 124 N. Car. 322.

*Ohio*.—*Tillyer v. Van Cleave Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

*Pennsylvania*.—*Newton Rubber Works v. Kahn*, 186 Pa. St. 306; *Morse v. Arnfield*, 15 Pa. Super. Ct. 140.

*South Carolina*.—*Trimmier v. Thompson*, 10 S. Car. 164.

*Texas*.—*Ellis v. Tips*, 16 Tex. Civ. App. 82. *Washington*.—*Elliott v. Puget Sound, etc., Steamship Co.*, 22 Wash. 220.

*Wisconsin*.—*Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 120; *Parry Mfg. Co. v. Tobin*,

106 Wis. 286; *Port Huron Engine, etc., Co. v. Clements*, 113 Wis. 249.

*Canada*.—*Crompton, etc., Loom Works v. Hoffman*, 5 Ont. L. Rep. 554.

**Two Separate Articles Bought in One Order.**—In *Barrett v. Wheeler*, 71 Iowa 663, the buyer ordered a quantity of cider for the purpose of bottling it for re-sale; in the same order, he requested the seller to have printed for him some cards and show labels to be used in selling the bottled product. These were paid for by the seller and sent as requested, but proved useless to the buyer because the cider was not as warranted and proved unsalable. It was held that the breach of warranty as to the cider could not be set up as a defense to an action to recover the cost of the cards and labels. *Compare Gutta Percha, etc., Mfg. Co. v. Wood*, 84 Mich. 452.

**Warranty on an Exchange of Property.**—It has been held in *North Carolina*, that in an action for deceit in a warranty on the exchange of horses, it is not competent for the defendant to give in evidence the defects of the property which he received from the plaintiff. *Odum v. Harrison*, 1 Jones L. (46 N. Car.) 402. But *compare Smith v. Steinkamper*, 16 Mo. 150, holding the rule to be well established that the same right of recoupment exists when there has been an exchange as in the case of sales.

**1. May Defeat Recovery of Any Purchase Money Whatever.**—*Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *McCormick Harvesting Mach. Co. v. Chesrown*, 33 Minn. 32.

The rule as to the measure of damages is the same whether the damages are claimed in a direct action on the warranty or by way of recoupment or counterclaim. See *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38, affirmed 169 N. Y. 587; *Noble v. Buswell*, 96 Me. 73.

**Extent of the Right.**—Under the *Pennsylvania* statute, in an action by the seller for the price of goods sold, the buyer can avail himself only of a claim sounding in contract, in the nature of assumpsit on the alleged warranty; the statute does not extend to claims sounding only in tort. *Dushane v. Benedict*, 120 U. S. 630.

**2. Buyer Not Bound to Return the Property.**—*Seymour v. Phillips*, 61 Neb. 282; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *Optenberg v. Skelton*, 109 Wis. 241.

**In a Suit to Redeem from Foreclosure** personal property sold and warranted to the plaintiff, upon his showing a failure of title as to a part of the property he need not establish the defect in the title by a proceeding at law based on the breach of warranty, but is entitled to a proper deduction from the purchase money notes secured by the mortgage. *Higbie v. Rogers*, 63 N. J. Eq. 368, reversing (N. J. 1901) 48 Atl. Rep. 554.

**3. Where Buyer Has Sold the Property.**—*York Mfg. Co. v. Bonnell*, 24 Ind. 667.

of the breach, and cannot be asserted against an innocent purchaser of the notes given by the buyer.<sup>1</sup>

**The Seller May Recover No More than the Real Value of the Article** where a breach of warranty is proven,<sup>2</sup> but he is entitled to recover that value notwithstanding the breach<sup>3</sup> where no damage is shown other than the diminished value of the article; the fact that the breach of warranty rendered the article wholly unfit for the purposes for which it was bought will not preclude a recovery for its actual value where the buyer retains it.<sup>4</sup>

**d. ACTION ON WARRANTY FOR DAMAGES.**—The warranty being an undertaking or contract on the part of the seller, the buyer is entitled to recover such damages as are sustained by him as a direct consequence of the breach of such contract. In this respect, the warranty may be regarded as an undertaking separate and distinct from the contract of sale.<sup>5</sup> The law relating to such actions is not peculiar, and the rule as to the measure of damages is referred to further on.<sup>6</sup> The bringing of an action on the warranty for damages implies an affirmation of the contract of sale and a *prima facie* liability for the contract price, less the damages sustained in consequence of the breach of warranty.<sup>7</sup>

**e. UPON AN EXCHANGE OF PROPERTY.**—It seems that in the case of exchange of property an action of trover will not lie on behalf of the party who has suffered by the other's breach of warranty;<sup>8</sup> nor, when the complaining party gave money in addition to the property, upon the exchange, will an action for money had and received be the proper action for trying the warranty.<sup>9</sup>

**f. WHERE CONTRACT PROVIDES SPECIAL REMEDY.**—In sales of certain classes of articles, the contract of sale frequently specifies the buyer's remedy in the event the warranty is not complied with. The buyer is not concluded by such a provision, however, but may waive the special remedy and proceed as if the contract had been silent in that particular,<sup>10</sup> except in

**1. When Buyer's Notes Are Held by Innocent Purchaser.**—Keith v. Thisler, 9 Kan. App. 888, 61 Pac. Rep. 758; Adler v. Robert Portner Brewing Co., 65 Md. 27.

**2. Adler v. Robert Portner Brewing Co.,** 65 Md. 27; McKinnon v. McIntosh, 98 N. Car. 89; Trimmier v. Thomson, 10 S. Car. 164.

**3. Seller May Recover Actual Value of Article.**—Massillon Engine, etc., Co. v. Schirmer, (Iowa 1903) 93 N. W. Rep. 599; McCormick Harvesting Mach. Co. v. Brady, 67 Mo. App. 292; Warder v. Fisher, 48 Wis. 338.

**4. When Article Is Wholly Unfit for Purposes Intended.**—Warder v. Fisher, 48 Wis. 338.

**5. Lyon v. Bertram,** 20 How. (U. S.) 149; Plant v. Condit, 22 Ark. 454; House v. Fort, 4 Blackf. (Ind.) 293; Gatling v. Newell, 9 Ind. 572; Laporte Imp. Co. v. Brock, 9 Iowa 485, 61 Am. St. Rep. 245; Allen v. Hooker, 25 Vt. 137; Walker v. Hoisington, 43 Vt. 608; Cutter v. Powell, 6 T. R. 320, 2 Smith Lead. Cas. (8th ed.) 1. See also *supra*, this title, III. 1. *Is a Collateral Undertaking.*

**6. See *infra*, this title, Measure of Damages.** The action must be founded expressly on the warranty; an undertaking or promise on the part of the seller must be shown and not merely a false representation. Cooper v. Landon, 102 Mass. 58; Thompson v. Ashton, 14 Johns. (N. Y.) 316. See also Tyre v. Causey, 4 Harr. (Del.) 425; Cutler v. Cox, 2 Blackf. (Ind.) 178, 18 Am. Dec. 152; Richardson v. Johnson, 1 La. Ann. 289; Kimball v. Cunningham, 4

Mass. 502, 3 Am. Dec. 230; Moyer v. Shoemaker, 5 Barb. (N. Y.) 319; Evertson v. Miles, 6 Johns. (N. Y.) 138; Carter v. Walker, 2 Rich. L. (S. Car.) 40; Vail v. Strong, 10 Vt. 457; Trice v. Cockran, 8 Gratt. (Va.) 442, 56 Am. Dec. 151.

**7. Action on Warranty Is an Affirmance of the Contract.**—Weybrich v. Harris, 31 Kan. 92; Rutter v. Blake, 2 Har. & J. (Md.) 353, 3 Am. Dec. 550.

**8. Trover Will Not Lie for Breach of Warranty as Exchange.**—Emanuel v. Dane, 3 Campb. 299; Power v. Wells, 2 Cowp. 818, 1 Dougl. 24, note. Compare Marston v. Knight, 29 Me. 311.

Detinue or replevin may be maintained, however, when the party to whom the warranty was given had, in the contract of exchange, expressly reserved the right to rescind. Thompson v. Harvey, 86 Ala. 519.

**9. Power v. Wells,** 2 Cowp. 818, 1 Dougl. 24, note; Cooke v. Munstone, 1 B. & P. N. R. 351.

**Evidence.**—In this connection, see Odom v. Harrison, 1 Jones L. (46 N. Car.) 402, where it was held that in an action for deceit in a false warranty upon an exchange of horses, it is not competent for the defendant to give in evidence the defects in the property which he had received from the plaintiff.

**10. Buyer Not Confined to Special Remedy.**—Shupe v. Collender, 56 Conn. 489; Cook v. Tavener, 41 Ill. App. 642; Kemp v. Freeman, 42 Ill. App. 500; Brown v. Russell, 105 Ind.



those cases where the language of the provision is such as clearly to indicate an agreement between the parties that no other remedy should be exercised.<sup>1</sup>

**The Special Remedy Most Frequently Stipulated** for in such contracts is the privilege of returning the article sold if it proves to be not as warranted, and receiving back the price paid. A failure to exercise the privilege within the time limited, or within a time reasonably sufficient for the discovery, operates as a waiver of the special remedy and leaves the buyer to his ordinary remedies at law<sup>2</sup> unless the failure to return was at the instance of the seller or otherwise consented to by him.<sup>3</sup> Such a retention, however, will not affect the buyer's ordinary remedies, unless the contract specifically provides otherwise.<sup>4</sup>

**The Requirement of a Return of the Article Is Sufficiently Complied With** by the buyer's delivering it to a person to whom the seller has directed him to send it<sup>5</sup> or by a mere offer to return when the seller has expressly declined to receive it if tendered.<sup>6</sup>

**When the Seller Reserves the Right**, upon a breach of warranty occurring, to have the article sold returned to him and the contract rescinded or to replace it with a new one,<sup>7</sup> he must exercise his right promptly upon complaint and

46; *McCormick v. Dunville*, 36 Iowa 645; *Love v. Ross*, 89 Iowa 400; *Hefner v. Haynes*, 89 Iowa 616; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. (Mass.) 88; *Mandel v. Buttles*, 21 Minn. 391; *Fitzpatrick v. Osborne*, 50 Minn. 261; *Perrine v. Serrell*, 30 N. J. L. 454; *Osborne v. McQueen*, 67 Wis. 392. See also *Aultman v. Theirer*, 34 Iowa 272.

The provision as to repair or replacement of broken parts and as to remedying defects are for the benefit of the seller and are not to be construed as restricting his remedies. *Timken Carriage Co. v. Smith*, 123 Iowa 554; *Blaess v. Nichols, etc., Co.*, 115 Iowa 373; *Elwood v. McDill*, 105 Iowa 437.

**1. Contract May Restrict Buyer's Remedies.** — *Bomberger v. Griener*, 18 Iowa 477; *Rowell v. Oleson*, 32 Minn. 288; *Beckett v. Gridley*, 67 Minn. 37; *Avery Planter Co. v. Peck*, 86 Minn. 40; *Larson v. Minneapolis Threshing Mach. Co.*, (Minn. 1904) 99 N. W. Rep. 623.

Even in those cases, the stipulation limiting the buyer to the remedy by return of the property is waived by the seller if he refuses to receive back the property upon its being tendered to him. *Osborne v. Mullikin*, 88 Mo. App. 350; *Champion Mach. Co. v. Mann*, 42 Kan. 372; *Berkey v. Lefebure*, (Iowa 1904) 99 N. W. Rep. 711.

When it is a condition of the sale that if the machine in question should not work as warranted the buyer should store it and safely deliver it to the seller or his agent, the buyer must observe the condition in order to be entitled to maintain an action on the warranty. *Williams v. Donaldson*, 8 Iowa 108, distinguished in *McCormick v. Dunville*, 36 Iowa 645.

**2. Special Remedy Waived by Neglect to Exercise It in Time.** — *Hercules Iron Works v. Dods-worth*, 57 Fed. Rep. 556; *Brown v. Russell*, 105 Ind. 46; *Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156; *Phelps, etc., Windmill Co. v. Piercy*, 41 Kan. 763; *Birdsall v. Carter*, 11 Neb. 146; *Clark v. Deering*, 29 Neb. 293; *Stutz v. Loyalhanna Coal, etc., Co.*, 131 Pa. St. 267.

**Reasonable Time — Question for the Jury.** — *Skeen v. Springfield Engine, etc., Co.*, 34 Mo. App. 485. Compare *Allen v. Todd*, 6 Lans.

(N. Y.) 222. See also *Seiberling v. Brauer*, 24 Neb. 510.

**3. No Forfeiture of Special Remedy When Retention Is at Seller's Instance.** — *Snody v. Shier*, 88 Mich. 304; *Skeen v. Springfield Engine, etc., Co.*, 34 Mo. App. 485; *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

**Implied Extension of Time for Return.** — When a machine warranted to work well fails to do so and is repaired by the seller, there is an implied agreement on the part of the seller that the buyer shall have a reasonable time thereafter within which to test the machine again without being charged with its final acceptance. *Osborne v. McQueen*, 67 Wis. 392. See also *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

**The Seller May Waive the Forfeiture of the Special Remedy** by extending the time within which the buyer may return the article. *Kansas Mfg. Co. v. Lumry*, 36 Neb. 123.

And if the seller announces that he will not accept the article, the buyer need not return or offer to return it. *Champion Mach. Co. v. Mann*, 42 Kan. 372.

**4.** See *infra*, this title, *Waiver of Warranty*. *Brown v. Russell*, 105 Ind. 46.

**5.** *Miles v. Withers*, 76 Mo. App. 87.

**6.** *Osborne v. Mullikin*, 88 Mo. App. 350.

**Buyer Mortgaging Article Meanwhile.** — The fact that the purchaser of a warranted machine, after having notified the vendor to repair it or take it back, and while waiting for him to do so, mortgaged it to a third person, does not bind the purchaser to keep the machine, where the vendor did not repair it according to the warranty, and the purchaser again notified him to take it back, the mortgage being released about the same time. *Osborne v. McQueen*, 67 Wis. 392. See also *Weston v. Card*, 96 Mich. 373; *Swann v. Lowe*, 4 Tex. App. Civ. Cas., § 303.

**7.** The seller may stipulate that if the animal sold is not as warranted the buyer shall return him and take another in his stead, and the remedy will be exclusive. *Davis v. Iverson*, 5 S. Dak. 295. See also *Canon City Electric Light, etc., Co. v. Medart Patent Pulley Co.*, 11 Colo. App. 300. Compare *Love v. Ross*, 89

proof of the breach; <sup>1</sup> if he delays an unreasonable length of time his right of election is waived. <sup>2</sup>

*g. BUYER CANNOT PURSUE INCONSISTENT REMEDIES.* — The buyer may not pursue two inconsistent remedies; if he chooses to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid, and cannot maintain an action to recover damages for a breach of the warranty. <sup>3</sup>

*h. CONDITIONS PRECEDENT TO BUYER'S RIGHT OF ACTION* — (1) *Generally.* — The contract of sale may, and frequently does, fix conditions precedent to the existence of any rights under the warranty, and a failure by the buyer to comply with such conditions, when they are not unreasonable, <sup>4</sup> is fatal to his remedy for a breach of the warranty, whether he attempts to exercise it by an action on the warranty or by setting up the breach of warranty in defense to an action for the purchase money. <sup>5</sup>

(2) *Payment of Purchase Money.* — The payment of the purchase money is not a condition precedent to the right of the buyer to pursue his remedy for a breach of the warranty by rescission or by an action for damages. <sup>6</sup> If the buyer has given a purchase-money note which has passed to an innocent holder, the former may still recover of his seller for a breach of the warranty although the note has gone to judgment and the judgment is still unpaid. <sup>7</sup> But payment of the price may be made a condition precedent by special provision of the contract. <sup>8</sup>

(3) *Buyer's Duty to Make Tests.* — Where an executory contract for the sale of material to be manufactured into articles of merchandise is with a warranty of their fitness for the purpose intended, the buyer, upon receipt of it, is bound to apply tests before using it, but if defects not open and visible

Iowa 400, holding that in such a case the buyer may retain the defective animal and maintain his action for damages for a breach of the warranty.

If the Contract Is of a Tentative Nature and requires the buyer to return the machine if it proves insufficient after a fair test, it is to be considered as fixing the buyer's remedy, and if he retains the machine he can neither rescind the contract nor sue for damages; and if he delay the return so long that the value of the machine is impaired he is equally without remedy. *Gray v. Consolidated Ice Mach. Co.*, 103 Ga. 115.

1. *Seller Must Exercise His Right Promptly.* — *Davis v. Butrick*, 68 Iowa 94; *Turnbull v. Seymour*, 31 Minn. 196.

2. *What Is Such Reasonable Time.* — It is ordinarily a question for the jury. *Robinson v. Berkey*, 111 Iowa 550.

3. *Buyer Must Elect.* — *Abraham v. Browder*, 114 Ala. 287; *Park v. Richardson, etc., Co.*, 81 Wis. 399.

4. *Conditions Must Be Reasonable.* — See *Furneaux v. Esterly*, 36 Kan. 539; *Staver v. Rogers*, 3 Wash. 603.

A Stipulation that Claims for Damages for Breach of Warranty Shall Be Presented Immediately will not be enforced literally; in such a case the buyer's right of action will not be affected if he presented his claim within a reasonable time after becoming aware of the facts. *Beane v. Tinkham*, 14 R. I. 197.

Such stipulations, limiting the time within which claims for damages for the breach of warranty shall be presented, are to be construed strictly against the seller. Thus a stipulation that no action for a breach of the warranty

should be after the year of the sale, will not deprive the buyer of his right to rely on the breach at any time as a defense to an action to recover the purchase money. *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328.

5. *Buyer Must Fulfil Conditions Precedent.* — *Nichols v. Wyman*, 71 Iowa 160; *Russell v. Murdock*, 79 Iowa 101, 18 Am. St. Rep. 348; *Furneaux v. Esterly*, 36 Kan. 539; *Platt v. Broderick*, 70 Mich. 577; *Nichols v. Hail*, 4 Neb. 210; *Hills v. Bannister*, 8 Cow. (N. Y.) 31; *Himes v. Kiehl*, 154 Pa. St. 190; *Swann v. Lowe*, 4 Tex. App. Civ. Cas., § 303; *Reynolds v. Roberts*, 57 Vt. 392; *Staver v. Rogers*, 3 Wash. 603.

*Breach of Condition in Immaterial Particular.* — A failure to discharge conditions imposed by the contract of sale does not affect the warranty when it appears that such failure was in an immaterial particular, or where the warranty was not conditioned upon a compliance with such provisions. *Platt v. Broderick*, 70 Mich. 577.

6. *Atkins v. Cobb*, 56 Ga. 86; *Thoreson v. Minneapolis Harvester Works*, 29 Minn. 341; *Fitzpatrick v. Osborne*, 50 Minn. 261; *Wiggins v. Hunter*, Harp. L. (S. Car.) 80.

7. *Volland v. Baker*, 32 Neb. 391; *Parker v. Roberts*, 63 N. H. 431. See also *J. I. Case Threshing Mach. Co. v. Smith*, 16 Oregon 381.

8. *Payment Made a Condition Precedent by Special Stipulation.* — *J. I. Case Threshing Mach. Co. v. Smith*, 16 Oregon 381.

Where Title Is to Remain in the Seller until the purchase money is fully paid, there can be no action on the warranty until the payment is made. *English v. Hanford*, 75 Hun (N. Y.) 428.

are afterward discovered, which amount to a breach of the warranty, his remedy by an action on the warranty is not affected.<sup>1</sup> If the contract is for the sale of a machine which is tested on the buyer's premises by the seller and rejected by the former upon such test, the buyer is under no duty to make further tests in the absence of any provision in the contract of sale imposing such a duty, but may elect not to accept the property, in which event he must stand on the condition of the property as it was at the time of his refusal to accept.<sup>2</sup>

**But a Buyer Is Not Concluded by a Test Made by the Seller** which apparently establishes the sufficiency of machinery sold to him; he may prove the results of continued use of the machinery for a reasonable time thereafter for the purpose of showing a breach of the warranty.<sup>3</sup>

(4) *Buyer's Duty to Return Article Purchased.*—A return of the article purchased is not a condition precedent to a right of action upon a warranty for a breach of it, and the buyer is not bound to return it;<sup>4</sup> his retention of it is material only as affecting the measure of damages recoverable.<sup>5</sup> The

**1. When Buyer Bound to Test.**—*Dounce v. Dow*, 57 N. Y. 16; *Gurney v. Atlantic*, etc., R. Co., 58 N. Y. 358. See also *U. S. Sugar Refinery v. E. P. Allis Co.*, (C. C. A.) 56 Fed. Rep. 786; *Zimmerman v. Robinson*, 118 Iowa 117.

If the contract expressly stipulates for a test by the buyer and a return of the article if it is unsatisfactory, he can maintain no action on the warranty, nor avail himself of a set-off, in the absence of proof of such a test and a return. *Avery Planter Co. v. Peck*, 80 Minn. 519, 86 Minn. 40.

**Test Must Extend Over Stipulated Period.**—Where the contract of sale of a jack provided that in case he proved useless for breeding purposes after two years trial under careful handling, the buyer might return him and receive another in his place, the buyer is bound to test him for the stipulated period and a return before the expiration of the two years is premature. *Thisler v. Hopkins*, 85 Ill. App. 207.

But the fact that the contract allows the buyer sixty days in which to make tests of a machine does not compel him to test the machine during all that time. *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188.

**2. Buyer Not Bound to Make Further Tests.**—*U. S. Sugar Refinery v. E. P. Allis Co.*, (C. C. A.) 56 Fed. Rep. 786.

**3.** *Edward P. Allis Co. v. Columbia Mill Co.*, (C. C. A.) 65 Fed. Rep. 52.

**4. Buyer Not Bound to Return Article Purchased**—*Alabama*.—*Milton v. Rowland*, 11 Ala. 732; *Kornegay v. White*, 10 Ala. 255.

*Arkansas*.—*Plant v. Condit*, 22 Ark. 454.

*Georgia*.—*Woodruff v. Graddy*, 91 Ga. 333, 44 Am. St. Rep. 33.

*Illinois*.—*Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Brown v. Reinholdt*, 41 Ill. App. 599.

*Iowa*.—*Storrs v. Emerson*, 72 Iowa 390; *Short v. Matteson*, 81 Iowa 638.

*Kentucky*.—*Cook v. Gray*, 2 Bush (Ky.) 121; *Carter v. Stennet*, 10 B. Mon. (Ky.) 250; *Ewing v. Hauss*, (Ky. 1899) 50 S. W. Rep. 249; *South Bend Pulley Co. v. W. E. Caldwell Co.*, (Ky. 1899) 54 S. W. Rep. 12, (Ky. 1900) 55 S. W. Rep. 208.

*Maryland*.—*Lane v. Lantz*, 27 Md. 211.

*Massachusetts*.—*Martin v. Roberts*, 5 Cush. (Mass.) 126; *Clark v. Baker*, 5 Met. (Mass.) 452.

*Michigan*.—*Hull v. Belknap*, 37 Mich. 179.

*Missouri*.—*Thompson v. Botts*, 8 Mo. 710; *Ross v. Barker*, 30 Mo. 385; *Martin v. Maxwell*, 18 Mo. App. 176.

*New York*.—*Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *Messenger v. Pratt*, 3 Lans. (N. Y.) 234; *Chase v. Everts*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 987; *Osborn v. American Ink Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 648.

*Pennsylvania*.—*Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 23 Am. Dec. 85.

*South Carolina*.—*Parker v. Pringle*, 2 Strobb. L. (S. Car.) 242.

*Tennessee*.—*Garr v. Young*, (Tenn. Ch. 1901) 62 S. W. Rep. 631; *Southern Brass*, etc., Co. v. *Exeter Mach. Works*, 109 Tenn. 67.

*Texas*.—*Hayden v. Houghton*, (Tex. Civ. App. 1894) 24 S. W. Rep. 803; *Houchins v. Williams*, (Tex. Civ. App. 1894) 25 S. W. Rep. 730; *Westinghouse Electric Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200.

*Vermont*.—*Houghton v. Carpenter*, 40 Vt. 583.

*Wisconsin*.—*Getty v. Roundtree*, 2 Chand. (Wis.) 28, 2 Pin. (Wis.) 379, 54 Am. Dec. 138; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Terry v. Allis*, 16 Wis. 478; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Larson v. Aultman*, etc., Co., 86 Wis. 281, 39 Am. St. Rep. 893; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *Waupeca Electric Light*, etc., Co. v. *Milwaukee Electric R. etc., Co.*, 112 Wis. 469.

As to the buyer's duty to return in cases of rescission, see *supra*, this section, *Buyer's Duty upon Rescinding*. See also the title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 620.

**Whether the Breach of Warranty Is Set Up in an Action for Damages or as a Defense to a Suit for the Price**, the rule is the same; in neither case is the buyer bound first to return the article purchased. *Murray v. Smith*, 4 Daly (N. Y.) 277; *Parker v. Pringle*, 2 Strobb. L. (S. Car.) 242.

**5. Failure to Return Material Only upon Meas-**



only cases in which a return of the property is necessary are cases where the buyer rescinds the contract of sale or where the contract specifically calls for such a return if the property proves to be not as warranted.<sup>1</sup> In the first of these cases the contract is repudiated and the action is not properly on the warranty but for the false representations, and a return of the property is always a condition precedent to the exercise of the remedy by rescission<sup>2</sup> unless the article is one of no value whatever.<sup>3</sup> In the other class of cases, where the contract expressly stipulates for a return of the property, the buyer sues upon the contract of sale containing the warranty and can, of course, assert no rights under it except after compliance with its mandatory provisions.<sup>4</sup> In such a case his failure to return the property amounts to a waiver of the breach of warranty.<sup>5</sup>

**A Return, When Expressly Required, Must Be Made Within a Reasonable Time** after the discovery of the breach of warranty;<sup>6</sup> what is a reasonable time in any particular case is ordinarily a question for the jury.<sup>7</sup>

(5) *Special Conditions Fixed by Contract of Sale* — (a) **Notice of Defects.** — Unless expressly stipulated for, notice of defects is not a condition precedent to the exercise of any remedy for a breach of the warranty.<sup>8</sup> But it is now a common practice, in the sale of certain classes of articles, particularly of farm machinery, to have the contract of sale expressly provide that, upon the buyer's discovering any defect in the article covered by the warranty, he shall give the seller notice thereof within a specified time; where such a condition is a part of the contract, the buyer can assert no remedy on the warranty except upon proof that the condition has been substantially complied with.<sup>9</sup>

**ure of Damages.** — *Aultman v. Johnson*, 45 Ill. App. 313; *Hull v. Belknap*, 37 Mich. 179; *Richardson v. Grandy*, 49 Vt. 22. See *infra*, this title, *Measure of Damages*.

**1. When Contract Requires a Return.** — *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Zimmerman v. Robinson*, 118 Iowa 117; *Ferguson v. Oliver*, 8 Smed. & M. (Miss.) 332; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Parks v. Morris Ax, etc., Co.*, 54 N. Y. 586. See also the title **RESCISSION, REFORMATION, AND CANCELLATION**, vol. 24, p. 645.

The rule of the text is true, even where the property is bought on inspection. *Houghton v. Carpenter*, 40 Vt. 588.

**2.** *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 324; *Cookingham v. Dusa*, 41 Kan. 229. See *supra*, this section, *Buyer's Duty upon Rescinding*.

**3.** *Smeltzer v. White*, 92 U. S. 390; *Dill v. O'Ferrell*, 45 Ind. 268.

**4.** *Hoover v. Doetsch*, 45 Ill. App. 631; *Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491; *F. C. Austin Mfg. Co. v. Clendenning*, 21 Ind. App. 459; *Gammar v. Borgain*, 27 Iowa 369; *Walls v. Gates*, 6 Mo. App. 242; *Dewey v. Erie*, 14 Pa. St. 211, 53 Am. Dec. 533. Compare *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Merchants', etc., Sav. Bank v. Frazee*, 9 Ind. App. 161.

**A Change in the Place of Delivery** after the contract of sale has been made does not release the buyer from his obligation to retain in such cases. *Gammar v. Borgain*, 27 Iowa 369. Compare *Osborn v. Rawson*, 47 Mich. 206.

**The Fact that the Seller Had Transferred the Purchase-money Note** and the buyer had paid it will not alter the rule; the buyer cannot recover damages without proving a compliance or an offer to comply with the stipulation requir-

ing him to return the article sold. *F. C. Austin Mfg. Co. v. Clendenning*, 21 Ind. App. 459.

**5. Failure to Return Amounts to Waiver.** — *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161. See *infra*, this title, *Waiver of Warranty or Breach*.

**6.** *Weston v. Card*, 96 Mich. 373 (slight continued use no waiver); *McCormick Harvesting Mach. Co. v. Warfield*, 33 N. Y. App. Div. 513. See also *Zimmerman v. Robinson*, 118 Iowa 117.

**"At Once."** — A requirement that the article shall be returned "at once" if not satisfactory, means within a reasonable time. *Warder, etc., Co. v. Horne*, 110 Iowa 285.

**7. Question of Reasonable Time One for Jury.** — *Warder, etc., Co. v. Horne*, 110 Iowa 285; *South Bend Pulley Co. v. W. E. Caldwell Co.*, (Ky. 1899) 54 S. W. Rep. 12 (Ky. 1900) 55 S. W. Rep. 208; *McCormick Harvesting Mach. Co. v. Warfield*, 33 N. Y. App. Div. 513.

**8. Notice of Defects Unnecessary When Not Expressly Stipulated for.** — *Ross v. Barker*, 30 Mo. 385; *McKeney v. Duvall*, 21 Md. 166; *Lewis v. Rountree*, 78 N. Car. 323; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129; *Wau-paca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co.*, 112 Wis. 469.

Where the original agreement of sale of a machine required the buyer to give notice of defects and, upon the machine's proving unsatisfactory, the parties make a new agreement, the requirement of notice in the original agreement does not become a part of the new agreement unless expressly made so. *Russell v. Hudson*, (Tenn. Ch. 1896) 37 S. W. Rep. 1001.

**9. Notice of Defects Necessary Where Contract Provides for It.** — *Chapman v. Barker*, 111 Hayett, etc., Mig. Co., 92 Ga. 273.

**Proof of Compliance with the Condition Is Unnecessary** where it appears that the seller's agent was present at the trial of the machine and observed its failure to work as warranted or where he otherwise impliedly waived notice by voluntarily attempting or promising to remedy the defects in question.<sup>1</sup> So, also, it seems, compliance with such a condition is unnecessary where it appears that it is impossible or absolutely useless,<sup>2</sup> or where the stipulation for the notice is an agreement distinct from and independent of the contract of warranty.<sup>3</sup> But the contract may preclude any inference of a waiver by stipulating that the presence of the seller's agent at the trial of the machine or his attempt to remedy defects shall not be taken as a waiver of the seller's right to the notice called for by the contract; in such cases no waiver can be assumed

*Idaho*.—Murphy v. Russell, 8 Idaho 133.

*Illinois*.—Havana Press Drill Co. v. Scurlock, 23 Ill. App. 426.

*Indiana*.—Brown v. Russell, 105 Ind. 46; Campbell v. Wray, 5 Ind. App. 155.

*Iowa*.—Nichols v. Wyman, 71 Iowa 160; Russell v. Murdock, 79 Iowa 101, 18 Am. St. Rep. 348; McCormick Harvesting Mach. Co. v. Brower, 88 Iowa 607.

*Kansas*.—Furneaux v. Esterly, 36 Kan. 539.

*Kentucky*.—Frick Co. v. Morgan, (Ky. 1902) 59 S. W. Rep. 1072; Davis v. J. I. Case Threshing Mach. Co., (Ky. 1904) 80 S. W. Rep. 1145.

*Michigan*.—Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281; Osborne v. Wigent, 127 Mich. 624.

*Minnesota*.—Beckett v. Gridley, 67 Minn. 37; Larson v. Minneapolis Threshing Mach. Co., (Minn. 1904) 99 N. W. Rep. 623.

*Missouri*.—Deere v. Hucht, 27 Mo. App. 1; Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co., 60 Mo. App. 148; Kingman v. Schulenberg, 64 Mo. App. 548.

*Nebraska*.—Moline, etc., Plow Co. v. Perea, 52 Neb. 577.

*New York*.—Hills v. Bannister, 8 Cow. (N. Y.) 31; Geiser Mfg. Co. v. Taylor, 55 N. Y. App. Div. 638.

*North Dakota*.—Fahey v. Esterley Harvesting Mach. Co., 3 N. Dak. 220, 44 Am. St. Rep. 554; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. Dak. 466.

*Pennsylvania*.—Himes v. Kiehl, 154 Pa. St. 190.

*Tennessee*.—Lewis v. Hubbard, 1 Lea (Tenn.) 436, 27 Am. Rep. 775.

*Texas*.—Aultman v. York, 1 Tex. Civ. App. 484; Aultman v. McKinney, (Tex. Civ. App. 1894) 26 S. W. Rep. 267; Equitable Mfg. Co. v. Stevens, (Tex. Civ. App. 1900) 60 S. W. Rep. 350.

*Washington*.—Staver v. Rogers, 3 Wash. 603.

*Wisconsin*.—Trapp v. New Birdsall Co., 99 Wis. 458; Nichols, etc., Co. v. Chase, 103 Wis. 573; Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co., 116 Wis. 130.

See also Bates v. Fish Bros. Wagon Co., 50 N. Y. App. Div. 38, affirmed 169 N. Y. 587; Pennsylvania Iron Works Co. v. Hygeian Ice, etc., Co., 185 Mass. 366.

**In an Action by the Seller to Recover the Price** of the article sold, it is error to admit evidence of the warranty or its breach when it appears that the notice was not given as required by the contract. Deere v. Hucht, 27 Mo. App. 1.

**A Provision Authorizing the Buyer to Return the Machine** if it proves unsatisfactory does not annul an earlier provision in the same contract requiring the buyer to give the seller notice of defects. Nichols, etc., Co. v. Chase, 103 Wis. 570.

**When Machine Is a Combined Mower and Reaper**.—McCormick v. Basal, 50 Iowa 523.

**1. Seller's Implied Waiver of Notice of Defects**—*Illinois*.—Jacobs v. Crumbaker, 67 Ill. App. 391.

*Indiana*.—McCormick Harvesting Mach. Co. v. Embree, 94 Ind. 85; Plano Mfg. Co. v. Kesler, 15 Ind. App. 110; Seiberling v. Newlon, 16 Ind. App. 374.

*Iowa*.—Sandwich Mfg. Co. v. Trindle, 71 Iowa 600; Warder v. Robertson, 75 Iowa 585; McCormick Harvesting Mach. Co. v. Brower, 94 Iowa 145; Briggs v. M. Rumely Co., 96 Iowa 202; Peterson v. Walter A. Wood Mowing, etc., Mach. Co., 97 Iowa 148, 59 Am. St. Rep. 399; Massillon Engine, etc., Co. v. Shirmmer, 122 Iowa 699.

*Kansas*.—Champion Mach. Co. v. Mann, 42 Kan. 372; Aultman, etc., Co. v. Frazier, 5 Kan. App. 202.

*Minnesota*.—Flatt v. Osborne, 33 Minn. 98; Nichols, etc., Co. v. Wiedemann, 72 Minn. 344; Massachusetts L. & T. Co. v. Welch, 47 Minn. 183.

*Nebraska*.—McCormick Harvesting Mach. Co. v. Machmuller, (Neb. 1901) 95 N. W. Rep. 507.

*Pennsylvania*.—Osborne v. Walley, 8 Pa. Super. Ct. 193.

*Texas*.—Equitable Mfg. Co. v. Stevens, (Tex. Civ. App. 1900) 60 S. W. Rep. 350.

*Compare* Irle v. Nichols, etc., Co., 89 Ill. App. 619; Boyer v. Neel, 50 Mo. App. 26; Heagney v. J. I. Case Threshing Mach. Co., (Neb. 1903) 96 N. W. Rep. 175.

**Sending or Promising to Send a Man to Repair the Defects** or to make the machine work, is a waiver of the notice when done by an authorized agent of the seller or by the seller himself. Aultman v. Wirth, 54 Ill. App. 17; Aultman, etc., Co. v. Frazier, 5 Kan. App. 202; Sandwich Mfg. Co. v. Feary, 40 Neb. 226, overruling 34 Neb. 411; Baker v. Nichols, etc., Co., 10 Okla. 685. *Compare* J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. Dak. 466.

**2. Performance of Conditions Impossible or Useless**.—Waters' Patent Heater Co. v. Smith, 120 Mass. 444. See also Aultman v. Stichler, 21 Neb. 79.

**3. When Stipulation Is Independent Agreement Distinct from Warranty**.—Perrine v. Serrell, 30

from the agent's conduct in those particulars.<sup>1</sup>

**The Waiver of Notice Must Be by Some Agent Having Authority to waive it,**<sup>2</sup> and if this lack of authority exists in the agent whose waiver is relied on by the buyer, either because the contract expressly provides that no agent shall have power to waive any provision of the contract,<sup>3</sup> or because of the utter absence of any such authority,<sup>4</sup> there can be no recovery by the buyer except upon proof of compliance with the requirements of the contract as to notice of defects and the like.

**Character and Sufficiency of Notice — To Whom Notice Must Be Given.** — The terms of the contract must be substantially observed. As a rule, notice to the seller's agent, particularly where he is the agent who made the sale, is notice to the principal.<sup>5</sup> But where the contract expressly provides that such a notice shall not be sufficient or impliedly so provides, as when it stipulates for notice both to the agent and to the principal,<sup>6</sup> or to the principal at the home office,

N. J. L. 454. *Compare* Himes v. Kiehl, 154 Pa. St. 190; Lewis v. Hubbard, 1 Lea (Tenn.) 436, 27 Am. Rep. 775.

A requirement of notice within one week is waived by a special agreement that the buyer's notes for the price should not be delivered until he had had a chance to try the machine thoroughly. *Dollarhide v. Hopkins*, 72 Ill. App. 509.

**1. Inference of Waiver Precluded by Express Stipulation.** — *Boyer v. Neel*, 50 Mo. App. 26; *Heagney v. J. I. Case Threshing Mach. Co.*, (Neb. 1903) 96 N. W. Rep. 175. See also *Advance Thresher Co. v. Pierce*, 74 Mo. App. 676, holding that no waiver of the required notice will be implied against the seller unless his conduct relied on as a waiver was under knowledge of the facts and was such as fairly to indicate an acquiescence on his part in the failure of the buyer to comply with the conditions in question.

**2. Fahey v. Esterley Harvesting Mach. Co.**, 3 N. Dak. 220, 44 Am. St. Rep. 554; *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. Dak. 466.

**3. Contract Expressly Negating Agent's Power to Waive Notice.** — *Reeves v. Corrigan*, 3 N. Dak. 425; *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. Dak. 466; *Larson v. Minneapolis Threshing Mach. Co.*, (Minn. 1904) 99 N. W. Rep. 623; *Trapp v. New Birdsall Co.*, 109 Wis. 543. See also *Furieux v. Esterly*, 36 Kan. 539. *Compare* *Massillon Engine, etc., Co. v. Shirmer*, 122 Iowa 699; *E. T. Kenney Co. v. Anderson*, (Ky. 1904) 81 S. W. Rep. 663.

**4. Irle v. Nichols, etc., Co.**, 89 Ill. App. 619; *Nichols v. Knowles*, 31 Minn. 489; *Aultman, etc., Co. v. Gunderson*, 6 S. Dak. 226, 55 Am. St. Rep. 837. See also *Zimmerman v. Robinson*, 118 Iowa 117.

**5. Notice to Agent Sufficient Generally.** — *Campbell v. Wray*, 5 Ind. App. 155; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Burke v. Keystone Mfg. Co.*, 19 Ind. App. 556; *Port Huron Engine, etc., Co. v. Smith*, 21 Ind. App. 233; *Davis v. Butrick*, 68 Iowa 94; *McCormick Harvesting Mach. Co. v. Brower*, 94 Iowa 144; *Acker v. Kimmie*, 37 Kan. 276; *Flatt v. Osborne*, 33 Minn. 98; *Nichols v. Root*, 35 Minn. 363; *Sandwich Mfg. Co. v. Feary*, 40 Neb. 226, overruling 34 Neb. 411; *McCormick Harvesting Mach. Co. v. Machmuller*, (Neb. 1901) 95 N. W. Rep. 507; *McCormick Harvesting Mach. Co. v. Smith*, 9 Kulp (Pa.) 448. See

also *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

**Notice to the Local Agent of the Seller** has been held sufficient although the contract provided for notice to the agent who made the sale. *Boley v. Walter A. Wood Mowing, etc., Mach. Co.*, 62 Mo. App. 139.

**The Testimony of a Discharged Agent of the Seller** to the effect that the buyer gave him notice of the defects is admissible, not for the purpose of proving notice to the seller but of showing diligence on the part of the buyer in his efforts to give notice. *Smoots v. Foster*, 9 Ohio Cir. Dec. 218, 16 Ohio Cir. Ct. 612.

**6. Stipulation Requiring Notice to Both Principal and Agent — Notice to Agent Not Enough.** — *Irle v. Nichols, etc., Co.*, 89 Ill. App. 619 (even though such agent sends man to repair defects); *Seiberling v. Rodman*, 14 Ind. App. 460; *J. I. Case Threshing Mach. Co. v. Lyons*, (Ky. 1903) 72 S. W. Rep. 356; *Weise v. Birdsall Co.*, 35 Mo. App. 229; *Fahey v. Esterley Harvesting Mach. Co.*, 3 N. Dak. 220, 44 Am. St. Rep. 554; *Gaar v. Hicks*, (Tenn. Ch. 1897) 42 S. W. Rep. 455; *Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co.*, 116 Wis. 130. *Compare* *Port Huron Engine, etc., Co. v. Smith*, 21 Ind. App. 233; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Aultman, etc., Co. v. Frazier*, 5 Kan. App. 202.

In such a case, however, notice to the agent alone is sufficient when the agent himself gave his personal warranty in addition to that of the manufacturer, and the breach of warranty is set up as a defense to an action by such agent to recover the price. *Campbell v. Wray*, 5 Ind. App. 155.

**Notice to General Agent of Seller Insufficient.** — A requirement in the contract that the buyer shall give notice of the failure of the machine to work, to the seller at its home office and to the agent who sold the machine, is not complied with by notice to the latter agent and a notice by telephone to the seller's general agent, and the fact that the latter agent sent an expert to repair the machine will not excuse the buyer's failure to give the required notice. The general agent is without power to waive the requirement of notice to the home office. *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. Dak. 466. *Compare* *Gaar v. Stark*, (Tenn. Ch. 1895) 36 S. W. Rep. 149. See also *Plano Mfg. Co. v. Bergmann*, 102 Wis. 21.



notice to the agent merely is not enough.<sup>1</sup>

**By Whom Notice May Be Given.** — The buyer may give notice by his agent though the latter may be an agent of the seller also.<sup>2</sup> But a mere promise by a sub-agent of the seller to give the latter the notice does not avail the buyer if such promise is not kept.<sup>3</sup>

**Manner of Notice.** If the contract requires the buyer to give written notice of defects, a verbal notice is not sufficient<sup>4</sup> although, in some instances, special circumstances may excuse a failure to comply strictly with this requirement.<sup>5</sup> If the contract require that the buyer state in the notice in what respect the machine is defective, a mere statement that it will not do the work for which it was bought is not sufficient.<sup>6</sup>

**Time of Notice.** — If the provision requiring notice of defects does not fix the time when it shall be given, notice within a reasonable time after discovery of the defect is sufficient.<sup>7</sup> If the contract fixes the time of notice, its provisions must be substantially followed.<sup>8</sup> Where, however, the defects are not

**When the Contract Specifically Provides that No Agent Has Authority to Change It** in any respect, and the buyer is given a duplicate copy of it, he is charged with notice of the limitation upon the powers of the seller's agents and cannot rely upon a waiver by them of any provision of the contract. *Furneaux v. Esterly*, 36 Kan. 539. See also *Bomberger v. Griener*, 18 Iowa 477; *Nichols v. Larkin*, 79 Mo. 264; *Miller v. Nichols*, 5 Neb. 478; *Dewey v. Erie*, 14 Pa. St. 211, 53 Am. Dec. 533.

1. *Weise v. Birdsall Co.*, 35 Mo. App. 229; *Fahey v. Esterley Harvesting Mach. Co.*, 3 N. Dak. 220, 44 Am. St. Rep. 554; *Gaar v. Hicks*, (Tenn. Ch. 1897) 42 S. W. Rep. 455. See also *Trapp v. New Birdsall Co.*, 109 Wis. 543.

2. *Nichols v. Root*, 35 Minn. 363.

3. *Nichols v. Larkin*, 79 Mo. 264. Compare *Aultman-Taylor Machinery Co. v. Ridenour*, 96 Iowa 638.

4. *Nichols, etc., Co. v. Caldwell*, (Ky. 1904) 80 S. W. Rep. 1099.

When the contract called for written notice to the manufacturer by registered letter, a verbal notice to the agent is insufficient. And this is true although one or two experts in the employ of the manufacturer who happened to be in that vicinity, examined the machine. *Aultman, etc., Co. v. Gunderson*, 6 S. Dak. 226, 55 Am. St. Rep. 837. See also *Nichols v. Larkin*, 79 Mo. 264. Compare *Aultman-Taylor Machinery Co. v. Ridenour*, 96 Iowa 638.

**Notice by Registered Mail.** — Although the contract stipulates that the buyer shall give the notice "by registered letter," it seems that a notice is not invalidated by the fact that it was sent in an unregistered letter. *Badgett v. Frick*, 28 S. Car. 176.

And such a requirement is sufficiently complied with where the buyer procures the local agent to write the letter and leaves it with him to be forwarded by registered mail. *Aultman-Taylor Machinery Co. v. Ridenour*, 96 Iowa 638. Compare *Nichols v. Larkin*, 79 Mo. 264; *Nichols, etc., Co. v. Caldwell*, (Ky. 1904) 80 S. W. Rep. 1099.

5. See *infra*, this subdivision, paragraph commencing *Notice in the Particular Manner and Time, etc.*

**Where Buyer Cannot Read or Write.** — Where there is a complete failure of the machine sold

to comply with the warranty, notwithstanding repeated efforts by the seller to remedy defects, and the buyer, after full trial with the seller's agent to assist him, gives verbal notice to such agent, being unable either to read or write, and then leaves the machine with him, the seller cannot recover the price, although the contract of sale provided for a written notice. *Aultman v. Trout*, 27 Neb. 199.

6. **What Notice Must State.** — *Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co.*, 116 Wis. 130.

A requirement that the buyer shall give notice to the seller and its agent stating particularly in what respects and what parts the machine fails to meet the warranty is sufficiently complied with by a notice that the machine (a separator) fails to clean the grain without wasting it. *Nichols, etc., Co. v. Charlebois*, 10 N. Dak. 446.

7. **Must Be in Reasonable Time.** — *Russell v. Newdigate*, (Ky. 1898) 44 S. W. Rep. 973, holding that notice given two years and a half after the sale is unreasonably late, particularly when it appears that the buyer had often seen the seller and his agent in the meantime and conversed with them regarding the contract without mentioning any defect. See also *Nichols, etc., Co. v. Chase*, 103 Wis. 570; *Trapp v. New Birdsall Co.*, 109 Wis. 543.

8. **Premature Notice.** — Under a contract providing that if, "upon one day's trial," the machine sold does not work well, the buyer shall give immediate notice to the seller or his agent, such a notice given by the buyer to the agent after only half a day's trial is premature and does not meet the requirement of the contract. *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607. See also *Thisler v. Hopkins*, 85 Ill. App. 207.

**"Immediate Notice."** — If the buyer, two days after a one day's trial of the machine, gives the seller's agent notice of the defects, and the latter asks him to keep the machine temporarily until he can confer with his principal, it is for the jury to say whether there was a compliance with the provision of the contract requiring "immediate" notice. *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607.

But notice two and a half months after dis-

discoverable, or were not discovered by the buyer in the exercise of due care, within the prescribed time, notice within a reasonable time after the defects are discovered will be sufficient.<sup>1</sup>

Notice in the Particular Manner and Time Provided for Is Waived by the seller if he accepts and acts upon notice of another kind.<sup>2</sup> Thus, a stipulation that the buyer shall give a notice "in writing" is waived by the seller's receiving or acting upon a verbal notice to himself or his agent.<sup>3</sup> Or, if a verbal notice is given to an agent who puts it in writing and forwards it to his principal, there is a sufficient compliance.<sup>4</sup> But mere information of defects in the machine sold, communicated to the seller in a manner different from that stipulated in the contract, and not acted upon, in lieu of the notice agreed on, does not operate as a waiver of the stipulated conditions.<sup>5</sup>

(b) Opportunity to Remedy Defects. — Special contracts for the sale of machinery, harvesters, and similar property, often provide that in case any defect constituting a breach of the warranty appears, notice thereof shall be given and the seller allowed an opportunity to remedy the defect. In such case, if the seller acts with reasonable promptness after receiving the notice,<sup>6</sup> in sending an agent to remedy the defects complained of, the buyer forfeits all rights under the warranty if he refuses to allow the repairs to be made,<sup>7</sup> either by returning the article<sup>8</sup> or otherwise. The seller must be given a reasonable opportunity;

covery of the defect is not "immediate." *Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co.*, 116 Wis. 130.

**1. Defects Not Discoverable Within Time Fixed.** — *Beasley v. Huyett*, etc., Mfg. Co., 92 Ga. 273; *Gaar v. Hill*, (Ky. 1899) 49 S. W. Rep. 202.

**2. Waiver of Particular Kind of Notice.** — *Avery Planter Co. v. Rigg*, 56 Ill. App. 599; *McCormick Harvesting Mach. Co. v. Embree*, 94 Ind. 85; *Huber Mfg. Co. v. Bussey*, 16 Ind. App. 410; *E. T. Kenney Co. v. Anderson*, (Ky. 1904) 81 S. W. Rep. 663; *Aultman*, etc. Co. v. *Frazier*, 5 Kan. App. 202; *Parsons Band Cutter*, etc., Co. v. *Gadeke*, 1 Neb. (unofficial) 605, 95 N. W. Rep. 850; *Russell v. Hudson*, (Tenn. Ch. 1896) 37 S. W. Rep. 1001 (implied waiver of time of notice by acting on later notice). See also *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

**3. Oral Notice When Contract Calls for Written Notice.** — *Davis v. Butrick*, 68 Iowa 94; *Dean v. Nichols*, etc., Co., 95 Iowa 89; *Parsons Band Cutter*, etc., Co. v. *Gadeke*, 1 Neb. (unofficial) 605, 95 N. W. Rep. 850.

**4. Verbal Notice to Agent Reduced to Writing by Him.** — *Springfield Engine*, etc., Co. v. *Kennedy*, 7 Ind. App. 502.

**5. Mere Information on Seller's Part Not Enough.** — *Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co.*, 116 Wis. 130; *Davis v. Butrick*, 68 Iowa 94; *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183.

**The Fact that an Agent, Without Knowledge of the Seller,** visited the buyer to look at the engine after the latter had given a notice of defects not in accordance with what the contract called for, is not a waiver of the seller's express right to a particular kind of notice. In this case, the contract called for notice to the seller and to the agent from whom the engine was bought, and the notice was given merely to the seller and to a different agent. *Trapp v. New Birdsall Co.*, 109 Wis. 513.

**6. The Seller Must Act Promptly** upon receiving the notice of defects; if he does not, he can-

not rely upon the provisions of the contract allowing him the right to remedy defects. *Clarke v. Johnson Foundry*, etc., Co., (Ky. 1897) 42 S. W. Rep. 844.

**The Existence of a Strike in the Seller's Factory** which prevents him from attending to the buyer's machine for some time will not excuse the former for his failure to remedy the defects of which he was notified. *Puget Sound Iron*, etc., Works v. *Clemmons*, 32 Wash. 36.

**7. Buyer Must Allow Seller Opportunity to Remedy Defects** — *Colorado*. — *Cañon City Electric Light*, etc., Co. v. *Medart Patent Pulley Co.*, 11 Colo. App. 300.

*Georgia*. — *Mayes v. McCormick Harvesting Mach. Co.*, 110 Ga. 545.

*Iowa*. — *Nichols v. Wyman*, 71 Iowa 160; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa 556; *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607.

*Nebraska*. — *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53, 34 Neb. 411, 40 Neb. 226.

*New York*. — *Hills v. Bannister*, 8 Cow. (N. Y.) 31; *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38, affirmed 169 N. Y. 587.

*North Dakota*. — *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. Dak. 81.

*Tennessee*. — *Lewis v. Hubbard*, 1 Lea (Tenn.) 436, 27 Am. Rep. 775.

*Texas*. — *Equitable Mfg. Co. v. Stevens*, (Tex. Civ. App. 1900) 60 S. W. Rep. 350.

*Washington*. — *Staver v. Rogers*, 3 Wash. 603.

*Wisconsin*. — *Port Huron Engine*, etc., Co. v. *Clements*, 113 Wis. 249. *Compare Parry Mfg. Co. v. Tobin*, 106 Wis. 286.

See also *supra*, this section, *Notice of Defects*.

**A Waiver of Notice of Defects** does not amount to a waiver of the seller's right to an opportunity to remedy the defects complained of. *Equitable Mfg. Co. v. Stevens*, (Tex. Civ. App. 1900) 60 S. W. Rep. 350.

*Osborne v. Wigent*, 127 Mich. 624; *Nichols*, etc., Co. v. *Chase*, 103 Wis. 570.

The buyer cannot avoid the contract by sim-

if he fails to remedy the defects on the first day, the buyer cannot refuse him the right to make another effort on the next day.<sup>1</sup>

(c) **Friendly Assistance.**—Where the contract requires the buyer to render "friendly assistance" to the seller or his agent in repairing defects or attempting to make a machine work, the buyer is bound to render it, but it is ordinarily a question for the jury whether he did so or not when he claims to have done so.<sup>2</sup>

(6) *What Is Sufficient Compliance with Conditions.*—A substantial compliance with the conditions imposed, either by the law as an incident to the remedy or by the special provisions of the contract, is all that is required, and the jury should be so instructed.<sup>3</sup>

**3. Parties Entitled to Complain of Breach.**—Ordinarily the benefit of the warranty is confined to the buyer to whom the warranty was given and does not extend to third persons.<sup>4</sup> It does not extend to a purchaser from the buyer,<sup>5</sup> except when the latter can prove special circumstances showing an undertaking on the part of the original seller inuring to his benefit.<sup>6</sup> If there is a sale to several joint buyers who give their joint note for the price, either of the buyers may, in an action on the note by the seller, set up a breach of warranty as a complete defense to the action.<sup>7</sup>

**The Right of Action for the Breach Is Assignable and may be asserted by an**

ply abandoning the machine. He must take care of it and afford the seller any opportunity to repair. *Gaar v. Hicks*, (Tenn. Ch. 1897) 42 S. W. Rep. 455.

**1. Reasonable Opportunity Must Be Allowed.**—*Mayes v. McCormick Harvesting Mach. Co.*, 110 Ga. 545.

But after one completed attempt to put the machine in order, the buyer is not bound to give a second notice and allow new opportunities to repair. *Electric Supply, etc., Co. v. Consolidated Light, etc., Co.*, 42 W. Va. 583.

**Question for the Jury.**—Whether the buyer, after giving notice of defects, allowed the seller a reasonable time within which to remedy them is ordinarily a question for the jury. *Harvey-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188. See also *Zimmerman v. Robinson*, 118 Iowa 117.

**2.** *Zimmerman v. Robinson*, 118 Iowa 117.

**3. Substantial Compliance with Conditions Sufficient.**—*Sandwich Mfg. Co. v. Trindle*, 71 Iowa 600; *Hall v. Aetna Mfg. Co.*, 30 Iowa 215; *Keystone Mfg. Co. v. Yeager*, (Ky. 1900) 55 S. W. Rep. 682; *McCormick Harvesting Mach. Co. v. Warfield*, 33 N. Y. App. Div. 513; *Nichols, etc., Co. v. Charlebois*, 10 N. Dak. 446. See also *Brummett v. Nemo Heater Co.*, 177 Mass. 480.

**4. Warranty Inures to Benefit of First Buyer Only.**—*Lyon v. Bertram*, 20 How. (U. S.) 149; *Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289; *Delano v. Rawson*, 10 Bosw. (N. Y.) 286; *Longmeid v. Holliday*, 6 Exch. 761, 20 L. J. Exch. 430.

**A Landlord May Not Sue for Breach of Warranty in the Sale of Seed to His Tenant** even though there is an injury to the land, but the tenant is entitled to recover, as part of the damages caused by the breach, the loss occasioned to his landlord thereby. *Phillips v. Vermillion*, 91 Ill. App. 133.

**5. Purchaser from Buyer Not Entitled to Benefit of Original Warranty.**—*Post v. Burnham*, (C. C. A.) 83 Fed. Rep. 79. *Compare* *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667.

**A Purchaser from the Buyer Is Not Entitled to a Set-off** in an action by the original seller against him on notes which he had given to the buyer and which the latter had turned over to the original seller as collateral security for his own notes, by showing a warranty from the seller to the buyer and from the buyer to himself. *Thisler v. Keith*, 7 Kan. App. 363. See also *Adler v. Robert Portner Brewing Co.*, 65 Md. 27.

"The right to a reduction of the price because of the defect in the property sold remains with the buyer, even after he sold it to a third person, who became his vendee. That principle was announced in *Brown v. Duplantier*, 1 Mart. N. S. (La.) 317." *Blymyer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439. See also *Dukes v. Nelson*, 27 Ga. 457.

**False Representations Communicated to Subsequent Purchaser.**—Where a false representation as to the value of a certain business, which had been made by defendant to B, was communicated by B to C with defendant's knowledge and was acted upon by C in purchasing the business, C may sustain an action against the defendant for the false representation. *Pilmore v. Hood*, 5 Bing. N. Cas. 97, 35 E. C. L. 43, 6 Scott 827.

**6.** *Gray v. Consolidated Ice Mach. Co.*, 103 Ga. 115.

**7. Sale to Several Joint Buyers.**—*York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144; *Buckner v. Hamilton*, 16 Ill. 487; *Snyder v. Johnson*, (Neb. 1903) 95 N. W. Rep. 692. *Compare* *Dempster Mill Mfg. Co. v. Fitzwater*, 6 Kan. App. 27.

If one of several joint purchasers sell out his interest in the purchase to his associates, they acquire thereby all the rights in the warranty which he had. *Kenney v. Bevilheimer*, 158 Ind. 653.

And where three jointly purchased a machine, giving joint notes therefor, a fourth person who acquired an interest with them and who subsequently becomes a joint maker of a note given in renewal of one of the original purchase-



assignee.<sup>1</sup> And in the case of a warranty given to a firm, it seems that the member remaining after the retirement of his partners may assert the right of action to the same extent as if there had been no such retirement.<sup>2</sup>

**The Party for Whose Benefit the Purchase Was Made**, who was present and assisting at the purchase and became the owner by immediate gift from the buyer, may, though not the actual purchaser, maintain an action for the damages sustained by him in consequence of a breach of the warranty made at such a sale.<sup>3</sup>

**4. Parties Liable.** — The general subject of parties to actions for breach of warranty is treated elsewhere.<sup>4</sup>

**The Purchaser of a Draft with Bill of Lading Attached Is Not Liable on a Warranty Given by His Assignor** of the character or quality of the goods covered by the bill of lading.<sup>5</sup>

**5. Limitation of Actions.** — Where, from the nature of the article, it is impossible to detect a breach of warranty until after a test by use of it, the statute of limitations will not begin to run until after a discovery or reasonable opportunity for discovery of the breach.<sup>6</sup>

**XVIII. DEFENSES TO ACTION FOR BREACH OF WARRANTY** — **1. Available Defenses.** — The seller may show, in defense to an action for a breach of warranty, that no warranty was given,<sup>7</sup> or that the warranty given was invalid for want or failure of consideration;<sup>8</sup> and in such a case, where a partial as well as a total failure of consideration is set up, the court must allow the jury to consider both defenses.<sup>9</sup> The seller may also show a waiver of the warranty<sup>10</sup> or a failure by the buyer to comply with some condition precedent to his right to maintain an action on the warranty.<sup>11</sup>

**The Defense of Infancy** is available as in the case of other contracts, and the same rules govern such a defense when set up in this class of cases as in ordinary cases.<sup>12</sup> But an infant seller must either affirm or avoid the entire contract; if he chooses to affirm it after becoming of age, by bringing an action upon the notes given him for the purchase money, he cannot, by a

money notes, is entitled to the benefit of the warranty equally with his associates. *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667.

**1. Assignee May Sue for Breach.** — *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 52 Mich. 602. Compare *Kendig v. Giles*, 9 Fla. 278.

But the warranty is not "negotiable." See *Dukes v. Nelson*, 27 Ga. 463; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220.

**2. Warranty in Favor of Firm.** — *Sinker v. Kidder*, 123 Ind. 528. See also *Kenney v. Bevilheimer*, 158 Ind. 653.

**3.** *Dallum v. Birdsall*, 66 Ill. 378; *Langbridge v. Levy*, 2 M. & W. 519, affirmed 4 M. & W. 337, 1 H. & H. 325. See also *George v. Skivington*, L. R. 5 Exch. 1, 39 L. J. Exch. 8. Compare *Longmeid v. Holliday*, 6 Exch. 761, 20 L. J. Exch. 430.

**Husband and Wife.** — *Driggs v. Schuyler*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 493. See also *Longmeid v. Holliday*, 6 Exch. 761, 20 L. J. Exch. 430.

**4.** See 19 ENCYC. OF PL. AND PR., pp. 85 et seq.

**5.** *Tolerton, etc., Co. v. Anglo-California Bank*, 112 Iowa 706. Compare *Finch v. Gregg*, 126 N. Car. 176; *Landa v. Lattin*, 19 Tex. Civ. App. 246.

**6.** *Bancroft v. San Francisco Tool Co.*, (Cal. 1897) 47 Pac. Rep. 684; *Kennard, etc., Carpet Co. v. Dornan*, 64 Mo. App. 17. See also the title LIMITATION OF ACTIONS, vol. 19, p. 195.

**A Contractual Limitation** to the effect that no action should be brought on the warranty unless begun within a year from the time of sale is not applicable where the buyer sets up the breach as a defense to an action by the seller to recover the price. *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328. See also the title LIMITATION OF ACTIONS, vol. 19, p. 181.

**7.** See *supra*, this title, *What Constitutes a Warranty*.

**8. Failure of Consideration.** — *Skipper v. Johnson*, 21 Ga. 310; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446; *Foster v. Calhoun, Dudley L.* (S. Car.) 75. See also *supra*, III. 6. *Consideration for Warranty*.

**Evidence of Prior Bargain for Same Article.** — The seller of an article who has inserted a warranty of its quality in a receipted bill therefor, cannot, in an action against him on the warranty, give evidence of a prior bargain for a sale of the thing at the same price without a warranty, for the purpose of showing that the warranty was without consideration. *Davis v. Ball*, 6 Cush. (Mass.) 505, 53 Am. Dec. 53.

**9.** *Skipper v. Johnson*, 21 Ga. 310.

**10.** See *supra*, this title, *Waiver of Warranty or Breach*.

**11.** See *supra*, XVII. 2. *h. Conditions Precedent to Buyer's Right of Action*.

**12.** *Morrill v. Aden*, 19 Vt. 505. See also the title INFANTS, vol. 16, p. 255.

plea of infancy, preclude the buyer from taking advantage of a breach of warranty in any proper manner as a defense.<sup>1</sup>

**Contributory Negligence of Buyer.**—The seller may defend an action to recover for a breach of warranty by showing that the alleged breach was caused by the buyer's own negligence,<sup>2</sup> as where notes are sold and warranted to be collectible and the buyer fails to make proper effort to collect them until after the maker had become insolvent,<sup>3</sup> or by the operation of some independent cause for which the seller was not responsible.<sup>4</sup>

**2. Defenses Not Available.**—The seller cannot defend an action for damages for a breach of warranty on the ground that, when the sale was made, he was ignorant of the defects complained of as constituting the breach; such knowledge is immaterial except in actions based on fraud or wilful deceit.<sup>5</sup> Nor can he set up the want of negligence on his part<sup>6</sup> or the impossibility of a compliance with the warranty unless the impossibility was brought about by the act of the buyer.<sup>7</sup> It is no bar to such an action that the plaintiff did not insist upon his claim for such damages in diminution of the recovery against him in an action by the seller to recover the price of the article, and that fact cannot be set up as a defense.<sup>8</sup>

**Fact of No Damage.**—The warranty is a guaranty of soundness or good quality and not a contract of indemnity against the loss on a resale; for this reason the seller is liable immediately upon a breach of it and he cannot defeat the action by showing that the buyer has suffered no loss or has resold at a profit,<sup>9</sup> though such a fact may, it seems, be shown to prevent the recovery of more than nominal damages.

**The Fact that the Seller Offered to Rescind the sale and return the purchase money paid and that his offer was refused does not affect the buyer's right of action on the warranty in the absence of special stipulations to the contrary in the contract of sale.**<sup>10</sup>

**The Fact that the Seller Had Obtained Judgment on the Purchase-money Notes does not preclude the buyer from maintaining an action for damages for the breach**

**1. Infant Seller Estopped to Disaffirm by Bringing Suit for Purchase Money.**—*Morrill v. Aden*, 19 Va. 505.

**2. Breach Due to Buyer's Negligence.**—*Tower v. Pauley*, 76 Mo. App. 287 (failure of furnace to work properly, due to buyer's want of care); *Matthews v. Moran*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 24.

**Alterations Assented to by Buyer.**—Where the plaintiff agreed to construct for defendant a machine in accordance with the plans submitted by the latter, the fact that the former afterwards made certain alterations, which were necessary and were assented to by the defendant, is no defense to a claim for damages for a breach of the warranty. *Giles v. San Antonio Foundry Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1020.

**3. Failure to Use Diligence to Collect Notes Warranted Collectible.**—*Meeker v. Denison*, *Brayt.* (Vt.) 237. See also *Figge v. Hill*, 61 Iowa 430.

**4. Breach to Operation of Independent Cause.**—*Gaar v. Hicks*, (Tenn. Ch. 1897) 42 S. W. Rep. 155.

**5. Seller's Good Faith No Defense.**—*Page v. Ford*, 12 Ind. 46; *Williams v. Harris*, 2 How. (Miss.) 627. See also *infra*, XX. 6. *Evidence of Fraud.*

**6. Seller Being Free from Negligence No Defense.**—*Randall v. Newson*, 2 Q. B. D. 102, 46 L. J. Q. B. 259.

In an action by a farmer against a chemist

for selling a sheep wash which killed his sheep, the evidence being that it was used according to the chemist's directions and that the sheep died from the absorption of arsenic contained in it, the jury are properly directed that they may find for the plaintiff, although it was also proven that the same mixture had been sold by the defendant for many years and used always theretofore with impunity. *Black v. Elliot*, 1 F. & F. 595.

**7. Compliance with Warranty Impossible.**—See *Gilpins v. Consequa*, Pet. (C. C.) 85.

**The Fact that the Articles Sold Were Destroyed after the commencement of the action, as when warranted fruit trees were destroyed by a freeze, is no defense to the action for a breach of warranty of their quality.** *Heilman v. Pruyn*, 122 Mich. 301, 80 Am. St. Rep. 570.

**8. Failure of Buyer to Claim Set Off.**—*Cook v. Moseley*, 13 Wend. (N. Y.) 277.

**9. Muller v. Eno**, 14 N. Y. 597. See also *Vance v. McBurnett*, 94 Ga. 251. Compare *Crabtree v. Crawford*, 25 Ill. 248.

**The Fact that the Goods Furnished Were More Valuable than Those Ordered is no defense, where it appears that they were ordered for a re-sale and the buyer's business was injured by his selling the wrong articles.** *Lovegrove v. Fisher*, 2 F. & F. 128.

**10. Marshall v. Wood**, 16 Ala. 806; *Riley v. Hicks*, 81 Ga. 265. Compare *Plummer v. Newdigate*, 2 Duv. (Ky.) 1, 87 Am. Dec. 479.

of warranty.<sup>1</sup>

**XIX. MEASURE OF DAMAGES — 1. General Doctrine.** — Where the vendor makes the warranty in good faith, and not fraudulently or with a knowledge that it is untrue or likely to prove so, the measure of damages recoverable by the vendee is governed by the rule applying in other cases which involve nothing more than a mere breach of contract. This rule, as laid down in a leading case, and steadily adhered to ever since, is that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."<sup>2</sup> The effect of this rule is to exclude the consideration of all remote and speculative damages or those depending upon mere contingencies.<sup>3</sup> In some jurisdictions the rule has been declared by statute.<sup>4</sup>

The General Rule Contemplates Two Distinct Classes of Damages: First, those which are the natural and necessary result of the breach, and second, such other damages resulting from the breach as the parties may reasonably be supposed to have had in contemplation, when the sale was made, as a probable consequence of a breach.<sup>5</sup>

**a. DIFFERENCE BETWEEN ACTUAL AND REPRESENTED VALUES.** — Under the first branch of the rule, the exact measure of damages recoverable for a breach of warranty of quality, where the buyer retains the article sold, is the difference between the actual value of the article at the time of the sale and what its value would have been if it had been as warranted.<sup>6</sup> This difference

1. *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109. See the title *RES JUDICATA*, vol. 24, p. 785. Compare *Sale v. Eichberg*, 105 Tenn. 333.

2. **The General Doctrine.** — *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. L. & Eq. 398. See this case quoted from and its doctrine applied to actions of the class now under consideration in the following cases: *Manning v. Fitch*, 138 Mass. 273; *Paine v. Sherwood*, 21 Minn. 225; *Wilson v. Reedy*, 33 Minn. 503 (damages referred to date of sale); *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 211 (where case is set out at length); *Aultman v. Stout*, 15 Neb. 586; *Burr v. Redhead, etc., Co.*, 52 Neb. 617; *Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co.*, (Neb. 1902) 91 N. W. Rep. 863; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Passinger v. Thorburn*, 34 N. Y. 635, 90 Am. Dec. 753; *Huyett, etc., Mfg. Co. v. Gray*, 111 N. Car. 87; *Beresford v. McCune*, 1 Cinc. Super. Ct. 50; *McDonald v. Unaka Timber Co.*, 88 Tenn. 43; *Hammer v. Schoenfelder*, 47 Wis. 455. See also *Ellis v. Tips*, 16 Tex. Civ. App. 82; and the title *DAMAGES*, vol. 8, p. 584.

3. See *infra*, this section, *Remote Damages Not Recoverable*.

4. **Measure of Damages Fixed by Statute.** — Such is the case in *California*. See Cal. Civil Code, §§ 3313-14, applied in *McLennan v. Ohmen*, 75 Cal. 559. So also in *South Dakota*. See Comp. Laws S. Dak., § 4593; *Hermon v. Silver*, 15 S. Dak. 476.

5. **Two Classes of Damages.** — The whole doctrine is set out in the opinion of the court, by Berry, J., in *Frohreich v. Gammon*, 28 Minn. 480. After stating the rule of the text, the

court said: "Under the first branch of this rule fall the damages arising from the fact that a thing sold and warranted is of less value than it would have been if the warranty were true. These damages arise, in the usual course of things, from the breach itself; that is to say, from the breach purely, and irrespective of consequential damages. Their measure is the difference in values before indicated. An instance falling under the second branch of the rule is where one sells and warrants a thing for a particular use, upon reasonable ground for believing that, if put to such a use, a certain loss to the buyer will be the probable result if the warranty is untrue. In such circumstances the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in contemplation of the parties when making the contract. The case where one sold and warranted a ship's cable, to be used for holding an anchor, and, in consequence of defects in it [which were warranted against], the buyer lost the anchor attached to it, and the seller was charged with the loss, falls within the second branch of the rule. *Borradaile v. Brunton*, 8 Taunt. 535," 4 E. C. L. 202. See also *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Aultman, etc., Mach. Co. v. Cappleman*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1213.

6. **Measure of Damages Ordinarily Difference Between Actual and Warranted Values** — *England*. — *Bridge v. Wain*, 1 Stark. 504, 2 E. C. L. 192; *Loder v. Kekule*, 3 C. B. N. S. 128, 91 E. C. L. 128, 4 Jur. N. S. 93; *Dingle v.*



is to be determined from these values at the time of the sale and in the

*Hare*, 7 C. B. N. S. 145, 97 E. C. L. 145, 6 Jur. N. S. 679; *Ashworth v. Wells*, 78 L. T. N. S. 136; *Jones v. Just*, L. R. 3 Q. B. 197, 9 B. & S. 141, 16 W. R. 643.

*United States*.—*Bulkley v. Honold*, 19 How. (U. S.) 390; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200; *Reynolds v. Palmer*, 21 Fed. Rep. 433; *Mack v. Sloteman*, 21 Fed. Rep. 109; *Wilson v. New U. S. Cattle Ranch Co.*, (C. C. A.) 73 Fed. Rep. 994; *Nashua Iron, etc., Co. v. Brush*, (C. C. A.) 91 Fed. Rep. 213; *Andrews v. Schreiber*, 93 Fed. Rep. 367; *Schreiber v. Andrews*, (C. C. A.) 101 Fed. Rep. 763; *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Florence Oil, etc., Co. v. Farrar*, 109 Fed. Rep. 254, 48 C. C. A. 346. See also *Marsh v. McPherson*, 105 U. S. 709.

*Alabama*.—*Kornegay v. White*, 10 Ala. 255; *Marshall v. Wood*, 16 Ala. 806; *Worthy v. Patterson*, 20 Ala. 173; *Foster v. Rodgers*, 27 Ala. 602; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Cawthon v. Lusk*, 97 Ala. 674; *Landman v. Blomer*, 117 Ala. 312 (article worthless); *Bessemer Ice Delivery Co. v. Brannen*, 138 Ala. 157.

*Arkansas*.—*Tatum v. Mohr*, 21 Ark. 349; *Murry v. Meredith*, 25 Ark. 164; *McDaniel v. Crabtree*, 21 Ark. 431.

*California*.—*McLennan v. Ohmen*, 75 Cal. 559; *Silberhorn Co. v. Wheaton*, (Cal. 1897) 51 Pac. Rep. 689; *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125.

*Colorado*.—*Cañon City Electric Light, etc., Co. v. Medart Patent Pulley Co.*, 11 Colo. App. 300; *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204.

*Delaware*.—*Burton v. Young*, 5 Harr. (Del.) 233.

*Georgia*.—*Hook v. Stovall*, 30 Ga. 418; *Clark v. Neufville*, 46 Ga. 261; *Porter v. Pool*, 62 Ga. 238; *Berry v. Shannon*, 98 Ga. 459, 58 Am. St. Rep. 313.

*Illinois*.—*Strawn v. Cogswell*, 28 Ill. 457; *Woodworth v. Woodburn*, 20 Ill. 184; *McClure v. Williams*, 65 Ill. 390; *Thorne v. McVeagh*, 75 Ill. 81; *Wheelock v. Berkeley*, 138 Ill. 153; *E. A. Moore Furniture Co. v. Sloane*, 166 Ill. 457, affirming 64 Ill. App. 581; *Skinner v. Mulligan*, 56 Ill. App. 47; *Miller v. Law*, 44 Ill. App. 630; *Atlas Furniture Co. v. E. S. Higgins Carpet Co.*, 71 Ill. App. 17; *Heenan v. Redmen*, 101 Ill. App. 603.

*Indiana*.—*Overbay v. Lighty*, 27 Ind. 27; *Ferguson v. Hosier*, 58 Ind. 438; *Blacker v. Slown*, 114 Ind. 322; *Crist v. Jacoby*, 10 Ind. App. 688.

*Iowa*.—*Lacey v. Straughan*, 11 Iowa 258; *Nyc v. Iowa City Alcohol Works*, 51 Iowa 129, 33 Am. Rep. 121; *Short v. Matteson*, 81 Iowa 638; *Love v. Ross*, 89 Iowa 400; *Douglas v. Moses*, 89 Iowa 40, 48 Am. St. Rep. 353, (Iowa 1896) 65 N. W. Rep. 1004; *Aultman, etc., Co. v. Shelton*, 90 Iowa 288; *Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289; *Alpha Checkrower Co. v. Bradley*, 105 Iowa 537.

*Kansas*.—*Loomis Milling Co. v. Vawter*, 8 Kan. App. 437.

*Kentucky*.—*Sharpe v. Bettis*, (Ky. 1895) 32 S. W. Rep. 395; *Ewing v. Hauss*, (Ky. 1899) 50 S. W. Rep. 249; *Merkley v. Phillips*, (Ky. 1899) 53 S. W. Rep. 1037; *Heilman Milling Co. v. Hotaling*, (Ky. 1899) 53 S. W. Rep. 655.

*Maine*.—*Moulton v. Scruton*, 39 Me. 287; *Noble v. Buswell*, 96 Me. 73; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310.

*Maryland*.—*Horn v. Buck*, 48 Md. 358; *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.*, 77 Md. 202.

*Massachusetts*.—*Stiles v. White*, 11 Met. (Mass.) 358, 45 Am. Dec. 214; *Tuttle v. Brown*, 4 Gray (Mass.) 457, 64 Am. Dec. 80.

*Michigan*.—*Macted v. Fowler*, 94 Mich. 106 (sale of shares of stock).

*Minnesota*.—*Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373; *Merrick v. Wiltse*, 37 Minn. 41; *Hansen v. Gaar*, 63 Minn. 94; *McCormick Harvesting Mach. Co. v. McNicholas*, 66 Minn. 384; *Miamisburg Twine, etc., Co. v. Wohlhuter*, 71 Minn. 484; *Benson v. Port Huron Engine, etc., Co.*, 83 Minn. 321; *Plano Mfg. Co. v. Richards*, 86 Minn. 94.

*Mississippi*.—*Hambrick v. Wilkins*, 65 Miss. 19, 7 Am. St. Rep. 631; *Stillwell, etc., Co. v. Biloxi Canning Co.*, 78 Miss. 779.

*Missouri*.—*Stearns v. McCullough*, 18 Mo. 411; *Hayner v. Churchill*, 29 Mo. App. 676; *Layson v. Wilson*, 37 Mo. App. 636; *McCormick Harvesting Mach. Co. v. Heath*, 65 Mo. App. 461; *Brown v. Emerson*, 66 Mo. App. 63; *Miles v. Withers*, 76 Mo. App. 87; *St. Louis Brewing Assoc. v. McEnroe*, 80 Mo. App. 429; *June v. Falkinburg*, 89 Mo. App. 563.

*Montana*.—*Hogan v. Shuart*, 11 Mont. 498.

*Nebraska*.—*Birdsall v. Carter*, 11 Neb. 143; *Young v. Filley*, 19 Neb. 545; *Brown v. Rogers*, 20 Neb. 547; *Lyon v. Moore*, 35 Neb. 636; *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474; *Burnham v. Meredith*, (Neb. 1902) 91 N. W. Rep. 553.

*New Hampshire*.—*Fisk v. Hicks*, 31 N. H. 535.

*New Jersey*.—*Perrine v. Serrell*, 30 N. J. L. 454.

*New York*.—*Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403; *Muller v. Eno*, 14 N. Y. 597; *Edwards v. Coilson*, 5 Lans. (N. Y.) 324; *Comstock v. Hutchinson*, 10 Barb. (N. Y.) 211; *Sharon v. Mosher*, 17 Barb. (N. Y.) 518; *Wells v. Selwood*, 61 Barb. (N. Y.) 238; *Fales v. McKeon*, 2 Hilt. (N. Y.) 53; *Fox v. Everson*, 27 Hun (N. Y.) 355; *Hunt v. Van Deusen*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 75; *Chace v. Nichols*, 56 Hun (N. Y.) 647, 9 N. Y. Supp. 878; *Mix v. Staples*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 775; *A. B. Cleveland Co. v. A. C. Nellis Co.*, (C. Pl. Gen. T.) 18 N. Y. Supp. 448; *Aherin v. O'Brien*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 821; *North Collins Bank v. Cary Safe Co.*, 42 N. Y. App. Div. 233; *Russell v. Corning Mfg. Co.*, 49 N. Y. App. Div. 610; *Ideal Wrench Co. v. Garvin Mach. Co.*, 65 N. Y. App. Div. 235; *J. R. Alsing Co. v. New England Quartz, etc., Co.*, 66 N. Y. App. Div. 473; *Black v. Dudley*, 75 N. Y. App. Div. 72; *Lockwood v. Dewey*,

market at the place of delivery,<sup>1</sup> and if there is no market there, then at the nearest market, in which latter event the cost of transportation to market must be added.<sup>2</sup> The rule in this connection is like that in actions for fraud and deceit.<sup>3</sup>

Where the Article Sold Is Worthless, the buyer, in an action on the warranty, is not necessarily limited to a recovery of the price paid, although the rule is sometimes so stated;<sup>4</sup> he is entitled to the benefit of his

(Supm. Ct. App. T.) 29 Misc. (N. Y.) 751; *Steinhardt v. Phelps*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 730. Compare *Jones v. Mayer*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 586.

*North Carolina*.—*Pritchard v. Fox*, 4 Jones L. (49 N. Car.) 140; *Hobbs v. Bland*, 124 N. Car. 284; *Huyett, etc., Mfg. Co. v. Gray*, 126 N. Car. 108, *denying rehearing of 124 N. Car. 322*; *Huyett-Smith Mfg. Co. v. Gray*, 129 N. Car. 438.

*North Dakota*.—*Aultman v. Ginn*, 1 N. Dak. 402.

*Ohio*.—*Beresford v. McCune*, 1 Cinc. Super. Ct. 50.

*Oregon*.—*Bump v. Cooper*, 20 Oregon 527; *Schumann v. Wager*, 36 Oregon 65; *Dean Pump Works v. Astoria Iron Works*, 40 Oregon 83.

*Pennsylvania*.—*Cothers v. Keever*, 4 Pa. St. 168; *Seigworth v. Leffel*, 76 Pa. St. 476; *Himes v. Kiehl*, 154 Pa. St. 190; *Weed v. Weinberger*, 12 Pa. Super. Ct. 12.

*South Carolina*.—*Wallis v. Frazier*, 2 Nott & M. (S. Car.) 516.

*South Dakota*.—*Western Twine Co. v. Wright*, 11 S. Dak. 521; *Hermon v. Silver*, 15 S. Dak. 476 (rule fixed by statute, Comp. Laws, § 4593).

*Tennessee*.—*McGavock v. Wood*, 1 Sneed (Tenn.) 181; *McDonald v. Unaka Timber Co.*, 88 Tenn. 47; *Reese v. Miles*, 99 Tenn. 398; *Garr v. Young*, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

*Texas*.—*Miller v. Greenleaf*, 4 Tex. App. Civ. Cas., § 283; *Suttle v. Hutchinson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 211; *Snyder v. Baker*, (Tex. Civ. App. 1896) 34 S. W. Rep. 981; *Danner v. Ft. Worth Implement Co.*, 18 Tex. Civ. App. 621; *Connor v. S. Blaisdell Jr. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 890; *Hume v. Sherman Oil, etc., Co.*, 27 Tex. Civ. App. 366; *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691; *Fay Fruit Co. v. Talerico*, (Tex. Civ. App. 1902) 69 S. W. Rep. 196; *Aultman, etc., Mach. Co. v. Cappleman*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1243.

*Vermont*.—*Brock v. Clark*, 60 Vt. 551.

*Virginia*.—*Thornton v. Thompson*, 4 Gratt. (Va.) 121.

*Wisconsin*.—*Aultman, etc., Co. v. Hetherington*, 42 Wis. 622; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590, 107 Wis. 9; *Park v. Richardson, etc., Co.*, 91 Wis. 189; *Williams v. Thrall*, 101 Wis. 337; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

**Rule Applied to Warranty of a Promissory Note.**—In an action upon the warranty of a promissory note assigned to the plaintiff, where it appears that the note was invalid as to one of the signers, by reason of his insanity at the time he signed it, and that an action upon the note had been successfully defended by him upon

that ground, and that the other signer had removed from the state, it was held that the plaintiff was entitled to recover of the assignor the difference between the actual value of the note and the amount appearing to be due upon it. *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Bicknall v. Waterman*, 5 R. I. 43.

**Sale of Nursery Stock.**—In an action for damages for a breach of a warranty on such a sale the difference between the value of the land occupied by the trees at the time the breach is discovered and the value such land would have had, had it been of the kind warranted, may be shown. *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125.

**1. Value at Time and Place of Delivery the Test.**—*Buford v. Gould*, 35 Ala. 265; *Thompson v. Bertrand*, 23 Ark. 730; *McClure v. Williams*, 65 Ill. 390; *Atlas Furniture Co. v. E. S. Higgins Carpet Co.*, 71 Ill. App. 17; *Heilman Milling Co. v. Hotaling*, (Ky. 1899) 53 S. W. Rep. 655; *Currie Fertilizer Co. v. Krish*, (Ky. 1903) 74 S. W. Rep. 268; *Converse v. Burrows*, 2 Minn. 229; *Lattin v. Davis*, Hill & D. (N. Y.) 9; *Carv v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Van Epps v. Harrison*, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; *Tripis v. Gamble*, (Tex. Civ. App. 1894) 28 S. W. Rep. 244. See also the title FRAUD AND DECEIT, vol. 14, p. 188. Compare *McDaniel v. Crabtree*, 21 Ark. 431; *Houston Cotton Oil Co. v. Trammell*, 96 Tex. 598.

**It Is Error to Charge** that the measure of damages is the difference between the value of the article as it should have been and its value at the time of the trial, particularly where it appears that the buyer has used it. *Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289.

But such an instruction is harmless where the article is shown to have been worthless from the beginning. *J. R. Alsing Co. v. New England Quartz, etc., Co.*, 66 N. Y. App. Div. 473.

**The Time Referred to in the Warranty** is the time with reference to which the values must be determined. *Western Twine Co. v. Wright*, 11 S. Dak. 521.

**2. Where There Is No Market at Place of Delivery.**—*Coffman v. Williams*, 4 Heisk. (Tenn.) 239; *McDonald v. Unaka Timber Co.*, 88 Tenn. 47; *Reese v. Miles*, 99 Tenn. 400.

**3.** See the title FRAUD AND DECEIT, vol. 14, pp. 182 *et seq.*

**4.** See *Landman v. Bloomer*, 117 Ala. 312.

In an action by the seller to recover the agreed price, if the article is shown to be worthless, the buyer is entitled, at least, to an offset equal to the balance of the price due. *Brown v. Reinholdt*, 41 Ill. App. 599.

The buyer cannot recover the entire price for a breach of warranty where he retains the ar-

baggage<sup>1</sup> and may therefore recover an amount representing the value the article would have had if it had been as warranted.<sup>2</sup>

**Proof of Values.** — The price agreed upon between the parties at the time of the sale is strong evidence as to what the value of the article would have been had it measured up to the warranty,<sup>3</sup> and this has occasioned the view often expressed that the measure of damages is the difference between the agreed price and the actual value of the article.<sup>4</sup> Such a statement of the rule, while correct in its application to the majority of cases, is inaccurate as a statement of the general rule; evidence of the agreed price is persuasive merely and not

article sold, except upon clear and affirmative proof that the article had no value. *Small v. Bartlett*, 96 Mo. App. 550.

**Where Worthlessness Is Remediable.** — Although the article may be entirely inefficient in its present state, and unfit for the purpose intended, yet if it can be put into proper order by the expenditure of a small sum, it cannot be considered as worthless, so as to relieve the purchaser entirely from liability for the price. *Trippie v. McLain*, 87 Ga. 536. See also *Osborne v. Huntington*, 37 Minn. 275; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

**Question for the Jury.** — Where there is any evidence that the article in question has a value, the question as to what is its value is for the jury. *Maxted v. Fowler*, 94 Mich. 106.

1. *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92; *Douglass v. Moses*, (Iowa 1896) 65 N. W. Rep. 1004.

2. **Buyer's Recovery Not Limited to Price Where Article Is Worthless.** — *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Westinghouse Electric Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200. See also the title **FRAUD AND DECEIT**, vol. 14, p. 182. *Compare A. B. Cleveland Co. v. A. C. Nellis Co.*, (C. Pl. Gen. T.) 18 N. Y. Supp. 448; *Aherin v. O'Brien*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 821. These cases hold that where it appears that the goods sold are worth less than their warranted value, but that the purchaser has paid on account of the price nothing more than their admitted value, and there is no evidence that their value as warranted exceeded the price, the purchaser cannot recover, in an action on the warranty, anything more than nominal damages. See also *Thompson v. Martin*, 84 Ga. 111.

3. **Price Agreed on Strong Evidence of Warranted Value** — *United States*. — *South Covington, etc., R. Co. v. Gest*, 34 Fed. Rep. 628 (sale of mortgage coupons); *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451.

*Arkansas*. — *Tatum v. Mohr*, 21 Ark. 349.

*California*. — *Woody v. Bennett*, 88 Cal. 241.

*Georgia*. — *Hook v. Stovall*, 30 Ga. 418.

*Louisiana*. — *Sullivan v. Goldman*, 19 La. Ann. 12.

*Maryland*. — *Lane v. Lantz*, 27 Md. 211.

*Massachusetts*. — *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166.

*Minnesota*. — *Minneapolis Harvester Works v. Bonnallic*, 29 Minn. 373; *Miamisburg Twine, etc., Co. v. Wohlhuter*, 71 Minn. 484.

*Mississippi*. — *Texada v. Camp*, Walk. (Miss.) 150.

*Missouri*. — *Hayner v. Churchill*, 29 Mo. App. 676; *Layson v. Wilson*, 37 Mo. App. 636.

*New Hampshire*. — *Fisk v. Hicks*, 31 N. H. 535; *Page v. Parker*, 40 N. H. 48.

*New York*. — *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299.

*North Carolina*. — *Williamson v. Canaday*, 3 Ired. L. (25 N. Car.) 349.

*Oregon*. — *Bump v. Cooper*, 20 Oeragon 527.

*Tennessee*. — *Garr v. Young*, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

*Texas*. — *Beard v. Miller*, 4 Tex. App. Civ. Cas., § 76; *Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53.

*Wisconsin*. — *Chaplin v. Warner*, 23 Wis. 448; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590.

See also the title **FRAUD AND DECEIT**, vol. 14, p. 188; *Blackmore v. Fairbanks*, 79 Iowa 282.

**In Case of an Exchange.** — In determining the damages recoverable for a breach of warranty made in an exchange, evidence of the value of the goods given in exchange for the warranted chattel is admissible as tending to show what would have been its value, if as warranted, where it does not appear that the money value of either the warranted article or the property given in exchange was settled by the parties at the time of the exchange. *Chaplin v. Warner*, 23 Wis. 448.

**Two Articles Sold in Solido** — **Proof of Estimated Price of Each.** — Where two articles are sold in *solido*, with written warranty not specifying the price of each, parol proof is admissible to show the estimated price of one of them alleged to be unsound. *Tutt v. McLeod*, 3 How. (Miss.) 223.

4. **View that Difference Between Price and Actual Value Is Measure of Damages.** — *Landman v. Bloomer*, 117 Ala. 312; *Canon City Electric Light, etc., Co. v. Medart Patent Pulley Co.*, 11 Colo. App. 300; *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204; *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 262; *Lane v. Lantz*, 27 Md. 211; *Miles v. Withers*, 76 Mo. App. 87; *Spiers v. Halsted*, 74 N. Car. 620; *Routh v. Caron*, 64 Tex. 289; *Beard v. Miller*, 4 Tex. App. Civ. Cas., § 76. See also *Matlock v. Reppy*, 47 Ark. 148; *Silberhorn Co. v. Wheaton*, (Cal. 1897) 51 Pac. Rep. 689. And see the title **FRAUD AND DECEIT**, vol. 14, p. 182.

The buyer, when sued for the price, cannot complain of an instruction that the measure of damages allowable to him as a set-off is the difference between the actual value of the thing delivered and the contract price. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200. See also *Beard v. Miller*, 4 Tex. App. Civ. Cas., § 76.

Following the view mentioned in the text it has been held that when the buyer has paid the price in full, the measure of his recovery



conclusive; either party may show, by other evidence, what the value of the article would have been if the warranty had been met.<sup>1</sup> Nor can evidence of the agreed price enter into the question of damages except in so far as it assists in the ascertainment of the warranted value;<sup>2</sup> the fact that the article in question was actually worth more than the price paid for it will not preclude the buyer from a recovery of damages, since he is entitled to the benefit of his bargain.<sup>3</sup>

**Evidence as to What the Article Afterwards Sold for** in its original state has been held to be admissible as tending to show the actual value.<sup>4</sup> But the better rule appears to be that such evidence is not admissible at all even though it would show that the article had been sold, either by the buyer or by some one else, in an unaltered state, for a sum larger than the price agreed on between the original parties.<sup>5</sup> And in no event is the price obtained by the buyer on a resale competent evidence of the actual value of the article where such resale was upon a warranty of quality or made while the parties were in ignorance of the true quality of the article.<sup>6</sup>

is the value the article would have had if it had been as warranted. *Ashworth v. Wells*, 78 L. T. N. S. 136. See also *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204.

**1. Either Party May Show that Price was Greater or Less than Warranted Value.**—*English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451; *Willis v. Dudley*, 10 Ala. 933; *Hook v. Stovall*, 26 Ga. 704; *Douglass v. Moses*, (Iowa 1896) 65 N. W. Rep. 1004; *Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co.*, (Neb. 1902) 91 N. W. Rep. 863; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Cothers v. Kever*, 4 Pa. St. 168; *McGavock v. Wood*, 1 Sneed (Tenn.) 181; *Park v. Richardson, etc., Co.*, 91 Wis. 189; *Clare v. Maynard*, 7 C. & P. 741, 32 E. C. L. 713. See also *North Collins Bank v. Cary Safe Co.*, 42 N. Y. App. Div. 233.

"The trial court was right in holding that the amount which the plaintiff is entitled to recover for the breach of warranty, is not limited by the price which he paid or agreed to pay for the harvester. Whether he paid or agreed to pay one price or another, he is still entitled to recover the difference in values before indicated [*i. e.*, the difference between the value of the harvester as it was, and as it was warranted]." *Frohreich v. Gammon*, 28 Minn. 476.

**2. Evidence of Price Limited in Its Effect.**—*Seigworth v. Leffel*, 76 Pa. St. 476.

**3. Effect of Fact that Article Was Worth More than Price Paid.**—*Douglass v. Moses*, (Iowa 1896) 65 N. W. Rep. 1004.

**The Fact that the Seed Delivered Were of Greater Value** than those contracted for will not preclude the buyer from recovering, as damages, the amount he was compelled to pay to his customers for having furnished them seed of a different plant from what they had ordered from him, he having sent them the same product sent to him by the seller with the same warranty. *Lovegrove v. Fisher*, 2 F. & F. 128. See also *Walker v. Gooch*, 48 Fed. Rep. 656.

**4. Evidence of Price Realized at Resale Held Competent.**—*Passinger v. Thorburn*, 34 N. Y. 639, 90 Am. Rep. 753; *Houston v. Starnes*, 12 Ired. L. (34 N. Car.) 313; *Woodward v. Thacher*, 21 Vt. 580, 52 Am. Dec. 73; *Brock*

*v. Clark*, 60 Vt. 551. See also *Stone v. Watson*, 37 Ala. 279; *Clark v. Neufville*, 46 Ga. 261; *Atkinson v. Cobb*, 56 Ga. 86.

**5. Such Evidence Not Admissible.**—*Andrews v. Schreiber*, 93 Fed. Rep. 367; *Berry v. Shan-nci*, 98 Ga. 459, 58 Am. St. Rep. 313; *Wheelock v. Berkeley*, 138 Ill. 153; *Comstock v. Hutchinson*, 10 Barb. (N. Y.) 211; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590. See also *Blymyer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439; *Miamisburg Twine, etc., Co. v. Wohlruter*, 71 Minn. 484; *Brown v. Emerson*, 66 Mo. App. 63; *Hogan v. Shuart*, 11 Mont. 498.

"In the absence of other evidence, the purchase price is *prima facie* its [the article's] value. \* \* \* This rule is not changed where the purchaser of a warranted article resells it for an equal or greater price than that which he paid for it. *Brown v. Bigelow*, 10 Allen (Mass.) 242; *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590." *Miamisburg Twine, etc., Co. v. Wohlruter*, 71 Minn. 484. See also *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672.

In the case of *Roe v. Hanson*, 5 Lans. (N. Y.) 304, the rule is laid down very clearly that, in an action for a breach of warranty, the price for which the vendee resold the article is not admissible as an evidence of its real value. The price realized by such a sale might be fixed by fraud and connivance between the parties to it, and would furnish means of manufacturing testimony in the suit for the breach of warranty. It would be, in fact, so the court urged, an act of the party in his own favor, which is never admissible in evidence.

**Evidence of What Vendee Was Offered for the Article.**—Evidence of the fact that since the commencement of the action, a "good and responsible party" offered the vendee a certain sum for the article sold, which offer was refused, is not admissible to prove the actual value of the article. *Finley v. Quirk*, 9 Minn. 194, 86 Am. Dec. 93; *Johnson v. Hillstrom*, 37 Minn. 122; *Keller v. Paine*, 34 Hun (N. Y.) 177; *Hine v. Manhattan R. Co.*, 132 N. Y. 480.

**6. When Resale Was with Warranty.**—*Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Brown v. Bigelow*, 10 Allen (Mass.) 242;

The Disposition Which a Purchaser Makes of the Property after acquiring it from the seller is an independent and collateral fact having no connection with the bargain by which he acquired his title, and the application of the general rule as to the measure of damages is not changed or modified by the fact that the purchaser of the warranted article has sold it for the same or even a greater price than that which he paid for it.<sup>1</sup>

**Breach of Warranty of Quantity.** Where the breach is of a warranty of the quantity of the commodity sold, the measure of damages is not the value of the shortage but a due proportion of the purchase money with interest thereon.<sup>2</sup>

**5. CONSEQUENTIAL DAMAGES — (1) Generally.** — The difference between the actual and the represented values of the article sold, with interest, while applied in the greater number of cases as the correct measure of damages, does not embrace the entire damages recoverable by the injured purchaser. Under the second class of cases, provided for by the general rule above stated, he is entitled, in addition to such difference in values, to remuneration for expenses suffered, gains prevented, and losses sustained as the proximate consequence of the breach of warranty, that is, for all such damages as may reasonably be presumed to have been in contemplation of the parties at the time the sale was made.<sup>3</sup>

Miamisburg Twine, etc., Co. v. Wohlhuter, 71 Minn. 484.

**1. Buyer Reselling at Same or Greater Price.** — Union Selling Co. v. Jones, (C. C. A.) 128 Fed. Rep. 672; Andrews v. Schreiber, 93 Fed. Rep. 367; Blymyer Ice Mach. Co. v. McDonald, 48 La. Ann. 439; Brown v. Bigelow, 10 Allen (Mass.) 244; Miamisburg Twine, etc., Co. v. Wohlhuter, 71 Minn. 484; Brown v. Emerson, 66 Mo. App. 63; Muller v. Eno, 14 N. Y. 597; Western Twine Co. v. Wright, 11 S. Dak. 521. See also Wheelock v. Berkeley, 138 Ill. 153; Eagle Iron Works v. Des Moines Suburban R. Co., 101 Iowa 289.

**2. Parker v. Barlow,** 93 Ga. 700 (warranty that a lot of wood sold would aggregate a certain number of cords).

When the warranty, upon the sale of cattle, was that there were eight hundred head of beef cattle in the herd, the measure of damages is the difference in value between eight hundred "beef cattle" and eight hundred of the best cattle in the herd. *Wilson v. New U. S. Cattle-Ranch Co.*, (C. C. A.) 73 Fed. Rep. 994.

**3. "Gains Prevented and Losses Sustained" Are Recoverable — United States.** — The Electron, 56 Fed. Rep. 304 (sale of patent).

*Alabama.* — Snow v. Schomacker Mfg. Co., 69 Ala. 112, 44 Am. Rep. 509.

*California.* — McLennan v. Ohmen, 75 Cal. 559; Silberhorn Co. v. Wheaton, (Cal. 1897) 51 Pac. Rep. 689.

*Florida.* — McKay v. Lane, 5 Fla. 268.

*Georgia.* — Van Winkle v. Wilkins, 81 Ga. 93, 12 Am. St. Rep. 299.

*Illinois.* — Hodgman v. State Line, etc., R. Co., 45 Ill. App. 395.

*Indiana.* — Sinker v. Kidder, 123 Ind. 528.

*Iowa.* — Alpha Checkrower Co. v. Bradley, 105 Iowa 537.

*Maine.* — Thoms v. Dingley, 70 Me. 100, 35 Am. Rep. 310.

*New York.* — Beeman v. Banta, 118 N. Y. 538, 16 Am. St. Rep. 779; Wood v. Anthony, 79 N. Y. App. Div. 111.

*Pennsylvania.* — McCormick Harvesting Mach. Co. v. Nicholson, 17 Pa. Super. Ct. 188.

*Tennessee.* — McGavock v. Wood, 1 Sneed (Tenn.) 181.

*Texas.* — Ellis v. Tips, 16 Tex. Civ. App. 82.

*Wisconsin.* — Cameron v. Mount, 86 Wis. 477.

**Breach of Warranty of Vehicle — Horses Injured.**

— Where a plaintiff buys of a carriage dealer a pole for his carriage which proves to be unfit and breaks while in use causing plaintiff's horses to become frightened and to injure themselves, he may, without regard to the defendant's negligence, recover the value of the pole and for the damage to his horses. *Randall v. Newson*, 2 Q. B. D. 102, 46 L. J. Q. B. 259, reversing 34 L. T. N. S. 527.

**Safe Warranted "Burglar Proof."** — The seller in such a case who gives insufficient directions for locking the safe has been held liable for the amount stolen from it in consequence of its not having been properly locked, where it appears that the buyer followed the instructions given him. *Deane v. Michigan Stove Co.*, 69 Ill. App. 106. Compare *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446, where it is held that the difference between the actual value of the safe and the value it would have had if it had been as warranted is the limit of recovery on the warranty; and that to justify a recovery for the loss of valuables placed in the safe it was necessary to show bad faith on the part of the seller. See also *Jones v. Ross*, 98 Ala. 448. Compare *Tyler v. Moody*, 111 Ky. 191, 98 Am. St. Rep. 406.

**Where a Boiler Explodes** owing to a defect which was embraced within the warranty, not only the value of the boiler but also the value of other property injured by the explosion, may be recovered in an action on the warranty. *Page v. Ford*, 12 Ind. 46; *Sinker v. Kidder*, 123 Ind. 528.

**Where a Rope, Warranted, Breaks** while being used on a crane and causes the loss of a pipe of wine which is being hoisted at the time,

(2) *Personal Injuries*. — When, in consequence of the article sold not being as warranted, a personal injury is sustained by the purchaser and it appears that the seller, at the time the warranty was given, knew or ought to have known the purpose for which the article was bought or the use to which it was to be put, and such other circumstances as might have led him to anticipate such an injury as a probable result of a breach of the warranty, he is liable to the buyer for the damage resulting from such injuries;<sup>1</sup> as, for example, where a horse, warranted to be kind and gentle, proves not to be so and runs away, causing a personal injury to the buyer.<sup>2</sup> If some one, other than the buyer, is injured in a similar way through the failure of the article to come up to the warranty and under such circumstances as to render the buyer liable to him for the damages resulting from the injury, the buyer is entitled to recover of the seller the amount of such liability discharged by him.<sup>3</sup>

(3) *Food or Material Communicating Disease*. — If a person sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury thus done.<sup>4</sup> And where material sold for manufacturing purposes proves to contain disease germs in consequence of which the buyer's employees become sick, the seller is responsible for the loss thereby occasioned.<sup>5</sup>

**Animal Warranted Sound Communicating Disease to Buyer's Flocks or Herds.** — If the animal sold is warranted free from disease and it proves to have an infectious disease which it communicates to other animals belonging to the buyer among which he placed it, the buyer, in addition to the differences in value heretofore mentioned, may recover the value of the animals lost in consequence of such infection, provided he can show that the seller knew or ought to have

the value of the wine is recoverable in an action on the warranty. *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371. See also *Borradaile v. Brunton*, 8 Taunt. 535, 4 E. C. L. 202.

**"Paris Green" Bought for the Purpose of Killing Insects.** — If the material is warranted and proves to be so impure or so weak as to fail to accomplish the purpose for which it was bought, the loss caused to plaintiff by reason of his crop being destroyed by the insects is not so remote as to prevent his recovering the value of the crop in an action on the warranty. *Kent v. Halliday*, 23 R. I. 182.

**1. Personal Injuries Sustained by Buyer.** — *Tyler v. Moody*, 111 Ky. 191, 98 Am. St. Rep. 406 (explosion of gas machine); *Cameron v. Mount*, 86 Wis. 477.

**2. Horse Warranted Gentle, Running Away.** — *Bruce v. Fiss, etc., Horse Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 472, 47 N. Y. App. Div. 273; *Cameron v. Mount*, 86 Wis. 477. Compare *Jones v. Ross*, 98 Ala. 448, where it is held that such damages are not recoverable for a mere breach of warranty occurring innocently, but only upon allegation and proof of "bad faith or fraud" or such reckless affirmations as would amount to bad faith. See also *Case v. Stevens*, 137 Mass. 551.

**For Such Injuries Occurring After the Buyer Knew the Horse Was Unsafe** he cannot recover; they are attributable to his own negligence. *Bruce v. Fiss, etc., Horse Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 472, 47 N. Y. App. Div. 273.

**3. Buyer Compelled to Pay Damages to Injured**

**Employee or Stranger.** — *Boston Woven Hose, etc., Co. v. Kendall*, 178 Mass. 232, 86 Am. St. Rep. 478; *Vogan v. Oulton*, 81 L. T. N. S. 435. In this last case, a sack full of peas burst while being hoisted and fell on X, injuring him, for which he recovered damages of the buyer. The sack had been warranted fit for the use for which it was intended, but was not so when delivered to the buyer. It was held that the buyer could recover of his seller the amount he had been compelled to pay X. Compare *Roughan v. Boston, etc., Block Co.*, 161 Mass. 24.

**4.** *Dushane v. Benedict*, 120 U. S. 630 (Gray, J.); *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Wilson v. Dunville*, L. R. 4 Ir. 249, L. R. 6 Ir. 210 (cattle killed by poisonous food); *Black v. Elliot*, 1 F. & F. 595 (similar case).

When oats sold for feeding proved bad and killed some of the horses, made others sick and injured others permanently, the exact measure of damages is the value of the horses killed, the expense of curing others, the loss of time by those made sick, and the decrease in value of those permanently injured. *Coyle v. Baum*, 3 Okla. 605.

**Where Coloring Matter for Ice Cream Proves to Be Poisonous** and makes customers of the buyer sick, the latter may recover, not merely the value of the cream which has been thus spoiled, but for injury to his business resulting from the loss of trade caused by the incident. *Swain v. Schieffelin*, 134 N. Y. 471, affirming 58 Hun (N. Y.) 608.

**5.** *Dushane v. Benedict*, 120 U. S. 630.



known that the animal would probably be put with others belonging to the buyer.<sup>1</sup>

(4) *Goods Purchased for Resale.*—Where goods are purchased with a view to a resale, the seller is liable for all the damages actually sustained by the purchaser in consequence of the latter's having to compensate his own buyers for a failure of the goods to come up to the warranty.<sup>2</sup> But the original purchaser cannot recover, as damages, compensation paid by him to his own buyers where there was no legal liability on his part to pay such compensation,<sup>3</sup> although if the original seller afterwards agrees to make an

1. *England.*—*Smith v. Green*, 1 C. P. D. 92, 16 Moak 441, 33 L. T. N. S. 572; *Mullett v. Mason*, L. R. 1 C. P. 559, 1 H. & R. 779, 12 Jur. N. S. 547; *Black v. Elliot*, 1 F. & F. 595.

*Delaware.*—*Cummins v. Ennis*, (Del. 1903) 56 Atl. Rep. 377.

*Georgia.*—*Snowden v. Waterman*, 105 Ga. 384; *Lewis v. Bracken*, 97 Ga. 337.

*Illinois.*—*McClure v. Williams*, 65 Ill. 390.

*Iowa.*—*Sherrod v. Langdon*, 21 Iowa 518; *Joy v. Bitzer*, 77 Iowa 73.

*Kansas.*—*Broquet v. Tripp*, 36 Kan. 700.

*Kentucky.*—*Faris v. Lewis*, 2 B. Mon. (Ky.) 375.

*Massachusetts.*—*Bradley v. Rea*, 14 Allen (Mass.) 20.

*Minnesota.*—*Marsh v. Webber*, 16 Minn. 418.

*Mississippi.*—*McKee v. Jones*, 67 Miss. 405 (no defense to seller that he did not know the animal was diseased).

*Nebraska.*—*Long v. Clapp*, 15 Neb. 419.

*New York.*—*Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

*Texas.*—*Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658.

*Vermont.*—*Packard v. Slack*, 32 Vt. 9.

*Wisconsin.*—*McCann v. Ullman*, 109 Wis. 574.

See also *Dushane v. Benedict*, 120 U. S. 630; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440. Compare *Hill v. Balls*, 2 H. & N. 299, 3 Jur. N. S. 592, 27 L. J. Exch. 45.

**Several Animals Sold—Recovery Not Limited to Value of Those Diseased at the Time.**—In *Bradley v. Rea*, 14 Allen (Mass.) 20, which was an action to recover the price of a number of pigs sold in one lot, it was held that the defendant, the buyer, might set up in defense that the pigs sold were warranted by the plaintiff to be sound and free from infectious or contagious diseases, and prove the existence of such a disease in some of the pigs at the time of the sale, which afterwards spread to the others and caused their death. The court, after referring to *Mullett v. Mason*, L. R. 1 C. P. 559, 1 H. & R. 779, 12 Jur. N. S. 547, said: "The nature of the subject matter of the warranty or deceit is such that when animals are sold in one lot together the warranty or representation as to the whole being single, we can have no doubt that the same principle should apply to the extent of a recoupment; and that the right to recoup in damages should not be confined to the diminished value of those which are proved to have the disease at the time of the sale." Followed in *Dushane v. Benedict*, 120 U. S. 630. See also *Rose v. Wallace*, 11 Ind.

112.

**Expenses Incurred in Resisting Contagion.**—

Where horses sold to a liveryman proved to be affected with a contagious disease, he was allowed to recover as damages the value of the horses that died, including the value of those which he owned before the sale and which died from the disease thus contracted, the expense of removing part of his stock to prevent the contagion from spreading to them, the rent of the place to which such stock were removed, the expense of caring for the sick horses, including bills for medicines and a veterinary surgeon, the expense of removing and burying the dead animals and of fumigating the stables. *Lewis v. Bracken*, 97 Ga. 337.

**That the Seller Knew the Buyer Was a Farmer** is sufficient, it seems, to charge the former with knowledge that the animal would probably be put with other animals belonging to the latter. *Smith v. Green*, 1 C. P. D. 92, 16 Moak 441.

**The Expense of Caring for the Diseased Animals** and of the efforts to cure them is recoverable, as part of the damages. *Heenan v. Redmen*, 101 Ill. App. 603; *Horn v. Buck*, 48 Md. 358; *Galbreath v. Carnes*, 91 Mo. App. 512; *Perrine v. Serrell*, 30 N. J. L. 454. Compare *Merrick v. Wiltse*, 37 Minn. 41.

**2. Where Original Buyer Is Compelled to Compensate His Purchasers.**—*Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Dingle v. Hare*, 7 C. B. N. S. 145, 97 E. C. L. 145, 6 Jur. N. S. 679. See also *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636; *Pennell v. Woodburn*, 7 C. & P. 117, 32 E. C. L. 462; *Lovegrove v. Fisher*, 2 F. & F. 128.

**Freight Paid by the Buyer** in order to have the goods returned to him by his sub-purchaser, the contract with the latter having authorized him to return the goods if not as warranted, is an element of damages recoverable by the buyer from the seller. *Merkley v. Phillips*, (Ky. 1899) 53 S. W. Rep. 1037; *Thorne v. McVeagh*, 75 Ill. 81; *Evenson v. Keystone Mfg. Co.*, 83 Minn. 164. See also *Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co.*, (Neb. 1902) 91 N. W. Rep. 863; *Silverhorn Co. v. Wheaton*, (Cal. 1897) 51 Pac. Rep. 689.

**Expense of Removing Inferior Article.**—When the buyer, a retail coal dealer, has furnished to a customer coal which his seller had warranted and, owing to the coal being not as warranted, is obliged to remove it from his customer's premises, the expense of such removal is an element of damage. *Hodgman v. State Line, etc., R. Co.*, 45 Ill. App. 395. See also *Ruben v. Lewis*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 583.

3. *Sutherland v. Round*, (C. C. A.) 57 Fed.

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allowance therefor, the agreement is for a valuable consideration and may be enforced.<sup>1</sup>

**The Amount of the Judgment Obtained Against the Buyer** by a customer to whom he sold the article with the same warranty given to him by the seller, is *prima facie* evidence of the amount he is entitled to recover in an action against the original seller,<sup>2</sup> and if he gave notice to the seller of the commencement of the action against him by the sub-purchaser, he may also recover his taxable costs therein, but in no case may he recover counsel fees.<sup>3</sup>

**Loss of Profits on Resale.**—Ordinarily, a purchaser is not entitled to recover, as a part of his damages, the profits which would have accrued to him on a resale of the goods in question had they been of the quality represented.<sup>4</sup> But this rule has no application where the seller, upon giving the warranty, had notice that his purchaser was buying to sell again in another market; in such case, the buyer may recover, as damages, both the losses actually sustained by reason of the breach and also the profits he would have realized upon the resale had the goods been as warranted.<sup>5</sup> The loss of such profits must be presumed to have been in the contemplation of the parties at the time of the warranty as a probable consequence of a breach.<sup>6</sup>

**Consequential Damages Sustained by the Buyer's Vendee**, to whom the former had sold the article bought by him from the original seller, are not recoverable by the buyer; the evidence of damage in such a case must be confined to the loss actually sustained by the buyer himself.<sup>7</sup>

(5) **Breach of Warranty of Machinery.**—The damages recoverable of a manufacturer or dealer for the breach of warranty of machinery which he contracts to furnish or place in operation for a known purpose are not confined to the difference between the machinery as warranted and as it proves to be, but include such consequential damages as are the direct, immediate, and probable result of the breach.<sup>8</sup> In some instances, the proper measure

Rep. 467; *Love v. Ross*, 89 Iowa 400. See also *Sherman v. Billings*, 90 Hun (N. Y.) 544.

The buyer cannot recover the expense incurred in adjusting differences between himself and his sub-purchaser. *Joseph v. Richardson*, 2 Pa. Super. Ct. 208, 38 W. N. C. (Pa.) 487.

**The Buyer Must Show a Warranty by Him to His Sub-purchasers**, and this is not sufficiently shown by proof merely that his salesmen were instructed to warrant the goods. *Black v. Dudley*, 75 N. Y. App. Div. 72.

**Seller Not Bound by Settlement Between Buyer and Sub-purchaser.**—*Copas v. Anglo-American Provision Co.*, 73 Mich. 541.

1. **Seller Voluntarily Agreeing to Make Compensation.**—*Coombs Commission Co. v. Block*, 130 Mo. 668.

2. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Passinger v. Thorburn*, 34 N. Y. 639, 90 Am. Dec. 753; *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Blasdale v. Babcock*, 1 Johns. (N. Y.) 518; *Carleton v. Lombard*, 19 N. Y. App. Div. 297, affirmed 162 N. Y. 628; *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84, 4 Jur. N. S. 662.

3. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166.

4. **Loss of Expected Profits Not Ordinarily an Element of Damage.**—*Howard v. Stillwell*, etc., Mfg. Co., 139 U. S. 199; *English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451; *Blymyer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439; *Lattin v. Davis*, Hill & D. (N. Y.) 9. See *infra*, this section, *Speculative Damages*.

5. **Loss of Profits Recoverable Where Seller Had Notice of Contemplated Resale.**—*English v. Spokane Commission Co.*, (C. C. A.) 57 Fed. Rep. 451; *Thorne v. McVeagh*, 75 Ill. 81; *Lewis v. Rountree*, 78 N. Car. 323; *Reese v. Miles*, 99 Tenn. 401. See also the titles *DAMAGES*, vol. 8, p. 624; *TELEGRAPHS AND TELEPHONES*, vol. 27, p. 1066.

**Lost Profits Recoverable Only for Contracts of Resale Already Made.**—The rule of the text should not, under the rule in *Illinois*, be given as an instruction to the jury unless there is evidence that the contract of resale existed and that the seller knew of its existence. *Carpenter v. Joliet First Nat. Bank*, 119 Ill. 352.

Where the buyer ordered carriage axles, the loss of profits on contracts by him to deliver axles such as he was buying must be limited to such orders as he had actually received and was unable to fill. *Liggett Spring, etc., Co. v. Michigan Buggy Co.*, 106 Mich. 445.

6. **Loss of Profits in Contemplation of Parties.**—*English v. Spokane Commission Co.*, 57 Fed. Rep. 451, 15 U. S. App. 218; *Thorne v. McVeagh*, 75 Ill. 81; *Carpenter v. Joliet First Nat. Bank*, 119 Ill. 352; *Messmore v. New York Shot, etc., Co.*, 40 N. Y. 422.

7. *Sutherland v. Round*, (C. C. A.) 57 Fed. Rep. 467.

8. *England.*—*Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371; *Since v. Foord*, 1 El. & El. 602, 102 E. C. L. 602.

*Canada.*—*Crompton, etc., Loom Works v. Hoffman*, 5 Ont. L. Rep. 554.

*United States.*—*Accumulator v. Dubuque St.*

of damages is the difference between the actual value of the machine as delivered and the sum which it would require to purchase in the market such a machine as the seller warranted his to be.<sup>1</sup>

Loss of the Buyer's Time and of that of his laborers resulting from the breach is recoverable where the circumstances of the sale were such as to have put the seller upon notice that such a loss would probably result from a breach.<sup>2</sup> So

R. Co., (C. C. A.) 64 Fed. Rep. 70; New York, etc., Min. Syndicate, etc., *v. Fraser*, 130 U. S. 611.

Connecticut. — *Ferris v. Comstock*, 33 Conn. 513.

Illinois. — *Huyett, etc., Mfg. Co. v. Saile*, 45 Ill. App. 562.

Indiana. — *Page v. Ford*, 12 Ind. 46; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Sinker v. Kidder*, 123 Ind. 528.

Iowa. — *Peoples' Sav. Bank v. Waterloo, etc., Rapid Transit Co.*, 118 Iowa 740.

Massachusetts. — *Whitehead, etc., Mach. Co. v. Ryder*, 139 Mass. 366.

Nebraska. — *Nye, etc., Co. v. Snyder*, 56 Neb. 754.

New York. — *Passenger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Swain v. Schieffelin*, 134 N. Y. 471; *Lockwood v. Dewey*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 751.

Texas. — *Dilley v. Ratchiff*, 29 Civ. App. 545; *Osborne v. Poindexter*, (Tex. Civ. App. 1896) 34 S. W. Rep. 299.

Wisconsin. — *Optenberg v. Skelton*, 109 Wis. 241; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

Compare *Canon City Electric Light, etc., Co. v. Medart Patent Pulley Co.*, 11 Colo. App. 300.

Thus, in an action for a breach of warranty in the construction and sale of two steam boilers, the necessary expense of repairing them, the purchaser's loss of time while so engaged, and the increased quantity of fuel necessarily consumed in order to generate steam, are recoverable as the natural and proximate results of the breach of the warranty. *Phelan v. Andrews*, 52 Ill. 486. And in such a case, if the boiler explodes, and on account of the explosion the purchaser's mill is compelled to remain idle for some time, the rental value of the mill for that time is to be considered in addition to other elements of damage; in ascertaining such rental value, it is proper to call witnesses who were acquainted with the capacity of the mill and its work, from day to day down to the time when the boiler exploded. *Sinker v. Kidder*, 123 Ind. 528. But as to this last case, see *Nye v. Iowa City Alcohol Works*, 51 Iowa 129, 33 Am. Rep. 121.

**Loss of Rent** of the house which was to be used as an office, but was not available for the purpose because of the failure of a heater to heat it properly, is to be considered in estimating the damages recoverable for a breach of warranty of the heater. *Russell v. Corning Mfg. Co.*, 49 N. Y. App. Div. 610. See also *Sinker v. Kidder*, 123 Ind. 528; *Cassidy v. Le Fevre*, 45 N. Y. 562. Compare *Wood v. Carleton*, 3 Silv. Supp. (N. Y.) 500.

**Where the Contract Expressly Limits the Buyer's Remedy** to a return of the machine and a recovery of the price paid, he cannot recover

consequential damages in the absence of any waiver of such provision by the seller. *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210.

**Breach of Warranty Entailing Increased Expense of Transporting Manufactured Product.** —

In an action by the seller for the price of machinery which he had guaranteed would "deliver pulp 50 per cent. dry," the buyer cannot be allowed, as a set-off, the increased expense of transporting the manufactured product resulting from its increased weight caused by the failure of the machinery to produce pulp as dry as warranted. *Bagley, etc., Co. v. Saranac River Pulp, etc., Co.*, 62 Hun (N. Y.) 618, 16 N. Y. Supp. 657, 135 N. Y. 626.

**The Character of the Warranty Is an Important Consideration.** —

Thus, in a contract of sale of an engine and boiler for the buyer's saw mill, to be placed therein in running order, there was a warranty that the engine would run a mill up to a certain horse power, and that the engine and boiler, with their appurtenances, were sound and in good order and would do good work up to their capacity. It was held that this did not amount to a special warranty that the boiler and engine were suited to the mill, but that the warranty was general, and the measure of damages was simply the difference between the actual and the warranted value of the engine and boiler. *Edwards v. Collson*, 5 Lans. (N. Y.) 324.

1. *Huyett, etc., Mfg. Co. v. Gray*, 124 N. Car. 322, 126 N. Car. 108.

**Where the Machine Is Warranted to Have a Certain Capacity** and there is no machine of such capacity on the market, the measure of damages is not the general rule but is the difference between the price paid and the real value of the machine as actually delivered. *Huyett-Smith Mfg. Co. v. Gray*, 129 N. Car. 438.

**2. Loss of Time an Element of Damage.** — *Kesler v. Miller*, 119 N. Car. 475; *Dilley v. Ratcliff*, 29 Tex. Civ. App. 545. Compare *Kingsland, etc., Mfg. Co. v. Board*, 60 Mo. App. 662, where it is said that when the contract stipulates for an opportunity to the seller to remedy defects, the time reasonably necessary for remedying them is not to be counted in estimating the damages. Compare also *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210.

**Warranty of Threshing Machine.** — The consequential damages recoverable by the purchaser for the breach of such a warranty are "the wastage of time of himself and his threshing crew in the actual effort to use the machine, upon plaintiff's [seller's] solicitation that he do so, and the value of his own time in reasonable efforts to remedy those defects, together with a small sum for the hire of another engine for a few days to accomplish the work for which, had this engine been as warranted, it would



also wastage and loss of grain resulting from imperfect binding of a harvester are elements of damage in an action for a breach of warranty of the harvester.<sup>1</sup>

The Expense or Cost of Changing or Repairing the machine so as to make it conform to the warranty is the measure of damages where the buyer retains the machine and such a result is practicable.<sup>2</sup> But the correctness of this rule has been denied where the warranty was a special one and embraced a guaranty that the machine was suited for a particular purpose, and the proper measure of damages stated to be the loss sustained by the purchaser through having the defective or worthless machinery, including loss of profits to his business for use in which the machinery was purchased.<sup>3</sup>

Possible Profits which the buyer might have realized from the operation of the machine had the warranty proved true are too speculative and contingent to be considered as an element of damage in an action on the warranty.<sup>4</sup>

(6) *In Sales of Seed.* — Where seed is sold with a warranty that it is of a particular kind and variety, the buyer may, in an action on the warranty, recover the price paid for the seed if it proves worthless, and his expenses in preparing the land for planting, together with the loss sustained from having

have served." *Optenberg v. Skelton*, 109 Wis. 241. See also *Kester v. Miller*, 119 N. Car. 475.

**Expense or Loss of Time Incurred in Experimenting with the Machine** after it has proved to be defective are not recoverable by the buyer. *Aultman v. Stout*, 15 Neb. 586. See also *Wilson v. Reedy*, 32 Minn. 256.

**1. Wastage of Grain by Imperfect Binder.** — *Osborne v. Poindexter*, (Tex. Civ. App. 1896) 34 S. W. Rep. 299. But the recovery could not include, it seems, the loss resulting from such a cause after the purchaser had become aware of the defect. *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325.

**Injury to Grain by Its Becoming Too Ripe**, and loss of wages paid to hands while waiting for repairs to be made on the machine in order to make it conform to the warranty, have been held too remote. *Smoots v. Foster*, 9 Ohio Cir. Dec. 218, 16 Ohio Cir. Ct. 612.

**2. Bixby v. Denison Normal School Assoc.**, (Iowa 1899) 78 N. W. Rep. 234 (sale of furnace); *New York State Monitor Milk Pan Co. v. Remington*, 109 N. Y. 143; *Reedy v. Weakley*, (Tenn. Ch. 1897) 39 S. W. Rep. 739 (elevator); *Graves v. Hillyer*, (Tex. Civ. App. 1899) 48 S. W. Rep. 889; *Saunders v. Weekes*, (Tex. Civ. App. 1900) 55 S. W. Rep. 33; *Williams v. Thrall*, 101 Wis. 337; *J. I. Case Plow Works v. Niles, etc., Co.*, 107 Wis. 9. See also *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38, *affirmed* 169 N. Y. 587; *Lockwood v. Dewey* (Supm. Ct. App. T.) 29 Misc. (N. Y.) 751; *Cassady v. Horton*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 148. See also *Johnston Harvester Co. v. Clark*, 31 Minn. 165.

**All Evidence Tending to Show What It Would Cost to Supply the Defect Complained of** in the article sold is admissible, independently of the question as to whether this constitutes the full measure of damages. *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491; *Hull v. Belknap*, 37 Mich. 179; *Johnston Harvester Co. v. Clark*, 31 Minn. 165.

Where the buyer has testified, in an action on the warranty, that the harvester is worthless because of certain defects in the binding attachment, it is proper to allow the seller to show, by cross-examination, the expense of changes

and repairs reasonably practicable so as to make the machine work with another binder, and also the value of the machine for that purpose. *Melby v. Osborne*, 33 Minn. 492.

**The Time When the Warranty Was Given** and not the time of the trial of the action several years later is the date with respect to which the cost of making the machine conform to the warranty is to be estimated. *Morse v. Arnfield*, 15 Pa. Super. Ct. 140.

**3. Rule in New York.** — *Beeman v. Banta*, 118 N. Y. 538, 16 Am. St. Rep. 779, (refrigerator bought by one engaged in preparing poultry for market). Compare *Wakeman v. Wheeler, etc., Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, which is distinguished in the former case.

**4. Prospective Profits Contingent and Speculative.** — *Accumulator Co. v. Dubuque St. R. Co.*, (C. C. A.) 64 Fed. Rep. 70; *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 139 (brick-drying machine); *Reed Lumber Co. v. Lewis*, 94 Ala. 626; *Frazier v. Smith*, 60 Ill. 145; *Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735; *Allis v. McLean*, 48 Mich. 428; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458; *Pennypacker v. Jones*, 106 Pa. St. 237; *Fleming v. Beck*, 48 Pa. St. 309; *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365.

**Warranty of Saw Mill — Loss of Timber.** — The damages recoverable for the breach of a warranty of a saw mill cannot include the loss of timber prepared for conversion into lumber by reason of the mill failing to operate as warranted, where such damages could not have been contemplated as a result of the breach at the time of warranty was given. *De Loach Mill Mfg. Co. v. Bonner*, 61 Ark. 510.

**Increased Expense of Buyer in Fulfilling Existing Contract.** — If the machine is one which cannot be replaced, the buyer may show that he was unable to fulfil a particular contract and may recover the difference between what he would have received had he been able to perform his contract and what the performance would have reasonably cost him. If he is compelled to send the work elsewhere to be done, he may recover the difference between what he had to pay therefor and what the work would have cost him had the seller made good

his land lie idle for the year or for such time as the use of it was lost.<sup>1</sup> If the seed is not true to the warranty and produces a plant which injures the land on which it is planted, the damage to the land thereby caused is also an element of recovery.<sup>2</sup> If the seed produces a crop not harmful to the land but of a poorer character and less value than would have been produced had the warranty been fulfilled, the measure of damages is the value of the crop of the true product, such as the seed was warranted to produce and such as would ordinarily have been produced that year, less the expense of raising it and less also the value of the crop actually raised from the seed sold.<sup>3</sup>

If the Buyer Had Knowledge of the Real Character of the Seed before sowing it, the seller is not liable for damage resulting to either the crop or the land in consequence of the inferior quality of the seed.<sup>4</sup>

(7) *Other Applications of General Rule.*—Where a Horse Warranted Fit for Breeding Purposes proves to be worthless for such purposes, the buyer may, in an action on the warranty, recover not only the difference between the actual value and that as warranted, but also expenses incurred while acting on the faith of the warranty, as, for example, the expense of advertising the horse, and of keeping and standing him.<sup>5</sup> But he cannot recover for the loss of prospective profits which he might have realized had the warranty proved true,<sup>6</sup> nor for

his warranty. *Carroll-Porter Boiler, etc., Co. v. Columbus Mach. Co.*, (C. C. A.) 55 Fed. Rep. 451. Compare *Weybrich v. Harris*, 31 Kan. 92.

1. **When Seed Are Wholly Worthless.**—*Ferris v. Comstock*, 33 Conn. 513; *Butler v. Moore*, 78 Ga. 780, 45 Am. Rep. 508; *Van Wyck v. Allen*, 6 Daly (N. Y.) 376; *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84, 4 Jur. N. S. 662; *Page v. Pavey*, 8 C. & P. 769, 34 E. C. L. 628. See also *Reiger v. Worth Co.*, 127 N. Car. 230, 80 Am. St. Rep. 798, where there was a sale of rice seed which proved to be worthless for planting, and it was held that there should be deducted from the damages the amount for which the buyer might have rented his land for that year for other purposes, after becoming aware of the worthlessness of the rice seed.

**Sale of a "Seeder."**—The rule of the text has been applied as the correct rule for the measure of damages for the breach of a warranty of a seeder, or machine for sowing. *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325.

**Sale of Nursery Stock.**—The measure of damages is the value which the trees would have added to the land if they had been as warranted, less the value, if any, the trees actually furnished added to the land. *Heilman v. Pruyn*, 122 Mich. 301, 80 Am. St. Rep. 570. See also *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125, applying Cal. Civ. Code, § 3313.

2. **Where Crop Injures Land.**—*Fox v. Everson*, 27 Hun (N. Y.) 355, where seed sold as clover seed and warranted to be such proved to be plaintiff seed.

In an Action by the Tenant, it seems that the loss to the landlord as well as that to himself is to be considered, since the warranty enures to the landlord's benefit. *Phillips v. Vermilion*, 91 Ill. App. 133.

3. **Where Inferior Seed Produce a Crop**—*England*.—*Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84, 4 Jur. N. S. 662.

*Connecticut*.—*Ferris v. Comstock*, 33 Conn. 513.

*Massachusetts*.—*Edgar v. Breck, etc., Corp.*, 172 Mass. 581.

*Nebraska*.—*Oliver v. Hawley*, 5 Neb. 439; *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474.

*New Jersey*.—*Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, affirmed 38 N. J. L. 496, 20 Am. Rep. 425.

*New York*.—*Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753 ("Bristol Cabbage Seed" Case); *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136, 6 Daly (N. Y.) 376; *White v. Miller*, 71 N. Y. 133, 27 Am. Rep. 18, reversing 7 Hun (N. Y.) 427; *Schutt v. Baker*, 9 Hun (N. Y.) 556 (crop inferior in quantity merely); *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145; *Gubner v. Vick*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 4.

*Rhode Island*.—*Kent v. Halliday*, 23 R. I. 182.

*Wisconsin*.—*Flick v. Wetherbee*, 20 Wis. 392. Compare *Brooks v. McDonnell*, 41 Wis. 130.

The Plaintiff's Interest in the Freehold is not a material matter when the damages claimed are for the injury to the crop merely and evidence as to the character of that interest is not competent. *Vannoy v. Givens*, 23 N. J. L. 201.

4. *Oliver v. Hawley*, 5 Neb. 439, distinguished in *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474.

5. *Newberry v. Bennett*, 38 Fed. Rep. 308; *Woody v. Bennett*, 88 Cal. 241; *Glidden v. Pooler*, 50 Ill. App. 36; *Short v. Matteson*, 81 Iowa 638; *Love v. Ross*, 89 Iowa 400; *Hambrick v. Wilkins*, 65 Miss. 19, 7 Am. St. Rep. 631; *Suttle v. Hutchinson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 211. See also *Fitzgerald v. Evans*, 49 Minn. 541. Compare *Sharpe v. Bettis*, (Ky. 1895) 32 S. W. Rep. 395, holding that expense of handling horse on faith of warranty is not recoverable.

The Value of a Horse a Breeder is always a competent inquiry even where the warranty in question relates merely to his soundness generally. *Fitzgerald v. Evans*, 49 Minn. 541.

6. **Prospective Profits from Standing Horse Not**

the expense of standing or keeping the animal after knowledge of the breach of warranty.<sup>1</sup>

**Material Sold for Manufacturing Purposes.** — Where such material is warranted to be of a certain quality and proves to be of an inferior quality, the measure of damages is the difference between the value of the manufactured article made from the inferior material and the value that the article would have had if it had been made from material such as that sold was warranted to be.<sup>2</sup> This rule has no application, however, where the purchaser discovers the real quality of the material before using it.<sup>3</sup>

**Where Buyer Compelled to Sell and Replace Inferior Article.** — Where the article is sold by sample, with a warranty as to quality, and an article of inferior quality has been furnished, if the buyer is obliged to resell it and replace the special quality contracted for, he is entitled to recover, as part of his damages, the cost of reselling and replacing.<sup>4</sup>

**c. SPECIAL CIRCUMSTANCES AFFECTING MEASURE OF DAMAGES.** — Special circumstances affecting the measure of damages cannot be considered for the purpose of authorizing a recovery of consequential damages except where it can be shown by the party offering proof of them that the seller knew or ought to have known them at the time the warranty was given.<sup>5</sup>

**d. WHERE WARRANTY IS FRAUDULENT.** — If the seller gives a warranty, knowing at the time that it is false, the buyer may sue in tort for the wrong

**Recoverable.** — *Glidden v. Pooler*, 50 Ill. App. 36; *Love v. Ross*, 89 Iowa 400; *Connoble v. Clark*, 38 Mo. App. 476.

**1. Expense of Keeping Horse After Knowledge of Breach.** — *Newberry v. Bennett*, 38 Fed. Rep. 308; *Elwood v. McDill*, 105 Iowa 439.

**2. Materials for Manufacturing Purposes.** — *Cleveland Linseed Oil Co. v. Buchanan*, (C. C. A.) 120 Fed. Rep. 906; *Hook v. Stovall*, 26 Ga. 704; *Green v. Witte*, 5 Ind. App. 343; *Elwood Planing Mills Co. v. Harting*, 21 Ind. App. 408; *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403; *Wait v. Borne*, 123 N. Y. 592, *reversing* 1 Silv. Sup. (N. Y.) 129; *Moore v. King*, 134 N. Y. 596, *affirming* 57 Hun (N. Y.) 224 (warranty of varnish); *Park v. Morris Axe, etc., Co.*, (Supm. Ct. Gen. T.) 41 How. Pr. (N. Y.) 18; *Dommerich v. Garfunkel*, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 433; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. Rep. 890. See also *Dwight Bros. Paper Co. v. Western Paper Co.*, 114 Wis. 414.

In the case of *F. Hammar Paint Co. v. Glover*, 47 Kan. 15, there was a sale of paint warranted to be good. The court, after stating the rule that possible or future contingent damages were not recoverable in an action on the warranty, went on to hold that if the breach of warranty involved the vendee in a legal liability to pay money, or in expense due to other parties for whom he did work with the paint, in order to relieve himself against the bad quality of the paint, such liability or expense, if certain, fixed, or liquidated, whether paid or not, constitutes an element of damage for which he may recover. And see *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310.

**Material Communicating Disease to Buyer's Employees.** — A warranty that rags sold are fit to be manufactured into paper is broken if they cannot be so manufactured without killing or making sick those employed in the manufacture. And in a suit for the price of such rags, the defendant may show, by way of set-off, that

they were infected with small-pox germs and communicated that disease to the workmen, thereby greatly injuring defendant's business. *Dushane v. Benedict*, 120 U. S. 630.

**3. Where Buyer Uses Material After Knowledge of Its True Quality.** — *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325; *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38; *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403, *reversing* 34 Barb. (N. Y.) 607, 12 Abb. Pr. (N. Y.) 451. See also *Elwood Planing Mills Co. v. Harting*, 21 Ind. App. 408. *Compare* *Wait v. Borne*, 123 N. Y. 592, *reversing* 1 Silv. Sup. (N. Y.) 129; *Nye, etc., Co. v. Snyder*, 56 Neb. 754.

Such a case comes within the rule requiring the buyer to use care to render the damages as light as practicable after knowledge of the breach. See *infra*, this title, *Buyer's Duty to Minimize Damages*.

**4.** *Hudmon v. Cuyas*, (C. C. A.) 57 Fed. Rep. 355. See also *Youghiogheny Iron, etc., Co. v. Smith*, 66 Pa. St. 340, where it is said that when, after an inferior article has been delivered to the buyer, he notifies the seller to take it away and the latter neglects to do so, the buyer may sell it and recover the difference between its worth and what he was obliged to pay for a good article to supply its place.

**5.** See the title *DAMAGES*, vol. 8, p. 593. See also *De Loach Mill Mfg. Co. v. Bonner*, 61 Ark. 510.

"But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at most could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such breach of contract. For, had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to de-



done, and in such cases the damages assume a wider range, and recovery may be had for all damages of which the vendee's deceit was the approximate cause, whether they were such as were in contemplation of the parties at the time of the sale or not; but in such cases the action is not on the contract of warranty, but for the fraud.<sup>1</sup> The vendee may, however, in such a case, waive his right of action for the fraud, and pursue his remedy on the contract, and where he does so, the measure of damages is the same as where the warranty is given in good faith.<sup>2</sup>

7. WHERE GOODS ARE RETURNED. — The cases hitherto considered have been those in which the purchaser retained the property which was warranted. As has been seen, however,<sup>3</sup> he has a right, in certain cases, upon discovering the breach of warranty, to return the property to the vendor, and where this is done the measure of damages is the same as in the cases already considered, except that no deduction of the actual value of the property is to be made. The measure of damages, therefore, where the vendee returns the property purchased, is the value of such property if it had been as warranted, together with such damages, in the nature of expenses incurred and losses sustained, as reasonably can be presumed to have been in contemplation of the parties when the contract was made, and which result as a natural consequence of the breach.<sup>4</sup> In the absence of proof of special damage, the recovery will be confined to the price paid by the purchaser.<sup>5</sup>

2. Remote Damages Not Recoverable. — Damages sustained by the purchaser which are only a remote consequence of the breach of warranty or which cannot reasonably be said to have been within the contemplation of the parties at the time when the warranty was given, are not recoverable.<sup>6</sup>

3. Speculative Damages. — Damages which, in their nature, are speculative, or depend, for their occurrence or amount, upon too many contingencies, are not recoverable.<sup>7</sup>

prive them." *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. L. & Eq. 398.

1. Fraud. — See *Faris v. Lewis*, 2 B. Mon. (Ky.) 375; *Brown v. Woods*, 3 Coldw. (Tenn.) 182. And see the title FRAUD AND DECEIT, vol. 14, p. 177.

When a seller fraudulently warrants a horse to be kind and gentle, and the buyer is injured through the animal's viciousness, the latter may prove the extent of the injuries to his person and vehicle and the expenses necessarily incurred by him in effecting a cure. *Sharon v. Mosher*, 17 Barb. (N. Y.) 518.

2. See *supra*, this section, *General Doctrine*. By electing to sue on the warranty, the buyer waives the fraud and deceit. See *infra*, this title, *Evidence*.

3. See *supra*, this title, XVII. 2. *b. Rescission*.

4. *Tilman v. Stringer*, 26 Ga. 171; *Evenson v. Keystone Mfg. Co.*, 83 Minn. 164; *Birdsall v. Carter*, 11 Neb. 143.

When rescission occurs, it is error to charge that the measure of damages is the difference in values. *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364.

5. Price Paid Is Limit of Recovery Where No Special Damage Is Shown. — *Sullivan v. Goldman*, 19 La. Ann. 12; *Lewis v. Doyle*, 13 N. Y. App. Div. 291; *Ideal Wrench Co. v. Garvin Mach. Co.*, 65 N. Y. App. Div. 235.

Notes for Purchase Price Transferred to Bona Fide Purchaser — Payment by Maker. — *Skeen v. Springfield Engine, etc., Co.*, 34 Mo. App. 485.

6. Remote Damages Excluded. — *Carroll-Porter*

*Boiler, etc., Co. v. Columbus Mach. Co.*, (C. C. A.) 55 Fed. Rep. 451; *Sutherland v. Round*, (C. C. A.) 57 Fed. Rep. 467; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4, 73 Ala. 446; *Case v. Stevens*, 137 Mass. 551; *Merrick v. Wiltse*, 37 Minn. 41; *Connoble v. Clark*, 38 Mo. App. 476; *Clark v. Deering*, 29 Neb. 293; *Bagley, etc., Co. v. Saranac River Pulp, etc., Co.*, 62 Hun (N. Y.) 618, 16 N. Y. Supp. 657, 135 N. Y. 626; *Huyett, etc., Mfg. Co. v. Gray*, 111 N. Car. 92; *Henning v. Withers*, 3 Brev. (S. Car.) 458, 6 Am. Dec. 589; *Reedy v. Weakley*, (Tenn. Ch. 1897) 39 S. W. Rep. 739; *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689; *Puget Sound Iron, etc., Works v. Clemmons*, 32 Wash. 36. Compare *George v. Skivington*, L. R. 5 Exch. 1, 39 L. J. Exch. 8.

7. Speculative Damages. — *Carroll-Porter Boiler, etc., Co. v. Columbus Mach. Co.*, (C. C. A.) 55 Fed. Rep. 451; *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 139; *Love v. Ross*, 89 Iowa 400; *Creamery Package Mfg. Co. v. Benton County Creamery Co.*, 120 Iowa 584; *F. Hammar Paint Co. v. Glover*, 47 Kan. 15; *Connoble v. Clark*, 38 Mo. App. 476; *Drake v. Sears*, 8 Oregon 209; *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689.

Damages to a Retailer alleged to have arisen out of the fact that the inferior nature of the goods in question became generally known, thus injuring his reputation and trade, are too remote and uncertain, too difficult of reasonable ascertainment, to be considered as an element of recovery. *Jackson Sleigh Co. v. Holmes*, 129 Mich. 370. See also *Sutherland v. Round*,

**4. Buyer's Duty to Minimize Damages.** — The general principle that a party cannot recover for damages to himself or his property which he might have prevented by the exercise of ordinary care<sup>1</sup> applies to actions for a breach of warranty as well as to other cases. The buyer owes an active duty to exercise ordinary care in order to render the damages arising from the breach of warranty as light as possible;<sup>2</sup> he cannot recover for expenses or losses unnecessarily or unreasonably incurred,<sup>3</sup> nor for any damages of which his own negligence was the proximate cause.<sup>4</sup> If by the exercise of ordinary care the damages might have been prevented, the measure of the buyer's recovery is the reasonable cost and expense of exercising such care, whether he exercised it or not.<sup>5</sup>

**5. Interest on Damages.** — The court or jury may, and in many instances should, award the buyer interest on the difference between the actual value of the article and its value if it had been as warranted, and for this reason it is proper to refuse an instruction to the jury that the difference between these values is the sole measure of damages recoverable, even where there is no claim made for other damages.<sup>6</sup>

(C. C. A.) 57 Fed. Rep. 467. Compare *Lovegrove v. Fisher*, 2 F. & F. 128.

**Loss of Patronage to a Street-railway Company** and consequent loss of profit resulting from the breach of warranty of a stationary engine are too remote and contingent. *People's Sav. Bank v. Waterloo, etc., Rapid Transit Co.*, 118 Iowa 740.

1. See the title **DAMAGES**, vol. 8, p. 605.

**2. Ordinary Care on Part of Buyer.** — *Newberry v. Bennett*, 38 Fed. Rep. 308; *Nye v. Iowa City Alcohol Works*, 51 Iowa 131, 33 Am. Rep. 121; *Brush v. Smith*, 111 Iowa 217; *Long v. Clapp*, 15 Neb. 420; *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38, 169 N. Y. 587; *Bruce v. Fiss, etc., Horse Co.*, 47 N. Y. App. Div. 273.

Thus, where a party has purchased a machine for planting seed, which is warranted good, but which turns out to be defective, he may recover in damages for the seed wasted, the time lost, the rental value of the land, etc. But as soon as he ascertains that the machine is defective, it is his duty to abandon the use of it at once, and he cannot enhance the damages by continuing to sow with it, ruining crop after crop with it. *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 325; *Birdsall v. Carter*, 11 Neb. 146. See also *Elwood v. McDill*, 105 Iowa 439.

**3. Expenses Unnecessarily Incurred.** — *Crane Co. v. Columbus Constr. Co.*, (C. C. A.) 73 Fed. Rep. 984.

**4. Damages Caused by Buyer's Contributory Negligence.** — *Nashua Iron, etc., Co. v. Brush*, (C. C. A.) 91 Fed. Rep. 213; *Brush v. Smith*, 111 Iowa 217; *Callahan v. Morse*, 37 Mo. App. 189; *Pinney v. Andrus*, 41 Vt. 631; *Johnson v. Moore*, 34 Nova Scotia 85. See also the title **CONTRIBUTORY NEGLIGENCE**, vol. 7, p. 368. And see *Gadsden v. Raysor*, 9 Rich. L. (S. Car.) 276.

**Ordinary Care Is Measure of Buyer's Duty.** — When, in the sale of a heater, the contract requires certain flues to be furnished by the purchaser, he complies with his duty by furnishing flues such as are ordinarily used, and the failure of the heater to work as warranted cannot be charged to him. *Brummett v. Nemo Heater Co.*, 177 Mass. 480.

Where the plaintiff bought cement for use in plastering a house, the fact that the manner of applying it was unskilful is no defense to an action for a breach of warranty when that manner of use was in accordance with instructions issued by the seller. *Nye, etc., Co. v. Snyder*, 56 Neb. 754.

**Buyer's Negligence Must Have Been Proximate Cause.** — Where the breach of warranty in the sale of a mule is a disease in an eye, it is proper to refuse an instruction that the buyer was guilty of contributory negligence which would bar him from recovery if he used the mule in such a way as to increase the injury. *Riddle v. Webb*, 110 Ala. 599.

**5. The General Rule Stated.** — "The law imposes upon a party injured by another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. \* \* \* Where it (this duty) exists, the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury, or the part of the injury, that such measures have or would have prevented." *Long v. Clapp*, 15 Neb. 420, quoting and applying *Sutherland on Damages* (2d ed.), § 88.

**6. Interest May Be Allowed on Difference in Values** — *Alabama*. — *Marshall v. Wood*, 16 Ala. 806; *Foster v. Rodgers*, 27 Ala. 602; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Buford v. Gould*, 35 Ala. 265.

*Connecticut*. — *Ferris v. Comstock*, 33 Conn. 513.

*Georgia*. — *Hook v. Stovall*, 30 Ga. 418; *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508.

*Kentucky*. — *Wood v. Wood*, 1 Met. (Ky.) 512; *South Bend Pulley Co. v. W. E. Caldwell Co.*, (Ky. 1899) 54 S. W. Rep. 12.

*Louisiana*. — *Burnham v. Hart*, 15 La. Ann. 517.

*Maine*. — *Moulton v. Scruton*, 39 Me. 287.

*Michigan*. — *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 52 Mich. 602.

**6. Breach of Warranty of Title.** — If there is a breach of warranty of title, and the buyer is deprived of the subject of the sale by paramount title, the measure of damages is, ordinarily, the price paid, with interest.<sup>1</sup> But the theory of the law in such cases is compensation merely,<sup>2</sup> and the better view is that he is entitled to recover the value of the article at the time he is deprived of its possession, whether that value be greater or less than the price.<sup>3</sup> If there is not a complete failure of title, but merely an incumbrance on the property, the buyer may recover the amount necessary to discharge the incumbrance.<sup>4</sup>

If the Buyer Defends the Title against an action brought by a third party, of which the seller was given notice, he may recover not merely the price paid, together with interest thereon, but also the cost of defending such action, with interest.<sup>5</sup>

*Minnesota.* — *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373; *Merrick v. Wiltse*, 37 Minn. 41.

*Mississippi.* — *Texada v. Camp, Walk.* (Miss.) 150; *Noel v. Wheatly*, 30 Miss. 181.

*Missouri.* — *Courtney v. Boswell*, 65 Mo. 196.

*New York.* — *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Burt v. Dewey*, 31 Barb. (N. Y.) 540.

*North Carolina.* — *Williamson v. Canaday*, 3 Ired. L. (25 N. Car.) 349.

*South Carolina.* — *Ware v. Weathnall*, 2 McCord L. (S. Car.) 413.

*Tennessee.* — *Crittenden v. Posey*, 1 Head (Tenn.) 311.

*Texas.* — *Anderson v. Duffield*, 8 Tex. 237; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Routh v. Caron*, 64 Tex. 289; *Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53.

*Compare* *Scott v. Clarkson*, 1 Bibb. (Ky.) 277; *Riss v. Messmore*, 58 N. Y. Super. Ct. 23; *Antrum v. Sloane*, 2 Spears L. (S. Car.) 594.

*Compare* also *White v. Miller*, 71 N. Y. 134, 27 Am. Rep. 18, where it is held that since the damages are unliquidated and not susceptible of computation, no interest is recoverable. This was a case, however, where damages in excess of the mere difference between the actual and the warranted values were claimed.

Interest should be allowed from the date of the breach to the time of the trial. *Brown v. Doyle*, 69 Minn. 543.

**1. Price Paid Is Ordinarily Measure of Damages.** — *Smeltzer v. White*, 92 U. S. 390 (warranty of genuineness of county warrants); *The Electron*, 56 Fed. Rep. 304; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220; *Close v. Crossland*, 47 Minn. 500; *Burt v. Dewey*, 31 Barb. (N. Y.) 540; *Atkins v. Hosley*, 3 Thomp. & C. (N. Y.) 322; *Arthur v. Moss*, 1 Oregon 193; *Glover v. Hutson*, 2 McMull. L. (S. Car.) 109; *Seibles v. Blackwell*, 1 McMull. L. (S. Car.) 56; *Ware v. Weathnall*, 2 McCord L. (S. Car.) 413; *Crittenden v. Posey*, 1 Head (Tenn.) 311; *Brown v. Woods*, 3 Coldw. (Tenn.) 182; *Thiele v. Axell*, 5 Tex. Civ. App. 548; *Harrell v. Broome*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1077. See also *Handy v. Aldrich*, 168 Mass. 34.

**Breach of Warranty of Title After Transfer by First Buyer.** — The damages recoverable of the original warrantor cannot be increased by reason of contracts made or liabilities or expenses incurred or paid by the buyer on account of independent warranties to subsequent buyers. A

warranty of soundness is not negotiable, and there is no reason why a warranty of title should stand on a different footing. Such a warranty does not "run" with the article sold. *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220.

**2. Buyer Entitled Only to Compensation, Not to Profits.** — *Hendrickson v. Back*, 74 Minn. 90; *Noel v. Wheatly*, 30 Miss. 181; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *O'Brien v. Jones*, 91 N. Y. 193.

**3. Value of Property at Time of Eviction.** — *Rowland v. Shelton*, 25 Ala. 217; *Brennecke v. Heald*, 107 Iowa 376; *Dyson v. Phelps*, 14 La. Ann. 733; *Close v. Crossland*, 47 Minn. 500; *Hendrickson v. Back*, 74 Minn. 90; *Brown v. Woods*, 3 Coldw. (Tenn.) 184. See also *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57. *Compare* *Wood v. Wood*, 1 Met. (Ky.) 512; *Arthur v. Morse*, 1 Oregon 193 (price alone recoverable).

**The Judgment Obtained Against the Buyer by the holder of a paramount title, in an action to recover the property in question, is conclusive on the original seller as to the fact of such recovery and as to the measure of damages.** *Pickett v. Ford*, 4 How. (Miss.) 246.

**4. Where Property Is Merely Encumbered.** — *Western v. Short*, 12 B. Mon. (Ky.) 153. See also *Close v. Crossland*, 47 Minn. 500; *Smith v. Ruggles*, 50 Hun (N. Y.) 606, 3 N. Y. Supp. 329.

**Where Buyer Has Not Discharged Incumbrance.** — It has been held that where property has been exchanged, as upon a sale, with a warranty that it is unencumbered and it proves to be encumbered, the buyer can recover no more than nominal damages in the absence of proof that he has paid off the amount of the incumbrance or has been deprived of possession. *Close v. Crossland*, 47 Minn. 500.

The correctness of this, however, depends upon what rule is recognized as to what constitutes a breach of warranty of title. See *supra*, this title, *Breach of Warranty—What Constitutes*.

**Upon a Sale of a Certificate of Shares in a partnership, with warranty of title, there is a breach of the warranty if the shares are not paid up, and the measure of damages recoverable therefor is the amount unpaid.** *Jamison v. Harbert*, 87 Iowa 186.

**5. Cost and Expense of Defending Title.** — *Rowland v. Shelton*, 25 Ala. 217; *Marlatt v. Clary*,



**XX. EVIDENCE — 1. In General.** — Any evidence which has a legitimate tendency to satisfy the jury or the court upon the question whether or not there was a warranty, or whether there had been a breach of it, and to what extent, or which is material upon the question of the measure of damages, is admissible, subject, of course, to the general rules of evidence respecting hearsay testimony and the like,<sup>1</sup> and to the rule that the proof must conform to the allegations in the pleadings,<sup>2</sup> and be material to some issue raised by them.<sup>3</sup>

**2. Evidence Must Not Be Remote in Point of Time.** — Testimony as to the existence and character of the warranty, but particularly as to the condition of the article sold and as to the breach of warranty, must be confined to the time when the warranty was made or the breach of it occurred, and evidence of facts remote in point of time is not admissible except in peculiar isolated cases.<sup>4</sup> But the strictness with which the general rule is to be applied varies.

20 Ark. 251; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220; *Bash v. Young*, 2 Ind. App. 297; *Western v. Short*, 12 B. Mon. (Ky.) 153; *Johnson v. Blanks*, 34 Mo. 255; *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Balte v. Bedemiller*, 37 Oregon 27, 82 Am. St. Rep. 737; *Glover v. Hutson*, 2 McMull. L. (S. Car.) 109; *Brown v. Woods*, 3 Coldw. (Tenn.) 182. See also *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166.

**1. Evidence — General Rule.** — *Jones v. Ross*, 98 Ala. 448; *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607; *Esterly v. Eppelsheimer*, 73 Iowa 260; *Blackmore v. Fairbanks*, 79 Iowa 282; *McGaughey v. Richardson*, 148 Mass. 615 (advertisement of auction sale); *Whittier Mach. Co. v. Graffam*, 156 Mass. 415; *Gutta Percha, etc., Mfg. Co. v. Wood*, 84 Mich. 452; *Lytle v. Erwin*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 491; *Hodges v. Wilkinson*, 111 N. Car. 56; *Tillyer v. Van Cleve Glass Co.*, 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99; *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691.

**The Buyer May Show that His Customers Returned Machines Sold to Them** as not working well; such testimony is competent as going to show a breach of the warranty made to the buyer by his vendor. *Alpha Checkrower Co. v. Bradley*, 105 Iowa 537.

**A Witness May Give the Name of a Horse in Order to Identify it**, but if, on being asked the name, he replies he had heard it called "the big legged runaway horse," the answer is incompetent as being both irresponsible and calculated to prejudice the seller. *Jones v. Ross*, 98 Ala. 448.

**Statements by a Subsequent Purchaser from the Buyer** with regard to the quality of the goods in question are mere hearsay and not admissible on the question of a breach of warranty as between the original parties to the sale. *Barrett v. Wheeler*, 71 Iowa 663.

**Testimony to Prove Agent's Authority to Warrant.** — Where the defense is that the agent (defendant's son) had no authority to warrant, it cannot be shown by a stranger that, on the day of the sale, the agent told such witness, upon the latter's asking the price of the horse, that he would warrant him. But it may be shown that the agent, in offering the horse for sale, offered a warranty, as that would be a statement accompanying an act done in the course of his agency. *Allen v. Denstone*, 8 C. & P. 760,

34 E. C. L. 623. See also *Smith v. Groneweg*, 40 Minn. 178.

**Proof of Mortgage Given by Seller.** — In an action upon a warranty of title, free from incumbrances, of a span of horses sold by the defendant to the plaintiff, it is error to admit in evidence, over defendant's objection, a note secured by a mortgage on the horses, purporting to have been executed by the defendant, without any other proof of their execution by him. *McHugh v. Brown*, 33 Mich. 2.

**2. Moor v. Dewees**, Litt. Sel. Cas. (Ky.) 227; *Deming v. Foster*, 42 N. H. 165 (proof of conditional warranty not competent where absolute warranty is alleged); *Martin v. Edwards*, 11 Humph. (Tenn.) 374.

Under an averment of a warranty that the horse in question was not over seven years old, it is competent to prove a warranty that he would be seven years old the next spring after the sale. *Henry v. Henry*, 1 D. Chip. (Vt.) 265. But where the breach of a warranty of soundness is charged to be a disease known as "glanders," proof that the animal had other diseases is not competent. *Snowden v. Waterman*, 100 Ga. 588.

**3. Evidence Must Be Material and Pertinent.** — *Levi v. Dimmick*, 99 Cal. 490; *McCeney v. Duvall*, 21 Md. 166; *Aultman v. Falkum*, 47 Minn. 414; *Halley v. Folsom*, 1 N. Dak. 325 (evidence of buyer's poor credit incompetent); *Troy Laundry Co. v. Henry*, 23 Oregon 232. See also *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428 (evidence as to object for which purchase was made held incompetent).

**Evidence of Market Value — Goods Bought for Specific Purpose.** — When the question is one of fact as to whether a sale was made with warranty, evidence of the market value of the goods sold is not admissible for the purpose of showing that the price paid by the plaintiff was below that of the market value of the goods suitable for the buyer's purposes, and so far below it as to raise a presumption that they could not have been of the quality warranted. *Ockershausen v. Durant*, 141 Mass. 338. And see *Wing v. Chapman*, 49 Vt. 33; *Edgar v. Breck, etc., Corp.*, 172 Mass. 581.

**4. Time of Warranty or Breach.** — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 77 Ill. App. 59; *Postel v. Oard*, 1 Ind. App. 252; *Best v. Kempf*, 64 Mo. App. 460; *Brisbane v. Parsons*, 33 N. Y. 332; *Titus v. Poole*, 73 Hun (N. Y.)

It must be strictly enforced where the article is, from its nature, peculiarly liable to become changed or where opportunities for a change in condition exist.<sup>1</sup> But much latitude is allowed where the evidence of the condition of the article at another time is accompanied with proof that no change had occurred in the interim or where, from the nature of things, a change in condition was not probable.<sup>2</sup>

Where a Machine Is Warranted for a Specified Period, evidence is admissible as to the condition of the machine at any time during that period, and the same would be true where the warranty was for an indefinite period, as, for example, where the machine was warranted to be as good as certain other machines.<sup>3</sup> In the latter case, evidence as to the working of the machine through several seasons is competent.<sup>4</sup>

**3. Evidence of Comparisons.** — The fact that articles similar to the one in question, sold by the seller in the same locality, had given satisfaction is no evidence that the particular article sold to the vendee was free from defects, and evidence as to the sufficiency or character of such other articles is not admissible on behalf of the seller.<sup>5</sup> Where, however, the article in question is a machine, *e.g.*, a harvester, and it appears, either inferentially or by direct proof, that it is of the same kind and character as others sold by the seller and in use in the vicinity, evidence has been held admissible, on behalf of the buyer, to show that such other harvesters, of the same kind and make as that sold to him, had failed to do the work for which they were designed, although operated by a competent person.<sup>6</sup> Such evidence seems to have been admitted on the theory that there was a question as to the sufficiency of the general type of machine rather than of the particular machine in question, but the better view seems to be that such evidence is not competent in any event except where the warranty itself institutes a comparison.<sup>7</sup>

383; *Myers v. McFarlane*, 3 Brev. (S. Car) 513; *Houston Cotton Oil Co. v. Trammell*, 96 Tex. 598; *Foot v. Woodworth*, 66 Vt. 216; *Miller v. McDonald*, 13 Wis. 673; *Milwaukee Rice Machinery Co. v. Hamacek*, 115 Wis. 422; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *Liddard v. Kain*, 9 Moore 356, 2 Bing. 183, 9 E. C. L. 373.

**Evidence that Trees Were Destroyed by a Freeze** after the buyer had commenced his action for breach of a warranty as to their kind is not competent. *Angell v. Pruyn*, 126 Mich. 16.

**1. Where Condition of Property Is Apt to Change.** — *Hall v. Plassan*, 19 La. Ann. 11; *Liebermann v. Lippert*, 109 Wis. 1.

**Where the Warranty Is Expressly Confined to a Limited Period**, evidence as to the condition of the article after such period is in no event admissible. *Times Pub. Co. v. North Carolina Steel, etc., Co.*, 114 N. Car. 224.

**2. Where Change in Condition of Article Is Improbable.** — *Kavanaugh v. Wausau*, (Wis. 1904) 98 N. W. Rep. 550; *Robinson v. Snow*, (Tex. Civ. App. 1903) 74 S. W. Rep. 328.

In an action for breach of warranty of a horse, evidence that, two years after he was bought, he killed himself in a fit of balking, is not too remote, if it is shown that his balking was a common habit, extending through the whole time. In such a case, evidence may also be given that he was balky three years before the sale. *Daniels v. Aldrich*, 42 Mich. 58; *Finley v. Quirk*, 9 Minn. 194, 86 Am. Dec. 93. Compare *Myers v. McFarlane*, 3 Brev. (S. Car.) 513. So also, in an action for a breach of a warranty of the soundness of a slave, evidence is admissible to show the value of the

slave a few months after the sale, as shedding light on the question of his value at the time of the sale. *Stone v. Watson*, 37 Ala. 279; *Gingles v. Caldwell*, 21 Ala. 444. See also in this connection *Moore v. Haviland*, 61 Vt. 58.

**3.** See *Osborne v. McQueen*, 67 Wis. 392.

**4.** *Osborne v. Carpenter*, 37 Minn. 331.

**5. Evidence of Comparisons.** — *Albany, etc., Iron, etc., Co. v. Lundberg*, 121 U. S. 451, *distinguishing* *Ames v. Quimby*, 106 U. S. 342; *Fox v. Stockton Combined Harvester, etc., Works*, 83 Cal. 333; *Murray v. Brooks*, 41 Iowa 45; *Brummett v. Nemo Heater Co.*, 177 Mass. 480; *Osborne v. Bell*, 62 Mich. 214; *Marsh v. Snyder*, 14 Neb. 237. See also *Rice v. Dickson Car Wheel Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 645. Compare *Aultman v. Weber*, 28 Ill. App. 91; *Davis v. Sweeney*, 80 Iowa 391; *Raynor v. Bryant*, 43 Kan. 492; *Larrison v. Payne*, 1 Silv. Sup. (N. Y.) 232.

**6.** *Davis v. Sweeney*, 80 Iowa 391; *Dempster Mill Mfg. Co. v. Fitzwater*, 6 Kan. App. 24. See also *Lyon v. Martin*, 31 Kan. 411; *Raynor v. Bryant*, 43 Kan. 492.

Where the claim of the seller of a furnace is that its failure to heat the house was due to the faulty construction of the building, evidence as to comparative results obtained in that house from the seller's furnace and one subsequently placed therein is competent. *Kramer v. Messner*, 101 Iowa 88.

**7.** *Marsh v. Synder*, 14 Neb. 237.

If evidence as to comparative results obtained from other machines is admissible in any event, it must first be shown that the other machines were of the same general make or pattern and were operated under similar circumstances and

**The Quality of a Larger Lot of Goods,** from which the goods in question were admittedly taken, may be shown by either party, as evidence of the quality of the particular goods.<sup>1</sup> But the fact that some of the goods delivered were not up to the warranty, while it is an evidential fact, is not sufficient to raise a presumption that the remainder of the goods delivered were not as warranted.<sup>2</sup>

**Where the Warranty Is that the Article Shall Be "as Good as"** certain other articles of like kind, evidence to show that it was or was not as good as such other articles is admissible, from the nature of the warranty.<sup>3</sup> But the evidence must be confined to the comparison made by the warranty itself, and it is not competent to show that the article is as good "as any in the market," where the warranty was that it should be as good as another particular machine.<sup>4</sup> Under such a warranty, any fact going to show a breach of or compliance with the warranty is admissible. Thus, the buyer may show that the machine is more expensive to operate than others.<sup>5</sup>

**4. Evidence of Other Warranties in Similar Sales.**—For the purpose of proving that a warranty exists in a particular case, it is not competent to show that the seller had given a warranty upon a sale of the same kind of goods to another person.<sup>6</sup> But for the purpose of showing the meaning of certain terms used and the general scope of the warranty, as understood by the parties, correspondence between the buyer and seller with reference to prior sales of similar goods is competent.<sup>7</sup>

**5. Testimony of Experts.**—An expert may testify as to the character and probable extent of any defects complained of in the article sold, it having first been shown that the witness is an expert and capacitated to form a correct opinion on the matters submitted to him.<sup>8</sup> But it is not competent for

conditions. *Hazlehurst Compress, etc., Co. v. Boomer, etc., Compress Co., (C. C. A.)* 48 Fed. Rep. 803.

1. *Ames v. Quimby*, 106 U. S. 342; *Buchanan v. Collins*, 42 Ala. 419; *Raynor v. Bryant*, 43 Kan. 492; *Green v. Donaldson*, 16 Vt. 162.

On an issue as to whether there was a breach of warranty in the sale of a lot of onions, evidence is not admissible to show that other onions, originally of the same lot, were unripe and improperly cured unless it appears that those had been subject to the same conditions in harvesting, storing, etc. *Lake v. Clark*, 97 Mass. 346.

Where one of the questions of fact in an action to recover the price was as to the germinating capacity of certain cotton seed sold by the plaintiff to the defendant, evidence tending to show that some of the plaintiff's cotton seed sold at the same time and kept in the same manner as that sold to the defendant would not germinate is admissible for the defendant. *Buchanan v. Collins*, 42 Ala. 419.

2. *J. I. Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590.

3. *Osborne v. Carpenter*, 37 Minn. 331; *Schroeder v. Coatsville Rolling Mill Co.*, 31 N. Y. App. Div. 295, *affirmed* 164 N. Y. 587; *Pearson v. Martin*, 38 Wis. 265. See also *Trapp v. New Birdsall Co.*, 109 Wis. 543. *Compare Dommerich v. Garfunkel*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 743, *affirming* (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 740.

**Where a Fertilizer Is Warranted as Good as Any Other on the Market,** the buyer may show that on other parts of the same land, with another fertilizer, better results were obtained, the same cultivation having been given to each part. *Reese v. Babcock & Co.*, 100 Ill. 111.

4. *McCormick Harvesting Mach. Co. v. Cochran*, 64 Mich. 636.

**Where the Machine Is Warranted to Be as Good as Any Other on the Market,** testimony as to comparisons, while admissible, must be limited to comparisons of the machine in question with similar machines on the market at the time the warranty was made. *Best v. Kempf*, 64 Mo. App. 460.

5. *Vermont Farm Mach. Co. v. Batchelder*, 68 Vt. 430.

6. *Jones v. Ellis*, 68 Vt. 544.

It seems that the buyer may show that, on previous claims made by him for a similar breach of warranty on other sales, his seller had paid for such deficiencies, as tending to show a breach of warranty. *Conestoga Cigar Co. v. Finke*, 144 Pa. St. 159. See also *Engelhardt v. Clauton*, 83 Ala. 336.

7. *Deeley v. Heintz*, 40 N. Y. App. Div. 612. *Compare Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156.

**For the Purpose of Showing that a Horse Warranted Sound Was Diseased** and had the glanders, a contagious disease, the plaintiff may show that a mule which had been worked with the horse had contracted that disease and died from it. *Wallace v. Wren*, 32 Ill. 146.

8. *Albany, etc., Iron, etc., Co. v. Lundberg*, 121 U. S. 451; *Bristol v. Galway*, 68 Conn. 248 (veterinary surgeon); *Dunham v. Rix*, 86 Iowa 300; *Earl v. Lefler*, 46 Hun (N. Y.) 9. And see the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

**A Witness Who Had Been Handling and Caring for Horses** for fifty years, had successfully treated them for many diseases, had himself owned many horses, and was acquainted with the signs and treatment of glanders, is a competent witness to testify that a horse was diseased with glanders. *Reese v. Babcock & Co.*, 100 Ill. 111.



one not shown to be an expert to state his opinion upon a matter of fact which is properly to be determined by the jury.<sup>1</sup>

**6. Evidence of Fraud.**—It is not essential to a recovery on the warranty that it should have been fraudulently made, and proof of fraud, where the action is on the warranty, is unnecessary<sup>2</sup> and incompetent.<sup>3</sup> Where, however, the action is not on the warranty, but independent of it, and is based on the fraudulent representations of the seller, evidence of fraud is competent and necessary; the plaintiff must prove, not merely that the representations were made and were untrue, but that the defendant knew they were untrue when he made them.<sup>4</sup>

Where the Property Is Warranted Sound so Far as the Seller Knows, proof of a scienter on the part of the seller is essential, since, in order to show a breach of such a warranty, it must appear that the seller knew or had reason to believe the property was unsound when he warranted it.<sup>5</sup>

**7. In Other Particular Cases—Tests of Machinery.**—Evidence of tests made for the purpose of ascertaining whether the machinery or material will stand the tests guaranteed is competent although they were made during the seller's absence. The fact of his absence goes merely to the weight of the evidence and not to its competency.<sup>6</sup> Where a machine is tested by the seller on the buyer's premises, and the latter thereupon refuses to accept it, the latter's evidence as to the results of such test, being the best evidence in his possession

whether the horse was foundered. *Vates v. Cornelius*, 59 Wis. 615. See also, in this connection, *Finch v. Phillips*, 41 Wis. 387; *Earl v. Lefler*, 46 Hun (N. Y.) 9.

**An Expert May Testify as to the Rental Value of a Mill** rendered idle in consequence of a breach of warranty as to machinery bought for it. And the fact that, in arriving at the rental value, he took into consideration the probable net profits does not render his testimony incompetent. The admission of such testimony is not tantamount to a holding that such net profits are recoverable as damages. *Edward P. Allis Co. v. Columbia Mill Co.*, (C. C. A.) 65 Fed. Rep. 52.

**Chemist's Analysis of Fertilizers—Standard.**—*De Loach v. Hardee*, 64 Ga. 94; *Wilcox v. Hall*, 53 Ga. 635.

**1. Testimony of Non-expert Incompetent.**—*Dunham v. Rix*, 86 Iowa 300.

In an action on a warranty of a second-hand dynamo bought by a street railway company, it is not proper to permit a witness, whether an expert or not, to testify that it is not safe to operate a street railway system with a second-hand generator or that there are difficulties in operating a new line especially trying on a generator. *Waupaca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co.*, 112 Wis. 460.

**2.** See *supra*, this title, III. 4. *Distinguished from Fraud.* See also *Tyler v. Moody*, 111 Ky. 191, 98 Am. St. Rep. 406.

**3. When Proof of Fraud Incompetent.**—*Bartholomew v. Bushnell*, 20 Conn. 271, 52 Am. Dec. 338; *Wallace v. Wren*, 32 Ill. 146; *Connell v. McNeth*, 109 Mich. 329; *Wilson v. Fuller*, 58 Minn. 149; *McKinnon v. McIntosh*, 98 N. Car. 89; *Wiggins v. Long*, 9 Humph. (Tenn.) 140; *Gerst v. Jones*, 32 Gratt. (Va.) 518, 34 Am. Rep. 773; *Cameron v. Mount*, 86 Wis. 477; *Williamson v. Allison*, 2 East 446. See also *Farmers, etc., Bank v. Upham*, 37 Neb. 417. Compare *Danforth v. Crookshanks*, 68

Mo. App. 311; *Gartner v. Corwine*, 57 Ohio St. 246; *Hubby v. Stokes*, 22 Tex. 217.

**4. When Proof of Scienter Essential.**—*Bartholomew v. Bushnell*, 20 Conn. 271, 52 Am. Dec. 338; *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364; *Farmers' Stock Breeding Assoc. v. Scott*, 53 Kan. 534; *Haven v. Neal*, 43 Minn. 315; *Carley v. Wilkins*, 6 Barb. (N. Y.) 557; *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428; *Martin v. Edwards*, 11 Humph. (Tenn.) 374; *West v. Emery*, 17 Vt. 583, 44 Am. Dec. 356; *Stevens v. Webb*, 7 C. & P. 60, 32 E. C. L. 435; *Ormrod v. Huth*, 14 M. & W. 651, 14 L. J. Exch. 366. Compare *Jones v. Bowden*, 4 Taunt. 847.

**A Different View Upheld in Some Earlier Cases.**—In a number of the earlier cases it has been held that there is no difference in the character of evidence necessary to sustain a recovery in cases where the action is *ex contractu* on the warranty and in those where it is *ex delicto* for a false and fraudulent warranty; in either class of cases proof of a scienter on the defendant's part is regarded as unnecessary. *McLeod v. Tutt*, 1 How. (Miss.) 288; *Hallock v. Powell*, 2 Cai. (N. Y.) 216; *Evertson v. Miles*, 6 Johns. (N. Y.) 138; *Williamson v. Allison*, 2 East 446; *Weall v. King*, 12 East 452; *Jones v. Bowden*, 4 Taunt. 847.

**5.** *Hubby v. Stokes*, 22 Tex. 217.

**6. Test Made in Absence of Seller.**—*Crane Co. v. Columbus Constr. Co.*, (C. C. A.) 73 Fed. Rep. 984 (test to ascertain what pressure pipes would sustain). See also *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 601.

**Motion by Seller to Have Machine Tested.**—After action brought by the buyer for damages for a breach of warranty, the defendant asked the court for permission to use the machine in question for the purpose of testing its capacity to do the work it was warranted to do. It was held that the trial court did not err in refusing the request. *Rogers v. Hanson*, 35 Iowa 283,

or under his control at the time of the trial of the action to recover the price, is not to be discredited because he failed to make further tests for himself after his refusal to accept. Such evidence is in no sense secondary.<sup>1</sup>

**Evidence as to How a Machine Was Handled** when used by the purchaser is competent where the warranty alleged to have been broken was that the machine would work well.<sup>2</sup> Similarly the seller may show that the machine, some time after the buyer had abandoned it, worked as warranted when in the hands of a competent person.<sup>3</sup> But such evidence is not competent when the only issue being tried is the condition of the machine when it reached the buyer.<sup>4</sup>

**Where the Article Sold Is in Distinct Separable Parts**, evidence is admissible to show the value of the outfit for any purpose, after part of it has been shown to be worthless.<sup>5</sup> If the defect in a machine is traceable to some detachable part which may be replaced, irrespective of the whole, or which does not necessarily render the balance of the machine useless, such facts may be proven to establish the value of the machine for any purpose and for rebutting the buyer's claim that the machine as a whole is worthless.<sup>6</sup>

**Evidence of a Usage in a Particular Trade**, or of the vendor, to give a warranty upon the sale of certain classes of goods, is admissible for the purpose of establishing a warranty<sup>7</sup> or of showing the meaning of terms used.<sup>8</sup>

**Evidence of Local Understanding Among Dealers** to the effect that a bill of sale for a certain commodity, specifying the invoice weight, is a warranty that the actual weight is substantially the same, is not admissible.<sup>9</sup> Such a specification in the bill of sale does not amount to a warranty, and cannot be made so by a mere local understanding.<sup>10</sup>

**When a Horse Is Warranted to Be an "Average Breeder,"** it is competent to show, by witnesses, what is the usual percentage of results from the service of admittedly good breeders.<sup>11</sup>

**Evidence of the Purpose or Use for Which an Article Is Bought**, where it appears that the seller knew or was informed of such purpose, is admissible for the purpose of examining what was intended to be embraced in the warranty, where the scope or extent of the warranty is in dispute.<sup>12</sup>

**The Declarations of an Agent of the Buyer** with respect to whether there had been a breach of the warranty are not admissible against the buyer when made after the sale and not at the time when the matter of the warranty was depending.<sup>13</sup>

1. **Best and Secondary Evidence of Tests.**—U. S. Sugar Refinery v. E. P. Allis Co., (C. C. A.) 56 Fed. Rep. 786.

2. *Tower v. Pauley*, 76 Mo. App. 287.

3. *Swanson v. Allen*, 108 Iowa 419.

**Fertilizers—Exhibiting to Jury Material Represented to Be Substance Sold.**—*Robson v. Miller*, 12 S. Car. 586, 32 Am. Rep. 518.

**The Buyer May Testify as to the Manner and Effect of His Use of the Fertilizer** in the cultivation of his crop, for the purpose of showing that the material delivered to him was worthless and not what he ordered. *Claghorn v. Lingo*, 62 Ala. 230.

4. *McKay v. Johnson*, 108 Iowa 610.

5. *Benson v. Port Huron Engine, etc., Co.*, 83 Minn. 321 (sale of a coal burning engine with straw burning attachment, the latter of which proved defective).

6. *Melby v. Osborne*, 33 Minn. 492 (sale of combined harvester and binder, the latter proving worthless). See also *Benson v. Port Huron Engine, etc., Co.*, 83 Minn. 321, *distinguishing Wyckoff v. Horan*, 39 Minn. 429.

7. **Usage.**—*Harris v. Nasits*, 23 La. Ann. 457; *Conestoga Cigar Co. v. Finke*, 144 Pa. St.

159, 29 W. N. C. (Pa.) 71. Compare *Rice v. Codman*, 1 Allen (Mass.) 377; *De Witt v. Berry*, 134 U. S. 306.

8. **Of Technical Trade Terms.**—Thus, where timber was sold warranted "sound," and an issue was taken as to whether it was sound or not, evidence was allowed to be given, with a view to showing that in the timber trade the word "sound" had a technical and conventional meaning. *Woodhouse v. Swift*, 7 C. & P. 310, 32 E. C. L. 521. See also *Powell v. Horton*, 2 Hodges 12, 2 Bing. N. Cas. 668, 29 E. C. L. 452, 3 Scott 110.

9. *Rice v. Codman*, 1 Allen (Mass.) 380; *Hutchison v. Bowker*, 5 M. & W. 535.

10. **Specification of Weight in Bill of Sale Not a Warranty.**—*Rice v. Codman*, 1 Allen (Mass.) 380.

11. *Brown v. Doyle*, 69 Minn. 543.

12. *Thornton v. Thompson*, 4 Gratt. (Va.) 121.

13. **Agency**—*White v. Miller*, 71 N. Y. 135, 27 Am. Rep. 18, *reversing 7 Hun* (N. Y.) 427.

**Where the Buyer Is a Corporation**, the declarations of one of its directors who was present at a trial of the machine, when made some time

**XXI. BURDEN OF PROOF — 1. In General.** — The burden is on the buyer to establish a warranty and that a breach of it has occurred,<sup>1</sup> whether he sues for a breach of the warranty or sets it up by way of set-off or counterclaim.<sup>2</sup> If the warranty is that a machine will work well, he must show in what particular it failed to do the work,<sup>3</sup> though he is not bound to show in what respect the machine was not well made.<sup>4</sup>

If the Warranty Is on Condition that the Buyer Take Certain Precautions in the use of the article purchased, the burden is on him affirmatively to show the observance of such precautions,<sup>5</sup> although there is, in ordinary cases, no burden on him to show an absence of contributory negligence on his part in the method of using the article.<sup>6</sup>

after such trial, are not competent against the buyer to show there was no breach of the warranty. *Allington, etc., Mfg. Co. v. Detroit Reduction Co.*, (Mich. 1903) 95 N. W. Rep. 562.

**1. Burden of Proving Warranty and Breach Is on Buyer** — *England*. — *Mallan v. Radloff*, 17 C. B. N. S. 588, 112 E. C. L. 588.

*United States*. — *Insurance Co. of North America v. Johnson*, (C. C. A.) 70 Fed. Rep. 703.

*Colorado*. — *Colorado Dry Goods Co. v. W. P. Dunn Co.*, 18 Colo. App. 409.

*District of Columbia*. — *Purity Ice Co. v. Hawley Down Draft Furnace Co.*, 22 App. Cas. (D. C.) 573.

*Illinois*. — *Cook v. Tavener*, 41 Ill. App. 642; *Morris v. Wibaux*, 47 Ill. App. 630; *Erie City Iron Works v. Dempsey*, 77 Ill. App. 667; *Wadleigh v. Robbins*, 74 Ill. App. 126.

*Indiana*. — *McKendry v. Sinker*, 1 Ind. App. 263; *Woodruff v. Hensley*, 26 Ind. App. 592; *H. B. Smith Co. v. Williams*, 29 Ind. App. 336.

*Kansas*. — *Acme Harvester Co. v. Erne*, 63 Kan. 858.

*Kentucky*. — *Palmer v. Mt. Sterling Nat. Bank*, (Ky. 1892) 18 S. W. Rep. 234; *Moor v. Dewees*, Litt. Sel. Cas. (Ky.) 227.

*Massachusetts*. — *Cunningham v. Hall*, 4 Allen (Mass.) 268; *Noble v. Fagnant*, 162 Mass. 275.

*Michigan*. — *Keystone Mfg. Co. v. Forsyth*, 123 Mich. 626.

*Minnesota*. — *Beckett v. Gridley*, 67 Minn. 37. *Mississippi*. — *Stilwell, etc., Co. v. Biloxi Canning Co.*, 78 Miss. 779.

*Missouri*. — *Garvey v. Hauck*, 85 Mo. App. 14; *Monumental Bronze Co. v. Doty*, 92 Mo. App. 5; *Roth v. Continental Wire Co.*, 94 Mo. App. 236.

*Nebraska*. — *Rosso v. Milwaukee Harvester Co.*, (Neb. 1901) 96 N. W. Rep. 213.

*New York*. — *Raines v. Totman*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 493; *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 N. Y. App. Div. 300, affirmed 164 N. Y. 593; *Deeley v. Heintz*, 40 N. Y. App. Div. 612. *Compare Wilbur v. Cartright*, 44 Barb. (N. Y.) 536.

*North Dakota*. — *Plano Mfg. Co. v. Root*, 3 N. Dak. 165; *James v. Bekkedahl*, 10 N. Dak. 120.

*Ohio*. — *Fred. W. Wolf Co. v. Sheriff St. Market, etc., Co.*, 11 Ohio Cir. Dec. 582.

*Pennsylvania*. — *Walker v. Taylor*, 19 Pa. Super. Ct. 39.

*South Carolina*. — *Stockfleet v. Fryer*, 2 Strobb. L. (S. Car.) 301.

*Texas*. — *Florida Athletic Club v. Hope Lumber Co.*, 18 Tex. Civ. App. 161; *Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53.

*Washington*. — *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. Rep. 890.

*Wisconsin*. — *Klipstein v. Raschein*, 117 Wis. 248.

**Warranty by a Partnership.** — Such a warranty is sufficiently proven by proof of a warranty given by a member of the firm, the article being one sold by the firm. *Eldridge v. Hargreaves*, 30 Neb. 638.

**Where the Sale Was to Two Persons**, who gave separate notes for the price, and the action is by the seller to recover on the note given by one of the buyers, upon proof of a warranty and breach, the burden is on the seller to prove that there was no personal warranty to the defendant. *Snyder v. Johnson*, (Neb. 1903) 95 N. W. Rep. 692.

**Nursery Stock.** — Proof that, of six hundred trees, all but twelve died, although they were well cared for, and that other trees, bought of other parties by the buyer, did well, is sufficient proof of a breach of warranty that the trees were good nursery stock. *De Foe v. Williams*, 99 Mo. App. 24.

**2. Garvey v. Hauck**, 85 Mo. App. 14; *Schumann v. Wager*, 36 Oregon 65.

**3. Canton First Nat. Bank v. McCann**, 4 Ill. App. 250. See also *Woodruff v. Hensley*, 26 Ind. App. 592; *Fred. W. Wolf Co. v. Sheriff St. Market, etc., Co.*, 11 Ohio Cir. Dec. 582. *Compare Lane, etc., Co. v. City Electric Light, etc., Co.*, 31 Tex. Civ. App. 449.

**The Buyer Must Show the Items of Damage** when there is merely a partial breach of the warranty. *Gilbert v. Gossard*, (Tex. Civ. App. 1903) 73 S. W. Rep. 989.

**4. McCormick Harvesting Mach. Co. v. Brower**, 88 Iowa 607. See also *Charter Gas Engine Co. v. Kellam*, 79 N. Y. App. Div. 231.

**Where a Defect in a Machine Is Once Shown to Have Existed**, and it develops that, in accordance with the agreement, the buyer gave notice thereof and the seller attempted to remedy it, it is then the duty of the seller to test the repaired machine and he must show its compliance with the warranty. *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502.

**5. Buyer Must Prove Observance of Stipulated Precautions.** — *Landman v. Bloomer*, 117 Ala. 312; *Acme Harvester Co. v. Erne*, 63 Kan. 858; *Prejean v. Wogan*, 110 La. 362. See also *Osborne v. Mullikin*, 88 Mo. App. 350.

**6. Tower v. Pauly**, 67 Mo. App. 632.



Where the Sale Was by Sample and the buyer refused to accept the goods on the ground that they were not as represented, the seller has the burden of proof to show that they corresponded with the sample.<sup>1</sup>

The Buyer Must Prove the Fact of Damage as well as such other facts as are necessary for estimating the amount of damages under the rules heretofore referred to.<sup>2</sup> Where the measure of his recovery is the difference in the value of the article as it was in fact and as it would have been had it conformed to the warranty, he must show both these values affirmatively.<sup>3</sup>

2. **Sufficiency of Proof.**—The sufficiency of proof must necessarily depend upon the character and weight of the testimony adduced and is therefore usually a question for the jury.<sup>4</sup> The testimony of the seller that the article in question was well manufactured from the best of material and that it ought to be perfect will not prevail over the positive and otherwise uncontradicted testimony of the buyer that he found it defective immediately upon attempting to use it.<sup>5</sup>

**WARRANTY DEED.** (See also the titles COVENANTS, vol. 8, p. 43; DEEDS, vol. 9, p. 87.)—See note 6.

**WARREN.**—The term “warren” is one of those terms which has not

Where the Contract of Warranty Gives the Buyer a Choice of Remedies, as where it provides that he may return the article if it is not as represented, the burden is on the seller, in an action by the buyer for damages for breach of the warranty, to prove that the buyer exercised his right to return the article if he relies on that fact to defeat the action for damages. *Osborne v. Henry*, 70 Mo. App. 19.

1. **Seller Must Prove that Goods Were Equal to Sample.**—*Penn v. Smith*, 98 Ala. 560; *Merriman v. Chapman*, 32 Conn. 146. Compare *Brigham v. Retelsdorf*, 73 Iowa 712.

“If the action had been brought upon the executory contract, for not accepting and paying for the goods, it is apparent that in order to prove his whole case, the plaintiff must have shown that the goods corresponded with the sample, since otherwise it would not appear that his part of the contract had been performed; while on an executed contract, it is only necessary for the plaintiff to prove its execution, and it is then for the defendant to show that the goods were inferior to the quality stipulated for, in order to reduce the price to be paid for them.” *Merriman v. Chapman*, 32 Conn. 146.

2. *Aultman v. Richardson*, 10 Ind. App. 413; *Hooper v. Story*, 155 N. Y. 171, affirming 79 Hun (N. Y.) 53.

3. *Thompson v. Martin*, 84 Ga. 11; *Plano Mfg. Co. v. Richards*, 86 Minn. 94; *Ideal Wrench Co. v. Garvin Mach. Co.*, 65 N. Y. App. Div. 235.

In an action for breach of warranty of certain seed, proof of the breach and of the value of the crop had the seed been such as they were represented to be, does not warrant a recovery of substantial damages, there being no proof of the expense incident to the raising of such a crop. *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145.

Where There Was Merely a Slight Defect in a Harvester, and this was susceptible of being remedied at a slight cost, there can be no recovery of damages by the buyer in the absence of proof of such cost and of the depreciation in

the value of the machine on account of the defect. *Dodds v. McCormick Harvesting Mach. Co.*, 62 Neb. 759.

If the Buyer Seeks to Set Off Damages for a breach of the warranty in an action by the seller to recover the price, he must show affirmatively the actual value of the article, and if he fails to do so, the seller is entitled to recover the entire agreed price even though a breach of the warranty is clearly established. *Osborne v. Huntington*, 37 Minn. 275; *Hooper v. Story*, 155 N. Y. 171, affirming 79 Hun (N. Y.) 53.

4. *Flath v. Casselman*, 10 N. Dak. 419.

If the proof is evenly balanced, as where the buyer testifies to the fact of a warranty and the seller denies it, the warranty is not established. *Raines v. Totman*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 493. See also *Rouple v. McCarty*, 1 Bay (S. Car.) 480.

Proof that the owner, in the sale of a cow at auction, offered to warrant her to one of the bidders, is not of itself sufficient to prove a warranty to the purchaser. *Palmer v. Hamilton* (Ky. 1894), 24 S. W. Rep. 613.

5. *Fuchs v. Morris*, 81 Hun (N. Y.) 536.

In such case it is not competent for the seller to testify that the articles in question were the best that could be made, that special care had been given to their manufacture, and that it was his aim to satisfy his customers thoroughly, as he desired to extend his trade in the United States. *Fuchs v. Morris*, 81 Hun (N. Y.) 536.

6. **Warranty Deed.**—In *Bowen v. Thrall*, 28 Vt. 385, it is said: “We can entertain no doubt that Johnson did agree to convey to the orator an undivided half of the premises by a *warranty deed*, containing the usual covenants of seizin and against incumbrances. These are covenants which, under the form of conveyances in this state, are usually inserted in deeds of that character, and when an agreement is made for a *warranty deed*, a deed with these covenants would be intended.”

**Distinguished from Quitclaim Deed.**—See QUITCLAIM, vol. 23, p. 587. See also *Bowen v. Thrall*, 28 Vt. 382.

always the same precise and definite meaning. It may be the expression of the grant of a franchise only, or it may import a conveyance of the soil.<sup>1</sup>

**WAR RISK.** — See note 2.

**WASH PLACE.** — See note 3.

**WASH SALES.** — See note 4.

**"WASHT. ST."** — See note 5.

1. **Warren.** — *Beauchamp v. Winn*, L. R. 6 H. L. 236.

The grant of a *warren* by a person who is both owner of the soil and has a right of free *warren* in it may pass an estate in the soil if the context of the instrument shows the intention to be such, but that is not its *prima facie* construction. *Beauchamp v. Winn*, L. R. 4 Ch. 570. See also *Coke Litt.* 5*b*.

**Warren of Conies.** — See *Beauchamp v. Winn*, L. R. 4 Ch. 562, L. R. 6 H. L. 236.

2. **War Risk.** — The charter-party of a schooner to the United States provided that the *war risk* should be borne by the government during the continuance of the charter. While in the service of the United States she was sunk by command of a military officer of

the government. It was held that the term *war risk* in the policy wherein the government was the insurer cannot be extended beyond the acts of the public enemy, and that the government did not insure against its own acts. *Bogert's Case*, 2 Ct. Cl. 163.

3. **Wash Place — Mines and Mining Claims.** — See *Cass v. Richardson*, 2 Coldw. (Tenn.) 29.

4. **Wash Sales.** — See *Kadish v. Bullen*, 10 Ill. App. 568.

5. **"Washt. St."** — A tax duplicate contained the abbreviation "*Washt. St.*" It was held that parol evidence was admissible to show that this meant "*Washington street.*" *Barton v. Anderson*, 104 Ind. 582. See also the title ABBREVIATIONS, vol. 1, p. 97.

# WASTE.

BY THEODOR MEGAARDEN.

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**I. DEFINITION.** — Waste is any permanent or lasting injury done or permitted to be done, by the holder of the particular estate, to the inheritance, or to the prejudice of any one who has an interest in the inheritance.<sup>1</sup>

**II. WASTE DISTINGUISHED FROM TRESPASS.** — Waste is distinguished from trespass in that waste is an injury to the estate by one who has not an absolute or unqualified title, but who is rightfully in possession, while trespass is an injury to the estate, or use thereof, by one who is a stranger to the title and has no right of possession.<sup>2</sup>

**III. WASTE DISTINGUISHED FROM DEVASTAVIT.** — The term “waste,” when confined to its strict technical meaning, may be said to be distinguished from the term *devastavit* as that word is used in legal terminology, the term *devastavit* being used to denote the wasting of an estate by the executor or administrator, whether real or personal.<sup>3</sup>

**IV. KINDS OF WASTE** — 1. **In General.** — Waste may first be divided into legal and equitable waste.

2. **Legal Waste** — *a.* **IN GENERAL.** — Legal waste consists of acts or omissions which the law considers to be waste, and for which it gives a remedy, though not necessarily to the exclusion of equity. It may be either voluntary or permissive waste.

*b.* **VOLUNTARY WASTE.** — Voluntary waste, sometimes called commissive or active waste, consists in the commission of some positive act which causes injury to the inheritance,<sup>4</sup> as pulling down or otherwise destroying a house,<sup>5</sup> cutting down timber, or the like. Generally it consists of some destructive

1. **Definition of Waste** — *Alabama.* — *McDaniel v. Callan*, 75 Ala. 327; *Alexander v. Fisher*, 7 Ala. 514.

*Maryland.* — *White v. Wagner*, 4 Har. & J. (Md.) 391, 7 Am. Dec. 674; *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350.

*Minnesota.* — *Whitney v. Huntington*, 34 Minn. 458, 57 Am. Rep. 68.

*Missouri.* — *Proffitt v. Henderson*, 29 Mo. 325; *Childs v. Kansas City, etc., R. Co.* (Mo. 1891) 17 S. W. Rep. 954.

*Nevada.* — *Price v. Ward*, 25 Nev. 203.

*New York.* — *McGregor v. Brown*, 10 N. Y. 114; *Beekman v. Van Dolsen*, 63 Hun (N. Y.) 490; *McKay v. Wait*, 51 Barb. (N. Y.) 226; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Hamilton v. Austin*, 36 Hun (N. Y.) 138.

*North Carolina.* — *Sherrill v. Connor*, 107 N. Car. 630; *Dills v. Hampton*, 92 N. Car. 565; *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

*Oregon.* — *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1.

*Pennsylvania.* — *McCullough v. Irvine*, 13 Pa. St. 438; *Woodman v. Good*, 6 W. & S. (Pa.) 166.

*Rhode Island.* — *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

*Utah.* — *Dooly v. Stringham*, 4 Utah 107.

*Wisconsin.* — *Lander v. Hall*, 69 Wis. 326.

Waste “may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title.” *Bandlow v. Thieme*, 53 Wis. 57; *Melms v. Pabst Brewing Co.*, 104 Wis. 7.

2. **Distinction Between Waste and Trespass.** — *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350; *Price v. Ward*, 25 Nev. 203; *William-*

*son v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891; *Lander v. Hall*, 69 Wis. 326.

In *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350, the court, by Bland, C., said: “In general, waste is the abuse or destructive use of property by him who has not an absolute, unqualified title. And, in general, trespass is an injury, or use without authority, of the property of another, by one who has no right whatever.”

3. **Distinction Between Waste and Devastavit.** — For definitions of *devastavit*, see the titles *DEVASTAVIT*, vol. 9, p. 416, and *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 970.

The distinction made in the text was taken in a *Massachusetts* case. A statute having provided that “the supreme judicial court shall have exclusive jurisdiction of all actions of waste, and all actions of the case in the nature of waste,” the court said: “We cannot doubt that it (the statute) applies solely to the action of waste technically known as such—the action of waste given to the reversioner, or him who has the immediate remainder, against a tenant for life or years, for the recovery of the place wasted, with treble damages, as authorized by the ancient English statutes, and recognized as adopted into our code, but now modified and regulated by *Massachusetts* Rev. Stat., ch. 105.” The court also held that the statute did not apply to an action against an executor or administrator, for wasteful management of the property of his testator or intestate. *Wilbur v. Wilbur*, 7 Met. (Mass.) 249.

4. **Definition of Voluntary Waste.** — *Consolidated Coal Co. v. Savitz*, 57 Ill. App. 659; *Stevens v. Rose*, 69 Mich. 259; *Powell v. Dayton, etc., R. Co.*, 16 Oregon 33, 8 Am. St. Rep. 251.

5. **Instances of Voluntary Waste.** — See *infra*, *Particular Acts or Omissions Constituting Waste* — *Buildings*.



act of the tenant himself, but destructive acts of a stranger for which the tenant is liable have been classified under the head of positive waste.<sup>1</sup>

**c. PERMISSIVE WASTE.**— Permissive waste consists in the mere neglect or omission of some duty, thereby causing an injury to the inheritance,<sup>2</sup> as suffering the premises to go to decay for want of necessary repair,<sup>3</sup> or, possibly, by allowing parts of the premises to be submerged by water to their injury.<sup>4</sup> The term seems to include, also, not only all destruction arising from neglect of the necessary reparations, but also such as proceeds from all casualties not occasioned immediately by an act of God.<sup>5</sup>

**3. Equitable Waste.**— Equitable waste (which is voluntary only) is an unconscientious abuse by a tenant, who is unimpeachable of waste at law, of his legal right, which equity will restrain on the ground that his acts are "malicious, extravagant, or humorsome" acts of destruction.<sup>6</sup> It may consist of such acts as pulling down houses, cutting timber of too young a growth, or cutting trees planted for ornament or shelter.<sup>7</sup> A bad motive for doing such acts is not necessary to constitute equitable waste.<sup>8</sup>

**4. Collusive Waste.**— If waste be of such a nature that there is no remedy at law, but a bill for an account will lie, as where the waste has been committed by collusion and fraud between the owner of the particular estate and the remainderman, it is called collusive waste.<sup>9</sup> Where the waste was alleged

The placing in a barn of a weight which is excessive, whereby damage to the barn results, is voluntary waste. *Chalmers v. Smith*, 152 Mass. 561.

Detaching from a gin house, and selling, the running gear or machinery thereto belonging, suffering the gin house to be partially dismantled, and allowing land to become forfeited for non-payment of taxes, are three acts of unmistakable voluntary waste. *Cannon v. Barry*, 59 Miss. 289.

**1. Destructive Acts of Strangers.**— Consolidated Coal Co. *v.* Savitz, 57 Ill. App. 659; *White v. Wagner*, 4 Har. & J. (Md.) 391, 7 Am. Dec. 674.

In a case where a tenant of a house, from year to year, moved out and closed the premises against intrusion, but within a few days thereafter the plumbing work was cut out and stolen by persons unknown, it was held that the waste was voluntary or commissive and not permissive. *Regan v. Luthy*, 16 Daly (N. Y.) 413.

**2. Definition of Permissive Waste.**— Co. Litt. 53a; *Auworth v. Johnson*, 5 C. & P. 239, 24 E. C. L. 298; *White v. M'Cann*, 1 Ir. C. L. 205; Consolidated Coal Co. *v.* Savitz, 57 Ill. App. 659; *Stevens v. Rose*, 69 Mich. 259; *Peirce v. Burroughs*, 58 N. H. 304; *Moore v. Townshend*, 33 N. J. L. 284; *Suydam v. Jackson*, 54 N. Y. 450; *Beekman v. Van Dolsen*, 63 Hun (N. Y.) 490; *Regan v. Luthy*, 16 Daly (N. Y.) 413; *Powell v. Dayton & Co., R. Co.*, 16 Oregon 33, 8 Am. St. Rep. 251. See *Sherrill v. Connor*, 107 N. Car. 630.

Where the neglect and omissions of lessees to perform their obligations under a lease, if permitted to continue, must eventually result in the ruin and destruction of its subject-matter, they constitute waste. *Anderson v. Hammon*, 19 Oregon 446, 20 Am. St. Rep. 832.

**3. Instances of Permissive Waste.**— *Cannon v. Barry*, 59 Miss. 289; *Schulting v. Schulting*, 41 N. J. Eq. 130.

But the decay and dilapidation of a fence, caused by negligence to repair, on the part of

a dowress, does not constitute permissive waste, it seems, within the meaning of the statute of *Delaware*. *Richards v. Torbert*, 3 Houst. (Del.) 172.

**4.** Co. Litt. 53a; Anonymous, Moo. K. B. 62.

**5.** 4 Kent's Com. 77; 3 Co. Litt. 248; Bacon's Abr. Waste (H) 1.

**6. Definition of Equitable Waste.**— *Turner v. Wright*, 6 Jur. N. S. 647; *Belt v. Simkins*, 113 Ga. 894; *Gannon v. Peterson*, 193 Ill. 372; *Chapman v. Epperson Circled Heading Co.*, 101 Ill. App. 164; *Clement v. Wheeler*, 25 N. H. 361.

**7.** For a discussion of various acts which may constitute equitable waste, see *infra*, Particular Acts or Omissions Constituting Waste—Equitable Waste.

**8. Motive Immaterial.**— In *Turner v. Wright*, 2 De G. F. & J. 234, 29 L. J. Ch. 598, Campbell, L. C., said: "But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscientious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. \* \* \* The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious, and what is to be considered equitable, waste; and no line to regulate the interposition of a court of equity by injunction can well be drawn, other than the recognized and well-established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable."

**9. Collusive Waste.**— In *Garth v. Cotton*, 1 Ves. 524, 556, a tenant for ninety-nine years if he should so long live, without impeachment of waste, except voluntary waste, remainder to

to have been committed by the tenant for life, who was also the remainderman in fee at the time, the charge of collusion was held not to be supported, the tenant having laid out, upon permanent improvements of the inheritance, a sum far in excess of that realized by the acts of waste.<sup>1</sup>

**5. Eventual Waste.** — Eventual waste may be defined to be that done by an admitted particular tenant, after the institution of a suit involving the title, or a partition suit.<sup>2</sup>

**6. Meliorating Waste.** — Meliorating waste is an act which increases the value of an estate, but which damages the inheritance by increasing the burden upon it, or by impairing the evidence of title.<sup>3</sup>

**V. PARTICULAR ACTS OR OMISSIONS CONSTITUTING WASTE** — **1. Legal Waste** — **a. GENERAL PRINCIPLES.** — It is impossible to lay down any precise rules establishing what acts shall constitute legal waste, but the general principle is that the law considers every unauthorized act to be waste which does a permanent injury to the freehold or inheritance.<sup>4</sup>

**Act Must Be Wrongful.** — To constitute waste the act must be wrongful. Thus, a lessee cannot be made liable for acts which, though otherwise amounting to waste, are expressly allowed by the terms of the lease.<sup>5</sup>

**Injury to Inheritance Necessary.** — And to constitute waste there must be an injury to the inheritance in some form.<sup>6</sup> The authorities are agreed that no

trustees to preserve contingent remainders, remainder to his first son in tail, remainder to A in fee, having no son at the time, colluded with A to fell the timber, and divide with him the proceeds. The tenant afterward had a son, who, as owner of the inheritance, was held to be entitled to recover what A so received. In this case the court, by Hardwicke, L. C., said: "But this was a collusion with the remainderman. Where a legal right is acquired by collusion, this court shall enjoin or give a recompense. I will adhere, as far as I can, to the rule *æquitas sequitur legem*; though till the remainder is vested, no action of waste lay, yet a remedy is given."

In *Williams v. Bolton*, 1 Cox Ch. 72, the particular estate and the remainder in fee were united in the same person, who, so to speak, colluded with himself in his double character. The case was as follows: B. was tenant for life in possession of the estate, remainder to his first and other sons in tail, remainder to O. for life, remainder to O.'s first and other sons in tail, remainder to B. in fee. O. had a son, who died an infant. B., relying perhaps on O. continuing childless, and having no child of his own, committed waste by cutting timber, but afterward O. had another son. The court held that B. ought not to take advantage of his own wrong by taking the timber thus cut.

1. *Birch-Wolfe v. Birch*, 18 W. R. 594, L. R. 9 Eq. 683.

**2. Definition of Eventual Waste.** — *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350.

**3. Definition of Meliorating Waste.** — *Greene v. Cole*, 2 Saund. 259; *Simmons v. Norton*, 7 Bing. 640, 20 E. C. L. 270; *Wild v. Stradling*, Finch 135; *Ligo v. Smith*, 2 Vern. 263; *Mollineux v. Powell*, 3 P. Wms. 268 note; *Barry v. Barry*, 1 Jac. & W. 631; *Leeds v. Amherst*, 2 Phil. 117; *Morris v. Morris*, 3 De G. & J. 323; *Coppinger v. Gubbins*, 3 J. & La T. 397, 9 Ir. Eq. 304; *Doran v. Carroll*, 11 Ir. Ch. 379.

**4. General Rule.** — *Coke Litt.* 53, 54; 7 Com. Dig. tit. Waste; 1 Washb. on R. Prop. (5th ed.)

p. 147; *Alexander v. Fisher*, 7 Ala. 514; *Waples v. Waples*, 2 Harr. (Del.) 281; *Proffitt v. Henderson*, 29 Mo. 325; *McGregor v. Brown*, 10 N. Y. 114; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *King v. Miller*, 99 N. Car. 583; *Keeler v. Eastman*, 11 Vt. 293.

In an action by the owner of the fee, against the owner of the life estate, to enjoin the commission of waste by cutting timber, the court instructed the jury as follows: Waste is whatever does a lasting damage to the inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. So what might be for the good and convenience of the tenant for life, by clearing parts of the land, might at the same time be to the permanent loss of the owner in fee simple, and consequently waste. If the jury believe that the contemplated cutting, if done, would lessen the value of the fee after the death of the life tenant, they should find for the plaintiff; if not, then for the defendant. It was held that the instruction was a correct enunciation of the law, on the subject of waste, as recognized in the *United States*. *Dawson v. Coffman*, 28 Ind. 220.

**Profitable Enjoyment Not the Criterion.** — In *Proffitt v. Henderson*, 29 Mo. 325, the court, by Ewing, J., said: "It is conceived that the profitable enjoyment of the land is not the proper criterion to determine the question of waste. There may be waste where there is such profitable enjoyment, and there may be profitable enjoyment without waste. The cutting of the timber may have been necessary to the profitable enjoyment of the land, according to the tenant's standard of profit, and yet have been a great outrage upon the rights of the reversioner."

**5. Wrongful Acts Only Constitute Waste.** — *McDaniel v. Callan*, 75 Ala. 329.

**6. Injury to Inheritance Necessary.** — *Doe v. Bond*, 5 B. & C. 855, 12 E. C. L. 387; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207; *Proffitt v. Henderson*, 29 Mo. 325; *McGregor v. Brown*, 10 N. Y. 114; *Jackson v.*

act can be waste which does not injure the inheritance, either, "first, by materially diminishing the value of the estate, or, secondly, by increasing the burden upon it, or, thirdly, by impairing the evidence of title."<sup>1</sup> But the third of these forms of working an injury to the inheritance is now of little importance, for by the adoption of new methods of identifying land, waste can now seldom be committed in that manner.<sup>2</sup>

**Injury Must Be Appreciable.** — Even though an act works an injury to the inheritance, the consequences of waste will not attach, and an action of waste will not lie, if the injury done is trifling.<sup>3</sup>

**Injury Must Be Permanent.** — Then again, the injury to the inheritance, to constitute waste, must be of a permanent character.<sup>4</sup>

**Acts Increasing Value of Property.** — An act may sometimes amount to waste even though it increases the value of the property, as where it damages the inheritance by increasing the burden upon it.<sup>5</sup> But speaking generally, it may be said that nothing will ordinarily be held to constitute waste which is dictated by good husbandry, and promotes rather than diminishes the permanent value of the property as an estate of inheritance.<sup>6</sup> Thus, it has been held that a cotenant does not commit waste by the doing of an act which improves, rather than injures, the land.<sup>7</sup> In *England* it seems that a tenant in common cannot be regarded as having committed waste, except by some act which amounts to an ouster of his cotenant, or to a destruction of the common property.<sup>8</sup> However, a court of equity will not refuse to restrain

*Tibbits*, 3 Wend. (N. Y.) 341; *King v. Miller*, 99 N. Car. 583; *Bandlow v. Thieme*, 53 Wis. 60. But see *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115.

1. 2 Bl. Com. 281; 3 Dane's Abr. 215; *Huntley v. Russell*, 13 Q. B. 572, 66 E. C. L. 572; *Doe v. Burlington*, 5 B. & Ad. 507, 27 E. C. L. 117; *West Ham Cent. Charity Board v. East London Waterworks Co.*, (1900) 1 Ch. 624; *Barret v. Barret*, Het. 34; *Harrow School v. Alderton*, 2 B. & P. 86; *Jones v. Chappell*, L. R. 20 Eq. 539; *Tucker v. Linger*, 21 Ch. D. 18, 8 App. Cas. 508.

2. *Doherty v. Allman*, 3 App. Cas. 709; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207; *Melms v. Pabst Brewing Co.*, 104 Wis. 7.

3. **Very Slight Injury Immaterial.** — *Co. Litt. 54a*; *Doe v. Burlington*, 5 B. & Ad. 507, 27 E. C. L. 117; *Doherty v. Allman*, 3 App. Cas. 733; *Harrow School v. Alderton*, 2 B. & P. 86; *Meux v. Copley*, (1892) 2 Ch. D. 253; *Holderness v. Lang*, 11 Ont. 1; *Sheppard v. Sheppard*, 2 Hayw. (3 N. Car.) 382; *Bandlow v. Thieme*, 53 Wis. 57. See the title *DE MINIMIS NON CURAT LEX*, vol. 8, p. 830, note 4.

**Waste by Mortgagor in Possession.** — In order that a mortgagee may maintain an action against a mortgagor in possession for acts of waste committed by him, it must be made to appear that the act complained of has so affected the value of the property that the plaintiff has suffered a damage in reference to the security. *Smith v. Frio County*, (Tex. Civ. App. 1899) 50 S. W. Rep. 958.

4. **Permanent Injury Necessary.** — *Baxter v. Taylor*, 1 N. & M. 13, 4 B. & Ad. 72, 24 E. C. L. 26; *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1; *Bandlow v. Thieme*, 53 Wis. 57.

5. **Acts Increasing Value of Estate.** — *Palmer v. Young*, 108 Ill. App. 252; *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115.

6. *Meux v. Copley*, (1892) 2 Ch. 253; *Cannon v. Barry*, 59 Miss. 289.

7. **Waste by Cotenants.** — *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

Thus, where a cotenant "by cutting down and clearing woodland, beyond his interest, has greatly injured the interest of his cotenant, he would be liable for waste. And so if the tenant for life cuts down more woodland than is necessary for the enjoyment of his estate, and has injured the remainder, he would be guilty of waste, and liable to account. It is the ultimate injury done to the rights of the plaintiffs, as cotenants or in remainder, which gives them the right to complain. For if the clearing of the land had improved its value to the cotenant or remainderman, it could not be pretended that still the cotenant or tenant for life would be liable for waste." *Johnson v. Johnson*, 2 Hill, Eq. (S. Car.) 277, 29 Am. Dec. 72.

At any rate, if the clearing of the common land by a cotenant increases the value of the premises, the other cotenant can recover only nominal damages at law. *Thompson v. Bostick*, McMull. Eq. (S. Car.) 85; *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 203.

8. *Jacobs v. Seward*, L. R. 4 C. P. 320, affirmed L. R. 5 H. L. 464; *Wilkinson v. Haygarth*, 12 Q. B. 837, 64 E. C. L. 827.

It has been held that a cotenant is not liable for waste by cutting timber if no injury is done to the inheritance. *Martyn v. Knowllys*, 8 T. R. 145.

In *Hole v. Thomas*, 7 Ves. Jr. 589, 6 Rev. Rep. 195, Lord Eldon, L. C., said: "I have no objection to grant an injunction against cutting saplings and any timber trees or underwood at unseasonable times, until answer or further order, for that is destruction."

In *Twort v. Twort*, 16 Ves. Jr. 132, 10 Rev. Rep. 141, an injunction was granted by Lord Eldon against plowing up meadow, on the



waste on the mere ground that the particular tenant has done other acts which will benefit the estate.<sup>1</sup>

**Question of Waste Dependent on Circumstances.** — While the authorities are pretty generally agreed as to what are the constituent elements of waste, the word "waste" is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged with having committed the wrong; in determining whether particular acts do or do not constitute waste, a reasonable regard must be had to all the circumstances.<sup>2</sup> Thus, the conditions and usages of the particular locality may be taken into consideration, for that which is waste in one part of the country may not be waste in another part.<sup>3</sup> Consequently, in the practical application of the principles by which the fact of waste is determined, there is naturally considerable difference between the results reached in *England* and those reached in the *United States*; as the law of waste in *England* varies and accommodates itself to the varying wants and situations of the different parts of that country, so the law of waste, in its application in the *United States*, varies and accommodates itself to the situation of a newer country.<sup>4</sup>

**b CUTTING OR DESTROYING TREES** — (1) *Timber Trees* — (a) **General Rule.** — Since trees are a part of the inheritance, it is a general rule, which is subject to certain limitations hereinafter discussed, that it is waste to fell growing timber, to lop it, or to do any act which may cause it to decay.<sup>5</sup>

ground that one tenant in common had become occupying tenant of the other.

1. *Coppinger v. Gubbins*, 3 J. & La. T. 397, 9 Ir. Eq. 304.

2. **Circumstances Controlling Question of Waste.** — *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

3. *Dashwood v. Magniac*, (1891) 3 Ch. 358; *Drown v. Smith*, 52 Me. 141; *Pynchon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207; *King v. Miller*, 99 N. Car. 583; *Keeler v. Eastman*, 11 Vt. 293.

4. **Application of Law of Waste Differs in United States and England.** — 3 Dane's Abr. 232.

*California.* — *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686.

*Illinois.* — *Bond v. Lockwood*, 33 Ill. 212.

*Indiana.* — *Dawson v. Coffman*, 28 Ind. 220.

*Maine.* — *Drown v. Smith*, 52 Me. 141.

*Massachusetts.* — *Pynchon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

*Mississippi.* — *Cannon v. Barry*, 59 Miss. 289.

*Missouri.* — *Proffitt v. Henderson*, 29 Mo. 325.

*New Hampshire.* — *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362; *Chase v. Hazelton*, 7 N. H. 177.

*New Jersey.* — *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603.

*New York.* — *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341.

*North Carolina.* — *Sherrill v. Connor*, 107 N. Car. 630; *King v. Miller*, 99 N. Car. 583; *Ward v. Sheppard*, 2 Hayw. (3 N. Car.) 283, 2 Am. Dec. 625; *Shine v. Wilcox*, 1 Dev. & B. Eq. (21 N. Car.) 631.

*Pennsylvania.* — *Sayers v. Hoskinson*, 110 Pa. St. 473; *Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721.

*Rhode Island.* — *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

*South Carolina.* — *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

*Tennessee.* — *Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

*Vermont.* — *Keeler v. Eastman*, 11 Vt. 293.

*Virginia.* — *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

In *King v. Miller*, 99 N. Car. 583, the court, by Smith, C. J., said: "While, in its essential elements, waste is the same in this country and in *England*, being a spoil or destruction in houses, trees, and the like, to the permanent injury of the inheritance, yet, in respect to acts which constitute waste, the rule that governs in a new and opening land, covered largely with primeval growth, must be very different. Where the proportions of arable and wood land are adjusted to give the greatest value to the farm in its present condition, a conversion of one kind into another may be in itself a waste committed, while here the clearing of the forest growth, and fitting the virgin soil which it covers for cultivation, which is ordinarily an improvement most valuable to the property, and is not, nor can it be, injurious to the succeeding estate in fee."

The common-law doctrine as to waste can have no application to the members of a band of Indians, occupying a large tract of wild land in *Indiana*, granted to them by the *United States*. It is competent for them to change the forest into cultivated fields, to build houses on the land, to occupy and cultivate it in convenient portions, and in short, to use it as a prudent farmer would his own land. *Wheeler v. Meshing-go-me-sia*, 30 Ind. 402.

5. **Cutting Timber Generally Waste.** — *Co. Litt.* 53a; 2 Bl. Com. 281; *Edwards v. Heather*, Sel. Ch. Cas. 3; *Waples v. Waples*, 2 Harr. (Del.) 281; *Smith v. Smith*, 105 Ga. 106; *Disher v. Disher*, 45 Neb. 100; *McGregor v.*

(b) **Right to Estovers or Botes.** — But, unless restrained by particular covenants or exceptions in the lease, a tenant for life or years is entitled to take reasonable estovers.<sup>1</sup>

**Repairs.** — Thus, it is not waste to cut timber which is reasonably necessary for the purpose of repairing fences and buildings.<sup>2</sup> But timber can only be cut for repairs which are presently needed, and not for such as are likely to become necessary,<sup>3</sup> or for repairs which have been made at other times,<sup>4</sup> or for repairs and improvements upon other property.<sup>5</sup> And only such trees as are suitable for the purpose may be cut.<sup>6</sup>

**Firewood.** — While a tenant may cut trees for necessary fuel, the right must be exercised in a reasonable manner. Thus, he cannot cut trees for firewood so long as there is sufficient dead wood on the premises.<sup>7</sup> And when there are trees which are suitable for firewood, it does not give the right to cut trees which are more suitable for other purposes.<sup>8</sup> It is waste to cut timber trees and exchange them for firewood, if there is wood on the premises suitable for the purpose.<sup>9</sup> And the right to firewood does not, it has been held, include the right to collect light-wood for tar.<sup>10</sup> But it is not always necessary that the firewood cut should be used exclusively by the tenant; wood may be taken to supply the tenant's servants with fuel when, under all the circumstances, it is reasonable to do so.<sup>11</sup>

(c) **Customary Use of Property.** — Certain uses of timber which are somewhat analogous to the common-law estovers have been recognized in the later cases. Thus, on the ground that, in considering the question of waste, regard must be had to the nature of the property, where an estate is kept for the purpose of producing salable timber, such cutting of timber as is consistent with that purpose is not waste.<sup>12</sup> And, since using the land in the ordinary mode is not waste, when land is annexed to a furnace, cutting wood for the furnace, in no greater quantity than has usually been cut every year for that purpose, has been held not to be waste.<sup>13</sup> It has also been held that a tenant who has a right to work mines on the land has also a right to timber to

Brown, 10 N. Y. 114; Davis v. Gilliam, 5 Ired. Eq. (40 N. Car.) 308.

**It Has Been Held that if a Tenant in Dower Permits Pasture-land to Become Woodland**, bearing a growth fit for timber, the cutting of the timber for purposes other than the use of the estate, would be waste in the same manner and to the same extent as it would be had the timber been on the land when it was set off to the tenant as dower. Clark v. Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450.

**Tapping Maple Trees** for the purpose of making sugar of the sap, though a cutting of timber in a sense, is not, as a question of law, waste. It has been held to be a question for a jury whether it tends to shorten the life of, and in the end destroy, the trees. Campbell v. Shields, 44 U. C. Q. B. 449.

**1. Cutting Timber for Estovers.** — 3 Co. Litt. 239; 2 Minor's Insts. 531; Lee v. Alston, 1 Ves. Jr. 78; Alexander v. Fisher, 7 Ala. 514; Harris v. Goslin, 3 Harr. (Del.) 340; Walters v. Hutchins, 29 Ind. 136; Calvert v. Rice, 91 Ky. 533, 34 Am. St. Rep. 240; Loudon v. Warfield, 5 J. J. Marsh. (Ky.) 196; Hubbard v. Shaw, 12 Allen (Mass.) 120; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

**2. Cutting Timber for Repairs.** — Moore 23; Co. Litt. 54b; Calvert v. Rice, 91 Ky. 533, 34 Am. St. Rep. 240; Harder v. Harder, 26 Barb. (N. Y.) 409; Kent v. Bentley, 3 Ohio Dec. 173; Morris v. Knight, 14 Pa. Super. Ct. 324.

**3. Gorges v. Stanfield**, Cro. Eliz. 593.

**4. Gower v. Eyre**, Coop. t. Eld. 156; Morehouse v. Cotheal, 22 N. J. L. 521; Kidd v. Denison, 6 Barb. (N. Y.) 9.

**5. Armstrong v. Wilson**, 60 Ill. 226.

**6. Simmons v. Norton**, 7 Bing. 640, 20 E. C. L. 270.

**7. Cutting Timber for Firewood.** — 7 Bac. Abr. 252; Simmons v. Norton, 7 Bing. 640, 20 E. C. L. 270; Arch Deacon v. Jennor, Cro. Eliz. 604.

**8. Hogan v. Hogan**, 102 Mich. 641; Rutherford v. Aiken, 3 Thomp. & C. (N. Y.) 60.

**9. Padelford v. Padelford**, 7 Pick. (Mass.) 152.

**10. Parkins v. Cox**, 2 Hayw. (3 N. Car.) 339.

**11. Co. Litt. 41b; Smith v. Jewett**, 40 N. H. 530; Gardiner v. Derring, 1 Paige (N. Y.) 573.

But it has been held that a tenant for life of a farm of one hundred and sixty-five acres is not entitled to firebote for the dwelling of a farmer or laborer in addition to firebote for the mansion. Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 604.

**12. Cutting Wood from Timber Lands.** — Honywood v. Honywood, L. R. 18 Eq. 306; Williard v. Williard, 56 Pa. St. 119. See also Dashwood v. Magniac, (1891) 3 Ch. 306; Angier v. Agnew, 98 Pa. St. 587, 42 Am. Rep. 624.

**13. Cutting Timber for Furnace on Land.** — Den v. Kinney, 5 N. J. L. 634; Wilson v. Smith, 5 Yerg. (Tenn.) 379.

work the mines.<sup>1</sup>

**By Tenants in Dower.** — For the same reason, it has been held that a tenant in dower does not commit waste by cutting and selling staves and shingles,<sup>2</sup> or hoop poles,<sup>3</sup> or by making turpentine from trees,<sup>4</sup> provided these are the usual and ordinary modes of managing the estate.

**By Cotenants.** — And a tenant in common does not commit waste by cutting timber in the ordinary or reasonable use of the common property.<sup>5</sup> But if the cutting of timber by the cotenant is not necessary to the reasonable enjoyment and use of the property, or is injurious to the interests of the other cotenants, it constitutes waste.<sup>6</sup> It has been held to be waste for one tenant in common to cut and remove timber from unimproved timber land.<sup>7</sup>

(d) **Dead or Decaying Timber.** — Since the inheritance cannot be injured by the falling of dead timber, or timber which is decaying and must soon die, this may be cut without the commission of waste.<sup>8</sup>

(e) **Clearing the Land for Cultivation or Pasture.** — The strict rule of the *English* common law has been modified to a considerable extent in the *United States* and *Canada* with reference to wild and uncleared lands used for agricultural purposes, and it has been substantially held that it is not waste to cut down wood or timber for the purpose of fitting the land for reasonable cultivation

**1. Cutting Timber for Mines on Land.** — Neel v. Neel, 19 Pa. St. 323; Findlay v. Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

**2. Cutting and Selling Staves and Shingles.** — Ballentine v. Poyner, 2 Hayw. (3 N. Car.) 110.

**3. Cutting and Selling Hoop Poles.** — Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

**4. Making Turpentine from Trees.** — The widow has no right to make turpentine upon the land assigned to her in dower, which in the lifetime of her husband had not been used for that purpose. But she may rightfully use, in the ordinary mode of making turpentine, trees that have been boxed or tended for turpentine in his lifetime; and she may box new trees as those already boxed become unfit for use, so as not to enlarge the crop beyond the extent which it had when the dower was assigned. Carr v. Carr, 4 Dev. & B. L. (20 N. Car.) 179.

**5. Cutting of Timber by Cotenant.** — Martyn v. Knowllys, 8 T. R. 145; Arthur v. Lamb, 2 Drew. & Sm. 428; Hihn v. Peck, 18 Cal. 640; Patureau v. Wilbert, 44 La. Ann. 355; Darden v. Cowper, 7 Jones L. (52 N. Car.) 210, 75 Am. Dec. 461; Dodd v. Watson, 4 Jones Eq. (57 N. Car.) 48, 72 Am. Dec. 577. See also Alford v. Bradeen, 1 Nev. 228.

It is no invasion of a privilege to cut timber for the use of a saw mill owned by two, that one of the owners of the mill, who was also a life owner of the land, cut and used a few hundred dollars' worth of timber, having left an abundance for the use of the saw mill and for all other purposes. Dodd v. Watson, 4 Jones Eq. (57 N. Car.) 48, 72 Am. Dec. 577.

**6. Martyn v. Knowllys, 8 T. R. 145; Hole v. Thomas, 7 Ves. Jr. 589; Maxwell v. Maxwell, 31 Me. 184, 50 Am. Dec. 657; Benedict v. Torrent, 83 Mich. 181, 21 Am. St. Rep. 589; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122; Elwell v. Burnside, 44 Barb. (N. Y.) 447; Bradley v. Reed, 2 Pittsb. (Pa.) 519; Johnson v. Johnson, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72; Hancock v. Day, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; McDoddrill v. Pardee, etc., Lumber Co., 40 W. Va. 564. See also Dodge v. Davis, 85 Iowa 77; State v. Judge, 52 La. Ann.**

103; Clow v. Plummer, 85 Mich. 550; Blake v. Milliken, 14 N. H. 213.

In Clow v. Plummer, 85 Mich. 550, the court, by Long, J., said: "The fact that the timber was liable to destruction by fire was no sufficient reason in law to authorize the defendant to cut, take away, and manufacture the common property. One tenant in common has no right over the property of his cotenant. The defendant had an undoubted right to compel the partition of the common property, but he had no right as cotenant over the undivided interests."

**In Pennsylvania** it is made unlawful by statute for the owner of any undivided interest in timber land to cut or remove timber trees from such land without the written consent of all the cotenants. Act Pa., May 4, 1869, §§ 1-3; Bright, Purd. Dig. Laws Pa. (1894), p. 2082; Hensal v. Wright, 10 Pa. Co. Ct. 416.

**7. Cutting Timber on Unimproved Timber Land.** — Benedict v. Torrent, 83 Mich. 181, 21 Am. St. Rep. 589.

In Elwell v. Burnside, 44 Barb. (N. Y.) 447, the court, by Marvin, J., said: "The plaintiffs and four defendants were tenants in common of the lands. They were not partners in the lumber business. The principal value of the lands consisted in the timber upon them, and they were purchased by the partners on account of the timber, and for lumbering purposes. The defendants, without the consent of the plaintiffs, entered upon the lands and cut and removed a large quantity of timber, and converted the same to their own use. These acts, in my opinion, in view of all the cases, constituted waste, and I think that they are such acts as were contemplated by the statute, and the parties are tenants in common."

**8. Cutting Dead or Decaying Timber.** — Gage v. Smith, 2 Rolle Abr. 817; Waples v. Waples, 2 Harr. (Del.) 281; Houghton v. Cooper, 6 B. Mon. (Ky.) 281; Kent v. Bentley, 3 Ohio Dec. 173; Sayers v. Hoskinson, 110 Pa. St. 473; Keeler v. Eastman, 11 Vt. 293.

**Removing Windfalls.** — It has been held that to remove timber prostrated by a tempest is not



or pasture, provided the cutting does not damage or diminish the value of the inheritance, and is conformable to the rules of good husbandry.<sup>1</sup> Thus, it is not waste for a tenant in dower to clear an amount of land reasonably necessary for the cultivation of the rest of her dower estate,<sup>2</sup> or to clear woodland to a reasonable extent.<sup>3</sup> Even though there is a sufficient quantity of cleared land for the support of the tenant, he may go on and clear land by cutting timber, in order to cultivate the land, provided sufficient timber is left for the permanent use of the estate.<sup>4</sup> But the tenant will be held liable for waste, if timber is cut to the detriment of the inheritance,<sup>5</sup> or if the clear-

waste, where the timber is valueless, but is in fact an amelioration, and in such case the technical doctrine of waste which prevails in *England* would not apply. *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

**1. Right to Clear the Land**—*United States*.—*Loomis v. Wilbur*, 5 Mason (U. S.) 13.

*Indiana*.—*Dawson v. Coffman*, 28 Ind. 220.

*Kentucky*.—*M'Cracken v. M'Cracken*, 6 T. B. Mon. (Ky.) 342; *Hickman v. Irvine*, 3 Dana (Ky.) 121.

*Maryland*.—*Adams v. Brereton*, 3 Har. & J. (Md.) 124.

*Mississippi*.—*Warren County v. Gans*, 80 Miss. 76.

*Missouri*.—*Proffitt v. Henderson*, 29 Mo. 325.

*Nebraska*.—*Disher v. Disher*, 45 Neb. 100.

*New Hampshire*.—*Chase v. Hazelton*, 7 N. H. 171.

*New Jersey*.—*Den v. Kinney*, 5 N. J. L. 634; *Morehouse v. Cotheal*, 22 N. J. L. 521.

*New York*.—*Harder v. Harder*, 26 Barb. (N. Y.) 409; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *People v. Davison*, 4 Barb. (N. Y.) 109; *McGregor v. Brown*, 10 N. Y. 114; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.

*North Carolina*.—*King v. Miller*, 99 N. Car. 583; *Davis v. Gilliam*, 5 Ired. Eq. (40 N. Car.) 308; *Parkins v. Cox*, 2 Hayw. (3 N. Car.) 339; *Shine v. Wilcox*, 1 Dev. & B. Eq. (21 N. Car.) 631; *Ward v. Sheppard*, 2 Hayw. (3 N. Car.) 283, 2 Am. Dec. 625; *Crawley v. Timberlake*, 2 Ired. Eq. (37 N. Car.) 460.

*Ohio*.—*Crockett v. Crockett*, 2 Ohio St. 180.

*Pennsylvania*.—*McCullough v. Irvine*, 13 Pa. St. 438; *Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721; *Givens v. McCalmont*, 4 Watts (Pa.) 460; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261; *Morris v. Knight*, 14 Pa. Super. Ct. 324; *Sayers v. Hoskinson*, 110 Pa. St. 473.

*South Carolina*.—*Smith v. Poyas*, 2 Desaus. (S. Car.) 65; *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293.

*Tennessee*.—*Lunn v. Oslin*, 96 Tenn. 28; *Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

*Vermont*.—*Keeler v. Eastman*, 11 Vt. 293.

*Virginia*.—*Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528.

*Wisconsin*.—*Wilkinson v. Wilkinson*, 59 Wis. 557.

*Canada*.—*Drake v. Wigle*, 24 U. C. C. P. 405; *Saunders v. Breakie*, 5 Ont. 603.

In *Crawley v. Timberlake*, 2 Ired. Eq. (37 N. Car.) 460, the right of the vendor of land, who retained possession thereof, to clear part

of it for the purpose of cultivation, was recognized.

**2. Right of Tenant in Dower to Clear Land**.—*Joyner v. Speed*, 68 N. Car. 236; *Lambeth v. Warner*, 2 Jones Eq. (55 N. Car.) 165; *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507.

**3. Hastings v. Crunckleton**, 3 Yeates (Pa.) 261.

**4. Clearing More Land than Necessary for Support of Tenant**.—*Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467, wherein the court, by Green, J., said: "In respect to the privilege of a tenant for life, in the destruction of timber, the law must necessarily be varied in this country from the English doctrine. There, we could not well conceive of the destruction of timber without attaching to it the idea of an injury to the estate; as timber is scarce, and forest trees are planted and raised for fuel and for timber, it is of too much value to permit its unnecessary destruction. That not being the state of things here, but on the contrary, as a benefit often results to the estate from clearing away the timber, it would be absurd to apply the rigid principles of the English law to a state of things wholly variant from theirs."

**5. Clearing Land to the Injury of the Inheritance**—*Alabama*.—*Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58; *Alexander v. Fisher*, 7 Ala. 514.

*Delaware*.—*Fleming v. Collins*, 2 Del. Ch. 230; *Waples v. Waples*, 2 Harr. (Del.) 281.

*Kentucky*.—*Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196.

*Maine*.—*Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657.

*Massachusetts*.—*Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

*Michigan*.—*Clow v. Plummer*, 85 Mich. 550.

*Missouri*.—*Proffitt v. Henderson*, 29 Mo. 325.

*New Hampshire*.—*Fuller v. Wason*, 7 N. H. 341.

*New York*.—*Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 177.

*North Carolina*.—*Sherrill v. Conner*, 107 N. Car. 543; *Davis v. Gilliam*, 5 Ired. Eq. (40 N. Car.) 308; *Crawley v. Timberlake*, 2 Ired. Eq. (37 N. Car.) 460.

*South Carolina*.—*Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72; *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293.

A tenant in dower must not, at any time dur-

ing of land is found by the jury to be bad husbandry,<sup>1</sup> or unauthorized by the terms of the lease.<sup>2</sup> Whether the cutting of timber amounts, in any instance, to waste depends upon the relative amount of cleared and wooded land on the estate,<sup>3</sup> what prudent men, owners of the fee, would do in a course of good husbandry, and whether lasting damage has been done to the freehold,<sup>4</sup> and the custom of farmers, the situation of the country, the value of the timber, and the manner of its cutting.<sup>5</sup>

(f) **Right to Sell Timber.**—While a tenant may take reasonable estovers, and in the *United States* and *Canada* may clear land when the clearing is in accordance with good husbandry, the felling of timber and selling it, simply for gain, is invariably waste.<sup>6</sup> Thus, the cutting of growing timber by a life tenant for the purpose of obtaining money to pay taxes, which it is the duty

ing the continuation of her estate, do more clearing than is necessary to the legal and proper enjoyment of her estate in dower. *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19.

**1. Clearing Land Contrary to Good Husbandry.**—*Chase v. Hazelton*, 7 N. H. 171.

**2. Clearing Land Contrary to Terms of the Lease.**—*Livingston v. Reynolds*, 26 Wend. (N. Y.) 115; *Sheridan v. McMullen*, 12 Oregon 150.

**3. Criterion of Waste — Relation Between Cleared and Wooded Land.**—*Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Duncombe v. Felt*, 81 Mich. 332; *Warren County v. Gans*, 80 Miss. 76; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Ballentine v. Poyner*, 2 Hayw. (3 N. Car.) 110; *Shine v. Wilcox*, 1 Dev. & B. Eq. (21 N. Car.) 631; *Woodman v. Good*, 6 W. & S. (Pa.) 169; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

The clearing of sixteen acres in addition to thirty acres already cleared in a tract of two hundred and forty acres, heavily timbered, is not out of proportion or unreasonable as regards the rights of the remainderman. *Lambeth v. Warner*, 2 Jones Eq. (55 N. Car.) 165.

The assignee of a widow who was entitled to one hundred and three acres of land as dower, has a right to clear ten acres of such dower land, where the clearing of the timber thereon is necessary for the proper cultivation of the remainder; and also necessary for the support of the widow and her children. *Joyner v. Speed*, 68 N. Car. 236.

**4. Same — Good Husbandry — England.**—*Martyn v. Knowllys*, 8 T. R. 145; *Arthur v. Lamb*, 2 Drew. & Sm. 428.

*Delaware.*—*Fleming v. Collins*, 2 Del. Ch. 230; *Waples v. Waples*, 2 Harr. (Del.) 281.

*Maine.*—*Drown v. Smith*, 52 Me. 141.

*New Hampshire.*—*Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

*North Carolina.*—*King v. Miller*, 99 N. Car. 583.

*Pennsylvania.*—*Sayers v. Hoskinson*, 110 Pa. St. 473; *Woodman v. Good*, 6 W. & S. (Pa.) 169.

*Rhode Island.*—*Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

*South Carolina.*—*Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

*Tennessee.*—*Owen v. Hyde*, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

*Vermont.*—*Keeler v. Eastman*, 11 Vt. 293.

*Wisconsin.*—*Wilkinson v. Wilkinson*, 59 Wis. 557.

**5. Same — Custom of Neighborhood.**—*Proffitt v. Henderson*, 29 Mo. 325; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Davis v. Gilliam*, 5 Ired. Eq. (40 N. Car.) 309; *McCullough v. Irvine*, 13 Pa. St. 438; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261; *Keeler v. Eastman*, 11 Vt. 293.

**6. Cutting Timber for Sale — Delaware.**—*Fleming v. Collins*, 2 Del. Ch. 230.

*Indiana.*—*Modlin v. Kennedy*, 53 Ind. 267.

*Kentucky.*—*Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 93.

*Maine.*—*Babb v. Perley*, 1 Me. 6.

*Michigan.*—*Webster v. Peet*, 97 Mich. 326.

*Mississippi.*—*Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621; *Warren County v. Gans*, 80 Miss. 76.

*Missouri.*—*Davis v. Clark*, 40 Mo. App. 515.

*New Hampshire.*—*Chase v. Hazelton*, 7 N. H. 171.

*New York.*—*Weatherby v. Wood*, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 404; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *People v. Davison*, 4 Barb. (N. Y.) 109; *Livingston v. Reynolds*, 26 Wend. (N. Y.) 122, 2 Hill (N. Y.) 157.

*North Carolina.*—*Jones v. Britton*, 102 N. Car. 166; *Dorsey v. Moore*, 100 N. Car. 41; *Parkins v. Coxe*, 2 Hayw. (3 N. Car.) 339; *Davis v. Gilliam*, 5 Ired. Eq. (40 N. Car.) 308.

*Rhode Island.*—*Lester v. Young*, 14 R. I. 579; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

*Canada.*—*Titus v. Sulis*, 9 Nova Scotia 497.

Where the tenant for life, out of the profits of the estate, has erected a new building in the place of one which was destroyed by the act of God, he has no right to reimburse himself for such outlay by committing waste on the inheritance, or by selling and bartering the timber growing thereon. *Miller v. Shields*, 55 Ind. 71.

**Sale of Standing Timber by Life Tenant.**—Where trustees, in exercise of a general power of sale, sold the land, excepting the timber, and the tenant for life impeachable of waste sold the timber valued separately to the same purchaser and received the purchase money, it was held that the sale was void; for the trustees had no power to sell the land without the

of the tenant to pay, constitutes waste.<sup>1</sup> And a widow who does not live upon the dower estate has no right to cut the wood thereon for sale.<sup>2</sup> By the strict rule of the common law timber taken as estover must be used for the purpose for which it is cut; and if the tenant sells the timber and buys it back, or if he buys more suitable timber with the proceeds, it is waste.<sup>3</sup> And it has been held that it is no defense that other wood was brought upon and used on the premises.<sup>4</sup> But it has been held in the United States, that it is not waste in a tenant for life to cut timber trees and to sell the timber to procure boards for necessary repairs, if the estate is thereby benefited.<sup>5</sup> And the rule is well settled in the United States that where timber has rightfully been cut for the purpose of clearing land for cultivation, the cutting does not become waste simply because the timber so cut is sold, used, or consumed off the premises.<sup>6</sup> And this seems now to be the rule in Canada.<sup>7</sup>

(g) **What Constitutes Timber.**—What constitutes timber depends much upon the custom and opinion of the place. Oak, ash, and elm are timber throughout *England*, but trees other than these may be the subject of waste, if they constitute the timber of the country where they grow.<sup>8</sup> But it has been said that trees must be at least twenty years old to constitute timber, and must also be fit for building purposes.<sup>9</sup> Trees, even of the kinds that may become timber, may be cut, if they are under the growth of twenty years, and the cutting is done seasonably.<sup>10</sup> The cutting of oak trees for fuel, if such is the common usage, is not in itself waste.<sup>11</sup>

(h) **Propriety of Cutting a Question of Fact.** Whether the tenant cut timber unnecessarily, upon a claim of so doing for reasonable estovers or for the cultivation of the land, and whether sufficient wood and timber were left for the permanent use of the inheritance, are questions for the decision of the jury.<sup>12</sup>

(2) **Trees Not Timber**—(a) **Underwood and Bushes.**—Unless they perform some important function, such as supporting a bank, or the like,<sup>13</sup> underwood and bushes may be cut properly and in season if the cutting is done so as not to destroy the germinative or reproductive power of the stools.<sup>14</sup> But

timber, and though the tenant for life might cut all the timber during his life, yet he had no power to sell the timber standing. *Cholmeley v. Paxton*, 3 Bing. 207, 11 E. C. L. 99; *Cockerell v. Cholmeley*, 10 B. & C. 564, 21 E. C. L. 130, 1 Russ. & M. 424, 1 Cl. & F. 61.

1. **Selling Timber to Pay Taxes.**—*Disher v. Disher*, 45 Neb. 100.

2. **Sale of Timber by Dowress.**—*Noyes v. Stone*, 163 Mass. 490.

3. **Using Timber for the Purpose for Which Cut.**—Co. Litt. 53b; 2 Rolle Abr. 823, 1, 14; Com. Dig. Waste (D) 5; *Simmons v. Norton*, 7 Bing. 640, 20 E. C. L. 270; *Gower v. Eyre*, Coop. 7. Eld. 156.

4. *Phillips v. Allen*, 7 Allen (Mass.) 115; *Johnson v. Johnson*, 18 N. H. 594.

5. *Loomis v. Wilbur*, 5 Mason (U. S.) 13, 15 Fed. Cas. No. 8,498; *Lunn v. Oslin*, 96 Tenn. 28. See *Miller v. Shields*, 55 Ind. 71.

And see *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 604, where it was held that, in an account decreed against a tenant, for waste of timber, he might be allowed, in mitigation, for firewood and timber furnished by him for the farm from other premises.

6. **Selling Timber Cut to Clear Land.**—*Disher v. Disher*, 45 Neb. 100; *Chase v. Hazelton*, 7 N. H. 171; *Davis v. Gilliam*, 5 Ired. Eq. (40 N. Car.) 308; *Parkins v. Cox*, 2 Hayw. (3 N. Car.) 339; *Crockett v. Crockett*, 2 Ohio St. 180; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Wilkinson v. Wilkinson*, 59 Wis. 557.

7. *Lewis v. Godson*, 15 Ont. 252. But compare *Saunders v. Breakie*, 5 Ont. 603.

8. **What Are Timber Trees.**—Co. Litt. 53a; Comyns's Dig., "Waste," D. 5; 2 Roll. 28 l. 10; 3 Dane's Abr. 218, 233; *Tudor's Lead. Cas.* 65; *Aubrey v. Fisher*, 10 East 446; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.

9. **Trees under Twenty-one Years of Age.**—Co. Litt. 53a; *Chandos v. Talbot*, 2 P. Wms. 606; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Dunn v. Bryan, Jr.* 7 Eq. 143.

It has been said that oak, ash, and elm are timber, if they are twenty years of age and are not too old to have usable wood in them. *Honywood v. Honnywood, L.* 18 Eq. 306.

10. *Dunn v. Bryan, Jr.* 7 Eq. 143; *Honywood v. Honnywood, L.* 18 Eq. 306.

11. **Cutting Oak Trees for Fuel.**—*Babb v. Perley*, 1 Mc. 6; *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Lester v. Young*, 14 R. I. 579.

12. **Question of Waste for the Jury.**—*Doe v. Wilson*, 11 East 56; *Adams v. Brereton*, 3 Har. & J. (Md.) 124; *Jackson v. Brownson*, 7 Johns. (N. Y.) 232, 5 Am. Dec. 258; *Moore v. Wait*, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; *Sherrill v. Connor*, 107 N. Car. 630.

13. **Cutting Underwood and Bushes.**—*Stripping's Case*, 22 Vin. Abr. 449, pl. 11. Compare *Jackson v. Andrew*, 18 Johns. (N. Y.) 431.

14. Co. Litt. 53a; *Honywood v. Honnywood, L.* 18 Eq. 310; *Lashmer v. Avery*, Cro. Jac. 126; *Humphreys v. Harrison*, 1 Jac. & W. 561; *Phil-*



when thorns, bushes, furze, or the like, are growing in pasture or arable lands, the tenant may lawfully stub them up; for this is good husbandry and not waste.<sup>1</sup>

(b) *Orchards and Fruit Trees.* — If a tenant is charged with the duty of caring for an orchard, his neglect is waste.<sup>2</sup> And it is waste to destroy fruit trees,<sup>3</sup> and to dig up and remove them.<sup>4</sup> But growing nursery stock may be removed if it is done in the usual course of business and in good faith.<sup>5</sup>

c. *CHANGING THE CHARACTER OF THE LAND* — (1) *In England.* — A very stringent rule was adopted in England, at least in the earlier cases, and it was held that any change in the nature of the property, although for the benefit of the estate, was waste.<sup>6</sup> For example, it was waste to plow up an old meadow and convert it into arable land,<sup>7</sup> or to convert closes of meadow into garden ground.<sup>8</sup> The reasons given for this rule were that the course of husbandry was changed, and the evidence of ownership might be endangered.<sup>9</sup>

(2) *In the United States.* — But these reasons are of little force in the United States, where the usages in cultivating land differ from those of England, and where the identification of land conveyed is more certain. Hence, the rigid rule of the early common law has been abandoned in the United States, and the question as to whether a change in the course of husbandry constitutes waste depends upon whether it is in conformity with the rules of good husbandry and upon whether it works an injury to the inheritance.<sup>10</sup> The question as to whether this kind of waste has been committed must, as in the case of cutting timber, depend a great deal upon the usages of

lips v. Smith, 14 M. & W. 589; Dunn v. Bryan, Ir. R. 7 Eq. 143.

1. *Maleverer v. Spinke*, 1 Dyer 37a.

2. *Neglecting Orchard.* — *Anderson v. Hammon*, 19 Oregon 446, 20 Am. St. Rep. 832.

3. *Destruction of Fruit Trees.* — *Kaye v. Banks*, 2 Dick. 431; *Bellows v. McGinnis*, 17 Ind. 64; *Duncombe v. Felt*, 81 Mich. 332.

4. *Removal of Fruit Trees.* — *Silva v. Garcia*, 65 Cal. 591.

5. *Removal of Growing Nursery Stock.* — *Robinson v. Russell*, 24 Cal. 467; *Hamilton v. Austin*, 36 Hun (N. Y.) 138.

6. *English Rule.* — See *West Ham Cent. Charity Board v. East London Waterworks Co.*, 69 L. J. Ch. 257, (1900) 1 Ch. 624, 82 L. T. N. S. 85; *Leeds v. Amherst*, 2 Phil. 117, 10 Jur. 956, affirming 14 Sim. 357, 15 L. J. Ch. 351.

7. *Converting Meadow into Arable Land.* — *Simmons v. Norton*, 5 M. & P. 645, 7 Bing. 640, 20 E. C. L. 270.

Although the conversion of ancient meadow into arable land has, in many cases, been considered waste, and is always *prima facie* considered as waste, yet the plowing up of a meadow infested with moss and weeds, for the purpose of laying it down again in grass when properly cleansed, is not waste. *St. Albans v. Skipwith*, 8 Beav. 354. See *contra*, *Martin v. Coggan*, 1 Hog. 120.

And it has been held not to be waste to plow up land held under a lease, if the land was not ancient meadow or pasture at the date of the lease. In fee-simple estates, a continuance in pasture for twenty years, during the life of the donor or testator, impresses on land the character of ancient pasture. If the period is less than twenty years, the case is open to evidence of intention, but not otherwise. *Morris v. Morris*, 1 Hog. 238.

It is waste for a tenant to cut down, injure,

or destroy underwood, hedges, or fences; to plow ancient meadow, or old pasture land; to sow land with mustard seed or any other pernicious crop; or to remove from it hay, straw, dung, or manure produced thereon. *Pratt v. Brett*, 2 Madd. 61.

If pastures are plowed within six years before the commencement of a lease, the lessee will not commit waste if he plows them also, even after a lapse of thirty years of his leasehold. *Goring v. Goring*, 3 Swanst. 661.

*Converting Dower Land.* — It has been held to be waste to plow, burn, break, or sow dower land. *Worsley v. Stuart*, 1 Bro. P. C. 357.

*Plowing Rabbit-warren.* — To plow a rabbit-warren, unless it be a warren by charter or prescription, is not waste as common law. *Lurting v. Conn*, 1 Ir. Ch. 273.

8. *Converting Meadow into Garden.* — *Harrow School v. Alderton*, 2 B. & P. 86; *Pindar v. Wadsworth*, 2 East 155.

*Turning Meadow into Buildings.* — It has been held not to be waste to turn meadow into buildings unless clearly injurious. *Atty.-Gen. v. Foundling Hospital*, 2 Ves. Jr. 42.

9. *Reasons for Early Rule.* — 2 Bl. Com. 282; *Comyns's Dig.*, "Waste," D. 4; *Darcy v. Askwith*, Hob. 234a, 1 Coke Litt. 53b.

10. 3 Dane's Abr. 219; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207; *Proffitt v. Henderson*, 29 Mo. 325; *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211; *McGregor v. Brown*, 10 N. Y. 118; *Crockett v. Crockett*, 2 Ohio St. 180; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Keeler v. Eastman*, 11 Vt. 293.

Even in *England* the effect of a change in the character of the land on the evidence of title is now of greatly diminished importance. See the observations of Lord O'Hagan, in *Doherty v. Allman*, 3 App. Cas. 726.

the place.<sup>1</sup>

**Changing Character of the Land.** — In the *United States* it is not necessarily waste to convert meadow land into pasture land,<sup>2</sup> or to break up meadow or grass lands occasionally for cultivation.<sup>3</sup>

**Opening Way over Land.** — A tenant may even open a way over the land for his convenience without committing waste.<sup>4</sup> But it has been held to be waste to turn arable land into a highway.<sup>5</sup>

**Allowing Wood to Grow on Pasture Land.** — As to whether it is waste to allow pasture land to become overgrown with brush, must depend, in a measure, upon whether a high or low state of cultivation is in vogue in the neighborhood.<sup>6</sup> But it has been held that changing the estate from pasture to woodland, by a tenant in dower, by suffering wood to grow on land which was a pasture before, is not waste.<sup>7</sup>

**Exhausting the Land.** — Waste may be committed by exhausting the land by improper tillage.<sup>8</sup> Thus, it is waste to impoverish fields by constant tillage from year to year,<sup>9</sup> or by tillage contrary to the established rotation of crops and the usage of the neighborhood.<sup>10</sup> While the failure of a tenant for years to cultivate the land in a husbandlike manner is sometimes considered to be waste,<sup>11</sup> it is more often treated as a breach of an implied covenant to cultivate.<sup>12</sup>

**Removing Hay, Manure, etc.** — Where it is customary to sell hay from farms, it is not waste to do so, though esteemed waste elsewhere.<sup>13</sup> But it is waste to remove manure made from the products of the land in the ordinary course of husbandry,<sup>14</sup> to remove bog grass from a farm, which had usually been foddered on the farm,<sup>15</sup> or to cut turf for sale where a lease gives a right of estovers only.<sup>16</sup>

**Suffering Inundation of Land.** — It has been said to be waste to suffer a bank to become ruinous, whereby the water of the sea or a river overflows and spoils meadow ground.<sup>17</sup> But where in altering the course of a creek, which was in

1. *Chapel v. Hull*, 60 Mich. 167; *Webster v. Webster*, 33 N. H. 25, 66 Am. Dec. 705; *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601; *Jones v. Whitehead*, 1 Pars. Eq. Cas. (Pa.) 304.

2. **Converting Meadow into Pasture Land.** — *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

3. **Cultivating Meadow or Grass Land.** — *Pynchon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

Even in *England*, "if a meadow be sometimes arable and sometimes meadow, and sometimes pasture, the ploughing of it is not waste." *Bac. Abr.*, "Waste," C. 1; *Com. Dig.*, "Waste," D. 4.

4. **Opening Way over Land.** — *Pynchon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

5. *Dills v. Hampton*, 92 N. Car. 570.

6. **Sufficient Pasture to Become Woodland.** — In *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621, the court, by *Greene, C. J.*, said: "The defendant is charged with having converted meadow land into pasture land. In *England* this would be waste. But we are not to apply the *English* law too strictly. Our lands are in many respects cultivated differently from land in *England*; and this difference is to be taken into account. \* \* \* It is said that the pastures have been permitted to become overgrown with brush. In *England* that would be waste, but you would not expect so high a state of cultivation in *Burrillville* as in *England*, or as in the vicinity of a populous city."

7. *Clark v. Holden*, 7 Gray (Mass.) 8, 66 Am. Dec. 450.

8. **Impoverishing the Land.** — *Chapel v. Hull*, 60 Mich. 167, wherein it was held that a tenant who plows about one hundred acres out of one hundred and forty acres of tillable land, including meadow land, uses the farm in an unhusbandlike manner, exhausts the soil by improper tillage, and therefore commits waste.

9. **Impoverishing Land by Bad Husbandry.** — *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601. But compare *Richards v. Torbert*, 3 *Houst. (Del.)* 172; *Shine v. Wilcox*, 1 *Dev. & B. Eq.* (21 N. Car.) 631.

10. *Wilds v. Layton*, 1 *Del. Ch.* 226, 12 Am. Dec. 91; *Darden v. Cowper*, 7 *Jones L.* (52 N. Car.) 210, 75 Am. Dec. 461.

11. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601; *Hubble v. Cole*, 85 Va. 87.

12. See the title *LEASES*, vol. 18, p. 638.

13. **Removing Products of Land.** — 1 *Washb. on Real Prop.*, p. 112.

14. *Onslow v. —*, 16 *Ves. Jr.* 173; *Daniels v. Pond*, 21 *Pick. (Mass.)* 367, 32 Am. Dec. 269; *Perry v. Carr*, 44 N. H. 118; *Lewis v. Jones*, 17 Pa. St. 262, 55 Am. Dec. 550. See *Wing v. Gray*, 36 *Vt.* 261. See also the title *LEASES*, vol. 18, p. 638.

15. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601.

16. *Courtown v. Ward*, 1 *Sch. & Lef.* 8.

17. **Inundation of Land.** — *Com. Dig.*, "Waste," D. 4; *Co. Litt.* 53b.

itself an act of good husbandry, the water had the effect to destroy growing timber, which had not been anticipated, it was held not to be an act of waste.<sup>1</sup>

**Raising Land.** — It has been said it is not waste to raise land by carrying thereon quantities of earth, unless injury is thereby done the inheritance.<sup>2</sup>

*d. REMOVING SOIL, MINERALS, AND SIMILAR MATERIALS* — (1) *General Rule.* — Tenants for life, or for years, impeachable for waste, cannot, in general, take any minerals or materials from the land except so far as may be reasonably necessary for the repair and maintenance of the property.<sup>3</sup>

(2) *Removing Clay, Gravel, etc.* — To dig and carry away soil, clay, gravel, stones or the like, except for the repair of the premises, since it does an injury to the inheritance, is voluntary waste,<sup>4</sup> unless such use constituted the recognized mode of enjoying the land at the commencement of the tenancy.<sup>5</sup> Thus, it is waste to take clay for the purpose of making brick, not for the repair of buildings, but for sale.<sup>6</sup> And it is waste to take rock, not for the purpose of improving the land, but to be used off the premises.<sup>7</sup> But if flints, which come to the surface during plowing, are removed, in accordance with an established custom, there is no waste.<sup>8</sup> And upon the same ground that the cutting down of timber by a tenant for the purpose of clearing the land and bringing it under cultivation is not waste in the *United States* and *Canada*, it has been held that the removal of stones by a tenant, for the purpose of fitting the land for cultivation, is not waste.<sup>9</sup>

(3) *Opening Mines.* — If there be a demise with minerals, and no open mines, the lessee may open mines and enjoy the profits.<sup>10</sup> But, unless the right is expressly given, it is a waste for a lessee, or a tenant for life subject to waste, to open the land to search for mines, or to open new mines,<sup>11</sup> or to

1. *Jackson v. Andrew*, 18 Johns. (N. Y.) 431.

2. **Raising Land.** — *Pynchon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207. But compare *West Ham Cent. Charity Board v. East London Waterworks Co.*, 69 L. J. Ch. 257, (1900) 1 Ch. 624, 82 L. T. N. S. 85, wherein it was held to be waste to fill in land with rubbish so as to raise the level of the land about ten feet, thereby increasing its value.

3. **Rule as to Removal of Minerals, etc.** — Leake, *Uses and Prof. of Land*, p. 57. See the title MINES AND MINING CLAIMS, vol. 20, p. 770.

4. **Removing Clay, Gravel, etc.** — Co. Litt. 53b; 22 Vin. Abr. 439.

*England.* — *Saunders' Case*, 5 Coke 12; *Huntley v. Russell*, 13 Q. B. 591, 66 E. C. L. 591.

*United States.* — *U. S. v. Bostwick*, 94 U. S. 53.

*Georgia.* — *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298.

*New Jersey.* — *Reed v. Reed*, 16 N. J. Eq. 248.

*New York.* — *Livingston v. Reynolds*, 2 Hill (N. Y.) 157; *Coates v. Cheever*, 1 Cow. (N. Y.) 460.

*Pennsylvania.* — *Martin's Appeal*, (Pa. 1887) 9 Atl. Rep. 490.

*West Virginia.* — *Lewisburg University v. Tucker*, 31 W. Va. 621.

5. *Huntley v. Russell*, 13 Q. B. 591, 66 E. C. L. 591; *Knight v. Mosely*, Ambler 176, cited in 1 White & T. Lead. Cas. 858; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624.

6. **Using Clay to Make Bricks for Sale.** — *Livingston v. Reynolds*, 2 Hill (N. Y.) 157; *Lewisburg University v. Tucker*, 31 W. Va. 622.

7. **Removal of Rocks by Municipality Having Only Right of Way.** — It has been held that a

city which takes rock from land granted to it merely as a right of way, commits waste. *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298. But it has been said that this decision, "unless it can be considered as substantially a case of a quarry, cannot be upheld." *Denniston v. Clark*, 125 Mass. 216.

8. *Tucker v. Linger*, 8 App. Cas. 508, affirming 21 Ch. D. 18.

9. *Lewis v. Godson*, 15 Ont. 252.

10. **Opening New Mines.** — Co. Litt. 54b. See *Eley's Appeal*, 103 Pa. St. 300. See *infra*, this section, *Working Mines on Land Leased for Mining Purposes*.

11. Co. Litt. 53b; 2 Bl. Com. 282; *Comyns's Dig.*, "Waste," D. 4.

*England.* — *Saunders' Case*, 5 Coke 12; *Stoughton v. Leigh*, 1 Taunt. 410; *Darcy v. Askwith*, Hob. 234; *Viner v. Vaughan*, 2 Beav. 466; *Whitfield v. Bewit*, 2 P. Wms. 240; *Plymouth v. Archer*, 1 Bro. C. C. 159.

*United States.* — *U. S. v. Gear*, 3 How. (U. S.) 120.

*Michigan.* — *Harlow v. Lake Superior Iron Co.*, 36 Mich. 105.

*Missouri.* — *Childs v. Kansas City, etc., R. Co.*, 117 Mo. 414.

*New York.* — *Coates v. Cheever*, 1 Cow. (N. Y.) 460.

See the title MINES AND MINING CLAIMS, vol. 20, p. 770, note 2.

**Under the Michigan Statutes** relating to dower, it has been held that a widow is entitled to dower rights and the royalties realized by the lease by the guardians of minor heirs of lands which at the time of the death of the husband were unimproved and unproductive, but which were rich in minerals, and were owned, held, and known as mining lands and were solely



bore for, and remove, oil from the land.<sup>1</sup> But it has been held that a lessee of land for the manufacture of salt does not commit waste by separating oil from the water arising in a salt well, and either allowing it to run to waste or preparing it for the market.<sup>2</sup>

(4) *Opening Quarries.*—The same principle applies to quarries, and, unless authorized by the grant or demise, it is waste to open a quarry and take any kind of stone therefrom.<sup>3</sup> Thus, quarrying rock from land which was granted to a municipality merely as a right of way is waste.<sup>4</sup> "There is, however, this difference between a mine and a quarry, namely, that stone or slate is frequently dug for the purpose of building or repairing houses on the property, and not for the purpose of profit, and although this is in one sense an opening of a quarry, it is not so in the sense necessary to enable a tennor to continue the working. It is not an opening for the purpose of profit."<sup>5</sup>

(5) *Working Open Mines, Quarries, etc.*—If lands containing open mines, wells, quarries, gravel pits, or the like, be demised to a tenant for life or for years, without express restriction of the use, it is presumed that the tenant shall take the profits of the land in the condition in which it is demised to him, and, while he is impeachable for waste in other respects, he may continue the working and take the profits for his own use.<sup>6</sup> And this right is not limited or restrained by a statute providing that the tenant for life shall have

valuable for the minerals contained in them. *Matter of Seager*, 92 Mich. 186.

**Digging and Carrying Off Coal.**—It has been held that the digging and carrying off of coal from the common property by a cotenant is waste. *Murray v. Haverty*, 70 Ill. 318; *Childs v. Kansas City, etc., R. Co.*, (Mo. 1891) 17 S. W. Rep. 954; *Cecil v. Clark*, 47 W. Va. 402, 81 Am. St. Rep. 802.

**1. Boring for Oil.**—*Lancey v. Johnston*, 29 Grant Ch. (U. C.) 67.

**Cotenants.**—It is waste for one tenant in common of oil lands to bore new wells and take the oil, though not to take the oil from wells already bored. *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

**2. Kier v. Peterson**, 41 Pa. St. 357.

**3. Opening New Quarries.**—*Cosgriff v. Dewey*, 164 N. Y. 1, 79 Am. St. Rep. 620, 21 N. Y. App. Div. 129; *Owings v. Emery*, 6 Gill (Md.) 260.

**Cotenants.**—It is waste for a cotenant to quarry and remove stone from the common property. *Childs v. Kansas City, etc., R. Co.*, 117 Mo. 414.

**Vendors.**—A vendor of land, who remains in possession according to the contract of sale, commits waste if he quarries and removes rock therefrom. *Holmberg v. Johnson*, 45 Kan. 197.

**4. Smith v. Rome**, 19 Ga. 89, 63 Am. Dec. 298; *Dennison v. Clark*, 125 Mass. 216.

**5. Cotton, L. J.**, in *Elias v. Griffith*, 8 Ch. D. 532; *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 454.

**6. Customary Use of Mines, etc., Not Waste.** *Co. Litt.* 54b; 2 Bl. Com. 282.

*England.*—*Astree v. Ballard*, T. Jones, 71, 2 Mod. 193; *Stoughton v. Leigh*, 1 Taunt. 410; *Campbell v. Wardlaw*, 8 App. Cas. 641; *Elias v. Griffith*, 8 Ch. D. 521; *Huntley v. Russell*, 13 Q. B. 591, 66 E. C. L. 591; *Knight v. Mosely*, Amb. 176.

*California.*—*McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686.

*Maine.*—*Moore v. Rollins*, 45 Me. 493.

*Massachusetts.*—*Billings v. Taylor*, 10 Pick. (Mass.) 460, 20 Am. Dec. 533.

*Michigan.*—*Ward v. Carp River Iron Co.*, 47 Mich. 65.

*New Jersey.*—*Reed v. Reed*, 16 N. J. Eq. 248; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603.

*New York.*—*Coates v. Cheever*, 1 Cow. (N. Y.) 460.

*Pennsylvania.*—*Neel v. Neel*, 19 Pa. St. 324; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721. See *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624.

*Virginia.*—*Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528.

**Operation of Mine by Cotenant.**—The operation of a mine by one cotenant, without excluding the others, does not constitute waste, though perhaps he may be liable to his cotenants on an accounting for profits. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686; *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

As to the rights of tenants in common in a mine, it was held in *Job v. Potton*, L. R. 20 Eq. 93, that they were "as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share."

But a cotenant will be liable for waste if he is in possession to the exclusion of his cotenants, and excavates, removes, sells, or uses the contents of the quarries. *Childs v. Kansas City, etc., R. Co.*, (Mo. 1891) 17 S. W. Rep. 954.

**Use of Clay by Mortgagor.**—The use of clay, by a mortgagor of an undivided interest and his cotenant, for the purpose of making brick, may be continued by them after the mortgage is given, and they will not thereby commit waste. *Russell v. Merchants' Bank*, 47 Minn. 286.

"reasonable and necessary use and enjoyment" of the land.<sup>1</sup>

**Extent of the Working.** — The open mines, etc., may be worked even to exhaustion.<sup>2</sup> And it is permissible to sink new shafts or new pits to reach the same veins, or new and lower strata.<sup>3</sup> This principle applies to salt works; if there is an existing salt well on the premises and a manufactory of salt, it is not waste to dig a new salt well in connection with the works.<sup>4</sup> But the removal of a barrier, or a boundary between two mines, has been held to be waste.<sup>5</sup>

**Limited or "Old Workings."** — But it seems that if mines, quarries, etc., on the land were, at the commencement of the tenancy, worked only for restricted purposes, as the repair of the premises, the tenant may not work them for the general purposes of profit.<sup>6</sup> And if the mines had been so completely abandoned before the beginning of the particular estate as to show an intention to devote the land to other uses, the tenant will be guilty of waste if he works them.<sup>7</sup> However, mines abandoned merely for want of a market may be worked by a tenant, but not if the abandonment had been long continued, and took place with a view to advantaging the estate thereby.<sup>8</sup>

(6) *Working Mines on Land Leased for Mining Purposes.* — Where the very purpose of the lease is to carry on mining operations, the lessee will not commit waste by conducting them, and by building houses on the land also, if such erections are authorized by the lease.<sup>9</sup> If a lessee has the exclusive right to drill on land for natural gas, the lessor may be restrained from drilling also on the leasehold, on the ground that the latter's action is threatened waste.<sup>10</sup>

1. **Effect of Statute Giving Life Tenant "Reasonable and Necessary Use and Enjoyment."** — *Irwin v. Covode*, 24 Pa. St. 162.

2. **Working Open Mines, etc., to Exhaustion.** — *Stoughton v. Leigh*, 1 Taunt. 410; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Irwin v. Covode*, 24 Pa. St. 162; *Neel v. Neel*, 19 Pa. St. 324; *Griffin v. Fellows*, 5 Leg. Gaz. (Pa.) 265, 2 Luz. Leg. Reg. (Pa.) 147; *Koen v. Bartlett*, 41 W. Va. 559, 56 Am. St. Rep. 884.

3. **New Shafts or Pits — England.** — *Spencer v. Scurr*, 31 Beav. 334; *Clavering v. Clavering*, 2 P. Wms. 388; *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 466.

*Maine.* — *Moore v. Rollins*, 45 Me. 493.

*Massachusetts.* — *Billings v. Taylor*, 10 Pick. (Mass.) 460, 20 Am. Dec. 533.

*New Jersey.* — *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603.

*New York.* — *Coates v. Cheever*, 1 Cow. (N. Y.) 460.

*Pennsylvania.* — *Kier v. Peterson*, 41 Pa. St. 357; *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344; *Irwin v. Covode*, 24 Pa. St. 162.

*Virginia.* — *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733; *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528.

4. **Digging New Salt Wells.** — *Kier v. Peterson*, 41 Pa. St. 357; *Findlay v. Smith*, 6 Munf. (Va.) 134, 8 Am. Dec. 733.

5. **Removing Barrier Between Mines.** — *Marker v. Kenrick*, 13 C. B. 188, 76 E. C. L. 188, 22 L. J. C. Pl. 129.

6. **Mines, etc., Worked for Restricted Purposes.** — *Elias v. Snowdon Slate Quarries Co.*, 4 App. Cas. 454. See *Ward v. Carp River Iron Co.*, 47 Mich. 65. But see *Neel v. Neel*, 19 Pa. St. 323.

Coal mines which were opened before the life estate began, may be used by the tenant for life, but only for such purposes as those for which

they were used before the beginning of the life estate. *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280.

7. **Old Workings.** — *Bagot v. Bagot*, 32 Beav. 509; *Viner v. Vaughan*, 2 Beav. 466; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280; *Martin's Appeal*, (Pa. 1887) 9 Atl. Rep. 490. See *Stoughton v. Leigh*, 1 Taunt. 402.

In *Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. 86, *Runyon, C.*, said: "In this case the diggings had not been worked for over sixty years when the company took possession. The owner, by whom they were made, never supposed that he could make the ore available as iron ore. He was convinced to the contrary. He abandoned the use of it for the special purposes in which he had employed it, and ceased to dig for or use it, and the abandonment was complete and thorough, and continued for sixty years and more. It cannot be said that he contemplated making profit of the substance of the estate by mining. The company cannot be said to be pursuing the same means of profit from the land which he and those who held under him took."

Where there were old clay pits which had not been worked for twenty years, and it was alleged that the last owner had, for some purpose or other, taken clay out of them, and had made some preparations for working them, yet they were not in course of working at his death, it was held that it was not at his death an open mine. *Viner v. Vaughan*, 2 Beav. 466.

8. *Bagot v. Bagot*, 32 Beav. 509.

9. **Land Leased for Purpose of Mining.** — *Heil v. Strong*, 44 Pa. St. 264.

10. **Under a Lease of Land for the Sole Purpose of Drilling and Operating for Oil and Gas**, the lessee's right in the surface of the land is in the nature of an easement of entry and examina-

*e. BUILDINGS — (1) Destruction.* — As a general rule the destruction of buildings is waste,<sup>1</sup> even though the destruction is made with the intention, on the part of the tenant, of replacing the structures with others of as good or better character.<sup>2</sup> The repair of one portion of a building does not justify the removal or destruction of another part.<sup>3</sup> And it may be waste to tear down a house even though it is not tenantable,<sup>4</sup> though buildings so dilapidated as to be dangerous to life may be torn down.<sup>5</sup> The strict rule of the common law, holding practically that every destruction of buildings constitutes waste, has been modified, it is believed, both in *England* and the *United States*, and the modern rule seems to be that the destruction of buildings is or is not waste according as the destruction does or does not result in lasting injury to the inheritance as it will come to the reversioner.<sup>6</sup> Applying this rule, the pulling down of a building is not waste, if proved not to be to some material extent injurious to the inheritance.<sup>7</sup> And it has been held that, in the absence of any contract, expressed or implied, to use the property for a specified purpose or to return it in the same condition in which it was received,

tion, with a right of possession arising where the particular place of operation is selected, and the easement of ingress, egress, storage, transportation, etc., during the continuance of operations. The real subject of possession to which the lessee is entitled, is the oil or gas contained in or obtainable through the land; these are minerals *feræ naturæ*, and are part of the land and belong to its owner only so long as they are in it and under his control; the lessee, when he has drilled a gas well and controls the gas produced thereby, is in possession of all the gas within the land. Therefore, the lessor will be restrained as for threatened waste, if he drills on the leasehold, the rights granted to the lessee being necessarily exclusive. *Westmoreland, etc., Natural Gas Co. v. De Witt*, 130 Pa. St. 235.

**1. Destruction of Buildings.** — *Huntley v. Russell*, 13 Q. B. 588, 66 E. C. L. 588; *U. S. v. Bostwick*, 94 U. S. 53; *Bass v. Metropolitan West Side Elevated R. Co.*, 53 U. S. App. 542, 82 Fed. Rep. 857; *Cornish v. Stratton*, 8 B. Mon. (Ky.) 586; *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517, 16 Am. Dec. 115; *Chalmers v. Smith*, 152 Mass. 561; *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1; *McCullough v. Irvine*, 13 Pa. St. 438; *Dooly v. Stringham*, 4 Utah 107.

**Destroying a Dovecote** is waste. *Kimpton v. Eve*, 2 Ves. & B. 349.

**Pulling Down Buildings and Carrying Away the Materials** just before the end of the term, is waste. *London v. Hedger*, 18 Ves. Jr. 355.

**Taking Fixtures from Mill.** — It has been held that a cotenant who takes away the wheels of a mill is liable to his cotenants for waste. *Linton v. Wilson*, 3 N. Bruns. 223. But where a cotenant took certain fixtures belonging to a mill which could not be used for the reason that it was out of repair, and used them temporarily in a mill of which he was the sole owner, it was held that he was not guilty of destructive waste. *Dodd v. Watson*, 4 Jones Eq. (57 N. Car.) 48, 72 Am. Dec. 577.

**2. Destroying Building Intending to Rebuild.** — 2 Rolle Abr. 815, pl. 17, 18; *Cole v. Green*, 1 Lev. 309, 2 Saund. 259, note 11; *Doe v. Bond*, 5 B. & C. 855, 12 E. C. L. 387; *Huntley v. Russell*, 13 Q. B. 572, 66 E. C. L. 572.

The reason for this rule is stated in *Smyth v. Carter*, 18 Beav. 78, wherein Romilly, M. R., said: "I entertain no doubt that this court will restrain a tenant from pulling down a house and building another which the landlord dislikes. It is not sufficient to show that the house proposed to be built is a better one; and the fact of the defendant's showing that the landlord does not know his own interest, will not affect the judgment of the court in any respect whatever. The landlord has a right to exercise his own judgment and caprice, whether there shall be any change; and if he objects, the court will not allow a tenant to pull down one house and build another in its place."

And in *Dooly v. Stringham*, 4 Utah 107, wherein the building which had been destroyed was shown to be of no value, the court by Boreman, J., said: "Its destruction would, therefore, be substantial damage to the reversion. Whether appellant would ever replace it with a better, or as good a building, or any building, is beyond our province to inquire. It might become an impossibility no matter how willing appellant might be."

**Destruction of Building by Tenant with Power to Alter.** — It has been held that a tenant for years, who has merely a power to make certain alterations, commits waste if he destroys the building, even though he should erect a better or more expensive one in its place. *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1.

**3. Partial Destruction with Repairs.** — *Bass v. Metropolitan West Side Elevated R. Co.*, 82 Fed. Rep. 857, 53 U. S. App. 543.

**4. Destroying Untenantable House.** — *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

**5. Clemence v. Steere**, 1 R. I. 272, 53 Am. Dec. 621.

**6. Modern Rule Stated.** — *Young v. Spencer*, 10 B. & C. 145, 21 E. C. L. 47; *Doe v. Burlington*, 5 B. & Ad. 507, 27 E. C. L. 117; *Phillips v. Smith*, 14 M. & W. 595, note; *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Hasty v. Wheeler*, 12 Me. 434; *Webster v. Webster*, 33 N. H. 25, 66 Am. Dec. 705; *McGregor v. Brown*, 10 N. Y. 118; *Jackson v. Andrew*, 18 Johns. (N. Y.) 431.

**7. Doe v. Burlington**, 5 B. & Ad. 507, 27 E. C. L. 117.



a radical and permanent change of surrounding conditions which has deprived the property of its value and usefulness as previously used may be an important and, sometimes, a controlling consideration upon the question whether a life tenant has been guilty of waste in destroying a building for the purpose of making the property useful.<sup>1</sup>

(2) *Alteration*. — As a general rule the entire alteration of a building, as by turning a dwelling into a shop or a stable, and *vice versa*, or even a material alteration, constitutes waste.<sup>2</sup> Thus, a tenant may commit waste by erecting a chimney,<sup>3</sup> by partially destroying a party-wall by cutting a doorway,<sup>4</sup> by changing windows into doors,<sup>5</sup> and by the alteration of partitions and removal of mantels.<sup>6</sup> According to the strict rule of the old common law complete changes or material alterations constituted waste even though the value of the property was thereby enhanced.<sup>7</sup> The rule was generally based on the theory that the evidence of title was affected.<sup>8</sup> But since this reason is now of very little if any force, the rule of the old common law has been greatly modified in both *England* and the *United States*, so that now, unless an alteration works a breach of contract, express or implied, on the part of the tenant, to preserve the nature of the premises as demised, it does not amount to waste if it increases the value of the property, but only if it works a lasting injury to the freehold or inheritance.<sup>9</sup> Thus, cutting a new door in a house has been held not to be waste if the building is not thereby weakened or otherwise injured.<sup>10</sup> And it has been held that the mere removal of a wooden partition of a somewhat temporary character from one part of a room to another, without altering any part of the substantial structure of the building, is not waste.<sup>11</sup>

**Alterations Authorized by Lease** — Where an alteration of the buildings on the land is authorized by the agreement between the lessor and lessee, of course the alteration is not waste.<sup>12</sup> Thus, the conversion of a dwelling house into

**1. Destruction of Building Rendered Valueless by Changes in Surroundings.** — *Melms v. Pabst Brewing Co.*, 104 Wis. 7, wherein it was held that the destruction of a dwelling house, which had become utterly useless for the purpose of a dwelling by reason of radical and permanent changes in the surroundings, and the grading of the land, which had become incapable of any use except for the purposes of business, to about the level of the street, thereby enhancing the value of the property, did not constitute waste.

**2. General Rule Stated.** — 3 Dane Abr. 215; Com. Dig., Waste, D. 3; 2 Rolle Abr. 815; Co. Litt. 53a, note 344; *North v. Guinan*, Beatty 343; *London v. Greyme*, Cro. Jac. 182; *Bonnett v. Saddler*, 14 Ves. Jr. 526; *Huntley v. Russell*, 13 Q. B. 572, 66 E. C. L. 572; *Maunsell v. Hort*, 11 E. 478; *Smyth v. Carter*, 18 Beav. 78; *Peer v. Wadsworth*, (N. J. 1904) 58 Atl. Rep. 379; *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1; *Dooley v. Stringham*, 4 Utah 107.

The tenant has no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. *Winship v. Pitts*, 3 Paige (N. Y.) 259.

**3. Rule Applied.** — *Brock v. Dole*, 66 Wis. 142.

**4. Klie v. Van Broock**, 56 N. J. Eq. 18.

**5. Peer v. Wadsworth**, (N. J. 1904) 58 Atl. Rep. 379.

**6. Wotton v. Wise**, 47 N. Y. Super. Ct. 515.

**7. Old Common-law Rule.** — *Doe v. Jones*, 4 B.

& Ad. 126, 24 E. C. L. 37; *Klie v. Von Broock*, 56 N. J. Eq. 18; *Agate v. Lowenheim*, 57 N. Y. 604; *Wotton v. Wise*, 47 N. Y. Super. Ct. 515; *Jackson v. Andrew*, 18 Johns. (N. Y.) 434; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Kidd v. Dennison*, 6 Barb. (N. Y.) 13; *Brock v. Dole*, 66 Wis. 142.

**8. Reason for Old Rule.** — *Cole v. Green*, 1 Lev. 309; *London v. Greyme*, Cro. Jac. 182; *Young v. Spencer*, 10 B. & C. 145, 21 E. C. L. 47.

**9. Modern Rule.** — *Doherty v. Allman*, 3 App. Cas. 709; *In re McIntosh*, etc., Imp. Co., 61 L. J. Q. B. 164; *Brooke v. Mernagh*, L. R. 23 Ir. 86; *Melms v. Pabst Brewing Co.*, 104 Wis. 7.

In the case of *Doherty v. Allman*, 3 App. Cas. 709, before cited, a court of equity refused an injunction preventing a tenant for a long term from changing storehouses into dwelling houses, on the ground that by change of conditions the demand for storehouses had ceased and the property had become worthless, whereas it would be productive when fitted for dwelling houses.

In *Sweetser v. Emes*, 3 Dane Abr. 234, it was held not to be waste for the lessee of a corn and grist mill to "turn the mill into one for grinding dyewoods," although the lessee took away part of the apparatus for grinding corn, and substituted others.

**10. Modern Rule Applied.** — *Young v. Spencer*, 10 B. & C. 145, 21 E. C. L. 47; *Doe v. Jones*, 4 B. & Ad. 126, 24 E. C. L. 37; *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341.

**11. Holderness v. Lang**, 11 Ont. 1.

**12. Alterations in Accordance with Stipulations**

a shop is not waste, if power to improve and add to demised premises is given in the lease.<sup>1</sup> And a provision in a lease that the tenant should repair and keep in repair such buildings, improvements, and additions as should be made by him during the term, has been construed to give him an implied license to make such improvements and additions, which otherwise might legally be waste.<sup>2</sup> But it has been held that although a lessee is given the right to alter a building, he has no right to tear down and destroy the building, even though he may erect a better or more expensive structure in the place thereof.<sup>3</sup>

(3) *Erection of New Buildings.* — As showing the narrow limits within which the ancient authorities restricted the tenant as to his right to alter or improve the premises without being chargeable with waste, it may be mentioned that it was for a time questionable whether a tenant or a copyholder could erect a new building upon the premises without subjecting himself to a loss of the property.<sup>4</sup> Coke laid it down that "if the tenant build a new house it is waste, and if he suffer it to be wasted it is a new waste."<sup>5</sup> And it was said that the making of new walls, fences, hedges, or ditches, to the confusion of boundaries, may be waste.<sup>6</sup> But according to the modern cases the erection of new buildings is not waste, unless the inheritance is thereby affected in a manner which the law recognizes to be injurious.<sup>7</sup> Upon the principle of these modern cases, it is not waste for the tenant to erect new buildings upon the premises, provided it can be done without destroying or materially injuring the buildings, or other improvements, already existing thereon, if the new erections may be removed at the end of the term without much inconvenience, leaving the property in the same situation as it was at the commencement of the tenancy, and the materials of the new erections, if left on the premises, will more than compensate the owner of the reversion for the expenses of their removal.<sup>8</sup>

*Erection of Buildings Authorized by Lease.* — The erection of houses upon land, in accordance with the terms of a mining lease, does not constitute waste.<sup>9</sup>

(4) *Removal of Improvements Made by Tenant.* — A structure erected by a tenant for years, of whatever size or material it may be, may be removed, though erected and used for purposes of agriculture or manufacture, if such erection and removal do not essentially injure the inheritance, and are accomplished during the term.<sup>10</sup> And should a tenant for life remove a building

of Lease. — *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1; *Holderness v. Lang*, 11 Ont. 1.

A gave B a lease of a "store and cellar" for five years, if not sooner determined by the lessor. The lessee covenanted not to commit strip or waste, but was to have the right "to repair, alter, and improve the premises, in such manner as should be for his interest and benefit" — and "all fixtures which should be added to the premises should remain and become the property of the lessor." The lessee entered, raised the store from one to two feet, and finished off a vaulting cellar, it never having been used for that purpose before, and made other alterations. It was held that this did not constitute waste. *Hasty v. Wheeler*, 12 Me. 434.

1. *Doe v. Jones*, 4 B. & Ad. 126, 24 E. C. L. 37.

2. *Doe v. Jones*, 4 B. & Ad. 126, 24 E. C. L. 37.

3. *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1.

4. *Old Common-Law Rule.* — See *Ward's Case*, 4 Leon. 241; *Grey v. Ulisses*, 2 Dyer 211b, note; *Darcy v. Askwith*, Hob. 234; 2 Rolle Abr. 815; *Keilw.* 38.

5. Co. Litt. 53a. And see *Anonymous*, 11 Mod. 7.

6. Co. Litt. 53b; *Queen's College v. Hallett*, 14 East 489.

7. *Modern Rule.* — Bac. Abr., Waste, C. 5; *Jones v. Chappell*, L. R. 20 Eq. 539, 44 L. J. Ch. 658; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

8. *Modern Rule Applied.* — *Winship v. Pitts*, 3 Paige (N. Y.) 259, holding that it was not waste for the tenant for years of a house and lot in the city of New York to erect a livery stable upon the land.

If a tenant for life erects a new smokehouse in place of one gone to decay, from materials obtained on the homestead, it is not waste. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 607.

And it has been held that a tenant for years who tore down a dilapidated building and erected another of the same size on the same foundation, and at the end of the term moved it off, did not commit waste. *Beers v. St. John*, 16 Conn. 322.

9. *Heil v. Strong*, 44 Pa. St. 264.

10. *Right of Tenant for Years to Remove Improvements.* — *Am. Notes & Cases*, 151, 152.

erected by him, but not affixed to the freehold, except as merely standing upon it, it would not be waste.<sup>1</sup> But permanent improvements annexed to the freehold become a part of the inheritance, and if erected by the tenant for life, he may not remove them.<sup>2</sup> For instance, if the husband of a tenant in dower erects a dwelling house upon the wife's lands, the removal of it after her death will be waste.<sup>3</sup> It seems that a tenant for years is not held to the same accountability, as to the removal of buildings, as is a tenant for life.<sup>4</sup> These principles and the principles controlling the analogous right of mortgagors and vendees in possession to remove improvements are discussed at length under another title in this work.<sup>5</sup>

(5) *Failure to Repair.* — Independently of any express agreement a tenant from year to year is liable for waste if he negligently allows the premises to go to decay.<sup>6</sup> And, generally speaking, this is true of a tenant for life,<sup>7</sup> even though there may be no timber upon the premises suitable for the purpose.<sup>8</sup> But he is not bound to expend extraordinary sums for the purpose.<sup>9</sup> And he is under no obligation to rehabilitate a house which is in a dilapidated condition when he enters, though he may do so, and cut timber for the purpose if there is any growing on the premises.<sup>10</sup> It has even been held, in the *United States*, that the failure of a life tenant to repair useless and undesirable

S.) 137; 3 Dane Abr. 222. See the title FIXTURES, vol. 13, p. 639 *et seq.*

1. **Right of Life Tenant to Remove Improvements.** — *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

2. *Austin v. Stevens*, 24 Me. 520. See the title FIXTURES, vol. 13, p. 637.

3. **Right to Remove Improvements Made by Husband upon Wife's Land.** — *Dozier v. Gregory*, 1 Jones L. (46 N. Car.) 100; *McCullough v. Irvine*, 13 Pa. St. 438. See the title FIXTURES, vol. 13, p. 639.

In *Washburn v. Sproat*, 16 Mass. 449, creditors of an intestate sought to have a building, which he had erected on his wife's land, made subject to the payment of their claims. But the court held that as the building had been erected voluntarily by the husband, and under no particular contract, it became a part of the realty, and could not be removed.

4. **Rights of Tenant for Years and Tenant for Life to Remove Improvements Compared.** — See the title FIXTURES, vol. 13, p. 637, note 4, p. 639, note 4.

The Reason for holding to be waste the removal of buildings by a tenant for life, which would not be held as such if done by a tenant for years, may perhaps be found in the following extract: In *McCullough v. Irvine*, 13 Pa. St. 438, the court, by Coulter, J., said: "There is a debt due to the land in return for its fruits and products, and a good tenant for life always pays it. He manures it, fences it, and builds a habitation on it, and they become part of the freehold, and thus the interest of agriculture is promoted. These exertions are the voluntary gift of the life tenant to the inheritance. He dedicates them to the inheritance when he has enjoyed the fruits of his labor. A good farmer creates, but does not destroy; and I may add that this rule, just in itself, has a tendency to liberalize the social affections as well as to promote agriculture. It banishes that sordid and selfish spirit which would destroy what the individual can no longer enjoy." As to the reason for allowing a tenant for years greater

latitude, see the title FIXTURES, vol. 13, p. 639, note 5.

5. See the title FIXTURES, vol. 13, p. 594.

**Right of Vendee in Possession to Remove Improvements.** — In an action to foreclose a land contract, the purchaser in possession will be enjoined from committing waste, without his insolvency being shown, if he removes machinery which he has placed in a shop built by him (the machinery being intended as a permanent accession to the freehold), if such removal will greatly damage the premises. *Taylor v. Collins*, 51 Wis. 123.

6. **Duty of Tenant from Year to Year to Repair.** — See the title LANDLORD AND TENANT, vol. 18, p. 246 *et seq.*

7. **Duty of Life Tenant to Repair.** — *Caldwall v. Baylis*, 2 Meriv. 408; *Woodhouse v. Walker*, 5 Q. B. D. 404; *Schulting v. Schulting*, 41 N. J. Eq. 130; *Kearney v. Kearney*, 17 N. J. Eq. 59, 504; *Long v. Fitzsimmons*, 1 W. & S. (Pa.) 530; *Cochran v. Cochran*, 2 Desaus. (S. Car.) 521; *Brough v. Higgins*, 2 Gratt. (Va.) 408.

In the case of *Matter of Steele*, 19 N. J. Eq. 120, an application for the sale of lands of an infant, *Zabriskie, Ch.*, said: "The life tenant is bound to keep the premises in as good repair as they were when he took them, not excepting ordinary wear and tear; if a new roof is needed, he is bound to put it on; if paint wears off, he is bound to repaint." See also *Piper's Estate*, 2 W. N. C. (Pa.) 711; *Wilson v. Edmonds*, 24 N. H. 517.

8. Co. Litt. 53a.

**Duty to Repair House Erected by Tenant.** — If a tenant erect a new house, he is as much bound to keep it in repair as he would be a house standing when he entered. 3 Dane Abr. 215.

9. **Extraordinary Sum Need Not Be Expended.** — *Wilson v. Edmonds*, 24 N. H. 517; *Brooks v. Brooks*, 12 S. Car. 422.

10. **Repair of House in Ruinous Condition.** — 3 Dane Abr. 221, 222; Co. Litt. 53, 54b; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.



buildings may not be waste.<sup>1</sup>

(6) *Mode of Using Premises.* — A tenant for life or for years is liable for waste if injury results to the premises from using them in an unreasonable or improper way.<sup>2</sup> For example, waste may be committed by placing an excessive weight in a building, causing it to fall.<sup>3</sup> But waste cannot arise from the use of the premises in a reasonable and proper manner.<sup>4</sup> Thus, in the case of a building constructed and let for a warehouse, the lessee was held not to be responsible for the floors breaking down under a not unreasonable weight of goods, which, unknown to him, they were insufficient to bear.<sup>5</sup>

(7) *Acts of Strangers.* — On the ground that a tenant is bound to protect the premises from waste, he is liable for waste done upon the premises by a stranger.<sup>6</sup> But in *Michigan*, if a tenant for life has conveyed away his estate, he will not be liable for any waste committed by his grantee, although such tenant for life be a tenant in dower.<sup>7</sup>

(8) *Acts of God, Public Enemies, or the Law.* — But the tenant is not liable for waste resulting from the act of God, public enemies, or the law.<sup>8</sup> But it has been said that if a house be unroofed by a tempest the tenant may not suffer it to remain so.<sup>9</sup>

#### 1. Repair of Useless and Undesirable Buildings.

— In the case of *Sherrill v. Connor*, 107 N. Car. 630, which was an action for permissive waste against a tenant in dower, who had permitted large barns and outbuildings upon a plantation to fall into decay, it was held that, as these buildings had been built before the civil war to accommodate the operation of the plantation by slaves, it was not necessarily waste to tear them down, or allow them to remain unrepaired, after the war, when the conditions had completely changed by reason of the emancipation and the changed methods of use resulting therefrom; and that it became a question for the jury whether a prudent owner of the fee, if in possession, would have suffered the unsuitable barns and buildings to fall into decay rather than incur the cost of repair.

2. *Unreasonable or Improper Use.* — *Saner v. Bilton*, 47 L. J. Ch. 267, 7 Ch. D. 815, 38 L. T. N. S. 281; *Pratt v. Brett*, 2 Madd. 61; *Machen v. Hooper*, 73 Md. 342; *Powell v. Dayton*, etc., R. Co., 16 Oregon 33, 8 Am. St. Rep. 251; *Zigler v. McClellan*, 15 Oregon 499; *Anderson v. Miller*, 96 Tenn. 35, 54 Am. St. Rep. 812. See the title LANDLORD AND TENANT, vol. 18, p. 247.

3. *Brooks v. Clifton*, 22 Ark. 54; *Chalmers v. Smith*, 152 Mass. 561.

4. *Reasonable and Proper Use.* — *Jennings v. Bond*, 14 Ind. App. 282; *Machen v. Hooper*, 73 Md. 342.

5. *Saner v. Bilton*, 7 Ch. D. 815, 47 L. J. Ch. 267; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507, 49 L. J. C. Pl. 809.

6. *Waste by Third Persons.* — Co. Litt. 54a; D. & Stud. 112; 3 Dane Abr. 225; *Attersoll v. Stevens*, 1 Taunt. 108; *Parrott v. Barney*, 2 Abb. (U. S.) 197, 1 Sawy. (U. S.) 423, 18 Fed. Cas. No. 10,773; *White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; *Fay v. Brewer*, 3 Pick. (Mass.) 203; *Wood v. Griffin*, 46 N. H. 230; *Moore v. Townshend*, 33 N. J. L. 284; *Austin v. Hudson River R. Co.*, 25 N. Y. 334; *Cook v. Champlain Transp. Co.*, 1 Den. (N. Y.) 91; *Powell v. Dayton*, etc., R. Co., 16 Oregon 33, 8 Am. St. Rep. 251.

In *Attersoll v. Stevens*, 1 Taunt. 183, the court, by Heath, J., said: "It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed;" and by Chambre, J., in the same case: "The situation of the tenant is extremely analogous to that of a common carrier; to prevent collusion (and not on the presumption of actual collusion) both are charged with the protection of the property intrusted to them, against all but the acts of God and the king's enemies; and as the tenant in one case is charged with the actual commission of waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him."

If a tenant removes from a house before the expiration of the term, and securely closes the premises, but within a few days thereafter the plumbing work is cut out and stolen by a stranger, it is waste for which the tenant is liable to the landlord. *Regan v. Luthy*, 16 Daly (N. Y.) 413.

#### Waste Committed by Receivers of Corporation.

— A corporation is liable for waste committed on land leased by it, even though such waste was committed by a receiver in whose hands it then was. *Powell v. Dayton*, etc., R. Co., 16 Oregon 33, 8 Am. St. Rep. 251.

7. *Liability of Life Tenant After Conveying Away Estate.* — *Beers v. Beers*, 21 Mich. 464.

8. *Waste Resulting from Act of God, etc.* — Co. Litt. 53a; *Shirbourne's Case*, Year Book, 12 Hen. IV. 5, pl. 11; *Saner v. Bilton*, 7 Ch. D. 815; U. S. v. Bostwick, 94 U. S. 53; *Sheer v. Fisher*, 27 Ill. App. 464; *Machen v. Hooper*, 73 Md. 342; *Earle v. Arbogast*, 180 Pa. St. 409; *Brooks v. Brooks*, 12 S. Car. 422.

9. Co. Litt. 54a; 3 Dane Abr. 216, 221; *Pol-lard v. Shaffer*, 1 Dall. (Pa.) 210, 1 Am. Dec. 239.

(9) *Injury by Fire.*—The tenant is, of course, liable for injuries to the premises from fire resulting from his own negligence.<sup>1</sup> Whether the tenant was by the early common law liable for loss by fire independently of negligence on his part, the authorities are not clear. Coke, without citing authority, said that "burning of the house by negligence or mischance is waste;"<sup>2</sup> but the cases decided before the enactment of statutes upon the subject are not conclusive, for the reason that negligence seems to have been present.<sup>3</sup> And Lord Coke's language has sometimes been understood as stating a liability only in case of negligence.<sup>4</sup> But, whatever may have been the common-law rule, the statute of 6 Anne, c. 31, substantially re-enacted by 14 Geo. III., c. 78, exonerated any person from liability for accidental fires in his own house.<sup>5</sup> And this statute has become a part of the common law in the *United States*,<sup>6</sup> so that now, in *England*, *Canada* and the *United States*, there can be no question but that an injury to the premises by an accidental fire does not make the tenant liable for waste.<sup>7</sup> Formerly, however, if the tenant covenanted to repair, without exception in case of fire, he was bound to rebuild; but this rule is now shorn of much of its former strictness both by statute and judicial construction.<sup>8</sup>

*f. NONPAYMENT OF TAXES.*—In the *United States* there are a number of cases that hold that the failure of the tenant to pay current taxes which he is under an obligation to pay, so that the property is forfeited or in danger of being forfeited, constitutes waste.<sup>9</sup>

**2. Equitable Waste**—*a. CUTTING OR DESTROYING TREES*—**Timber or Undergrowth.**—Equitable waste may be committed by the destruction of timber<sup>10</sup> and undergrowth,<sup>11</sup> if the destruction is wanton, unreasonable, and destructive of the inheritance.

**Ornamental or Shade Trees.**—The cutting of timber which has been planted or left standing for ornament is waste, and even though the tenant is unimpeachable of waste, equity will grant relief.<sup>12</sup> Equitable waste may be committed by cutting down trees in lines or avenues, or riding in a park,<sup>13</sup> extending a considerable distance from the mansion house.<sup>14</sup> Thus, it may

1. **Fires Caused by Tenant's Negligence.**—Filliter v. Phippard, 11 Q. B. 347, 63 E. C. L. 347; Anderson v. Miller, 96 Tenn. 35. See the title FIRES, vol. 13, p. 411 *et seq.*

2. **Accidental Fires**—**Early Common-law Rule.**—Co. Litt. 53b.

3. Salop v. Crompton, Cro. Eliz. 777; Hicks v. Downing, 1 Ld. Raym. 99.

4. Blackburn, C. J., in White v. M'Cann, 1 Ir. C. L. 205.

5. **Same**—**Modern Rule.**—Filliter v. Phippard, 11 Q. B. 347, 63 E. C. L. 347; Canterbury v. Atty.-Gen., 1 Phil. 316.

6. See the title FIRES, vol. 13, p. 410, note 6.

7. U. S. v. Bostwick, 94 U. S. 53; Nave v. Berry, 22 Ala. 383; Maull v. Wilson, 2 Harr. (Del.) 443; Wainscott v. Silvers, 13 Ind. 497; Bernard v. Poor, 21 Pick. (Mass.) 378; Levey v. Dyess, 51 Miss. 501; Warner v. Hitchins, 5 Barb. (N. Y.) 666; Clark v. Foot, 8 Johns. (N. Y.) 421; Lansing v. Stone, 37 Barb. (N. Y.) 15; Earle v. Arbogast, 180 Pa. St. 409; Sampson v. Grogan, 21 R. I. 174; Maggort v. Hansbarger, 8 Leigh (Va.) 536; Wolfe v. McGuire, 28 Ont. 45.

8. **Effect of Covenant to Repair.**—Sampson v. Grogan, 21 R. I. 174. See the title LANDLORD AND TENANT, vol. 18, p. 249 *et seq.*

9. **Forfeiture of Property for Nonpayment of Taxes.**—Stetson v. Day, 51 Me. 434; Cannon v. Barry, 59 Miss. 289; McMillan v. Robbins, 5

Ohio 28; Abernethy v. Orton, 42 Oregon 437, 95 Am. St. Rep. 774; Phelan v. Boylan, 25 Wis. 679. See the title TAXATION, vol. 27, p. 748, note.

10. **Destroying Timber.**—Duncombe v. Felt, 81 Mich. 332; Stevens v. Rose, 69 Mich. 259.

11. **Destroying Undergrowth.**—Aston v. Aston, 1 Ves. 264; Brydges v. Stephens, 6 Madd. 279.

12. **Cutting Ornamental or Shade Trees.**—Chamberlyne v. Dummer, 1 Bro. C. C. 166, 3 Bro. C. C. 549, 2 Dick. 600; Packington v. Packington, 1 Dick. 101; Aston v. Aston, 1 Ves. 265; Morris v. Morris, 15 Sim. 505, 16 L. J. Ch. N. S. 201, 1 Jur. 196; Williams v. M'Namara, 8 Ves. Jr. 70; Tamworth v. Ferrers, 6 Ves. Jr. 419; Day v. Merry, 16 Ves. Jr. 375; Lushington v. Boldero, 6 Madd. 149; Bubb v. Yelverton, L. R. 10 Eq. 465, 40 L. J. Ch. 38, 18 W. R. 1146; Packington's Case, 3 Atk. 215; Obrien v. Obrien, Ambl. 107, 1 Bro. C. C. 168, note; Stevens v. Rose, 69 Mich. 259.

Grubbing, improperly cutting, or allowing cattle to destroy the germs of a hedge, is waste. Dunn v. Bryan, Ir. R. 7 Eq. 143.

13. Packington's Case, 3 Atk. 215.

14. Wombwell v. Bellasyse, 6 Ves. Jr. 110, note, cited in Marker v. Marker, 9 Hare 22.

If a devise is made without impeachment of waste, except the timber growing in the park avenues, demesne lands, and woods adjoining to a capital messuage, the restriction as to cut-

be equitable waste to cut down clumps of firs, which have been planted for ornament, on a common, two miles from the house.<sup>1</sup> And the doctrine may be extended to trees planted for the purpose of excluding objects from view.<sup>2</sup> But trees may be highly ornamental, and yet not be entitled to protection as being planted or left standing for ornament,<sup>3</sup> and in case of doubt it is necessary to show some act of the settlor impressing an ornamental character upon the timber.<sup>4</sup> The intention of the settlor will govern the court in its decision as to what is equitable waste of ornamental timber;<sup>5</sup> and such waste is not to be judged, therefore, by what a prudent owner would do in the proper or ordinary course of management, for the tenant is bound by the taste or want of taste of the absolute owner by whom the timber may have been planted or left standing.<sup>6</sup> And if a testator had pulled down a mansion house, without any intention of rebuilding it, the tenant might cut down ornamental trees which stood around it.<sup>7</sup>

**b. DESTROYING BUILDINGS.**—The legal powers of a tenant for life, without impeachment of waste, to deal with the buildings as he pleases, are very much limited by the doctrine of equitable waste. Thus, the tenant for life, even though he is without impeachment of waste, may be decreed to repair and rebuild the mansion house which he has pulled down,<sup>8</sup> or may be restrained from pulling down the farm houses on the estate.<sup>9</sup> And where a tenant, without impeachment of waste, is made liable, by the settlement, for all voluntary waste in pulling down houses or buildings, and not rebuilding the same, or others of equal or greater value, a court of equity will compel the rebuilding, if the original house is being torn down.<sup>10</sup> So, where the settlement contemplates the abandonment of the mansion and the building of another, the tenant will not be liable to an account and inquiry as to the application of the materials of the old mansion house, if they were used in the construction of the new one.<sup>11</sup>

ting timber will be confined to the premises specified in the exception clause, and will not be extended to the woods adjoining to the excepted parts, nor to the avenues made by the testator in those woods; and no proceeding for equitable waste can be maintained as to trees planted, for ornament, around a house which had formerly been a principal mansion, and having gone to decay, had been restored by the tenant for life. *Newdigate v. Newdigate*, 8 Bligh N. S. 734, 2 Cl. & F. 601.

1. *Downshire v. Sandys*, 6 Ves. Jr. 107.

2. *Wheldale v. Wheldale*, 16 Ves. Jr. 376.

3. *Halliwell v. Phillips*, 4 Jur. N. S. 607, 6 N. R. 408; *Burges v. Lamb*, 16 Ves. Jr. 174; *Williams v. M'Namara*, 8 Ves. Jr. 70.

4. *Halliwell v. Phillips*, 4 Jur. N. S. 607, 6 W. R. 408.

5. *Marker v. Marker*, 9 Hare 1, 20 L. J. Ch. N. S. 246, 15 Jur. 663; *Hawley v. Wolverton*, 5 Paige (N. Y.) 522.

6. *Ford v. Tynte*, 2 De G. J. & S. 127.

7. *Micklethwait v. Micklethwait*, 3 Jur. N. S. 1279, 26 L. J. Ch. 721, 1 De G. & J. 504, 5 W. R. 861.

A mansion house, park, and pleasure grounds, with certain villas on the estates, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion house, sell the materials and apply the proceeds in paying off incumbrances on the estate. The house was accordingly pulled down, but the tenant for life, unimpeachable of waste, was afterwards re-

strained from felling the ornamental timber in the park and grounds. *Wellesley v. Wellesley*, 6 Sim. 497.

**8. Pulling Down Mansion.**—*Barnard's Case*, Prec. Ch. 454, 2 Vern. 738, Gilb. Eq. 127, 1 Eq. Cas. Abr. 399 par. 3, 1 Salk. 161. This case is known as the "Raby Castle Case," which, although not the earliest, is the leading authority on this subject. The decree to repair and rebuild the mansion house not having been performed in Lord Barnard's lifetime, an issue was directed to charge his assets with the value of the damages.

**9. Pulling Down Farm House.**—*Rolt v. Somerville*, 3 Eq. Cas. Abr. 759, pl. 8; *Aston v. Aston*, 1 Ves. 265; *Blake v. Peters*, 10 W. R. 826.

**10. Micklethwait v. Micklethwait**, 1 De G. & J. 504.

**11. Rebuilding with Materials of Old Building.**—*Morris v. Morris*, 28 L. J. Ch. 329, 3 De G. & J. 323, 5 Jur. N. S. 220. In this case, the court, by Bruce, L. J., said: "This is not a question of injunction, for the act of which complaint is made was done more than thirty years ago. It is a mere question of equitable damage, and in considering that, we must look at the peculiar circumstances of the case. That it was a reasonable, a judicious, and a beneficial thing to pull down the house at Clasmont, and to use the materials, so far as they could be used, for building at Sketty, is perfectly clear; but I agree with Mr. Malins that an act may be reasonable, may be judicious, may be beneficial to all persons interested in a settled property, and yet it may be an act pro-



**VI. WHO MAY COMMIT WASTE — 1. Mere Possessors or Trespassers.** — Waste can only be committed by one in the rightful possession of land; that which is waste by a person in the rightful possession of land, if done by a mere intruder or trespasser, would ordinarily be merely trespass.<sup>1</sup> There is, however, a disposition to break down the distinction between trespass and waste so far as the remedy is concerned, and to give for such trespasses as are destructive of the inheritance the remedies for waste.<sup>2</sup> If the acts of trespass or spoliation are committed by one who is out of possession, and not claiming to have color of title, equity will not interfere, unless the acts of destruction are so ruinous as to be incapable of actual measurement in money, or there are other grounds for equitable interference.<sup>3</sup>

**2. Persons in Rightful Possession — a. EARLY COMMON-LAW RULE.** — By the early common law the only persons liable for waste were the tenants of legal estates, *i. e.*, estates which were created by the law as distinguished from conventional estates or estates created by deed. When a limited estate was created by deed, the particular tenant was not liable for waste, unless it was so expressly stipulated. Hence, waste was not punishable in any tenant save only in three persons, namely, a guardian in chivalry, a tenant in dower,

hibited to a tenant for life, if a person interested in the remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness, and on the beneficial nature of what was done; but those considerations are ingredients in the case. The property has been benefited by what has been done, and the plaintiffs and others interested in the remainder are receiving the benefit of it. Still, if it had been shown, or were in any degree probable, that any part of the materials of the old house had been sold, it is very possible, notwithstanding the much larger expenditure upon the construction of the new mansion house, that the estate of the second baronet would be held liable to account."

**1. Not Committed by Mere Possessors Without Right or Trespassers.** — *Palmer v. Young*, 108 Ill. App. 252. See *supra*, *Waste Distinguished from Trespass*.

In *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350, the court, by Bland, C., said: "In general, waste is the abuse or destructive use of property by him who has not an absolute, unqualified title. And, in general, trespass is an injury, or use without authority, of the property of another, by one who has no right whatever."

In *Lander v. Hall*, 69 Wis. 326, the court held that at common law the relation of tenancy was what distinguished waste from trespass to the realty; and that the statute of *Wisconsin*, which gives to the holder of a certificate of the sale of lands for taxes a right to recover damages from any one who commits waste on said lands, does not apply to cases of waste committed by a mere trespasser, but applies only to cases where the action of waste would lie at the common law.

The action of trespass does not lie for waste committed upon land by permission of a person actually in possession, though the possession be unlawful. The remedy is an action of unlawful detainer, in which the party lawfully entitled may recover as well for the waste and injury committed, as the possession. *Hawkins v. Roby*, 77 Mo. 140.

**2 Partial Obliteration of Distinction Between**

**Trespass and Waste.** — In *Lowndes v. Bettle*, 10 Jur. N. S. 226, 33 L. J. Ch. 451, *Kindersley, V. C.*, said in substance: "It appears to me that the case comes under the head of 'irremediable waste,' as defined by Lord Eldon. That is, a destruction of the substance of the inheritance; and I think it comes within the cases in which, the plaintiff being in possession and the defendant not, an injunction has been granted. I think, therefore, that under the circumstances, and having regard to what appears, to me, to be the constant tendency of the decisions upon the subject, *viz.*, to break down the unreasonable distinction between trespass and waste, that this is a case in which the injunction ought to be granted."

**3. Shipley v. Ritter**, 7 Md. 408, 61 Am. Dec. 371; *Davis v. Reed*, 14 Md. 152; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572. In the last case the court, by Jackson, C. J., said: "The facts alleged here, we think, make a case within these rules of law defining the limits within which equity will interfere by injunction. If the shade trees, necessarily the growth of years, in some instances of centuries, standing in a man's yard, where he has built his residence, or is about to build it, are being cut down and destroyed, nothing but time, and time beyond a generation, can replace them. It is impossible to estimate the value to the homestead in money. It is irreparable in damages. If the only timber on a ninety-acre farm is being cut down, and all forest vegetation laid waste, so that nothing will be left to shade man or beast, in toil or in rest, in the field or the pasture—nothing to repair fencing or mend the fire, it would be very difficult to ascertain the damage in money. In either case, both of which appear in this bill, how can damages be estimated at all? Is not the waste destructive to the freehold as a farm, for farming purposes, and almost equally so to the freehold chosen as the spot for a residence, and cleared of undergrowth for that purpose? Especially should equity arrest such destruction where the defendant is a mere naked trespasser, without shadow of title or right to the land."

and a tenant by the curtesy; it was not punishable in a tenant for life or for years.<sup>1</sup> The reason for the diversity, as stated by Coke and generally accepted, was that the estate of the first three above-named tenants was created by the act of the law itself, which should, therefore, protect the remainderman or reversioner; but a tenant for life or for years came in by demise or lease of the owner of the fee, who might have provided against the commission of waste by the tenant.<sup>2</sup>

*b.* STATUTES OF MARLBIDGE AND OF GLOUCESTER. — But the common law was changed by the statute of Marlbridge (52 Hen. III., c. 23), which provides that "fermers during their terms shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage and shall be punished by amerciamment grievously." And by the statute of Gloucester (6 Edw. I., c. 5) it was enacted that "a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life or for term of years, or a woman in dower. And he which shall be attainted of waste shall lose the thing that he has wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." In the *United States* these statutes are either considered a part of the common law, so far as applicable to the different conditions,<sup>3</sup> or they have been expressly enacted in a modified form.<sup>4</sup>

**3. Tenants for Life or Years** — *a.* VOLUNTARY OR COMMISSIVE WASTE. — The term "fermers" as used in the statute of Marlbridge comprehended all who held by lease for life or lives, or for years, by deed or without deed,<sup>5</sup> and the rule is now universal that unless exempted by the terms of his lease from responsibility for waste, a tenant for life or for years is responsible for voluntary waste of the premises.<sup>6</sup>

**1. Persons Liable for Waste** — **Early Common Law.** — 4 Coke's Inst. 299; Co. Litt. 54; Bac. Abr., title Waste H.; Com. Dig., title Waste; 2 Bl. Com. 283.

*England.* — 4 Kent's Com. 79; Woodhouse v. Walker, 5 Q. B. D. 404, *per* Lush, J.; Shrewsburies Case 5 Coke 13; London v. Web, 1 P. Wms. 527; Jefferson v. Durham, 1 B. & P. 105.

*United States.* — Scott v. Lenox, 2 Brock. (U. S.) 57.

*Connecticut.* — Wilford v. Rose, 2 Root (Conn.) 20; Moore v. Ellsworth, 3 Conn. 483.

*Georgia.* — Dickinson v. Jones, 36 Ga. 97.

*Massachusetts.* — Sackett v. Sackett, 8 Pick. (Mass.) 309.

*New Jersey.* — Moore v. Townshend, 33 N. J. L. 284; Newbold v. Brown, 44 N. J. L. 266.

*New York.* — Donald v. Elliott, (Supm. Ct.) 11 Misc. (N. Y.) 120.

*Ohio.* — Stauffer v. Eaton, 13 Ohio 322.

*Rhode Island.* — Sampson v. Grogan, 21 R. I. 174.

*Virginia.* — Dejarnatte v. Allen, 5 Gratt. (Va.) 499.

**2. Reason for Common-law Rule.** — 2 Co. Litt. 300; Shrewsburies Case, 5 Coke 13; Woodhouse v. Walker, 5 Q. B. D. 406; Moore v. Ellsworth, 3 Conn. 483, reviewing the various statements of the reason for the rule at length; Sampson v. Grogan, 21 R. I. 174.

**3. Statutes of Marlbridge and Gloucester in the United States.** — Parrott v. Barney, Deady (U. S.) 405, 18 Fed. Cas. No. 10,773a; Parker v. Chambliss, 12 Ga. 235; Dickinson v. Jones, 36 Ga. 97; Hasty v. Wheeler, 12 Me. 438; Sackett

v. Sackett, 8 Pick. (Mass.) 309; Stauffer v. Eaton, 13 Ohio 322. And see Chase v. Hazelton, 7 N. H. 171. But see Moore v. Ellsworth, 3 Conn. 483.

**4.** Newbold v. Brown, 44 N. J. L. 266; Dejarnatte v. Allen, 5 Gratt. (Va.) 499.

The material parts of the statutes of Marlbridge and Gloucester have been re-enacted in *North Carolina*. Dozier v. Gregory, 1 Jones L. (46 N. Car.) 100. But the word "may" has been substituted for the word "shall" in the statute of Gloucester. Sherrill v. Conner, 107 N. Car. 543.

In *Pennsylvania* tenants for life are forbidden by the statutes to commit such acts as at common law constitute waste, except they be such as are necessary, in the judgment of the common pleas, to the reasonable use and enjoyment of the estate. Irwin v. Covode, 24 Pa. St. 162.

**Life Tenancies Created by Will.** — A statute restricting tenants for life from committing waste has been construed tenancies for life created by will. Hamden v. Rice, 24 Conn. 350, wherein it was held that the *Connecticut* Act restricting tenants for life from committing waste, passed in 1840 (Conn. Rev. Stat., tit. 1, c. 15, § 284), embraces tenancies for life created by will.

**5. Fermer Defined.** — See the title FERMER, vol. 12, p. 1085, note 4.

**6. Liability of Tenants for Life or Years for Voluntary Waste** — *Connecticut.* — Moore v. Ellsworth, 3 Conn. 483.

*Georgia.* — Dickinson v. Jones, 36 Ga. 97.

**b. PERMISSIVE WASTE.** — According to Coke, the words “do or make waste,” as used in the statutes both of Marlbridge and of Gloucester, include permissive as well as voluntary waste.<sup>1</sup> There has, however, been considerable conflict of opinion in *England* as to the liability of tenants for life and for years for permissive waste.<sup>2</sup> But it seems clear that a tenant for years or

*Illinois.* — Consolidated Coal Co. v. Savitz, 57 Ill. App. 659.

*Indiana.* — Miller v. Shields, 55 Ind. 71.

*Maryland.* — White v. Wagner, 4 Har. & J. (Md.) 391, 7 Am. Dec. 674.

*Massachusetts.* — Sackett v. Sackett, 8 Pick. (Mass.) 314, reviewing the history of the statute.

*New Hampshire.* — Webster v. Webster, 33 N. H. 18, 66 Am. Dec. 705; Johnson v. Johnson, 18 N. H. 594; Chase v. Hazelton, 7 N. H. 111.

*New Jersey.* — Newbold v. Brown, 44 N. J. L. 266; Moore v. Townshend, 33 N. J. L. 284.

*New York.* — Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601.

*North Carolina.* — Browne v. Blick, 3 Murph. (7 N. Car.) 511; Dozier v. Gregory, 1 Jones L. (46 N. Car.) 100.

*Ohio.* — Stauffer v. Eaton, 13 Ohio 322.

*Oregon.* — Powell v. Dayton, etc., R. Co., 16 Oregon 33, 8 Am. St. Rep. 251.

*Pennsylvania.* — Neel v. Neel, 19 Pa. St. 324; Shult v. Barker, 12 S. & R. (Pa.) 272.

*Rhode Island.* — Sampson v. Grogan, 21 R. I. 174; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621.

*South Carolina.* — Smith v. Daniel, 2 McCord Eq. (S. Car.) 143.

*Virginia.* — Dejarnatte v. Allen, 5 Gratt. (Va.) 499.

See the title MINES AND MINING CLAIMS, vol. 20, p. 769.

**Good Faith of Tenant.** — A tenant's innocence or honesty of purpose will not excuse the commission of waste. Rutherford v. Aiken, 3 Thomp. & C. (N. Y.) 60.

In Clark v. Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450, the court, by Bigelow, J., said: “A tenant for life cannot pull down buildings, cut off timber trees, or do other acts which tend to the disherison of the remainderman or reversioner, and justify them on the ground that he acted in good faith, without any purpose of permanently injuring the estate. Such acts, in law, constitute waste for which the tenant for life is liable, however innocent or honest may have been the purpose with which they were done.”

**Counterbalancing Improvements by Tenant.** — Improvements by a life tenant are no excuse or justification for committing waste; more especially when the waste is to the inheritance, and the improvements are to the fertility of the soil, which may be exhausted during the life estate. Van Syckel v. Emery, 18 N. J. Eq. 387.

**1. Liability for Permissive Waste.** — 2 Coke's Inst. 145.

**2. Conflict of Opinion in England.** — In a note in exposition of the statute of Marlbridge, Lord Coke, in commenting on the words *non facient*, says: “To do or make waste, in legal understanding in this place, includes as well permissive waste, which is waste by reason of

omission or not doing as for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses, or the like; and the same word hath the statute of Gloucester, c. 5, *que aver fait waste*, and yet is understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste.” 2 Inst. 145; 7 Bac. Abr. 250; 3 Bl. Com. 225; 2 Saund. 252; 4 Kent 76. The instances in the earlier reports in which lessees for life or years were held liable for permissive waste, which consisted in injuries resulting from acts of negligence or omission, are quite frequent and their liability is grounded, not on the covenants or agreements in the instrument of demise, but on the statute which subjected them to the action of waste. Griffith's Case, Moore K. B. 69; Anonymous, Moore K. B. 62; Anonymous, Moore K. B. 73, Keilw. 206; Darcy v. Askwith, Hob. 234; Glover v. Pipe, Owen 92, 3 Dyer 281, 2 Roll. Abr. 816, l. 40; 22 Vin. Abr. Waste “c” and “d,” pp. 436-440, 443; Co. Litt. 52a, 53b; 5 Com. Dig., Waste, D. 2, D. 4; Bissett on Estates 299, 300. So uniformly had the courts determined that lessees for life or years had committed waste by the application of the common-law rules with respect to waste, whether of omission or commission, that the learned commentator on English law says “that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste.” 2 Bl. Com. 283. This construction of the statutes of Marlbridge and Gloucester continued to be received without dissent until the decision of the case of Gibson v. Wells, 1 B. & P. N. R. 290, in the year 1805, which was followed by the case of Herne v. Bembow, 4 Taunt. 764. These cases, it is insisted, have settled the construction against the liability of a tenant for years for permissive waste. Gibson v. Wells, 1 B. & P. N. R. 290, is not an authority for this position. The tenant against whom the action there was brought was a tenant at will, who is not included within the statutes, and who, at common law, was punishable for voluntary, but not for permissive waste. In Herne v. Bembow, 4 Taunt. 764, it does not clearly appear that the lease was for a term. It is certain that the opinion of the court proceeded upon the principles applicable to tenants at will. As the case is reported in Taunton, it appears to have been decided without argument or consideration. The opinion is a *per curiam* opinion, and the only case cited is the Shrewsburies Case, 5 Coke 14, which was a case of a tenancy at will. The only subsequent case which sustains these cases is Torriano v. Young, 6 C. & P. 8, 25 E. C. L. 253, a case at *nisi prius*. In other cases where Herne v. Bembow, 4 Taunt. 764, was cited, the English courts show no disposition to fol-



from year to year is liable for permissive waste,<sup>1</sup> though his liability is usually defined by contract.<sup>2</sup> But a tenant for life of leaseholds is liable only for voluntary waste.<sup>3</sup> In the *United States* both a tenant for years<sup>4</sup> and a tenant for life<sup>5</sup> are liable for permissive waste.

*c. TENANTS "WITHOUT IMPEACHMENT OF WASTE" — (1) In General.* — The statute of Marlbridge, quoted above, prohibited tenants for life and for years from making waste "without special license had by writing of covenant making mention that they may do it." The special license mentioned in the statute is now commonly expressed, "without impeachment of waste." Reservations are frequently made in favor of particular tenants, especially tenants for life, in *England*, and to a lesser extent in the *United States*, which give them estates "without impeachment of waste."

(2) *Creation of Estates "Without Impeachment of Waste" — Extent of Unimpeachable Character.* — "The addition, without impeachment of waste, is an addition of interest; and it may be general or under such restrictions as the settlor thinks fit." Thus, a tenancy for life may be subject to impeachment of waste, except in cutting down timber for repairs, or timber going to decay or injurious to other trees; and a lease may be made of a house and land "without impeachment of waste in the house."<sup>6</sup> In leases granted under powers, the license to commit waste is restricted by the limits of the power; and the lease must conform to the power in this respect. Under a power to grant leases such that the lessee shall not be made punishable for waste, a lease in which the lessor covenanted to repair was construed as exempting

low it. In *Jones v. Hill*, 7 Taunt. 392, 2 E. C. L. 392, Gibbs, C. J., expressly guards himself against being supposed to concur in the position that an action will not lie against a lessee for years for permissive waste. In *Martin v. Gilham*, 7 Ad. & El. 540, 34 E. C. L. 152, and in *Beale v. Sanders*, 3 Bing. N. Cas. 850, 32 E. C. L. 354, a decision of that question is avoided; and in *Harnett v. Maitland*, 16 M. & W. 261, Parke, B., on *Gibson v. Wells*, 1 B. & P. N. R. 290, *Herne v. Bembow*, 4 Taunt. 764, and *Torriano v. Young*, 6 C. & P. 8, 25 E. C. L. 253, being cited, intimates an opinion against those cases as necessarily involving the result that a tenant for life is also punishable for permissive waste. Text writers of acknowledged authority have not recognized these cases as settling the law against the older cases and the opinions of Coke and Blackstone, but have regarded them as merely throwing a doubt upon a principle that had previously been set at rest. 2 Saund. 252b; Arch. L. & T. 196, 7; Smith on L. & T. 196; Comyn on L. & T. 495, and note; 2 Bouv. Law Dict. 645, Waste, § 14; 1 Washburn on R. Prop. 124, and note 1. By other legal writers they are doubted or condemned as unsound in principle. Roscoe on Real Actions 385; Ferrard on Fixtures 278, 281, note; 1 Evans' Statutes 193, note; Broom on Parties 257; 4 Kent 76, 79; Elmes on Dilapidations 257. See *Moore v. Townshend*, 33 N. J. L. 284.

1. *Tenant for Years.* — Co. Litt. 53; *Ferguson v. —*, 2 Esp. 590; *Leach v. Thomas*, 7 C. & P. 327, 32 E. C. L. 527; *Harnett v. Maitland*, 16 M. & W. 257; *Davies v. Davies*, 38 Ch. D. 499; *Yellowly v. Gower*, 11 Exch. 274; *Thursby v. Plant*, 1 Saund. 233, note.

2. There are cases which seem to hold the tenant for years liable for permissive waste only when the lease contains a covenant by him to

repair. *Gibson v. Wells*, 1 B. & P. N. R. 290; *Wise v. Metcalfe*, 10 B. & C. 299, 21 E. C. L. 84.

3. *Tenant for Life of Leaseholds.* — *In re Parry*, (1900) 1 Ch. 160, 81 L. T. N. S. 807; *In re Cartwright*, 41 Ch. D. 532; *Barnes v. Dowling*, 44 L. T. N. S. 809; *Patterson v. Central Canada Loan, etc., Co.*, 29 Ont. 134.

4. *In the United States.* — *White v. Wagner*, 4 Har. & J. (Md.) 373; *Moore v. Townshend*, 33 N. J. L. 284; *Newbold v. Brown*, 44 N. J. L. 266; *Suydam v. Jackson*, 54 N. Y. 450; *Long v. Fitzsimmons*, 1 W. & S. (Pa.) 530.

5. *Miller v. Shields*, 55 Ind. 71; *Stevens v. Rose*, 69 Mich. 259; *Wilson v. Edmonds*, 24 N. H. 517; *Schulting v. Schulting*, 41 N. J. Eq. 130. See *Moore v. Townshend*, 33 N. J. L. 284; *Harvey v. Harvey*, 41 Vt. 373. *Contra*, *Richards v. Torbert*, 3 Houst. (Del.) 172.

6. *Limited Right to Commit Waste.* — Co. Litt. 54b; *Pigot v. Bullock*, 1 Ves. Jr. 483; *Aston v. Aston*, 1 Ves. 265; *Tooker v. Annesley*, 5 Sim. 235.

*Excepting Tenant from Action for Waste.* — The phrase "without impeachment of waste by any action," or "without being impleaded for waste," is construed as excepting only the liability to an action for the waste, but without affecting the property in the waste committed, as in trees cut down, which remain the property of the lessor. Such words bar the lessor of his action for damages, but not of his property. *Barb v. Case*, 11 Coke 80b.

*A Lease Made "Without Impeachment of Waste, Excepting Voluntary Waste,"* was held to leave the tenant liable for wilful waste, and to give him no further right or interest in the timber than an ordinary tenant for life. *Garth v. Cotton*, 1 Ves. 524, 1 White & T. Lead. Cas. 841. But see *Vincent v. Spicer*, 22 Beav. 380.

the lessee from waste to the extent of the repairs by the lessor, which being in excess of the power rendered the lease void.<sup>1</sup>

**Words Creating.** --- No particular form of words is necessary to make an estate dispunishable for waste.<sup>2</sup> It may be done by the usual phrase "without impeachment of waste," or an equivalent phrase, appended to the limitation of the estate.<sup>3</sup>

**Words Which Are Sufficient.** — Thus, it has been held that an estate which is held without impeachment of waste is created by the use of the words "without liability for the commission of waste,"<sup>4</sup> and of the words "to have and to hold, and to use and control as the lessee thinks proper, for his benefit during his natural life."<sup>5</sup> And an estate which is unimpeachable for waste has been held to be created by a devise of a life estate which gives the devisee "the use and full control" of the estate,<sup>6</sup> or which gives him the "full and entire use."<sup>7</sup>

**Words Which Are Insufficient.** — But a devise of a life estate which provides that the property is to be "under the control" of the devisee has been considered not to be as comprehensive as one giving the devisee "the full and entire use" of the property, and it has been held that it does not create an estate unimpeachable for waste.<sup>8</sup> Nor does a conveyance "reserving all the right, title, and interest" in the premises for the grantor's natural life have the effect of making the life estate dispunishable for waste.<sup>9</sup> In several instances estates granted "in strict settlement,"<sup>10</sup> or with restraint on anticipation,<sup>11</sup> have been held to be impeachable of waste. A tenant in possession

1. **Leases Granted under Powers.** — *Yellowly v. Gower*, 11 Exch. 274; *Doe v. Bettison*, 12 East 305. See *Davies v. Davies*, 38 Ch. D. 499.

2. **Particular Words Not Necessary.** — *Goodright v. Barron*, 11 East 220; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

3. *Woodhouse v. Walker*, 5 Q. B. D. 407.

4. **Words Creating Estate Without Impeachment of Waste.** — *Chapman v. W. F. Epperson* Circled Heading Co., 101 Ill. App. 161.

5. *Stevens v. Rose*, 69 Mich. 259.

6. *Wiley v. Wiley*, (Neb. 1901) 95 N. W. Rep. 702.

7. *White v. Briggs*, 15 Sim. 17, 2 Phill. 583.

In *Goodright v. Barron*, 11 East 220, a will was executed with this clause: "Also, I give and bequeath to my wife, Elizabeth, whom I likewise make my sole executrix, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed." In an action of ejectment, the court, in reference to this clause, by Ellenborough, J., said: "But these words may have been meant to make her dispunishable of waste, for which, as tenant for life only, she would have been liable;" and by Le Blanc, J.: "If the words 'during her life' had been added, that would have made the intent clear in one way."

But a life tenant, who was also executrix with "full and absolute control" over the estate during her life, was held to be punishable for waste. *Pardoe v. Pardoe*, 82 L. T. N. S. 547.

8. **Words Insufficient to Create Estates Without Impeachment for Waste.** — *Clow v. Clow*, 4 Ont. 355.

9. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

10. **Estates Granted in Strict Settlement.** — If an executory trust for the settlement of freehold estates, "in strict settlement," directs, either expressly or by reference to the trusts of other

property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable of waste. *Stanley v. Coulthurst*, L. R. 10 Eq. 259. In this case, Malins, V. C., said: "The general doctrine of the court is, that where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, as in *Leonard v. Sussex*, 2 Vern. 526, and all that long line of cases referred to in *Fearnie on Contingent Remainders*, in which the general intention could only be effected by limiting estates to the issue as purchasers, there the life estates are made unimpeachable for waste. But no one could suppose that if a testator were to direct a settlement to be made on A for life with remainder to his issue, without adding the words 'in strict settlement,' A would be impeachable for waste; but that if the testator had directed a settlement in precisely the same terms, but added the words 'in strict settlement,' A would be unimpeachable of waste. On the contrary, in my opinion, the addition of the words 'in strict settlement' would rather cut down than enlarge the measure of ownership to be allowed to the tenant for life." See also *Davenport v. Davenport*, 10 Jur. N. S. 35, 12 W. R. 6, 1 Hem. & M. 775, 3 N. R. 26.

11. **Estates Granted with Restraints on Anticipation.** — In *Clive v. Clive*, L. R. 7 Ch. 433, James, L. J., said: "The testator has directed the trustees to settle the property on his granddaughter for her separate use, without power of anticipation, and has expressly authorized them to give power to her husband to commit waste, but has authorized nothing of the kind with respect to the granddaughter herself. It appears to me difficult to conceive how a power

under a lease containing a clause conferring upon him the privilege of purchasing the demised premises within a specified time, and having failed to exercise it, is liable in an action for damages for waste committed on the premises during his possession.<sup>1</sup> A stipulation in a lease giving the lessee the privilege of expending a portion of the rent each year for repairs cannot have the effect of relieving the tenant from liability for waste in allowing the premises to decay for want of necessary repairs.<sup>2</sup>

**Estates Cut Down to Life Estates.** — It is a general rule that where the intention of a testator requires that an estate devised which turns out larger than a mere life estate shall be cut down to a life estate in order to give effect to other conflicting dispositions of the same property, the court will deal with such life estate as one unimpeachable for waste.<sup>3</sup>

**Quitclaim Releasing All Grantor's Rights During Life.** — It has been held that a conveyance by quitclaim, releasing all right to the premises to another, during the grantor's life, leaves the life estate subject to impeachment for waste unless there is an express provision to the contrary.<sup>4</sup>

(3) *Liability of Tenants for Waste — In General.* — When a tenant for life holds an estate "without impeachment of waste" he has greater rights than an ordinary tenant. Like the ordinary tenant, he may cut timber for his firewood and for repairs and buildings and fences, but he may go further, cutting and removing timber of natural growth even to the extent of cutting off and selling all the timber and cultivating the land as a field. He may, in fact, do any act with reference to the land which the owner of the fee might do, if consistent with the substantial preservation of the estate.<sup>5</sup> Generally speaking, a tenant for life without impeachment of waste, is not liable for waste, except such as is committed unreasonably, wantonly, or unconscientiously to the injury of the inheritance.<sup>6</sup>

**Permissive Waste.** — Hence, if the estate of a life tenant is made dispunishable for waste, he is not liable for permissive waste.<sup>7</sup>

**Equitable Waste.** — It was at an early date decided that a tenant for life "without impeachment of waste," at law had equal powers to commit waste and to appropriate its proceeds with tenants in tail or in fee simple.<sup>8</sup> To check the abuses which are possible under this state of the law, equity has intervened to protect the inheritance on the ground that where land is settled for estates for life and in remainder, the intention must be that the land shall

to commit waste can exist consistently with a restraint on anticipation. The very object of the restraint is to protect the property against the husband, but if the power to commit waste was given, all the timber on the estate might be swept away to pay the husband's debts."

1. **Lease with Privilege of Purchasing Premises.** — *Powell v. Dayton, etc., R. Co.*, 16 Oregon 33, 8 Am. St. Rep. 251.

2. **Privilege of Expending Part of Rent in Repairs.** — *Moore v. Townshend*, 33 N. J. L. 284.

3. **Estates Cut Down to Life Estates.** — *Stanley v. Coulthurst*, L. R. 10 Eq. 265; *Davenport v. Davenport*, 1 Hem. & M. 779.

4. **Release of All Grantor's Rights During Life.** — *Chase v. Hazelton*, 7 N. H. 171.

5. **Rights of Tenant Generally.** — *Belt v. Simkins*, 113 Ga. 897; *Chapman v. W. F. Epperson* Circled Heading Co., 101 Ill. App. 161.

6. *Wiley v. Wiley*, (Neb. 1901) 95 N. W. Rep. 702.

A father who holds an estate, without impeachment of waste, cannot be enjoined by his son, who is tenant in tail, from removing a

deal floor which he (the father) had placed, and young oaks he had planted, breaking up meadow land, etc., if such acts do not amount to waste and spoliation. *Peirs v. Peirs*, 1 Ves. 521. In this case the court, by Hardwicke, L. C., said: "The clause, without impeachment of waste, is generally put in to prevent disputes of this kind; but if it was so to be made use of that a son should have it in his power to call a father into a court of equity for every alteration he makes in a walk or an avenue, though he removes the trees to another part, and so of the house, it would be such a fund for disputes between a father and son, there would be no end of it; and it would be better for the public that Raby Castle had been pulled down, than that that precedent had been made."

7. **Not Liable for Permissive Waste.** — *Powys v. Blagrove*, 4 De G. M. & G. 448; *Lansdowne v. Lansdowne*, 1 Jac. & W. 502; *Duncombe v. Felt*, 81 Mich. 332; *Cannon v. Barry*, 59 Miss. 289.

8. **Nonliability at Law.** — *Bowles' Case*, 11 Coke 79.



be substantially preserved and delivered over to the successive tenants in its integrity. Therefore, while a tenant in possession of an estate "without impeachment of waste" is allowed all his legal rights to the extent of taking all reasonable use and profit from the land, equity will restrain him from unreasonable, unconscientious or malicious acts of waste to the detriment of the inheritance.<sup>1</sup> In furtherance of this principle it has been provided, in *England*, by the Judicature Act, 1873,<sup>2</sup> that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." These restrainable acts became known as, and are still included under the general description of, "equitable waste."<sup>3</sup>

(4) *License from Remainderman*.—The tenant for life may, with the license of the remainderman, do acts which would otherwise be waste, and be under no liability therefor.<sup>4</sup>

*d. TENANTS IN DOWER AND BY CURTESY*—(1) *General Rule*.—In accordance with the above-stated rule of the common law,<sup>5</sup> since estates of dower and curtesy are created by the law, a remedy for at least voluntary waste is given by the common law, irrespective of any statutes, against tenants in dower<sup>6</sup> and tenants by the curtesy.<sup>7</sup>

(2) *Permissive Waste*.—There was a considerable conflict of opinion in the early authorities as to whether a tenant in dower is liable for permissive waste.<sup>8</sup> In the *United States* it has been doubted whether a tenant in dower is liable for permissive waste;<sup>9</sup> but since ordinary tenants for life, who have not expressly been made punishable for waste, are held to be liable for permissive as well as voluntary waste,<sup>10</sup> it is difficult to see why a different rule should be applied to tenants in dower. And there is authority to the effect that the same rule should be applied both to tenants in dower<sup>11</sup> and

1. **Liable for Equitable Waste.**—10 Bac. Abr. 468; *Baker v. Sebright*, 13 Ch. D. 179; *Vane v. Barnard*, 1 Salk. 161, 2 Vern. 738; *Rolt v. Somerville*, 2 Eq. Cas. Abr. 759, pl. 8; *Marker v. Marker*, 9 Hare 1; *Downshire v. Sandys*, 6 Ves. Jr. 110; *Aston v. Aston*, 1 Ves. 264; *Abraham v. Bubb*, 2 Eq. Cas. Abr. 757, pl. 1; *Williams v. Day*, 2 Ch. Cas. 32; *Turner v. Wright*, 2 De G. F. & J. 234; *Stevens v. Rose*, 69 Mich. 259; *Clement v. Wheeler*, 25 N. H. 361.

The case of *Garth v. Cotton*, 1 Ves. 524, 1 White & T. Lead. Cas. 870, is an instance in which the tenant for life was punishable for waste only in a qualified sense, voluntary waste being expressly excepted. The tenant for life, then without issue, and remainderman agreed together and cut down timber and divided the proceeds; but afterwards the tenant for life had a son, who was held entitled to recover from the remainderman's representatives the share he had received from the proceeds of the sale. See also *Vincent v. Spicer*, 22 Beav. 380.

**Malicious Acts of Waste.**—Where a tenant for life under a settlement "without impeachment of waste," from motives of displeasure at his son who was tenant in remainder, began wilfully to destroy the house, the court granted an injunction to restrain the waste and decreed that the house should be restored. *Vane v. Barnard*, 2 Vern. 738, 1 Salk. 161.

2. **Judicature Act.**—33 & 37 Vict., c. 66, § 25, subs. (3).

3. **What Constitutes Equitable Waste.**—See *supra*, *Particular Acts or Omissions Constituting Waste—Equitable Waste*.

4. **Acts Done under License from Remainderman.**—*Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362.

5. See *supra*, this section, *Persons in Rightful Possession—Early Common-law Rule*.

6. **Tenant by Dower Liable for Voluntary Waste.**—*Alexander v. Fisher*, 7 Ala. 514; *Crocker v. Fox*, 1 Root (Conn.) 323; *Parker v. Chambliss*, 12 Ga. 235; *Stetson v. Day*, 51 Me. 434; *Clark v. Holden*, 7 Gray (Mass.) 8, 66 Am. Dec. 450; *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19; *Fuller v. Wason*, 7 N. H. 341. See the title **DOWER**, vol. 10, p. 151, note 7.

7. **Tenant by Curtesy Liable for Waste.**—*McLeod v. Dial*, 63 Ark. 10; *Rose v. Hays*, 1 Root (Conn.) 244; *Armstrong v. Wilson*, 60 Ill. 226; *Learned v. Ogden*, 80 Miss. 769; *Porch v. Fries*, 18 N. J. Eq. 204; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260; *McCullough v. Irvine*, 13 Pa. St. 438.

8. **Liability of Tenant in Dower for Permissive Waste.**—For a review of the early authorities, see *Dozier v. Gregory*, 1 Jones L. (46 N. Car.) 100.

9. *Richards v. Torbert*, 3 Houst. (Del.) 172; *Smith v. Follansbee*, 13 Me. 273.

10. See *supra*, this section, *Tenants for Life or Years—Permissive Waste*.

11. *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407.

tenants by the curtesy.<sup>1</sup>

(3) *Discrimination Between Reversionary Interests.* — If a dower estate is set off to a widow in two or more separate and distinct tracts, she may not take firewood from one of the estates for use upon another.<sup>2</sup> But although the dower lands assigned to a widow may be partitioned among the heirs, so that the reversionary rights in the different parcels are in different persons, it does not follow that she is bound to use each parcel as if her husband died seized only of the one lot which constitutes such parcel; regardless of the partition, she may treat the dower lands fairly as one estate.<sup>3</sup> Thus, if a lot of woodland, separated from the cultivated lands, is included in the assignment of dower, the widow may take from the woodland fuel and timber for the use of the cultivated lands.<sup>4</sup> But she may not, through mere caprice and partiality, take wood from one reversionary interest rather than another.<sup>5</sup>

(4) *Liability of Husband of Tenant in Dower.* — The husband of a tenant in dower commits waste if he removes from the premises, even after the death of his wife, a house which he has built thereon,<sup>6</sup> but he is not liable for mere permissive waste after the death of his wife and after the surrender of his possession.<sup>7</sup>

*e. JOINTRESSES.* — A jointress is liable for the commission of waste by pulling down houses,<sup>8</sup> or by doing other like acts; but if she gives leave to the next in remainder for life, who is without impeachment of waste, to cut timber, and the remainderman in tail acquiesces in such cutting, the jointress is not liable to the remainderman in tail for the waste committed by him who was next in remainder for life.<sup>9</sup>

*f. JOINT TENANTS AND TENANTS IN COMMON* — *In England.* — By the English common law, a cotenant could not be guilty of waste, and, therefore, the same act which would be waste if committed by a tenant for life or for years, would not be waste when committed by a cotenant.<sup>10</sup> But this rule was changed by the statute of Westminster II.,<sup>11</sup> and a right of action was given to one tenant against his cotenant for waste committed by him.

*In the United States.* — While a cotenant seems to be liable for waste in

1. *Liability of Tenants by the Curtesy for Permissive Waste.* — Matter of Steele, 19 N. J. Eq. 120; Murch v. J. O. Smith Mfg. Co., 47 N. J. Eq. 193.

2. *Dower Estate in Separate Tracts.* — Cook v. Cook, 11 Gray (Mass.) 123.

3. *Dower Estate in One Tract Partitioned Between Heirs.* — Padelford v. Padelford, 7 Pick. (Mass.) 152; Childs v. Smith, 1 Md. Ch. 483; Dalton v. Dalton, 7 Ired. Eq. (42 N. Car.) 197.

In Owen v. Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467, the court, by Green, J., said: "She was not bound to notice any division which may have been made of the reversionary interest among the heirs; she took the dower estate as it was assigned to her with the rights and liabilities which attach to that as a whole; and although she may have destroyed all the timber which was on that part of one of the lots included in her dower, yet, if the dower estate was not injured, but benefited thereby, she would not be guilty of waste; for that is the great criterion by which to determine whether waste has been committed, as that only which does a lasting damage to the inheritance, or depreciates its value, is waste."

4. Childs v. Smith, 1 Md. Ch. 483; White v. Willis, 7 Pick. (Mass.) 143; White v. Cutler, 17 Pick. (Mass.) 248.

5. See Dalton v. Dalton, 7 Ired. Eq. (42 N. Car.) 197.

6. *Husband's Liability for Waste.* — McCullough v. Irvine, 13 Pa. St. 438.

7. Dozier v. Gregory, 1 Jones L. (46 N. Car.) 100.

8. *Liability of Jointress for Waste.* — Cooke v. Whaley, 1 Eq. Cas. Abr. 400, pl. 5; Cook v. Winford, 1 Eq. Cas. Abr. 221, pl. 2.

If a jointress has a covenant that her jointure shall be of a certain yearly value, which falls short, though her estate is not without impeachment of waste, yet the court will prohibit her committing waste so far as to make up the defect of her jointure. Carew v. Carew, 1 Eq. Cas. Abr. 400, pl. 6.

It is a question whether the court will relieve as to waste if the under tenant of a jointress commits waste sparsim, but improves the yearly value and offers to take a lease at the improved rent and to pay for the timber cut. Ligo v. Smith, 2 Vern. 263.

9. Aston v. Aston, 1 Ves. 396.

10. *English Common-law Rule.* — McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134, 49 Am. Rep. 686; Shiels v. Stark, 14 Ga. 429; Nelson v. Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; Elwell v. Burnside, 44 Barb. (N. Y.) 447.

11. *Statute of Westminster II.* — 13 Edw. I., c. 22.

some of the United States, irrespective of statute,<sup>1</sup> a number of states have enacted statutes somewhat similar to that of Westminster II., making cotenants liable for waste.<sup>2</sup>

**Cotenant Claiming Sole Ownership.** — In *Massachusetts*, on the ground that the object of the statute making cotenants liable for waste is to give a remedy against those who knowingly encroach upon the rights of their cotenants, it has been held that no action can be maintained under the statute against a cotenant who commits waste upon the common property thinking he is sole owner.<sup>3</sup> But a claim of title to the whole estate is not always sufficient to exempt the cotenant claiming the sole ownership from liability for waste.<sup>4</sup>

**g. MORTGAGORS AND MORTGAGEES — Mortgagors.** — A mortgagor, when in possession, may exercise the right of an owner, provided he does nothing to impair the security.<sup>5</sup> Thus, a mortgagor in possession, either before or

1. **Recognition of Waste by Cotenants Irrespective of Statute.** — *Dodge v. Davis*, 85 Iowa 77; *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72; *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 75.

2. **Statutory Liability of Cotenants for Waste — California.** — *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686.

*Georgia.* — *Shiels v. Stark*, 14 Ga. 429.

*Illinois.* — *Murray v. Havery*, 70 Ill. 318.

*Kentucky.* — *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550; *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

*Maine.* — *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Hubbard v. Hubbard*, 15 Me. 198; *Moody v. Moody*, 15 Me. 205.

*Massachusetts.* — *Jenkins v. Wood*, 145 Mass. 494; *Byam v. Bickford*, 140 Mass. 31.

*Michigan.* — *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589.

*Minnesota.* — *Shepard v. Pettit*, 30 Minn. 119.

*Missouri.* — *Childs v. Kansas City, etc., R. Co.*, (Mo. 1891) 17 S. W. Rep. 954.

*New York.* — *Cosgriff v. Dewey*, 164 N. Y. 1, affirming 21 N. Y. App. Div. 129; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447.

*North Carolina.* — *Morrison v. Morrison*, 122 N. Car. 598; *Hinson v. Hinson*, 120 N. Car. 400; *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574. And see *Darden v. Cowper*, 7 Jones L. (52 N. Car.) 210, 75 Am. Dec. 461.

*South Carolina.* — *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

*West Virginia.* — *Cecil v. Clark*, 47 W. Va. 402; *Williamson v. Jones*, 43 W. Va. 562.

The action on the case in the nature of waste, allowed by *North Carolina* Rev. Stat., c. 119, § 4, to one tenant in common against his cotenant, is limited to cases where there is a permanent injury done to the property held in common. *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

If one tenant in common destroys houses or trees, or does any act amounting to waste or destruction in woods or other such property, the other tenant may have an action on the case against him, but he can never, in any event, have an action of trespass *quare clausum fregit* against his cotenant, nor against any person entering by his authority. *Anders v. Mere-*

*dith*, 4 Dev. & B. L. (20 N. Car.) 199, 34 Am. Dec. 376.

3. **Cotenant Claiming Sole Ownership.** — *Jenkins v. Wood*, 145 Mass. 494.

The *Maine* Act of March 15, 1821, c. 35, § 2, which punishes waste committed by one tenant in common without notice to the others, by treble damages, applies only to cases where the tenancy in common is admitted, and not to cases where the entirety is claimed by title or disseizin, although it turns out defective as to a moiety. *Prescott v. Nevers*, 4 Mason (U. S.) 326.

4. Where one tenant in common disseizes his cotenant he is liable to an action for rents and for waste, notwithstanding the fact that he is in possession, claiming title as sole owner. *Dodge v. Davis*, 85 Iowa 77.

Where one tenant in common occupies the whole of the land, and excludes his cotenant from entering and enjoying the property, he will be liable to such cotenant for waste, and this without regard to any statute like that of 4 & 5 Anne. *Childs v. Kansas City, etc., R. Co.*, (Mo. 1891) 17 S. W. Rep. 954. See *contra*, *Prescott v. Nevers*, 4 Mason (U. S.) 326, 19 Fed. Cas. No. 11,390.

Where the defendant, a tenant in common, who is in possession of the premises, denies the complainant's right to a share, he cannot be permitted to commit waste by cutting the timber on the premises, pending the proceedings to establish the title, if his portion appears inadequate to answer for such waste. *Van Fleet v. C.*, in *Brown v. Farley*, Jan., 1883 (N. J.).

5. **Mortgagor's Right of Enjoyment — England.** — *Hampton v. Hodges*, 8 Ves. Jr. 105; *Ex p. National Mercantile Bank*, 16 Ch. D. 104. *Canada.* — *Wafer v. Taylor*, 9 U. C. Q. B. 609.

*Connecticut.* — *Cooper v. Davis*, 15 Conn. 556.

*Illinois.* — *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350.

*Iowa.* — *Corbin v. Reed*, 43 Iowa 459.

*Maine.* — *Judkins v. Woodman*, 81 Me. 351.

*Massachusetts.* — *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425; *Hagood v. Blood*, 11 Gray (Mass.) 400.

*Minnesota.* — *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203.

*New Hampshire.* — *Smith v. Moore*, 11 N. H. 55.



after condition broken, may cut timber for use upon the premises, as for fire-wood, or repairs, or other ordinary purposes, according to the usages of good husbandry.<sup>1</sup> But he may be enjoined from the commission of waste,<sup>2</sup> and he will commit waste by using the estate in an unauthorized way,<sup>3</sup> or so as to render it an inadequate security for the amount due upon the mortgage;<sup>4</sup> or, it has been held, even by using it so as to effect a material and vital

*Pennsylvania*.—*Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624; *Hoskin v. Woodward*, 45 Pa. St. 42.

*Vermont*.—*Wright v. Lake*, 30 Vt. 206.

In *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203, the land mortgaged constituted four acres, its principal value being a granite quarry thereon. It was held that while the removal of that material depreciated the value of the land, the quarrying had not been carried on to such an extent as to so far impair the value of the land as to render it insufficient security for the debt.

1. **Right to Estovers or Botes**.—*Hampton v. Hodges*, 8 Ves. Jr. 105; *Wafer v. Taylor*, 9 U. C. Q. B. 609; *Hapgood v. Blood*, 11 Gray (Mass.) 400; *Page v. Robinson*, 10 Cush. (Mass.) 102; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624; *Wright v. Lake*, 30 Vt. 206.

2. **Liable for Waste**.—*Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350.

3. **Unauthorized Use of Land**.—A mortgagor in possession held the land under an understanding with the mortgagee, from whom he had purchased it, that the mortgagor was to sell it in building lots; but the mortgagor sold the soil of the land and opened sand and stone quarries. It was held that he committed waste. *Martin's Appeal*, (Pa. 1887) 9 Atl. Rep. 490.

**Removal of Buildings**.—The mortgagor will commit waste if he removes buildings. *Dorr v. Dudderar*, 88 Ill. 107.

**Removal of Fixtures**.—The mortgagee may recover for the removal of fixtures, that being considered waste. *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564, 32 Leg. Int. (Pa.) 398.

After a mortgage foreclosure sale of real property, and while the purchaser is the holder of the sheriff's certificate of sale, but before the issue of the sheriff's deed thereon, removal by the mortgagor of fixtures is waste, for which an action of waste may be maintained by the purchaser to recover damages therefor. (*Wisconsin Rev. Stats.*, c. 143, §§ 8, 9.) So, where the mortgaged property was a blacksmith's shop, and the articles removed by the mortgagor included door locks and certain iron fixtures imbedded in the masonry of the forge chimney, it was held that these articles were part and parcel of the freehold and the removal of them was waste. Also, that the breaking of the chimney to remove the iron fixtures imbedded therein, was in itself an act of waste. *Lackas v. Bahl*, 43 Wis. 53.

4. **Rendering Security Inadequate**—*England*.—*Simmis v. Shirley*, 6 Ch. D. 173; *Harper v. Aplin*, 54 L. T. N. S. 383; *King v. Smith*, 2 Hare 239; *Usborne v. Usborne*, 1 Dick. 75; *Hippesley v. Spencer*, 5 Madd. 422.

*United States*.—*Bradley v. Reed*, 12 Pittsb. Leg. J. (Pa.) 65, 3 Fed. Cas. No. 1,785.

*Alabama*.—*Coker v. Whitlock*, 54 Ala. 180. See also *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58.

*California*.—*Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147; *Buckout v. Swift*, 27 Cal. 434, 87 Am. Dec. 90.

*Connecticut*.—*Maples v. Millon*, 31 Conn. 598; *Cooper v. Davis*, 15 Conn. 556.

*Illinois*.—*Dorr v. Dudderar*, 88 Ill. 107; *Nelson v. Pinegar*, 30 Ill. 473; *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350.

*Indiana*.—*Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

*Maryland*.—*Brown v. Stewart*, 1 Md. Ch. 87; *Salmon v. Clagett*, 3 Bland (Md.) 125.

*Massachusetts*.—*Wilmarth v. Bancroft*, 10 Allen (Mass.) 348.

*Michigan*.—*Webster v. Peet*, 97 Mich. 326.

*Minnesota*.—*Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203.

*Missouri*.—*State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310.

*New Hampshire*.—*Sanders v. Reed*, 12 N. H. 558.

*New Jersey*.—*Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387.

*New York*.—*Southworth v. Van Pelt*, 3 Barb. (N. Y.) 347; *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148. See *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507.

*Pennsylvania*.—*McGeorge v. Hancock Steel, etc., Co.*, 11 Phila. (Pa.) 602, 32 Leg. Int. (Pa.) 372.

*Vermont*.—*Hastings v. Perry*, 20 Vt. 272; *Langdon v. Paul*, 22 Vt. 205.

*Wisconsin*.—*Fairbank v. Cudworth*, 33 Wis. 358.

A purchaser of land subject to a mortgage, who removed a building from the mortgaged premises onto his own land, thereby rendering the security inadequate for the payment of the mortgage, is guilty of waste, and, in case of deficiency, is liable for the value of the building so removed. *Elder v. Hasche*, 67 Wis. 653.

No authority to commit waste upon mortgaged premises will be implied from the object for which the property was purchased, nor from the price agreed to be paid. *Coggill v. Millburn Land Co.*, 25 N. J. Eq. 90.

In an action by a second mortgagee of realty against the mortgagor or his assign, for an injury to the security resulting from the removal of fixtures or other waste, plaintiff need not prove actual knowledge of his mortgage on the part of the defendant. Constructive notice by proper registration is sufficient; nor need he prove that the defendant acted fraudulently or intended to injure him. Actual damage necessarily resulting from the defendant's act is the legal basis of his suit; nor is the insolvency of his debtor a material fact. *Jackson v. Turrell*, 39 N. J. L. 329.

The owner of the equity of redemption may not cut the growing timber if the premises are a scanty security for the mortgage debt thereon.

deterioration of the security contracted for.<sup>1</sup> But, of course, a mortgagor cannot be liable for waste committed prior to the execution of the mortgage.<sup>2</sup>

**Mortgagees.** — A mortgagee in possession is accountable for waste committed by himself or by an assignee,<sup>3</sup> and he may be required to account for any loss resulting therefrom.<sup>4</sup> The mortgagee in possession may be chargeable with permissive waste if he does not keep the mortgaged premises in repair, or if he cultivates the land improperly.<sup>5</sup>

**4. VENDORS AND PURCHASERS — Vendors.** — A vendor of land who retains possession after the contract of sale is made, is liable for waste committed by himself or by his tenants,<sup>6</sup> or even by one who claims adversely to him.<sup>7</sup> But a vendor who remains in possession of the land by agreement is not liable for waste by such cutting of trees as is consistent with a reasonable and proper use of the land.<sup>8</sup>

**Purchasers.** — A purchaser of land who remains in possession after the rescission of the contract to convey is liable for waste.<sup>9</sup> And since a vendor who sells on credit, retaining the title as security for the purchase money, sustains the same relation to the vendee, so far as the question of security is concerned, as does a mortgagee to the mortgagor, the vendee in possession, like a mortgagor, may be restrained from lessening the security by the commission of waste.<sup>10</sup> But the purchaser, like the mortgagor in possession, cannot be restrained from the exercise of the right to cut timber, unless the cut-

Bird, V. C., in *Gross v. Hoffman*, Nov., 1884 (N. J.).

A purchaser at a tax sale, holding only a sale certificate, and before the execution of a tax deed, has no such title or right to the land as will protect him in committing waste. *Douglas v. Dickson*, 31 Kan. 310.

**1. Effecting a Material Deterioration in the Security.** — *Beaver Lumber Co. v. Eccles*, 43 Oregon 400.

**2. Acts Done Prior to Execution of Mortgage.** — Where a purchaser of land entered into possession, and in about two months gave the vendor a note secured by a deed of trust on the land for an unpaid balance of the purchase money, in accordance with a previous understanding, it was held that he was not liable for waste in cutting trees on the land during the period intervening between the purchase and the execution of the trust deed. *Girard L. Ins., etc., Co. v. Mangold*, 94 Mo. App. 125.

**3. Liability of Mortgagee for Waste.** — *Farrant v. Lovel*, 3 Atk. 723; *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *McCormick v. Digby*, 8 Blackf. (Ind.) 99; *Morse v. Whitcher*, 64 N. H. 590; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Givens v. McCalmont*, 4 Watts (Pa.) 460.

**4. Sandon v. Hooper, 6 Beav. 246; *Hansom v. Derby*, 2 Vern. 392; *Perdue v. Brooks*, 85 Ala. 459; *McCormick v. Digby*, 8 Blackf. (Ind.) 99; *Whiting v. Adams*, 66 Vt. 679.**

A mortgagee in possession is bound to account for all rents, issues, and profits received by him, and for all waste and destruction of the premises, and must deduct the allowance for these matters from the amount due on the mortgage. But such allowances can only be claimed, either on bill to foreclose, or bill to redeem, against a mortgagee in possession, and in possession as mortgagee. He cannot be called to account in such suits for trespasses committed by him; nor if he is in possession as tenant of the mortgagor, under a lease from

him, which a mortgagee may take as well as a stranger, can the mortgagor claim an allowance for rent due on the lease, or waste committed as tenant. *Onderdonk v. Gray*, 19 N. J. Eq. 65.

**5. Liability of Mortgagee for Permissive Waste.** — *Russell v. Smithies*, 1 Anstr. 96; *Wragg v. Denham*, 2 Y. & C. 117; *Dexter v. Arnold*, 2 Sumn. (U. S.) 108; *Barnett v. Nelson*, 54 Iowa 41, 37 Am. Rep. 183; *Lenderking v. Rosenthal*, 63 Md. 28; *Youle v. Richards*, 1 N. J. Eq. 534, 3 Am. Dec. 722. See the title MORTGAGES, vol. 20, p. 1017 *et seq.*

**6. Liability of Vendors for Waste.** — *Holmberg v. Johnson*, 45 Kan. 197; *Marsh v. Current*, 6 B. Mon. (Ky.) 493; *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517, 16 Am. Dec. 115; *Worrall v. Munn*, 53 N. Y. 185; *Crawley v. Timberlake*, 2 Ired. Eq. (37 N. Car.) 460.

**7. Weakland v. Hoffman, 50 Pa. St. 513.**

**8. Right of Vendors to Cut Timber.** — *Crawley v. Timberlake*, 2 Ired. Eq. (37 N. Car.) 460.

**9. Purchaser Remaining in Possession After Rescission of Contract.** — *State v. Gramelspacher*, 126 Ind. 398; *Bartlett v. Blanton*, 4 J. J. Marsh. (Ky.) 426.

When a contract for the sale of land, which the purchaser has paid for and is put in possession of, is rescinded for causes free of fraud, the purchaser is not answerable for the natural wear and tear, or such deterioration only as may have resulted in the prudent and ordinary use of the land, but should be held responsible for waste or any damage or deterioration caused by gross neglect, wantonness, or mismanagement. *Williams v. Rogers*, 2 Dana (Ky.) 374.

**Permissive Waste.** — A purchaser in possession of mills, who negligently suffers them to be burned, will be responsible to his vendor for the loss, upon a rescission of the contract. *Cornish v. Strutton*, 8 B. Mon. (Ky.) 586.

**10. Purchaser on Credit.** — *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Core v. Bell*, 20 W. Va.

ting is such as to render the land insufficient security for the balance of the purchase price.<sup>1</sup> Nor can he be restrained from cutting such timber as he is entitled to cut by the terms of the contract of sale.<sup>2</sup> But if, by the terms of the contract of sale, the purchaser of land is to keep the premises "in as good condition" as they were at the date of the contract, until, by payment, he becomes entitled to a deed, he will be precluded from taking off timber until that time.<sup>3</sup>

**Exchange of Lands.** — In an exchange of land, one of the parties who commits waste between the time of the contract of exchange and the delivery of possession is liable to the other in an action on the case, even if there is no covenant against waste in the deed of exchange.<sup>4</sup>

**7. TENANTS AT WILL — Voluntary Waste.** — The tenant at will has the possession of the land and all the uses and profits incident to mere possession, but he is under an implied obligation to use the land in a tenant-like manner, and not to commit waste.<sup>5</sup> However, a tenant whose acts are such as would constitute waste in the case of other tenants is usually considered to have committed, not waste, but a trespass which terminates the tenancy and makes him liable to an action of trespass.<sup>6</sup> The tenant at will is also liable for waste committed by him, in an action *ex contractu* for the breach of an implied agreement to use the premises in a tenant-like manner.<sup>7</sup>

**Acts Constituting Waste.** — A tenant at will may be liable for waste if he cuts timber for other purposes than the repair of fences and buildings, etc., which he has agreed to keep in repair,<sup>8</sup> if he removes manure from the land,<sup>9</sup> if he places an excessive weight in a building,<sup>10</sup> or if he allows a meadow to be injured and fruit trees destroyed.<sup>11</sup>

**Permissive Waste.** — The statutes in regard to waste do not apply in terms to tenants at will, and it has uniformly been held that they are not liable for permissive waste.<sup>12</sup> It has been said that the reason of this exemption of tenants at will from liability for permissive waste was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repair.<sup>13</sup>

169; *Taylor v. Collins*, 51 Wis. 123. See *Moreton v. Reese*, *Wright* (Ohio) 381.

**1. Right of Purchaser to Cut Timber.** — *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507.

**2.** *Hoile v. Bailey*, 58 Wis. 434.

**3.** *Jennison v. Stone*, 33 Mich. 99.

**4. Liability for Waste upon Exchange of Lands.** — Where A and B entered into a contract for an exchange of lands, and subsequently passed the deeds of conveyance and delivered possession, before which time, and after the contract of sale, A committed waste on the land sold by him, it was held that B might maintain an action on the case against him for the injury. *Marsh v. Current*, 6 B. Mon. (Ky.) 493.

**5. Right of Tenant to Use Land.** — *Freeman v. Headley*, 33 N. J. L. 523.

**6. Tenancy at Will Terminated by the Commission of Waste.** — Co. Litt. 57; *West v. Treude*, Cro. Car. 187; *Salop v. Crompton*, Cro. Eliz. 777; *Goodwright v. Vivian*, 8 East 190; *Attersoll v. Stevens*, 1 Taunt. 104; *Shrewsburies Case*, 5 Coke 13; *Files v. Magoon*, 41 Me. 104; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Chalmers v. Smith*, 152 Mass. 561; *Perry v. Carr*, 44 N. H. 118; *Pettengill v. Evans*, 5 N. H. 54; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Suffern v. Townsend*, 9 Johns. (N. Y.) 35. See the title LANDLORD AND TENANT, vol. 18, p. 188, notes 3 and 4.

But in *Bellows v. McGinnis*, 17 Ind. 64, it

seems to be taken for granted that a tenant at will is liable to an action for waste. And see *Freeman v. Headley*, 33 N. J. L. 523.

**7. Action Ex Contractu.** — *Chalmers v. Smith*, 152 Mass. 561.

**8. Cutting Timber.** — *Suffern v. Townsend*, 9 Johns. (N. Y.) 35; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Wright v. Roberts*, 22 Wis. 161.

**9. Removing Manure from Land.** — *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269.

**10. Improper Use of Building.** — *Chalmers v. Smith*, 152 Mass. 561.

**11. Injuring Meadow or Destroying Fruit Trees.** — *Bellows v. McGinnis*, 17 Ind. 64.

**12. Not Liable for Permissive Waste.** — Litt., § 71; Co. Litt. 57a; *Harnett v. Maitland*, 16 M. & W. 257; *Shrewsburies Case*, 5 Coke 13; *Lothrop v. Thayer*, 138 Mass. 466; *Coale v. Hannibal*, etc., R. Co., 60 Mo. 227; *Moore v. Townshend*, 33 N. J. L. 284.

A tenant at will, or by sufferance, is not liable for waste committed by a stranger, and, therefore, can have no action against a railroad for fires communicated by sparks from one of its engines. *Coale v. Hannibal*, etc., R. Co., 60 Mo. 227.

**13. Reason for Making Tenants at Will Dispunishable for Permissive Waste.** — In *Moore v. Townshend*, 33 N. J. L. 284, the reasons for the exemption of tenants at will from liability for the commission of permissive waste is pointed



*J. TENANTS IN QUALIFIED FEES* — (1) *Tenants in Fee with Executory Devise Over.* — A tenant in fee subject to an executory devise over, is punishable for legal, but not for equitable, waste,<sup>1</sup> unless a provision against his committing waste is annexed to his estate.<sup>2</sup>

(2) *Contingent Interest in the Fee.* — Devisees holding contingent interests in the fee are not impeachable for waste, but will be prevented from despoiling the inheritance.<sup>3</sup>

(3) *Tenants in Tail.* — Tenants in tail are not impeachable for waste of any kind, either at law or in equity.<sup>4</sup> But tenants in tail after possibility of issue extinct, who are considered in effect as tenants for life without impeachment of waste, may be restrained from acts which are unduly destructive to the reversion and which come within the doctrine of equitable waste.<sup>5</sup>

(4) *Purchasers of State Lands.* — In case of forfeiture of state lands for nonpayment of the purchase money, the statutes of some states make special provision against the commission of waste by the purchaser.<sup>6</sup>

out by Depue, J., in the following language: "Tenants at will were always considered as omitted from the statute of Marlbridge, as well as from the statute of Gloucester, and therefore continued to be punishable for mere permissive waste and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester is attributable to the fact that the owner of the inheritance might at any time by entry determine the estate of the tenant, and thus protect the inheritance from spoil or destruction."

**1. Liability for Waste of Tenant in Qualified Fee.** — *Dyer v. Dyer*, 34 Beav. 504, 11 Jur. N. S. 721; *Matthews v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 305; *Gannon v. Peterson*, 193 Ill. 372. In *Turner v. Wright*, 2 De G. F. & J. 234, 6 Jur. N. S. 809, *Campbell, L. C.*, said: "The defendant is tenant in fee simple, with all the incidents of such an estate, although there be executory devises over, in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber, mature and fit to be cut, and not such as has been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first taker who is made tenant in fee should, during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life, and *sans waste*. He could not have intended that the first taker to whom he gave a fee should be more restricted in the management of the property than the devisee over, to whom he gave only a life estate. Having given the first taker a fee, he probably thought

it quite unnecessary expressly to make him punishable of waste. So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been if the testator, being a prudent man, had himself survived, and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter."

**North Carolina Homestead Estate.** — The estate in the homestead, as created by the constitution of North Carolina, is a determinable fee, and the owner thereof is not impeachable for waste. *Poe v. Hardie*, 65 N. Car. 447.

**2. Provision Against Waste Annexed to Estate.** — *Blake v. Peters*, 1 De G. J. & S. 345, 9 Jur. N. S. 836.

**3. Tenant Holding Contingent Interest in Fee.** — *Gordon v. Lowther*, 75 N. Car. 193.

If a devisee, having a life interest in land, may possibly take under the will an undivided interest in the fee, he is not a life tenant under the *North Carolina* code, and hence is not impeachable of waste, but may be enjoined from cutting timber not warranted by a course of prudent husbandry. *Farabow v. Green*, 108 N. Car. 339.

A devisee, whether his estate be an estate tail or a contingent fee, has no power to commit waste so as to destroy the inheritance. *Wallington v. Taylor*, 1 N. J. Eq. 314.

**4. Liability for Waste of Tenants in Tail.** — *Lifords Case*, 11 Coke 50a; *Hales v. Petit*, Plowd. 259; *Secheverel v. Dale*, Popham 194; *Atty.-Gen. v. Marlborough*, 3 Madd. 498; *Wigram, V. C.*, in *Ferrand v. Wilson*, 4 Hare 374.

**5. Abrahah v. Bubb**, 2 Show. 69; *Cooke v. Whaley*, 1 Eq. Cas. Abr. 400, pl. 5; *Williams v. Williams*, 15 Ves. Jr. 419, 11 Rev. Rep. 357, note; *Garth v. Cotton*, 1 Ves. 524, 1 White & T. Lead. Cas. 806; *Williams v. Day*, 2 Ch. Cas. 32; *Abraham v. Bubb*, Freem. Ch. 53.

**6. Purchasers of State Lands.** — The auditor of the county is authorized by *Indiana* Rev. Stat. 1881, § 4648, to bring an action in the name of the state for the use of *Indiana University*, when there has been a sale of any of the land selected by the governor in accordance with the

(5) *Tax Delinquents*. — The statutes of some states make special provisions to prevent waste upon lands on which taxes are due and remain unpaid.<sup>1</sup>

(6) *Purchasers of Tax Titles*. — The purchaser at a tax sale is not protected by his certificate from the commission of waste.<sup>2</sup>

(7) *Judgment Debtors*. — Acts on the part of a judgment debtor which diminish the value of the premises and impair the security of the creditor, may constitute waste.<sup>3</sup> But if no injury is done to the freehold, the judgment debtor will not be chargeable with waste.<sup>4</sup> And he will not be liable for waste committed before the execution sale.<sup>5</sup> Nor is a purchaser at an execution sale entitled to have the sale set aside because of waste committed after the purchase with his knowledge.<sup>6</sup>

(8) *Tenant by Elegit*. — It has been held that a tenant by *elegit* is not liable for waste.<sup>7</sup>

(9) *Guardians*. — Guardians are liable for waste committed by them,<sup>8</sup> but they do not commit waste if the acts complained of work no substantial

provision of a certain act of Congress, to recover any waste committed, in case of forfeiture by the purchaser. But the statute authorizes a recovery only against such purchasers as committed the waste, or with whose knowledge and permission it was done. *State v. Gramelspacher*, 126 Ind. 398.

1. *Tax Delinquents*. — See *Caldwell v. Ward*, 88 Mich. 378; *Rossman v. Adams*, 91 Mich. 69; *Lander v. Hall*, 69 Wis. 326.

2. *Purchasers at Tax Sales*. — See the title *TAX TITLES*, vol. 27, p. 983, note 3.

3. *Liability of Judgment Debtor for Waste*. — *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707; *Whitney v. Huntington*, 34 Minn. 458, 57 Am. Rep. 68; *Vandemark v. Schoonmaker*, 9 Hun (N. Y.) 16; *Rich v. Baker*, 3 Den. (N. Y.) 79; *Jones v. Britton*, 102 N. Car. 166.

In *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505, it was held that the owner of a steam mill property and land, incumbered by judgment liens beyond their value, could not sever and remove the steam engine or other constituent parts of the machinery so that, as personally, they might be levied upon and sold upon the execution of a subsequent judgment creditor, and that such severance was a fraud upon the prior judgment creditors of the debtor, such as a court of equity would restrain by injunction. So, in *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707, it was held that where the land of an insolvent debtor had been attached in a suit at law, a court of chancery, during the pendency of the suit at law, would enjoin the debtor from committing waste.

4. *Right to Work Mines in the Usual Way*. — It was held in *Ward v. Carp River Iron Co.*, 47 Mich. 65, that while the judgment debtor could not open new mines, he could work those already opened, if such working was done in the customary and reasonable way.

Where execution is levied on a mine, the taking of ore from the mine after the sale made on the execution, and during the period allowed for redemption, is not necessarily waste, as the judgment debtor is entitled to continue the working of the mine during that period in a reasonable and prudent manner, having regard to the customary working before the execution sale; and he can dispose of the products. If the mining be improper, exces-

sive, or wasteful, it may at any time be restrained, and the party responsible for it held liable in damages. *Ward v. Carp River Iron Co.*, 50 Mich. 522.

5. *Waste Committed Before Execution Sale*. — *Hughlett v. Harris*, 1 Del. Ch. 349, 12 Am. Dec. 104.

6. *Waste Committed After Execution Sale with Knowledge of Purchaser*. — *Miles v. Wilson*, 3 Harr. (Del.) 382.

7. *Tenant by Elegit Not Liable for Waste*. — In *Scott v. Lenox*, 2 Brock. (U. S.) 57, it was held that an action of waste is not maintainable against a tenant by *elegit*, either upon the principles of the common law or under the statute of *Virginia*. But in *Wilds v. Layton*, 1 Del. Ch. 226, 12 Am. Dec. 91, it was held that a tenant by *elegit* might be enjoined from tilling the soil in a way which is contrary to good husbandry.

A husband has no right by the marriage to cut down the timber on his wife's land, or to do those acts which, in the case of a tenant for life or years, would be waste. But the wife is destitute of the usual remedy by action for damages against the husband for this or any other injury to her inheritance, because a wife can in no case sue her husband. And if a judgment creditor of the husband extend his execution on the land of the wife, he thereby succeeds to the husband's legal right to the rents and profits of the land, but not to his legal impunity for waste. If the creditor in such case injure the inheritance of the wife, as by cutting down and selling the trees, an action on the case lies against him in which the husband must join. *Babb v. Perley*, 1 Me. 6.

8. *Liability of Guardians for Waste*. — *Morehead v. Hobbs*, 7 Ky. L. Rep. 748; *Patterson v. Tittman*, 54 Mo. App. 490; *Torry v. Black*, 58 N. Y. 185, reversing 65 Barb. (N. Y.) 414, 1 Thomp. & C. (N. Y.) 42; *Truss v. Old*, 6 Rand. (Va.) 556, 18 Am. Dec. 748.

The statutes of *Wisconsin* require every guardian to manage the estate of his ward frugally and without waste (Wis. Rev. Stat., c. 112, § 24), and this duty courts of equity will impose upon him, in the absence of any statutory provision, so that where injury has been caused to the estate by bad husbandry



injury to the estate,<sup>1</sup> or if the property has been managed as well as could reasonably be expected under the circumstances.<sup>2</sup>

(10) *Trustees.* — A trustee is not liable at law for waste committed on the lands which he holds in trust,<sup>3</sup> unless, perchance, he may be at the same time a tenant for life.<sup>4</sup>

(11) *Executors and Administrators.* — Wasteful management of the property of his testator or intestate by an executor or administrator is not what is known in the law technically as waste,<sup>5</sup> and has therefore been treated elsewhere in this work.<sup>6</sup> An executor who becomes a tenant of the tenant for life cannot be charged as executor for alleged waste committed by him while he is such tenant, if he does not exceed the rights of a tenant for life.<sup>7</sup>

**VII. REMEDIES FOR WASTE** — 1. **Early Remedies** — *a.* **IN GENERAL.** — By the common-law and early statutes there were the writ of estrepement and the writ of prohibition of waste to prevent threatened waste, and the writ of waste for the recovery of damages for waste actually committed.

*b.* **WRIT OF ESTREPEMENT.** — The writ of estrepement was a common-law writ for the prevention of waste. Originally it lay only after judgment in a real action and before possession was delivered by the sheriff.<sup>8</sup> But as waste might be committed in some cases pending the suit, the statute of Gloucester<sup>9</sup> gave another writ of estrepement *pendente placito*.<sup>10</sup> The writ

and improper cultivation, the guardian will be charged therewith, and must make good in his account. It constitutes waste within the meaning of the law. *Willis v. Fox*, 25 Wis. 646.

1. In *Bond v. Lockwood*, 33 Ill. 212, trees upon six acres were cut, but they proved to be of no particular value, and the worth of the land as an estate was not diminished; besides, the guardian accounted for the money which he received for the wood. It was held that he was not chargeable with waste, but it was said that under the common law he might have been, if the acts done had amounted to waste.

2. *Mahony v. Mahony*, 41 La. Ann. 135, wherein it was held that a tutor who had administered the estate of his wards as well as he could under straitened circumstances was not chargeable with waste simply because the buildings had become more or less dilapidated.

3. **Liability of Trustees for Waste.** — *Kincaid v. Scott*, 12 Johns. (N. Y.) 368, wherein the reasoning of the court was in substance as follows: At common law an action for waste lay only against guardian in chivalry, tenant in dower, and tenant by the curtesy, and not against a tenant for life or years. The *New York* statute "for preventing waste" gave an action for waste and triple damages and for seizure "against him or her who holdeth by curtesy or otherwise for term of life or for term of years, or other term, or a woman in dower as well as against guardians." Now since it could not be pretended that the defendant stood in the relation of guardian to the plaintiff, the only question to be determined was whether he should be considered as holding "for term of life or for term of years, or other term." The court was of the opinion that under the rules of construction applicable to penal statutes the defendant was not a tenant within the purview of the statute. He had been appointed trustee under the terms of the will and this gave him the right to occupy and control the real estate during the minority of the devisee as trustee for the

infant; and, as such, he was under the general superintendence and control of the chancellor, and was accountable according to the rules which govern trusts. He had no interest or estate in the lands in his own right and might be divested of the trust for incompetency or other good cause at the discretion of the chancellor.

Where real estate was devised to trustees absolutely and in fee, with full power to lease for the most money that could be obtained, and for any term that they thought proper, it was held that they were not guilty of waste in allowing a tenant to pull down an old building and put up a new one instead, it appearing that the resulting improvement greatly increased the value of the property. *New York Dyeing, etc., Establishment v. DeWestenberg*, Feb. 19, 1886, N. Y. Reg.

4. *Phillips v. Allen*, 7 Allen (Mass.) 115.

5. **Devastavit.** — *Wilbur v. Wilbur*, 7 Met. (Mass.) 249, wherein it was held that the *Massachusetts* Act of 1841, c. 55, which gives to the Supreme Judicial Court exclusive jurisdiction of all actions of waste, and all actions of the case in the nature of waste, does not apply to an action against an executor or administrator for wasteful management of the property of his testator or intestate, but is limited to those technical actions against tenants of real estate which are authorized by Mass. Rev. Stat., c. 105, §§ 1-6. See *supra*, this title, *Test: Distinguished from Devastavit*.

6. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 970 *et seq.*

7. *Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721.

8. **Writ of Estrepement.** — *Fitz. Nat. Brev.* 60; 3 Bl. Com. 225.

9. 6 Edw. I., c. 13.

10. 3 Bl. Com. 226; *Duvall v. Waters*, 1 Bland (Md.) 569; *Jones v. Whitehead*, 1 Pars. Eq. Cas. (Pa.) 304.

In *Jones v. Whitehead*, 1 Pars. Eq. Cas. (Pa.) 304, the court, by Parsons, J., said: "Hence,



was sometimes directed to the sheriff and also the party in possession of the lands, in order to make the latter amenable to the court as for a contempt in the event of his disobedience of the injunction of the writ.<sup>1</sup> By virtue of the writ of estrepement, the sheriff might resist those who commit waste, or offer to do so; and he might use sufficient force for the purpose.<sup>2</sup> While the writ of estrepement seems to be still available in at least *Pennsylvania*,<sup>3</sup> it has been generally superseded by the equitable remedy by injunction.<sup>4</sup>

c. WRIT OF PROHIBITION OF WASTE AND ATTACHMENT. — The writ of prohibition of waste issued out of a court of chancery and was directed to a tenant, prohibiting him from committing waste pending suit.<sup>5</sup> It was considered the foundation of a suit between the party suffering by the waste and the party committing it.<sup>6</sup> If this was disobeyed it was followed by an original writ of attachment from the same source returnable in the courts of common law.<sup>7</sup> By the statute of Westminster II., the writ of prohibition was taken away, and the writ of summons was substituted in its place.<sup>8</sup> But the entire remedy has been replaced in modern practice by the equitable remedy of

we find this word [estrepement] is used for the name of a writ which lay at the common law after judgment obtained in an action real, as on a writ of right, before possession was delivered by the sheriff, to stop any waste which the defeated party might be tempted to commit in lands which were determined no longer to be his. 2 Inst. 328. But by the statute of Gloucester, 6 Edw. I., c. 13, it was provided that this writ might be issued by any person having an action depending, as a formedon, writ of right, etc., to prohibit the tenant from committing waste during the pendency of the suit, lest, knowing the weakness of his title, he might be tempted to injure the land of the rightful owner."

1. At common law the proper process used to bring the tenant into court is a *venire facias*, and thereon an attachment. Upon the coming in of the defendant the plaintiff declares against him. The defendant generally pleads that "he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But since this verdict convicts the defendant of a contempt the court proceeds against him for that cause as in other cases. 2 Coke's Insts. 329; 5 Coke's Insts. 119; Jefferson v. Durham, 1 B. & P. 121.

2. Authority of Sheriff under Writ of Estrepement. — 3 Bl. Com. 225.

The writ of estrepement does not command the sheriff to take the body of the defendant, but authorizes him to do so, if necessary to prevent waste, and other means are evidently insufficient. Com. v. White, 9 Lanc. Bar. (Pa.) 41.

3. Survival of Writ of Estrepement. — Williard v. Williard, 56 Pa. St. 119; Heil v. Strong, 44 Pa. St. 264; Byrne v. Boyle, 37 Pa. St. 260; Jones v. Whitehead, 1 Pars. Eq. Cas. (Pa.) 304; Hensal v. Wright, 10 Pa. Co. Ct. 416; Duff's Appeal, 21 W. N. C. (Pa.) 491.

Writs of estrepement, like injunctions, are means of preserving property that is in litigation, from spoil or injury, until the rights in relation to it can be settled, and the statutes of *Pennsylvania* allowing them are simply declaratory of the common-law authority of the courts. Byrne v. Boyle, 37 Pa. St. 260.

Lien creditors are entitled to a writ of estrepement to stop the removal of timber and minerals from the land of the debtor. Duff's Appeal, 21 W. N. C. (Pa.) 491.

A writ of estrepement does not issue of course, but must be grounded on an affidavit of actual waste done or permitted. Dickinson v. Nicholson, 2 Yeates (Pa.) 281.

In *Delaware* the writ of estrepement is grantable only in real actions, and in ejectment since the Act of 1829. Burbage v. Dazy, 5 Harr. (Del.) 324.

In *New Jersey* a writ of attachment may be issued against the defendant in an ejectment suit who is committing waste, and upon whom a rule to stop it has been had. A foundation for the attachment must be laid by affidavits, of the taking of which the defendant or his attorney should have notice. Flommerfelt v. Zellers, 7 N. J. L. 31.

4. Writ of Estrepement Succeeded by Injunction. — Loudon v. Warfield, 5 J. J. Marsh. (Ky.) 196. See *infra*, this section, 2. b. Injunction.

5. Writ of Prohibition of Waste. — Jefferson v. Durham, 1 B. & P. 121; Duvall v. Waters, 1 Bland (Md.) 569; Attaquin v. Fish, 5 Met. (Mass.) 140; State v. Road Com'rs, 1 Mill (S. Car.) 55, 12 Am. Dec. 596.

6. Jefferson v. Durham, 1 B. & P. 121; Attaquin v. Fish, 5 Met. (Mass.) 140.

7. Writ of Attachment. — In Jefferson v. Durham, 1 B. & P. 120, the court, by Eyre, C. J., said: "At common law the proceeding in waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed the ends of justice were answered; but if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the original writ of attachment which was, and is, the foundation of all proceedings in prohibition."

8. Writ of Prohibition Abolished. — 2 Coke's Insts. 389; Jefferson v. Durham, 1 B. & P. 121; Goodeson v. Gallatin, 2 Dick. 455.

injunction.<sup>1</sup>

*d. WRIT OF WASTE* — (1) *In General*. — The early remedy for waste actually committed was the writ or action of waste, which was founded partly upon the common law and partly upon the statute of Gloucester.<sup>2</sup> It lay for the recovery of the premises wasted and for the recovery of damages, and hence was a mixed action,<sup>3</sup> although it has sometimes been classed as a real action.<sup>4</sup> The writ of waste referred to waste "committed against our prohibition," but the maintenance of it was not dependent on the prior issuance of a writ of prohibition, for the common law was itself a prohibition of waste.<sup>5</sup>

(2) *Present Status of the Action*. — The writ of waste long since fell into disuse in England, its place being taken by the action on the case in the nature of waste,<sup>6</sup> and was finally abolished in 1834.<sup>7</sup> In the *United States* the action of waste was generally adopted, and, while it seems that it still survives in some of the states,<sup>8</sup> its place has been taken quite generally by the action on the case in the nature of waste.<sup>9</sup> Under the codes and practice acts it would seem that the action of waste is practically the action on the case in the nature of waste.<sup>10</sup> But, notwithstanding this abandonment of the old action for waste, some knowledge of its general features is still of value, for the reason that the modern action on the case in the nature of waste may

**1. Writ of Prohibition Superseded by Injunction.** — In *Duvall v. Waters*, 1 Bland (Md.) 572, Bland, C., said that the writ of prohibition "was extended, by a statute passed in the year 1267, to tenants for life and for years; and afterwards, in 1285, it was taken away, and another form of writ given in its place; but when the court of chancery first granted injunctions it seems to have taken its jurisdiction from this writ of prohibition of waste."

**2. Action of Waste.** — Co. Litt. 53a; *Duvall v. Waters*, 1 Bland (Md.) 569; *Purton v. Watson*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 661.

**3. Nature of Action.** — *Stevens v. Rose*, 69 Mich. 259.

**4.** *Robinson v. Wheeler*, 25 N. Y. 252; *Purton v. Watson*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 661.

**5.** 2 Coke's Insts. 300.

**6. Disuse of Writ of Waste in England.** — *Queen's College v. Hallett*, 14 East 489; *Greene v. Cole*, 2 Saund. 252a, note 7; *Woodhouse v. Walker*, 5 Q. B. D. 406, 49 L. J. Q. B. 609; *Gibson v. Wells*, 1 B. & P. N. R. 290; *Bacon v. Smith*, 1 Q. B. 345, 41 E. C. L. 571, 4 Per. & Dav. 651; *Jefferson v. Jefferson*, 3 Lev. 131.

**7. Abolition of the Writ in England.** — 3 & 4 Wm. IV., c. 27, § 36. See *Stevens v. Rose*, 69 Mich. 259.

**8. Survival of the Writ in the United States.** — *Bullock v. Hayward*, 10 Allen (Mass.) 460; *Stevens v. Rose*, 69 Mich. 259; *Thackeray v. Eldigan*, 21 R. I. 481. See also *Wilbur v. Wilbur*, 7 Met. (Mass.) 249.

The action of waste, though generally superseded by the action of ejectment, in *Delaware* is still not obsolete. *Waples v. Waples*, 2 Harr. (Del.) 281.

In *Crocker v. Fox*, 1 Root (Conn.) 323, it was held that the action would lie against a tenant in dower. But in *Smith v. Follansbee*, 13 Me. 273, it was held that waste would not lie against a tenant in dower, but it was thought that an action on the case in the nature of waste might lie.

In *Stetson v. Day*, 51 Me. 434, it was held that under the *Maine* statute then existing a

reversioner might have an action of waste to recover the place wasted and damages, or he might have an action on the case in the nature of waste to recover damages only, but he could not have both.

**9. Abandonment of the Action in the United States** — *Georgia*. — *Parker v. Chambliss*, 12 Ga. 235.

*Indiana*. — *Bellows v. McGinnis*, 17 Ind. 64; *Bollenbacker v. Fritts*, 98 Ind. 52.

*Maine*. — *Stetson v. Day*, 51 Me. 434.

*Maryland*. — *Dickinson v. Baltimore*, 48 Md. 583; *M'Laughlin v. Long*, 5 Har. & J. (Md.) 113; *White v. Wagner*, 4 Har. & J. (Md.) 373; *Duvall v. Waters*, 1 Bland (Md.) 569.

*Michigan*. — *Stevens v. Rose*, 69 Mich. 259.

*New Hampshire*. — *Chase v. Hazelton*, 7 N. H. 171; *Elliot v. Smith*, 2 N. H. 430.

*New Jersey*. — *Moore v. Townshend*, 33 N. J. L. 284.

*New York*. — *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Robinson v. Wheeler*, 25 N. Y. 252.

*North Carolina*. — *Shields v. Lawrence*, 72 N. Car. 43.

*Pennsylvania*. — *McCullough v. Irvine*, 13 Pa. St. 438; *Shult v. Barker*, 12 S. & R. (Pa.) 272.

*West Virginia*. — *Rogers v. Coal River Boom, etc., Co.*, 41 W. Va. 596.

*Wisconsin*. — *Poertner v. Russel*, 33 Wis. 199.

See *infra*, this section, 2. *a. Action on the Case in the Nature of Waste*.

In *Dozier v. Gregory*, 1 Jones L. (46 N. Car.) 100, the court, by Battle, J., said: "The action of waste, which was founded upon privity of estate, and could only be brought by the owner of the inheritance against his immediate tenant for life or years, is now very seldom used, and has given way to a more easy and general remedy, to wit, an action on the case in the nature of waste."

**10. The Action of Waste under Codes and Practice Acts.** — *Parrott v. Barney*, Deady (U. S.) 409, 18 Fed. Cas. No. 10,773a; *Purton v. Watson*, (N. Y. City Ct. Gen. T.) 19 N. Y. St. Rep. 6, citing *Harder v. Harder*, 26 Barb. (N. Y.) 409; *St. John v. Pierce*, 22 Barb. (N. Y.) 362;

be maintained in all cases where the old writ of waste lay.<sup>1</sup> And although the writ of waste was abolished by 3 & 4 Wm. IV., c. 27, § 26, the decisions regarding it seem to have been applied generally to the action on the case in the nature of waste, which has been substituted both in England and the United States.<sup>2</sup>

(3) *By and Against Whom Maintainable* — (a) *In General*. — The immediate remainderman or reversioner may maintain an action of waste against the particular tenant by whom waste has been committed.<sup>3</sup> But by the common law an action of waste will lie only where there is privity of estate between the parties.<sup>4</sup> And the technical rule of the common law seems to be applied in construing statutes concerning waste, unless the statutes provide that privity of estate need not exist.<sup>5</sup>

(b) *By Whom* — *In General*. — By the common law an action of waste may be maintained by remainderman or reversioner for waste committed by a tenant during occupation.<sup>6</sup>

*Necessity of Estate of Inheritance*. — Waste being an injury to the inheritance, by the common law none but those entitled to the inheritance can bring the action of waste.<sup>7</sup> A contingent interest is not sufficient.<sup>8</sup>

*Future Life Tenant*. — He who is entitled to the remainder or reversion for life only cannot sue out a writ of waste; his interest may never come into possession and then he has suffered no injury.<sup>9</sup>

*Mortgagee*. — On the same principle, since the interest of a mortgagee may be defeated by the payment of the money secured by the mortgage, he cannot maintain an action of waste,<sup>10</sup> at least until there has been a forfeiture.<sup>11</sup>

*Necessity of Immediate Estate of Inheritance*. — By the common law no person could maintain the action of waste unless he had the immediate estate of inheritance.<sup>12</sup> But in *New York* this rule was altered at an early day so far

Lang *v.* Wilbraham, 2 Duer (N. Y.) 171. See also Dorsey *v.* Moore, 100 N. Car. 41.

1. *Similarity Between Action for Waste and Action on the Case*. — Patterson *v.* Cunliffe, 11 Phila. (Pa.) 564, 32 Leg. Int. (Pa.) 398.

2. Jefferson *v.* Jefferson, 3 Lev. 131; Bacon *v.* Smith, 1 Q. B. 345, 41 E. C. L. 571, 4 Per. & Dav. 651; Woodhouse *v.* Walker, 5 Q. B. D. 404; Stetson *v.* Day, 51 Me. 434; Stevens *v.* Rose, 69 Mich. 259.

3. *Tenant Committing Waste Liable to Immediate Remainderman or Reversioner*. — Co. Litt. 53a; Stout *v.* Dunning, 72 Ind. 343; Dawson *v.* Coffman, 28 Ind. 220; Wood *v.* Griffin, 46 N. H. 230.

4. *Necessity of Privity of Estate*. — Walker's Case, 3 Coke 23; Wilford *v.* Rose, 2 Root (Conn.) 20; Baker *v.* Johnson, 2 Marv. (Del.) 219; Foot *v.* Dickinson, 2 Met. (Mass.) 611; Bates *v.* Shraeder, 13 Johns. (N. Y.) 260; Browne *v.* Blick, 3 Murph. (7 N. Car.) 511; Williams *v.* Lanier, Busb. L. (44 N. Car.) 31; Patterson *v.* Cunliffe, 11 Phila. (Pa.) 564, 32 Leg. Int. (Pa.) 398.

5. Lander *v.* Hall, 69 Wis. 331.

6. *Action Maintainable by Reversioner or Remainderman*. — Greene *v.* Cole, 2 Saund. 252, note 7; Jefferson *v.* Durham, 1 B. & P. 120.

7. *Plaintiff Must Have Estate of Inheritance*. — 3 Bl. Com. 225; M'Laughlin *v.* Long, 5 Har. & J. (Md.) 113; Mayo *v.* Feaster, 2 McCord Eq. (S. Car.) 137.

8. *Contingent Interest Insufficient*. — Mayo *v.* Feaster, 2 McCord Eq. (S. Car.) 142.

An action for waste cannot be maintained by one having only a contingent remainder, though

the remainder is in fee. Hunt *v.* Hall, 37 Me. 363; Sager *v.* Galloway, 113 Pa. St. 500.

9. *Right to Remainder or Reversion for Life Insufficient*. — 3 Bl. Com. 225; M'Laughlin *v.* Long, 5 Har. & J. (Md.) 113; Mayo *v.* Feaster, 2 McCord Eq. (S. Car.) 137.

10. *Mortgagee's Interest Insufficient*. — Cooper *v.* Davis, 15 Conn. 556; Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350; Searle *v.* Sawyer, 127 Mass. 491, 34 Am. Rep. 425; Peterson *v.* Clark, 15 Johns. (N. Y.) 205.

11. Peterson *v.* Clark, 15 Johns. (N. Y.) 205.

12. *Plaintiff Must Have Immediate Estate of Inheritance*. — Com. Dig. Waste, C. 2; Co. Litt. 218b, note 122; Bac. Abr., tit. Waste, 3; Paget's Case, 5 Coke 76b; Bewick *v.* Whitfield, 3 P. Wms. 268, note; Bacon *v.* Smith, 1 Q. B. 345, 41 E. C. L. 571; Waples *v.* Waples, 2 Harr. (Del.) 281; Short *v.* Piper, 4 Harr. (Del.) 181; Hatch *v.* Hatch, 1 Ohio Dec. 271, 31 Cinc. L. Bul. 57.

"It will have been remarked that the action can only be brought by one who has the immediate estate of inheritance, i. e., an immediate reversion or remainder in fee or in tail. Thus, 'if a lease be made to A for life or years, remainder to B for life, and A commit waste, the action cannot be brought by him in the remainder, or reversion in fee or in tail, so long as the estate of B continues. But if B should afterwards die or surrender his estate, the reversioner or remainderman may bring an action against A for the waste so done by him, for by the death or surrender of B the impediment is removed. So, if a lease for life be made remainder for years the reversioner



as to permit "a person seized of an estate in remainder or reversion" to maintain waste for an injury done to the inheritance, notwithstanding an intervening estate for life or years.<sup>1</sup>

**Necessity of Legal Title in Plaintiff.** — The party bringing the action must have the legal title to the land,<sup>2</sup> be a trustee or have a right to the legal title.<sup>3</sup>

(c) **Against Whom.** — As has already been stated, waste was not punishable only in tenants in dower or by the curtesy and guardians in chivalry,<sup>4</sup> but by the statutes of Marlbridge and Gloucester liability for waste was extended to tenants for life and for years.<sup>5</sup>

**Executors and Administrators.** — By the common law an action of waste would not lie against an executor or administrator for waste committed by the decedent, for waste being a tort the cause of action is strictly personal and dies with the person.<sup>6</sup> But this rule has been very extensively changed by statute, and actions for waste survive against the administrator, etc., of the tenant.<sup>7</sup>

(d) **Effect of Assignment or Devolution of Particular or Future Estate — Assignment of Particular Estate.** — If the tenant assigns his estate to a person who commits waste, the reversioner or remainderman has no action against the assignee, for there is no privity of estate,<sup>8</sup> but he has his action against the original tenant on account of the privity between them.<sup>9</sup>

or remainderman may bring the action notwithstanding the mesne remainder. No person can maintain the action unless he had an estate of inheritance in him at the time of the waste committed, and, therefore, it does not lie by an heir for waste done in the lifetime of his ancestor, nor by the grantee of a reversion for waste done before the grant to him.<sup>10</sup> Yool on Law of Waste and Nuisance, p. 4.

**Right to Proceeds of Waste.** — Although the remainderman or reversioner may not bring an action for waste if there is an intervening estate, he is entitled to timber wrongfully cut upon the premises and has his action to enforce the right. See *infra*, *Proceeds of Waste*.

**1. Statutory Action Notwithstanding Intervening Estate.** — *Carris v. Ingalls*, 12 Wend. (N. Y.) 70.

The statute (1 *New York Law*, p. 527, Sess. 36, c. 56, § 33) authorizing any person or persons seized of an estate in remainder or reversion to maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding an intervening estate for life or for years, gives such person or persons, in remainder or reversion, an action of waste only against the tenant or his assignee or heirs; and an action of trespass against a stranger only. *Livingston v. Haywood*, 11 Johns. (N. Y.) 429.

A person must be seized of an estate in remainder or reversion, to maintain an action of waste for an injury done to the inheritance, when there is an intervening estate for life or for years (1 *New York Rev. Stat.* 750, § 8); but a court of equity will sometimes interfere to prevent waste when the party complainant cannot maintain an action at law against the wrongdoer. *Woodruff v. Cook*, 47 Barb. (N. Y.) 100.

**2. Plaintiff Must Have Legal Title.** — *Greenly v. Hall*, 3 Harr. (Del.) 9; *Baker v. Johnson*, 2 Marv. (Del.) 219; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Webb v. Boyle*, 63 N. Car. 271; *Southerland v. Jones*, 6 Jones L. (51 N. Car.) 321; *Gillett v. Treganza*, 13 Wis. 472.

**Executor.** — An executor who has no right or title to the premises, but is only authorized to lease the same, cannot maintain an action for waste. Such action can only be maintained by a reversioner in fee. But the executor may maintain an action upon covenants in the lease, against committing waste. *Page v. Davidson*, 22 Ill. 111.

**3. Trustee.** — A trustee named in a will may maintain the action of waste even though he does not name himself as trustee in the declaration. *Woodman v. Good*, 6 W. & S. (Pa.) 169.

**Cestui Que Trust.** — A *cestui que trust* may maintain an action of waste against his trustee, without first obtaining a conveyance of the legal title. *Wyant v. Dieffendafer*, 2 Grant Cas. (Pa.) 334. But see *Gillett v. Treganza*, 13 Wis. 472.

**4. Persons Liable to Action of Waste.** — See *supra*, *Who May Commit Waste — Persons in Rightful Possession — Early Common-law Rule*.

**5.** See *supra*, *Who May Commit Waste — Persons in Rightful Possession — Statutes of Marlbridge and Gloucester*.

**6. Executors and Administrators.** — *Co. Litt.* 53b; *Whitney v. Morrow*, 34 Wis. 644. See the title DEBTS OF DECEDENTS, vol. 8, p. 1029.

**7.** For example, see the following statutes: *Me. Rev. Stat.* 1871, c. 95, § 4; *Mass. Pub. Stat.*, c. 179, § 5; *Mich. Rev. Stat.*, pt. 3, tit. 3, c. 6, § 6.

**8. Assignment of Particular Estate.** — *Com. Dig.*, Waste, C. 4; *Bac. Abr.*, Waste, H.; *Walker's Case*, 3 Coke 23; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260.

**9.** *Walker's Case*, 3 Coke 23; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260.

But by the *New York Code of Civil Procedure*, § 1651, an action of waste lies against the assignee of a term of years for waste committed by him, but not against the lessee; the proper action against the lessee is for breach of the covenants of the lease. *Donald v. Elliott*, (Supm. Ct.) 11 Misc. (N. Y.) 120, 24 Civ. Pro. (N. Y.) 190.

**Assignment or Devolution of Future Estate.** — The reversioner who has assigned or become divested of the reversion cannot maintain an action of waste.<sup>1</sup> And, since there is a want of privity of estate, the assignee of a remainder or reversion cannot, by the common law, maintain an action of waste done before the assignment.<sup>2</sup> And the same would be the effect if the reversioner or remainderman should die; the heir could have no action against the particular tenant for waste committed during the lifetime of the ancestor.<sup>3</sup> But in several of the *United States* the difficulties as to the forms and parties to the action of waste, arising from the technical rules of the common law, have been obviated by statute, in some cases giving the heir of the reversioner an action for waste done in the lifetime of the ancestor.<sup>4</sup> And, under the statutes of some of the *United States*, the action of waste may be maintained by the assignee of the reversioner.<sup>5</sup>

**Assignment of Both Particular and Future Estate.** — If the particular tenant assign his estate and the remainderman or reversioner also grants away his estate, either before or after the assignment, the privity is gone, and while the grantee has waste against the assignee for waste afterwards committed,<sup>6</sup> he has no action against the original tenant.<sup>7</sup>

(e) **Effect of Lease from Particular Tenant to Remainderman.** — It has been held that where a tenant for years demised the premises to the remainderman for the term, the estate for years immediately merged in the remainder in fee and the lessee could not maintain an action of waste against the lessor.<sup>8</sup>

**2. Modern Remedies** — *a. ACTION ON THE CASE IN THE NATURE OF WASTE* — (1) *In General.* — As has been shown, owing to usage and statutes, the action of waste has almost wholly fallen into disuse, and its place has been taken very generally by the action on the case in the nature of waste.<sup>9</sup> The reason for this was the many advantages which the action on the case has over the action of waste.<sup>10</sup>

**1. Assignment of Reversion or Remainder.** — *Waples v. Waples*, 2 Harr. (Del.) 281.

2. *Co. Litt.* 53*a*; *Greene v. Cole*, 2 Saund. 235, note 2; *M'Laughlin v. Long*, 5 Har. & J. (Md.) 113; *Carris v. Ingalls*, 12 Wend. (N. Y.) 70; *Robinson v. Wheeler*, 25 N. Y. 252.

But in *Fay v. Brewer*, 3 Pick. (Mass.) 203, it was held that where a mortgagee of a reversion of an estate in dower entered after condition broken, but not before, he might maintain an action against the tenant for life for waste committed before the breach of the condition.

**3. Devolution of Reversion or Remainder.** — *Browne v. Blick*, 3 Murph. (7 N. Car.) 511.

4. For example see the following statutes: Del. Rev. Code 1852, c. 88, § 5; Iowa Code 1873, p. 533; Ky. Gen. Stat. 1873, p. 609; Me. Rev. Stat. 1871, c. 95; Mass. Pub. Stat., c. 179, § 1; Mich. Comp. Stat. 1857, c. 136, § 4; Mo. Wagner Stat. 884; N. J. Nixon's Dig. 908; N. Y., 2 Stat. at L. 345; Wis. Rev. Stat. 1858, c. 143, § 4.

**5. Statutory Action by Grantee of Remainderman or Reversioner.** — *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60.

**6. Assignment by Both Particular Tenant and Reversioner or Remainderman.** — *Coke on Litt.* 54*a*.

7. In one case a widow had assigned her interest and the reversioner had assigned his. Her assignee committed waste. It was held that the assignee of the reversion could not have waste or an action on the case in the nature of waste against her, because of the

want of privity between them. *Foot v. Dickinson*, 2 Met. (Mass.) 611.

**8. Right of Remainderman Who Leases from Tenant for Years to Maintain Action of Waste.** — A tenant for years demised to the remainderman, to have and to hold, during the term, reserving to the lessor the right to erect buildings on the demised premises, without hindrance, the lessee yielding and paying a yearly rent, and engaging to keep the fences in repair, and to pay all taxes; "it being understood that in case the lessor should use any part of the land for buildings and their appendages, a proportionate amount shall be deducted from the rent which the lessee is to pay." It was held that the term merged in the remainder, and that the lessee could not maintain an action of waste against the lessor. *Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

**9. Action of Waste Superseded by Action on the Case.** — See *supra*, this section, *Early Remedies* — *Writ of Waste* — *Present Status of the Action*.

In Iowa an owner of land may have trespass for acts of permanent injury done to it while in possession of a tenant, the statute having done away with the distinction between trespass and case. *Brown v. Bridges*, 31 Iowa 145.

**10. Advantages of the Action on the Case.** — See *Dozier v. Gregory*, 1 Jones L. (46 N. Car.) 100.

Although the plaintiff cannot, in an action on the case, recover the place wasted, where the tenant is still in possession, as he may do in an action of waste, yet this latter action was found by experience to be so imperfect

(2) *Nature and Scope of the Action.* — The action on the case in the nature of waste is not of a possessory character, but is an action for the recovery of damages merely.<sup>1</sup> And the recovery in the common-law action is limited to the damages actually sustained.<sup>2</sup>

(3) *When the Action Lies.* — The action on the case may be maintained in all cases where the old writ of waste would issue, yet it does not follow that it is confined to such cases.<sup>3</sup> "It is of the very nature of the action on the case that it is adapted as a remedy for all legal wrongs for redress of which the other forms of action are not applicable."<sup>4</sup> The action may be maintained, although the waste alleged might be the subject of an action for the breach of an express covenant contained in an instrument of demise, or for the breach of a promise implied by law;<sup>5</sup> if the lessee covenants merely against waste, that is, to the same effect as the common-law liability for waste, the remedy by action of waste is retained notwithstanding the covenant, but if the covenant varies the liability the remedy lies upon the covenant.<sup>6</sup> A lessor may maintain the action although he permits the tenant to retain possession after the commission of waste and accepts rent for the full term for which the premises are let.<sup>7</sup> Case in the nature of waste will be against a tenant for years after the expiration of the term,<sup>8</sup> or after notice to quit.<sup>9</sup>

**Permissive Waste.** — The earlier cases held that the action on the case would not lie for permissive waste,<sup>10</sup> and this has been held of the corresponding statutory action in some of the states.<sup>11</sup> But the better rule seems to be that the action does lie for permissive waste.<sup>12</sup> However, the action cannot be

and defective a mode of recovering seizin of the place wasted that the plaintiff obtained little or no advantage from it. It has also this further advantage over an action of waste; it may be brought by him in the reversion or remainder for life or years, as well as in fee, or in tail, and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste. *Greene v. Cole*, 2 Saund. 234, note.

1. **Damages Only Recoverable.** — *Randall v. Cleaveland*, 6 Conn. 328; *Parker v. Chambliss*, 12 Ga. 235; *Stetson v. Day*, 51 Me. 434; *Duval v. Waters*, 1 Bland (Md.) 569; *Fay v. Brewer*, 3 Pick. (Mass.) 203; *Chase v. Hazelton*, 7 N. H. 171; *Moore v. Townshend*, 33 N. J. L. 284.

2. See *infra*, *Damages and Penalties*.

**Distinguished from Action for Wilful and Malicious Injury to Real Property.** — The action of waste and the action on the case in the nature of waste are to be distinguished from the statutory action for wilful and malicious injury to real property. *Bandlow v. Thieme*, 53 Wis. 57.

3. **When Action on the Case Maintainable.** — *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564, 32 Leg. Int. (Pa.) 398.

4. *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71.

5. *Marker v. Kenrick*, 13 C. B. 188, 76 E. C. L. 188; *Moore v. Townshend*, 33 N. J. L. 284. See *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258.

Though assumpsit is the usual remedy against a tenant for not cultivating land according to the course of good husbandry, or for not repairing, yet for voluntary waste, and particularly where there has been any conversion of trees or other property, case is frequently preferable; and this, it has been held,

is a concurrent remedy with covenant, where there has been voluntary waste. *Queen's College v. Hallett*, 14 East 489.

6. *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Jones v. Hill*, 7 Taunt. 392, 2 E. C. L. 392; *Marker v. Kenrick*, 13 C. B. 188, 76 E. C. L. 188, 22 L. J. C. P. 129.

7. **Permitting Tenant to Retain Possession and Accepting Rent After the Commission of Waste.** — *Chalmers v. Smith*, 152 Mass. 561.

8. **Action Lies After Expiration of Term.** — *Kinlyside v. Thornton*, 2 W. Bl. 1111.

9. **Action Lies After Notice to Quit.** — *Burchell v. Hornsby*, 1 Campb. 360.

10. **Whether the Action Lies for Permissive Waste.** — *Herne v. Bembow*, 4 Taunt. 764; *Jones v. Hill*, 1 Moo. 100; *Gibson v. Wells*, 1 B. & P. N. R. 290; *Yellowly v. Gower*, 11 Exch. 294.

In *Turner v. Buck*, 22 Vin. Abr. 523, it was held that there was no remedy in law or equity, as a general rule, for permissive waste, after the death of the particular tenant.

11. In *New York* it has been said that the action of waste does not lie for permissive waste, for whatever duties the law casts on the tenant it raises an implied assumpsit for him to perform if there be no covenant, and if there be one the action should be on that. *Danziger v. Silberthan*, (N. Y. Super. Ct. Spec. T.; 21 Civ. Pro. (N. Y.) 283.

The *Kentucky* statutory action for waste (Ky. Stat., § 2328), wherein treble damages may be recovered, has been held not to lie for permissive waste. *Smith v. Mattingly*, 96 Ky. 228.

12. *Woodhouse v. Walker*, 5 Q. B. D. 404; *Harnett v. Maitland*, 16 M. & W. 257; *Parrott v. Barney*, Deady (U. S.) 409; *White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; *Stevens v. Rose*, 69 Mich. 259; *Dozier v. Greg-*



maintained against a tenant who cuts up and converts trees which have been blown down by the wind.<sup>1</sup>

(4) *By and Against Whom Maintainable* — (a) *General Rule.* — Generally speaking, the action upon the case in the nature of waste may be maintained by any one having a reversionary interest in the premises wasted against any one who does the injury, whether the tenant or a stranger.<sup>2</sup> Privity of estate seems to be still necessary in a few jurisdictions,<sup>3</sup> but the general rule is that the privity of estate between the parties which is necessary to the maintenance of an action of waste<sup>4</sup> is not essential to the maintenance of the action on the case in the nature of waste,<sup>5</sup> for this action may be maintained even against a stranger.<sup>6</sup>

(b) *By Whom Maintainable* — *In General.* — While the action of case in the nature of waste can only be maintained by one who has an interest in the reversion,<sup>7</sup> it differs from the action of waste in that it may be brought by any reversioner or remainderman; it may be brought by one having a future estate for life or years as well as by one having an estate in fee.<sup>8</sup>

ory, 1 Jones L. (46 N. Car.) 100. See *supra*, *Who May Commit Waste—Tenants for Life or Years—Tenants in Dower and by Curtesy, and Tenants at Will.*

1. *Action Does Not Lie for Appropriation of Windfalls.* — Shult v. Barker, 12 S. & R. (Pa.) 272.

2. *General Rule.* — Greene v. Cole, 2 Saund. 252d, note; Elwes v. Maw, 3 East 38; Randall v. Cleaveland, 6 Conn. 328; Dickinson v. Baltimore, 48 Md. 583; Chase v. Hazelton, 7 N. H. 171; Dupree v. Dupree, 4 Jones L. (49 N. Car.) 387. See the title TRESPASS ON THE CASE, vol. 28, p. 622.

A reversioner may maintain an action of waste to recover damages of the tenant for life, for felling timber trees on the premises for the purpose of sale, although the tenant acted in good faith or under the claim of right, or was in possession claiming title in fee to the land upon which the waste was committed; and such reversioner is not debarred from his remedy at law or in equity for waste, because the proceedings may involve the determination of a disputed title. Robinson v. Kime, 70 N. Y. 147.

3. *Privity of Estate.* — See Hatch v. Hatch, 1 Ohio Dec. 270; Lander v. Hall, 69 Wis. 326; Whitney v. Morrow, 34 Wis. 644.

4. See *supra*, this section, 1. *Early Remedies—Writ of Waste—By and Against Whom Maintainable—In General.*

5. Dickinson v. Baltimore, 48 Md. 583; Dozier v. Gregory, 1 Jones L. (46 N. Car.) 100; Williams v. Lanier, Busb. L. (44 N. Car.) 30; Dupree v. Dupree, 4 Jones L. (49 N. Car.) 387.

6. See *infra*, this section, (c) *Against Whom Maintainable.*

7. *Reversionary Interest in Plaintiff Necessary.* — M'Laughlin v. Long, 5 Har. & J. (Md.) 113, wherein it was held that the plaintiff who had rented a room for one year from the owner of the freehold could not maintain an action on the case for waste against the defendant to whom he had rented the room for two years, thereby transferring all the interest he had in the premises.

*Executor.* — An executor who is only authorized to lease premises, and has no right or title

to them, cannot maintain an action for waste, but he may maintain an action upon the covenants in the lease against committing waste. Page v. Davidson, 22 Ill. 111.

*Vendors.* — It has been held that where a purchaser of land is in possession under a contract of sale remaining open and in force between the parties, he is not liable to the vendor in an action on the case for an injury to the property. The vendor in such case has not a reversionary interest for an injury for which he can recover damages, nor can he support an action for such damages in the nature of an action for waste. Stauffer v. Eaton, 13 Ohio 322.

8. *Estate for Life or Years Sufficient.* — Greene v. Cole, 2 Saund. 252, note 7; Cru. Dig. 124; Williams v. Lanier, Busb. L. (44 N. Car.) 30; Dozier v. Gregory, 1 Jones L. (46 N. Car.) 100.

A reversioner or remainderman, whether in fee or for life or years, may, if his residuary interest was wasted, bring either the "real action" of waste or a suit for trespass for single damages alone. Purton v. Watson, (N. Y. City Ct. Gen. T.) 19 N. Y. St. Rep. 6. See also Bouton v. Thomas, 46 Hun (N. Y.) 6; Thompson v. Manhattan R. Co., 130 N. Y. 360.

Where the tenant in possession of real estate under a lease, and after the death of the lessor, wrongfully cut therefrom a large quantity of wood and converted the same to his own use, it was held that such cutting was clearly waste for which the parties entitled to the reversion, and not the administrator, would be entitled to recover in trespass for waste. Howard v. Patrick, 38 Mich. 795.

*Guardians.* — The Revised Statutes of Indiana, 1881, give the right or cause of action for waste or trespass for injury to the inheritance to the person seized of the estate in remainder or reversion. And when an infant shall have a right of action, such infant shall be entitled to bring suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age. It was held that an infant seized of an estate in remainder or reversion must sue in his own proper name or by next friend for waste, or trespass, or injury to the inheritance committed by the life tenant, and that a guardian of the infant cannot

**Contingent Remainderman or Reversioner.** — But the action cannot be maintained by one having only a contingent remainder or reversion or who is entitled upon a contingency to an executory devise,<sup>1</sup> nor by the devisee of a contingent remainder.<sup>2</sup>

**Mortgagees.** — On the same principle it has been held that, since the interest of a mortgagee before forfeiture may be defeated by payment of the money secured by the mortgage, he cannot maintain an action on the case in the nature of waste;<sup>3</sup> but it seems that the mortgagee has an action against the mortgagor for acts of waste which impair the security, and that he may recover damages for the injury to the mortgage as distinguished from injury to the land.<sup>4</sup> And the action of case in the nature of waste may be maintained by a mortgagee for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for the sale of the mortgaged premises has been obtained.<sup>5</sup> It has been held that a mortgagee may also maintain an action on the case against a stranger,<sup>6</sup> and against a tenant

not maintain an action. *Wilson v. Galey*, 103 Ind. 257.

**Party Redeeming Land Sold on Execution.** — It has been held that a party who redeems land sold on execution after receiving the sheriff's deed can maintain an action for waste against any person who, between the sale and the sheriff's deed, cuts and takes away timber from the premises. *Thomas v. Crofut*, 14 N. Y. 474, in which case it was so held where the party who bid off the premises at the sheriff's sale cut and carried away the timber with the consent of the judgment debtor who was in possession.

**1. Contingent Interest Insufficient.** — *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350; *Hunt v. Hall*, 37 Me. 363; *Peterson v. Clark*, 15 Johns. (N. Y.) 205; *Hatch v. Hatch*, 1 Ohio Dec. 271; *Sager v. Galloway*, 113 Pa. St. 500.

**2. Devisee of Contingent Remainder.** — *Sager v. Galloway*, 113 Pa. St. 500.

**3. Right of Mortgagee to Maintain the Action Denied.** — *Peterson v. Clark*, 15 Johns. (N. Y.) 205. See *supra*, this section, i. d. (3) *By and Against Whom Maintainable — By Whom*.

**4. Right of Mortgagee to Recover Damages for Injury to Lien of Mortgage.** — In holding that an action on the case will lie by the holder of a mortgage on land, against the mortgagor or a purchaser of the equity of redemption, for acts of waste committed with the knowledge that the value of the security will be thereby impaired, the court, in *Van Pelt v. McGraw*, 4 N. Y. 110, by Platt, J., said: "The case of *Yates v. Joyce*, 11 Johns. (N. Y.) 136, was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case was referred to and approved in *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213, and in *Gardner v. Heartt*, 3 Den. (N. Y.) 234. Nor is there anything in the case of *Peterson v. Clark*, 15 Johns. (N. Y.) 205, which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seizin in the plaintiff, upon which the defend-

ant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seizin. It is quite clear that upon such an issue the mortgagee must fail. Now, this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable."

**5. Recognition of Right of Mortgagee to Maintain the Action.** — It has been held that an action on the case in the nature of waste can be maintained by a mortgagee after foreclosure but before the time limited for redemption. *Langdon v. Paul*, 22 Vt. 205.

A mortgagee may maintain an action on the case against the mortgagor, or a person claiming under him, for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for the sale of the mortgaged premises, where the mortgagor is insolvent, and the mortgaged premises are inadequate security for the mortgage debt. *Southworth v. Van Pelt*, 3 Barb. (N. Y.) 347. See also *Cooper v. Davis*, 15 Conn. 556.

Where a mortgagor in possession procures the removal of a building from the premises, without the consent or knowledge of the mortgagee, it seems that the person removing the same with a knowledge of the existence of the mortgage, as well as the mortgagor, is legally responsible in damages to the mortgagee. *Dorr v. Dudderar*, 88 Ill. 107.

A purchaser of real estate at a mortgage sale acquires an inchoate right to the land, subject to be defeated by redemption. If not so redeemed, his title becomes absolute and relates back to the time of purchase, and he may then recover for injury to the estate by cutting and carrying away growing timber between the time of sale and the expiration of the time for redemption. *Stout v. Keyes*, 2 Dougl. (Mich.) 184, 48 Am. Dec. 465.

**6. Patterson v. Cunliffe**, 11 Phila. (Pa.) 564, 32 Leg. Int. (Pa.) 398.

for life who commits waste before the mortgagee of the reversion enters.<sup>1</sup>

**Immediate Reversion in Plaintiff Not Necessary.** — It is not necessary, as in the action of waste, that the plaintiff have the immediate reversion; he may maintain case though there may be an intervening life estate.<sup>2</sup> It is now frequently provided by express statutory provisions that the action may be maintained by the remainderman or reversioner notwithstanding the existence of an intervening estate for life or years.<sup>3</sup> And it has been held that it is now necessary that the owner of the intervening estate for life or years unite with the reversioner or remainderman as plaintiff.<sup>4</sup>

**Whether Plaintiff Must Have Legal Title.** — There is some authority to the effect that one who has not the legal title to the land cannot maintain an action in the nature of waste.<sup>5</sup> It has been said that actions of waste and ejectment, being legal remedies, must be brought by the person legally interested in the property, and cannot be maintained by a *cestui que trust* or other person having only an equitable interest.<sup>6</sup> But it has been held that a *cestui que trust*, after arriving at his majority, can maintain an action on the case in his own name for waste of the premises without a conveyance to him of the legal title, even though there be a provision in the trust deed that the premises shall be conveyed to him.<sup>7</sup>

(c) **Against Whom Maintainable — In General.** — For a treatment of the question of who are liable for waste reference should be made to a preceding section under this title.<sup>8</sup>

**Strangers.** — Unlike the action of waste, which will lie only where there is a privity of estate between the parties, the action on the case in the nature of waste may lie against a stranger.<sup>9</sup> It has been said that whenever the action of waste could be maintained for an injury committed by a privy, the remedy for such an injury committed by a stranger would be by action on the case in the nature of waste.<sup>10</sup> The immediate remainderman or reversioner may maintain case in the nature of waste for injury to his interest in the freehold at the same time that a tenant for life sues for injury done to his possession.<sup>11</sup> But it has been held that the *New York* statute,<sup>12</sup> giving the reversioner or remainderman an action of waste or trespass, notwithstanding any intervening

1. *Fay v. Brewer*, 3 Pick. (Mass.) 203.

2. **Mediate Reversioner or Remainderman.** — *Short v. Piper*, 4 Harr. (Del.) 181.

3. *Wilson v. Galey*, 103 Ind. 257; *Woodruff v. Cook*, 47 Barb. (N. Y.) 309; *Donald v. Elliott*, (Supm. Ct.) 24 Civ. Pro. (N. Y.) 190, citing *Purton v. Watson*, (N. Y. City Ct. Gen. T.) 19 N. Y. St. Rep. 6, and *Williams v. Peabody*, 8 Hun (N. Y.) 271. See also *Bouton v. Thomas*, 46 Hun (N. Y.) 6.

4. **Joinder of Tenant.** — *Van Deusen v. Young*, 29 N. Y. 9; *Bouton v. Thomas*, 46 Hun (N. Y.) 6.

But in *Bullock v. Hayward*, 10 Allen (Mass.) 460, it was held that in an action of tort in the nature of waste, all the owners of the premises wasted must join as plaintiffs.

5. **Necessity of Legal Title in Plaintiff.** — *Weob v. Boyle*, 63 N. Car. 271.

6. *Gillett v. Treganza*, 13 Wis. 472. See *Eaton v. Smith*, 19 Wis. 537.

7. *Wyant v. Dieffendafer*, 2 Grant Cas. (Pa.) 334.

8. **Who Liable for Waste.** — See *supra*, *Who May Commit Waste*.

9. **Action Maintainable Against Stranger.** — *Parrott v. Barney*, *Deady* (U. S.) 405, 18 Fed. Cas. No. 10,773a; *Randall v. Cleveland*, 6 Conn. 328; *Chase v. Hazelton*, 7 N. H. 171;

*Elliot v. Smith*, 2 N. H. 430; *Williams v. Lanier*, Busb. L. (44 N. Car.) 30. See *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9, 42 Am. Dec. 214.

It has been held that the husband of a tenant in dower is liable in an action in the nature of waste even after death of the wife. *Dozier v. Gregory*, 1 Jones L. (46 N. Car.) 100.

10. *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564, 32 Leg. Int. (Pa.) 398.

11. *Randall v. Cleveland*, 6 Conn. 328; *Wood v. Griffin*, 46 N. H. 230; *Chase v. Hazelton*, 7 N. H. 176.

The landlord cannot recover for mere wrongful ouster of his tenant by a stranger, where the wrong done is to the tenant alone. To authorize him to recover, it must appear that he has sustained a loss of his rents, which he would have received if the tenant had continued in possession, or that he has sustained damages in the destruction of the premises or in the dilapidation of them, injurious to the reversion, by reason of their being vacant and unoccupied. In that case he may, by an action in the nature of a special action on the case, recover such damages. *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204; *McConnel v. Kibbe*, 33 Ill. 175.

12. **Under New York Statute.** — *New York Rev. Stat.* 750, § 8.



estate for life or years, authorizes only waste against a tenant and trespass against a stranger; it does not give waste against a stranger.<sup>1</sup>

(d) **Effect of Assignment of Particular or Future Estate — Assignment of Particular Estate.** — The reversioner may sue, in an action on the case, the assignee of a life estate<sup>2</sup> or of a lease.<sup>3</sup> He may also sue one who purchases timber trees from the life tenant and severs them from the land; and the fact that the purchaser has already paid the life tenant for the timber so severed will not bar a recovery from him by the reversioner of the value of the timber severed, or for the damage thereby done to the inheritance.<sup>4</sup>

**Assignment of Reversion or Remainder.** — The action of case in the nature of waste may be maintained by one seized of an estate in reversion when the waste was committed, but who subsequently conveyed it away.<sup>5</sup> And it has been held that the purchase by the defendant of the interest of the reversioner during the pendency of the action does not defeat it.<sup>6</sup>

**Mortgagee of Reversion.** — The mortgagee of a reversion of an estate in dower, it has been held, may maintain the action against the tenant for life who commits waste before the mortgagee enters for condition broken.<sup>7</sup>

**Purchase by Reversioner of the Tenant's Estate.** — And it is no defense to an action on the case in the nature of waste, brought by the reversioner, that he purchased the estate of the particular tenant after the waste was committed.<sup>8</sup>

**Assignment of Both Estates.** — Under the statutes of some of the states the assignee of the reversioner may maintain an action of waste against the subtenant of the tenant for life.<sup>9</sup>

1. *Livingston v. Haywood*, 11 Johns. (N. Y.) 429; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260.

An action of trespass will not lie by a reversioner for an injury to the inheritance committed by a person who acts under the authority or by the permission of the tenant for life; such person not being a stranger within the meaning of the statute authorizing actions by reversioners. *Livingston v. Mott*, 2 Wend. (N. Y.) 605.

2. **Assignee of Life Estate.** — In *Curtiss v. Livingston*, 36 Minn. 380, the court, by Gillilan, C. J., said: "An assignee of an estate for life or for a term of years is a tenant for life or for years. His estate is one for life or years, according to the nature of the interest granted to his assignor. Though there are very few decisions on the question whether the action for waste may be maintained against an assignee of the lessee for life or years (we have not found any case deciding that it cannot), it seems to have been considered in *England*, under the common law as enlarged by the statutes of Gloucester and Marlbridge, that the action will lie. Thus Coke says (1 Inst. 54a): 'If tenant for life grant over his estate upon condition, and the grantee doeth waste, and the grantor reëntereth for the condition broken, the action of waste shall be brought against the grantee.' See also *Sanders v. Norwood*, Cro. Eliz. 683; *Ward v. Waddington*, Clayt. 126; *Foster's Case*, Gouldsb. 63; *Greene v. Cole*, 2 Saund. 252, and note. So, in *New York*, an action on the case in the nature of waste lay against the assignee. *Short v. Wilson*, 13 Johns. (N. Y.) 33. The assignee is as much within the reason for the rule as the lessee before assigning. Succeeding to the entire interest of the lessee, and standing in his estate, he owes the same duty, so far as privity of estate is concerned, to preserve the reversion."

Under the *Michigan Comp. Laws*, §§ 4698, 4699, where a tenant for life conveys his estate absolutely without retaining possession, an action on the case in the nature of waste cannot be maintained against such tenant for waste committed by his grantee. *Beers v. Beers*, 21 Mich. 464.

3. **Assignee of Lease.** — *Short v. Wilson*, 13 Johns. (N. Y.) 33.

4. **Purchaser of Timber Trees.** — *Dorsey v. Moore*, 100 N. Car. 41.

5. **Assignment of Reversionary Interest.** — *Robinson v. Wheeler*, 25 N. Y. 252.

6. **Purchase by Tenant of Interest of Reversioner.** — The plaintiff, in an action on the case in the nature of waste, conveyed her interest in the property to the defendant during the pendency of the action. It was held that if she held the reversionary interest in the property at the time the act complained of was committed, she was entitled to recover for the same; her alienation of the property afterward, or during the pendency of the suit for damages, could not operate to defeat her right of recovery. *Dickinson v. Baltimore*, 48 Md. 583.

7. **Mortgagee of Reversion.** — *Fay v. Brewer*, 3 Pick. (Mass.) 203.

8. **Purchase of the Particular Estate by the Reversioner.** — *Dupree v. Dupree*, 4 Jones L. (49 N. Car.) 387, 69 Am. Dec. 757.

9. **Action by Assignee of Reversion Against Life Tenant's Subtenant.** — In an action for waste, by the assignee of the reversioner, against the subtenant of the tenant for life, it was held that an action for waste was maintainable under 2 *New York Rev. Stat.* 334, § 1, against the subtenant; that the cause of action was one that would survive to the personal representatives of the reversioner, and was assignable; that the fact that the waste was committed without malice, and under the belief,

*b. INJUNCTION*—(1) *In General*.—To prevent the commission of threatened waste equity gives the remedy by injunction.<sup>1</sup> This remedy has obvious

on the part of the defendant, that he had a right to do the acts constituting it, did not affect the right of the plaintiff to treble damages. *Rutherford v. Aiken*, 3 *Thomp. & C.* (N. Y.) 60.

**1. Injunction to Prevent Threatened Waste**—*England*.—*Gibson v. Smith*, 2 *Atk.* 183; *Strachy v. Francis*, 2 *Atk.* 217; *Perrot v. Perrot*, 3 *Atk.* 94; *Robinson v. Litton*, 3 *Atk.* 210; *Boteler v. Allington*, 3 *Atk.* 453; *Lowther v. Stamper*, 3 *Atk.* 496; *Farrant v. Lovel*, 3 *Atk.* 723; *Atty.-Gen. v. Marlborough*, 3 *Madd.* 525; *Whitelegg v. Whitelegg*, 1 *Bro. C. C.* 57; *Strathmore v. Bowes*, 2 *Bro. C. C.* 88; *Aston v. Aston*, 1 *Ves.* 264; *Rex v. Smith*, 2 *Hare* 244; *Kettle v. Corbin*, 1 *Dick.* 314; *Roberts v. Roberts*, *Hardes* 96; *Field v. Jackson*, 2 *Dick.* 599; *Goodwyn v. Spray*, 2 *Dick.* 667; *Atty.-Gen. v. Ancaster*, 1 *Dick.* 68; *Chamberlyne v. Dummer*, 3 *Bro. C. C.* 549; *Vane v. Bernard*, 1 *Salk.* 161; *Bubb v. Yelverton*, *L. R.* 10 *Eq.* 465; *Nicholson v. Rose*, 4 *De G. & J.* 10; *Skelton v. Skelton*, 2 *Swanst.* 171, note; *Winchester v. Wolgar*, 3 *Swanst.* 493, note; *Atty.-Gen. v. Hallett*, 16 *M. & W.* 569; *Collard v. Cooper*, 6 *Madd.* 190; *Brydges v. Stephens*, 6 *Madd.* 279; *Bagnall v. Villar*, 12 *Ch. D.* 812; *Caldwall v. Baylis*, 2 *Meriv.* 408; *Richards v. Noble*, 3 *Meriv.* 673; *Jones v. Jones*, 3 *Meriv.* 161; *Parrott v. Palmer*, 3 *Myl. & K.* 632; *Thomas v. Oakley*, 18 *Ves. Jr.* 184; *Petley v. Eastern Counties R. Co.*, 8 *Sim.* 483; *Courtown v. Ward*, 1 *Sch. & Lef.* 8; *Talbot v. Scott*, 4 *Jur. N. S.* 1172; *Hony v. Hony*, 1 *Sim. & St.* 568; *Bathurst v. Burden*, 2 *Bro. C. C.* 64; *Smyth v. Carter*, 18 *Beav.* 78; *Abraham v. Bubb*, 2 *Show.* 69; *Newdigate v. Newdigate*, 2 *Cl. & F.* 601; *Marker v. Marker*, 9 *Hare* 1, 4 *Eng. L. & Eq.* 95; *Bassett v. Bassett*, *Finch* 189; *Briggs v. Oxford*, 16 *Jur.* 53; *Fosbrook v. Woodcock*, 12 *Jur.* 956; *Birch-Wolfe v. Birch*, *L. R.* 9 *Eq.* 683; *Morris v. Morris*, 3 *De G. & J.* 323; *Stanford v. Hurlstone*, *L. R.* 9 *Ch.* 116; *Lansdowne v. Lansdowne*, 1 *Madd.* 116; *Coffin v. Coffin*, 6 *Madd.* 17; *Webster v. South-Eastern R. Co.*, 1 *Sim. N. S.* 272; *Bailey v. Hobson*, *L. R.* 5 *Ch.* 180; *Higginbotham v. Hawkins*, *L. R.* 7 *Ch.* 676; *Casamajor v. Strode*, 1 *Sim. & St.* 381; *Lee v. Alston*, 1 *Ves. Jr.* 78; *Hole v. Thomas*, 7 *Ves. Jr.* 589; *Etches v. Lance*, 7 *Ves. Jr.* 417; *Grierson v. Eyre*, 9 *Ves. Jr.* 341; *Stansfield v. Habergham*, 10 *Ves. Jr.* 273; *Courthope v. Mapplesden*, 10 *Ves. Jr.* 290; *Hannay v. M'Entire*, 11 *Ves. Jr.* 54; *Oxford, etc., University v. Richardson*, 6 *Ves. Jr.* 706; *Mitchell v. Dors*, 6 *Ves. Jr.* 147; *Downshire v. Sandys*, 6 *Ves. Jr.* 110; *Pulteney v. Warren*, 6 *Ves. Jr.* 89; *Tamworth v. Ferrers*, 6 *Ves. Jr.* 419; *De Wilton v. Saxon*, 6 *Ves. Jr.* 106; *Pillsworth v. Hopton*, 6 *Ves. Jr.* 51; *Hanson v. Gardiner*, 7 *Ves. Jr.* 305; *Williams v. M'Namara*, 8 *Ves. Jr.* 70; *Smith v. Collyer*, 8 *Ves. Jr.* 89; *Bonnett v. Sadler*, 14 *Ves. Jr.* 526; *Crockford v. Alexander*, 15 *Ves. Jr.* 138; *Aller v. Jones*, 15 *Ves. Jr.* 605; *Peacock v. Peacock*, 16 *Ves. Jr.* 49; *Norway v. Rowe*, 19 *Ves. Jr.* 159; *Morphett v. Jones*, 19 *Ves. Jr.* 350; *Day v. Merry*, 16 *Ves. Jr.* 375; *Burges v. Lamb*, 16 *Ves. Jr.* 174;

*Twort v. Twort*, 16 *Ves. Jr.* 128; *Kimpton v. Eve*, 2 *Ves. & B.* 349; *Garth v. Cotton*, 1 *Ves.* 524, 546, 3 *Atk.* 751; *Jackson v. Cator*, 5 *Ves. Jr.* 688; *Lathropp v. Marsh*, 5 *Ves. Jr.* 259; *Davies v. Leo*, 6 *Ves. Jr.* 787; *Thomas v. Jones*, 1 *Y. & C. Ch.* 510; *London v. Web*, 1 *P. Wms.* 527; *Hoskins v. Featherstone*, 2 *Bro. C. C.* 552; *Clavering v. Clavering*, 2 *P. Wms.* 388; *Kekewich v. Marker*, 3 *Macn. & G.* 329; *Obrien v. Obrien*, 1 *Amb.* 107.

*United States*.—*U. S. v. Parrott*, *McAll.* (U. S.) 271; *Erhardt v. Boaro*, 113 *U. S.* 537; *U. S. v. Guglard*, 79 *Fed. Rep.* 21; *McBride v. Pierce County*, 44 *Fed. Rep.* 17; *Marshall v. Turnbull*, 32 *Fed. Rep.* 124, 34 *Fed. Rep.* 827; *Lanier v. Alison*, 31 *Fed. Rep.* 100; *Preston v. Smith*, 26 *Fed. Rep.* 884; *Fletcher v. New Orleans N. E. R. Co.*, 20 *Fed. Rep.* 345; *Nichols v. Jones*, 19 *Fed. Rep.* 855.

*Alabama*.—*Moses v. Johnson*, 88 *Ala.* 517; *McDaniel v. Callan*, 75 *Ala.* 327; *Malone v. Marriott*, 64 *Ala.* 486; *Boulo v. New Orleans, etc., R. Co.*, 55 *Ala.* 480; *Coker v. Whitlock*, 54 *Ala.* 180; *Lyon v. Hunt*, 11 *Ala.* 295.

*California*.—*Mitchell v. Amador Canal, etc., Co.*, 75 *Cal.* 464; *Perrine v. Marsden*, 34 *Cal.* 14.

*Connecticut*.—*Camp v. Bates*, 11 *Conn.* 51.

*Delaware*.—*Fleming v. Collins*, 2 *Del. Ch.* 230; *Hughlett v. Harris*, 1 *Del. Ch.* 349; *Wilds v. Layton*, 1 *Del. Ch.* 226; *Thompson v. Lynam*, 1 *Del. Ch.* 64.

*Georgia*.—*Smith v. Smith*, 105 *Ga.* 106; *Powell v. Cheshire*, 70 *Ga.* 357, 48 *Am. Rep.* 572; *Dickinson v. Jones*, 36 *Ga.* 97.

*Illinois*.—*Armstrong v. Wilson*, 60 *Ill.* 226; *Minneapolis Trust Co. v. Verhulst*, 74 *Ill. App.* 350.

*Indiana*.—*Wilson v. Galey*, 103 *Ind.* 257; *Robertson v. Meadors*, 73 *Ind.* 43; *White Water Valley Canal Co. v. Comegys*, 2 *Ind.* 469; *Gray v. Baldwin*, 8 *Blackf. (Ind.)* 164.

*Indian Territory*.—*Gaines v. Leslie*, 1 *Indian Ter.* 546.

*Kansas*.—*Godfrey v. Black*, 39 *Kan.* 193.

*Kentucky*.—*Calvert v. Rice*, 91 *Ky.* 533; *Harris v. Bannon*, 78 *Ky.* 568; *Smith v. Mattingly*, 96 *Ky.* 228; *Loudon v. Warfield*, 5 *J. J. Marsh. (Ky.)* 197; *Brashear v. Macey*, 3 *J. J. Marsh. (Ky.)* 89; *Houghton v. Cooper*, 6 *B. Mon. (Ky.)* 281.

*Maryland*.—*Crowe v. Wilson*, 65 *Md.* 479; *Baugh v. Crane*, 27 *Md.* 36; *Green v. Keen*, 4 *Md.* 98; *Maddox v. White*, 4 *Md.* 72; *Hamilton v. Fly*, 4 *Gill (Md.)* 34; *Salmon v. Clagett*, 3 *Bland (Md.)* 125; *Duvall v. Waters*, 1 *Bland (Md.)* 569; *George's Creek Coal, etc., Co. v. Detmold*, 1 *Md. Ch.* 371; *Brown v. Stewart*, 1 *Md. Ch.* 87.

*Massachusetts*.—*Atkins v. Chilson*, 7 *Met. (Mass.)* 308.

*Michigan*.—*Rossman v. Adams*, 91 *Mich.* 69; *Duncombe v. Felt*, 81 *Mich.* 332; *Stevens v. Rose*, 69 *Mich.* 259; *Litka v. Wilcox*, 39 *Mich.* 94; *Drake v. McLean*, 47 *Mich.* 102.

*Minnesota*.—*Russell v. Merchants' Bank*, 47 *Minn.* 286; *Moriarty v. Ashworth*, 43 *Minn.* 1.

*Mississippi*.—*Cannon v. Barry*, 59 *Miss.* 289; *Eskridge v. Eskridge*, 51 *Miss.* 522; *Poindexter*

advantages over the common-law remedies. "Waste is a wrong which cannot always be duly estimated and remunerated in damages; it is an injury which requires to be met, in its onset or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise; and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident, can be obtained from a court of common law, open only at short intervals during the year, acting from term to term, and limited to a given set of technical forms of proceeding. Hence it is that the remedy has been so constantly, in modern times, sought in the court of chancery, which is always open, constantly accessible, and is capable of moving with an energy and dispatch called for by the emergency, and suited to the peculiar nature of the case."<sup>1</sup> And hence it is, too, that the remedy by injunction has not only superseded the old common-law actions, but has to a great extent taken the place of the action on the case for damages.<sup>2</sup> The remedy may be applied, although a statute provides a remedy at law,<sup>3</sup> unless, of course, the legal remedy is adequate.

*v. Henderson, Walk. (Miss.) 176; Nevitt v. Gillespie, 1 How. (Miss.) 108.*

*Missouri.*—*Hughes v. Burriss, 85 Mo. 660; Echelkamp v. Schrader, 45 Mo. 505.*

*Nebraska.*—*Disher v. Disher, 45 Neb. 100.*  
*New Hampshire.*—*Dennett v. Dennett, 43 N. H. 499; Miles v. Miles, 32 N. H. 147.*

*New Jersey.*—*Bentley v. Bentley, (N. J. 1897) 38 Atl. Rep. 286; Fortescue v. Bowler, 55 N. J. Eq. 741; Weise v. Welsh, 30 N. J. Eq. 431; Coffin v. Loper, 25 N. J. Eq. 443; Coghill v. Millburn Land Co., 25 N. J. Eq. 90; Porch v. Fries, 18 N. J. Eq. 204; West v. Page, 9 N. J. Eq. 119; Ackerman v. Hartley, 8 N. J. Eq. 476; Vervalen v. Older, 8 N. J. Eq. 98; Staats v. Freeman, 6 N. J. Eq. 490; Phoenix v. Clark, 6 N. J. Eq. 447; Harker v. Christy, 5 N. J. L. 824; Den v. Driver, 1 N. J. L. 129; Brick v. Getsinger, 5 N. J. Eq. 391; Ware v. Ware, 6 N. J. Eq. 117; Capner v. Flemington Min. Co., 3 N. J. Eq. 467; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694; Van Derveer v. Tallman, 1 N. J. Eq. 9.*

*New York.*—*Livingston v. Reynolds, 26 Wend. (N. Y.) 115; Johnson v. White, 11 Barb. (N. Y.) 194; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Brumley v. Fanning, 1 Johns. Ch. (N. Y.) 501; Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435; Kane v. Vanderburgh, 1 Johns. Ch. (N. Y.) 11; Van Wyck v. Alliger, 6 Barb. (N. Y.) 507; Rodgers v. Rodgers, 11 Barb. (N. Y.) 595; McCay v. Wait, 51 Barb. (N. Y.) 225; Vandemark v. Schoonmaker, 9 Hun (N. Y.) 16; Hurst v. Elliott, 52 Hun (N. Y.) 273; Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 497; Talbot v. Chamberlin, 3 Paige (N. Y.) 219; Winship v. Pitts, 3 Paige (N. Y.) 259; Utica Bank v. Messereau, 3 Paige (N. Y.) 517; Beebe v. Coleman, 8 Paige (N. Y.) 392; Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601; Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122; Storm v. Mann, 4 Johns. Ch. (N. Y.) 21; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315; Watson v. Hunter, 5 Johns. Ch. (N. Y.) 169; Robinson v. Preswick, 3 Edw. (N. Y.) 246; Weatherby v. Wood, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 404; Spear v. Cutter, (Supm. Ct.) 2 Code Rep. (N. Y.) 100; Cahn v. Hewsey, (N. Y. Super. Ct. Spec. T.) 8 Misc. (N. Y.) 384; West Point*

*Iron Co. v. Raymert, 45 N. Y. 703; Keller v. Ogsbury, 121 N. Y. 362; Selden v. Mann, 2 N. Y. Leg. Obs. 328.*

*North Carolina.*—*Peterson v. Ferrell, 127 N. Car. 169; Morrison v. Morrison, 122 N. Car. 598; Jones v. Britton, 102 N. Car. 166; Farabow v. Green, 108 N. Car. 339; Cowand v. Meyers, 99 N. Car. 198; McCormick v. Nixon, 83 N. Car. 113; Webb v. Boyle, 63 N. Car. 271; Hough v. Martin, 2 Dev. & B. Eq. (22 N. Car.) 379; Dalton v. Dalton, 7 Ired. Eq. (42 N. Car.) 197; Dodd v. Watson, 4 Jones Eq. (57 N. Car.) 48; Gause v. Perkins, 3 Jones Eq. (56 N. Car.) 177; Thompson v. Williams, 1 Jones Eq. (54 N. Car.) 176.*

*Ohio.*—*Piatt v. Piatt, 2 Disney (Ohio) 408.*

*Oregon.*—*Sheridan v. McMullen, 12 Oregon 150.*

*Pennsylvania.*—*Martin's Appeal, (Pa. 1887) 9 Atl. Rep. 490; Westmoreland, etc., Natural Gas Co. v. De Witt, 130 Pa. St. 235; Grubb's Appeal, 90 Pa. St. 228; Bradley v. Reed, 2 Pittsb. (Pa.) 519; Jones v. Whitehead, 1 Pars. Eq. Cas. (Pa.) 304.*

*South Carolina.*—*Smith v. Poyas, 2 Desaus. (S. Car.) 65; Shubrick v. Guerard, 2 Desaus. (S. Car.) 616.*

*Tennessee.*—*Walker v. Fox, 85 Tenn. 154.*

*Utah.*—*Dooly v. Stringham, 4 Utah 107.*

*Virginia.*—*Scott v. Wharton, 2 Hen. & M. (Va.) 25.*

*West Virginia.*—*Greathouse v. Greathouse 46 W. Va. 21; Williamson v. Jones, 39 W. Va. 239, 43 W. Va. 562, 64 Am. St. Rep. 891; Dunlap v. Hedges, 35 W. Va. 287; Lewisburg University v. Tucker, 31 W. Va. 621; Core v. Bell, 20 W. Va. 169; Frank v. Brunnemann, 8 W. Va. 462.*

*Wisconsin.*—*Brock v. Dole, 66 Wis. 142; Fairbank v. Cudworth, 33 Wis. 358; Kimball v. Darling, 32 Wis. 686; Atkinson v. Hewitt, 51 Wis. 275; Scott v. Webster, 50 Wis. 53; Poertner v. Russel, 33 Wis. 193.*

1. *Bland, C., in Duvall v. Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350.*

2. **Actions at Law Largely Superseded by Injunction.**—*Palmer v. Young, 108 Ill. App. 252; Kane v. Vanderburgh, 1 Johns. Ch. (N. Y.) 11.*

3. **Existence of Concurrent Remedy at Law.**—*Duncombe v. Felt, 81 Mich. 332; Harris v.*



(2) *Nature of the Remedy.* — The granting of an injunction to restrain waste is largely discretionary,<sup>1</sup> and hence it has been held that the granting of an application for an order to stay waste will not be compelled by mandamus.<sup>2</sup>

(3) *Adequacy of Remedy at Law.* — In accordance with the general rule that an injunction will not be granted where the remedy at law for the injury complained of is full, adequate, and complete,<sup>3</sup> the remedy by injunction in the case of waste lies only when the law does not afford an adequate remedy.<sup>4</sup> Thus, if the facts relied on show that the injury complained of is susceptible of complete pecuniary satisfaction by the ordinary legal remedies, an injunction does not lie.<sup>5</sup>

(4) *When Remedy Available* — (a) *In General.* — Generally speaking, an injunction to stay waste may be granted where the nature of the injury is such that a preventive remedy is indispensable and should be permanent.<sup>6</sup> If the remedy at law is inadequate, an injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recover damages,<sup>7</sup> and in a variety of others where no such action could be brought.<sup>8</sup> It is not necessary to the issuing of an injunction to restrain waste that the tenant be shown to be insolvent.<sup>9</sup> It has been said that in some of the *United States* an injunction to stay waste has become almost a matter of course.<sup>10</sup>

(b) *Remedy Restricted to Future Waste* — *aa. GENERAL RULE.* — The practice of granting injunctions in cases of waste is to prevent or stay the future commission of waste; and the remedy for waste already committed is merely incidental to the jurisdiction in the other case, assumed to prevent a multiplicity of suits.<sup>11</sup>

*bb. REMOVAL OF TIMBER ALREADY CUT.* — Since an injunction lies only to restrain a future commission of waste, it will not be granted to restrain the removal

Thomas, 1 Hen. & M. (Va.) 18. See the title INJUNCTIONS, vol. 16, p. 354.

1. *Granting of Injunction Largely Discretionary.* — Jerome v. Ross, 7 Johns. Ch. (N. Y.) 321.

2. Parks v. Marquette County, 38 Mich. 244.

3. *Injunction Granted Only Where Remedy at Law Is Inadequate.* — See the title INJUNCTIONS, vol. 16, p. 352 *et seq.*

4. Poindexter v. Henderson, Walk. (Miss.) 176; Cutting v. Carter, 4 Hen. & M. (Va.) 424.

Equity takes jurisdiction to stay waste by injunction; and in some particular cases, as the conversion of timber or the proceeds of mines, to obtain a discovery and account, but will not entertain a bill that seeks simply to recover possession of the place wasted, with damages for the waste committed, without praying an injunction or discovery and account. Case under the statute would, it seems, be the proper action. Leforge v. West, 2 Ind. 514.

5. Watson v. Ferrell, 34 W. Va. 406; Greathouse v. Greathouse, 46 W. Va. 21; Cox v. Douglass, 20 W. Va. 175; McMillan v. Ferrell, 7 W. Va. 223.

6. *When Injunction Granted.* — Perrot v. Perrot, 3 Atk. 94; Wadsworth v. Goree, 96 Ala. 227; Moses v. Johnson, 88 Ala. 517; Lyon v. Hunt, 11 Ala. 295; Miller v. Waddingham, 91 Cal. 377; Fleming v. Collins, 2 Del. Ch. 230; Duvall v. Waters, 1 Bland (Md.) 569; Attaquin v. Fish, 5 Met. (Mass.) 140; Duncombe v. Felt, 81 Mich. 332; Moriarty v. Ashworth, 43 Minn. 1; Capner v. Flemington Min. Co., 3 N. J. Eq. 467; Arment v. Hensel, 5 Wash. 152.

7. Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122

8. Lyon v. Hunt, 11 Ala. 295; Duvall v. Waters, 1 Bland (Md.) 569. See Norwich v. Johnson, 3 Mod. 90. And see *infra*, this section, (5) *By and Against Whom Available.*

9. *Insolvency of Tenant Not Necessary.* — Williams v. Chicago Exhibition Co., 188 Ill. 19; Palmer v. Young, 108 Ill. App. 252.

10. Markham v. Howell, 33 Ga. 508; Smith v. Rome, 19 Ga. 89, 63 Am. Dec. 298.

11. *Future Waste Only Within Scope of Remedy.* — Watson v. Hunter, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295.

The chancellor will restrain waste on a bill filed for that purpose, but so far as the bill seeks to recover for waste committed, it cannot be sustained. Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64.

A court of equity only interferes to prevent future waste except in cases where the complainant has no remedy at law, or a discovery is necessary, or where there is some other grounds for equitable interference. In ordinary cases the count for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplicity of suits. Winship v. Pitts, 3 Paige (N. Y.) 259.

Where waste has been committed which would be a ground for merely nominal damages, and it does not appear that the tenant contemplates the commission of further waste, or that he asserts a right to commit waste, equity will not grant relief by injunction. Doran v. Carroll, 11 Ir. Ch. R. 379.

of timber which has been cut, except under very unusual circumstances.<sup>1</sup> But a court which has jurisdiction to enjoin the wasteful cutting of timber may decree an account and satisfaction for what has been already cut.<sup>2</sup>

(c) **Threatened Waste.** — An injunction may be granted if material waste has been threatened, although the injury actually done is trifling.<sup>3</sup> Indeed it is not necessary that any waste should actually have been committed; if the tenant in possession shows an intention to commit waste by attempting, preparing, or threatening to do so, an injunction will be granted.<sup>4</sup> Thus, an injunction has been granted against a tenant for life who, without having committed waste, insisted on the right to do so, although he did not have the right.<sup>5</sup> But it is not alone sufficient that the complainant has been informed or believes that the tenant intends to commit waste.<sup>6</sup>

(d) **Extent of the Injury.** — It has been said that an injunction may be granted where no account of damages could be claimed or where the waste done is so insignificant that there could be no recovery of damages at law.<sup>7</sup> But there must be more than a mere inconvenience or temporary injury to the complainant.<sup>8</sup> And injunctions have been refused where the acts of waste committed were trivial and the complainant's proceeding was dilatory.<sup>9</sup>

(e) **Permissive Waste.** — It has been held that an injunction may be issued to restrain permissive as well as voluntary waste.<sup>10</sup>

(f) **Equitable Waste.** — Although the tenant may be punishable at law for committing waste, as where a life tenant holds "without impeachment of waste," a court of equity may enjoin the commission of such waste as comes within the definition of equitable waste.<sup>11</sup> In equitable, as in legal, waste if

**1. Restraining Removal of Timber Already Cut.** — *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; *Johnson v. White*, 11 Barb. (N. Y.) 194; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507; *Winship v. Pitts*, 3 Paige (N. Y.) 250.

**2. Accounting.** — *Fleming v. Collins*, 2 Del. Ch. 230; *Weatherby v. Wood*, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 404. See *infra*, this section, *c. Accounting*.

**3. Threatened Waste.** — *White Water Valley Canal Co. v. Comegys*, 2 Ind. 469; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115.

**4. England.** — *Gibson v. Smith*, 2 Atk. 183; *Coffin v. Coffin*, Jac. 70; *Hannay v. M'Entire*, 11 Ves. Jr. 54; *Norway v. Rowe*, 19 Ves. Jr. 157; *Morphett v. Jones*, 19 Ves. Jr. 350; *Peacock v. Peacock*, 16 Ves. Jr. 49; *Oxford, etc., University v. Richardson*, 6 Ves. Jr. 706; *Jackson v. Cator*, 5 Ves. Jr. 688; *Hext v. Gill*, L. R. 7 Ch. 699; *Barry v. Barry*, 1 Jac. & W. 633; *London v. Hedger*, 18 Ves. Jr. 355; *Kimpton v. Eve*, 2 Ves. & B. 349; *Caldwall v. Baylis*, 2 Meriv. 408.

*United States.* — *Poor v. Carleton*, 3 Sumn. (U. S.) 70.

*Georgia.* — *Dickinson v. Jones*, 36 Ga. 97.

*Illinois.* — *Palmer v. Young*, 108 Ill. App. 252.

*Indiana.* — *White Water Valley Canal Co. v. Comegys*, 2 Ind. 469.

*Kentucky.* — *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196.

*Maryland.* — *Duvall v. Waters*, 1 Bland (Md.) 569.

*Oregon.* — *Sheridan v. McMullen*, 12 Oregon 150.

*Wisconsin.* — *Poertner v. Russel*, 33 Wis. 193.

**Threatening to Sow Land with Mustard Seed.** — Thus, a tenant has been enjoined from sowing the land with mustard seed to avenge himself on his landlord who had distrained his goods, it appearing that the sowing of the mustard seed would have been very injurious to the soil. *Pratt v. Brett*, 2 Madd. 62.

**5. Tenant Insisting on Right to Commit Waste.** — *Gibson v. Smith*, Barn. Ch. 497.

**6. Belief or Information that Tenant Will Commit Waste.** — *Hanson v. Gardiner*, 7 Ves. Jr. 309; *Etches v. Lance*, 7 Ves. Jr. 417; *Jackson v. Cator*, 5 Ves. Jr. 688.

A court of equity will not interfere unless it is shown that there is danger from the mode in which a tenant for life in possession is dealing with the property. *Dutt v. Dossee*, 6 Moo. Indian App. 433.

**7. Injuries for Which Damages at Law Not Recoverable.** — *Oxford, etc., University v. Richardson*, 6 Ves. Jr. 706; *Harrow School v. Alderton*, 2 B. & P. 86.

**8. Mere Inconvenience to Complainant.** — *Shaver v. Cohn*, (Supm. Ct.) 40 How. Pr. (N. Y.) 129.

**9. Trivial Injuries and Dilatoriness on Part of Complainant.** — *Barry v. Barry*, 1 Jac. & W. 631. See also *Greathouse v. Greathouse*, 46 W. Va. 21.

**10. Restraining Permissive Waste.** — *Poertner v. Russel*, 33 Wis. 199.

**11. Restraining Equitable Waste.** — *Turner v. Wright*, Johns. Ch. (Eng.) 740, 6 Jur. N. S. 647, 809; *Gent v. Harrison*, Johns. Ch. (Eng.) 517; *Baker v. Sebright*, 13 Ch. D. 179; *Micklethwait v. Micklethwait*, 1 De G. & J. 504; *Vane v. Barnard*, 2 Vern. 739; *Downshire v. Sandys*, 6 Ves. Jr. 110; *Attaquin v. Fish*, 5 Met. (Mass.) 140.

As to what constitutes equitable waste, see

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one act of waste be established the court will restrain equitable waste generally.<sup>1</sup>

(g) **Waste of Lands in Foreign Country.** — Waste may be enjoined even though the property is located abroad, if a case for the interposition of a court of equity is made out.<sup>2</sup> But an injunction will not be granted merely on the ground that the acts of the officials of a foreign country by which the defendant's title was granted are void.<sup>3</sup>

(5) *By and Against Whom Available* — (a) **Title of the Parties.** — It is not, of course, necessary to the maintenance of a bill for an injunction restraining waste that either the complainant or respondent should have possession.<sup>4</sup> But, as will appear later, it is a general rule, which, however, is subject to some important exceptions, that the complainant should be able to establish an interest in the land,<sup>5</sup> and that the defendant should have the right of possession.

(b) **Privity of Estate.** — But the privity of estate between the parties which is necessary to the maintenance of an action of waste,<sup>6</sup> and, in some jurisdictions, to the maintenance of case in the nature of waste,<sup>7</sup> need not exist between the parties to a bill for an injunction to restrain waste.<sup>8</sup> It may be stated as a general rule that an injunction to stay waste may be obtained in all cases where an action of waste or of case in the nature of waste would lie, although there may be no privity of estate.<sup>9</sup>

(c) **By Whom Maintainable** — *aa.* **TITLE OF COMPLAINANT.** — The complainant in a bill in equity to restrain waste need not be in possession.<sup>10</sup> But unless the complainant is in actual possession he must ordinarily establish a valid and subsisting title in himself to the premises.<sup>11</sup> If it is probable that the defendant

*supra*, this title, V. 2. *Particular Acts or Omissions Constituting Waste — Equitable Waste.*

1. *Coffin v. Coffin*, 6 Madd. 17.

2. **Waste of Property Located Abroad.** — *Marshall v. Turnbull*, 32 Fed. Rep. 124.

3. *Marshall v. Turnbull*, 34 Fed. Rep. 827.

4. **Neither Party Need Be in Possession.** — *Douglas Co. v. Tennessee Lumber Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 438; *Peck v. Ayers, etc.*, *Tie Co.*, (C. C. A.) 116 Fed. Rep. 273.

5. See *infra*, this section, (c) *By Whom Maintainable* — *Title of Complainant.*

6. **Privity of Estate.** — See *supra*, this section, 1. *d. Writ of Waste — By and Against Whom Maintainable — In General.*

7. See *supra*, this section, 2. *a. Action on the Case in the Nature of Waste — By and Against Whom Maintainable — General Rule.*

8. *Palmer v. Young*, 108 Ill. App. 252.

9. *Norwich v. Johnson*, 3 Mod. 90, 2 Show. 457.

10. **Complainant Need Not Be in Possession.** — *Peck v. Ayers, etc.*, *Tie Co.*, (C. C. A.) 116 Fed. Rep. 273; *Douglas Co. v. Tennessee Lumber Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 438.

11. **Title in Plaintiff Ordinarily Necessary.** — The complainant in a bill in equity to restrain waste, like the plaintiff in an action of trespass *quare clausum fregit*, must aver and prove, either actual possession or a valid and subsisting title in himself to the premises in dispute. Constructive possession is not sufficient to maintain an action without proof of title. *Walker v. Fox*, 85 Tenn. 154.

In *Flannery v. Hightower*, 97 Ga. 592, *Atkinson, J.*, in delivering the opinion of the court, said: "If a person be a stranger both to the title and possession, then injunction will not issue, at his instance, to restrain a trespass or to

stay waste about to be committed upon land occupied by another; and if such person neither claims the legal title or the right of possession thereunder, nor is in the actual possession of the premises, or some part thereof, by himself or another, under such a claim of right as might ripen into a prescription, he cannot be other than a stranger to the title or possession. The institution of a suit by such a person would be wholly gratuitous, and courts of equity will not grant relief upon the prayer of such a volunteer."

Where a bill for an injunction to prevent the commission of waste showed no title in the plaintiff to the land, nor interest therein other than as an applicant to purchase the same as mineral land from the *United States*, and that his claims to acquire title were being contested in the *United States* land office, it was held that such bill did not state a case sufficient to justify a departure from the time-honored rule that such relief will be granted only for the protection of an existing right and only in favor of one in whom an estate of inheritance is shown to be vested by unquestioned proof. *McBride v. Pierce County*, 44 Fed. Rep. 17.

Under the *Washington* statute, a claimant to land under the laws of the *United States* may have an injunction against another claimant who "is threatening to commit, upon such land, waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages." The removal of trees from land still the property of the government, is one injury which would tend to materially lessen the value of the inheritance, and damages will not compensate their loss in the sense meant by the statute. *Arment v. Hensel*, 5 Wash. 152.



has the better title an injunction will not be granted,<sup>1</sup> especially if it does not appear that the defendant is insolvent.<sup>2</sup> It has been said that an injunction against waste will not be granted where the complainant's title is denied,<sup>3</sup> especially if there has been any unnecessary delay in trying the title at law.<sup>4</sup> But a bare denial by the defendant of title in the complainant is not always sufficient to prevent the granting of an injunction.<sup>5</sup> And, while it is ordinarily held that a court of equity will not restrain waste except upon unquestionable evidence of title in the complainant,<sup>6</sup> a court of equity may, and frequently does, issue an injunction to restrain waste where irreparable mischief, going to the destruction of the substance of the estate, is being done or threatened, although the title to the premises may be in litigation.<sup>7</sup> In this case the fact that the defendant will be unable to respond in damages is a strong reason

#### 1. Better Title Apparently in Defendant. —

Where the complaint and evidence show that a defendant is in possession of land, and claiming under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted, on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528. See also *Poindexter v. Henderson*, Walk. (Miss.) 176, 12 Am. Dec. 550; *Nevitt v. Gillespie*, 2 How. (Miss.) 108, 26 Am. Dec. 696; *Eskridge v. Eskridge*, 51 Miss. 522.

#### 2. *Nethery v. Payne*, 71 Ga. 374.

3. Denial of Title in Complainant. — Formerly if the defendant in his answer positively denied the complainant's title the injunction would be refused, or having been granted, would, on the coming of such answer, be dissolved. *Norway v. Rowe*, 19 Ves. Jr. 147; *Smith v. Collyer*, 8 Ves. Jr. 89; *Pillsworth v. Hopton*, 6 Ves. Jr. 51; *Powers v. Heery*, R. M. Charl. (Ga.) 523; *Duvall v. Waters*, 1 Bland (Md.) 569.

An injunction against waste will not be granted where the complainant's title is denied in the answer; it will be refused before answer if the defendant has had no notice of the motion. *Morse v. O'Reilly*, 4 Pa. L. J. Rep. 75, 6 Pa. L. J. 501.

4. *Higgins v. Woodward*, 1 Hopk. (N. Y.) 342.

#### 5. *Basore v. Henkel*, 82 Va. 474.

An injunction will be granted to stay waste by a defendant, who insists on his own title, but admits that he received possession from the plaintiff's tenant without the plaintiff's knowledge, in breach of the tenant's duty. *Norway v. Rowe*, 19 Ves. Jr. 154; *Courthope v. Mapplesden*, 10 Ves. Jr. 290.

6. Complainant's Title Doubtful — *England*. — *Field v. Jackson*, 2 Dick. 599; *Lowe v. Lucey*, 1 Ir. Eq. R. 93; *Davies v. Leo*, 6 Ves. Jr. 784; *Smith v. Collyer*, 8 Ves. Jr. 89; *Beatty v. Beatty*, 2 Molloy 541; *Fingal v. Blake*, 2 Molloy 50; *Pillsworth v. Hopton*, 6 Ves. Jr. 51.

*United States*. — *McBride v. Pierce County*, 44 Fed. Rep. 17; *Preston v. Smith*, 26 Fed. Rep. 884.

*California*. — *Smith v. Wilson*, 10 Cal. 528.

*Georgia*. — *Nethery v. Payne*, 71 Ga. 374; *Flannery v. Hightower*, 97 Ga. 592.

*Mississippi*. — *Eskridge v. Eskridge*, 51 Miss. 522; *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 26 Am. Dec. 696; *Poindexter v. Henderson*, Walk. (Miss.) 176.

*New York*. — *Storm v. Mann*, 4 Johns. Ch. (N. Y.) 21.

*North Carolina*. — *Hough v. Martin*, 2 Dev. & B. Eq. (22 N. Car.) 379.

*Pennsylvania*. — *Morse v. O'Reilly*, 4 Pa. L. J. Rep. 75, 6 Pa. L. J. 501.

In a contest between two for a tract of land, each claiming the legal title, where the one in possession is cutting down timber and building in the ordinary course of agriculture, the court of equity will not stay the operation of him in possession, upon the ground merely that he is insolvent. *Thompson v. Williams*, 1 Jones Eq. (54 N. Car.) 176.

7. Injunction Pending Determination of Title — *United States*. — *Erhardt v. Boaro*, 113 U. S. 537; *Le Roy v. Wright*, 4 Sawy. (U. S.) 530; *Lanier v. Alison*, 31 Fed. Rep. 100; *Fletcher v. New Orleans N. E. R. Co.*, 20 Fed. Rep. 345.

*Georgia*. — *Powell v. Cheshire*, 70 Ga. 357.

*Illinois*. — *Palmer v. Young*, 108 Ill. App. 252.

*Kansas*. — *Snyder v. Hopkins*, 31 Kan. 557.

*Maryland*. — *Green v. Keen*, 4 Md. 98.

*Nevada*. — *Meadow Valley Min. Co. v. Dodds*, 6 Nev. 261.

*New York*. — *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *Spear v. Cutter*, 5 Barb. (N. Y.) 486.

*Tennessee*. — *Walker v. Fox*, 85 Tenn. 154.

*Washington*. — *Arment v. Hensel*, 5 Wash. 152.

*West Virginia*. — *Bettman v. Harness*, 42 W. Va. 433. See also *Piatt v. Piatt*, 2 Disney (Ohio) 408.

Where a suit to enforce forfeiture is pending, an injunction will lie to preserve the property sought to be forfeited during the pendency of the suit, as equity will restrain the commission of waste of every kind until the rights of the parties are determined. *Fletcher v. New Orleans N. E. R. Co.*, 20 Fed. Rep. 345.

Where there is a controversy pending in equity involving the title to land, an injunction restraining the commission of waste upon it may be applied for by petition in the cause. Such application looks to the preservation of the property until the title can be ascertained. *Green v. Keen*, 4 Md. 98.

Courts of equity will interfere by injunction to restrain waste or trespass, and to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the de-

for granting the injunction.<sup>1</sup> The commission of waste must be established,<sup>2</sup> and it must be shown that irreparable injury will be done to the land.<sup>3</sup>

**bb. REMAINDERMAN OR REVERSIONER — In General.**—An injunction to restrain waste may, generally speaking, be granted at the instance of any person interested in remainder or reversion,<sup>4</sup> unless his interest is so remote that the injury to him will be trivial.<sup>5</sup> There are many cases where a person is not punishable

defendant, or otherwise, the plaintiff cannot obtain relief at law. Such interference is placed upon the ground of preventing irreparable mischief and the destruction of the substance of the inheritance. So an injunction was sustained where the plaintiff alleged that he was owner of the premises, but the defendant was committing waste by cutting down timber, etc., which would be an irreparable injury, and that he was insolvent, notwithstanding the defendant was in possession as tenant under a decision in summary proceedings to recover possession of the land, by a county judge, which the plaintiff defended, but had carried by certiorari to the Supreme Court for review, and which was pending and undetermined. *Spear v. Cutter*, (Supm. Ct.) 2 Code Rep. (N. Y.) 100.

**Defendant's Right to Customary Use of Land.**—The Court of Chancery of *Maryland* will grant an injunction to stay waste, pending a suit at law to try the title to the land. But an injunction to stay waste pending a suit respecting the title does not prohibit the defendant from cultivating the land, and using it in the ordinary manner. *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350.

Nor does it restrain him from felling timber for the purpose of clearing the land in accordance with the usages of good husbandry. *People v. Davison*, 4 Barb. (N. Y.) 109.

**1. Inability of Defendant to Respond in Damages.**—*Kinsler v. Clarke*, 2 Hill Eq. (S. Car.) 617. See *Shubrick v. Guerard*, 2 Desaus. (S. Car.) 616.

Where a complaint alleged that the plaintiff was the owner and entitled to the possession of lands, that there were improvements on the demanded premises, that the defendants were in possession, that they threatened to destroy, and would, if not enjoined, destroy, such improvements, and that they were insolvent, and unable to respond in damages, it was held that it was sufficient to support an order enjoining the defendants from removing improvements or committing waste on the premises in dispute, pending the trial. *Meadow Valley Min. Co. v. Dodds*, 6 Nev. 261.

Where the plaintiff, claiming the ownership of certain land, brings an action to recover the same, and (as auxiliary to the main relief) seeks to enjoin the defendant in possession from cutting timber and turpentine trees thereon, for building and fencing, he must show the defendant's inability to respond in damages for such injury. *McCormick v. Nixon*, 83 N. Car. 113.

A bill in equity to restrain waste lies ordinarily only when the complainant's title is undisputed and the party committing the waste is in rightful possession; but may be maintained in other cases on special grounds, such as to quiet possession, to prevent multiplicity of suits, to prevent irreparable mischief, and when the

defendant is insolvent. *Walker v. Fox*, 85 Tenn. 154.

**2. Establishing Commission of Waste.**—A motion for an order to restrain the defendant from the commission of waste upon land or premises, for the recovery of which an action of ejectment is pending, will be denied on the defendant's fully denying the commission of waste. *Martin v. Odell*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 108.

As a general rule, in the practice of courts of equity nothing can be read on a motion to dissolve an injunction but the answer. If the writ has issued and the answer when filed denies the equity of the bill, the injunction will be dissolved. But there are many cases where this rule does not prevail. Waste is one of them, and the exception to the rule is upon the ground that irreparable mischief would ensue, and the court will prevent irreparable mischief by its interposition. Hence, an affidavit to prove waste is admissible even after answer filed. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

**3. Irreparable Injury Necessary.**—The courts have made a distinction between cases where privity exists and those where it is absent, to the effect that where there is a privity of title, as between tenants for life or years and the reversioner, it is not necessary for the plaintiff to show irreparable injury or destruction of the estate to entitle him to the remedy by injunction. But as between strangers or parties claiming adversely there is no distinction between trespass and waste; and in both cases the injury must be shown to be irreparable before the court will grant an injunction. *Perry v. Hamilton*, 138 Ind. 271; *Whalen v. Dalashmutt*, 59 Md. 254; *Baugh v. Crane*, 27 Md. 36; *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371; *Atkins v. Chilson*, 7 Met. (Mass.) 398; *Chapel v. Hull*, 60 Mich. 167; *Poindexter v. Henderson*, Walk. (Miss.) 176; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507; *Spear v. Cutter*, 5 Barb. (N. Y.) 486; *Cutting v. Carter*, 4 Hen. & M. (Va.) 424.

In a bill for a special injunction to stay the cutting of timber it is necessary that the plaintiff should set forth, not only that the threatened injury would be irreparable, but he must show how it would be so. *Thompson v. Williams*, 1 Jones Eq. (54 N. Car.) 176.

**4. Remainderman or Reversioner.**—*Perrot v. Perrot*, 3 Atk. 94; *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707; *Dickinson v. Jones*, 36 Ga. 97; *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 93; *Canon v. Barry*, 59 Miss. 289; *Lewisburg University v. Tucker*, 31 W. Va. 621.

**The Remainderman of an Undivided Share of the Inheritance** may have an injunction and an account. *Co. Litt.* 53b; *Whitfield v. Bewit*, 2 P. Wms. 211.

**5. Strother v. Barr**, 5 Bing. 136, 15 E. C. L.

at law for committing waste, and yet a court of equity will enjoin him at the instance of a party who could not maintain an action at law against him for such waste; as where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained by injunction from committing waste, although if he did so no action of waste would lie against him by the remainderman for life; for he has not the inheritance; nor would an action for waste lie by the remainderman in fee, by reason of the interposed remainder for life.<sup>1</sup>

**Owner of Equitable Title.** — In modern equity practice an injunction to restrain waste will be granted in many instances where no legal action could be maintained, although the interest of the injured party is legal, and also where the estate of the injured party is entirely equitable.<sup>2</sup>

**Future Tenant for Life or Years.** — And while the writ of waste could not be maintained by one who was entitled to the remainder or reversion for life only,<sup>3</sup> a bill for an injunction to stay waste, like the action of case in the nature of waste,<sup>4</sup> may be maintained by a remainderman or reversioner for life or years.<sup>5</sup>

**Intervention of Intermediate Estate.** — And although the writ of waste could be sued out only by one who had the immediate estate of inheritance, the intervention of an intermediate estate for life does not deprive the remainderman or reversioner of the right to an injunction.<sup>6</sup>

**Owners of Contingent or Executory Interests.** — An injunction to stay waste may be granted in favor of one who is entitled to a contingent or executory estate of inheritance.<sup>7</sup> A contingent remainderman whose estate has not vested by the happening of the event, cannot maintain a bill against the life tenant in possession to recover damages for past waste, but may enjoin him from future

391. See *M'Laughlin v. Long*, 5 Har. & J. (Md.) 113.

1. *Palmer v. Young*, 108 Ill. App. 252.

2. **Equitable Interest Sufficient.** — *Palmer v. Young*, 108 Ill. App. 252.

3. See *supra*, this section, 1. d. (3) *By and Against Whom Maintainable—By Whom*.

4. See *supra*, this section, 2. a. (4) *By and Against Whom Maintainable—By Whom Maintainable*.

5. **Remainderman or Reversioner for Life or Years.** — *England.* — *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683; *Mollineux v. Powell*, 3 P. Wms. 268, note F; *Perrot v. Perrot*, 3 Atk. 94; *Davies v. Leo*, 6 Ves. Jr. 784; *Bewick v. Whitfield*, 3 P. Wms. 268.

*United States.* — *U. S. v. Parrott*, McAll. (U. S.) 271.

*Arkansas.* — *Freeman v. Reagan*, 26 Ark. 373.

*Connecticut.* — *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707.

*Georgia.* — *Smith v. Smith*, 105 Ga. 106; *Dickinson v. Jones*, 36 Ga. 97; *Powers v. Heery*, R. M. Charl. (Ga.) 523.

*Indiana.* — *Gwaltney v. Gwaltney*, 119 Ind. 144; *Robertson v. Meadors*, 73 Ind. 43.

*Maryland.* — *Duvall v. Waters*, 1 Bland (Md.) 369.

*New Hampshire.* — *Dennett v. Dennett*, 43 N. H. 499.

*New Jersey.* — *Van Syckel v. Emery*, 18 N. J. 87.

*New York.* — *Kane v. Vanderburgh*, 1 Johns. Ch. (N. Y.) 11.

*South Carolina.* — *Smith v. Daniel*, 2 McCord Eq. (S. Car.) 143; *Mayo v. Feaster*, 2 McCord Eq. (S. Car.) 137.

*West Virginia.* — *Frank v. Brunnemann*, 8 W. Va. 462.

Where waste is committed by the holder of a life estate, in land charged with the payment of a legacy on the termination of the life estate, the remedy of the remainderman is in equity, where the commission of further waste may be restrained and damages awarded for the waste already committed. In such a case, equity will hold the damages collected for the benefit of the legatee, who must be paid before the remaindermen take. *Dawson v. Tremaine*, 93 Mich. 320.

6. **Mediate Reversioner or Remainderman.** — *England.* — *Laussat's Fonbl. Eq.* 3, note, 52, note; *Jones v. Hill*, 1 Moo. 100; *Mollineux v. Powell*, 3 P. Wms. 268, note F; *Bewick v. Whitfield*, 3 P. Wms. 268, note; *Farrant v. Lovel*, 3 Atk. 723; *Roswell's Case*, 1 Roll. Abr. 377; *Tracy v. Tracy*, 1 Vern. 23; *Perrot v. Perrot*, 3 Atk. 94; *Robinson v. Litton*, 3 Atk. 210; *Davies v. Leo*, 6 Ves. Jr. 784.

*Indiana.* — *Gwaltney v. Gwaltney*, 119 Ind. 144; *Robertson v. Meadors*, 73 Ind. 43.

*Maryland.* — *Duvall v. Waters*, 1 Bland (Md.) 369.

*New Hampshire.* — *Dennett v. Dennett*, 43 N. H. 499.

*New York.* — *Thompson v. Manhattan R. Co.*, 130 N. Y. 360; *Kane v. Vanderburgh*, 1 Johns. Ch. (N. Y.) 11.

*South Carolina.* — *Mayo v. Feaster*, 2 McCord Eq. (S. Car.) 137.

7. **Contingent or Executory Interests.** — *Bewick v. Whitfield*, 3 P. Wms. 268, note; *Hayward v. Stillingfleet*, 1 Atk. 422.

**Equitable Contingent Interest.** — One who has an equitable contingent interest in lands may maintain an action to restrain waste. *Lee v. Whalon*, 20 N. Y. Wkly. Dig. 366.



voluntary waste.<sup>1</sup> So devisees,<sup>2</sup> and owners of executory bequests and other contingent interests,<sup>3</sup> are entitled to have their interests protected from threatened waste or destruction by injunctive relief.

cc. PERSON NOT IN ESSE.—An injunction to stay waste may be granted in favor of a child *en ventre sa mere*,<sup>4</sup> and in favor of trustees to preserve a contingent remainder, before the contingent remainderman has come *in esse*.<sup>5</sup>

dd. LESSORS AND LESSEES.—A lessee who sublets has his remedy by injunction to restrain the commission of waste by his sublessee or those claiming under him.<sup>6</sup> One who holds land at a ground rent is as much entitled to an injunction restraining waste by an underlessee as if he had an estate of inheritance.<sup>7</sup> And an injunction may be granted to a lessee in case the lessor interferes with his proper use of the demised premises, and commits or threatens waste to the detriment of the lessee's estate.<sup>8</sup>

**1. Contingent Remainderman or Reversioner.**—Williams v. Bolton, 3 P. Wms. 268, note 1; Robinson v. Litton, 3 Atk. 209; Brashear v. Macey, 3 J. J. Marsh. (Ky.) 93; Cannon v. Barry, 59 Miss. 289; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; Peterson v. Ferrell, 127 N. Car. 169; Cowand v. Meyers, 99 N. Car. 108; Gordon v. Lowther, 75 N. Car. 193; Lewisburg University v. Tucker, 31 W. Va. 621.

While a contingent remainderman has no positive or certain interest in the land limited, he still has such an interest as will in certain cases authorize him to interfere to protect the property; while, therefore, he cannot maintain a bill for an account of past waste, he may have an injunction to enjoin future voluntary waste, but in such case all persons having an interest should be joined in the bill. Cannon v. Barry, 59 Miss. 289.

**2. Devisees and Owners of Executory Bequests and Other Contingent Interests.**—An injunction will lie in behalf of a devisee, and against the son of the testator, on the showing that the son is collecting the rents of the estate pending a decision as to the probate of the testator's will, and that waste is being committed by him. Piatt v. Piatt, 2 Disney (Ohio) 408.

**3. Gordon v. Lowther, 75 N. Car. 193.** See also Bewick v. Whitfield, 3 P. Wms. 268; Hayward v. Stillingfleet, 1 Atk. 422; Duvall v. Waters, 1 Bland (Md.) 569; Douthett v. Bodenhamer, 4 Jones Eq. (57 N. Car.) 444; Watson v. Watson, 3 Jones Eq. (56 N. Car.) 400; Braswell v. Morehead, Busb. Eq. (45 N. Car.) 26.

One who has an equitable contingent interest in lands may maintain an action to restrain waste. Lee v. Whalon, 20 N. Y. Wkly. Dig. 366.

It has been held that a devise to P. for life, remainder to testator's daughter N., provided she "shall have lawful heirs of her body, and if not, I give it unto my son," vests in N. upon the death of P. an estate for life which will be enlarged into a fee if she should have issue at her death; and the son took an estate in fee contingent upon the event that N. died without issue, and was entitled to be protected by injunction against waste. Cowand v. Meyers, 99 N. Car. 108, wherein the court said: "In Gordon v. Lowther, 75 N. Car. 193, the facts were similar, except that the limitation over and after the life estate was to such children as the life tenant might have who attained the age of

twenty-one years, and to the plaintiff if there were none such left; and the life tenant, as in our case, had passed the period of child-bearing, and it was decided that no recovery could be had for damages from waste already committed, but the plaintiff was entitled to protection against future waste and destruction by the exercise of the restraining power of the court. This case is not distinguishable in principle from that before us and is decisive of the appeal."

One whose claim to land depends on a contingent event may sustain a bill to enjoin waste, that being his only remedy against waste, because, his interest not being vested, no action at law will lie. But he cannot recover damages for waste which has been committed. Brashear v. Macey, 3 J. J. Marsh. (Ky.) 93.

Where waste is committed by the holder of a life estate in land charged with the payment of a legacy on the termination of the life estate, the remedy of the remainderman is in equity, where the commission of further waste may be restrained and damages may be awarded for the waste already committed. In such a case equity will hold the damages collected for the benefit of the legatee, who must be paid before the remaindermen take. Dawson v. Tremaine, 93 Mich. 320.

**4. Child en Ventre Sa Mere.**—Robinson v. Litton, 3 Atk. 211. See also Duvall v. Waters, 1 Bland (Md.) 569.

**5. Trustees to Preserve Contingent Remainders.**—Garth v. Cotton, 1 Dick. 183, 3 Atk. 754; Stansfield v. Habbergham, 10 Ves. Jr. 273. See Duvall v. Waters, 1 Bland (Md.) 569.

**6. Lessee May Enjoin Waste by Subtenant.**—Maddox v. White, 4 Md. 72, 59 Am. Dec. 67.

**7. Ground Landlord.**—Farrant v. Lovel, 3 Atk. 723; Mayo v. Feaster, 2 McCord Eq. (S. Car.) 137.

**8. Lessee May Enjoin Waste by Lessor.**—Westmoreland, etc., Natural Gas Co. v. De Witt, 130 Pa. St. 235, wherein it was held that where a lessee is entitled to the oil or gas contained in or obtainable through the land demised, equity has jurisdiction to restrain the lessor from drilling on the leasehold, the rights granted to the lessee being necessarily exclusive, and the damage to arise from the threatened waste being entirely incapable of measurement at law, if not irreparable.

It has been held that the lessor who has commenced proceedings to recover demised prem-

66. **TENANTS IN DOWER.** — An injunction may be issued at the suit of a tenant in dower to restrain the commission of waste by the heir.<sup>1</sup>

67. **RECEIVERS.** — A receiver is entitled to an injunction to restrain tenants or under tenants from committing waste,<sup>2</sup> or using the premises to the detriment of the owners.<sup>3</sup>

(d) **Against Whom Maintainable** — *aa.* **RULE AS TO MERE POSSESSORS OR TRESPASSERS.** — Formerly courts having general equity jurisdiction confined the exercise of their jurisdiction to technical waste.<sup>4</sup> And the jurisdiction given to particular courts by statute has sometimes been held to extend only to cases of technical waste.<sup>5</sup> But the remedy by injunction has now been considerably extended, and a continuing trespass may sometimes be restrained.<sup>6</sup> Since, however, this article deals only with technical waste, which cannot be committed by one

ises may be enjoined pending such proceedings from interfering with the rights of the tenants by threats and menaces, and by driving away their employees, the bill averring the total insolvency of the lessor. *Walker v. Walker*, 51 Ga. 22.

1. **Dowress.** — *Harker v. Christy*, 5 N. J. L. 824.

2. **Receivers.** — *Dorman v. Dorman*, 3 Ir. Eq. 385.

3. *Parkman v. Aicardi*, 34 Ala. 393, 73 Am. Dec. 457; *Beckwith v. Howard*, 6 R. I. 1.

4. **Injunction Formerly Restricted to Technical Waste.** — *Leighton v. Leighton*, 32 Me. 399; *Atkins v. Chilson*, 7 Met. (Mass.) 398; *Attaquin v. Fish*, 5 Met. (Mass.) 140; *Poindexter v. Henderson, Walk. (Miss.)* 176.

5. **Statutes Giving Equitable Jurisdiction.** — *Leighton v. Leighton*, 32 Me. 399; *Attaquin v. Fish*, 5 Met. (Mass.) 140; *Lander v. Hall*, 69 Wis. 326.

In *Leighton v. Leighton*, 32 Me. 399, Wells, J., in delivering the opinion of the court, said: "Formerly, courts having general equity jurisdiction, confined the exercise of it in relation to waste, to such as was technically so called, but it was afterwards extended to trespasses where the mischief was irreparable and operated as a permanent injury to the estate. Story Eq. Jur., § 928; *Thomas v. Oakley*, 18 Ves. Jr. 184. In *Stevens v. Beekman*, 1 Johns. Ch. (N. Y.) 318, it was doubted whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. And in *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 345, while the jurisdiction was admitted to exist in that court, exercising full chancery powers, it was stated that it ought to be restrained to those cases where the property itself was of peculiar value and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. It is thus apparent that courts of general chancery jurisdiction exercise it in relation to a certain class of trespasses, and the question arises whether it has been given to this court. The same question has arisen upon a similar statute in *Massachusetts*, *Attaquin v. Fish*, 5 Met. (Mass.) 140, and the rule laid down there as having been acted upon, in the construction of statutes conferring chancery jurisdiction upon the court, is, never to take cognizance of any subjects which are not expressly brought within it by statute, and not to extend jurisdiction to such subjects by implication, and certainly not when the implication is doubtful. And it was decided that the

equitable powers given concerning waste extended to cases of technical waste only, and not to those trespasses which courts that have full chancery powers restrain by injunction. Acting upon this rule, to which no objection is apparent, we must confine the jurisdiction to cases of technical waste. We cannot find in the statute any clear and satisfactory intention to confer a more enlarged power. Because courts of equity in the plenitude of their power have gone beyond legal waste, a term well defined and understood in the law, and have granted relief and injunctions in cases of trespasses committed and threatened to be committed, this court, having but a limited jurisdiction, cannot feel justified in pursuing the same course."

6. **Injunctions to Restrain Acts of Trespass.** — *Thomas v. Oakley*, 18 Ves. Jr. 184; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Palmer v. Young*, 108 Ill. App. 252; *Duvall v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350; *Turner v. Holland*, 54 Mich. 300; *Porch v. Fries*, 18 N. J. Eq. 204; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756.

An injunction may issue to restrain the destruction of an osage hedge fence by a stranger to the inheritance. *Sapp v. Roberts*, 18 Neb. 299.

But it has been held that, under a statute giving the remedy of injunction for waste committed, acts of waste, and not merely of naked trespass, must be alleged and proved. *Lander v. Hall*, 69 Wis. 326, wherein it was held that a complaint which discloses a mere naked trespass by one in no way related to the title or possession is bad.

In the case of *Hamilton v. Ely*, 4 Gill (Md.) 34, the court, in dismissing a bill for an injunction against mere trespassers, said: "The bill in this case neither alleges the trespass as going to the destruction of the inheritance nor the mischief as irreparable. If the bill did contain such allegations, that would not be sufficient; the facts must be stated to show the apprehension of further acts of trespass, well founded, to satisfy the conscience of the court."

A bill for an injunction to restrain waste, alleging that a trespasser was about to commit irreparable injury by boxing and working turpentine trees, and by cutting timber and making staves on land fit only to be cultivated for these products, without an averment of the defendant's insolvency, will be dismissed on motion. *Gause v. Perkins*, 3 Jones Eq. (56 N. Car.) 177, 69 Am. Dec. 728.

who is a stranger to the title and has no right to the possession,<sup>1</sup> reference should be had to other titles for cases dealing with the power of courts of equity to restrain mere acts of trespass.<sup>2</sup>

*bb. TENANTS FOR LIFE.* — A tenant for life may be restrained by injunction from committing either voluntary legal waste<sup>3</sup> or equitable waste.<sup>4</sup> But an injunction will not be granted where there is only permissive waste,<sup>5</sup> except under very special circumstances.<sup>6</sup>

*cc. TENANTS IN DOWER.* — An injunction lies against a tenant in dower, provided the acts complained of constitute waste.<sup>7</sup>

*dd. TENANTS BY THE CURTESY.* — A tenant by the curtesy may also be enjoined from the commission of waste.<sup>8</sup>

*ee. TENANTS FOR YEARS.* — Whenever, under the terms of a lease, a lessee is restricted to the use of the demised premises in a particular manner or for a specified purpose, a violation of the covenant by the use of the premises in a different manner or for another purpose affords ground for the interposition of equity by injunction to restrain waste, since the term "waste" embraces improper use.<sup>9</sup> Violation of a covenant in a lease restricting the use of the

1. See *supra*, *Waste Distinguished from Trespass and Who May Commit Waste—Mere Possessors or Trespassers*.

2. See the title *TRESPASS*, vol. 28, p. 595.

3. **Voluntary Waste.** — *Gibson v. Smith*, 2 Atk. 183; *Dickinson v. Jones*, 36 Ga. 97; *Robertson v. Meadors*, 73 Ind. 43; *Hughes v. Burriss*, 85 Mo. 660; *Williams v. Peabody*, 8 Hun (N. Y.) 271; *Farabow v. Green*, 108 N. Car. 339; *Smith v. Poyas*, 2 Desaus. (S. Car.) 65; *Lewisburg Baptist University v. Tucker*, 31 W. Va. 621; *Poertner v. Russel*, 33 Wis. 193.

4. **Equitable Waste.** — *Tracy v. Tracy*, 1 Vern. 23; *Vane v. Bernard*, 1 Salk. 161, Prec. Ch. 454; *Strathmore v. Bowes*, 2 Bro. C. C. 88; *Skelton v. Skelton*, 2 Swanst. 171, note; *Duncombe v. Felt*, 81 Mich. 332.

5. **Permissive Waste.** — *Powys v. Blagrave*, 4 De G. M. & G. 448; *Lansdowne v. Lansdowne*, 1 Jac. & W. 502; *Cannon v. Barry*, 59 Miss. 289.

6. In *Caldwall v. Baylis*, 2 Meriv. 408, copyholds were devised to A for life, and after his decease to B in fee; but if he should die in the lifetime of A then to the plaintiffs as tenants in common. A permitted the premises to go to decay during the life of B, who had intended to commence proceedings against him in consequence of his neglect, but desisted upon his promise to repair forthwith. B died, and A having neglected to perform his promise, either during B's lifetime or since his death, the buildings grew ruinous for want of the needful repairs. An injunction was granted to restrain A from permitting or suffering any further waste.

In *Marsh v. Wells*, 2 Sim. & St. 87, a person entitled to leasehold property, subject to a previous life interest therein, renewed the lease with the consent of the tenant for life, and covenanted to repair; the tenant for life having neglected to keep the premises in repair, his estate was held liable to indemnify the covenantor, because, as the court held, the covenantor had made the covenant for the benefit of the tenant for life at his request, and the latter's estate ought therefore to be answerable for the tenant's permissive waste occasioned by failure to repair.

7. **Dowress.** — *Calvert v. Rice*, 91 Ky. 533;

*Childs v. Smith*, 1 Md. Ch. 483; *Dalton v. Dalton*, 7 Ired. Eq. (42 N. Car.) 197.

The objection to the jurisdiction of the Court of Chancery of Maryland to stay waste committed by a dowress on her dower lands, upon the ground that the remedy should be sought on the equity side of the County Court, is untenable. *Childs v. Smith*, 1 Md. Ch. 483.

8. **Tenant by the Curtesy.** — A husband, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They began cutting during her life, and continued cutting after her death. A bill was filed by her infant heir, and the cutting was enjoined. It was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question whether the husband should account for it; and also to inquire and report whether the interests of the infant required that the trees still standing should be felled. *Ware v. Ware*, 6 N. J. Eq. 117.

9. **Improper Use of Land by Lessee—England.** — *Bathurst v. Burden*, 2 Bro. C. C. 64; *Nicholson v. Rose*, 4 De G. & J. 10; *Smyth v. Carter*, 18 Beav. 78; *De Wilton v. Saxon*, 6 Ves. Jr. 106; *Bonnett v. Sadler*, 14 Ves. Jr. 526; *Kemp v. Sober*, 1 Sim. N. S. 520; *London v. Hedger*, 18 Ves. Jr. 355.

*Alabama.* — *Parkman v. Aicardi*, 34 Ala. 393, 73 Am. Dec. 457.

*California.* — *Silva v. Garcia*, 65 Cal. 591; *Jungerman v. Bovee*, 19 Cal. 354.

*Delaware.* — *Wilds v. Layton*, 1 Del. Ch. 226, 12 Am. Dec. 91.

*Georgia.* — *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572.

*Kansas.* — *Godfrey v. Black*, 39 Kan. 193, 7 Am. St. Rep. 544.

*Kentucky.* — *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

*Maryland.* — *Crowe v. Wilson*, 65 Md. 479, 57 Am. Rep. 343; *Baughner v. Crane*, 27 Md. 36; *Maddox v. White*, 4 Md. 72.

*Massachusetts.* — *Atkins v. Chilson*, 7 Met. (Mass.) 398.

*Michigan.* — *Chapel v. Hull*, 60 Mich. 167.

*Mississippi.* — *Eskridge v. Eskridge*, 51 Miss. 522.



land may be enjoined although the lessor has accepted rent from the tenant.<sup>1</sup> Though, as has been seen, a receiver may secure an injunction to restrain waste by tenants or undertenants,<sup>2</sup> yet equity will not interfere by injunction against a lessee in possession who is using the premises in accordance with the terms of the lease, working no destruction or injury to the reversion other than that contemplated and authorized by the lease itself.<sup>3</sup>

**§7. TENANTS IN QUALIFIED FEE.**—Although a devisee in fee, subject to an executory devise over, is not impeachable for waste, he may be restrained by injunction from committing equitable waste.<sup>4</sup>

**§8. TENANTS IN COMMON.**—As a general rule, equity will not interfere to restrain waste as between joint tenants, tenants in common, or coparceners, since their right is equal in the use and enjoyment of the estate.<sup>5</sup> But an injunction will lie by one against the other, if the one committing the waste is insolvent,<sup>6</sup> or a suit for the partition of the premises is pending and waste is being committed by one of the tenants in common;<sup>7</sup> or if the waste is destructive of the estate and not according to the usual and legitimate enjoyment thereof;<sup>8</sup> or if one of the parties by agreement with the other holds the

*New York.*—*Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Gillilan v. Norton*, 6 Robt. (N. Y.) 546; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Stewart v. Winters*, 4 Sandf. Ch. (N. Y.) 587.

*Oregon.*—*Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1.

*Pennsylvania.*—*Jones v. Whitehead*, 1 Pars. Eq. Cas. (Pa.) 304.

*West Virginia.*—*Frank v. Brunnemann*, 8 W. Va. 462.

*Wisconsin.*—*Poertner v. Russel*, 33 Wis. 193; *Brock v. Dole*, 66 Wis. 142.

1. **Acceptance of Rent from Tenant.**—*Wright v. Heidorn*, 6 Ohio Dec. 151, 4 Ohio N. P. 124.

2. See *supra*, this section, (c) *By Whom Maintainable*—*Receivers*.

3. **Using Land in Accordance with Terms of Lease.**—*McDaniel v. Callan*, 75 Ala. 327.

A defendant in possession claiming as lessee will not be enjoined from using the premises for purposes not illegal, upon the ground that the complainant has not authorized the lease, but the complainant will be left to his legal remedy in order to recover possession. *Bodwell v. Crawford*, 26 Kan. 292, 40 Am. Rep. 306.

Nor can a tenant be enjoined from removing from the premises a building erected thereon by himself if the injunction is sought by a landlord who is not entitled to the reversion. *Perrine v. Marsden*, 34 Cal. 14.

4. **Tenant in Qualified Fee.**—*Turner v. Wright*, 2 De G. F. & J. 234, 6 Jur. N. S. 809; *Farabow v. Green*, 108 N. Car. 339. See *contra*, *Matthews v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 395.

5. **General Rule.**—*Goodwyn v. Spray*, 2 Dick. 667; *Hole v. Thomas*, 7 Ves. Jr. 589; *Hihn v. Peck*, 18 Cal. 640; *Russell v. Merchants' Bank*, 47 Minn. 286.

6. **Insolvency of Cotenant Committing Waste.**—*Smallman v. Onions*, 3 Bro. C. C. 621; *Stout v. Curry*, 110 Ind. 514.

7. **Pendency of Suit for Partition.**—*Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122. See the title **PARTITION**, vol. 21, p. 1173, notes 9 and 10.

A tenant in common may, in a suit for partition, be enjoined from committing waste; and if the waste be committed by the husband of the tenant, there is enough in the practical

community, if not actual identity, of interest between his wife and him, growing out of their marriage relation, to warrant joining him in the bill with his wife instead of instituting a separate suit against him, and so treating him as an entire stranger. *Weise v. Welsh*, 30 N. J. Eq. 431.

Although at common law one tenant in common had no legal remedy against his cotenant for waste, since the statute of Westminster II., giving such redress, courts of equity have interposed to prevent waste and preserve the corpus of the estate until partition. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

In an action of partition, where one tenant in common has committed waste by cutting and carrying away timber from the lands sought to be partitioned, equity has the power to ascertain the amount of damages for the waste, and the commissioners can be directed to make the proper allowance therefor in the division. *Jackson v. Beach*, (N. J. 1885) 1 Cent. Rep. 263.

8. **Acts Destructive of the Estate.**—*Twort v. Twort*, 16 Ves. Jr. 128; *Hole v. Thomas*, 7 Ves. Jr. 589; *Stout v. Curry*, 110 Ind. 514; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Dodd v. Watson*, 4 Jones Eq. (57 N. Car.) 48, 72 Am. Dec. 577.

In *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, the court, by McKinstry, J., said: "At the common law, the tenant had no redress for acts of admitted waste committed by his cotenant. But the latter might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called 'equitable waste' because allowable at law. By our statute, however, a tenant may recover damages of his cotenant in every case of waste."

Where a tenant in common, by cutting down and clearing woodland beyond his interest, injures his cotenant, he is liable for waste, and equity will afford relief. *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

Pending a suit in equity, one tenant in common in possession will not be permitted to strip the land of its timber. It would greatly diminish the value of the estate, and, therefore,

common property as occupying tenant of the other.<sup>1</sup> And it has been held that where a statute provides that one tenant in common may maintain an action for waste against his cotenant or joint tenant, the right to sue for waste includes the right to restrain its commission.<sup>2</sup> One tenant in common in remainder may be made a party to a bill filed by his cotenant to enjoin waste committed by the former and tenants for life and lessees.<sup>3</sup>

*hh. TAX DELINQUENTS.* — The statutes of some states provide that governmental officials may sue out an injunction to prevent the commission of waste on lands on which the taxes are delinquent.<sup>4</sup>

*ii. EXECUTORS.* — An executor who is the principal legatee, and is authorized to use and occupy the premises until he shall make a sale thereof for the payment of his own and minor legacies, will not be enjoined from committing waste, since the minor legacies can be secured by an accounting.<sup>5</sup>

*ij. LIENHOLDERS.* — It has been said that the existence of a "lien" on behalf of the complainant will not entitle him to an injunction to restrain the defendant in the free use and enjoyment of his property; in cases of lien, to entitle a complainant to the aid of an injunction, he must show that the free enjoyment of the property by defendant will, in all probability, tend to its injury or destruction to an extent that will impair its value as a security for his demand and peril its ultimate payment.<sup>6</sup> And it has been declared to be doubtful whether a court of equity will, at the suit of a mere judgment creditor who has not brought the debtor's land to liability by a sale, interpose to restrain such acts of a judgment debtor, in possession as owner of real estate, as would constitute waste at the common law.<sup>7</sup> But injunctions to restrain waste have been granted at the suit of judgment creditors,<sup>8</sup> attaching creditors,<sup>9</sup> and purchasers at execution sales.<sup>10</sup> The judgment debtor and preferred judgment creditors may also be enjoined from the removal of fixtures from

is an injury recognized by law, and the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

1. **One Tenant Holding as Occupying Tenant for the Other.** — *Twort v. Twort*, 16 Ves. Jr. 128.

2. **Statute Giving Action of Waste Between Cotenants.** — *Morrison v. Morrison*, 122 N. Car. 519.

3. **Joinder of Tenant in Common in Remainder.** — *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362. But one tenant in common in remainder is not liable to his cotenant, if he merely looks at one who commits waste on the premises held in common and does not prevent the commission of such waste. *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281.

4. **Tax Delinquents.** — *Rossman v. Adams*, 91 Mich. 69; *Caldwell v. Ward*, 83 Mich. 13.

5. **Executor.** — *Keller v. Ogsbury*, 121 N. Y. 62.

6. **Lienholders.** — *Pensacola, etc., R. Co. v. Spratt*, 12 Fla. 26, 91 Am. Dec. 747.

7. **Judgment Creditors.** — *Witmer's Appeal*, 45 Pa. St. 455.

8. *Jones v. Britton*, 102 N. Car. 166.

9. **Attaching Creditors.** — *U. S. v. Parrott, McAll.* (U. S.) 323; *Kennedy v. Scovil*, 14 Conn. 71; *Crandall v. Gallup*, 12 Conn. 374; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707.

10. **Holder of Certificate of Sale on Execution.** — In *New York* it has been held that the holder of a certificate of sale of lands upon execution may enjoin the commission of waste upon the premises covered by the lien of the judgment. *Utica Bank v. Messereau*, 7 Paige (N. Y.) 517;

*Boyd v. Hoyt*, 5 Paige (N. Y.) 65; *Talbot v. Chamberlin*, 3 Paige (N. Y.) 219.

Where a judgment is a lien upon one piece of land only, and from which alone satisfaction can be obtained (the judgment debtor being dead), and where such land is inadequate security for the payment of the judgment, a person in possession of such land may be restrained from the commission of waste thereon, by cutting and removing timber and wood, where such acts diminish the value of the premises, and thereby impair the only security the creditor has for payment of his debt. *Vandemark v. Schoonmaker*, 9 Hun (N. Y.) 10.

*Connecticut.* — In *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707, wherein waste on the lands of an insolvent debtor was enjoined by an attaching creditor, the court, by Williams, C. J., said: "The case, in principle, seems much like that of a mortgage. In both cases the land is appropriated as security for the debt. In both cases the creditor has the right to take the land, or resort to other property if it can be found. In both cases the debtor may remove the lien by payment of the debt. In both cases the debtor may deny or disprove the existence of the debt. Why, then, should not a Court of Chancery have the same power to prevent waste upon this property, in the one case as well as the other? If it is done in the one case, that the security given by the party should not be destroyed, it should be done in the other, that the security given by the law should not be destroyed. Surely the law must be as anxious to guard its own en-

the insolvent debtor's premises, at the suit of another judgment creditor whose rights are thus sought to be defrauded.<sup>1</sup>

**42. MORTGAGORS AND MORTGAGEES — In General.** — An injunction to restrain waste may be granted against a mortgagor or mortgagee in possession.<sup>2</sup>

**Waste by Mortgagor in Possession.** — The mortgagor has a right to his whole mortgage security, and when the mortgagor in possession commits, or threatens to commit, such acts of waste as impair the security of the mortgage, an injunction may be issued,<sup>3</sup> even though the mortgage debt may not be

actments, as the provisions of the parties themselves."

*Delaware.* — And in Delaware it has been held that a purchaser of land at a sheriff's sale, the sale having not been returned, nor a legal title acquired, has nevertheless a remedy by injunction to stay waste of the premises purchased. *Thompson v. Lynam*, 1 Del. Ch. 64.

But the party committing the waste is not liable in equity to account for waste committed prior to a purchase of the premises, by a judgment creditor who had obtained an injunction to prevent the commission of waste, and, pending the injunction, purchased the premises at a sheriff's sale in execution of the judgment; for title at the time of the commission of waste is regarded as necessary to sustain a right to an accounting in equity. *Hughlett v. Harris*, 1 Del. Ch. 349.

*North Carolina.* — In *Jones v. Britton*, 102 N. Car. 166, it was held that a judgment is a lien upon land to which the debtor is entitled as a homestead, under the law of North Carolina, and when the land is not worth more than \$1,000, and much of its value consists in timber trees, the debtor, or other person to whom he has sold them, may be enjoined from cutting such trees for profit. In this case, the court, by Merrimon, J., said: "Obviously the creditor having such lien is entitled to have the property to which it attaches protected against the destruction or unreasonable impairment of it prejudicial to that lien. As it cannot be enforced while the exemption of the property from sale lasts, the property will be properly protected during that time, so that the creditor may, in the end, have the benefit of his lien. A court of equity will not hesitate, in a proper case, to interfere by injunction, or in any other proper way, for such purpose. Otherwise, the creditor would have no remedy during the exemption. *Webb v. Boyle*, 63 N. Car. 271; *Gordon v. Lowther*, 75 N. Car. 193; *Braswell v. Morehead*, Bush. Eq. (45 N. Car.) 26, 57 Am. Dec. 586; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707."

*Virginia* — In 1844, A took possession of land under a patent and held exclusive possession thereof, and paid the taxes for more than the statutory period, the county record showing no other claim to the land. In 1882, after the land had been purchased and paid for at a judicial sale from A, the defendant, B entered forcibly, under claim of title under an older patent, and committed waste thereon. It was held that the purchaser was entitled to a perpetual injunction restraining waste. *Bassore v. Henkel*, 82 Va. 474.

*Wisconsin.* — In *Law v. Wilgees*, 5 Biss.

(U. S.) 13, it was held that, under the Wisconsin Rev. Stat. of 1849, the holder of a certificate of sale of land on execution cannot maintain a bill to restrain waste. The case was decided on the ground that a judgment creditor or attaching creditor has no title to the land; that the holder of a certificate of purchase has no right or title to the possession of land until he obtains his deed, after the expiration of the time for redemption; that they do not stand in the light either of mortgagees or mortgagors (who are entitled to injunctive relief to preserve their security); and that, therefore, as the statutes of Wisconsin did not then authorize such a proceeding in behalf of the holder of a certificate of sale, an injunction would not be granted.

**1. Enjoining Removal of Fixtures.** — *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505. In this case the court, by Woodward, J., said: "The other argument of the plaintiffs in error is akin to the former, that before a creditor can question the disposition of a debtor's property, he must have completed his title by judgment and execution. This is true as to personal property, and for this reason, that the execution only, and not the judgment, is a lien on chattels. English cases were cited to show that it is true also as to real estate in *England*, and for precisely the same reason, that a judgment there is no lien on land. It is the execution which establishes the legal relation between the creditor and the debtor's land, as here it is the execution which establishes the legal relation between the creditor and the debtor's goods. But our statutes bring judgment creditors, as the contract of mortgage brings mortgagees, into direct relation with the debtor's lands, and because the law creates the relation, equity will protect it — will protect it, not from such reasonable use and enjoyment of the lands by the owner as are usually incident to unincumbered ownership, but will protect it from such wanton and injurious acts as are of the nature of waste."

**2. Mortgagor or Mortgagee in Possession.** — *Farratt v. Lovel*, 3 Atk. 723; *Humphreys v. Harrison*, 1 Jac. & W. 561; *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148.

**3. Waste by Mortgagor Impairing the Security** — *England.* — *Robinson v. Litton*, 3 Atk. 209. *Alabama.* — *Coker v. Whitlock*, 54 Ala. 180. *Connecticut.* — *Cooper v. Davis*, 15 Conn. 561.

*Illinois.* — *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Dorr v. Dudderar*, 88 Ill. 107; *Nelson v. Pinegar*, 30 Ill. 473; *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350.

*Indiana.* — *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.



due.<sup>1</sup> And it is not necessary that the mortgagor be insolvent,<sup>2</sup> although that would be an additional reason for granting the injunction.<sup>3</sup>

**Acts Which May Be Enjoined.** — The mortgagor can only be enjoined for acts of technical waste. He cannot be enjoined from using the premises in the same manner as they were used before the mortgage was executed. Hence, mines and mineral deposits and quarries may be legitimately worked,<sup>4</sup> nursery stock

*Maryland.* — *Salmon v. Clagett*, 3 Bland (Md.) 125; *Brown v. Stewart*, 1 Md. Ch. 87.

*New Jersey.* — *Emmons v. Hinderer*, 24 N. J. Eq. 39; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467.

*New York.* — *Mutual L. Ins. Co. v. Bigler*, 79 N. Y. 568; *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148; *Beebe v. Coleman*, 8 Paige (N. Y.) 392.

*Pennsylvania.* — *Martin's Appeal*, (Pa. 1887) 9 Atl. Rep. 490. See also *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

*Wisconsin.* — *Taylor v. Collins*, 51 Wis. 123; *Fairbank v. Cudworth*, 33 Wis. 358; *Bunker v. Locke*, 15 Wis. 635.

It has sometimes been contended that in order to justify an injunction against waste by the mortgagor, the waste must be such as to render the security inadequate or insufficient, or at least of doubtful sufficiency. The following cases have sometimes been cited to this effect: *Coker v. Whitlock*, 54 Ala. 180; *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147; *Vanderslice v. Knapp*, 20 Kan. 647; *Harris v. Bannon*, 78 Ky. 568; *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203.

*Van Wyck v. Alliger*, 6 Barb. (N. Y.) 511, and some of these cases make use of the word "impair" as well as of the word "inadequate" and seem to treat them as convertible terms.

But however this may be, there can be no question but that a mortgagor will be enjoined from the commission of such waste as will not only impair the security, but render it inadequate or insufficient. *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Coggill v. Millburn Land Co.*, 25 N. J. Eq. 90.

The meaning of the term "insufficient security" is explained in *King v. Smith*, 2 Hare 244. In this case, the court, by Wigram, V. C., said: "I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense — that the security is worth so much more than the money advanced — that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

In *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310, it was decided that as between the mortgagee and mortgagor a frame building erected by the side of a mill for use as an office in connection with the mill is part of the realty, although to be ultimately removed, and not attached to the mill, nor fixed to the ground, but resting upon wooden blocks sitting upon the surface of the earth; and its removal may be enjoined without allegation and proof that such removal would work an irreparable injury to the land, and although

the mortgagor who threatens to remove it is a person of undoubted solvency.

**1. Mortgage Debt Need Not Be Due.** — *Coggill v. Millburn Land Co.*, 25 N. J. Eq. 90; *Cahn v. Hewsey*, (N. Y. Super. Ct. Spec. T.) 8 Misc. (N. Y.) 384, 31 Abb. N. Cas. (N. Y.) 387.

**2. Insolvency of Mortgagor Not Necessary** — *England.* — *Bagnall v. Villar*, 12 Ch. D. 812.

*Alabama.* — *Coleman v. Smith*, 55 Ala. 369.

*Connecticut.* — *Cooper v. Davis*, 15 Conn. 556.

*Illinois.* — *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Dorr v. Dudderar*, 88 Ill. 107; *Nelson v. Pinegar*, 30 Ill. 473.

*Indiana.* — *Knarr v. Conaway*, 42 Ind. 260.

*Kentucky.* — *Harris v. Bannon*, 78 Ky. 568.

*Minnesota.* — *Adams v. Corrison*, 7 Minn. 456.

*New Jersey.* — *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387; *Emmons v. Hinderer*, 24 N. J. Eq. 39.

*New York.* — *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148.

*Wisconsin.* — *Taylor v. Collins*, 51 Wis. 123; *Scott v. Webster*, 50 Wis. 53; *Fairbank v. Cudworth*, 33 Wis. 358; *Bunker v. Locke*, 15 Wis. 635.

**3.** A mortgagor who is insolvent will be restrained from committing waste upon the land mortgaged, such as cutting of timber, where such cutting will render the mortgagee's security inadequate. *Bunker v. Locke*, 15 Wis. 635.

The defendant, H., being owner of one undivided eighth part of certain land, took a tax deed of an undivided three-fourths of the same land, and he quitclaimed said undivided three-fourths to one C., who mortgaged the same to one A. When the mortgage was executed, there was a large quantity of valuable pine timber on said land, constituting its main value, and H. and his cotenants, who claimed under a license from the owner of the other undivided one-eighth, entered into possession of the land and cut off most of the timber, and threatened to cut off and remove the remaining timber. In an action by the mortgagee to restrain them from further cutting the timber (to the destruction of the plaintiff's security), it was held that none of the defendants had an interest in the question whether C.'s mortgage to H. was a valid lien upon an undivided two-thirds, or only an undivided one-eighth of the land, and that the mortgagee was entitled to the injunction sought, especially as C., his mortgagor, was shown to be insolvent. *Atkinson v. Hewitt*, 51 Wis. 275.

**4.** An injunction against a mortgagor, restraining him from quarrying on a quarry lot, half of which was conveyed, as such, to him by the mortgagee, to secure the consideration for which conveyance the mortgage was given, was dissolved on answer denying the charges

sold,<sup>1</sup> and timber cut if a license has been given, either impliedly or expressly;<sup>2</sup> provided in each case the premises remain sufficient security for the debt.

**Time of Enjoining Waste.** — The mortgagor may be enjoined from committing waste pending a bill for foreclosure<sup>3</sup> after a decree has been entered,<sup>4</sup> or even after a sale of the premises.<sup>5</sup>

in the bill, from which it might be inferred that the defendant was improperly impairing the value of the mortgaged premises and endangering the complainant's security; the court holding that as the land was sold for quarrying purposes, the proper use of it as such could not be considered waste. *Vervalen v. Older*, 8 N. J. Eq. 98.

**Working Open Mines or Quarries.** — *Russell v. Merchants' Bank*, 47 Minn. 286.

But a quarry company will be restrained from removing or disposing of stone quarried on the mortgaged lands after a decree of foreclosure. *American Trust Co. v. North Belleville Quarry Co.*, 31 N. J. Eq. 89.

**1. Sale of Nursery Stock.** — *Hamilton v. Austin*, 36 Hun (N. Y.) 138.

But the removal of growing nursery stock may be enjoined, if there is an averment of the mortgagor's insolvency. *Robinson v. Russell*, 24 Cal. 467.

**2. Cutting Timber.** — Whether the cutting of wood and timber is wrongful or not depends upon the question whether a license has been given, or may be implied; and this is a question for the jury. *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425; *Page v. Robinson*, 10 Cush. (Mass.) 99; *Smith v. Moore*, 11 N. H. 55.

A mortgage of land, given as security with a note payable in wood, provided that the mortgagor was "not to cut wood or timber upon the said estate, except for the payment of said note, to reduce the value below the amount secured with interest annually." It was held that the mortgagor had the right to cut timber to any extent, even after a breach of the condition of the mortgage, provided he did not so strip the land as to leave it of less value than the amount then due upon the note. *Ingell v. Fay*, 112 Mass. 451.

A large tract of pine land owned in connection with a glass factory, for the ordinary uses and purposes of which the owner from time to time cut wood from the pine land, was mortgaged. After the mortgage was given a fire swept over a large portion of the tract, killing the timber standing on it. The mortgagors commenced cutting down the burnt timber, proposing to cut it all down, alleging that it was necessary to do so, as well to save the wood from rotting, as for the permanent benefit of the estate in reference to new growth. The mortgagees filed a bill to restrain the mortgagors from cutting down or removing from the premises any wood or timber growing thereon, or from removing from the premises any of the wood or timber already cut down, and from committing any other waste. They obtained an injunction. The bill did not pray a foreclosure; the whole money not being then payable. On answer stating the fact as to the burning and the propriety of felling the burnt

timber, and offering to give other security for an amount equal to the value of the burnt wood which the mortgagors proposed to cut, a reference was ordered to ascertain such value, with a view to directing such security to be given. In this case it was said, by the chancellor, that if a large proportion in value of pine woodland, mortgaged, be burnt over, and it be proper, to save the burnt wood from rotting and for the permanent benefit of the estate in reference to the new growth, that the burnt wood be cut off, the land being worth but little without wood on it, it would be right that the burnt wood so cut should be applied towards paying the mortgage. *Brick v. Getsinger*, 5 N. J. Eq. 391.

**3. Waste Pending Foreclosure.** — Pending a bill to foreclose a mortgage against the mortgagor and his grantee in fee, the grantee sold standing timber on the land; an injunction was granted against the mortgagor and his grantee, but was refused as against the purchasers, they not being parties to the bill, and having a right to be heard. *Van Derveer v. Tallman*, 1 N. J. Eq. 9.

Where, during the pendency of an action to foreclose a mortgage, waste is being committed on the mortgaged premises by the cutting down and removal of timber thereon, an order may be obtained, under *New York Code Civ. Pro.*, § 1681, to restrain the commission of further waste, but not to restrain the disposition of the timber or wood already cut, especially where there is no allegation that the parties removing it are insolvent. *Episcopate v. Matteson*, (Supm. Ct. Spec. T.) 12 N. Y. St. Rep. 370.

**4. Waste After Entry of Foreclosure Decree.** — A mortgagor in possession, committing waste after a decree of foreclosure has been rendered, but before it has been executed, may be restrained by injunction. *Malone v. Marriott*, 64 Ala. 486.

**5. Waste After Foreclosure Sale.** — After a sale of mortgaged premises under decree and execution, the mortgagor in possession will be restrained from committing waste. *Phoenix v. Clark*, 6 N. J. Eq. 447.

W. sold and conveyed a tract of land to H., and took a deed of trust to secure certain notes given for the purchase money. Default was made in the payment of the notes, and during the pendency of an advertisement of sale by the trustee, H., the mortgagor, confessed a judgment to his father, who afterward bought the mortgaged premises at the trustee's sale, but refused to pay for them, because he claimed title by virtue of the confession of judgment. Upon a bill, filed by the trustee, setting forth these facts, and alleging that the mortgagor was insolvent and had been allowing the farm to run down, and was cultivating it in a wasteful and destructive manner, a proper case was presented for the appointment of a special receiver to take charge of the property

**Waste by Mortgagee in Possession.** — A mortgagee in possession with a sufficient security may be enjoined by the mortgagor from committing waste.<sup>1</sup>

**Waste by Vendee of Equity of Redemption.** — The mortgagor may also enjoin the vendee of his equity of redemption from committing waste,<sup>2</sup> unless it is done under a special license.<sup>3</sup>

**V. VENDOR AND PURCHASER.** — The same principles which apply in respect to injunctions against waste committed by a mortgagor in possession, are also applicable as between a purchaser who has obtained possession before the payment of the purchase money, and the vendor.<sup>4</sup> And it is not necessary to the granting of an injunction that the purchaser be insolvent,<sup>5</sup> though, of course, the insolvency of the purchaser is an additional reason for granting an injunction.<sup>6</sup> But the vendor is not entitled to an injunction, if the waste alleged does not impair the security of the vendee,<sup>7</sup> or is justified by good husbandry,<sup>8</sup> or by special agreement between the vendor and vendee.<sup>9</sup> Likewise, the vendee may enjoin the vendor who remains in possession from

until the conflicting claims could be adjusted. *Dunlap v. Hedges*, 35 W. Va. 287.

**1. Waste by Mortgagee in Possession.** — *Humphreys v. Harrison*, 1 Jac. & W. 561; *Sandon v. Hooper*, 6 Beav. 246; *Hardy v. Reeves*, 4 Ves. Jr. 479; *Farrant v. Lovel*, 3 Atk. 723; *Mitchell v. Amador Canal, etc., Co.*, 75 Cal. 464.

**2. Waste by Vendee of Equity of Redemption.** — It seems that a mortgagor, who has sold his equity of redemption in the mortgaged premises without taking any indemnity against his liability upon his bond, can have an injunction against his vendee to stay waste, on the ground that he would be answerable for the amount of the mortgage which the proceeds of the sale of the land might fail to satisfy. *Hurst v. Elliott*, 52 Hun (N. Y.) 273; *Brumley v. Fanning*, 1 Johns. Ch. (N. Y.) 501.

**3.** But the mortgagor cannot restrain the vendee of the mortgaged premises, if the latter buys in reliance upon an oral license to cut timber, and proceeds to cut it in accordance with the license. *Hurst v. Elliott*, 52 Hun (N. Y.) 273.

**4. Purchaser in Possession Before Payment of Purchase Money.** — *Petley v. Eastern Counties R. Co.*, 8 Sim. 483; *Webster v. South-eastern R. Co.*, 1 Sim. N. S. 272; *Casamajor v. Strode*, 1 Sim. & St. 381; *Crockford v. Alexander*, 15 Ves. Jr. 138; *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58; *McCaslin v. State*, 44 Ind. 151; *Staats v. Freeman*, 6 N. J. Eq. 490; *Bradley v. Reed*, 2 Pittsb. (Pa.) 519; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Core v. Bell*, 20 W. Va. 174.

A court of equity will not permit a vendee of land in possession, with the bulk of the purchase money due and unpaid, to diminish the security of his vendor by cutting and removing timber from the land. *Bradley v. Reed*, 2 Pittsb. (Pa.) 519.

An injunction to stay waste ought to be granted to a vendor against a vendee, to whom he has sold a tract of land in fee simple, retaining the title as a security for the purchase money, who brings his suit to subject the land to the payment of the purchase money, and the bill charges the defendant with cutting timber on the land in a manner calculated to render it an incompetent security for the payment of

the purchase money. *Core v. Bell*, 20 W. Va. 174.

**Voidable Contract of Sale.** — An injunction was granted restraining waste on a farm conveyed by the complainant to the defendant, on a bill alleging that a deed was procured by the defendant from the complainant by undue means, the complainant being addicted to intemperance, and praying that the deed might be declared void; and after answer, the injunction was retained to the hearing. *Staats v. Freeman*, 6 N. J. Eq. 490.

**5. Insolvency of Purchaser.** — *Core v. Bell*, 20 W. Va. 174.

In an action to foreclose a contract for the purchase of land, an injunction may issue against the purchaser to prevent the removal of structures which have become a part of the realty, without showing the purchaser's insolvency. *Taylor v. Collins*, 51 Wis. 123.

**6.** In a suit by the vendor in a contract for the sale of land, to foreclose the interest of the purchaser, to recover a judgment for the debt, and to subject the interest of the purchaser to sale, where the vendee is insolvent, is in possession, has committed waste, and threatens to materially impair the value of the property by cutting down and removing timber, the court may grant an injunction to restrain the commission of such waste, and appoint a receiver to take charge and possession of the land. *McCaslin v. State*, 44 Ind. 151.

**7. Impairment of Security Necessary.** — *Miller v. Waddingham*, 91 Cal. 377; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25.

An owner of land, who contracted to sell the same to a purchaser who caused houses to be built thereon, under an agreement with the building contractor that he should own them until paid for, cannot maintain an injunction for waste against the vendee of the contractor, after such vendee has removed the houses from the premises onto the street, although when deprived of the buildings the land constitutes insufficient security for the money still due the owner upon his contract for the sale of the land. *Stowell v. Waddingham*, 100 Cal. 7.

**8. Acts Justified by Good Husbandry.** — *Crawley v. Timberlake*, 2 Ired. Eq. (37 N. Car.) 460.

**9. Acts Done in Accordance with Agreement.** — *Hoile v. Bailey*, 58 Wis. 434.



committing waste.<sup>1</sup>

c. **ACCOUNTING**—(1) *General Rule*.—In all cases in which a bill for an injunction will lie to restrain future waste, a court of equity, upon the ground of preventing a multiplicity of suits, will give an account of past waste.<sup>2</sup> And conversely, as a general rule, if the party committing waste has parted with his estate, or for any other reason there happens to be nothing on which an injunction can operate, and complete relief can be had in an action at law, a bill for an account will not lie.<sup>3</sup>

(2) *Exceptions to the Rule*.—But if the waste is of such a kind that an action at law will not afford adequate relief, equity will give the remedy of an account, even if an injunction may not be had.<sup>4</sup>

(3) *Scope of Remedy*.—The account is limited to moneys actually received and profits actually made by the tenant committing the waste; there can be no account in respect of acts unattended by profit.<sup>5</sup>

**1. Vendor Remaining in Possession**.—A purchaser who pays part of the purchase money down, the vendor remaining in possession, for the purpose of using the land for a term of years, is entitled to an injunction against the commission of waste by quarrying or the removal of trees. *Holmberg v. Johnson*, 45 Kan. 197.

**2. Accounting for Past Waste Whenever Injunction Issues**—*England*.—*Jesus College v. Bloome*, 3 Atk. 263; *Parrott v. Palmer*, 3 Myl. & K. 632; *Lee v. Alston*, 1 Ves. Jr. 78; *Thomas v. Jones*, 1 Y. & C. Ch. 510; *Newdigate v. Newdigate*, 2 Cl. & F. 601; *Grierson v. Eyre*, 9 Ves. Jr. 346.

*United States*.—*Carrington v. Lentz*, 40 Fed. Rep. 18.

*Alabama*.—*Stoudenmire v. De Bardelaben*, 85 Ala. 85.

*California*.—*Mitchell v. Amador Canal, etc., Co.*, 75 Cal. 464.

*Delaware*.—*Fleming v. Collins*, 2 Del. Ch. 230.

*Georgia*.—*Powell v. Cheshire*, 70 Ga. 357.

*Illinois*.—*Armstrong v. Wilson*, 60 Ill. 226.

*Maryland*.—*Duvall v. Waters*, 1 Bland (Md.) 569.

*Michigan*.—*Dawson v. Tremaine*, 93 Mich. 320.

*Nebraska*.—*Disher v. Disher*, 45 Neb. 100.

*New Hampshire*.—*Dennett v. Dennett*, 43 N. H. 499.

*New Jersey*.—*Lippincott v. Barton*, 42 N. J. Eq. 272; *Jackson v. Beach*, (N. J. 1886) 2 Cent. Rep. 263; *Ackerman v. Hartley*, 8 N. J. Eq. 476; *Ware v. Ware*, 6 N. J. Eq. 117; *Porch v. Fries*, 18 N. J. Eq. 204.

*New York*.—*Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Utica Bank v. Messereau*, 7 Paige (N. Y.) 517; *Weatherby v. Wood*, (Supm. Ct. Spec. T.) 29 How. Pr. (N. Y.) 404; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169; *Kane v. Vanderburgh*, 1 Johns. Ch. (N. Y.) 11; *Winship v. Pitts*, 3 Paige (N. Y.) 259.

*North Carolina*.—*Dodd v. Watson*, 4 Jones Eq. (57 N. Car.) 48; *Gause v. Perkins*, 3 Jones Eq. (56 N. Car.) 177.

*West Virginia*.—*Williamson v. Jones*, 39 W. Va. 239.

**3. Generally Accounting Granted Only When Injunction Is Proper**—*England*.—*Jesus College*

*v. Bloome*, 3 Atk. 262; *Grierson v. Eyre*, 9 Ves. Jr. 341; *Oxford, etc., University v. Richardson*, 6 Ves. Jr. 689; *Higginbotham v. Hawkins*, L. R. 7 Ch. 676; *Smith v. Cooke*, 3 Atk. 381; *Gent v. Harrison*, Johns. Ch. (Eng.) 517; *Pulteney v. Warren*, 6 Ves. Jr. 89; *Parrott v. Palmer*, 3 Myl. & K. 632.

*Indiana*.—*Lefforge v. West*, 2 Ind. 514.

*Maryland*.—*Duvall v. Waters*, 1 Bland (Md.) 569.

*New Hampshire*.—*Dennett v. Dennett*, 43 N. H. 499.

*New Jersey*.—*Lippincott v. Barton*, 42 N. J. Eq. 272; *Ackerman v. Hartley*, 8 N. J. Eq. 476; *Ware v. Ware*, 6 N. J. Eq. 117.

*New York*.—*Spear v. Cutter*, 5 Barb. (N. Y.) 486; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169; *Winship v. Pitts*, 3 Paige (N. Y.) 259.

*North Carolina*.—*Gause v. Perkins*, 3 Jones Eq. (56 N. Car.) 177.

*Pennsylvania*.—*Grubb's Appeal*, 90 Pa. St. 228.

**4. Accounting Granted Though Injunction Will Not Issue**.—An accounting will be granted in a case where an action to stay waste and recover damages fails, if the relations of the cotenants, being *sui generis*, demand it, as where one of the tenants in common may be in a position to appropriate the whole profits of the estate to his own individual use. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686. In this case, a rebate was allowed to the defendant tenant for buying in an outstanding title because it was necessary to protect the common possession.

A decree for an account of timber will be made against the assets of a remainderman in fee, who colludes with the tenant for life in cutting timber before the birth of a contingent remainderman. *Garth v. Cotton*, 3 Atk. 751, 1 Ves. 524, 1 Dick. 183.

**Equitable Waste**.—In cases of equitable waste, a bill for an account will lie against the assets of a deceased wrongdoer, though an injunction cannot be had. *Lansdowne v. Lansdowne*, 1 Madd. 116; *Leeds v. Amherst*, 2 Phill. 117; *Morris v. Morris*, 3 De G. & J. 323; *Blake v. Peters*, 1 De G. J. & S. 345.

**5. Scope of Remedy**.—*Lee v. Alston*, 1 Ves. Jr. 78; *Colburn v. Simms*, 2 Hare 560; *Powell v. Aiken*, 4 Kay & J. 343.

(4) *Who Entitled to an Accounting — In General.* — It has been held that a title to the land at the time of waste committed is necessary in order to sustain the right to an account for the waste.<sup>1</sup>

*Tenants in Common.* — The proper remedy for a tenant in common, whose cotenant has wasted the estate, but not wasted it to destruction, is a bill in equity for an account.<sup>2</sup>

*Mesne Remainderman for Life.* — A mesne remainderman for life, although entitled to an injunction to protect his enjoyment, has not such an interest as to enable him to call for an account.<sup>3</sup>

*Legatee or Devisee.* — A sole legatee or devisee is entitled to relief by an accounting for the commission of waste on the premises devised.<sup>4</sup>

**VIII. DAMAGES AND PENALTIES — 1. Measure of Damages.** — In actions to recover damages for waste the measure of damages is the extent of the injury to the plaintiff's specific estate,<sup>5</sup> which is ordinarily the extent to which the value of the land is diminished.<sup>6</sup> In an action by a remainderman to recover damages for waste by a life tenant, the measure of damages is the injury to the estate in remainder.<sup>7</sup> And it has been said that for waste committed by a mortgagor in possession, the measure of damages is the diminution in the value of the mortgage security.<sup>8</sup> Damages are not measured by the parol receipts of the waste committed.<sup>9</sup> Hence, in an action for the cutting of timber, the value of the timber cut does not constitute the measure of damages.<sup>10</sup>

**2. Treble Damages.** — One of the penalties given by virtue of the statute of Gloucester, for the commission of waste, was the recovery of an amount three times in excess of the damages actually found to have been suffered by

**1. Title at Time of Waste Necessary.** — *Hughlett v. Harris*, 1 Del. Ch. 349, in which the court said: "The acts alleged to be done and complained of were done by the persons having at the time the fee-simple title to the lands, and the person now claiming an account then had no title. I can find no case in the books to warrant a decree for an account in such a case as this, and am of opinion that the complainant is not entitled to such a decree. The principle laid down in *Garstin v. Asplin*, 1 Madd. 149, that where an injunction is obtained to prevent a wrong, a court of equity will, in order to prevent a multiplicity of suits, proceed to give full relief, must be understood to apply to those cases where the party has not only a right to the injunction to prevent future wrong, but also to have relief in a court of equity for the wrong previously done. To extend the principles further would bring many cases into chancery which properly belong to the courts of common law."

**2. Tenants in Common.** — *Co. Litt.* 200; *Bentley v. Bates*, 4 Y. & C. Exch. 182; *Martyn v. Knowllys*, 8 T. R. 145; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686; *Darden v. Cowper*, 7 Jones L. (52 N. Car.) 210, 75 Am. Dec. 461.

**3. Mesne Remainderman for Life.** — *Pigot v. Bullock*, 1 Ves. Jr. 479, 3 Bro. C. C. 539.

**4. Sole Legatee or Devisee.** — If the sole legatee and devisee of a deceased wife files a bill in equity against the surviving husband, for an account of waste committed during coverture, by the removal of houses from his wife's land to his own, the complainant succeeds only to the rights of the wife, and can recover only the damages which accrued to her; the indirect injury to adjacent river lands belonging to the complainant himself, which were not suitable

for residence or cultivation, is not an element for the recovery of damages; the houses having been removed with the consent of the wife, the measure of damages is not the value of the houses, but the actual injury to the land, that is; the difference in its market value before and after the removal. *Stoudenmire v. De Bardelaben*, 85 Ala. 85.

**5. Measure of Damages.** — *Hamden v. Rice*, 24 Conn. 350; *Van Deusen v. Young*, 29 N. Y. 9.

It has been held that where all the persons entitled as reversioners do not join in the suit for waste, the plaintiffs are entitled to recover not the full value of the land, but only such portion of the damages as was incurred by themselves alone. *Titus v. Sulis*, 9 Nova Scotia 497.

**6. American Freehold Mortg. Co. v. Pollard**, 132 Ala. 155; *Stoudenmire v. De Bardelaben*, 85 Ala. 85; *Perdue v. Brooks*, 85 Ala. 459; *Cole v. Bickelhaupt*, 64 N. Y. App. Div. 6; *Bodkin v. Arnold*, 48 W. Va. 108.

**7. Kent v. Bentley**, 6 Ohio Cir. Dec. 457, 10 Ohio Cir. Ct. 132; *Morris v. Knight*, 14 Pa. Super. Ct. 324.

**8. Tate v. Field**, 57 N. J. Eq. 632.

In an action by a second mortgagee of realty, against the mortgagor or his assigns, for an injury to the security resulting from the removal of fixtures or other waste, the damages recoverable are to be measured by the injury to the mortgage as a security. And if it be doubtful whether the damages should not go to the first mortgagee, the court will exert its equitable powers to control the disposition of the fund so that no injustice may be done. *Jackson v. Turrell*, 39 N. J. L. 329.

**9. American Freehold Land Mortg. Co. v. Pollard**, 132 Ala. 155.

**10. Dishrow v. Westchester Hardwood Co.**,

the plaintiff by reason of the waste committed.<sup>1</sup> This penalty is still retained by virtue of the statutes of several states,<sup>2</sup> although by some of them the giving of such damages is made discretionary with the court.<sup>3</sup> Treble damages cannot be recovered, however, if the action is on the covenants of a lease, for damages caused by permissive rather than voluntary waste.<sup>4</sup> And the courts have shown a disposition not to apply the penalty of treble damages to cases in which waste has been committed by tenants in common.<sup>5</sup> Some

164 N. Y. 415; *Winship v. Pitts*, 3 Paige (N. Y.) 259. But see *Worrall v. Nunn*, 53 N. Y. 185.

1. **Statute of Gloucester.**—6 Edw. I., c. 5, *Sackett v. Sackett*, 8 Pick. (Mass.) 309.

2. **American Statutes.**—*Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60; *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

The *New York* Code does not abrogate the right to recover treble damages in actions of the character of the former action of waste. It is not necessary for the complaint in such an action to contain a reference to the statute or provision for treble damages, to entitle the plaintiff to such damages. The recovery is limited to the amount of damage to the freehold; and the statute will not excuse a defendant from treble damages because he had good reason to believe the land to be his own. *Robinson v. Kinne*, 1 Thomp. & C. (N. Y.) 60.

By *New York* Code, §§ 450-452, the action of waste is abolished, and the remedies substituted are judgment for damages, and forfeiture, when the injury to plaintiff's estate equals the value of the tenant's estate, or unexpired term. The relative value of the land with wood on or off, the depreciation of the wood if left standing, and the amount of woodland left on the farm, become material in determining the amount of damage done. *Harder v. Harder*, 26 Barb. (N. Y.) 409. But treble damages must be recovered as provided by the statute, and not as part of the remedies under a bill in equity to redeem mortgaged property. *Boston Iron Co. v. King*, 2 Cush. (Mass.) 400.

Where an action was brought in the justices' court, under the statute giving treble damages for trespass on lands and cutting and carrying off timber, etc., and the declaration referred to the chapter of the statute by the wrong number, but otherwise cited it correctly, and it was not demurred to, it was held that it was sufficient to support a verdict for the plaintiff. This statute was not framed to protect mere possessory rights, but to give the owner of the fee the right to sue under the form of trespass, for injuries to his inheritance; and it is, therefore, not a defense to the action that the defendant had disseized the plaintiff, though it may prevent treble damages. Where the proof given in such action, without objection, only shows the plaintiff to own one undivided half of the premises, but no plea in abatement has been interposed, the nonjoinder of the other owner as plaintiff only goes to apportion the damages; and in error, where it is not claimed or objected that entire damages were assessed, the court will not presume that they were not apportioned. *Achey v. Hull*, 7 Mich. 423.

The statute of Gloucester, giving an action of waste against the tenant for life, for the recovery of the place wasted and treble dam-

ages, has been adopted in *Massachusetts*, though modified in respect to the tenant in dower. *Sackett v. Sackett*, 8 Pick. (Mass.) 309.

3. **Treble Damages Made Discretionary with the Court.**—Under a statute providing that "there may be judgment for treble damages," it has been held that the matter of giving treble damages is left to the discretion of the court. *Isom v. Rex Crude Oil Co.*, 140 Cal. 678.

The giving of treble damages in case of waste is discretionary with the court, under the *North Carolina* Code, § 629, providing that "the court may give judgment for thrice the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted if the said damages shall not be paid on or before a day to be named in the judgment." *Sherrill v. Conner*, 107 N. Car. 543.

4. **Permissive Waste.**—*Danziger v. Silberthan*, (N. Y. Super. Ct. Spec. T.) 21 Civ. Pro. (N. Y.) 283.

5. **Waste by Cotenants.**—*Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

The excavation and removal of cinnabar from a quicksilver mine, or the cutting of timber trees used in working the mine, by one tenant, does not constitute waste for which his cotenant may recover treble damages under *California* Code Civ. Pro., § 732.

Nor do such excavation and cutting and conversion constitute waste which should be enjoined. But the cotenants may be entitled to an accounting. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686.

The *Massachusetts* Act, March 15, 1821, c. 25, § 2, providing for the punishment of waste committed by one tenant in common, without notice to the others, by treble damages, applies only to cases where the tenancy in common is admitted, and not to cases where the entirety is claimed by title or disseizin, although it turns out defective as to a moiety. *Prescott v. Nevers*, 4 Mason (U. S.) 326.

Where one of several children and heirs at law is in occupation of the estate, as administrator, without objection from the other heirs, and while in such occupation cuts and carries away timber trees from the land, though liable to account for their value, under the provision of the *Massachusetts* Rev. Stat., c. 67, § 6, he would not be liable to treble damages under *Massachusetts* Rev. Stat., c. 105, § 7, as one entering upon the estate and committing waste without notice to the other heirs or persons interested therein. *Adams v. Palmer*, 6 Gray (Mass.) 338.

Under the *Maine* statute of 1821 a tenant in common guilty of waste was liable in treble damages to his cotenant. *Prescott v. Nevers*, 4 Mason (U. S.) 326; *Hazen v. Wight*, 87 Me. 233; *Richardson v. Richardson*, 64 Me. 62;



states in which the penalties of the statute of Gloucester have been retained have modified those penalties in respect to the tenant in dower.<sup>1</sup>

**3. Forfeiture.**—Another penalty provided by the statute of Gloucester was the forfeiture of the land wasted.<sup>2</sup> Although this penalty has been retained in several of the states,<sup>3</sup> it seems not to be favored by the law.<sup>4</sup> A reversioner who takes possession under a lease from the tenant of the particular estate waives all claim of forfeiture for waste committed by the latter.<sup>5</sup>

**IX. QUESTIONS OF LAW AND FACT.**—The question whether waste has been committed is ordinarily one of fact to be determined by the jury.<sup>6</sup>

*Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Moody v. Moody*, 15 Me. 205.

**Waste by One of Two Cotenants.**—Although if one of two joint tenants commits waste, it is waste by both, the statutory treble damages are recoverable only against the person who actually committed the waste. *Greene v. Cole*, 2 Saund. 259.

**1. Waste by Tenants in Dower.**—By the *Massachusetts* Act of 1783, c. 40, § 3, a tenant in dower committing waste forfeits the place wasted and single damages only. *Padelford v. Padelford*, 7 Pick. (Mass.) 152.

**2. Statute of Gloucester.**—*Richards v. Noble*, 3 Meriv. 673; *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574.

**3. Retention of Forfeiture in the United States.**—*Woodward v. Gates*, 38 Ga. 205; *State v. Gramelspacher*, 126 Ind. 398; *Smith v. Mattingly*, 96 Ky. 228; *Hickman v. Irvine*, 3 Dana (Ky.) 121; *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Harder v. Harder*, 26 Barb. (N. Y.) 409. See the title LANDLORD AND TENANT, vol. 18, p. 380.

In *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621, the court, in its charge by *Greene, C. J.*, said: "You will perceive that there are various portions claimed to be wasted. Waste in any particular place forfeits the place, as, waste in the woods forfeits the woods, in the meadow forfeits the meadow. A destruction of the dwelling house forfeits the whole place. You are to find the place forfeited where the waste was committed. And in addition you are also to assess the damages for the place wasted, over and above the value of the place."

If waste be committed in one acre or one room, it is a forfeiture of that acre or room only. But if it be committed promiscuously, it is a forfeiture of the whole tract or house. *Waples v. Waples*, 2 Harr. (Del.) 281.

**4. Forfeiture Not Favored.**—*Woodward v. Gates*, 38 Ga. 205; *Smith v. Mattingly*, 96 Ky. 228; *Sackett v. Sackett*, 5 Pick. (Mass.) 191; *Kent v. Bentley*, 6 Ohio Cir. Dec. 457, 10 Ohio Cir. Ct. 132; *Williard v. Williard*, 56 Pa. St. 119; *Phelan v. Boylan*, 25 Wis. 679.

The remedy for waste, in *California*, is confined to treble damages and does not include a forfeiture of the estate. *Chipman v. Emeric*, 3 Cal. 273.

If waste has been committed simply by removing a stone wall which did not inclose any land, this will not be cause for a forfeiture of any land. *Thacher v. Phinney*, 7 Allen (Mass.) 146.

By the *Indiana* statute (Rev. Stat. 1881, par.

286) judgment of forfeiture and eviction for waste is to be given only where it appears that the injury to the property was equal to the value of the tenant's estate or unexpired term, or that the injury had been done maliciously. *Bollenbacker v. Fritts*, 98 Ind. 50; *Sullivan v. O'Hara*, 1 Ind. App. 259.

Under a statute providing that if "any tenant for life or years shall commit waste during his estate or term" he shall lose the thing wasted and pay treble damages, it has been held that the forfeiture of the estate and the liability for treble damages are incurred only by voluntary waste, and not by permissive waste. *Smith v. Mattingly*, 96 Ky. 228.

**Dower Estates.**—The statutes of some states, and the disposition of the courts, seem to be opposed to the forfeiture of the dower estate because of waste. *Richards v. Torbert*, 3 Houst. (Del.) 172; *Hickman v. Irvine*, 3 Dana (Ky.) 121; *Robinson v. Miller*, 2 B. Mon. (Ky.) 284.

In *Georgia* a tenant in dower is liable for waste committed on the estate, but she does not forfeit her estate, and treble damages for waste committed, as provided by the statute of Gloucester. The remedy against her is either by an action on the case in the nature of waste to recover the actual damage sustained, or by injunction, when the latter remedy shall be necessary and proper to restrain her from committing waste. *Parker v. Chambliss*, 12 Ga. 235.

**5. Waiver of Right to Forfeiture.**—*Hickman v. Irvine*, 3 Dana (Ky.) 121.

**6. Commission of Waste a Question of Fact for the Jury—England.**—*Young v. Spencer*, 10 B. & C. 145, 21 E. C. L. 47; *Doe v. Burlington*, 5 B. & Ad. 507, 27 E. C. L. 117; *Phillips v. Smith*, 14 M. & W. 595, note.

*Maine.*—*Drown v. Smith*, 52 Me. 141; *Hasty v. Wheeler*, 12 Me. 434.

*Maryland.*—*Machen v. Hooper*, 73 Md. 342. *Massachusetts.*—*Pyncheon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207.

*Missouri.*—*Proffitt v. Henderson*, 29 Mo. 325.

*New Hampshire.*—*Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

*New Jersey.*—*Morehouse v. Cothcal*, 22 N. J. L. 521.

*New York.*—*McGregor v. Brown*, 10 N. Y. 114; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Jackson v. Andrew*, 18 Johns. (N. Y.) 431; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341. See also *Eysaman v. Small*, 61 Hun (N. Y.) 618, 15 N. Y. Supp. 288.

But what constitutes waste is properly a question of law.<sup>1</sup> And when the law defines waste to be whatever does a lasting damage to the freehold or inheritance, it does not mean that it is invariably to be left to a jury to determine, according to the opinions of witnesses, whether the act complained of causes such damage; for certain acts are, in contemplation of law, injurious *per se* to the inheritance, and the only subject of inquiry for the jury is whether such acts have been committed.<sup>2</sup>

**X. EVIDENCE.** — In cases of alleged waste, the presumption is in favor of the tenant until the contrary appears,<sup>3</sup> and the plaintiff must show, not only that acts which may be waste have been committed, but also that they worked an injury to the inheritance.<sup>4</sup> The evidence should, of course, be confined to the particular acts of waste for which suit is brought.<sup>5</sup> The opinion of a witness as to whether he considers certain acts to be waste is inadmissible.<sup>6</sup>

**XI. PROCEEDS OF WASTE.** — Trees which are cut and structures, stones, or minerals which are removed from the land by the tenant without committing waste belong to him.<sup>7</sup> Thus, a tenant is entitled to the proceeds of such wood as may rightfully be cut by him, whether he makes the severance,<sup>8</sup> or it is made by some other person, or by a windstorm,<sup>9</sup> or by the lessor.<sup>10</sup> So, in the case of a tenancy without impeachment of waste, the proceeds of trees or minerals severed from the land, either by the elements or by a stranger, belong to the tenant, as if they were severed by him.<sup>11</sup> And he is also, upon the vesting of his estate in possession, entitled to the proceeds of a severance made during the possession of previous tenants for life, unimpeachable of

*North Carolina.* — *King v. Miller*, 99 N. Car. 583; *Davis v. Gilliam*, 5 Ired. Eq. (40 N. Car.) 308.

*Ohio.* — *Crockett v. Crockett*, 2 Ohio St. 180.

*Pennsylvania.* — *Lynn's Appeal*, 31 Pa. St. 46, 72 Am. Dec. 721; *McCullough v. Irvine*, 13 Pa. St. 438; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261.

*Vermont.* — *Keeler v. Eastman*, 11 Vt. 293.

A lease authorized the lessee to make any inside alterations to the premises that he might think proper, provided the same did not injure said premises. The assignees of the lessee made extensive alterations, taking down and removing a number of partitions and doors, gas fixtures, chandeliers, etc. In an action by the lessors against the tenant, to recover for the alleged injuries, it was held that whether the acts the defendant did really caused injury to the reversion, or whether they were reasonable for the enjoyment of the premises according to the business which was carried on, could not be determined as a question of law, but was rather a matter of fact, and, as such, was a question for the jury. *Agate v. Lowenbein*, 57 N. Y. 604.

**1. Constituent Elements of Waste.** — *Van Syckel v. Emery*, 18 N. J. Eq. 387.

**2.** *McGregor v. Brown*, 10 N. Y. 114.

**3. Burden of Proof.** — *Lynn's Appeal*, 31 Pa. St. 44, 72 Am. Dec. 721.

**4.** *Morris v. Knight*, 14 Pa. Super. Ct. 324.

It has been held that the spread of such noxious weeds as mustard seed and quack grass from natural causes, or by the action of cattle depasturing or eating hay or straw that came from the fields where the mustard was, and the failure to overcome the growth of these and thistles by a process of summer fallowing, or by a process of hand-picking, is

no evidence of voluntary waste, but only of ill-husbandry. *Patterson v. Central Canada Loan, etc., Co.*, 29 Ont. 134.

**5. Scope of Evidence.** — *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, wherein it was held that instructions properly limiting the plaintiff's recovery do not cure the error of admitting evidence of acts of waste which had been barred by the statute of limitations. But on the other hand it has been held that evidence of acts of waste ten years previous to the waste sued for was immaterial and its admission harmless. *Smith v. Meiser*, 11 Ind. App. 468.

The plaintiff in an action to recover damages for waste by the felling of timber must show with reasonable certainty what trees were cut by the defendant or his servants, and it has been held that the number of stumps counted by witnesses does not tend to fix the number of trees cut by the defendant or his servants under his direction. *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621.

**6. Opinion Evidence.** — *McGregor v. Brown*, 10 N. Y. 114.

**7. Proceeds of Acts Not Amounting to Waste.** — *Moers v. Wait*, 3 Wend. (N. Y.) 104; *Hastings v. Crunckleton*, 3 Yeates (Pa.) 261; *Lewis v. Godson*, 15 Ont. 252.

**8. Proceeds of Trees Rightfully Cut.** — *Proffitt v. Henderson*, 29 Mo. 325; *Clement v. Wheeler*, 25 N. H. 361; *Crockett v. Crockett*, 2 Ohio St. 180; *Keeler v. Eastman*, 11 Vt. 293.

**9. Medium of Severance Immaterial.** — *Bateman v. Hotchkin*, 31 Beav. 486; *Herlakenden's Case*, 4 Coke 63a; *Bowles's Case*, 11 Coke 79b.

**10.** *Channon v. Patch*, 5 B. & C. 897; *Ward v. Adams*, 2 Chit. 636, 18 E. C. L. 435.

**11.** *Bowles's Case*, 11 Coke 79b; *In re Barington*, 33 Ch. Div. 523; *Anonymous*, Mosely 237.

waste, under the same settlement.<sup>1</sup> But when the tenant commits waste by severing from the land something that is part of the inheritance, the thing so severed belongs to the owner of the inheritance.<sup>2</sup> And this rule as to the ownership is not changed by reason of the fact that the severance is made by a third person or by the action of the elements.<sup>3</sup> Thus, if trees, being timber, are blown down by the wind, or severed by a trespasser, they belong to the lessor, and not to the tenant for life or years, for they are part of the inheritance.<sup>4</sup>

**WASTE, WASTING, ETC.** (See also the title *WASTE*, *ante*.)—Waste is defined as “that which is of no value; worthless remnants; refuse; specifically, remnants of cops, or other refuse resulting from the working of cotton, wool, hemp, and the like, used for wiping machinery, absorbing oil in the axle boxes of railroad cars, etc.”<sup>5</sup>

1. *Gent v. Harrison*, Johns. Ch. (Eng.) 517; *Lownes v. Norton*, 6 Ch. D. 139.

2. **Proceeds of Acts Constituting Waste.**—*Bowles's Case*, 11 Coke 79b; *Herlakenden's Case*, 4 Coke 62a; *Bewick v. Whitfield*, 3 P. Wms. 267; *Lushington v. Boldero*, 15 Beav. 1; *Bulkley v. Dolbeare*, 7 Conn. 232; *Richardson v. York*, 14 Me. 216; *White v. Cutler*, 17 Pick. (Mass.) 248; *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621; *Lane v. Thompson*, 43 N. H. 320; *Johnson v. Johnson*, 18 N. H. 594; *Mooers v. Wait*, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; *Williamson v. Jones*, 43 W. Va. 562.

3. **Medium of Severance Immaterial.**—*Bewick v. Whitfield*, 3 P. Wms. 266; *Williams v. Bolton*, 1 Cox Ch. 72; *Liford's Case*, 11 Coke 48a; *Bulkley v. Dolbeare*, 7 Conn. 232; *Elliot v. Smith*, 2 N. H. 430; *Shult v. Barker*, 12 S. & R. (Pa.) 272.

But “if the house fall down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in and fall down, the tenant may build the same again with such materials as remain, and with other timber which he may take growing on the ground.” *Co. Litt. 53a*; *Herlakenden's Case*, 4 Coke 63; *Bowles's Case*, 11 Coke 82a.

4. *Ward v. Andrews*, 2 Chit. 636, 18 E. C. L. 435; *Mooers v. Wait*, 3 Wend. (N. Y.) 104.

5. **Waste.**—*Patton v. U. S.*, 159 U. S. 500.

**Action by Taxpayer to Prevent Waste of Property of Town or Municipality.**—The *New York Code* provides that “an action to obtain a judgment, preventing *waste* of or injury to the estate, funds, or other property of a county, town, city, or incorporated village of the state, may be maintained against any officer thereof, or any agent, commissioner, or other person acting in its behalf, either by a citizen resident therein, or by a corporation who is assessed for and is liable to pay, or within one year before the commencement of the action has paid, a tax therein.” In construing this provision the court said: “The terms *waste* and ‘injury,’ as used in the statutes, do not comprehend individual acts, but only illegal, wrongful, and dishonest acts of public officials.” *Sheehy v. McMillan*, 26 N. Y. App. Div. 141. See also *Talcott v. Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 N. Y. 348.

In *Ayers v. Lawrence*, 59 N. Y. 197, the 30 C. of L.—20

court said: “*Waste* has a technical meaning when it is used to denote spoliation or destruction to lands or other corporeal hereditaments by a tenant to the prejudice of the reversioner or remainderman; but it is not infrequently used in a different and more comprehensive sense and may be applied to any squandering or misapplication of property or fund by trustees or others charged with a duty, or any abuse of trust or of duty by which property is lost or an estate or trust fund diminished in value. A devastavit by an executor or administrator is defined to be a *wasting* of the assets and may consist of any act or omission, every mismanagement, by which the estate suffers loss. (2 Wms. on Exrs., 1629 *et seq.*) The term *waste*, as used in the act, includes every wrongful act of mismanagement of the property rights or interests of the municipality causing the loss or damage. The word ‘injury’ includes every wrong, every thing that is not done rightfully.”

In *Chittenden v. Wurster*, 152 N. Y. 345, it is said: “The terms *waste* and ‘injury’ used in the statute, which gives a right of action to a taxpayer as against municipal officers, comprehend illegal, wrongful, or dishonest official acts, and were not intended to subject official action to the supervision of judicial tribunals where it was within the jurisdiction and discretion of the officers or municipal bodies.” *Per Gray, J., dissenting.*

**Tariff Act.** (See also the title *REVENUE LAWS*, vol. 24, p. 883.)—In *Standard Varnish Works v. U. S.*, (C. C. A.) 59 Fed. Rep. 457, it is said: “There is no evidence as to the commercial meaning of *waste*. Congress evidently did not use the word as meaning ‘that which is of no value, worthless remnant, refuse,’—the primary definition given in Webster's Dictionary,—since it imposed upon it an *ad valorem* duty. The Century Dictionary defines *waste* as ‘broken, spoiled, useless, or superfluous material; stuff that is left over, or that is unfitted, or cannot readily be utilized for the purpose for which it was intended; overplus; useless or rejected material.’ This definition exactly fits spoiled, superfluous, or rejected material, which is of the same kind as the material utilized for the intended purpose.” See also *Patton v. U. S.*, 159 U. S. 500; *U. S. v. Milne*, 117 Fed. Rep. 352.

*Waste* held not to include by-product.



**WATCH.** — See LOOK AFTER, vol. 19, p. 548.

**WATCHING.** — See note 1.

**WATER DISTRICT.** — See note 2.

**WATERING STOCK.** (See also the title STOCKS AND STOCKHOLDERS, vol. 20, p. 808.) — To water stock is to increase the nominal capital without addition, or only a partial addition, to the actual capital.<sup>3</sup>

**WATERMAN.** — See note 4.

**WATER MARK.** (See also HIGH-WATER MARK, vol. 15, p. 341; LOW-WATER MARK, vol. 19, p. 600, and references there given.) — The term "water mark" means the place where the water ordinarily flows to at high or low tide.<sup>5</sup>

**WATER MILL.** — See note 6.

**WATER POWER.** (See also the title WATERS AND WATERCOURSES, *post.*) — See note 7.

**WATER PRIVILEGES.** — See note 8.

**WATERPROOF INSULATION.** — See note 9.

**WATER RATES.** — See note 10.

**WATER RIGHT.** (See also the title IRRIGATION, vol. 17, p. 485.) — See note 11.

Standard Varnish Works v. U. S., (C. C. A.) 59 Fed. Rep. 456.

As to what *waste* not specially provided for, see Train v. U. S., 107 Fed. Rep. 261, (C. C. A.) 113 Fed. Rep. 1020.

In U. S. v. Dodge, (C. C. A.) 107 Fed. Rep. 107, it is said that *waste* presupposes some process of manufacture.

**Waste by Executor or Administrator.** — See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720.

"**Wasting His Estate.**" — In Shuck v. Shuck, 7 Bush (Ky.) 306, it was held that the confirmed habits of drunkenness of the husband for not less than a year was within the term "*wasting his estate*" as used in a divorce statute.

So in McKay v. McKay, 18 B. Mon. (Ky.) 8; it was held that the words "*wasting of his estate*" embraced and applied to a man's health, time, and labor.

**1. Watching or Besetting.** — In Charnock v. Court, (1899) 2 Ch. 35, it was held that *watching* or besetting a place where a person resides or works, or carries on business, under the English Conspiracy and Protection of Property Act of 1875, did not necessarily imply any lengthened *watching*, and was not limited to places which the person habitually frequented.

In Lyons v. Wilkins, (1896) 1 Ch. 811, it was held that the picketing of the works or place of business of an employer, for the purpose of persuading people, whether masters or men, not to work for him, is a "*watching* or besetting" with a view wrongfully and illegally to compel persons to abstain from doing a lawful act. See also the title LABOR COMBINATIONS, vol. 18, p. 86.

**2. Water District.** — See Hunter Dist. Water Supply, etc., Board v. Newcastle Wallsend Coal Co., (1896) A. C. 84.

**3. Watering Stock.** — Wiltbank's Appeal, 64 Pa. St. 260.

**4. Waterman.** — See Kennaird v. Cory, (1898) 2 Q. B. 584.

**5. Water Mark.** — See Gerrish v. Union Wharf, 26 Me. 395, 46 Am. Dec. 568.

**6. Water Mill.** — In Dixon v. Eaton, 68 Me. 542, the complaint that the defendant's intestate did erect and maintain a *water mill* and a dam to raise water for working it was held not to be sustained by proof of a steam mill and a dam to raise water for floating logs.

**7. Water Power.** — A grant of *water power* distinguished from a grant of water. See McDonald v. Askew, 29 Cal. 207.

"It may be conceded that a *water power*, used or unused, is included within the meaning of the word 'land.'" Kimberly, etc., Co. v. Hewitt, 75 Wis. 374.

**Property in Water and Water Power.** — In Union Water Power Co. v. Auburn, 90 Me. 65, it is said: "But \* \* \* the owner of the dam may not be the owner of mills; \* \* \* he simply stores up water for sale to the mill owner. That should make no difference. The water itself is not property, although he alone may use it. When he does so, the power it produces attaches to the mill, and becomes an element in the value of the mill. When he sells it, the same result follows as if he applied it to his own mill. The mill where it is applied becomes the more valuable thereby. It there, indirectly, becomes the subject of taxation as a part of the mill property. The water in a mill pond cannot be regarded as property apart from the mill that uses it, and separate ownership makes no difference. Water as an element is not property any more than air. When used, its potential power becomes actual, by operating upon real property, and thereby giving it value, and that value is the basis for the purposes of taxation."

**8. Water Privileges.** — See Rogers v. Bancroft, 20 Vt. 257.

**9. Waterproof Insulation.** — See Knowlton v. Des Moines Edison Light Co., 117 Iowa 451.

**10. Water Rates.** — A landlord liable to pay the usual and ordinary *water rates* was held not liable to pay for the extraordinary use of water required to run a hydraulic elevator placed in the leased building at the special request of the tenant. Williams v. Kent, 67 Md. 355.

**11. Water Right.** (See also the title RIPARIAN

RIGHTS, vol. 24, p. 978.) — In *Smith v. Denniff*, 24 Mont. 20, it is said: "A *water right* may be defined to be the legal right to use water. The right to the use of running water is a corporeal right or hereditament which follows or is embraced by the ownership of riparian soil. It is a corporeal right running with riparian land." See also *Hill v. Newman*, 5 Cal. 445; *Cary v. Daniels*, 8 Met. (Mass.) 480; *La Junta, etc., Canal Co. v. Hess*, 6 Colo. App. 497. In *Helena v. Rogan*, 26 Mont. 452, it is said:

"What is a *water right*? In *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, it is defined as the legal right to use water. This may be modified to mean, in this case, the right to use water appropriated according to law from the streams of the state for any useful or beneficial purpose. From what description there is in the complaint we learn that all of the *water rights* referred to are rights to the 'use of \* \* \* waters \* \* \* for irrigation purposes.'"

# WATERS AND WATERCOURSES.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *WATERS AND WATERCOURSES*, in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 22, p. 1142, and the cross-references there given.

As to *Adverse Possession and User of Water*, see in this work the title *ADVERSE POSSESSION*, vol. 1, p. 875.

As to *Appropriation by Aliens*, see the title *ALIENS*, vol. 2, p. 71.

As to *Damages for Diversion*, see the title *DAMAGES*, vol. 8, p. 537.

As to *Dedication of Water Ways*, see the title *DEDICATION*, vol. 9, p. 25.

As to *Exemption of Waterworks from Taxation*, see the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, pp. 371-375.

*As to Mandamus to Enforce Water Rights, see the title MANDAMUS, vol. 19, p. 877.*  
*As to Nature of Property in Water, see the title PERSONAL PROPERTY, vol. 22, p. 749.*  
*As to Obstruction of Surface Water, see the title STREETS AND SIDEWALKS, vol. 27, p. 138.*  
*As to Partition of Water Rights, see the titles PARTITION, vol. 21, p. 1126; PROFIT A PRENDRE, vol. 23, p. 187.*  
*As to Proof of Value, see the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 485.*  
*As to Recovery of Water Rights, see the title EJECTMENT, vol. 10, p. 478.*  
*As to Reservation of Water Power, see the title CONDITIONS, vol. 6, p. 517.*  
*As to Water Rights as Incumbrances, see the title COVENANTS, vol. 8, p. 123.*  
*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ADMIRALTY JURISDICTION, vol. 1, p. 645; APPROPRIATION, vol. 2, p. 517; APPURTENANT, vol. 2, p. 526; ARTESIAN WELLS, vol. 2, p. 944; BOOM COMPANIES, vol. 4, p. 707; BOUNDARIES, vol. 4, p. 818; BRIDGES, vol. 4, p. 918; CANALS, vol. 5, p. 111; DAMS, vol. 8, p. 699; DRAINS AND SEWERS, vol. 10, p. 220; EASEMENTS, vol. 10, p. 397; EMINENT DOMAIN, vol. 10, p. 1043; FERRIES, vol. 12, p. 1086; FIRE DEPARTMENT, vol. 13, p. 73; FISH AND FISHERIES, vol. 13, p. 554; FLOODS, vol. 13, p. 685; ICE, vol. 15, p. 907; IRRIGATION, vol. 17, p. 485; ISLANDS, vol. 17, p. 530; LAKES AND PONDS, vol. 18, p. 129; LOGS AND LUMBER, vol. 19, p. 522; NAVIGABLE WATERS, vol. 21, p. 424; NUISANCES, vol. 21, p. 679; RIPARIAN RIGHTS, vol. 24, p. 978; TRESPASS, vol. 28, p. 548; WATERWORKS AND WATER COMPANIES, *post*.*

**I. UNDERGROUND WATERS — 1. Percolating Waters — a. WHAT CONSTITUTE PERCOLATING WATERS.** — Percolating waters, as distinguished from subsurface streams, are the waters beneath the earth's surface which do not have a known and defined channel; <sup>1</sup> and it has been held that underground bodies of water, though having defined channels, will be deemed percolating waters if their

**1. Percolating Waters Defined — California.** — *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 261.

*Mississippi.* — *Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535.

*Nevada.* — *Mosier v. Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

*New Jersey.* — *Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447.

*New York.* — *Merrick Water Co. v. Brooklyn*, 32 N. Y. App. Div. 454.

*Ohio.* — *Wyandot Club v. Sells*, 9 Ohio Dec. 106, 6 Ohio N. P. 64.

*Vermont.* — *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659.

*Virginia.* — *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 86 Am. St. Rep. 924.

*Washington.* — *Meyer v. Tacoma Light, etc., Co.*, 8 Wash. 144.

*Wisconsin.* — *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933.

Percolating waters include any flowage of subsurface water, other than that of a running stream, open, visible, and clearly to be traced. *Mosier v. Caldwell*, 7 Nev. 363.

In *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, the evidence showed that within an area of two and one-half by five miles artesian wells might successfully be drilled,

and flowing water reached either in a stratum of limestone or in a stratum of sandstone at a depth of about two hundred feet, and that when the water was reached there was no sudden drop of the drill bit, but it rested on the bottom of the well. It was held that such evidence was not sufficient to sustain a finding that the water in such wells was supplied by a subterranean stream with a defined channel, but showed that it came from percolation.

In *Meyer v. Tacoma Light, etc., Co.*, 8 Wash. 144, involving the diversion of the waters of a stream tributary to a lake, the evidence showed that in the wet season there was an abundance of water, but in the summer season the water ceased to flow into the lake over the surface of the ground. There was nothing in the evidence tending to show that the water percolating below the surface was confined to a space immediately below or near the actual bed of the stream, although the proofs tended to show that the whole valley or watershed of the stream had an underlying impervious stratum, and that such stratum was covered by a deposit of gravel of varying depth, but that the trend of this impervious stratum from each side of the stream was, in general, toward the bed thereof. It was held that the waters underlying the watershed were to be deemed percolating waters.

existence and location are unknown and not reasonably ascertainable.<sup>1</sup> Hence, in order to prevent the classification of underground waters as percolating waters, they must be known or easily ascertainable and discoverable from the surface of the ground without subsurface explorations,<sup>2</sup> and underground waters are presumed to be percolating waters until it is shown that they flow in a well-known and defined channel.<sup>3</sup> After percolating waters have reached the waters of a watercourse they lose their character as percolating waters.<sup>4</sup>

*b. RULES AS TO WATERCOURSES NOT APPLICABLE TO PERCOLATING WATERS.* — Subsurface waters that do not follow defined and known channels are not governed by the rules of law affecting the use and diversion of watercourses.<sup>5</sup>

*c. INTERCEPTION AND DIVERSION* — (1) *In General.* — As a general rule, the owner of the soil may intercept and divert the percolating subsurface waters without incurring liability to owners of land in the neighborhood through whose lands the waters so diverted or intercepted would have flowed or percolated,<sup>6</sup> and this is true notwithstanding the fact that

1. *Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535.

In *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 86 Am. St. Rep. 924, Cardwell, J., said: "Subterranean waters can only be the subject of riparian rights when flowing in defined or known channels. 'Defined' means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. 'Known' means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. 'Known,' in this rule of law, is not synonymous with 'visible,' nor is it restricted to knowledge derived from exposure of the channel by excavation." See also *KNOWN*, vol. 18, p. 69.

2. *Subsurface Explorations.* — *Ewart v. Belfast Poor Law Guardians*, L. R. 9 Ir. 172; *Black v. Ballymena Com'rs*, L. R. 17 Ir. 459; *Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535. Compare *Burroughs v. Saterlee*, 67 Iowa 396, 56 Am. Rep. 350.

In *Black v. Ballymena Com'rs*, L. R. 17 Ir. 459, Chatterton, V. C., said: "The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that, without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, where it emerges into light, comes from, and has flowed through, a defined subterranean channel."

3. *Presumption as to Character of Subsurface Waters.* — *Black v. Ballymena Com'rs*, L. R. 17 Ir. 459; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262; *Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535; *Wyandot Club v. Sells*, 9 Ohio Dec. 106, 6 Ohio N. P. 64; *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933.

In a controversy respecting the use of the waters of a spring, where there was nothing to show that it was supplied by any defined flowing stream, it was held that it must be presumed to be formed by the ordinary per-

colation of water in the soil. *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299.

4. *Boyce v. Cupper*, 37 Oregon 256.

5. *Principles Relating to Watercourses Not Applicable* — *England.* — *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Exch. 81; *Acton v. Blundell*, 12 M. & W. 324, 13 L. J. Exch. 289; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, 16 Jur. 200; *M'Nab v. Robertson*, (1897) A. C. 129, 66 L. J. P. C. 27. Compare *Balston v. Bensted*, 1 Campb. 463.

*United States.* — *Alexander v. U. S.*, 25 Ct. Cl. 87.

*California.* — *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201.

*Connecticut.* — *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49.

*Maine.* — *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419.

*Minnesota.* — *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. Rep. 541.

*Mississippi.* — *Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535.

*New Jersey.* — *Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447.

*New York.* — *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; *Goodale v. Tuttle*, 29 N. Y. 459.

*Ohio.* — *Dissette v. Lowrie*, 9 Ohio Dec. 545, 6 Ohio N. P. 392.

*Oregon.* — *Taylor v. Welch*, 6 Oregon 198.

*Pennsylvania.* — *Williams v. Ladew*, 161 Pa. St. 283, 41 Am. St. Rep. 891.

*Utah.* — *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 70 Am. St. Rep. 810; *Willow Creek Irrigation Co. v. Michaelson*, 21 Utah 248.

*Wisconsin.* — *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933; *Case v. Hoffman*, 100 Wis. 314.

Compare *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

6. *Interception and Diversion* — *England.* — *M'Nab v. Robertson*, (1897) A. C. 129; *Balston v. Bensted*, 1 Campb. 463; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710, 113 E. C. L.



the consequence of his act in so diverting or intercepting the percolating waters would be to injure or even to render entirely worthless another's well,<sup>1</sup>

710; *Galgay v. Great Southern, etc.*, R. Co., 4 Ir. C. L. 456; *Hammond v. Hall*, 4 Jur. 694, 10 Sim. 551; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483, 24 L. T. N. S. 402; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Great-lex v. Hayward*, 8 Exch. 291; *Acton v. Blundell*, 12 M. & W. 324; *Stainton v. Woolrych*, 23 Beav. 225; *Bradford v. Pickles*, (1895) A. C. 587, 64 L. J. Ch. 759; *New River Co. v. Johnson*, 2 El. & El. 435, 105 E. C. L. 435.

*United States.*—*Alexander v. U. S.*, 25 Ct. Cl. 87.

*California.*—*Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Huston v. Leach*, 53 Cal. 262; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201; *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35.

*Connecticut.*—*Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49.

*Florida.*—*Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262.

*Illinois.*—*Edwards v. Haeger*, 180 Ill. 99.

*Indiana.*—*New Albany, etc.*, R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60; *Greencastle v. Hazelett*, 23 Ind. 189; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc.*, R. Co. v. Houry, 77 Ind. 364.

*Iowa.*—*Hougan v. Milwaukee, etc.*, R. Co., 35 Iowa 558, 14 Am. Rep. 502; *Quinn v. Chicago, etc.*, R. Co., 63 Iowa 510.

*Maine.*—*Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Morrison v. Bucksport, etc.*, R. Co., 67 Me. 353.

*Massachusetts.*—*Parker v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 107, 50 Am. Dec. 709; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Walker v. Cronin*, 107 Mass. 564; *Wilson v. New Bedford*, 108 Mass. 265, 11 Am. Rep. 352; *Ætna Mills v. Brookline*, 127 Mass. 69. *Compare Hollingsworth, etc.*, Co. v. Foxborough Water Supply Dist., 165 Mass. 186.

*Mississippi.*—*Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535.

*Missouri.*—*Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74.

*Montana.*—*Leonard v. Shatzer*, 11 Mont. 444.

*Nevada.*—*Mosier v. Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

*New Hampshire.*—*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 573, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

*New Jersey.*—*Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447.

*New York.*—*Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316, 45 N. Y. 362, 6 Am. Rep. 100; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Barkley v. Wilcox*, 86 N. Y. 147, 40 Am. Rep. 519; *Bloodgood v.*

*Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, *affirming* 37 Hun (N. Y.) 356; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, *affirming* 41 Hun (N. Y.) 418.

*Ohio.*—*Wyandot Club v. Sells*, 9 Ohio Dec. 106, 6 Ohio N. P. 64; *Lewis v. Mt. Adams, etc.*, *Inclined Plane R. Co.*, 7 Ohio Dec. (Reprint) 566, 3 Cinc. L. Bul. 1007; *Warder v. Springfield*, 9 Ohio Dec. (Reprint) 855, 17 Cinc. L. Bul. 398; *Frazier v. Brown*, 12 Ohio St. 294; *Columbus Gas Light, etc.*, Co. v. Freeland, 12 Ohio St. 392; *Elster v. Springfield*, 49 Ohio St. 82.

*Oregon.*—*Taylor v. Welch*, 6 Oregon 198; *Shively v. Hume*, 10 Oregon 76.

*Pennsylvania.*—*Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Coleman v. Chadwick*, 80 Pa. St. 81, 21 Am. Dec. 93; *Trout v. McDonald*, 83 Pa. St. 144; *Haugh's Appeal*, 102 Pa. St. 42, 48 Am. Rep. 193; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 17 Am. St. Rep. 791; *Williams v. Ladew*, 161 Pa. St. 283, 41 Am. St. Rep. 891; *Brown v. Kistler*, 190 Pa. St. 499.

*Rhode Island.*—*Buffum v. Harris*, 5 R. I. 243.

*South Dakota.*—*Deadwood Cent. R. Co. v. Barker*, 14 S. Dak. 558; *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746.

*Utah.*—*Sullivan v. Northern Spy Min. Co.*, 11 Utah 438; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 70 Am. St. Rep. 810; *Herriman Irrigation Co. v. Keel*, 25 Utah 96.

*Vermont.*—*Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469.

*Virginia.*—*Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 86 Am. St. Rep. 924.

*Washington.*—*Meyer v. Tacoma Light, etc.*, Co., 8 Wash. 144.

*Wisconsin.*—*Case v. Hoffman*, 100 Wis. 314; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933.

*Compare Keeney v. Carillo*, 2 N. Mex. 480.

**1. Injuries to Wells**—*England.*—*New River Co. v. Johnson*, 2 El. & El. 435, 105 E. C. L. 435.

*United States.*—*Alexander v. U. S.*, 25 Ct. Cl. 87.

*Connecticut.*—*Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352.

*Illinois.*—*Edwards v. Haeger*, 180 Ill. 99.

*Indiana.*—*New Albany, etc.*, R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60.

*Massachusetts.*—*Greenleaf v. Francis*, 18 Pick. (Mass.) 117.

*Mississippi.*—*Clarke County v. Mississippi Lumber Co.*, 80 Miss. 535.

*Nevada.*—*Mosier v. Caldwell*, 7 Nev. 363.

*New Jersey.*—*Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447.

*South Dakota.*—*Deadwood Cent. R. Co. v. Barker*, 14 S. Dak. 558.

spring,<sup>1</sup> or surface watercourse<sup>2</sup> into which the waters would have flowed. And where the interception of percolating water causes it to set back upon the land of another there is no liability to the owner of such land.<sup>3</sup> So in the absence of a condition arising from a grant or otherwise, no right of action arises from a subsidence of land caused by the act of an adjoining owner in exercising the right of draining his own soil, as a man has, at common law, no right to the support of subterranean waters.<sup>4</sup> The landowner may license a stranger to intercept and divert percolating waters to the same extent that he may himself do so.<sup>5</sup> After a person has intercepted and collected percolating waters, he acquires a property right therein which will be protected and may be disposed of to the same extent as other property rights.<sup>6</sup>

**Reason for Rule.** — The reasons for the rule allowing landowners to intercept and divert percolating waters are based mainly upon considerations of public policy. First, because the existence, origin, movements, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed, that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. Second, because any recognition of correlative rights between neighboring owners in percolating waters would interfere to the material detriment of the commonwealth with drainage, agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.<sup>7</sup> The rule has also been based upon the ground that percolating waters are the absolute property of the owner of the fee as

*Utah.* — *Sullivan v. Northern Spy Min. Co.*, 11 Utah 438.

*Vermont.* — *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659; *Chatfield v. Wilson*, 28 Vt. 49.

*Wisconsin.* — *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933.

In *New River Co. v. Johnson*, 2 El. & El. 445, 105 E. C. L. 445, *Crompton, J.*, in considering the question of the abstraction of percolating water, observed: "The only remedy of the owner of a well from which such water has been abstracted is to sink the well deeper."

**1. Injuries to Springs** — *California.* — *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615.

*Illinois.* — *Edwards v. Haeger*, 180 Ill. 99.

*Maine.* — *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419.

*Nevada.* — *Mosier v. Caldwell*, 7 Nev. 363.

*New York.* — *Ellis v. Duncan*, 21 Barb. (N. Y.) 230.

*Ohio.* — *Elster v. Springfield*, 49 Ohio St. 82.

*Pennsylvania.* — *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542.

*Utah.* — *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 70 Am. St. Rep. 810.

*Virginia.* — *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 86 Am. St. Rep. 924.

**2. Injuries to Watercourses.** — *Chasemore v. Richards*, 7 H. L. Cas. 349; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230.

**3.** *Lewis v. Mt. Adams, etc., Inclined Plane R. Co.*, 7 Ohio Dec. (Reprint) 566, 3 Cinc. L. Bull. 1007; *Harwood v. Benton*, 32 Vt. 724. See also *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179.

**4.** *Popplewell v. Hodkinson*, L. R. 4 Exch.

248; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, 16 Jur. 200. See also *Elliot v. Northeastern R. Co.*, 10 H. L. Cas. 358. Compare *Gumbert v. Kilgore*, (Pa. 1886) 6 Cent. Rep. 406.

In *Popplewell v. Hodkinson*, L. R., 4 Exch. 248, *Cockburn, C. J.*, said: "Although there is no doubt that a man has no right to withdraw from his neighbor the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if for any reason it becomes necessary or convenient for him to do so. It may be, indeed, that where one grants land to another for some special purpose, for building purposes, for example, then, since according to the old maxim a man cannot derogate from his own grant, the grantor could do nothing whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been. In the case put by Mr. Holker with regard to Chatmoss, possibly, therefore, his observations might be well founded. If the owners of that moss were to drain it to such an extent as, by the amount of water drawn off, to loosen the foundations of the railway which runs across it, and for the purpose of constructing which they had sold a portion of it to the railway company, that might be an act in derogation of their own grant, and one, therefore, for which they might properly be made responsible."

**5.** *Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs*, 40 N. J. Eq. 447.

**6.** *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558.

**7. Reasons for Rule.** — *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721.

completely as are the earth, stones, minerals, or other matter to any depth whatever beneath the surface.<sup>1</sup>

(2) *Sinking Wells*. — From the foregoing principles it follows that a person may sink a well or other excavation upon his own lands and draw the percolating waters therefrom for his reasonable use in connection with his land;<sup>2</sup> and it is immaterial that the water is drawn from the well by a powerful pump, by which the natural percolating flow to the well from surrounding lands is increased.<sup>3</sup> The water raised from a well fed by percolating waters may be used, without liability to neighboring landowners, for the supply of a reservoir or artificial pond used in connection with a mill upon the land of the owner of the well,<sup>4</sup> or may be conveyed by such owner from the premises for the purpose of supplying water to the inhabitants of a district,<sup>5</sup> or such owner may authorize a stranger to convey the water intercepted away from the premises for use elsewhere;<sup>6</sup> and in *Wisconsin* it has been held that a landowner intercepting percolating waters by an artesian well may allow the water flowing from the well to run to waste without incurring liability to neighboring landowners whose wells are thereby injured.<sup>7</sup>

**Qualifications of Rule.** — In the later cases the right of a landowner to intercept and divert percolating waters has been subjected to some qualifications on the ground that such right relates to the beneficial use of the waters or of the land for some purpose connected with ordinary operations of agriculture, mining, domestic use, or improvements either public or private.<sup>8</sup> Under this doctrine it has been held that a landowner has no right, except for the benefit and improvement of his own premises or for his beneficial use, to drain, collect, or divert percolating waters therein where such act will destroy or materially injure the spring of another, the waters of which spring are used by the general public for domestic purposes; that he cannot drain, collect, or divert such waters for the sole purpose of wasting them;<sup>9</sup> that the owner of land cannot gather percolating water by pumps or by natural means that it may be carried to a distant place for use by or sale to strangers having no right to it, in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner;<sup>10</sup> and that a municipality has no right

1. Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs, 40 N. J. Eq. 447.

2. *Sinking Wells*. — *England*. — Chasemore v. Richards, 7 H. L. Cas. 349, 5 Jur. N. S. 873. *Connecticut*. — Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352.

*Illinois*. — Edwards v. Haeger, 180 Ill. 99.

*Iowa*. — Hougau v. Milwaukee, etc., R. Co., 35 Iowa 558, 14 Am. Rep. 502.

*Maine*. — Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419.

*Massachusetts*. — Greenleaf v. Francis, 18 Pick. (Mass.) 117.

*Mississippi*. — Clarke County v. Mississippi Lumber Co., 80 Miss. 535.

*Nevada*. — Mosier v. Caldwell, 7 Nev. 363.

*Pennsylvania*. — Lybe's Appeal, 106 Pa. St. 626, 51 Am. Rep. 542; Williams v. Ladew, 161 Pa. St. 283, 41 Am. St. Rep. 891, 34 W. N. C. (Pa.) 363.

*South Dakota*. — Deadwood Cent. R. Co. v. Barker, 14 S. Dak. 558.

*Utah*. — Sullivan v. Northern Spy Min. Co., 11 Utah 438; Herriman Irrigation Co. v. Butterfield Min., etc., Co., 19 Utah 453.

*Virginia*. — Miller v. Black Rock Springs Imp. Co., 99 Va. 747, 86 Am. St. Rep. 924.

3. Clarke County v. Mississippi Lumber Co., 80 Miss. 535. Compare Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666.

4. Clarke County v. Mississippi Lumber Co., 80 Miss. 535.

5. Chasemore v. Richards, 7 H. L. Cas. 349. See also Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs, 40 N. J. Eq. 447.

6. Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs, 40 N. J. Eq. 447.

7. Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933.

8. Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35; Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541; Smith v. Brooklyn, 18 N. Y. App. Div. 340, affirmed 160 N. Y. 357. See, however, Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs, 40 N. J. Eq. 447; Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933. See the well-considered opinion of Bartlett, J., in Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179. See also Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Garrish v. Clough, 48 N. H. 11, 2 Am. Rep. 165, 97 Am. Dec. 561.

9. Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 541; Compare Willis v. Perry, 92 Iowa 297.

10. Smith v. Brooklyn, 18 N. Y. App. Div. 340, affirmed 160 N. Y. 359. Compare Ocean Grove Camp Meeting Assoc. v. Asbury Park Com'rs, 40 N. J. Eq. 447.

In *New York* it has been held that where



by reason of its ownership of land to collect percolating waters for distribution to its inhabitants by means of wells and pumps therein having such suction power as to draw the percolating waters from the surrounding lands to a great distance, thereby rendering such lands unfit for cultivation.<sup>1</sup> So it has been held that a landowner cannot collect percolating water by means of artesian wells and convey it away from his land for sale to a distant landowner to the injury of his neighboring landowners.<sup>2</sup>

(3) *Aqueducts, Sewers, etc.* — In several jurisdictions it is held that where, in the construction of aqueducts, sewers, and similar public improvements, percolating waters which had theretofore found their way into wells or springs on the land of another are intercepted to the injury of such wells or springs, the owner thereof is not entitled to compensation, his injury being *damnum absque injuria*.<sup>3</sup> In *Massachusetts*, however, it has been held, under statutes authorizing railroad companies or municipalities to take, under the power of eminent domain, land for railways or sewers, and providing that the railway company or municipality shall be liable for damages to property owners by reason of the construction of the railway or sewer, that a property owner whose land is not taken is entitled to recover damages for injuries to his well or spring caused by the interception of percolating waters by which the well was fed.<sup>4</sup>

two landowners are seeking to collect the percolating waters for distribution to the inhabitants of a city neither can object to the use by the other of the waters, though one collects more than the other for such purpose. *Merrick Water Co. v. Brooklyn*, 32 N. Y. App. Div. 454, affirmed 160 N. Y. 657.

1. *Forbell v. New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, affirming 47 N. Y. App. Div. 371.

2. *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35.

3. *Aqueducts, Sewers, etc.* — *New River Co. v. Johnson*, 2 El. & El. 435, 105 E. C. L. 435; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710, 113 E. C. L. 710; *Stainton v. Woolrych*, 23 Beav. 225, 26 L. J. Ch. 300, 3 Jur. N. S. 257; *Alexander v. U. S.*, 25 Ct. Cl. 87; *Elster v. Springfield*, 49 Ohio St. 82.

A City Is Not Liable because, in constructing a sewer, it drains away the water which formerly percolated to a spring. *Elster v. Springfield*, 49 Ohio St. 82.

**Railroad Excavations.** — In *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60, it was held that a railroad company, for the purpose of constructing its road, had the same right to excavate within the limits of its right of way that a private individual had to dig upon his land for any purpose, and that one whose well or subterranean stream was rendered dry by such excavation had no right of action, the injury being *damnum absque injuria*.

In *Hogan v. Milwaukee, etc., R. Co.*, 35 Iowa 558, 14 Am. Rep. 502, where the railroad acquired "the right of way over and through the land for all purposes connected with the construction, use, and occupation of its railway," it was held that it had a legal right to dig a well upon such right of way, and to use for railway purposes the water supplied by percolation, although such use materially diminished the supply of water in a spring upon the grantor's land.

4. *Parker v. Boston, etc., R. Co.*, 3 Cush.

(Mass.) 107, 50 Am. Dec. 709; *Hart v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 488; *Trowbridge v. Brookline*, 144 Mass. 139.

In *Hart v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 488, an injunction was granted against a corporation authorized to take land, in favor of the plaintiff, who alleged that the corporation was sinking a ditch and well on the land of which the plaintiff was the owner in fee, and which the defendant took under the statute, and was erecting thereon powerful pumping machinery, to be used in pumping water from the well for the purpose of supplying water to its customers, and that the plaintiff was the owner of other land adjoining that so taken, and also valuable water rights and privileges below the land taken, the value of which would be seriously impaired by the acts of the defendant corporation.

In *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107, 50 Am. Dec. 709, in regard to the injury to the plaintiff's well, Shaw, C. J., said: "The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*. But the respondents did not own the land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

In *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212, where damages had been assessed by the commissioners to a landowner for an injury done to him by excavations for the purposes of the railroad, in the manner prescribed by the legislature authorizing the act, it was held that a special action could not be maintained for injury to the plaintiff's spring; but that such injury must be presumed to have been considered by the commissioners when the damages were assessed.

(4) *Mining*. — Where, in mining operations, the tunnel of the mine intercepts percolating waters, there is no liability to surrounding landowners into whose wells or springs the waters so intercepted would have otherwise found their way.<sup>1</sup> So a person may open a quarry upon his own land though thereby percolating waters are intercepted.<sup>2</sup>

(5) *Drainage*. — A person may open a ditch to drain his land though percolating waters are diverted thereby from a spring or well on the land of another.<sup>3</sup>

(6) *Priority of Enjoyment*. — Priority of enjoyment of the benefits of percolating waters by one landowner does not affect the right of another landowner to intercept and divert the water percolating through his land.<sup>4</sup> So in the Western states where the principle of appropriation of waters exists, no right to percolating waters can be acquired on the theory of prior appropriation so as to prevent a landowner from intercepting such percolating waters upon his own land.<sup>5</sup>

(7) *Prescriptive Rights*. — One landowner cannot by prescription acquire the right to have percolating waters flow unintercepted through the lands of another to a well, spring, or watercourse upon his own land, and thereby deprive the other of his right to intercept and divert such percolating waters,<sup>6</sup>

1. *Mining*. — *Acton v. Blundell*, 12 M. & W. 324, 13 L. J. Exch. 289; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Coleman v. Chadwick*, 80 Pa. St. 81, 21 Am. Rep. 93; *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 27 Am. Rep. 711; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 145, 57 Am. Rep. 445.

2. *Ellis v. Duncan*, 21 Barb. (N. Y.) 230.

3. *Drainage*. — *Ellis v. Duncan*, 21 Barb. (N. Y.) 230.

4. *Priority of Enjoyment*. — *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721.

5. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615; *Deadwood Cent. R. Co. v. Barker*, 14 S. Dak. 558; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 70 Am. St. Rep. 810; *Willow Creek Irrigation Co. v. Michaelson*, 21 Utah 248. See also *Sullivan v. Northern Spy Min. Co.*, 11 Utah 438.

6. *Prescription*. — *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710, 113 E. C. L. 710; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; *Frazier v. Brown*, 12 Ohio St. 294; *Elster v. Springfield*, 49 Ohio St. 82; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 70 Am. St. Rep. 810; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659. Compare *Balston v. Bensted*, 1 Camb. 463.

In *Chasemore v. Richards*, 5 H. & N. 988, Lord Chelmsford, commenting upon the case of *Balston v. Bensted*, 1 Camb. 463, said: "The great distinction between water flowing in a definite stream and water percolating through the ground was not presented to the mind of the judge; and his observation that twenty years' exclusive enjoyment was decisive as to the presumption in favor of the party showed that he thought only of the rights which arose out of the uninterrupted enjoyment of a right

to water flowing in a defined stream on the surface of the ground. The case, terminating as it did, could hardly be urged as an authority upon the point." And Cresswell, J., in the court exchequer chamber (2 H. & N. 183), said: "There are two cases in our books, and I believe two only, which support a claim to water not in a flowing stream — *Balston v. Bensted*, 1 Camb. 463, and *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282. In the former of those cases, Lord Ellenborough said: 'There could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it.' His lordship is not reported to have explained the nature of the presumption to be made, but at that period it seems to have been supposed that the right of a riparian owner arose out of some presumption of a grant by those higher up the stream. It is therefore probable that in the case then before him, which related to the water springing up in the plaintiff's land, he meant that an enjoyment of it for twenty years raised a presumption of a grant — a presumption not generally made against those who had no knowledge of the existence of that which they are to be presumed to have granted, and I do not understand that any one has insisted in this case upon the doctrine of presumption, which was altogether repudiated in the other case alluded to (*Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282), where Lord Chief Baron Pollock, in giving the judgment of the court, says: 'We consider it as settled law that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above and below, but is *ex jure nature*, and an incident of property as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighboring proprietor, who cannot dig so as to deprive it of the support of his land.' It would seem, therefore, that the Court of Exchequer, as constituted when that judgment was given, would not have rested an opinion in favor of the plaintiff, in



for no presumption can arise against a party on the ground of long enjoyment of a privilege by another until it is shown that the privilege in some way interferes with the right of the party whose grant is proposed to be presumed,<sup>1</sup> and in the case of a surface stream the right of a proprietor to have it running in its natural course is not from a presumed grant acquired by the user, but is *ex jure naturæ*, and an incident of property.<sup>2</sup>

(8) *Intent as Affecting Interception and Diversion.* — Where the question has necessarily arisen, it has been held that as the right to intercept and divert percolating waters is a legal property right of the landowner, it is not affected by the fact that one causing such interception and diversion acts with a malicious intent to injure his neighboring landowner.<sup>3</sup> Still, in a number of

Balston v. Bensted, 1 Campb. 463, on the ground stated by Lord Ellenborough."

In Frazier v. Brown, 12 Ohio St. 294, Brinkerhoff, J., in stating the proposition of the text, said: "The doctrine of prescription, or presumption of grant from lapse of time, can have no proper application to the question: (1) Because the party against whom the doctrine would have to be applied could not be reasonably required to enter his caveat against the appropriation of a thing so hidden and obscure as is percolating underground water; and (2) because the appropriation of such waters by an adjoining proprietor is no infringement of his rights, so as to become the subject of legal redress, until such time as he himself has occasion to appropriate them."

1. See generally the title PRESCRIPTION, vol. 22, pp. 1193, 1194.

In Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, Lewis, C. J., said: "The prior occupancy of the spring for the uses of a tannery gave no right of servitude over or through the land of the adjacent proprietor. No man, by mere prior enjoyment of the advantages of his own land, can establish a servitude upon the land of another. This is shown in a satisfactory manner by Mr. Justice Rogers, in Hoy v. Sterrett, 2 Watts (Pa.) 330, 27 Am. Dec. 313. But it seems to be thought that the enjoyment of the spring by the plaintiff below and those under whom he claims, for the period of twenty-one years, gives him a right to its continued existence, although the neighboring proprietor may thereby be deprived of the chief value of his own land. This depends upon the question whether the enjoyment of the spring was of such a character as to have invaded his neighbor's rights, so as to enable the latter to maintain an action for the injury. No man can be barred by a statute of limitation for not bringing his action within the prescribed period until it is first shown that he had a cause of action which he could have maintained. \* \* \* Presumption is when the conduct of the party out of possession cannot be accounted for without presuming a conveyance. Kingston v. Leslie, 10 S. & R. (Pa.) 390; Butz v. Ihrie, 1 Rawle (Pa.) 218. The Frederician Code of Prussia provides that no presumption can take place where no negligence can be imputed, and accordingly by that code a man may raise his house after any lapse of time, although it darkens his neighbor's house. Frederician Code of Prussia 48, 55. The same principle is to be found in the law of Scotland. Erskine's Prin. Law of Scotland

350. The owner of the mine had no right to complain of his neighbor below for making use of the spring on his own lands. As long as it flowed there, he had a right to make use of it, and the owner of the land through which the supply of water came was not in any manner injured by such use of the water. Silence or acquiescence, where one is not injured and has no cause of complaint, can never deprive him of his rights on the ground of presumption of a grant. No man can be said to have granted a right about which it would have been an impertinent interference to utter a complaint. Hoy v. Sterrett, 2 Watts (Pa.) 331, 27 Am. Dec. 313; Merlin's Repertoire de Jurisp., verb. 'Cours d'Eau.' \* \* \* By the Civil Code of Louisiana, nonapparent servitudes can be established only by title. Immemorial possession alone is not sufficient to acquire them. Louisiana Civ. Code, tit. Servitudes, p. 240; Pardessus, Traité des Servitudes, § 95. In a case like the present, therefore, there is no reason whatever for depriving the plaintiff in error of the enjoyment of his rights of property on his own land, on the ground of any servitude established by time or acquiescence for the benefit of the tannery on the adjacent tract."

2. Dickinson v. Grand Junction Canal Co., 7 Exch. 299; Shury v. Piggot, 3 Bulst. 339; Tyler v. Wilkinson, 4 Mason (U. S.) 397; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276.

3. *Intent as Affecting Right of Interception and Diversion.* — Paine v. Chandler, 134 N. Y. 385; Chatfield v. Wilson, 28 Vt. 49; Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933. See also Corey v. People, 45 Barb. (N. Y.) 262; Moran v. McClearn, 60 Barb. (N. Y.) 388; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Mahan v. Brown, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Porter v. Durham, 74 N. Car. 767; Frazier v. Brown, 12 Ohio St. 294; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Harwood v. Benton, 32 Vt. 734.

In Walker v. Cronin, 107 Mass. 556, Wells, J., commenting upon Greenleaf v. Francis, 18 Pick. (Mass.) 117, said: "It is intimated in this case that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly, it is



cases it has been said that a landowner cannot wantonly and maliciously cut off on his own land the percolating waters which supply the well or spring upon the land of another;<sup>1</sup> and in upholding the right of a landowner to intercept and divert percolating waters the courts have laid stress upon the want of a malicious intent.<sup>2</sup>

(9) *Statutory Regulation.* — In *Wisconsin* it has been held that as the right of a landowner to intercept and divert percolating waters is a common-law property right, the legislature has no power to restrict it except by the exercise of the power of eminent domain.<sup>3</sup>

(10) *Contracts Affecting Right to Percolating Waters.* — While, of course, a landowner may by express contract restrict his right to intercept and divert waters percolating through his land,<sup>4</sup> the grant of land upon which a well or

generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial."

In *Chatfield v. Wilson*, 28 Vt. 49, where the defendant had placed within his own land, and near the line of the plaintiff's land, dry, hard earth, which prevented water from percolating into the plaintiff's land and supplying a reservoir placed therein, it was held that the act, being lawful of itself, could not subject the defendant to damages, unless by reason thereof some right of the plaintiff had been violated.

In *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, the defendant was the owner of land upon which there was a mineral spring surrounded by an artificial embankment. The plaintiff dug a well on his own land, striking a vein of mineral water, which rose high enough to be conducted in pipes to his bathhouse. The defendant, for no purpose beneficial to himself, and simply to divert the water from the plaintiff's well, lowered the embankment on his land, thereby cutting off the supply of water from the plaintiff's well. The court held that the plaintiff had sustained no legal injury, and could not maintain an action for such diversion of the water, and that the maxim *sic utere tuo ut alienum non ladas* does not apply to an act legal in itself.

In *Frazier v. Brown*, 12 Ohio St. 294, Brinkerhoff, J., observed: "As an act unlawful in itself, resulting in injury to another, whatever may have been the motive with which it was done, is none the less the subject of legal redress, so the act done, to wit, the using of one's own property, being lawful in itself, the motive with which it is done, whatever it may be as a matter of conscience, is in law a matter of indifference."

"The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbor, *animo vicino nocendi*. The same principle is adopted in the laws of Scotland, where an otherwise lawful act is forbidden if done *in emulationem vicini*; but this principle has not found a place in our law." *Chasemore v. Richards*, 7 H. L. Cas. 349, *per* Lord Wensleydale.

1. *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74, 1 Mo. App. Rep. 699; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; *Wyandot Club*

*v. Sells*, 4 Ohio Dec. 254, 3 Ohio N. P. 210; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511. See also *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276.

2. *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 115, 50 Am. Dec. 709; *Howland v. Vincent*, 10 Met. (Mass.) 373, 43 Am. Dec. 442; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Haldeman v. Bruckhart*, 45 Pa. St. 521, 84 Am. Dec. 511. See also *Chasemore v. Richards*, 7 H. L. Cas. 349; *Acton v. Blundell*, 12 M. & W. 324.

3. *Statutory Regulation.* — In *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, wherein it was held that Laws Wis. 1901, c. 354, § 2, providing that "any person who shall needlessly allow or permit any artesian well owned or operated by him to discharge greater quantities of water than is reasonably necessary for the use of such person, so as to materially diminish the flow of water in any other artesian well in the same vicinity, shall be liable for all damages which the owner of any such other well shall sustain," was unconstitutional as depriving the landowner of his right to intercept percolating waters without compensation. In this case the court distinguished *State v. Ohio Oil Co.*, 150 Ind. 21, *affirmed* 177 U. S. 190, in which a similar statute with regard to waste of natural gas and oil was sustained as constitutional, on the ground that the right to intercept oil and gas was to be distinguished from the absolute common-law right to intercept percolating waters.

4. *Contracts Relating to Percolating Waters.* — *Whitehead v. Parks*, 2 H. & N. 877; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Minard v. Currier*, 67 Vt. 489.

In *Minard v. Currier*, 67 Vt. 489, it appeared that there was a conveyance in fee of certain springs or wells fed by percolating waters, and also a further conveyance of all the grantor's rights to the water that would naturally flow into them. It was held that though a grant of land containing wells or springs would not have deprived the grantor of the right to dig upon remaining land to the injury of the wells or springs by the interception of percolating waters, still, as a right to percolating water greater than could be acquired by deed to the land could be created by apt and sufficient words, if the language of the deed clearly im-

spring is located does not impliedly grant the percolating waters by which the well or spring is fed, so as to prevent the grantor from intercepting them before they reach the spring or well.<sup>1</sup> And it has been held also that the mere grant of a spring or well<sup>2</sup> or stream<sup>3</sup> *co nomine* does not impliedly grant the percolating waters by which the spring or stream is fed, so as to prevent the grantor from subsequently intercepting such waters before they have reached the spring or stream conveyed.

*d. POLLUTION OF PERCOLATING WATERS.*—In some few cases it has been held that as a landowner has the absolute right to appropriate the water percolating under his land, he is not liable for contaminating or polluting such water in the reasonable use of his own land, though thereby a well or spring upon the land of a neighboring landowner is polluted or contaminated.<sup>4</sup> Still, since one who collects filthy or offensive matter upon his land is required to prevent its escape therefrom, and is liable in damages to neighboring landowners who are injured by the percolation of such matter through the soil,<sup>5</sup> and since this liability does not depend upon negligence, but the rea-

ports such a right, the law will recognize it, and that the further conveyance of all the grantor's rights to the water that would naturally flow into the wells imported a conveyance of percolating waters which the wells would receive when nothing was done to intercept their passage.

1. *Brain v. Marfell*, 41 L. T. N. S. 455; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Davis v. Spaulding*, 157 Mass. 431; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Minard v. Currier*, 67 Vt. 489. See, however, *Paine v. Chandler*, 134 N. Y. 385. In this case the defendant was the owner of two adjoining farms, upon one of which was a spring, from which pipes had been laid conducting the water to the barnyard on the other, thus furnishing sufficient water for the stock thereon and other domestic uses. The defendant sold and conveyed the farm so supplied to the plaintiff by a deed which conveyed the land with appurtenances, but made no mention of the spring or the pipes. The defendant dug a well upon his farm a few feet from the spring, which resulted in lowering the water of the spring below the mouth of the pipes so as to deprive the plaintiff of the use of the water. It was held that, the uninterrupted flow of the water being essential to the full enjoyment of the estate conveyed, the defendant could be restrained from the use of the well causing the injury.

2. *Brain v. Marfell*, 41 L. T. N. S. 455, 44 J. P. 56; *M'Nab v. Robertson*, (1897) A. C. 129; *Edwards v. Haeger*, 180 Ill. 99; *Davis v. Spaulding*, 157 Mass. 431; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Buffum v. Harris*, 5 R. I. 243; *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659.

In *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542, it appeared that A purchased land subject to the reservation that B should have the right to conduct the water from a certain spring thereon to his adjoining land. A, by a well dug upon his own land, cut off the subterranean supply of the spring, to the injury of B. It was held that A might lawfully do so, and that B could not claim the absolute right to an uninterrupted flow through A's land.

A grant of "a certain spring or fountain of

water" does not deprive the owner of the land of the right of properly draining his land to make it productive, even though in some unknown mode the drainage of the land may affect his supply of water. *Buffum v. Harris*, 5 R. I. 243.

In *Davis v. Spaulding*, 157 Mass. 431, it was held that the grant of a mere easement to draw water from a well by a pipe laid in the ground, which was used at the time of the grant, did not preclude the grantor or his subsequent vendee from digging another well or reservoir on his own land, although the result was to destroy the value of the easement by diversion of the water which formerly percolated into the well.

3. *M'Nab v. Robertson*, (1897) A. C. 129.

4. *Pollution of Percolating Waters.*—*Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Upjohn v. Board of Health*, 46 Mich. 542, 41 Am. Rep. 178. See also *Brown v. Illius*, 25 Conn. 583; *Greencastle v. Hazelett*, 23 Ind. 186.

In *Upjohn v. Board of Health*, 46 Mich. 542, 41 Am. Rep. 178, *Cooley, J.*, said: "If withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure, and no negligence. The one act destroys the well, and the other does no more."

In *Dillon v. Acme Oil Co.*, 49 Hun (N. Y.) 565, *Haight, J.*, said: "It is only in exceptional cases that the channels of subterranean streams are known and their courses defined; it is only in such exceptional cases that the owner can know beforehand that his works will affect his neighbor's wells or supply of water; and we are therefore of the opinion that in the absence of negligence and of knowledge as to the existence of such subterranean watercourses, when the business is legitimate and conducted with care and skill, there can be no liability if such subterranean courses become contaminated."

5. *England.*—*Tenant v. Goldwin*, 1 Salk. 360, 2 Ld. Raym. 1089, 6 Mod. 311; *Hodgkinson v. Ennor*, 4 B. & S. 229, 116 E. C. L. 229; *Norton v. Scholefield*, 9 M. & W. 665; *Womersley v. Church*, 17 L. T. N. S. 190.

sonable precautions which the law requires must be such precautions as will effectually exclude the filth from the neighbors' land,<sup>1</sup> it is generally held that a landowner is liable in damages if by the accumulation of filthy or contaminating matter upon his own land he contaminates the waters percolating therein to the injury of a neighboring landowner whose well or spring subsequently receives the percolating waters so contaminated;<sup>2</sup> and injunctions have been granted to prevent such contamination.<sup>3</sup> *A fortiori* a landowner

*Florida.*—Pensacola Gas Co. v. Pebley, 25 Fla. 381.

*Georgia.*—Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170.

*Illinois.*—Ottawa Gas Light, etc., Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263.

*Kentucky.*—Tate v. Parrish, 7 T. B. Mon. (Ky.) 325.

*Maine.*—Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699.

*Massachusetts.*—Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56.

*Minnesota.*—Berger v. Minneapolis Gaslight Co., 60 Minn. 296.

*Ohio.*—Columbus Gas Light, etc., Co. v. Freeland, 12 Ohio St. 392.

*Pennsylvania.*—Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Haugh's Appeal, 102 Pa. St. 42, 48 Am. Rep. 193.

*Wisconsin.*—Greene v. Nunnemacher, 36 Wis. 50; Price v. Oakfield Highland Creamery Co., 87 Wis. 536.

See also the title NUISANCES, vol. 21, pp. 699, 700.

1. Hodgkinson v. Ennor, 4 B. & S. 229, 116 E. C. L. 229; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56.

2. *England.*—Tenant v. Goldwin, 2 Ld. Raym. 1089, 1 Salk. 360; Humphries v. Cousins, 2 C. P. D. 239; Rylands v. Fletcher, L. R. 3 H. L. 330; Wood v. Waud, 3 Exch. 748; Hodgkinson v. Ennor, 4 B. & S. 229, 116 E. C. L. 229; Hipkins v. Birmingham, etc., Gas Light Co., 5 H. & N. 74; Embrey v. Owen, 6 Exch. 353; Smith v. Kenrick, 7 C. B. 515, 62 E. C. L. 515; Wormersley v. Church, 17 L. T. N. S. 190; Snow v. Whitehead, 27 Ch. D. 588; Ballard v. Tomlinson, 29 Ch. D. 115; Millington v. Griffiths, 30 L. T. N. S. 65; Turner v. Mirfield, 34 Beav. 390.

*California.*—Robinson v. Black Diamond Coal Co., 57 Cal. 412, 40 Am. Rep. 118.

*Illinois.*—Wahle v. Reinbach, 76 Ill. 322; Decatur Gas Light, etc., Co. v. Howell, 92 Ill. 19.

*Kentucky.*—Louisville, etc., R. Co. v. Simpson, (Ky. 1895) 33 S. W. Rep. 395; Kinnaird v. Standard Oil Co., 89 Ky. 468, 25 Am. St. Rep. 545.

*Maine.*—Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699.

*Massachusetts.*—Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352.

*Minnesota.*—Red River Roller Mills v. Wright, 30 Minn. 249, 44 Am. Rep. 194.

*Nebraska.*—Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711.

*New Jersey.*—Perrine v. Taylor, 43 N. J. Eq. 128.

*New York.*—Dillon v. Acme Oil Co., 49 Hun (N. Y.) 565.

*Ohio.*—Columbus Gas Light, etc., Co. v. Freeland, 12 Ohio St. 392; Frazier v. Brown, 12 Ohio St. 295.

*Pennsylvania.*—Shuter v. Philadelphia, 3 Phila. (Pa.) 228, 15 Leg. Int. (Pa.) 333; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Jacobs v. Worrell, 15 Leg. Int. (Pa.) 139; Haugh's Appeal, 102 Pa. St. 42, 48 Am. Rep. 193; Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, 17 Am. St. Rep. 791; Hauck v. Tidewater Pipe Line Co., 153 Pa. St. 366, 34 Am. St. Rep. 710.

*Texas.*—Jung v. Neraz, 71 Tex. 396.

**In the Leading Case** of Ballard v. Tomlinson, 29 Ch. D. 125, the defendant was held liable for injury to his neighbor's well by permitting sewage from his house to flow into the well. Lindley, L. J., said: "The right to foul water is not the same as the right to get it, and in my opinion does not depend on the same principles. *Prima facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbor's supply. In such a case the neighbor must submit to the inconvenience. But *prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbor, and whether the nuisance is effected by sending filth onto his neighbor's land, or by putting poisonous matter on his own land and allowing it to escape on his neighbor's land, or whether the nuisance is effected by poisoning the air which his neighbor breathes, or the water which he drinks, appears to me wholly immaterial. \* \* \* So, if a man chooses to poison his own well, he must take care not to poison waters which other persons have a right to use as much as himself. To hold the contrary, on the ground that the water is not their property until they get it, and that it is poisoned before they get it, is to take an inadequate view of the subject, and to overlook the fact that the law of nuisance is not based exclusively on rights of property."

**Contributing Causes.**—In Sherman v. Fall River Iron Works Co., 5 Allen (Mass.) 213, the court held that the fact that other causes have contributed to render the water of a well impure and unfit for use is no bar to an action to recover damages for an injury to the water, caused by the escape of gas into it; but it may be shown in mitigation of damages.

3. **Injunctions.**—Hodgkinson v. Ennor, 4 B. & S. 229, 116 E. C. L. 229; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Dillon v. Acme Oil Co., 49 Hun (N. Y.) 565; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443; Clark v. Lawrence, 6 Jones Eq. (59 N. Car.) 83, 78 Am. Dec. 241; Frazier v. Brown, 12 Ohio St. 294; Haugh's Appeal, 102 Pa. St. 42, 48 Am. Rep. 193; Jung v. Neraz, 71 Tex. 396.



is liable for contaminating percolating waters to the injury of another's well or spring where such contamination is due to negligence upon his part.<sup>1</sup> Thus, relief has been granted against the contamination or pollution of percolating waters by the establishment of cemeteries,<sup>2</sup> gas-lighting plants,<sup>3</sup> reservoirs for the storage of oil,<sup>4</sup> or privies, vaults, cesspools, and sewers.<sup>5</sup> The fact that the plaintiff appropriates the polluted water by artificial means, as, for instance, by pumping, which accelerates the flow of the contaminated percolating waters from the defendant's premises, has been held to be immaterial.<sup>6</sup> But to render one liable for contaminating percolating waters there must have been a substantial and positive injury,<sup>7</sup> and the court has refused to grant an injunction restraining a contemplated use of land which it was alleged would result in the contamination of percolating waters to the injury of the complainant's well or spring where such contemplated injury was purely conjectural.<sup>8</sup>

*e.* **ARTIFICIAL PERCOLATION.** — The artificial collection of waters into large reservoirs has frequently caused injury to neighboring landowners by reason of the percolation of such waters through the ground, and it has been held that the owner of the reservoir is liable for the injuries so caused, without regard to the question whether he was or was not guilty of negligence in the construction of the reservoir.<sup>9</sup>

1. Thus, in *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 17 Am. St. Rep. 791, it was held that if a person boring for oil or gas had knowledge that neighboring wells of water were supplied from a stratum of clear water underlying his land, and that there was a deeper stratum of salt water which would mingle with the fresh when penetrated in such boring, and that this mingling might be prevented by reasonable outlay, the failure to use the means available therefor was negligence rendering him liable to the owner of a well whose waters were contaminated by the rising of the salt water. See also *Collins v. Chartiers Valley Gas Co.*, 139 Pa. St. 111.

2. **Cemeteries.** — *Barnes v. Hathorn*, 54 Mo. 124; *Clark v. Lawrence*, 6 Jones Eq. (59 N. Car.) 83, 78 Am. Dec. 241; *Jung v. Neraz*, 71 Tex. 396.

3. **Gas Plants.** — *Pensacola Gas Co. v. Pebley*, 25 Fla. 381; *Ottawa Gas Light, etc., Co. v. Graham*, 28 Ill. 74, 81 Am. Dec. 263; *Ottawa Gas Light, etc., Co. v. Thompson*, 39 Ill. 601; *Decatur Gas Light, etc., Co. v. Howell*, 92 Ill. 19; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711; *Columbus Gas Light, etc., Co. v. Freeland*, 12 Ohio St. 392; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 17 Am. St. Rep. 791.

In *Ottawa Gas Light, etc., Co. v. Graham*, 28 Ill. 74, 81 Am. Dec. 263, it appeared that the gas company erected its works near the well of the plaintiff, and, by permitting the substances used in the manufacture of the gas to permeate the soil, injured the water in the plaintiff's well. It was held to be proper to instruct the jury that if such substances did soak into the ground, percolate through the soil, and render the water of the plaintiff's well unfit for use, the verdict should be for the plaintiff.

4. **Storage of Oil.** — *Kinnaird v. Standard Oil Co.*, 89 Ky. 469, 25 Am. St. Rep. 545.

5. **Cesspools, etc.** — *Rylands v. Fletcher*, L.

R. 3 H. L. 330; *Baird v. Williamson*, 15 C. B. N. S. 376, 109 E. C. L. 376; *De Givie v. Seltzer*, 64 Ga. 423; *Wahle v. Reinbach*, 76 Ill. 322; *Rand v. Wilber*, 19 Ill. App. 395; *Iliff v. School Directors*, 45 Ill. App. 419.

6. In *Ballard v. Tomlinson*, 29 Ch. D. 115, *reversing* 26 Ch. D. 194, the defendant polluted his own well with sewage, and the water therefrom percolated into the plaintiff's well, which was on a lower level. The latter used his well by pumping. It was contended that inasmuch as such water did not come to him through the operation of natural causes alone, but was appropriated by artificial means, the defendant was not liable; but the court held otherwise.

7. **Extent of Contamination.** — *Upjohn v. Board of Health*, 46 Mich. 542, 41 Am. Rep. 178; *Columbus Gas Light, etc., Co. v. Freeland*, 12 Ohio St. 400; *Wahl v. M. E. Cemetery Assoc.*, 197 Pa. St. 197.

8. *Greencastle v. Hazelett*, 23 Ind. 186.

9. **Percolation from Artificial Reservoir** — *England.* — *Rylands v. Fletcher*, L. R. 3, H. L. 330; *Cooper v. Barber*, 3 Taunt. 99, 12 Rev. Rep. 604; *Nichols v. Marsland*, L. R. 10 Exch. 255. See also *Evans v. Manchester, etc., R. Co.*, 36 Ch. D. 626; *Snow v. Whitehead*, 27 Ch. D. 588.

*California.* — *Parker v. Larsen*, 86 Cal. 236, 21 Am. St. Rep. 30.

*Georgia.* — *Ellington v. Bennett*, 59 Ga. 286; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291.

*Massachusetts.* — *Fuller v. Chicopee Mfg. Co.*, 16 Gray (Mass.) 46; *Monson, etc., Mfg. Co. v. Fuller*, 15 Pick. (Mass.) 554; *Wilson v. New Bedford*, 108 Mass. 265, 11 Am. Rep. 352; *Mears v. Dole*, 135 Mass. 508.

*New York.* — *Odell v. Nyack Water Works Co.*, 91 Hun (N. Y.) 283; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72, *reversing* 32 Barb. (N. Y.) 268; *Heacock v. State*, 105 N. Y. 246; *Reed v. State*, 108 N. Y. 407.

*Oregon.* — *Marsh v. Trullinger*, 6 Oregon 356; *Esson v. Wattier*, 25 Oregon 7.

**Leading English Case.** — In *Rylands v. Fletcher*,

**Diversion of Waters by Artificial Percolation.** — The distinction between artificial and natural percolations is again apparent in cases of the diversion of surface streams. Although a landowner may appropriate the natural percolations upon his land, he cannot construct his well or other structure in such a manner as to create an artificial underground current of water from a running stream or other natural body of water, resulting in the diversion of such water to the injury of his neighbors.<sup>1</sup>

**2. Underground Watercourses.** — Subterranean watercourses which flow in known and defined channels are governed by the same rules, with regard to their diversion and the correlative rights of the landowners through whose land they run, as are applied to surface watercourses.<sup>2</sup> In order, however,

L. R. 3 H. L. 330, the leading English case on this subject, it appeared that a reservoir was created artificially, from which the water flowed from some passage, apparently filled up and long disused, into the plaintiff's mine. Lord Cranworth said, in substance: "If a man brings or accumulates water and allows it to escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. If water naturally rising in the defendants' land had, by percolation, found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought onto their land a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants were certainly responsible."

**1. Diversion Through Artificial Percolation.** — Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 487; Dickinson v. Grand Junction Canal Co., 7 Exch. 282, 16 Jur. 200; Elwell v. Crowther, 8 Jur. N. S. 1004; McClellan v. Hurdle, 3 Colo. App. 430; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; Ætna Mills v. Waltham, 126 Mass. 422; Bailey v. Woburn, 126 Mass. 416; Atty.-Gen. v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; Cowdrey v. Woburn, 136 Mass. 409; Reed v. State, 108 N. Y. 407. Compare Delhi v. Youmans, 50 Barb. (N. Y.) 316.

**Ignorance of Injury.** — In Dickinson v. Grand Junction Canal Co., 7 Exch. 282, where the defendant, by digging a well, drew water from a river after it had formed part of a stream, thereby preventing the plaintiff from working his mill, which was situated on the river, it was held that an action would lie. Pollock, C. B., said: "If, indeed, it had appeared that the company were ignorant, and could not by any degree of care have ascertained before making the well that it would have the effect of abstracting the water, and when they discovered that it did, could not have repaired the mischief, it might have raised a question whether the action was maintainable."

**2. Underground Watercourses — England.** — Embrey v. Owen, 6 Exch. 353; Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483, 24 L. T. N. S. 402, 19 W. R. 569; Dickinson v. Grand Junction Canal Co., 9 Eng. L. & Eq. 521.

*United States.* — Cole Silver Min. Co. v. Virginia, etc., Water Co., 1 Sawy. (U. S.) 470.

*California.* — Hale v. McLea, 53 Cal. 581; Cross v. Kitts, 69 Cal. 217, 58 Am. Rep. 558; Los Angeles v. Pomeroy, 124 Cal. 597; Vine-land Irrigation Dist. v. Azusa Irrigating Co., 126 Cal. 486; Yarwood v. West Los Angeles Water Co., 132 Cal. 204.

*Colorado.* — Buckers Irrigation, etc., Co. v. Farmers' Independent Ditch Co., 31 Colo. 62.

*Florida.* — Tampa Waterworks Co. v. Cline, 37 Fla. 586, 53 Am. St. Rep. 262.

*Georgia.* — Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62.

*Indiana.* — Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199.

*Iowa.* — Burroughs v. Saterlee, 67 Iowa 396, 56 Am. Rep. 350; Willis v. Perry, 92 Iowa 297.

*Nevada.* — Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

*Ohio.* — Wyandot Club v. Sells, 9 Ohio Dec. 106, 6 Ohio N. P. 64; Castalia Trout Club Co. v. Castalia Sporting Club, 8 Ohio Cir. Dec. 693, 8 Ohio Cir. Ct. 194.

*Oregon.* — Taylor v. Welch, 6 Oregon 198; Shively v. Hume, 10 Oregon 76.

*Pennsylvania.* — Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Whetstone v. Bowser, 29 Pa. St. 59.

And see *infra*, this title, *Watercourses*. See, however, Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49.

Where subterranean water emerges, and afterwards sinks and re-emerges, if its entire, exact course can be traced, the proprietor of the land at the lower part will be protected against the diversion of the water. Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62.

In Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, Lewis, C. J., said: "In limestone regions streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, for all the purposes of life. To say that these streams might be obstructed or diverted merely because they run through subterranean channels is to forget the rights and duties of man in relation to flowing water."

In Dickinson v. Grand Junction Canal Co., 7 Exch. 282, Pollock, C. B., said: "When water is on the surface, the right of the owner of the adjoining land to the usufruct of that water is not a doubtful matter of fact; \* \* \* and indeed, if the course of a subterranean

that the rules applicable to surface watercourses shall be applied to subterranean streams, the channels of such streams must be known and defined, otherwise they will be considered as percolating waters and will be governed by the rules applicable to the latter class of waters.<sup>1</sup>

**II. SURFACE WATERS** — 1. **Definition.** — Surface waters may be defined as waters on the surface of the ground which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence, and which are lost by being diffused over the surface of the ground, through percolation into the soil and by evaporation.<sup>2</sup> They are to be distinguished

stream were well known, as is the case with many which sink underground, pursue for a short space a subterranean course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground."

1. *Chasemore v. Richards*, 7 H. L. Cas. 349; *Los Angeles v. Pomeroy*, 124 Cal. 597; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721. And see *supra*, this section, *Percolating Waters*.

The fact that a spring fails to flow when the water is drained from a natural basin on higher ground is not of itself sufficient to show that the water flowed in a well-defined channel from such basin to the spring. *Taylor v. Welch*, 6 Oregon 200.

Water passing through the sand and gravel constituting the bed of a stream and the land so nearly adjacent that the only natural outlet would be through the channel of such stream is not percolating water as ordinarily defined by the common law, but is a part of the water of the stream, and its diversion will not be permitted where the rights of prior proprietors will be injuriously affected. *Buckers Irrigation, etc., Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62. See also *Los Angeles v. Pomeroy*, 124 Cal. 597.

The waters of a spring at one time flowed through a natural surface channel to a creek. The calcareous properties of the water of the spring formed a light, porous limestone by which the natural channel to the creek became closed, and by some subterranean means the waters found their way to the creek. The diversion of the waters of the spring appreciably diminished the volume of the water flowing in the creek. It was held that the waters of the spring before reaching the creek were not to be considered percolating waters, but were governed by the laws with regard to the appropriation of the waters of natural watercourses. *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

2. **Surface Waters Defined** — *England.* — *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 486; *Broadbent v. Ramsbotham*, 11 Exch. 615. *Indiana.* — *Rice v. Evansville*, 108 Ind. 13, 58 Am. Rep. 22; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Taylor v. Fickas*, 64 Ind. 172, 31 Am. Rep. 114.

*Iowa.* — *Livingston v. McDonald*, 21 Iowa 166, 89 Am. Dec. 563.

*Massachusetts.* — *Macomber v. Godfrey*, 108 Mass. 221, 11 Am. Rep. 349; *Luther v. Winnimmet Co.*, 9 Cush. (Mass.) 171.

*Minnesota.* — *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73.

*Missouri.* — *Gray v. Schriber*, 58 Mo. App. 173.

*Nebraska.* — *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *Bunderson v. Burlington, etc., R. Co.*, 43 Neb. 545; *Morrissey v. Chicago, etc., R. Co.*, 38 Neb. 406.

*New Hampshire.* — *Swett v. Cutts*, 50 N. H. 416, 9 Am. Rep. 276.

*New York.* — *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Curtiss v. Ayrault*, 47 N. Y. 73; *Mann v. Retsof Min. Co.*, 49 N. Y. App. Div. 454; *Wagner v. Long Island R. Co.*, 2 Hun (N. Y.) 633.

*Ohio.* — *Crawford v. Rambo*, 44 Ohio St. 282.

*Rhode Island.* — *Buffum v. Harris*, 5 R. I. 153.

*South Carolina.* — *Brandenberg v. Zeigler*, 62 S. Car. 18, 89 Am. St. Rep. 887; *Lawton v. South Bound R. Co.*, 61 S. Car. 548.

*Utah.* — *Jordan v. Mt. Pleasant*, 15 Utah 449.

*Vermont.* — *Hawley v. Sheldon*, 64 Vt. 491, 33 Am. St. Rep. 941; *Boynton v. Gilman*, 53 Vt. 17.

*Wisconsin.* — *Case v. Hoffman*, 100 Wis. 314; *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715.

See also *SURFACE WATER*, vol. 27, p. 545.

Surface water has been characterized as water which comes no one knows exactly whence, and flows no one knows exactly how, either under ground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day or spring up from beneath the surface in a direction which no one knows. *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 486.

**Slough or Bayou.** — In *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 620, it was shown that the Whitewater river, in Missouri, was a stream of perpetual flow, draining a large area of country, and was about two hundred feet wide. At a certain point in its course a slough or bayou ran out of it eastwardly at nearly right angles. The slough, at its junction with the Whitewater, had a width of about one hundred and fifty feet, and a well-defined channel and banks for a distance of from four hundred to six hundred feet and no more. This slough or bayou was known as the Thumb. It was not shown to be fed by any living springs, but in high water the water of the Whitewater found a partial outlet through it, running through its defined channel for the distance



from watercourses, to wit, streams usually flowing in definite channels,<sup>1</sup> and from lakes and ponds, to wit, bodies of water confined in depressions of the earth and having a substantial as distinguished from a vagrant existence.<sup>2</sup> Thus, waters from rain or melting snow, having no banks or channel in the soil, are regarded as surface waters though they customarily and naturally flow in a known direction or course,<sup>3</sup> as in the case of valleys and depressions of an undulating country, through which the waters from rains and snows are accustomed to find their way.<sup>4</sup> Whether water is or is not surface water must be determined from the peculiar facts in the case in which the question is presented.<sup>5</sup> After waters which in their first instance were surface waters have reached and become a part of a watercourse, or a permanent lake or pond, they lose their character as surface waters, and the rights of persons in their use and diversion are governed by the law relating to watercourses or lakes and ponds.<sup>6</sup>

**Flood Waters of Watercourses.** — The decisions on the question whether the flood waters of watercourses in times of high water are to be regarded as surface water or water of the watercourse are in conflict. In some jurisdictions waters which overflow the banks of watercourses by reason of the insufficiency of the channel to carry off all the water are declared to be surface waters,<sup>7</sup> and after flood waters have lost all connection with the watercourse and cannot return thereto as the water subsides, they should, it would seem, be unquestionably considered as surface waters.<sup>8</sup> In other jurisdictions flood waters are regarded as waters of the watercourse,<sup>9</sup> and this would seem to be the

above stated, and then spreading out through the timber and over the surrounding country without any defined channel. It was held that the bayou or slough was not a natural watercourse, and that the construction of a solid embankment across it at its junction with the Whitewater should not be enjoined.

1. See *infra*, this title, *Watercourses*.

2. See the title LAKES AND PONDS, vol. 18, p. 129.

3. **Absence of Channel or Banks.** — *Livingston v. McDonald*, 21 Iowa 166, 89 Am. Dec. 563; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; *Shields v. Arndt*, 4 N. J. Eq. 246; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

In *Bloodgood v. Ayers*, 108 N. Y. 403, 2 Am. St. Rep. 443, *affirming* 37 Hun (N. Y.) 356, it appeared that a spring, or at least a reservoir of water, existed on the plaintiff's land. The water followed depressions in the land across the plaintiff's meadow to a road. It ran in no defined channel having banks, but flowed over the sod almost wholly without breaking it, following its lowest levels and sometimes spreading out over an acre or more. Its route could be traced by the deeper green of the grass which it watered, but it proved no obstruction to cutting the grass, for the evidence was that the plaintiff mowed across it habitually as if it were not there. It was held that the water so flowing was surface water.

**Overflow of Pond.** — After heavy rains, a pond of surface water on the plaintiff's land discharged a part of its waters along a certain line over the defendant's lands. The plaintiff, by the defendant's permission, dug a ditch along the line of the flow, but it did not appear that the line of discharge, before the digging of the ditch, had any fixed bed or banks, and the water did not usually flow therein. It was held that neither the original line of flow nor the arti-

ficial channel was a watercourse. *Fryer v. Warne*, 29 Wis. 511.

4. **Valleys and Depressions.** — *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

5. *Chicago, etc., R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602.

6. *Broadbent v. Ramsbotham*, 11 Exch. 602; *Palmer v. Waddell*, 22 Kan. 352; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73; *Alcorn v. Sadler*, 66 Miss. 221; *Jones v. Hannovan*, 55 Mo. 462; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367; *Crawford v. Rambo*, 44 Ohio St. 282.

7. **Flood Waters.** — *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; *Jean v. Pennsylvania Co.*, 9 Ind. App. 56; *Jacks v. Lollis*, 10 Ind. App. 700; *New York, etc., R. Co. v. Speelman*, 12 Ind. App. 372; *Morris v. Council Bluffs*, 67 Iowa 346, 56 Am. Rep. 343; *Missouri Pac. R. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249; *Jones v. St. Louis, etc., R. Co.*, 84 Mo. 151; *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 256; *Schneider v. Missouri Pac. R. Co.*, 29 Mo. App. 70; *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 624; *Kenney v. Kansas City, etc., R. Co.*, 74 Mo. App. 301; *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859. And see *SURFACE WATER*, vol. 27, p. 545.

8. *O'Connell v. East Tennessee, etc., R. Co.*, 87 Ga. 246, 27 Am. St. Rep. 246; *New York, etc., R. Co. v. Speelman*, 12 Ind. App. 372; *Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514; *Jordan v. Mt. Pleasant*, 15 Utah 449; *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859.

9. *Cairo, etc., R. Co. v. Brevoort*, 62 Fed. Rep. 129; *McDaniel v. Cummings*, 83 Cal.

natural doctrine so long as such flood waters follow the course of the ordinary channel of the watercourse and re-enter the channel as the waters subside.<sup>1</sup> *A fortiori*, after the overflow returns to the channel, it is no longer to be deemed surface water.<sup>2</sup> So a watercourse may have defined high-water and low-water channels, so that the water when in the high-water channel will still constitute a part of the watercourse.<sup>3</sup>

**Overflow Waters of a Pond** in time of rains have been considered to be surface waters.<sup>4</sup>

**Seepage.** — Water which seeps through an embankment or levee of a river is to be deemed surface water, and is governed by the rules applicable to the flowage, diversion, and repulsion of surface water.<sup>5</sup>

**Ravines and Gorges** through which the waters from rains and melting snows run down and are discharged from a higher to a lower level, but which at all other times are free from water, are not to be considered as watercourses, but such waters are deemed surface waters.<sup>6</sup>

**Water Which Collects in Depressions** surrounded by high lands, during the rainy

515; *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169; *O'Connell v. East Tennessee, etc., R. Co.*, 87 Ga. 246, 27 Am. St. Rep. 246; *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344; *Chicago, etc., R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602; *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 181; *Spelman v. Portage*, 41 Wis. 144; *Barden v. Portage*, 79 Wis. 126. And see **SURFACE WATER**, vol. 27, p. 545.

1. *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 659, 7 Am. St. Rep. 501; *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263. See also *O'Connell v. East Tennessee, etc., R. Co.*, 87 Ga. 247, set out under **SURFACE WATER**, vol. 27, p. 545.

In *Crawford v. Rambo*, 44 Ohio St. 282, the court said: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when swollen by rains and melting snows it extends and flows over the bottoms along its course, that is its flood channel, as when by drought it is reduced to its minimum, it is then in its low-water channel."

2. *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 665, 7 Am. St. Rep. 501.

It appeared that in times of high water, surface waters of a creek left its bank at a point above a culvert and flowed for a short distance over the adjoining land. They were forced back by the embankment of a railroad into the creek again above the culvert. It was held that such waters were not surface waters, but must, in determining the sufficiency of the culvert, be regarded in the same light as if they had continuously flowed in the creek. *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263.

3. *Cairo, etc., R. Co. v. Brevoort*, 62 Fed. Rep. 129; *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344.

4. *Bowlsby v. Speer*, 31 N. J. L. 354, 86 Am. Dec. 216.

5. **Seepage.** — *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163.

6. **Ravines and Gorges** — *Indiana*. — *Weis v. Madison*, 75 Ind. 257, 39 Am. Rep. 135; *Robinson v. Shanks*, 118 Ind. 134; *Carroll County v. Bailey*, 122 Ind. 46.

*Kansas*. — *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374.

*Michigan*. — *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797.

*Missouri*. — *Benson v. Chicago, etc., R. Co.*, 78 Mo. 514, 20 Am. & Eng. R. Cas. 96; *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 257.

*New Jersey*. — *Shields v. Arndt*, 4 N. J. Eq. 246.

*New York*. — *Wagner v. Long Island R. Co.*, 2 Hun (N. Y.) 636.

*Wisconsin*. — *Hoyt v. Hudson*, 27 Wis. 661, 9 Am. Rep. 473; *Eulrich v. Richter*, 37 Wis. 226; *Johnson v. Chicago, etc., R. Co.*, 80 Wis. 641, 27 Am. St. Rep. 76.

"*Lhemerie coulie*" was a hollow or ravine worn down through the hills or bluffs on the east side of the Mississippi river. The evidence showed that there was no living stream of water flowing down the coulie or out of the mouth thereof, but that during and for a short time after any considerable rainfall, water flowed down the coulie upon the lowlands below the bluffs. There had, however, never been any definite channel through the lowlands in which the water was accustomed to flow, and it spread out over the lowlands. In an action against a landowner for damming back and turning away the water from his lands, it was held that the coulie was not a watercourse. *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715.

**Province of Jury.** — An action was brought for the alleged erection of a dam across a brook or watercourse. The testimony tended to show that the alleged brook was a ravine through which surface water, which had gathered on the higher lands, ran during the melting of snows and after heavy rains, but in no regular or defined channel, nor generally so as to hinder the growing of crops in the ravine on the plaintiff's land. The trial court instructed the jury in substance that, there being no substantial conflict in the testimony as to the character of the stream as a proposition of law, the *locus in quo* was a watercourse. On appeal, the Supreme Court held that the instruction was erro-

seasons or when the snow melts, and which soon disappears from evaporation and percolation, is to be considered as surface water.<sup>1</sup>

**Street Drainage.** — The natural surface flow in streets and highways is regarded as surface water.<sup>2</sup>

**Springs.** Waters which have their source in springs may constitute surface waters when they spread out over the surface of the ground and are dissipated by evaporation and percolation.<sup>3</sup>

**2. Appropriation of Surface Waters.** — Surface water so long as it remains upon one's land is regarded as his absolute property, and he may collect it in natural or artificial basins and may use it exclusively as his own;<sup>4</sup> and this is true though by the interception or diversion of such water it fails to reach a watercourse or permanent lake or pond,<sup>5</sup> or to flow over the land of another.<sup>6</sup>

**3. Repulsion of Flow** — *a. CIVIL-LAW RULE* — (1) *In General.* — Under the rule of the civil law, which has been adopted in many jurisdictions in the United States, the right to drain surface waters is governed by the law of nature, as between the owners of adjacent lands, and the lower proprietor is bound to receive the surface waters which naturally flow from the land above, and cannot do anything to prevent such flow which will cast it back upon the land above.<sup>7</sup> Thus, railroad companies, in the construction of their roadbeds,

neous, and that the question whether the ravine was a watercourse should have been submitted to the jury. *Eulrich v. Richter*, 37 Wis. 230.

**1. Collections in Depressions.** — *Rawstron v. Taylor*, 11 Exch. 382; *Barkley v. Wilcox*, 86 N. Y. 147, 40 Am. Rep. 519; *Brandenberg v. Zeigler*, 62 S. Car. 19, 89 Am. St. Rep. 887.

**2. Street Drainage.** — *Wagner v. Long Island R. Co.*, 5 Thomp. & C. (N. Y.) 163, 2 Hun (N. Y.) 633; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

**3. Springs.** — *White v. Sheldon*, 35 Hun (N. Y.) 143.

**4. Appropriation of Surface Waters** — *England.* — *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Broadbent v. Ramsbotham*, 25 L. J. Exch. 115, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *Briscoe v. Drought*, 11 Ir. C. L. 250.

*California.* — *Green v. Carotta*, 72 Cal. 267.

*Indiana.* — *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Greencastle v. Hazelett*, 23 Ind. 186; *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60.

*Iowa.* — *Hougan v. Milwaukee, etc., R. Co.*, 35 Iowa 558, 14 Am. Rep. 502.

*Kansas.* — *Emporia v. Soden*, 25 Kan. 608, 37 Am. Rep. 265.

*Minnesota.* — *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73.

*New York.* — *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Curtiss v. Ayrault*, 47 N. Y. 73.

*Rhode Island.* — *Buffum v. Harris*, 5 R. I. 253.

*South Carolina.* — *Brandenberg v. Zeigler*, 62 S. Car. 19, 89 Am. St. Rep. 887.

*Wisconsin.* — *Case v. Hoffman*, 100 Wis. 314.

**5. Broadbent v. Ramsbotham**, 11 Exch. 615; *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

**6. Rawstron v. Taylor**, 11 Exch. 369; *Livingston v. McDonald*, 21 Iowa 166, 89 Am. Dec. 563.

**7. Repulsion of Surplus Waters** — *Civil-law Rule*

— *Alabama.* — *Shahan v. Alabama G. S. R. Co.*, 115 Ala. 181, 67 Am. St. Rep. 20; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24.

*California.* — *West v. Girard*, (Cal. 1884) 4 Pac. Rep. 565; *Drew v. Cole*, (Cal. 1893) 32 Pac. Rep. 229; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Gray v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169.

*Georgia.* — *Farkas v. Towns*, 103 Ga. 150, 68 Am. St. Rep. 88; *Goldsmith v. Elsas*, 53 Ga. 186.

*Illinois.* — *Gillham v. Madison County R. Co.*, 49 Ill. 484, 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; *Toledo, etc., R. Co. v. Morrison*, 71 Ill. 616; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, reversing 11 Ill. App. 62; *Totel v. Bonnefoy*, 123 Ill. 653, 5 Am. St. Rep. 570; *Groff v. Ankenbrandt*, 124 Ill. 51, 7 Am. St. Rep. 342; *Anderson v. Henderson*, 124 Ill. 164; *Dayton v. Drainage Com'rs*, 128 Ill. 271; *Young v. Highway Com'rs*, 134 Ill. 569; *Mellor v. Pilgrim*, 7 Ill. App. 309; *Doud v. Guthrie*, 11 Ill. App. 194; *Highway Com'rs v. Whitsitt*, 15 Ill. App. 318; *Wagner v. Chaney*, 19 Ill. App. 546; *Stoddard v. Filgur*, 21 Ill. App. 560; *Patneaud v. Claire*, 32 Ill. App. 554; *Graham v. Keene*, 34 Ill. App. 87; *Crohen v. Ewers*, 39 Ill. App. 34; *Ribordy v. Murray*, 70 Ill. App. 527.

*Louisiana.* — *Martin v. Jett*, 12 La. 502, 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161, 33 Am. Dec. 581; *Hays v. Hays*, 19 La. 351; *Adams v. Harrison*, 4 La. Ann. 168; *Dela-houssaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521; *Hooper v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 194; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Minor v. Wright*, 16 La. Ann. 151; *Bowman v. New Orleans*, 27 La. Ann. 501; *Guesnard v. Bird*, 33 La. Ann. 796; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Schaffer v. State Nat. Bank*, 37 La. Ann. 248; *Foley v. Godchaux*, 48 La. Ann. 466.



must use reasonable diligence not to interfere with the flow of the surface water, and have been held liable for injuries resulting from their failure to do so.<sup>1</sup> So municipal corporations have no right by changing the grade of streets

*Maryland.*—Philadelphia, etc., R. Co. v. Davis, 68 Md. 281, 6 Am. St. Rep. 440.

*Michigan.*—Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831; Rice v. Flint, 67 Mich. 401; Osten v. Jerome, 93 Mich. 196; Leidlein v. Meyer, 95 Mich. 586; Finkbinder v. Ernst, 126 Mich. 565. Compare Horton v. Sullivan, 97 Mich. 282.

*Nevada.*—Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781.

*North Carolina.*—Overton v. Sawyer, 1 Jones L. (46 N. Car.) 308, 62 Am. Dec. 170; Porter v. Durham, 74 N. Car. 767; Mullen v. Lake Drummond Canal, etc., Co., 130 N. Car. 496.

*Ohio.*—Cincinnati, etc., R. Co. v. Ahr, 2 Cinc. Super. Ct. 504; Sheldon v. Cole, 3 Ohio Dec. 473, 2 Ohio N. P. 307; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Crawford v. Rambo, 44 Ohio St. 284.

*Pennsylvania.*—Keating v. Pittston, 8 Kulp (Pa.) 421; Kauffman v. Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437; Martin v. Riddle, 26 Pa. St. 415; Hays v. Hinkleman, 68 Pa. St. 324; Davidheiser v. Rhoads, 25 W. N. C. (Pa.) 513; Glass v. Fritz, 148 Pa. St. 324; Meixell v. Morgan, 149 Pa. St. 415, 34 Am. St. Rep. 614; Lucot v. Rodgers, 159 Pa. St. 58; Pfeiffer v. Brown, 165 Pa. St. 267, 44 Am. St. Rep. 660; Davidson v. Sanders, 1 Pa. Super. Ct. 432; McMahon v. Thornton, 5 Pa. Super. Ct. 495; Plank-Road Co. v. McCloy, (Pa. 1887) 11 Atl. Rep. 319.

*Tennessee.*—Garland v. Aurin, 103 Tenn. 555, 76 Am. St. Rep. 699; Sweetwater v. Pate, (Tenn. Ch. 1900) 59 S. W. Rep. 480; Carriger v. East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388; Louisville, etc., R. Co. v. Hays, 11 Lea (Tenn.) 382, 47 Am. Rep. 291, 14 Am. & Eng. R. Cas. 284.

The fact that the lower landowner has by the obstruction of the flow of surface water reclaimed more of the upper owner's land than he has flooded does not justify such obstruction. Farris v. Dudley, 78 Ala. 124, 56 Am. Rep. 24.

*California Statute.*—By Acts Cal. 1850, p. 219, which is embodied in the Pol. Code Cal., § 4468, it was enacted that "the common law of England, so far as it is not repugnant or inconsistent with the statute of the United States or the statute or laws of California, is the rule of decisions in all the courts of this state." After the enactment of this statute the court, in Ogburn v. Connor, 46 Cal. 346, adopted the civil-law rule with regard to the obstruction of the flow of surface waters. In McDaniel v. Cummings, 83 Cal. 515, it was urged that the rule adopted in that case was erroneous and contrary to the provisions of the statute, but the court held that the law of the case had become a rule of property in the state, and it was bound thereby on the principle of *stare decisis*.

**Seepage** through a levee or embankment in time of flood is surface water, and the lower proprietor is bound to permit it to flow over his lands in the manner in which surface water

usually flows over them. Gray v. McWilliams, 98 Cal. 157, 35 Am. St. Rep. 163.

**Flood Waters of River.**—In *California* it has been held that the flood waters of a river were not surface waters within the rule prohibiting a lower landowner from obstructing the flow of surface waters from upper lands, but that such rule applied only to rain and spring waters which the upper landowners could not keep out. McDaniel v. Cummings, 83 Cal. 515. See also Sanguinetti v. Pock, 136 Cal. 466, 89 Am. St. Rep. 169.

**Release of Servitude of Flow.**—Delahoussaye v. Judice, 13 La. Ann. 587, 71 Am. Dec. 521.

In *Oregon* the question has not been decided. In West v. Taylor, 16 Oregon. 165, Strahan, J., purposely avoided expressing an opinion as to either rule, since the facts of the case did not make it necessary.

In *West Virginia* there is no decision necessarily involving the point, but in Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763, there is a dictum which manifests a decided preference for the rule of the civil law. Johnson, J., said: "A number of the authorities we have cited recognize the principle that individuals and municipal corporations have the right to dispose of surface water in any manner they please, to prevent its flow from adjoining lands upon their premises, although the result may be to flood the adjoining land, or to expel it, throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics as well as law, that a man may use his own property in any manner he pleases provided he does not thereby interfere with the rights of his neighbor."

**1. Railroad Companies.**—*Alabama.*—Shahan v. Alabama G. S. R. Co., 115 Ala. 181, 67 Am. St. Rep. 20; Alabama G. S. R. Co. v. Shahan, 116 Ala. 302; Central of Georgia R. Co. v. Windham, 126 Ala. 552.

*Georgia.*—Gilbert v. Savannah, etc., R. Co., 69 Ga. 396; Georgia R., etc., Co. v. Bohler, 98 Ga. 184.

*Illinois.*—Gillham v. Madison County R. Co., 49 Ill. 484, 95 Am. Dec. 627; Alton, etc., Horse R., etc., Co. v. Deitz, 50 Ill. 210, 99 Am. Dec. 509; Toledo, etc., R. Co. v. Morrison, 71 Ill. 616; Jacksonville, etc., R. Co. v. Cox, 91 Ill. 500; Kankakee, etc., R. Co. v. Horan, 23 Ill. App. 259; St. Louis, etc., R. Co. v. Claunch, 41 Ill. App. 592; Ohio, etc., R. Co. v. Long, 52 Ill. App. 670; St. Louis, etc., R. Co. v. Ellis, 58 Ill. App. 110.

*Iowa.*—Cornish v. Chicago, etc., R. Co., 49 Iowa 378; Sullens v. Chicago, etc., R. Co., 74 Iowa 659, 7 Am. St. Rep. 501. See also Drake v. Chicago, etc., R. Co., 63 Iowa 302, 50 Am. Rep. 746, 70 Iowa 62; Moore v. Chicago, etc., R. Co., 75 Iowa 263; Noe v. Chicago, etc., R. Co., 76 Iowa 360.

*Louisiana.*—Lattimore v. Davis, 14 La. 161, 33 Am. Dec. 581; Bourdier v. Morgan's Louisiana, etc., R. Co., 35 La. Ann. 947; Heath v. Texas, etc., R. Co., 37 La. Ann. 728; Payne v.

to obstruct the flow of the surface waters from adjacent lots,<sup>1</sup> and the same is true with regard to the change of highways proper.<sup>2</sup> But though the upper landowner may have the right to have the surface water flow from his land over the lower land, the lower owner may provide artificial means for such drainage in lieu of the natural flow,<sup>3</sup> and where such artificial means of drainage is substituted the question of liability, in case it proves insufficient, depends upon the existence of negligence in providing reasonably adequate means for the flow of the surface waters.<sup>4</sup> In *Iowa* the civil-law rule has been stated with approval by way of dictum,<sup>5</sup> but the rule can scarcely be deemed settled in this jurisdiction,<sup>6</sup> and it has been said that it may be doubted whether the civil-law rule should be applied so as to prevent the owner of the lower estate from making improvements in good faith which

*Morgan's Louisiana, etc., R., etc., Co.*, 38 La. Ann. 164, 58 Am. Rep. 174.

*Maryland.*—*Philadelphia, etc., R. Co. v. Davis*, 68 Md. 281, 6 Am. St. Rep. 440.

*North Carolina.*—*Raleigh, etc., Air Line R. Co. v. Wicker*, 74 N. Car. 220; *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 438.

*Ohio.*—*Cincinnati, etc., R. Co. v. Ahr*, 2 Cinc. Super. Ct. 504.

*Tennessee.*—*Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388; *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 389, 47 Am. Rep. 291; *Louisville, etc., R. Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670.

*Virginia.*—*Norfolk, etc., R. Co. v. Carter*, 91 Va. 587.

**The Texas Statute** (Rev. Stat. Tex., art. 4171) expressly provides that "in no case shall any railroad construct a roadbed without first constructing the necessary culverts or sluices as the natural law of the land requires for the necessary drainage thereof." See *Gulf, etc., R. Co. v. Donahoo*, 59 Tex. 128; *Gulf, etc., R. Co. v. Helsley*, 62 Tex. 593; *Gulf, etc., R. Co. v. Holiday*, 65 Tex. 512; *Sabine, etc., R. Co. v. Hadnot*, 67 Tex. 503; *Sabine, etc., R. Co. v. Wood*, 69 Tex. 679; *Sabine, etc., R. Co. v. Brouard*, 75 Tex. 597; *Green v. Taylor, etc., R. Co.*, 79 Tex. 604; *Texas, etc., R. Co. v. Snyder*, (Tex. 1891) 18 S. W. Rep. 559; *Austin, etc., R. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350; *Rosenthal v. Taylor, etc., R. Co.*, 79 Tex. 325; *International, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 29 S. W. Rep. 483; *Campbell v. Nicolini*, (Tex. Civ. App. 1896) 35 S. W. Rep. 74; *Texas, etc., R. Co. v. Padgett*, 14 Tex. Civ. App. 435; *San Antonio, etc., R. Co. v. Mohl*, (Tex. Civ. App. 1896) 37 S. W. Rep. 22; *Texarkana, etc., R. Co. v. Spencer*, 28 Tex. Civ. App. 251.

In *Gulf, etc., R. Co. v. Helsley*, 62 Tex. 593, 20 Am. & Eng. R. Cas. 89, Stayton, J., said: "The intent of this statute is evident, and it was doubtless intended in this class of cases to furnish a simple rule by which would be avoided the difficulty, which has been so often felt in adjusting the rights of persons under the conflicting decisions [arising out of the application of the doctrine of the common and civil-law rules]. It was intended thereby to compel railways to construct such culverts or sluices as were necessary to permit water, not confined within watercourses, as that term is usually understood in legal works, to flow after a railway is constructed as it did before, in accordance with the natural lay of the land; to

compel them to permit the flow of surface water as it aforesaid had naturally done, and culverts or sluices which do not permit this are not the necessary culverts or sluices contemplated by the law. If a railway company undertakes to change the flowing of surface water, it must see to it that such change does not operate to the injury of the landowner."

**1. Municipal Corporations.**—*Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 112; *Avondale v. McFarland*, 101 Ala. 381; *Aurora v. Love*, 93 Ill. 521; *Edwards v. Peoria*, 66 Ill. App. 68; *Cotes v. Davenport*, 9 Iowa 227; *Ross v. Clinton*, 46 Iowa 606, 26 Am. Rep. 169; *Bowman v. New Orleans*, 27 La. Ann. 501; *Rice v. Flint*, 67 Mich. 401. See, however, *Cedar Falls v. Hansen*, 104 Iowa 189, 65 Am. St. Rep. 439; *Freburg v. Davenport*, 63 Iowa 119, 50 Am. Rep. 737.

**2. Barnard v. Highway Com'rs**, 71 Ill. App. 187.

**3. Artificial Means for Drainage.**—*Wilson v. Duncan*, 74 Iowa 491; *Darby v. Miller*, 6 La. Ann. 645; *Hooper v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 194; *Minor v. Wright*, 16 La. Ann. 151.

**4. Kansas City, etc., R. Co. v. Williams**, 3 Indian Ter. 352; *Philadelphia, etc., R. Co. v. Davis*, 68 Md. 281, 6 Am. St. Rep. 440; *Sabine, etc., R. Co. v. Hadnot*, 67 Tex. 503; *Texas, etc., R. Co. v. Padgett*, 14 Tex. Civ. App. 435; *Gulf, etc., R. Co. v. Wishart*, 28 Tex. Civ. App. 162. See also *Hannah v. St. Paul, etc., R. Co.*, 5 Dak. 1; *Edgar v. Walker*, 106 Ga. 454.

Where railroad beds obstruct the flow of surface waters, the culverts, drains, etc., provided in lieu of the natural drainage need not be so constructed as to provide for extraordinary floods and excessive rainfalls which cannot reasonably be foreseen. *Philadelphia, etc., R. Co. v. Davis*, 68 Md. 290, 6 Am. St. Rep. 440, 34 Am. & Eng. R. Cas. 143; *Baltimore, etc., R. Co. v. Sulphur Spring Independent School Dist.*, 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166; *Sabine, etc., R. Co. v. Hadnot*, 67 Tex. 503, 30 Am. & Eng. R. Cas. 197.

**5. Livingston v. McDonald**, 21 Iowa 160, 89 Am. Dec. 563.

**6. Drake v. Chicago, etc., R. Co.**, 63 Iowa 302, 50 Am. Rep. 746, 17 Am. & Eng. R. Cas. 45, 70 Iowa 59, 29 Am. & Eng. R. Cas. 514; *Sullens v. Chicago, etc., R. Co.*, 74 Iowa 662, 7 Am. St. Rep. 501; *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263; *Noe v. Chicago, etc., R. Co.*, 76 Iowa 360; *Wharton v. Stevens*, 84 Iowa 107, 35 Am. St. Rep. 296.

would have the effect to prevent the surface water from flowing from the upper estate.<sup>1</sup> In *Kentucky* it also seems that the civil-law rule prevails though it has not been adopted *eo nomine*.<sup>2</sup>

**Reason of Rule of Civil Law.** — The courts, in adopting the civil-law rule with regard to the obstruction of the flow of surface waters, have generally laid stress upon the maxim *sic utere tuo ut alienum non lædas*; <sup>3</sup> but the real basis of the rule has its foundation in the natural situation of the lands and the necessity of affording an escape for the flow of surface waters as exemplified by the maxim *aqua currit et debet currere ut solebat*.<sup>4</sup>

(2) *Urban Property.* — In *Tennessee* the rule is held to apply to urban as well as rural property; <sup>5</sup> but in other jurisdictions where the civil-law rule has been adopted the court seems to make an exception with regard to urban property.<sup>6</sup>

(3) *Prescriptive Rights.* — In the jurisdictions in which the civil-law rule prevails, the lower landowner may, by prescription, acquire the right to obstruct the natural flow of surface waters from the land of the upper landowner.<sup>7</sup>

(4) *Remedies for Obstruction.* — Where a lower landowner obstructs the natural flow of surface water from the land of the upper landowner, the latter may maintain an action for damages,<sup>8</sup> and courts of equity have unhesitatingly

1. *Livingston v. McDonald*, 21 Iowa 160, 89 Am. Dec. 563; *Wharton v. Stevens*, 84 Iowa 107, 35 Am. St. Rep. 296.

2. *Hahn v. Thornberry*, 7 Bush (Ky.) 403; *Kemper v. Louisville*, 14 Bush (Ky.) 87; *Chesapeake, etc., R. Co. v. Gross*, (Ky. 1897) 43 S. W. Rep. 203; *Grinstead v. Sanders*, (Ky. 1900) 56 S. W. Rep. 665.

3. **Reasons for Civil-law Rule.** — *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Gillham v. Madison County R. Co.*, 49 Ill. 484, 95 Am. Dec. 627.

4. *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781.

In *Gormley v. Sanford*, 52 Ill. 158, Lawrence, J., said: "We do not perceive why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land."

5. **Urban Property.** — *Sweetwater v. Pate*, (Tenn. Ch. 1900) 59 S. W. Rep. 480; *Garland v. Aurin*, 103 Tenn. 555, 76 Am. St. Rep. 699. See also *Goldsmith v. Elsas*, 53 Ga. 186.

6. *Crabtree v. Baker*, 75 Ala. 94, 51 Am. Rep. 424; *Farris v. Dudley*, 78 Ala. 126, 56 Am. Rep. 24; *Phillips v. Waterhouse*, 69 Iowa 199, 58 Am. Rep. 220; *Cedar Falls v. Hansen*, 104 Iowa 189, 65 Am. St. Rep. 439; *Boyd v. Conklin*, 54 Mich. 588, 52 Am. Rep. 831; *Kohn v. Moore*, 4 Leg. Gaz. (Pa.) 46; *Bentz v. Arm-*

*strong*, 8 W. & S. (Pa.) 40, 42 Am. Dec. 265; *Gross v. Lampasas*, 74 Tex. 195. See also *Gormley v. Sanford*, 52 Ill. 158.

In *Bentz v. Armstrong*, 8 W. & S. (Pa.) 40, 42 Am. Dec. 265, it was held that if several persons unite in the purchase of a piece of ground, and divide it into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate his own lot that the water which falls or accumulates upon it shall not run on the lot of his neighbor, and that the erection by the owner of the lower lots of an obstruction which turns back the water on the upper lands does not give a cause of action.

7. **Prescription.** — *Louisville, etc., R. Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670.

**Public Domain.** — In *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213, it appeared that the proprietor of the lower land obstructed the flow of water from the higher land while the latter was still a part of the public domain and the property of the United States. Thereafter, the higher land was purchased from the United States, and it was held that the owner of the lower land could not acquire a prescriptive right as against the United States to flood the higher lands with water while they were a part of the public domain, and that the purchaser thereof might commence an action for injury at any time within the statutory period after his purchase from the national government.

8. **Action for Damages.** — *Shahan v. Alabama G. S. R. Co.*, 115 Ala. 181, 67 Am. St. Rep. 20; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732.

**Limitation of Action.** — Each overflow caused by the obstruction of surface water is, for the purpose of the statute of limitations, regarded as an independent wrong, and gives a separate cause of action for the damages resulting to crops or other property on the land overflowed. *Carriger v. East Tennessee, etc., R. Co.*, 7 Lea (Tenn.) 388.



granted relief by injunction against further obstruction.<sup>1</sup> So it has been held that the upper landowner may enter and remove the obstruction erected on the lower land.<sup>2</sup>

*b. COMMON-LAW RULE* — (1) *In General.* — Under the common-law rule which exists in many jurisdictions, surface water is regarded as a common enemy, and every landed proprietor has the right, as a general proposition, to take any measures necessary to the protection of his property from its ravages even if in doing so he prevents its entrance upon his land and throws it back upon a coterminous proprietor. The damage resulting in such case is regarded as *damnum absque injuria*, affording no cause of action.<sup>3</sup> But of course one has no right, for the purpose of diverting the flow of surface water

1. *Injunction.* — *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Sheldon v. Cole*, 3 Ohio Dec. 473; *International, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 29 S. W. Rep. 483. *Compare Cherry v. Stein*, 11 Md. 1; *Porter v. Armstrong*, 132 N. Car. 66.

2. *Overton v. Sawyer*, 1 Jones L. (46 N. Car.) 308, 62 Am. Dec. 170.

3. *Common-law Rule* — *United States.* — *Walker v. New Mexico, etc.*, R. Co., 165 U. S. 593 (decided under the *New Mexico* rule); *Hagge v. Kansas City S. R. Co.*, 104 Fed. Rep. 391 (*Missouri* rule).

*Connecticut.* — *Grant v. Allen*, 41 Conn. 156; *Chadeayne v. Robinson*, 55 Conn. 345, 3 Am. St. Rep. 55.

*Indiana.* — *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205; *Hill v. Cincinnati, etc., R. Co.*, 109 Ind. 511, 29 Am. & Eng. R. Cas. 502; *Jean v. Pennsylvania Co.*, 9 Ind. App. 56; *Jacks v. Lollis*, 10 Ind. App. 700.

*Kansas.* — *Atchison, etc., R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374, 20 Am. & Eng. R. Cas. 116; *Chicago, etc., R. Co. v. Steck*, 51 Kan. 737; *Missouri Pac. R. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249.

*Maine.* — *Bangor v. Lansil*, 51 Me. 521; *Greeley v. Maine Cent. R. Co.*, 53 Me. 200; *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353; *Murphy v. Kelley*, 68 Me. 521.

*Massachusetts.* — *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Gannon v. Hargadon*, 10 Allen (Mass.) 106, 87 Am. Dec. 625; *Franklin v. Fisk*, 13 Allen (Mass.) 211, 90 Am. Dec. 194; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Ashley v. Wolcott*, 11 Cush. (Mass.) 192; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Bates v. Smith*, 100 Mass. 181; *Macomber v. Godfrey*, 108 Mass. 221, 11 Am. Rep. 349; *Rathke v. Gardner*, 134 Mass. 14, 14 Am. & Eng. R. Cas. 281; *Keith v. Brockton*, 136 Mass. 119, 6 Am. & Eng. Corp. Cas. 133; *Cassidy v. Old Colony R. Co.*, 141 Mass. 178, 23 Am. & Eng. R. Cas. 85.

*Minnesota.* — *O'Brien v. St. Paul*, 25 Minn. 336, 33 Am. Rep. 470; *Hogenson v. St. Paul, etc., R. Co.*, 31 Minn. 226, 14 Am. & Eng. R. Cas. 291; *Rowe v. St. Paul, etc., R. Co.*, 41

Minn. 384, 16 Am. St. Rep. 706; *Jordan v. St. Paul, etc., R. Co.*, 42 Minn. 172, 41 Am. & Eng. R. Cas. 1; *Follmann v. Mankato*, 45 Minn. 457; *Brown v. Winona, etc., R. Co.*, 53 Minn. 259, 39 Am. St. Rep. 603.

*Mississippi.* — *Yazoo, etc., R. Co. v. Davis*, 73 Miss. 678, 55 Am. St. Rep. 562; *Sinai v. Louisville, etc., R. Co.*, 71 Miss. 547.

*Missouri.* — *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 224; *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 437; *Hosher v. Kansas City, etc., R. Co.*, 60 Mo. 329; *Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514, 5 Am. & Eng. R. Cas. 79; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504, 20 Am. & Eng. R. Cas. 96; *Stewart v. Clinton*, 79 Mo. 603, 7 Am. & Eng. Corp. Cas. 511; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271, 53 Am. Rep. 581, 20 Am. & Eng. R. Cas. 103; *Jones v. St. Louis, etc., R. Co.*, 84 Mo. 151, 29 Am. & Eng. R. Cas. 523; *Hoester v. Hemsath*, 16 Mo. App. 486; *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 251; *Martin v. Benoist*, 20 Mo. App. 262; *Field v. Chicago, etc., R. Co.*, 21 Mo. App. 600; *Schneider v. Missouri Pac. R. Co.*, 29 Mo. App. 68; *Bird v. Hannibal, etc., R. Co.*, 30 Mo. App. 365; *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 620; *Burke v. Missouri Pac. R. Co.*, 29 Mo. App. 370; *Collier v. Chicago, etc., R. Co.*, 48 Mo. App. 398; *Gray v. Schriber*, 58 Mo. App. 173; *DeLapp v. Kansas City, etc., R. Co.*, 69 Mo. App. 572; *Graves v. Kansas City, etc., R. Co.*, 69 Mo. App. 574; *Gottenetroter v. Kapplemann*, 83 Mo. App. 290. *Compare Laumier v. Francis*, 23 Mo. 181; *McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359; 35 Am. Rep. 431; *Shane v. Kansas City, etc., R. Co.*, 71 Mo. 237, 36 Am. Rep. 480.

*Nebraska.* — *Morrissey v. Chicago, etc., R. Co.*, 38 Neb. 406; *Lincoln, etc., R. Co. v. Sutherland*, 44 Neb. 526; *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768.

*New Hampshire.* — *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

*New Jersey.* — *Bowlsby v. Speer*, 31 N. J. L. 351, 86 Am. Dec. 216; *Union v. Durkes*, 38 N. J. L. 21; *Kelly v. Dunning*, 39 N. J. Eq. 483; *Jesse v. Bamford Bros. Silk Mfg. Co.*, 66 N. J. L. 641, 88 Am. St. Rep. 502. *Compare Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq. 174; *Ross v. Mackeney*, 46 N. J. Eq. 140.

*New York.* — *Wagner v. Long Island R. Co.*, 5 Thomp. & C. (N. Y.) 163, 2 Hun (N. Y.) 633; *Conhocton Stone Road Co. v. Buffalo, etc., R. Co.*, 5 Thomp. & C. (N. Y.) 651, 3 Hun (N. Y.) 523; *Barkley v. Wilcox*, 19 Hun (N. Y.)

from his land, to go upon the land of another and change the surface thereof.<sup>1</sup>

**Improvement of City Lots.** — Under the common-law rule the owner of city lots may improve them by bringing them to grade or otherwise, though thereby he prevents the natural flow of surface waters over them and casts such waters on the lot of an adjoining owner.<sup>2</sup>

(2) *Municipal Corporations.* — In the jurisdictions which adopt the common-law rule, it is held that the rule applies fully to municipal or *quasi*-municipal corporations as to individuals, and that such a corporation does not incur any liability if in the improvement of its streets or highways it prevents the flow of surface water from adjacent lots;<sup>3</sup> and the same has been held true with

320, *affirmed* 86 N. Y. 140, 40 Am. Rep. 519; *White v. Sheldon*, 35 Hun (N. Y.) 193; *Goodale v. Tuttle*, 29 N. Y. 467; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Moyer v. New York Cent., etc.*, R. Co., 88 N. Y. 351; *Eyener v. New York, etc.*, R. Co., 3 N. Y. App. Div. 157. See also *Gould v. Booth*, 66 N. Y. 64. Compare *Ashberry v. West Seneca*, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 306.

*South Carolina.* — *Edwards v. Charlotte, etc.*, R. Co., 39 S. Car. 472, 39 Am. St. Rep. 746; *Baltzege v. Carolina Midland R. Co.*, 54 S. Car. 245; *Lawton v. South Bound R. Co.*, 61 S. Car. 548; *Brandenberg v. Zeigler*, 62 S. Car. 19, 89 Am. St. Rep. 887. Compare *Waldrop v. Greenwood, etc.*, R. Co., 28 S. Car. 163, 34 Am. & Eng. R. Cas. 204.

*Vermont.* — *Harwood v. Benton*, 32 Vt. 724; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693.

*Virginia.* — *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587.

*Washington.* — *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859.

*Wisconsin.* — *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Eulrich v. Richter*, 37 Wis. 226; *Ramsdale v. Foote*, 55 Wis. 560; *Hanlin v. Chicago, etc.*, R. Co., 61 Wis. 515, 20 Am. & Eng. R. Cas. 70; *O'Connor v. Fon du Lac, etc.*, R. Co., 52 Wis. 526, 38 Am. Rep. 754; *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715; *Johnson v. Chicago, etc.*, R. Co., 80 Wis. 641, 27 Am. St. Rep. 76; *Borchsenius v. Chicago, etc.*, R. Co., 96 Wis. 448; *Schmeckpepper v. Chicago, etc.*, R. Co., 116 Wis. 592.

*Canada.* — *Ostrom v. Sils*, 24 Ont. App. 526; *Crewson v. Grand Trunk R. Co.*, 27 U. C. Q. B. 68; *McGillivray v. Millin*, 27 U. C. Q. B. 62; *Darby v. Crowland Tp.*, 38 U. C. Q. B. 338.

A proprietor of land may erect structures upon it as solid and as high as he pleases without regard to their effect upon surface water, which would otherwise come from the adjoining lands upon his soil. And the fact that the adjoining land is a burial ground does not abridge his rights in this respect. The erection of a structure for the purpose of preventing the surface water from flowing from the burial ground over his land is not a violation of the *Massachusetts* statute with reference to the drainage of burial grounds; for the proprietors of the burial grounds have no easement which he violates or obstructs. *Bates v. Smith* 100 Mass. 181.

**Operation of Maxim Sic Utere Tuo.** — With reference to the maxim *sic utere tuo ut alienum non lædas*, Biddle, J., said, in *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114: "The maxim

that every one must so enjoy his property as not to injure the property of another \* \* \* means no more than that every one must so enjoy his property according to his legal right as not to injure the legal right in the property of another. It is sometimes impossible for the owner to use his property within his legal right without, in some slight degree at least, injuring the property of another. Such a case is not within the maxim, provided it does not injure a legal right in the property of another."

**Origin of Common-law Rule.** — It is of interest to note that what is known as the common-law doctrine seems to have originated in *Massachusetts* in the case of *Parks v. Newburyport*, 10 Gray (Mass.) 28. The English courts do not appear to have had the question before them for consideration.

1. *Grant v. Allen*, 41 Conn. 156, wherein it was held that a person has no right, without permission, to go upon his neighbor's land, from which surface water flows upon his own, and put earth upon it, or dig the soil, for the purpose of turning the flow of water from his own land; and it is no justification of the act that the flow of water is endangering the wall of his house, and that he has given notice to the owner of the adjoining lot, and the latter has neglected to take any action. *Pardee, J.*, said: "The right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow. There being in the case before us no grant, express or implied, and no stipulation between the parties concerning the mode in which their respective parcels of land shall be occupied and improved, the defendants could not enter upon the plaintiff's land without his consent, place additional earth upon it, change the grade, and burden it with a barrier for the diversion of such water from their own land. He could not compel them to receive it, they could not compel him to withhold it."

2. **Raising Grade of City Lots.** — *Chadecayne v. Robinson*, 55 Conn. 345, 3 Am. St. Rep. 55; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 510.

3. **Municipal Corporations.** — *Delaware.* — *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Magarity v. Wilmington*, 5 Houst. (Del.) 530. *District of Columbia.* — *Herring v. District of Columbia*, 3 Mackey (D. C.) 572.

*Georgia.* — *Roll v. Augusta*, 34 Ga. 326.

regard to the improvement of city lots owned by a municipality.<sup>1</sup> On the other hand, it has been held that a landowner may, by erections or obstructions on his own lands, prevent the flowage of surface waters from a highway upon his land.<sup>2</sup>

(3) *Railroad Companies*.—In the jurisdictions in which the common-law rule is recognized, the courts have held that it is applicable to the obstruction of the flow of surface waters in the construction of railroads.<sup>3</sup>

*Indiana*.—*Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Davis v. Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 361.

*Kansas*.—*Atchison v. Challiss*, 9 Kan. 603.

*Maryland*.—*Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304.

*Massachusetts*.—*Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Perry v. Worcester*, 6 Gray (Mass.) 546, 66 Am. Dec. 431; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Brayton v. Fall River*, 113 Mass. 226, 18 Am. Rep. 470; *Keith v. Brockton*, 136 Mass. 119, 6 Am. & Eng. Corp. Cas. 133; *Kennison v. Beverly*, 146 Mass. 467, 20 Am. & Eng. Corp. Cas. 438; *Collins v. Waltham*, 151 Mass. 196; *Woodbury v. Beverly*, 153 Mass. 245; *Bainard v. Newton*, 154 Mass. 255.

*Minnesota*.—*Lee v. Minneapolis*, 22 Minn. 13; *Alden v. Minneapolis*, 24 Minn. 254; *Henderson v. Minneapolis*, 32 Minn. 319, 6 Am. & Eng. Corp. Cas. 4; *Follman v. Mankato*, 45 Minn. 457.

*Missouri*.—*Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Foster v. St. Louis*, 71 Mo. 157, 4 Mo. App. 564; *Stewart v. Clinton*, 79 Mo. 603, 7 Am. & Eng. Corp. Cas. 511; *Rychlicki v. St. Louis*, 98 Mo. 497, 14 Am. St. Rep. 651, 25 Am. & Eng. Corp. Cas. 160; *Schmidt v. Rowse*, 35 Mo. App. 288.

*Nebraska*.—*Kearney v. Themanson*, 48 Neb. 74.

*New Jersey*.—*West Orange Tp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670; *Union v. Durkes*, 38 N. J. L. 21; *Miller v. Morristown*, 47 N. J. Eq. 62.

*New York*.—*Wilson v. New York*, 1 Den. (N. Y.) 595, 43 Am. Dec. 719; *Kavanagh v. Brooklyn*, 38 Barb. (N. Y.) 232; *Acker v. New Castle*, 48 Hun (N. Y.) 312; *Gould v. Booth*, 66 N. Y. 62; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Watson v. Kingston*, 114 N. Y. 88, 28 Am. & Eng. Corp. Cas. 233.

*Oregon*.—*Bush v. Portland*, 19 Oregon 45, 20 Am. St. Rep. 789.

*Rhode Island*.—*Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598; *Smith v. Tripp*, 13 R. I. 152.

*Vermont*.—*Noble v. St. Albans*, 56 Vt. 522.

*Wisconsin*.—*Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Waters v. Bay View*, 61 Wis. 642; *Heth v. Fond du Lac*, 63 Wis. 228, 53 Am. Rep. 279, 7 Am. & Eng. Corp. Cas. 506; *Champion v. Crandon*, 84 Wis. 405. Compare *Addy v. Janesville*, 70 Wis. 401.

*Canada*.—*Darby v. Crowland Tp.*, 38 U. C. Q. B. 338.

1. *Parks v. Newburyport*, 10 Gray (Mass.) 28.

2. *Bangor v. Lansil*, 51 Me. 521; *Franklin v. Fisk*, 13 Allen (Mass.) 211, 90 Am. Dec. 194.

3. *Railroad Companies—United States*.—*Walker v. New Mexico*, etc., R. Co., 165 U. S. 593 (law of *New Mexico*); *Hagge v. Kansas City S. R. Co.*, 104 Fed. Rep. 391 (*Missouri* rule).

*Arkansas*.—*Bentonville R. Co. v. Baker*, 45 Ark. 252.

*Dakota*.—*Hannah v. St. Paul*, etc., R. Co., 5 Dak. 1.

*Indiana*.—*Grand Rapids*, etc., R. Co. v. Horn, 41 Ind. 479; *Cairo*, etc., R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; *Cairo*, etc., R. Co. v. Houry, 77 Ind. 364, 5 Am. & Eng. R. Cas. 62; *Hill v. Cincinnati*, etc., R. Co., 109 Ind. 511; *New York*, etc., R. Co. v. Speelman, 12 Ind. App. 372; *Cleveland*, etc., R. Co. v. Huddleston, 21 Ind. App. 621, 69 Am. St. Rep. 385.

*Kansas*.—*Atchison*, etc., R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; *Kansas City*, etc., R. Co. v. Riley, 33 Kan. 374; *Missouri Pac. R. Co. v. Renfro*, 52 Kan. 237, 39 Am. St. Rep. 344; *Chicago*, etc., R. Co. v. Steck, 51 Kan. 737.

*Maine*.—*Greeley v. Maine Cent. R. Co.*, 53 Me. 200; *Morrison v. Bucksport*, etc., R. Co., 67 Me. 353.

*Massachusetts*.—*Walker v. Old Colony*, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509; *Rathke v. Gardner*, 134 Mass. 14; *Cassidy v. Old Colony R. Co.*, 141 Mass. 174, 23 Am. & Eng. R. Cas. 85; *Woodbury v. Beverly*, 153 Mass. 245.

*Minnesota*.—*Pilegar v. Hastings*, etc., R. Co., 28 Minn. 510, 5 Am. & Eng. R. Cas. 85; *Rowe v. St. Paul*, etc., R. Co., 41 Minn. 384, 16 Am. St. Rep. 706; *Jordan v. St. Paul*, etc., R. Co., 42 Minn. 172; *Brown v. Winona*, etc., R. Co., 53 Minn. 259, 39 Am. St. Rep. 603.

*Mississippi*.—*Yazoo*, etc., R. Co. v. Davis, 73 Miss. 678, 55 Am. St. Rep. 562.

*Missouri*.—*Clark v. Hannibal*, etc., R. Co., 36 Mo. 202; *Hosher v. Kansas City*, etc., R. Co., 60 Mo. 329; *Benson v. Chicago*, etc., R. Co., 78 Mo. 504; *Abbott v. Kansas City*, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581; *Moss v. St. Louis*, etc., R. Co., 85 Mo. 86; *Jones v. Wabash*, etc., R. Co., 18 Mo. App. 251; *Schneider v. Missouri Pac. R. Co.*, 29 Mo. App. 68; *Burke v. Missouri Pac. R. Co.*, 29 Mo. App. 370; *Collier v. Chicago*, etc., R. Co., 48 Mo. App. 398; *Kenney v. Kansas City*, etc., R. Co., 69 Mo. App. 569. See also *Munkers v. Kansas City*, etc., R. Co., 60 Mo. 334.

*Nebraska*.—*Morrissey v. Chicago*, etc., R. Co., 38 Neb. 406; *Bunderson v. Burlington*, etc., R. Co., 43 Neb. 545; *Lincoln*, etc., R. Co. v. Sutherland, 44 Neb. 526; *Chicago*, etc., R. Co. v. Shaw, 63 Neb. 380; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768.

*New York*.—*Wagner v. Long Island R. Co.*, 2 Hun (N. Y.) 633; *Conhocton Stone Road Co. v. Buffalo*, etc., R. Co., 5 Thomp. & C. (N. Y.)



(4) *Natural Drainage Channels*. — In some jurisdictions in which the common-law rule has been adopted in general terms, an exception has been made as a matter of necessity with regard to the obstruction of natural drainage channels through which the surface waters, collecting in times of heavy rains or melting snows, are carried from a higher to a lower elevation, or into a watercourse. In such jurisdictions it is held that while a landowner may obstruct the flow of diffused waters which pass over the surface of the country in such condition and are nowhere gathered in large or restricted volume, yet he has no right negligently to obstruct a natural channel in which surface waters collect in large and restricted volume and through which they are discharged to a lower elevation or into a watercourse.<sup>1</sup> This rule has

651, 3 Hun (N. Y.) 523; *Mundy v. New York*, etc., R. Co., 75 Hun (N. Y.) 479; *Moyer v. New York Cent.*, etc., R. Co., 88 N. Y. 351; *Egener v. New York*, etc., R. Co., 3 N. Y. App. Div. 157. Compare *Mitchell v. New York*, etc., R. Co., 36 Hun (N. Y.) 177.

*South Carolina*. — *Baltzger v. Carolina Midland R. Co.*, 54 S. Car. 242; *Lawton v. South Bound R. Co.*, 61 S. Car. 548.

*Virginia*. — *Norfolk*, etc., R. Co. *v. Carter*, 91 Va. 587.

*Wisconsin*. — *O'Connor v. Fond du Lac*, etc., R. Co., 52 Wis. 526, 38 Am. Rep. 753; *Hanlin v. Chicago*, etc., R. Co., 61 Wis. 515; *Johnson v. Chicago*, etc., R. Co., 80 Wis. 641, 27 Am. St. Rep. 76.

*Canada*. — *Crewson v. Grand Trunk R. Co.*, 27 U. C. Q. B. 68.

In *Rowe v. St. Paul*, etc., R. Co., 41 Minn. 384, 16 Am. St. Rep. 706, it was shown that the defendant's railroad traversed in a northerly and southerly direction an unusually flat and level prairie, having a gradual and uniform slope of two to four feet to the mile westerly to the Red river. The plaintiff's farm was situated about one mile to the east of the defendant's railroad, which was consequently from two to four feet lower than the defendant's land. The action was brought for damages suffered by the plaintiff by reason of the obstruction interposed by the roadbed to the free passage of surface waters from the adjacent lands, so as to prevent the drainage thereof through and over the defendant's right of way to the river. There was no watercourse. It was held that the plaintiff could not recover.

**Allowing Ditch to Become Useless**. — A railroad company, when it constructed its road, made a ditch along it which carried off the water from the plaintiff's adjoining land to a natural channel. The ditch was allowed to fall into disrepair, and became so choked up that the water could no longer flow through it. It was held that, as the flow of the surface water had not been changed by the building of the road to the plaintiff's injury, the company was not bound to keep the ditch open for his benefit, and that he had no cause of action. *Louisville*, etc., R. Co. *v. McAfee*, 30 Ind. 291.

**1. Natural Drainage Channels** — *Indiana*. — *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199.

*Iowa*. — *Waverly v. Page*, 105 Iowa 225.

*Kansas*. — *Palmer v. Waddell*, 22 Kan. 355; *Union Pac. R. Co. v. Dyche*, 31 Kan. 120, 14 Am. & Eng. R. Cas. 272.

*Minnesota*. — *McClure v. Red Wing*, 28 Minn.

186; *Jungblum v. Minneapolis*, etc., R. Co., 70 Minn. 153.

*Nebraska*. — *Lincoln*, etc., R. Co. *v. Sutherland*, 44 Neb. 536; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *Missouri Pac. R. Co. v. Hemingway*, 63 Neb. 610.

*New Jersey*. — *Earl v. De Hart*, 12 N. J. Eq. 283, 72 Am. Dec. 395; *McKinley v. Chosen Freeholders*, 29 N. J. Eq. 164; *Kelly v. Dunning*, 39 N. J. Eq. 484; *Schnitzius v. Bailey*, 48 N. J. Eq. 409. See also *Bowlsby v. Speer*, 31 N. J. L. 351, 86 Am. Dec. 216.

*Oregon*. — *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727.

See also *Barkley v. Wilcox*, 86 N. Y. 144, 40 Am. Rep. 519; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473.

In *Palmer v. Waddell*, 22 Kan. 355, the evidence showed that in time of heavy rains and in the spring season every year as far back as the memory of man ran, the surface of the ground for a mile and more back from the Mississippi river was such as to collect water falling on a large section of country, to such an extent as required an outlet to the river through the bottoms or low lands at the foot of the bluffs, and that the flow of the water had produced a definite or natural channel through the land of the defendant and of other persons, where such accumulated surface water had always been accustomed to run. It was held that there was a natural watercourse which could not be obstructed.

In the later case of *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241, the same court held that to bring such water within the rules relating to watercourses, it is not sufficient that the conformation of the surface be such that the water falling on a large tract of land naturally flows upon and over a depression at one end of that tract; there must be a necessity for the outflow over this depression in order to prevent the flooding of a considerable portion of land, and there must be a distinct channel, with well-defined banks, cut through the turf and into the soil by the action of the water — the bed of a stream, or something which will present on casual glance to every one the unmistakable evidences of the frequent action of running water.

In *McClure v. Red Wing*, 28 Minn. 186, it appeared that the municipal authorities had graded a street across a ravine which was about three rods wide, and on either side of which was a hill fifteen or twenty feet high. There was a well-defined channel or watercourse from six to eight feet wide and from four to five feet

frequently been applied to the obstruction of natural drainage channels in the construction of railroads.<sup>1</sup>

(5) *Prescription*. — The fact that surface water has for years flowed according to the natural lay of the land from the upper land over the lower does not give to the owner of the upper land a prescriptive right to have such flow continue and deprive the owner of the lower land of the right to obstruct such flow so as to cast back the water on the land of the upper owner.<sup>2</sup>

3. *MODIFIED DOCTRINE — Reasonable Use*. — In *New Hampshire* the courts have refused to adopt either the civil-law or the common-law rule as to the right to obstruct the flow of surface waters, and have devised the rule that a lower landowner has the right to obstruct the flow of such waters upon his premises while in the reasonable use and improvement of his land;<sup>3</sup> while, on the other hand, the lower landowner has no right by making an unreasonable use or improvement of his land to obstruct the flow of the surface water over it to the injury of adjoining landowners.<sup>4</sup> In determining whether a landowner has obstructed the flow of surface waters in the reasonable use and improvement of his property, the circumstances of the case should be considered, including the nature and importance of the improvements, the extent of the interference with the flow, the amount of injury done to other landowners as compared with the value of such improvements, and the ability of the defendant to have reasonably foreseen and avoided such injury;<sup>5</sup> and these considerations are questions of fact for the determination of the jury.<sup>6</sup> In *Arkansas* the court seems to have also adopted this modified rule and restricted the right of a landowner to obstruct the flow of surface waters to acts constituting a reasonable use and improvement of his lands.<sup>7</sup>

deep in the bottom of the ravine. This channel was the only and usual means of drainage of a considerable tract of country, but it was usually dry except during heavy rains and the melting of snow. The city constructed a road or street across the ravine and placed therein a sewer to permit the water to flow beneath it. The sewer proved insufficient, and the result was that adjoining lands were flooded. It was held that the rules applicable to surface waters could not be applied without considerable modification, and that the ravine must be regarded as a watercourse.

1. *Arkansas*. — *St. Louis, etc., R. Co. v. Morris*, 35 Ark. 622.

*Minnesota*. — *Rowe v. St. Paul, etc., R. Co.*, 41 Minn. 384, 16 Am. St. Rep. 706; *Jungblum v. Minneapolis, etc., R. Co.*, 70 Minn. 151.

*Mississippi*. — *Canton, etc., R. Co. v. Paine*, (Miss. 1896) 19 So. Rep. 199; *Sinai v. Louisville, etc., R. Co.*, 71 Miss. 547.

*Nebraska*. — *Lincoln, etc., R. Co. v. Sutherland*, 44 Neb. 536; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *Chicago, etc., R. Co. v. Shaw*, 63 Neb. 380; *Missouri Pac. R. Co. v. Hemingway*, 63 Neb. 610.

*Virginia*. — *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587.

In *Lincoln, etc., R. Co. v. Sutherland*, 44 Neb. 526, the evidence showed that a draw some seven miles in length crossed the premises of a farmer. The surface waters produced by rains and melting snows ran into this draw from the surrounding territory and thence found their way to the Platte river. A railroad company constructed its roadbed across the premises and built an embankment without culvert or opening over the draw. In a suit

by the owner of the land against the company for damages for negligently constructing the embankment without an opening whereby the surface waters were stopped and overflowed the land and destroyed the crops thereon, it was held that the case called for the application of the rule against the railroad company that the proprietor must so use the property as not unnecessarily and negligently to injure his neighbor, and that the question of negligence was one to be determined by the jury. See also *Town v. Missouri Pac. R. Co.*, 50 Neb. 768.

2. *Prescription*. — *Greatrex v. Hayward*, 8 Exch. 291; *White v. Chapin*, 12 Allen (Mass.) 518; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Cassidy v. Old Colony R. Co.*, 141 Mass. 178, 23 Am. & Eng. R. Cas. 85; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316; *White v. Sheldon*, 35 Hun (N. Y.) 193; *Pettigrew v. Evansville*, 25 Wis. 227, 3 Am. Rep. 50.

3. *Modified Doctrine — Reasonable Use*. — *Rindge v. Sargent*, 64 N. H. 294; *Priest v. Boston, etc., R. Co.*, 71 N. H. 114.

4. *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Rindge v. Sargent*, 64 N. H. 294; *Priest v. Boston, etc., R. Co.*, 71 N. H. 114; *Franklin v. Dudgee*, 71 N. H. 186.

5. *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Rindge v. Sargent*, 64 N. H. 294; *Franklin v. Dudgee*, 71 N. H. 186.

6. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Priest v. Boston, etc., R. Co.*, 71 N. H. 114.

7. *Little Rock, etc., R. Co. v. Chapman*, 39 Ark. 473; *Kansas City, etc., R. Co. v. Cook*, 57 Ark. 387.

d. **FEDERAL COURTS.** — In cases involving the respective rights and duties of proprietors of upper and lower lands as to the repulsion of the flow of surface waters, the federal courts follow the decisions of the local state courts.<sup>1</sup>

4. **Drainage of Surface Waters** — a. **IN GENERAL.** — An upper landowner owes no duty to a lower owner to drain the surface water that collects on his land<sup>2</sup> or to prevent such surface water from flowing according to nature from his land to the land of the lower owner, and the latter can maintain no action against the upper owner for permitting such flow;<sup>3</sup> and the fact that such surface flow carries with it soil from land under ordinary cultivation is immaterial.<sup>4</sup> So the fact that an upper landowner has diverted the flow of surface waters from the land of a lower owner does not preclude him from abandoning such diversion and permitting the waters again to flow in their natural course.<sup>5</sup> Nevertheless, there is a manifest distinction between preventing the flow of surface water upon the land of the owner and casting such water away on the land of another,<sup>6</sup> and it is held both in the jurisdictions which adopt the civil-law rule and in those following the common-law rule that the owner of land which surface water has reached has no right to collect it into a ditch, culvert, or other artificial channel and discharge it upon the land of another in quantity or volume exceeding what would have reached the latter land by natural drainage.<sup>7</sup> The fact that the artificial channels by which the surface

1. **Federal Courts.** — Walker v. New Mexico, etc. R. Co., 165 U. S. 593 (law of *New Mexico*); Hagge v. Kansas City S. R. Co., 104 Fed. Rep. 391 (*Missouri* rule).

2. Corcoran v. Benicia, 96 Cal. 1, 31 Am. St. Rep. 171; Fremont, etc., R. Co. v. Gayton, (Neb. 1903) 93 N. W. Rep. 163; Goodale v. Tuttle, 29 N. Y. 459; Vanderwiele v. Taylor, 65 N. Y. 341; Sentner v. Tees, 132 Pa. St. 216.

3. **No Liability for Permitting Natural Drainage** — *California.* — Mathews v. Kinsell, 41 Cal. 512.

*Connecticut.* — Grant v. Allen, 41 Conn. 156. *Indiana.* — Schwartz v. Nie, 29 Ind. App. 329.

*Kentucky.* — Livezey v. Schmidt, 96 Ky. 441. *Massachusetts.* — Morrill v. Hurley, 120 Mass. 99; Rathke v. Gardner, 134 Mass. 14; Collins v. Waltham, 151 Mass. 197.

*Michigan.* — Leidlein v. Meyer, 95 Mich. 586. *Minnesota.* — Rowe v. St. Paul, etc., R. Co., 41 Minn. 384, 16 Am. St. Rep. 706.

*Missouri.* — Laumier v. Francis, 23 Mo. 181; Schmidt v. Rowse, 35 Mo. App. 288.

*Nebraska.* — Fremont, etc., R. Co. v. Gayton, (Neb. 1903) 93 N. W. Rep. 163.

*Nevada.* — Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781.

*New Jersey.* — Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157.

*New York.* — Vanderwiele v. Taylor, 65 N. Y. 341; McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479; Peck v. Goodberlett, 109 N. Y. 180; Garrett v. Wood, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 397. Compare Thomas v. Kenyon, 1 Daly (N. Y.) 132.

*Ohio.* — Ruffner v. Coöperative Land, etc., Assoc., 6 Ohio Dec. (Reprint) 1065, 10 Am. L. Rec. 51.

*Oregon.* — Whitney v. Willamette Bridge R. Co., 23 Oregon, 188.

*Pennsylvania.* — Sowers v. Lowe, (Pa. 1887) 9 Atl. Rep. 44; Scranton's Appeal, 121 Pa. St. 97, 6 Am. St. Rep. 75; Hays v. Hinkleman, 68 Pa. St. 324; Sentner v. Tees, 132 Pa. St. 216.

*Texas.* — Adams v. Missouri, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. Rep. 1006.

*Wisconsin.* — Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50.

4. Olson v. St. Paul, etc., R. Co., 38 Minn. 479; Jordan v. St. Paul, etc., R. Co., 42 Minn. 172; Canton Iron Co. v. Biwabik Bessemer Co., 63 Minn. 367; Venum v. Wheeler 35 Hun (N. Y.) 53.

The defendant owned land upon the slope of a hill running down to a millpond belonging to the plaintiff. He cultivated and fertilized his land in the ordinary way for garden purposes, and the flow of the surface water carried a large amount of solid matter into the plaintiff's millpond. It was held that the defendant's acts gave to the plaintiff no cause of action for an unlawful encroachment upon its pond. Middlesex Co. v. McCue, 149 Mass. 103, 14 Am. St. Rep. 402.

5. Canton Iron Co. v. Biwabik Bessemer Co., 63 Minn. 367. See also Dailey v. Western New York, etc., R. Co., 53 N. Y. App. Div. 551; Felton v. Simpson, 11 Ired. L. (33 N. Car.) 84; Bush v. Portland, 19 Oregon 45, 20 Am. St. Rep. 789.

6. Rathke v. Gardner, 134 Mass. 14; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519.

7. **Casting Away Surface Waters in Artificial Channels** — *England.* — Hurdman v. North Eastern R. Co., 3 C. P. D. 168; Sharpe v. Hancock, 8 Scott (N. R.) 46, 7 M. & G. 354, 49 E. C. L. 354.

*Canada.* — Voyer v. Montreal, 1 L. C. Jur. 166; Les Ecclésiastiques, etc., v. Kieffer, 11 Quebec K. B. 173, reversing 14 Quebec Sup. Ct. 325; Sombra Tp. v. Chatham Tp., 21 Can. Sup. Ct. 305; Ostrom v. Sills, 24 Ont. App. 526.

*Alabama.* — Crommelin v. Cox, 30 Ala. 318, 68 Am. Dec. 120; Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Crabtree v. Baker, 75 Ala. 91, 51 Am. Rep. 424; Central of Georgia R. Co. v. Windham, 126 Ala. 552.

*Arkansas.* — Springfield, etc., R. Co. v. Henry, 44 Ark. 360; Newgass v. St. Louis, etc., R. Co., 54 Ark. 140.



water is collected and discharged do not extend entirely to the lands of the

*California*.—Durgin v. Neal, 82 Cal. 595; Drew v. Hicks, (Cal. 1894) 35 Pac. Rep. 563; Rudel v. Los Angeles County, 118 Cal. 281; Cushing v. Pres., 124 Cal. 603.

*Colorado*.—Denver v. Rhodes, 9 Colo. 554.

*Connecticut*.—Adams v. Walker, 34 Conn. 466, 91 Am. Dec. 742.

*District of Columbia*.—Frisbie v. Cowen, 18 App. Cas. (D. C.) 381.

*Georgia*.—Farkas v. Towns, 103 Ga. 150, 68 Am. St. Rep. 88; Goldsmith v. Elsas, 53 Ga. 186.

*Illinois*.—Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Aurora v. Reed, 57 Ill. 29, 11 Am. Rep. 1; Toledo, etc., R. Co. v. Morrison, 71 Ill. 616; St. Louis, etc., R. Co. v. Capps, 72 Ill. 188; Hicks v. Silliman, 93 Ill. 255; Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627, reversing 11 Ill. App. 62; Anderson v. Henderson, 124 Ill. 164; Dayton v. Drainage Com'rs, 128 Ill. 271; Davis v. Highway Com'rs, 143 Ill. 9; East St. Louis, etc., R. Co. v. Eisentraut, 134 Ill. 96; Young v. Highway Com'rs, 134 Ill. 569, reversing 34 Ill. App. 178; Mellor v. Pilgrim, 3 Ill. App. 476, 7 Ill. App. 306; Weidekin v. Snelson, 17 Ill. App. 461; Wagner v. Chaney, 19 Ill. App. 546; Stoddard v. Filgur, 21 Ill. App. 560; Kankakee, etc., R. Co. v. Horan, 23 Ill. App. 259; Chicago, etc., R. Co. v. Connors, 25 Ill. App. 561; Ribordy v. Pellachoud, 28 Ill. App. 303; Brown v. Barrett, 38 Ill. App. 248; Davis v. Highway Com'rs, 42 Ill. App. 422; Larkin v. Lamping, 44 Ill. App. 649; Crossville v. Stuart, 77 Ill. App. 513.

*Indiana*.—Templeton v. Voshloe, 72 Ind. 134, 37 Am. Rep. 150; Cairo, etc., R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Crawfordsville v. Bond, 96 Ind. 236; Rice v. Evansville, 108 Ind. 7, 58 Am. Rep. 22; Reed v. Cheney, 111 Ind. 387; Davis v. Crawfordsville, 119 Ind. 1, 12 Am. St. Rep. 361; Weddell v. Hapner, 124 Ind. 315; De Haven v. Helvie, 126 Ind. 82; Patoka Tp. v. Hopkins, 131 Ind. 142, 31 Am. St. Rep. 417; Young v. Gentis, 7 Ind. App. 199; Mitchell v. Bain, 142 Ind. 604; Rarey v. Lee, 16 Ind. App. 121.

*Iowa*.—Livingston v. McDonald, 21 Iowa 160, 89 Am. Dec. 563; Williamson v. Oleson, 91 Iowa 290; Stinson v. Fishel, 93 Iowa 656; Mulvihill v. Thompson, 114 Iowa 734.

*Kentucky*.—Grinstead v. Sanders, (Ky. 1900) 56 S. W. Rep. 665; Bonte v. Postel, 109 Ky. 64.

*Louisiana*.—Orleans Nav. Co. v. New Orleans, 2 Mart. (La.) 214; Becknell v. Weindhal, 7 La. Ann. 291; Kilgore v. Grevenberg, 10 La. Ann. 689, 63 Am. Dec. 597; Martin v. Jett, 12 La. 501, 32 Am. Dec. 120; Lattimore v. Davis, 14 La. 161, 33 Am. Dec. 581; Hooper v. Wilkinson, 15 La. Ann. 497, 77 Am. Dec. 194; Barrow v. Landry, 15 La. Ann. 681, 77 Am. Dec. 199; Sowers v. Shiff, 15 La. Ann. 300; Guesnard v. Bird, 33 La. Ann. 796; Ludeling v. Stubbs, 34 La. Ann. 935; Sharpe v. Levert, 51 La. Ann. 1249.

*Maryland*.—Lion v. Baltimore City Pass. R. Co., 90 Md. 266; New York, etc., R. Co. v. Jones, 91 Md. 24.

*Massachusetts*.—Dickinson v. Worcester, 7 Allen (Mass.) 19; White v. Chapin, 12 Allen (Mass.) 516; Curtis v. Eastern R. Co., 14 Allen (Mass.) 55; Rockwood v. Wilson, 11 Cush. (Mass.) 221; Rathke v. Gardner, 134 Mass. 14; Jackman v. Arlington Mills, 137 Mass. 277; Stanchfield v. Newton, 142 Mass. 110. Compare Gannon v. Hargadon, 10 Allen (Mass.) 106, 87 Am. Dec. 625.

*Michigan*.—Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Cubit v. O'Dett, 51 Mich. 347; Gregory v. Bush, 64 Mich. 37, 8 Am. St. Rep. 797; Chapel v. Smith, 80 Mich. 100; Yerex v. Eineder, 86 Mich. 24, 24 Am. St. Rep. 113; Osten v. Jerome, 93 Mich. 196; Horton v. Sullivan, 97 Mich. 282; Finkbinder v. Ernst, 126 Mich. 565; Breen v. Hyde, 130 Mich. 1, 8 Detroit Leg. N. 1128.

*Minnesota*.—O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470; Hogenson v. St. Paul, etc., R. Co., 31 Minn. 224, 14 Am. & Eng. R. Cas. 291; Blakely Tp. v. Devine, 36 Minn. 53; Pye v. Mankato, 36 Minn. 373, 1 Am. St. Rep. 671; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656; Olson v. St. Paul, etc., R. Co., 38 Minn. 419, 34 Am. & Eng. R. Cas. 152; Beach v. Gaylord, 43 Minn. 476; Follmann v. Mankato, 45 Minn. 457; Ofetlie v. Hammond, 78 Minn. 275; Galbraith v. Yates, 79 Minn. 436. Compare Jordan v. St. Paul, etc., R. Co., 42 Minn. 172.

*Mississippi*.—Illinois Cent. R. Co. v. Miller, 68 Miss. 760.

*Missouri*.—McCormick v. Kansas City, etc., R. Co., 70 Mo. 359, 35 Am. Rep. 431; Benson v. Chicago, etc., R. Co., 78 Mo. 504; Rychlicki v. St. Louis, 98 Mo. 497, 14 Am. St. Rep. 651; Paddock v. Somes, 102 Mo. 226; Martin v. Benoist, 20 Mo. App. 262; Ready v. Missouri Pac. R. Co., 98 Mo. App. 467.

*Nebraska*.—Davis v. Longgreen, 8 Neb. 43; Fremont, etc., R. Co. v. Marley, 25 Neb. 138, 13 Am. St. Rep. 482; Lincoln St. R. Co. v. Adams, 41 Neb. 737; Jacobson v. Van Boening, 48 Neb. 80, 58 Am. St. Rep. 684.

*Nevada*.—Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781.

*New Jersey*.—Merritt v. Parker, 1 N. J. L. 526; Field v. West Orange Tp., 36 N. J. Eq. 118, 37 N. J. Eq. 600, 45 Am. Rep. 670; Kelly v. Dunning, 39 N. J. Eq. 482; Soule v. Passaic, 47 N. J. Eq. 28; Miller v. Morristown, 47 N. J. Eq. 62; Davison v. Hutchinson, 44 N. J. Eq. 474; Perkins v. Moorestown, etc., Turnpike Co., 48 N. J. Eq. 499; Slack v. Lawrence Tp., (N. J. 1890) 19 Atl. Rep. 663; Kelly v. Dunning, 39 N. J. Eq. 482.

*New York*.—Schwab v. Cleveland, 28 Hun (N. Y.) 458; Foot v. Bronson, 4 Lans. (N. Y.) 47; Byrnes v. Cohoes, 67 N. Y. 204; Jutte v. Hughes, 67 N. Y. 267; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Barkley v. Wilcox, 86 N. Y. 148, 40 Am. Rep. 519; Mairs v. Manhattan Real Estate Assoc., 89 N. Y. 498; Vogel v. New York, 92 N. Y. 10, 44 Am. Rep. 349; Seifert v. Brooklyn, 101 N. Y. 143, 54 Am. Rep. 664; Bellows v. Sackett, 15 Barb. (N. Y.) 96; Mitchell v. New York, etc., R. Co., 36 Hun (N. Y.) 177; Saal v. Abeles, 20 N. Y. Wkly. Dig. 528; White v. Sheldon, (Supm. Ct.

lower landowner is immaterial.<sup>1</sup> This rule, however, does not prohibit the owner of upper lands from cultivating his lands or draining them by artificial ditches, though surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause water to flow on such lands which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the interests of such adjacent owner.<sup>2</sup> The liability of an upper landowner for col-

Gen. T.) 8 N. Y. Supp. 212; *Schrieber v. Driving Club*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 632.

*North Carolina*.—*Carter v. Page*, 8 Ired. L. (30 N. Car.) 190; *Porter v. Durham*, 74 N. Car. 780; *Staton v. Norfolk*, etc., R. Co., 109 N. Car. 337; *Jenkins v. Wilmington*, etc., R. Co., 110 N. Car. 446; *Parker v. Norfolk*, etc., R. Co., 123 N. Car. 71; *Rice v. Norfolk*, etc., R. Co., 130 N. Car. 375.

*Ohio*.—*Hunter v. Cincinnati*, etc., R. Co., 7 Ohio N. P. 202, 1 Ohio Dec. 223; *Butler v. Peck*, 16 Ohio St. 335, 88 Am. Dec. 452.

*Oregon*.—*Davidson v. Oregon*, etc., R. Co., 11 Oregon 136.

*Pennsylvania*.—*Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Hays v. Hinkleman*, 68 Pa. St. 324; *Torrey v. Scranton*, 133 Pa. St. 173; *Rhoads v. Davidheiser*, 133 Pa. St. 226, 19 Am. St. Rep. 630; *Pfeiffer v. Brown*, 165 Pa. St. 267, 44 Am. St. Rep. 660; *Davidson v. Sanders*, 1 Pa. Super. Ct. 432; *Magee v. Pennsylvania Schuylkill Valley R. Co.*, 13 Pa. Super. Ct. 187; *Dennison v. Somerset*, etc., R. Co., 21 Pa. Super. Ct. 248.

*Rhode Island*.—*Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598.

*South Carolina*.—*Brandenberg v. Zeigler*, 62 S. Car. 18, 89 Am. St. Rep. 887; *Cain v. South Bound R. Co.*, 62 S. Car. 25.

*Texas*.—*Galveston*, etc., R. Co. v. *Tait*, 63 Tex. 223; *Galveston*, etc., R. Co. v. *Seymour*, 63 Tex. 345; *Gembler v. Echterhoff*, (Tex. Civ. App. 1900) 57 S. W. Rep. 313.

*Vermont*.—*Whipple v. Fair Haven*, 63 Vt. 221.

*Virginia*.—*Amick v. Tharp*, 13 Gratt. (Va.) 564, 67 Am. Dec. 787.

*Washington*.—*Peters v. Lewis*, 28 Wash. 366; *Sullivan v. Johnson*, 30 Wash. 72.

*West Virginia*.—*Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Knight v. Brown*, 25 W. Va. 808; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

*Wisconsin*.—*Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Wendlandt v. Cavanaugh*, 85 Wis. 256; *Borchsenius v. Chicago*, etc., R. Co., 96 Wis. 448; *Schuster v. Albrecht*, 98 Wis. 241, 67 Am. St. Rep. 804; *Nicolai v. Wilkins*, 104 Wis. 580. Compare *Johnson v. Chicago*, etc., R. Co., 80 Wis. 641, 27 Am. St. Rep. 76.

The defendant was the owner of a farm north of and higher than the plaintiff's farm. There was a low and swampy part of the defendant's land, which was sometimes a pond, into which two streams ran, and where surface water also collected. This swamp naturally discharged its surface water to the west, and not upon the plaintiff's land. It was separated from the plaintiff's land by high ground, which

was impenetrable to water. Through this high ground the defendant dug a wide and deep ditch to a point upon his own land, and through this ditch discharged the whole of the waters of the pond and marsh upon his own land, which at that place was so gravely as immediately to take up such water and transmit it underground upon the plaintiff's land, where it again came to the surface and caused damage to the plaintiff. It was held that, even if the pond and marsh consisted wholly of surface water, the defendant had no right to discharge it through a ditch as he did at such a place and in such a manner that it would naturally and necessarily, although underground, flow upon the plaintiff's land. *Vernum v. Wheeler*, 35 Hun (N. Y.) 53.

1. *Beach v. Gaylord*, 43 Minn. 476; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

It is not material that the increased and injurious volume of water is first discharged from the drain upon the land of the upper proprietor. If the plaintiff is damaged by the collecting of surface water into a body and the casting of it in a volume upon his land, it is wholly immaterial whether the damage is done by directly casting it upon his premises by artificial means after it has been gathered up or by collecting and discharging it upon the higher lands near the boundary line. *Beach v. Gaylord*, 43 Minn. 476.

2. **Qualification of Rule—Reasonable Improvement**—*England*.—*Weeks v. Heward*, 10 W. R. 557.

*Alabama*.—*Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

*Illinois*.—*Hicks v. Silliman*, 93 Ill. 255; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, reversing 11 Ill. App. 62; *Highway Com'rs v. Whitsitt*, 15 Ill. App. 318; *Chicago*, etc., R. Co. v. *Glenney*, 28 Ill. App. 364; *Graham v. Keene*, 34 Ill. App. 87; *Baker v. Leka*, 48 Ill. App. 353; *Ribordy v. Murray*, 70 Ill. App. 527; *Helm v. Richmond*, 72 Ill. App. 516; *Crossville v. Stuart*, 77 Ill. App. 513; *Daum v. Cooper*, 103 Ill. App. 4.

*Indiana*.—*Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150.

*Iowa*.—*Vannest v. Fleming*, 79 Iowa 638, 18 Am. St. Rep. 387; *Wharton v. Stevens*, 84 Iowa 107, 35 Am. St. Rep. 206; *Resser v. Davis*, 100 Iowa 745; *Schrope v. Pioneer Tp.*, 111 Iowa 113.

*Louisiana*.—*Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161, 33 Am. Dec. 581; *Sowers v. Shiff*, 15 La. Ann. 300; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Guesnard v. Bird*, 33 La. Ann. 796; *Ludeling v. Stubbs*, 34 La. Ann. 935.

*Massachusetts*.—*Middlesex Co. v. McCue*, 110 Mass. 106, 11 Am. St. Rep. 107.

*Michigan*.—*Gregory v. Bush*, 64 Mich. 37,

lecting and discharging surface water upon the lower land in increased volume does not depend upon any question of care or negligence on his part; his act itself gives to the owner of the lower land his cause of action,<sup>1</sup> and the fact that the collection of the waters and their discharge upon the lower land constituted good husbandry on the part of the upper owner is immaterial.<sup>2</sup> So it is immaterial that no special damage is suffered by the landowner whose lands are flooded by the diversion of surface waters,<sup>3</sup> or even that the diversion is more beneficial to the lower owner than the natural drainage of the waters.<sup>4</sup> And it is no defense to an action for wrongfully discharging surface water on the plaintiff's land that the plaintiff might, by taking steps to protect his land, have avoided or prevented the damage.<sup>5</sup> *A fortiori*, one has

8 Am. St. Rep. 797; *Verex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113; *Osten v. Jerome*, 93 Mich. 196.

*Minnesota*.—*Brown v. Winona, etc.*, R. Co., 53 Minn. 259, 39 Am. St. Rep. 603; *Sheehan v. Flynn*, 59 Minn. 436; *Gilfillan v. Schmidt*, 64 Minn. 29, 58 Am. St. Rep. 515.

*Missouri*.—*Hoester v. Hemsath*, 16 Mo. App. 485.

*Nebraska*.—*Rath v. Zembleman*, 49 Neb. 351.

*New Jersey*.—*Schnitzius v. Bailey*, 48 N. J. Eq. 409.

*New York*.—*Jeffers v. Jeffers*, 107 N. Y. 650; *Peck v. Goodberlett*, 109 N. Y. 180.

*Ohio*.—*Dill v. Oglesbee*, 8 Ohio Dec. 224, 5 Ohio N. P. 271.

*Pennsylvania*.—*Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Martin v. Riddle*, 26 Pa. St. 415; *Rhoads v. Davidheiser*, 133 Pa. St. 226, 19 Am. St. Rep. 603; *Meixell v. Morgan*, 149 Pa. St. 415, 34 Am. St. Rep. 614.

*Texas*.—*Missouri, etc., R. Co. v. Bishop*, (Tex. Civ. App. 1896) 34 S. W. Rep. 323.

*Wisconsin*.—*Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Connell v. Stark*, 108 Wis. 92.

In *Anderson v. Henderson*, 124 Ill. 170, Scott, J., said: "The owner of a higher tract of land has the right to have the surface water falling or coming naturally upon his premises by rains or melting snow pass off the same through the natural drains upon or over the lower or servient lands next adjoining, and the owner of the dominant heritage has, and ought to have, the right, by ditches and drains, to drain his own land into the natural and usual channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands be thereby increased. The rule in this respect is a just one, and is indispensable to secure proper drainage—in many instances necessary to render land tillable. While the owner of lower lands shall receive all water that naturally flows from the next higher lands, the owner of the higher lands may not open or remove natural barriers, and let on to such lower lands water that would not otherwise naturally flow in that direction. That would be to subject the servient heritage to an unreasonable burden, which the law will not permit, and against which the owner ought reasonably to have protection. The principles of law that govern in such cases are in harmony with good neighborhood, and ought to be readily acquiesced in."

*Louisiana Statute*.—Civ. Code La., art. 660 (656), provides: "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor below is not at liberty to raise any dam or to make any other work to prevent this running of the water. The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome." *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Guesnard v. Bird*, 33 La. Ann. 796.

In construing this statute the courts have expressly declared on several occasions that a strict construction of the provision that the proprietor above can do nothing to render the servitude due by the lower estate more burdensome would be destructive to agricultural industry. *Martin v. Jett*, 12 La. 503, 32 Am. Dec. 120; *Sowers v. Shift*, 15 La. Ann. 300; *Minor v. Wright*, 16 La. Ann. 151. Such provision is therefore to be liberally construed in favor of the upper proprietor, and he may cut ditches by which the natural drainage is accelerated. *Sowers v. Shift*, 15 La. Ann. 300; *Guesnard v. Bird*, 33 La. Ann. 796.

**1. Liability Does Not Depend on Negligence.**—*Central of Georgia R. Co. v. Windham*, 126 Ala. 552; *Jutt v. Hughes*, 67 N. Y. 267; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

**2. Good Husbandry.**—*Yerex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113; *Breen v. Hyde*, 130 Mich. 1, 8 Detroit Leg. N. 1128. See also *Finkbinder v. Ernst*, 126 Mich. 565.

**3. Special Injury Not Necessary.**—*Chapel v. Smith*, 80 Mich. 100, holding that no one has the right by the diversion of surface waters to flood the wild lands of another, or to add to the water upon them, although no present special damage can be shown.

**4. Barrow v. Landry**, 15 La. Ann. 681, 77 Am. Dec. 199. Compare *Crohen v. Ewers*, 39 Ill. App. 34; *Montgomery Tp. v. Springhouse, etc.*, *Turnpike-Road Co.*, 16 Montg. Co. Rep. (Pa.) 186.

**5. Bonte v. Postel, 109 Ky. 64; *Paddock v. Sones*, 102 Mo. 226; *Noonan v. Albany*, 79 N. Y. 478, 35 Am. Rep. 540; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 507. See also *Austin, etc., R. Co. v. Anderson*, 85 Tex. 88.**

In *Noonan v. Albany*, 79 N. Y. 478, 35 Am. Rep. 540, the court held that if a drain constructed on the defendant's land became choked, and the water in consequence flowed on the



no natural right to maintain on the land of another an artificial drain for his own benefit,<sup>1</sup> and one who makes an artificial ditch upon his own land for drainage of surface waters is not required to keep it open for the benefit of the lands of another.<sup>2</sup>

*b. MUNICIPAL CORPORATIONS.* — Where a municipal corporation has not changed the natural drainage of the surface waters nor collected them in a volume in excess of what would have accumulated upon its streets according to the natural drainage of the surrounding lands, it is not required to provide artificial drainage to prevent the flowage of such surface waters upon adjacent lands.<sup>3</sup> Still, municipal or *quasi*-municipal corporations have no right in their street or highway drainage to collect surface waters in increased volume and discharge them upon adjacent lot owners.<sup>4</sup> This rule, however, does not

plaintiff's land in a body, the plaintiff was not bound to protect himself against the consequences of the defendant's negligence by removing or causing the removal of the obstruction.

In *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 507, the court held that a landowner on whose premises water is wrongfully cast by his neighbor is under no obligation to make the wall of his house impervious to the water.

1. *Johnson v. Cunningham*, 56 Ill. App. 593; *Cleveland, etc., R. Co. v. Huddleston*, 21 Ind. App. 621, 69 Am. St. Rep. 385; *Wilson v. Duncan*, 74 Iowa 491; *Landry v. McCall*, 3 La. Ann. 134; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *White v. Chapin*, 97 Mass. 101; *Olson v. St. Paul, etc., R. Co.*, 38 Minn. 479; *Davis v. Sullivan*, 36 Neb. 69.

2. *Greatrex v. Hayward*, 8 Exch. 291, 22 L. J. Exch. 137; *Stoddard v. Filgur*, 21 Ill. App. 560; *Olson v. St. Paul, etc., R. Co.* 38 Minn. 479; *Willey v. Norfolk Southern R. Co.*, 98 N. Car. 263.

3. *Municipal Corporations — Arkansas.* — *Little Rock v. Willis*, 27 Ark. 572.

*California.* — *Moore v. Los Angeles*, 72 Cal. 287.

*Colorado.* — *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62; *Denver v. Rhodes*, 9 Colo. 551.

*Indiana.* — *Evansville v. Decker*, 84 Ind. 327, 43 Am. Rep. 86; *Davis v. Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 361.

*Iowa.* — *Freburg v. Davenport*, 63 Iowa 119, 50 Am. Rep. 737; *Gilfeather v. Council Bluffs*, 69 Iowa 310.

*Kansas.* — *Atchison v. Challis*, 9 Kan. 603.

*Massachusetts.* — *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Collins v. Waltham*, 151 Mass. 198.

*Minnesota.* — *Follmann v. Mankato*, 45 Minn. 457.

*Missouri.* — *Stewart v. Clinton*, 79 Mo. 603; *Schmidt v. Rowse*, 35 Mo. App. 288.

*New York.* — *Gould v. Booth*, 66 N. Y. 62; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271.

*Ohio.* — *Springfield v. Spence*, 39 Ohio St. 665.

*Pennsylvania.* — *Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342; *West Bellevue v. Huddleson*, (Pa. 1889) 16 Atl. Rep. 764, 23 W. N. C. (Pa.) 240; *Lafferty v. Girardville*, (Pa. 1889) 17 Atl. Rep. 12.

4. *United States.* — *Arn v. Kansas City*, 14 Fed. Rep. 236.

*Alabama.* — *Eufaula v. Simmons*, 86 Ala. 517.

*California.* — *Conniff v. San Francisco*, 67 Cal. 49; *Spangler v. San Francisco*, 84 Cal. 17, 18 Am. St. Rep. 158; *Stanford v. San Francisco*, 111 Cal. 198; *Rudel v. Los Angeles County*, 118 Cal. 281.

*Colorado.* — *Denver v. Rhodes*, 9 Colo. 554, 20 Am. & Eng. Corp. Cas. 411.

*Delaware.* — *Benson v. Wilmington*, 9 Houst. (Del.) 359.

*Georgia.* — *Savannah v. Cleary*, 67 Ga. 153; *Reid v. Atlanta*, 73 Ga. 523; *Smith v. Atlanta*, 75 Ga. 110; *Maguire v. Cartersville*, 76 Ga. 84. *Compare* *Phinzy v. Augusta*, 47 Ga. 260.

*Illinois.* — *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Jacksonville v. Lambert*, 62 Ill. 519; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Bloomington v. Brokaw*, 77 Ill. 194; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Paris v. Cracraft*, 85 Ill. 294; *Elgin v. Kimball*, 90 Ill. 356; *Aurora v. Love*, 93 Ill. 521; *Young v. Highway Com'rs*, 134 Ill. 569, *affirming* 34 Ill. App. 178; *Elgin v. Welch*, 16 Ill. App. 483.

*Indiana.* — *Indianapolis v. Huffer*, 30 Ind. 235; *Indianapolis v. Lawyer*, 38 Ind. 348; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Evansville v. Decker*, 84 Ind. 327, 43 Am. Rep. 86; *North Vernon v. Voegler*, 89 Ind. 77; *Princeton v. Gieske*, 93 Ind. 102; *Crawfordsville v. Bond*, 96 Ind. 236; *Sullivan v. Phillips*, 110 Ind. 320; *Patoka Tp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417; *New Albany v. Ray*, 3 Ind. App. 321; *Monticello v. Fox*, 3 Ind. App. 489; *Lebanon v. Twiford*, 13 Ind. App. 384; *Terre Haute v. Hudnut*, 112 Ind. 542. *Compare* *Davis v. Crawfordsville*, 119 Ind. 1, 12 Am. St. Rep. 361.

*Iowa.* — *Cotes v. Davenport*, 9 Iowa 227; *Ellis v. Iowa City*, 29 Iowa 229; *Russell v. Burlington*, 30 Iowa 262; *Simpson v. Keokuk*, 34 Iowa 568; *Bartle v. Des Moines*, 38 Iowa 417; *Damour v. Lyons City*, 44 Iowa 276; *Holmes v. Calhoun Co.*, 97 Iowa 360; *Mulvihill v. Thompson*, 114 Iowa 734.

*Kansas.* — *Atchison v. Challiss*, 9 Kan. 603.

*Maryland.* — *Hitchins v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422, 20 Am. & Eng. Corp. Cas. 401.

*Massachusetts.* — *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Franklin v. Fisk*, 13 Allen (Mass.) 211, 90 Am. Dec. 104; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Manning v. Lowell*, 130 Mass. 21; *Collins v. Waltham*, 151 Mass. 196; *Bates v. Westborough*, 151 Mass. 174.

prevent the construction, in the drainage of streets and highways, of artificial drains which may accelerate and assist the natural drainage.<sup>1</sup> The duty of a municipality to keep in repair artificial drains and sewers which it has constructed has been fully treated in another place.<sup>2</sup>

c. RAILROAD COMPANIES. — Railroad companies have no right in the construction of their roadbeds to collect the surface water in ditches, where the natural flow is intercepted by their embankments, and precipitate such waters in increased volume upon land of adjoining owners.<sup>3</sup> Such companies

*Michigan*. — *Ashley v. Port Huron*, 35 Mich. 30, 21 Am. Rep. 552; *Cubit v. O'Dett*, 51 Mich. 347; *Rice v. Flint*, 67 Mich. 401; *Chapel v. Smith*, 80 Mich. 100.

*Minnesota*. — *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Blakely Tp. v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671; *Follmann v. Mankato*, 45 Minn. 457; *Simpson v. Stillwater Water Co.*, 62 Minn. 444; *Oftelie v. Hammond*, 78 Minn. 275.

*Missouri*. — *Foster v. St. Louis*, 71 Mo. 157, *affirming* 4 Mo. App. 564; *Rychlicki v. St. Louis*, 98 Mo. 497, 14 Am. St. Rep. 651; *Torpey v. Independence*, 24 Mo. App. 288; *McInery v. St. Joseph*, 45 Mo. App. 296.

*New Hampshire*. — *Vale Mills v. Nashua*, 63 N. H. 136.

*New Jersey*. — *West Orange Tp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670, *affirming* 36 N. J. Eq. 118; *Soule v. Passaic*, 47 N. J. Eq. 28; *Miller v. Morristown*, 47 N. J. Eq. 62; *Slack v. Lawrence Tp.*, (N. J. 1890) 19 Atl. Rep. 663.

*New York*. — *Bradt v. Albany*, 5 Hun (N. Y.) 592; *Bastable v. Syracuse*, 8 Hun (N. Y.) 587; *Clark v. Rochester*, 43 Hun (N. Y.) 271; *Moran v. McClearn*, 63 Barb. (N. Y.) 185; *Byrnes v. Cohoes*, 67 N. Y. 204, *affirming* 5 Hun (N. Y.) 602; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349, 2 Am. & Eng. Corp. Cas. 537; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Butler v. Edgewater*, 2 Silv. Sup. (N. Y.) 3; *Daggett v. Cohoes*, 5 Silv. Sup. (N. Y.) 183; *Ashberry v. West Seneca*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 306; *McCarthy v. Far Rockaway*, 3 N. Y. App. Div. 379; *Carll v. Northport*, 11 N. Y. App. Div. 120.

*Pennsylvania*. — *West Bellevue v. Huddleston*, 23 W. N. C. (Pa.) 240; *Elliott v. Oil City*, 129 Pa. St. 570; *Torrey v. Scranton*, 133 Pa. St. 173; *Weir v. Plymouth*, 148 Pa. St. 566; *Bohan v. Avoca*, 154 Pa. St. 404; *Magee v. Pennsylvania Schuylkill Valley R. Co.*, 13 Pa. Super. Ct. 187. See also *Limerick*, etc., *Turnpike Co's Appeal*, 80 Pa. St. 425.

*Rhode Island*. — *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

*Tennessee*. — *Burton v. Chattanooga*, 7 Lea (Tenn.) 739.

*Texas*. — *Houston v. Bryan*, 2 Tex. Civ. App. 550.

*Vermont*. — *Winn v. Rutland*, 52 Vt. 481; *Whipple v. Fair Haven*, 63 Vt. 221.

*West Virginia*. — *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763.

*Wisconsin*. — *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Addy v. Janesville*, 70 Wis. 401, 22 Am. & Eng. Corp. Cas. 437.

*Canada*. — *Derinzy v. Ottawa*, 15 Ont. App. 712.

*Compare* *Bronson v. Wallingford*, 54 Conn. 513; *Bush v. Portland*, 19 Oregon 45, 20 Am. St. Rep. 789.

1. *Georgia*. — *Phinizy v. Augusta*, 47 Ga. 260.

*Illinois*. — *Young v. Highway Com'rs*, 134 Ill. 569, *affirming* 34 Ill. App. 178; *Highway Com'rs v. Whitsitt*, 15 Ill. App. 318; *Palmer v. O'Donnell*, 15 Ill. App. 324; *Highway Com'rs v. Young*, 34 Ill. App. 178; *Graham v. Keene*, 34 Ill. App. 87; *Crohen v. Ewers*, 39 Ill. App. 34.

*Louisiana*. — *Thibodaux v. Thibodaux*, 46 La. Ann. 1528.

*Massachusetts*. — *Barry v. Lowell*, 8 Allen (Mass.) 127, 85 Am. Dec. 690; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Benjamin v. Wheeler*, 8 Gray (Mass.) 409; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Kennison v. Beverly*, 146 Mass. 467; *Collins v. Waltham*, 151 Mass. 196.

*New Jersey*. — *Miller v. Morristown*, 47 N. J. Eq. 62.

*New York*. — *Acker v. New Castle*, 48 Hun (N. Y.) 312; *Gould v. Booth*, 66 N. Y. 62; *Rutherford v. Holley*, 105 N. Y. 632.

2. See the title DRAINS AND SEWERS, vol. 10, p. 220.

3. *Railroad Companies* — *Alabama*. — *Savannah*, etc., *R. Co. v. Buford*, 106 Ala. 303; *Central of Georgia R. Co. v. Windham*, 126 Ala. 562.

*Arkansas*. — *Springfield*, etc., *R. Co. v. Henry*, 44 Ark. 360; *Newgass v. St. Louis*, etc., *R. Co.*, 54 Ark. 140.

*District of Columbia*. — *Frisbie v. Cowen*, 18 App. Cas. (D. C.) 381.

*Georgia*. — *Gilbert v. Savannah*, etc., *R. Co.*, 69 Ga. 396.

*Illinois*. — *Toledo*, etc., *R. Co. v. Morrison*, 71 Ill. 616; *St. Louis*, etc., *R. Co. v. Capps*, 72 Ill. 188; *Chicago*, etc., *R. Co. v. Hoag*, 90 Ill. 339; *Jacksonville*, etc., *R. Co. v. Cox*, 91 Ill. 500; *East St. Louis*, etc., *R. Co. v. Eisentraut*, 134 Ill. 96, *reviewing* 34 Ill. App. 563; *Kanka-kee*, etc., *R. Co. v. Horan*, 23 Ill. App. 259; *Chicago*, etc., *R. Co. v. Connors*, 25 Ill. App. 561; *Chicago*, etc., *R. Co. v. Riley*, 25 Ill. App. 569; *Chicago*, etc., *R. Co. v. Glenney*, 28 Ill. App. 364.

*Iowa*. — *Drake v. Chicago*, etc., *R. Co.*, 63 Iowa 302, 50 Am. Rep. 746.

*Maryland*. — *New York*, etc., *R. Co. v. Jones*, 94 Md. 24.

*Massachusetts*. — *Curtis v. Eastern R. Co.*, 14 Allen (Mass.) 55; *Rathke v. Gardner*, 134 Mass. 14.

*Minnesota*. — *Hogenson v. St. Paul*, etc., *R. Co.*, 31 Minn. 224; *Olson v. St. Paul*, etc., *R. Co.*, 38 Minn. 419, 34 Am. & Eng. R. Cas. 152; *Brown v. Winona*, etc., *R. Co.*, 53 Minn. 250, 39 Am. St. Rep. 603; *Fossum v. Chicago*, etc., *R. Co.*, 80 Minn. 9.

are also required to construct their embankments in such a manner as to withstand the pressure of surface waters which may ordinarily accumulate against them, and if such embankments are so negligently constructed as to be unable to withstand the pressure of such waters, and by reason of their giving way lower land is flooded, the railroad company will be liable for the damages.<sup>1</sup>

*d* DRAINAGE OF DEPRESSIONS AND MARSH LANDS. — The owner of land on which surface water has accumulated in depressions and marshy places has no right by artificial channels to collect such water and discharge it upon the land of another;<sup>2</sup> but landowners may fill up low and wet places so as to

*Mississippi.* — *Illinois Cent. R. Co. v. Miller*, 68 Miss. 760; *Kansas City, etc., R. Co. v. Lackey*, 72 Miss. 881, 48 Am. St. Rep. 589.

*Missouri.* — *McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359, 35 Am. Rep. 431; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504, 20 Am. & Eng. R. Cas. 96; *Ready v. Missouri Pac. R. Co.*, 98 Mo. App. 467.

*Nebraska.* — *Fre蒙特, etc., R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482; *Lincoln, etc., R. Co. v. Sutherland*, 44 Neb. 526.

*New York.* — *Mitchell v. New York, etc., R. Co.*, 36 Hun. (N. Y.) 177; *Deigleman v. New York, etc., R. Co.*, (Buffalo Supm. Ct. Eq. T.) 12 N. Y. Supp. 83.

*North Carolina.* — *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 446; *Staton v. Norfolk, etc., R. Co.*, 111 N. Car. 278; *Fleming v. Wilmington, etc., R. Co.*, 115 N. Car. 676; *Parker v. Norfolk, etc., R. Co.*, 119 N. Car. 677, 123 N. Car. 71; *Lassiter v. Norfolk, etc., R. Co.*, 126 N. Car. 509; *Staton v. Norfolk, etc., R. Co.*, 109 N. Car. 337.

*Oregon.* — *Davidson v. Oregon, etc., R. Co.*, 11 Oregon 136.

*South Carolina.* — *Cain v. South Bound R. Co.*, 62 S. Car. 25.

*Tennessee.* — *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 382, 47 Am. Rep. 291.

*Texas.* — *Gulf, etc., R. Co. v. Donahoe*, 59 Tex. 128; *Galveston, etc., R. Co. v. Tait*, 63 Tex. 223; *Sabine, etc., R. Co. v. Brouard*, 75 Tex. 597; *Gulf, etc., R. Co. v. Frederickson*, (Tex. 1892) 19 S. W. Rep. 124; *Austin, etc., R. Co. v. Anderson*, 85 Tex. 88; *Gulf, etc., R. Co. v. Ryon*, (Tex. Civ. App. 1903) 72 S. W. Rep. 72; *Ft. Worth, etc., R. Co. v. Scott*, 2 Tex. App. Civ. Cas., § 140.

*Vermont.* — *Waterman v. Connecticut, etc., Rivers R. Co.*, 30 Vt. 610, 73 Am. Dec. 326.

*West Virginia.* — *Henry v. Ohio River R. Co.*, 40 W. Va. 234.

*Wisconsin.* — *Clauson v. Chicago, etc., R. Co.*, 106 Wis. 308.

See, however, *Kansas City, etc., R. Co. v. Williams*, 3 Indian Ter. 352.

**Formation of Ice.** — A railroad company turned the waste water from a tank on the plaintiff's premises. The water spread and froze, causing damage to the plaintiff, though but for the freezing no damage would have resulted. It was held that the company could not escape liability on the ground that the freezing of the water was an act of nature; and that, as the result might have been foreseen, the wrongful act of the company must be deemed the proximate cause of the injury. *Chicago, etc., R. Co. v. Hoag*, 90 Ill. 339.

**Liability for Act of Third Persons.** — A railroad company is liable only for its own acts. If water is turned into its ditches by other adjoining proprietors without right or without consent, it is not liable for damages resulting from the overflow of its ditches by reason thereof; and in the absence of proof it cannot be presumed that such parties have the right to turn water into the railroad ditches, or that they did so with the consent of the railway company. *Chicago, etc., R. Co. v. Glenney*, 118 Ill. 487.

**Cutting Railway Embankment to Discharge Accumulated Water.** — In *Whalley v. Lancashire, etc., R. Co.*, 13 Q. B. D. 131, 17 Am. & Eng. R. Cas. 66, it appeared that the defendant railway company maintained by authority of law an embankment which was built on sloping ground and so situated that the land on one side was higher than the other. Owing to an extraordinary rainfall the higher land was flooded, and the water pressing against the embankment endangered its safety. In order to preserve the embankment the defendant cut openings through it and let the water flow through on the plaintiff's land, flooding it and injuring his crops. It was held that the defendant's act in discharging the water on the plaintiff's land was not justifiable, and rendered the defendant liable for the damage.

1. *Borchsenius v. Chicago, etc., R. Co.*, 96 Wis. 448.

2. **Drainage of Depressions and Marsh Lands** — *Illinois.* — *Anderson v. Henderson*, 124 Ill. 164; *Herrington v. Peck*, 11 Ill. App. 62.

*Louisiana.* — *Ludeling v. Stubbs*, 34 La. Ann. 935.

*Michigan.* — *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797; *Yerex v. Eineder*, 86 Mich. 24, 24 Am. St. Rep. 113.

*Nebraska.* — *Davis v. Londgreen*, 8 Neb. 43.

*New York.* — *Vernum v. Wheeler*, 35 Hun (N. Y.) 53; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.

*Ohio.* — *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Neff v. Sullivan*, 9 Ohio Dec. (Reprint) 765, 17 Cinc. L. Bul. 168.

*South Carolina.* — *Bradenbury v. Ziegler*, 62 S. Car. 18, 89 Am. St. Rep. 887.

*Wisconsin.* — *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Nicolai v. Wilkins*, 104 Wis. 580; *Schuster v. Albrecht*, 98 Wis. 241, 67 Am. St. Rep. 804.

*Compare Gilfillan v. Schmidt*, 64 Minn. 29, 58 Am. St. Rep. 515.

A natural pond covering about five acres of the defendant's land was the reservoir for the surface waters of about one hundred acres of



render them arable, thus causing the surface waters, which previously settled in them, to spread out and pass onto the land below.<sup>1</sup> Of course the owner of marsh lands is not justified in draining them where the direct result is to divert the waters of a natural lake or pond in which others have rights.<sup>2</sup>

**c. WATER FROM ROOFS OF BUILDINGS.**—The owner of a building must prevent the water from the roof thereof from falling upon adjoining land belonging to another, and if he fails to do so he is liable therefor.<sup>3</sup> So the owner of a building has no right to collect the water from the roof into a gutter or trough and cast it upon the adjoining land,<sup>4</sup> and it is immaterial

lowland surrounding. Before the defendant cut a ditch to drain the pond there was no outlet to it, and the water accumulating therein was carried away by evaporation and percolation. It was held that the defendant could not drain the pond upon the plaintiff's land through the ditch which he had cut. *Davis v. Londgreen*, 8 Neb. 43.

On the defendant's lands there was a marshy basin from which, in times of high water, a portion of the water contained therein overflowed its rim and naturally found its way through a swale to and upon the plaintiff's land, while the remaining portion of the water in the basin had no outlet and was dissipated by evaporation. It was held that the defendant could not by an artificial drain conduct the water that had no natural outlet through the basin and along the swale, so as to cause it to flow upon the plaintiff's land to his damage. *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452.

1. *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, reversing 11 Ill. App. 62; *Highway Com'rs v. Whitsitt*, 15 Ill. App. 318; *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797; *Goodale v. Tuttle*, 29 N. Y. 459; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

2. In *Bennett v. Murtaugh*, 20 Minn. 151, where the plaintiff owned a mill upon a stream which was supplied by a lake, and the defendant owned marshy or swampy lands bounding on the lake and with a natural outlet thereto, it was held that the defendant must be enjoined from constructing a ditch from his marshy lands to another stream not supplied by the lake, the necessary effect of the ditch being to drain away and lower the waters of the lake.

3. **Roof Drip**—*England*.—*Pennruddock's Case*, 5 Coke 101.

*Arkansas*.—*Chandler v. Lazarus*, 55 Ark. 312.

*California*.—*Armstrong v. Luco*, 102 Cal. 272.

*Illinois*.—*Tanner v. Volentine*, 75 Ill. 624.

*Indiana*.—*Miles v. Wingate*, 6 Ind. 458.

*Iowa*.—*Copper v. Dolvin*, 68 Iowa 757, 56 Am. Rep. 872.

*Kansas*.—*Hazeltine v. Edgmand*, 35 Kan. 202, 57 Am. Rep. 157.

*Massachusetts*.—*Martin v. Simpson*, 6 Allen (Mass.) 102; *Shipley v. Fifty Associates*, 106 Mass. 108, 8 Am. Rep. 318; *Hooten v. Barnard*, 137 Mass. 36; *Fitzpatrick v. Welch*, 174 Mass. 486.

*Michigan*.—*Underwood v. Waldron*, 33 Mich. 232. Compare *Barry v. Peterson*, 48 Mich. 263.

*New York*.—*Bellows v. Sackett*, 15 Barb.

(N. Y.) 96; *Slater v. Mersereau*, 5 Daly (N. Y.) 445, affirmed 64 N. Y. 138.

*Pennsylvania*.—*Whitney v. Sanders*, 3 Pittsb. (Pa.) 226; *Gould v. McKenna*, 86 Pa. St. 297, 27 Am. Rep. 705.

*Vermont*.—*Simonds v. Pollard*, 53 Vt. 343.

**Buildings Divided by Party Wall.**—A party wall divided the buildings of the plaintiff and the defendant. The defendant increased the height of his building, and in so doing added eighteen or twenty feet to the party wall. He constructed his roof in such a manner that it turned the water from his building on the roof of the plaintiff below. In the winter large icicles formed on the wall as carried up, overhanging the plaintiff's building, and, becoming detached, fell upon the roof and damaged it. It was held that the roof of the defendant's building as constructed was a nuisance, and that the plaintiff was entitled to an injunction. *Brooks v. Curtis*, 4 Lans. (N. Y.) 287.

In *Martin v. Simpson*, 6 Allen (Mass.) 102, which was an action of tort brought by the tenant of a building to recover damages sustained by reason of the falling of the wall of the defendant's adjoining building upon the building occupied by the plaintiff, the court said: "No one has a right by an artificial structure of any kind, upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon land of an adjacent proprietor. Such an erection, if it occasions the water to flow, either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's right of property, and cannot be justified, unless a right is shown by express grant or by prescription."

4. *England*.—*Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Tucker v. Newman*, 11 Ad. & El. 40, 39 E. C. L. 21.

*California*.—*Yik Hon v. Spring Valley Water Works*, 65 Cal. 619; *Armstrong v. Luco*, 102 Cal. 272.

*Connecticut*.—*Adams v. Walker*, 34 Conn. 466 91 Am. Dec. 742.

*Indiana*.—*Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568.

*Massachusetts*.—*Hooten v. Barnard*, 137 Mass. 36.

*Minnesota*.—*Beach v. Gaylord*, 43 Minn. 476.

*New York*.—*Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Schwab v. Cleveland*, 28 Hun (N. Y.) 458; *Jutte v. Hughes*, 67 N. Y. 268, reversing 40 N. Y. Super. Ct. 126.

**Suit by Landlord of Leased Building.**—The building of a roof with eaves which discharge water by a spout upon adjoining premises is an injury for which the landlord of such prem-

that the water so collected is first discharged upon his own land from which it flows in increased volume upon the adjoining land; <sup>1</sup> and where the owner of a building collects the roof water into a pipe or drain to carry it off to a proper outlet, he is required to see that such pipe or drain is kept in proper condition. <sup>2</sup> If a house owner has constructed a gutter or eaves trough of sufficient capacity to carry off such rains as might ordinarily be expected, he is not liable for injuries caused to the premises of an adjoining owner by an extraordinary rain such as no experience or prudent foresight could have guarded against. <sup>3</sup> The owners of buildings in cities must also so construct them that snow falling and ice forming on the roofs shall not be precipitated upon persons lawfully using the city streets. If the roof of a building is so constructed as to permit the snow falling on it to be precipitated upon the street, it is, in the judgment of the law, a nuisance, and the owner is liable to persons injured by the falling snow. <sup>4</sup>

**Drainage into Street.** — It has been held that a lot owner in a city may, in the improvement of his lot, change the flow of the surface water into the street, whence it flows to another lot which is below grade, without incurring any liability to such lot owner. <sup>5</sup>

*f.* **DRAINAGE INTO WATERCOURSES.** — Watercourses are the means which nature has provided for the drainage of the country through which they pass, and from the natural servitude of lands upon a watercourse to receive the waters flowing therein from the lands above springs the right of the owner of upper lands to have the surface water from his lands of which the watercourse is the natural outlet drained into and carried off thereby, and the correlative duty of the owner of the lower lands not to interfere with or obstruct its passage. <sup>6</sup> Hence it is well settled that the owner of lands drained by a watercourse may change and control the natural flow of the surface water thereinto, and by ditches or other artificial means accelerate the flow or increase the volume of surface water which reaches the stream, if he does this in the reasonable use of his own premises. <sup>7</sup> This right of drainage into watercourses

ises can recover, as reversioner, while they are under demise, if there is damage to the reversion. *Tucker v. Newman*, 11 Ad. & El. 40, 39 E. C. L. 21.

1. *Beach v. Gaylord*, 43 Minn. 476. Compare *Sowers v. Lowe*, 20 W. N. C. (Pa.) 76.

2. *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Schwab v. Cleveland*, 28 Hun (N. Y.) 458.

3. *Gould v. McKenna*, 86 Pa. St. 297, 27 Am. Rep. 705. See also *Meister v. Lang*, 28 Ill. App. 624; *Barry v. Peterson*, 48 Mich. 263.

4. *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Smethurst v. Independent Cong. Church*, 148 Mass. 261, 12 Am. St. Rep. 550; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164; *Walsh v. Mead*, 8 Hun (N. Y.) 387.

**Liability of Landlord.** — *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Walsh v. Mead*, 8 Hun (N. Y.) 387.

5. **Drainage into Street.** — *Phillips v. Waterhouse*, 69 Iowa 199, 58 Am. Rep. 220. See also *Young v. Leedom*, 67 Pa. St. 351.

6. **Drainage into Watercourses.** — *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479.

7. *Illinois.* — *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Lambert v. Alcorn*, 144 Ill. 313; *Ribordy v. Murray*, 177 Ill. 134, affirming 70 Ill. App. 527; *Graham v. Keene*, 34 Ill. App. 87, affirmed 143 Ill. 425.

*Massachusetts.* — *Jackman v. Arlington Mills*, 137 Mass. 277.

*Michigan.* — *Treat v. Bates*, 27 Mich. 390.

*Missouri.* — *Gray v. Schriber*, 58 Mo. App. 173.

*New Jersey.* — *Wilson v. Plainfield*, 4 N. J. L. J. 380.

*New York.* — *Waffle v. New York Cent. R. Co.*, 58 Barb. (N. Y.) 413, affirmed 53 N. Y. 11, 13 Am. Rep. 467; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479.

*North Carolina.* — *Jenkins v. Wilmington, etc., R. Co.*, 110 N. Car. 438; *Mizell v. McGowan*, 129 N. Car. 93, 85 Am. St. Rep. 705.

*Oregon.* — *Whitney v. Willamette Bridge R. Co.*, 23 Oregon 188.

*Pennsylvania.* — *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445.

See also *Williams v. Gale*, 3 Har. & J. (Md.) 231.

In *Waffle v. New York Cent. R. Co.*, 58 Barb. (N. Y.) 413, affirmed 53 N. Y. 11, 13 Am. Rep. 467, *Johnson, J.*, said: "Every person has the unquestionable right to drain the surface water from his own land to render it more wholesome, useful, or productive, or even to gratify his taste or will; and if another is inconvenienced or incidentally injured thereby, he cannot complain. No one can divert a natural watercourse and stream through his

is, however, subject to the qualification that one landowner cannot by artificial means, to the damage of other owners, increase the volume of surface-water flow into a watercourse beyond the natural capacity thereof.<sup>1</sup> So the right to the use of a watercourse for the discharge of surface waters exists only in respect of surface waters of which the watercourse is the natural outlet,<sup>2</sup> and a landowner has no right to turn surface waters the natural outlet of which is by way of one stream into another stream.<sup>3</sup> It has been held that artificial drainage of surface water may be made into a natural and well-defined channel, not constituting a watercourse, which carries such water from an upper to a lower elevation.<sup>4</sup>

The Drainage of Highways is governed by the same rules as farm drainage, and surface waters of highways may be collected and discharged into a watercourse though the volume of water in the watercourse is thereby increased.<sup>5</sup>

**g. CONTRACT RIGHTS.** — The upper landowner may, of course, acquire by contract the right to divert the natural flow of surface waters upon his land and discharge them upon the land of another,<sup>6</sup> or to maintain an artificial drain over the land of another.<sup>7</sup> But it has been held that where the owner of adjoining estates maintains an artificial drain over one for the benefit of another, and conveys both estates on the same day to different purchasers, the conveyance of the *quasi* dominant estate does not impliedly grant also the right to the continual use of such drain.<sup>8</sup> The right to discharge surface waters in increased volume upon the land of another or to maintain a drain

land to the injury of another with impunity; nor can he by means of drains and ditches throw the surface water from his own land upon the land of another, to the injury of such other. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and watercourse, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year, or to diminish the supply at another."

**Waters Accumulating in Quarry.** — The plaintiffs opened a quarry on their premises, the excavation made forming a natural reservoir in which the surface water from the contiguous land collected, and in the spring, when the plaintiffs commenced their operations, they pumped this water, together with that arising from the melting snows and what came from small natural watercourses cut off by the excavation, into a watercourse which lower down crossed the defendant's farm. This water, if the excavation had not been made, would have naturally descended and flowed into the stream, and although the flow of water when the pumping was going on was greater than it would otherwise have been, the natural capacity of the watercourse was sufficient to carry off the water pumped into it, together with the other water running in the stream. There was no evidence that the defendant sustained damage from the acts of the plaintiffs in pumping the water into the stream. It was held that the plaintiffs were entitled to an injunction restraining the defendant from obstructing the stream, thus casting back upon the plaintiffs' land the water which they pumped into it. *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479.

**Pumping Water from Mine.** — The owner of land in which there is a mine may pump water therefrom into a stream which forms the

natural drainage of his land, although the quantity of water in the stream is thereby increased. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445.

**1. Observation of Capacity of Watercourse.**

*Jackman v. Arlington Mills*, 137 Mass. 277; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479. See also *Mizzell v. McGowan*, 125 N. Car. 439.

**2. Changing Watershed.** — *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Staton v. Norfolk, etc., R. Co.*, 111 N. Car. 278. See also *Mizzell v. McGowan*, 125 N. Car. 439, 129 N. Car. 93, 85 Am. St. Rep. 705.

**3. McCormick v. Horan**, 81 N. Y. 86, 37 Am. Rep. 479.

**4. Peck v. Herrington**, 109 Ill. 611, 50 Am. Rep. 627; *Todd v. York County*, (Neb. 1904) 100 N. W. Rep. 299.

**5. Drainage of Highways.** — *Highway Com'rs v. Whitsitt*, 15 Ill. App. 318.

**6. Contract Rights.** — *Davison v. Hutchinson*, 44 N. J. Eq. 474; *Curtiss v. Ayrault*, 5 Thomp. & C. (N. Y.) 611, 3 Hun (N. Y.) 487; *Lancaster Ave. Imp. Co. v. Humphreys*, 12 Montg. Co. Rep. (Pa.) 66; *West Bellevue v. Huddleston*, (Pa. 1889) 16 Atl. Rep. 764.

**7. St. Louis, etc., R. Co. v. Anderson**, 62 Ark. 360; *Ribordy v. Murray*, 70 Ill. App. 527; *Steinke v. Bentley*, 6 Ind. App. 663; *Raleigh v. Clark*, 71 S. W. Rep. 857, 24 Ky. L. Rep. 1554; *Baltimore, etc., R. Co. v. Hackett*, 87 Md. 224; *Gilligan v. Feuschter*, (Supm. Ct. Gen. T.) 8 N. Y. St. Rep. 220; *Carter v. Page*, 8 Ired. L. (30 N. Car.) 190; *Hair v. Downing*, 96 N. Car. 172; *Williams v. Drummond Water, etc., Co.*, 130 N. Car. 746; *Eshleman v. Martie Tp.*, 152 Pa. St. 68, 31 W. N. C. (Pa.) 180.

**8. Johnson v. Jordan**, 2 Met. (Mass.) 234, 37 Am. Dec. 85; *Randall v. McLaughlin*, 10 Allen (Mass.) 366. *Compare Shaw v. Etheridge*, 3 Jones L. (48 N. Car.) 300.



through the land of another is an interest in land within the meaning of the statute of frauds.<sup>1</sup>

A Mere License, not founded upon any consideration, to divert and discharge surface waters upon the land of the licensor is revocable at any time.<sup>2</sup>

*h.* **PRESCRIPTIVE RIGHTS.** — One landowner may, by prescription, acquire the right to divert and discharge surface waters upon the lands of another,<sup>3</sup> or to maintain an artificial drain across the land of another for the drainage of his lands.<sup>4</sup> The general rules as to the acquisition of prescriptive rights apply, of course, in such cases.<sup>5</sup> Thus, in order to acquire such right by prescription the exercise of the right must have been adverse,<sup>6</sup> and the permissive exercise of the right with the consent of the lower landowner is insufficient.<sup>7</sup> So the exercise of the right must have been continuous during the prescriptive period,<sup>8</sup> and the manner of the diversion or character of the artificial drain must have remained the same.<sup>9</sup> Furthermore, the right must

1. *Tanner v. Volentine*, 75 Ill. 624; *Dunham v. Joyce*, 129 Mo. 5.

2. *White v. Sheldon*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 212. See generally the title LICENSE (REAL PROPERTY), vol. 18, p. 1127.

3. **Prescription** — *England*. — *Claxton v. Claxton*, 7 Ir. C. L. 23; *Thomas v. Thomas*, 2 C. M. & R. 34; *Harvey v. Walters*, L. R. 8 C. P. 162.

*Alabama*. — *Polly v. McCall*, 37 Ala. 20.

*Arkansas*. — *St. Louis, etc., R. Co. v. Anderson*, 62 Ark. 360.

*Georgia*. — *Phinizy v. Augusta*, 47 Ga. 268.

*Kentucky*. — *Raleigh v. Clark*, 71 S. W. Rep. 857, 24 Ky. L. Rep. 1554.

*Maine*. — *Augusta v. Moulton*, 75 Me. 284.

*Maryland*. — *Cherry v. Stein*, 11 Md. 1.

*Massachusetts*. — *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *White v. Chapin*, 12 Allen (Mass.) 516.

*Michigan*. — *Conklin v. Boyd*, 46 Mich. 56; *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797; *Chapel v. Smith*, 80 Mich. 112; *Leidlein v. Meyer*, 95 Mich. 586.

*Nevada*. — *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781.

*New Jersey*. — *Ross v. Mackeney*, 46 N. J. Eq. 140; *Schnitzius v. Bailey*, 48 N. J. Eq. 409. See also *Shields v. Arndt*, 4 N. J. Eq. 234.

*Ohio*. — *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732.

*Pennsylvania*. — *Eshleman v. Martie Tp.*, 152 Pa. St. 68.

*Tennessee*. — *Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 382, 47 Am. Rep. 291, 14 Am. & Eng. R. Cas. 284; *Louisville, etc., R. Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670.

*Vermont*. — *Norton v. Volentine*, 14 Vt. 246, 39 Am. Dec. 220.

See also *Neale v. Sceley*, 47 Barb. (N. Y.) 314.

4. *White v. Chapin*, 12 Allen (Mass.) 516; *Smith v. Miller*, 11 Gray (Mass.) 145; *Leidlein v. Meyer*, 95 Mich. 586.

5. *Ribordy v. Pellachoud*, 28 Ill. App. 303. And see the title PRESCRIPTION, vol. 22, p. 1180.

6. *Indiana*. — *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568; *Cleveland, etc., R. Co. v. Huddleston*, 21 Ind. App. 621, 69 Am. St. Rep. 385.

*Louisiana*. — *Delahoussaye v. Judice*, 13 La.

Ann. 587, 71 Am. Dec. 521; *Gillis v. Nelson*, 16 La. Ann. 275.

*Massachusetts*. — *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Hooten v. Barnard*, 137 Mass. 36.

*Minnesota*. — *Beach v. Gaylord*, 43 Minn. 476.

*Nevada*. — *Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781.

*New York*. — *White v. Sheldon*, 35 Hun (N. Y.) 193, 8 N. Y. Supp. 212.

**Presumption** — **Adverse Use**. — *White v. Chapin*, 12 Allen (Mass.) 516.

**While Two Adjoining Estates Are Owned by the Same Person** no easement can be created in one of them by the use of a drain through it for the benefit of the other. *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688. See also the title EASEMENTS, vol. 10, p. 420 *et seq.*

7. *Smith v. Miller*, 11 Gray (Mass.) 145; *White v. Sheldon*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 212, *reaffirming* 35 Hun (N. Y.) 193.

8. *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429; *Chapel v. Smith*, 80 Mich. 100; *Osten v. Jerome*, 93 Mich. 196.

9. *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429; *Chapel v. Smith*, 80 Mich. 100; *Boynton v. Longley*, 19 Nev. 76, 3 Am. St. Rep. 781.

**Alteration of Drain.** — In *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429, it was held that a right to empty a town drain upon the land of an individual cannot be acquired by twenty years' use unless the drain be one and the same and the use thereof uninterrupted during that number of years. If the drain during these years be enlarged, deepened, and varied in its course and termination, the town cannot acquire such right as against the owner of the land by using the drain less than twenty years after it is thus enlarged and altered. It was also held that a person who enters a drain from his cellar into a town drain, which is afterwards enlarged, deepened, and varied in its course and termination, and who thereafter deepens his cellar and lays the drain therefrom deeper than it was before, and enters it into the altered town drain, cannot acquire a right thus to drain his cellar by the use of the town drain for less than twenty years after it is altered.

In 1861 the owner of land drained his land into a ditch through the land of his neighbor. In 1871 a new ditch was made near the first,

have been exercised openly.<sup>1</sup>

**Loss of Prescriptive Right.**—A prescriptive right to flow lands by the diversion of surface waters may be lost by nonuser or abandonment.<sup>2</sup>

**7. REMEDIES — Action for Damages.**—Where surface water is diverted by an upper landowner and discharged in increased volume upon the land of a lower owner, the latter may, of course, maintain an action at law for damages.<sup>3</sup>

the old one being filled up. The owner of the higher land used the new ditch until 1882. It was held that he did not thereby acquire a prescriptive right to have the surface water from his land drained over the land of his neighbor. *Totel v. Bonnefoy*, 123 Ill. 653, 5 Am. St. Rep. 570, the court saying: "We do not think that the time of the use of the new ditch can be added to or tacked on to the time of the use of the old ditch so as to make a prescriptive period of twenty years."

In *Davison v. Hutchinson*, 44 N. J. Eq. 474, it appeared that the plaintiff and the defendant were the owners of adjoining lands. More than twenty years before the commencement of the suit, one of the defendant's grantors cut a ditch on his land near the division line and extended the ditch so as to cast the water upon the lands of the plaintiff's grantor. The plaintiff's grantor also, more than twenty years before the commencement of the suit, cut a ditch on his land to and into the ditch on the lands of the defendant, and water was thereby carried from the plaintiff's lands into the drain and on to the land of the defendant. Some years before the commencement of the suit, the plaintiff's grantor put down a tile drain, sinking it at least two feet deeper than the old ditch. The defendant raised an obstruction to the flow of water from the drain, and the plaintiff thereupon brought a suit for a mandatory injunction directing the removal of the obstruction. It was held that the prescriptive right of the plaintiff to discharge water over the defendant's lands was not limited to an open ditch, and that the use of tiles to conduct the water was not an abuse of his privilege, but that an increase of the flow of water was such abuse.

1. *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688.

2. **Extinguished by Nonuser or Abandonment.**—A prescriptive right to collect and discharge waters upon lower lands may be lost by a nonuser of the right for the same term as was required to establish it. *Shields v. Arndt*, 4 N. J. Eq. 234. So if the owner of the dominant estate, in order to put an end to the complaints of the servient owners and prevent a lawsuit, himself constructs works which obstruct and extinguish the servitude at the request and by agreement with the owner of the servient estate, he thereby makes a tacit renunciation of his rights. *Delahoussaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521.

3. **Action for Damages**—*Alabama*.—Central of Georgia R. Co. v. Windham, 126 Ala. 552. See also *Polly v. McCall*, 37 Ala. 20; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

*District of Columbia*.—*Frisbie v. Cowen*, 18 App. Cas. (D. C.) 381.

*Illinois*.—*Mellor v. Pilgrim*, 3 Ill. App. 476; *Chicago, etc., R. Co. v. Henneberry*, 28 Ill. App. 110; *Chicago, etc., R. Co. v. Glenney*, 28 Ill.

App. 364; *St. Louis Merchants' Bridge Terminal R. Co. v. Pepper*, 84 Ill. App. 116.

*Kentucky*.—*Louisville, etc., R. Co. v. Hodge*, 6 Bush (Ky.) 141.

*Maryland*.—*New York, etc., R. Co. v. Jones*, 94 Md. 24.

*Massachusetts*.—*Wells v. New Haven, etc., R. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 44 Am. & Eng. R. Cas. 491.

*Michigan*.—*Chapel v. Smith*, 80 Mich. 100; *Breen v. Hyde*, 130 Mich. 1, 8 Detroit Leg. N. 1128.

*Missouri*.—*Freudenstein v. Heine*, 6 Mo. App. 287.

*North Carolina*.—*Parker v. Norfolk, etc., R. Co.*, 119 N. Car. 677.

*Tennessee*.—*Louisville, etc., R. Co. v. Hays*, 11 Lea (Tenn.) 382, 47 Am. Rep. 291, 14 Am. & Eng. R. Cas. 284.

*West Virginia*.—*Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763.

**Measure of Damages**—*Alabama*.—Central of Georgia R. Co. v. Windham, 126 Ala. 552; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Eufaula v. Simmons*, 86 Ala. 518.

*Arkansas*.—*St. Louis, etc., R. Co. v. Anderson*, 62 Ark. 360.

*Illinois*.—*Dixon v. Baker*, 65 Ill. 521, 16 Am. Rep. 591; *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Chicago, etc., R. Co. v. Glenney*, 118 Ill. 487; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 34 Am. St. Rep. 92, affirming 46 Ill. App. 34; *St. Louis Merchants' Bridge Terminal R. Co. v. Pepper*, 84 Ill. App. 116.

*Indiana*.—*Indianapolis v. Huffer*, 30 Ind. 235; *Louisville, etc., R. Co. v. Sparks*, 12 Ind. App. 410.

*Iowa*.—*Van Pelt v. Davenport*, 42 Iowa 308, 20 Am. Rep. 622; *Drake v. Chicago, etc., R. Co.*, 63 Iowa 302, 50 Am. Rep. 746, 17 Am. & Eng. R. Cas. 45, 70 Iowa 62, 29 Am. & Eng. R. Cas. 514; *Noe v. Chicago, etc., R. Co.*, 76 Iowa 362; *Podhaisky v. Cedar Rapids*, 106 Iowa 543.

*Maryland*.—*New York, etc., R. Co. v. Jones*, 94 Md. 24.

*Massachusetts*.—*Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171.

*Michigan*.—*Breen v. Hyde*, 130 Mich. 1, 8 Detroit Leg. N. 1128.

*Minnesota*.—*Lommeland v. St. Paul, etc., R. Co.*, 35 Minn. 412, 26 Am. & Eng. R. Cas. 596; *Fossum v. Chicago, etc., R. Co.*, 80 Minn. 9.

*Mississippi*.—*Illinois Cent. R. Co. v. Miller*, 68 Miss. 760.

*Missouri*.—*Benson v. Chicago, etc., R. Co.*, 78 Mo. 504, 20 Am. & Eng. R. Cas. 96; *Ready v. Missouri Pac. R. Co.*, 98 Mo. App. 467.

*New York*.—*Chase v. New York Cent. R. Co.*, 24 Barb. (N. Y.) 273; *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 94; *Murray v. Archer*, 52 Hun (N. Y.) 613, 5 N. Y. Supp. 326.

**Injunction.** — So courts of equity have unhesitatingly granted injunction to prohibit the continuance of the wrong.<sup>1</sup>

**Removal of Cause of Diversion.** — It has been held also that where the upper landowner creates on his own premises obstructions or artificial channels which cause the diversion of surface waters upon the lower land, the lower landowner may enter and remove such obstructions or fill in such channels.<sup>2</sup> And to prevent the flooding of his land by the diversion of surface water by the upper landowner, the lower owner may erect embankments upon his land so as to set back the water.<sup>3</sup>

**5. Pollution of Surface Waters.** — On the general principle that he who brings filthy and corrupting matter upon his own lands is bound at his peril to prevent its escape to the adjoining lands of others, it is held that if the owner of land, the surface water from which usually flows over his neighbor's land, places noxious substances upon his property which, becoming mingled with the surface water, flow upon the adjoining land, contaminating the surface water and the wells and springs thereon, the owner of the lower land has a cause of action against him for the damages caused by the pollution.<sup>4</sup>

**III. WATERCOURSES** — 1. **Definition.** — A watercourse may be defined as a natural stream of water usually flowing in a definite channel having a bed and

*North Carolina.* — Hocutt v. Wilmington, etc., R. Co., 124 N. Car. 214; Lassiter v. Norfolk, etc., R. Co., 126 N. Car. 509.

*Texas.* — San Antonio, etc., R. Co. v. Gwynn, 4 Tex. App. Civ. Cas., § 219; Sabine, etc., R. Co. v. Joachimi, 58 Tex. 456, 11 Am. & Eng. R. Cas. 539; Texas, etc., R. Co. v. Young, 60 Tex. 201; Texas, etc., R. Co. v. Bayliss, 62 Tex. 570; Gulf, etc., R. Co. v. Helsley, 62 Tex. 593, 20 Am. & Eng. R. Cas. 89; Galveston, etc., R. Co. v. Tait, 63 Tex. 223; Gulf, etc., R. Co. v. Holliday, 65 Tex. 521; Owens v. Missouri Pac. R. Co., 67 Tex. 679, 30 Am. & Eng. R. Cas. 205; Sabine, etc., R. Co. v. Brouard, 69 Tex. 617, 34 Am. & Eng. R. Cas. 199; Trinity, etc., R. Co. v. Schofield, 72 Tex. 496; Gulf, etc., R. Co. v. McGowan, 73 Tex. 355; Lockett v. Ft. Worth, etc., R. Co., 78 Tex. 211; Rosenthal v. Taylor, etc., R. Co., 79 Tex. 325; Green v. Taylor, etc., R. Co., 79 Tex. 604; Austin, etc., R. Co. v. Anderson, 79 Tex. 427, 23 Am. St. Rep. 350; Gulf, etc., R. Co. v. Frederickson, (Tex. 1892) 19 S. W. Rep. 124; Galveston, etc., R. Co. v. Parr, 8 Tex. Civ. App. 280; Gulf, etc., R. Co. v. Richards, 11 Tex. Civ. App. 95; Texas Cent. R. Co. v. Clifton, 2 Tex. App. Civ. Cas., § 489; Galveston, etc., R. Co. v. Bibb, 3 Tex. App. Civ. Cas., § 272.

*Vermont.* — Whipple v. Fair Haven, 63 Vt. 221.

*West Virginia.* — Hargreaves v. Kimberly, 26 W. Va. 787, 53 Am. Rep. 121.

*Wisconsin.* — Schmeckpepper v. Chicago, etc., R. Co., 116 Wis. 592.

**1. Injunction** — *Georgia.* — Warmack v. Brownlee, 84 Ga. 196.

*Illinois.* — Hicks v. Silliman 93 Ill. 255; Anderson v. Henderson, 124 Ill. 164; Dayton v. Drainage Com'rs, 128 Ill. 271; Herrington v. Peck, 11 Ill. App. 62; Chicago, etc., R. Co. v. Smith, 17 Ill. App. 58; Hotz v. Hoyt, 34 Ill. App. 488. — Compare Laney v. Jasper, 39 Ill. 46.

*Indiana.* — Sullivan v. Phillips, 110 Ind. 320.

*Iowa.* — Holmes v. Calhoun County, 97 Iowa 360.

*Michigan.* — Gregory v. Bush, 64 Mich. 37, 8 Am. St. Rep. 797; Bruggink v. Thomas, 125 Mich. 9, 7 Detroit Leg. N. 389.

*Mississippi.* — Ferris v. Wellborn, 64 Miss. 29; Alcorn v. Sadler, 66 Miss. 221.

*Nebraska.* — Davis v. Londgreen, 8 Neb. 43; Jacobson v. Van Boening, 48 Neb. 80, 58 Am. St. Rep. 684.

*New Jersey.* — Field v. West Orange Tp., 36 N. J. Eq. 118, 37 N. J. Eq. 600, 45 Am. Rep. 670; Soule v. Passaic, 47 N. J. Eq. 28; Slack v. Lawrence Tp., (N. J. 1890) 19 Atl. Rep. 663; Myers v. Allspruce Meadow Co., 58 N. J. Eq. 438.

*New York.* — Foot v. Bronson, 4 Lans. (N. Y.) 47.

*Vermont.* — Whipple v. Fair Haven, 63 Vt. 221.

*Wisconsin.* — Pettigrew v. Evansville, 25 Wis. 240, 3 Am. Rep. 50; Wendlandt v. Cavanaugh, 85 Wis. 256; Nicolai v. Wilkins, 104 Wis. 580.

**2. White v. Sheldon,** (Supm. Ct. Gen. T.) 8 N. Y. Supp. 212.

**3. Crabtree v. Baker,** 75 Ala. 91, 51 Am. Rep. 424; Throop v. Griffin, 77 Ill. App. 505; Schmitz v. Ort, 92 Ill. App. 407; Kauffman v. Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437.

**4. Pollution of Surface Waters** — *England.* — Hodgkinson v. Ennor, 4 B. & S. 229, 116 E. C. L. 229; Turner v. Mirfield, 34 Beav. 390.

*Connecticut.* — Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49.

*Kentucky.* — Tate v. Parrish, 7 T. B. Mon. (Ky.) 325; Kinnaird v. Standard Oil Co., 89 Ky. 468, 25 Am. St. Rep. 545.

*New Jersey.* — Gawtry v. Leland, 31 N. J. Eq. 385.

*New York.* — Jutte v. Hughes, 67 N. Y. 267, reversing 40 N. Y. Super. Ct. 126; Daggett v. Cohoes, 5 Silv. Sup. (N. Y.) 183.

*Pennsylvania.* — Crossland v. Pottsville, 126 Pa. St. 511, 12 Am. St. Rep. 891.

*Vermont.* — Beard v. Murphy, 37 Vt. 90, 86 Am. Dec. 693; Winn v. Rutland, 52 Vt. 481.

See also the title **NUISANCES**, vol. 21, p. 699. Compare Greencastle v. Hazelett, 23 Ind. 186; Upjohn v. Board of Health, 46 Mich. 542, 41 Am. Rep. 178.



slides or banks, and discharging itself into some other stream or body of water.<sup>1</sup>

**1. Watercourse Defined** — *England*. — M'Nab v. Robertson, (1851) 11 C. 100; Rex v. Oxfordshire, 1 B. & Ad. 301, 20 E. C. L. 392; Dudden v. Guardians of Poor, 1 H. & N. 627; Ennor v. Barwell, 2 Giff. 410, 6 Jur. N. S. 155. — *Breadth* v. Ramsbottom, 11 Exch. 602; Briscoe v. Drought, 11 Ir. C. L. 250; Staffordshire, etc., Canal Nav. Co. v. Birmingham Canal Nav. Co., L. R. 1 H. L. 254, 35 L. J. Ch. 757.

*Canada*. — Wilton v. Murray, 12 Manitoba 35; Beer v. Stroud, 19 Ont. 10; Williams v. Richards, 23 Ont. 651; McGillivray v. Millin, 27 U. C. Q. B. 62; Crewson v. Grand Trunk R. Co., 27 U. C. Q. B. 68; Darby v. Crowland Tp., 38 U. C. Q. B. 338.

*United States*. — Paine Lumber Co. v. U. S., 55 Fed. Rep. 854; Hagge v. Kansas City S. R. Co., 104 Fed. Rep. 391.

*California*. — Green v. Carotto, 72 Cal. 267; Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158; Chauvet v. Hill, 93 Cal. 407.

*Connecticut*. — Gillett v. Johnson, 30 Conn. 180; Chamberlain v. Hemingway, 63 Conn. 1, 38 Am. St. Rep. 330.

*Illinois*. — Lambert v. Alcorn, 144 Ill. 313; Ribordy v. Murray, 177 Ill. 134.

*Indiana*. — Schlichter v. Phillipy, 67 Ind. 201; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Rice v. Evansville, 108 Ind. 7, 58 Am. Rep. 22; Hill v. Cincinnati, etc., R. Co., 109 Ind. 511; Robinson v. Shanks, 118 Ind. 133; Carroll County v. Bailey, 122 Ind. 46; New York, etc., R. Co. v. Speelman, 12 Ind. App. 372; Schwartz v. Nie, 29 Ind. App. 329.

*Iowa*. — Benson v. Connors, 63 Iowa 670; Sullens v. Chicago, etc., R. Co., 74 Iowa 659, 7 Am. St. Rep. 501; Moore v. Chicago, etc., R. Co., 75 Iowa 263.

*Kansas*. — Palmer v. Waddell, 22 Kan. 352; Gibbs v. Williams, 25 Kan. 220, 37 Am. Rep. 241; Chicago, etc., R. Co. v. Morrow, 42 Kan. 339; Missouri Pac. R. Co. v. Wren, 10 Kan. App. 408.

*Maine*. — Bangor v. Lansil, 51 Me. 525; Greeley v. Maine Cent. R. Co., 53 Me. 200; Morrison v. Bucksport, etc., R. Co., 67 Me. 255.

*Massachusetts*. — Dickinson v. Worcester, 7 Allen (Mass.) 19; Luther v. Winnisimmet Co., 9 Cush. (Mass.) 171; Ashley v. Wolcott, 11 Cush. (Mass.) 192; Parks v. Newburyport, 10 Gray (Mass.) 28; Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Stanchfield v. Newton, 142 Mass. 110.

*Michigan*. — Gregory v. Bush, 64 Mich. 37, 8 Am. St. Rep. 797; Rummell v. Lamb, 100 Mich. 424.

*Missouri*. — Imler v. Springfield, 55 Mo. 119, 17 Am. Rep. 645; Munkers v. Kansas City, etc., R. Co., 60 Mo. 334; Benson v. Chicago, etc., R. Co., 78 Mo. 514; Jones v. Wabash, etc., R. Co., 18 Mo. App. 251.

*Nebraska*. — Pyle v. Richards, 17 Neb. 180; Morrissey v. Chicago, etc., R. Co., 38 Neb. 406.

*Nevada*. — Barnes v. Sabron, 10 Nev. 217.

*New Hampshire*. — State v. Gilmanton, 14 N. H. 467.

*New Jersey*. — Shields v. Arndt, 4 N. J. Eq. 246; Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395; Bowlby v. Speer, 31 N. J. L.

354, 86 Am. Dec. 216; Kelly v. Dunning, 39 N. J. Eq. 482.

*New York*. — Wagner v. Long Island R. Co., 5 Thomp. & C. (N. Y.) 163, 2 Hun (N. Y.) 633; Vernum v. Wheeler, 35 Hun (N. Y.) 55; Goodale v. Tuttle, 29 N. Y. 459; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519, *affirming* 19 Hun (N. Y.) 320; Jeffers v. Jeffers, 107 N. Y. 650; Mann v. Retsof Min. Co., 49 N. Y. App. Div. 454.

*Ohio*. — Dissette v. Lowrie, 9 Ohio Dec. 545, 6 Ohio N. P. 392; Burton v. Jensen, 9 Ohio Dec. (Reprint) 120, 11 Cinc. L. Bul. 26.

*Oregon*. — Shively v. Hume, 10 Oregon 76; Simmons v. Winters, 21 Oregon 35, 28 Am. St. Rep. 727; Mace v. Mace, 40 Oregon 586.

*Pennsylvania*. — Adam v. Moll, 6 Pa. Super. Ct. 380; Wolf v. Crothers, 21 Pa. Co. Ct. 627.

*Rhode Island*. — Buffum v. Harris, 5 R. I. 243.

*Utah*. — Jordan v. Mt. Pleasant, 15 Utah 449. *Washington*. — Geddis v. Parrish, 1 Wash. 587; Rigney v. Tacoma Light, etc., Co., 9 Wash. 576.

*West Virginia*. — Neal v. Ohio River R. Co., 47 W. Va. 316.

*Wisconsin*. — Hoyt v. Hudson, 27 Wis. 661, 9 Am. Rep. 473; Fryer v. Warne, 29 Wis. 514; Eulrich v. Richter, 37 Wis. 226, 41 Wis. 318; O'Connor v. Fon du Lac, etc., R. Co., 52 Wis. 531, 38 Am. Rep. 754.

In Hoyt v. Hudson, 27 Wis. 661, 9 Am. Rep. 473, Dixon, C. J., said: "There must be a stream usually flowing in a particular direction, though it need not flow continually. \* \* \* It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation watercourses."

And in Benson v. Chicago, etc., R. Co., 78 Mo. 514, Phillips, C., said that this was the best legal definition of the term "watercourse" which he could find.

In Jeffers v. Jeffers, 107 N. Y. 651, a watercourse was defined as a living stream with defined banks and channels, not necessarily running all the time, but fed from other and more permanent sources than mere surface water.

In Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395, the chancellor said: "A watercourse is defined to be 'a channel or canal for the conveyance of water, particularly in draining lands.'"

**Abandoned Creek.** — If the bed of a creek has long been abandoned by the water, and streets, roads, railroad tracks, and buildings have been constructed across it in places, it is no longer to be regarded as a watercourse, and water gathered in a reservoir formed by the con-

The Size or Length of the stream is immaterial as regards its character as a watercourse.<sup>1</sup>

**Channel.**—A definite channel, having a bed and sides or banks, is an essential requisite to a watercourse.<sup>2</sup> But where a stream crosses swamp land it does not necessarily lose its character as a watercourse,<sup>3</sup> and it has been held that a watercourse does not lose its character as such because at certain points it spreads over meadow land and flows thereon for a distance before flowing again in a definite channel.<sup>4</sup> So a stream may constitute a watercourse

struction of the streets, etc., across it is to be regarded as surface water. *Kansas City v. Swope*, 79 Mo. 446.

1. *School Trustees v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Van Orsdel v. Burlington, etc.*, R. Co., 56 Iowa 470; *Hinkle v. Avery*, 88 Iowa 47, 45 Am. St. Rep. 224; *Union Pac. R. Co. v. Dyche*, 31 Kan. 120; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Pyle v. Richards*, 17 Neb. 180; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768.

The right of the owner of land to have a well-defined watercourse continue to flow does not depend upon the length of the stream above him, nor is his right affected by the fact that the source of the stream is a spring upon the adjoining land of another, nor is it material to trace the source of the spring itself, in an action to restrain such diversion. *Chauvet v. Hill*, 93 Cal. 407.

In *Ferris v. Wellborn*, 64 Miss. 29, a creek which had a channel one-half mile long, with defined bed and banks of varying width and depth, through which water was conveyed and discharged into lowlands adjacent to a running stream, and which ran when there was water to be carried off by it, was held to be a watercourse, with all the incidents thereof, though it was dry most of the time.

A River has been defined as "a considerable stream of water that has a current of its own, flowing from a higher level, that constitutes its source, to its mouth, where it debouches." *The Garden City*, 26 Fed. Rep. 766. And for other definitions see RIVER, vol. 24, p. 984.

2. **Channel**—*England*.—*Dudden v. Guardians of Poor*, 1 H. & N. 627.

*Canada*.—*Williams v. Richards*, 23 Ont. 651; *McGillivray v. Millin*, 27 U. C. Q. B. 62.

*United States*.—*Howard v. Ingersoll*, 13 How. (U. S.) 427; *Paine Lumber Co. v. U. S.*, 55 Fed. Rep. 854.

*California*.—*Los Angeles Cemetery Assoc. v. Los Angeles*, 103 Cal. 461; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169.

*Indiana*.—*Weis v. Madison*, 75 Ind. 257, 39 Am. Rep. 135; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22.

*Kansas*.—*Palmer v. Waddell*, 22 Kan. 352; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374; *Chicago, etc., R. Co. v. Morrow*, 42 Kan. 339.

*Maine*.—*Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353.

*Michigan*.—*Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797.

*Missouri*.—*Benson v. Chicago, etc., R. Co.*, 78 Mo. 514.

*New York*.—*Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 413; *Barkley v. Wilcox*,

86 N. Y. 144, 40 Am. Rep. 519, affirming 19 Hun (N. Y.) 320; *Jeffers v. Jeffers*, 107 N. Y. 650; *Mann v. Retsof Min. Co.*, 49 N. Y. App. Div. 454.

*Pennsylvania*.—*Kislinski v. Gilboy*, 19 Pa. Super. Ct. 453.

*Washington*.—*Geddis v. Parrish*, 1 Wash. 587.

*Wisconsin*.—*Fryer v. Warne*, 29 Wis. 511; *Case v. Hoffman*, 100 Wis. 314.

See also *Lambert v. Alcorn*, 144 Ill. 313.

"For a watercourse there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie over which water flows. It matters not what the width or depth may be, a watercourse implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream." *Gibbs v. Williams*, 25 Kan. 220, 37 Am. Rep. 241, per Brewer, J.

In *Lambert v. Alcorn*, 144 Ill. 313, the question arose whether the natural course along which surface water flowed was a watercourse within the meaning of the *Illinois* statute authorizing the owners of land to drain it into any natural watercourse. It was held that if the formation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as uniformly to discharge it upon the lower tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a watercourse within the meaning of the statute and within the principles applicable to the drainage of surface waters. It was also declared that it is not important that the force of water is not sufficient to wear out a channel or canal having definite and well-marked banks.

3. *Lux v. Haggin*, 69 Cal. 413.

4. *England*.—*Mansford v. Ross*, L. R. 4 New Zealand 290; *Briscoe v. Drought*, 11 Ll. C. L. 250.

*Connecticut*.—*Gillett v. Johnson*, 30 Conn. 180.

*Indiana*.—*Robinson v. Shanks*, 118 Ind. 125; *Mitchell v. Bain*, 142 Ind. 604.

*Iowa*.—*Hinkle v. Avery*, 88 Iowa 47, 45 Am. St. Rep. 224.

*Massachusetts*.—*Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349.

*Missouri*.—*Munkres v. Kansas City, etc., R. Co.*, 72 Mo. 514.

*New Jersey*.—*Shields v. Arndt*, 4 N. J. Eq. 246.

*Oregon*.—*West v. Taylor*, 16 Oregon 165.

*Washington*.—*Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

*Wisconsin*.—*Spelman v. Portage*, 41 Wis.

though a part of its course is underground.<sup>1</sup> And the fact that a ditch is constructed over and along a natural watercourse so that the waters are confined in the artificial channel does not change its character as a watercourse;<sup>2</sup> but an artificial ditch by which the waters of a watercourse are diverted does not constitute a watercourse.<sup>3</sup>

**Flow.** To constitute a watercourse it must appear that there is usually a flow of water.<sup>4</sup> But though such flow must have a well-defined and substantial existence,<sup>5</sup> it need not be continual; the channel may be sometimes dry without depriving the stream of its character as a watercourse provided there is usually a flow of water therein.<sup>6</sup>

144; *Case v. Hoffman*, 84 Wis. 438, 36 Am. St. Rep. 937; *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290.

1. *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77; *Buckers Irrigation, etc., Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Washington County Water Co. v. Garver*, 91 Md. 398; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Case v. Hoffman*, 84 Wis. 438, 36 Am. St. Rep. 937.

2. *Sutcliffe v. Booth*, 9 Jur. N. S. 1037, 32 L. J. Q. B. 136; *Roberts v. Richards*, 50 L. J. Ch. 297, 44 L. T. N. S. 271; *Schwartz v. Nie*, 29 Ind. App. 329; *Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576. See also *Diamond v. Reddick*, 36 U. C. Q. B. 391; *Missouri Pac. R. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249.

A watercourse, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury that if the stream was artificial and made by the hand of man, the plaintiff would have no cause of action. *Sutcliffe v. Booth*, 9 Jur. N. S. 1037.

3. *Cleveland, etc., R. Co. v. Huddleston*, 21 Ind. App. 621, 69 Am. St. Rep. 385; *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727.

4. **Flow—England.**—*Dudden v. Guardians of Poor*, 1 H. & N. 627.

**Canada.**—*Murray v. Dawson*, 19 U. C. C. P. 314; *McGillivray v. Millin*, 27 U. C. Q. B. 62.

**California.**—*Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 2 Am. St. Rep. 775; *Los Angeles Cemetery Assoc. v. Los Angeles*, 103 Cal. 461; *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169.

**Connecticut.**—*Gillett v. Johnson*, 30 Conn. 180.

**Illinois.**—*Joliet, etc., R. Co. v. Healy*, 94 Ill. 416.

**Indiana.**—*Hill v. Cincinnati, etc., R. Co.*, 109 Ind. 511; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22; *Carroll County v. Bailey*, 122 Ind. 46; *Robinson v. Shanks*, 118 Ind. 125.

**Kansas.**—*Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Kansas City, etc., R. Co. v. Riley*, 33 Kan. 374.

**Massachusetts.**—*Dickinson v. Worcester*, 7

*Allen (Mass.)* 19; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171.

**Minnesota.**—*Byrne v. Minneapolis, etc., R. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668.

**Missouri.**—*Benson v. Chicago, etc., R. Co.*, 78 Mo. 504.

**Nebraska.**—*Pyle v. Richards*, 17 Neb. 180; *Morrissey v. Chicago, etc., R. Co.*, 38 Neb. 406.

**New Jersey.**—*Shields v. Arndt*, 4 N. J. Eq. 234.

**New York.**—*Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Jeffers v. Jeffers*, 107 N. Y. 650.

**Vermont.**—*Boynton v. Gilman*, 53 Vt. 17.

**Washington.**—*Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

**Wisconsin.**—*Fryer v. Warne*, 29 Wis. 511; *Eulrich v. Richter*, 37 Wis. 228.

In *England*, to constitute a watercourse in which rights may be acquired by user, under the statute 2 & 3 Wm. IV., c. 71, § 2, the flow of the water must possess that unity of character which, though on one person's land, can be identified with that on his neighbor's land. *Briscoe v. Drought*, 11 Ir. C. L. 250.

Water passing from the opening of a canal lock does not constitute a watercourse within the meaning of the act. *Staffordshire, etc., Canal Nav. Co. v. Birmingham Canal Nav. Co.*, L. R. 1 H. L. 254, 35 L. J. Ch. 757.

5. *Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *Barnes v. Sabron*, 10 Nev. 217.

6. **Continuity of Flow—England.**—*Dudden v. Guardians of Poor*, 1 H. & N. 627. See also *Rex v. Oxfordshire*, 1 B. & Ad. 301, 20 E. C. L. 392.

**Canada.**—*Beer v. Stroud*, 19 Ont. 10; *Arthur v. Grand Trunk R. Co.*, 22 Ont. App. 89.

**California.**—*Conniff v. San Francisco*, 67 Cal. 45; *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158; *Los Angeles Cemetery Assoc. v. Los Angeles*, 103 Cal. 461.

**Illinois.**—*Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Lambert v. Alcorn*, 144 Ill. 313.

**Indiana.**—*Schwartz v. Nie*, 29 Ind. App. 329; *New York, etc., R. Co. v. Speelman*, 12 Ind. App. 372.

**Iowa.**—*Wharton v. Stevens*, 84 Iowa 107.

**Kansas.**—*Palmer v. Waddell*, 22 Kan. 352.

**Maine.**—*Morrison v. Bucksport, etc., R. Co.*, 67 Me. 353.

**Minnesota.**—*M'Clure v. Red Wing*, 28 Minn. 186; *Byrne v. Minneapolis, etc., R. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668.

**Mississippi.**—*Ferris v. Wellborn*, 64 Miss.



**Swales, Sloughs, and Ravines** through which waters collected from the surrounding territory pass in times of freshets from rains and melting snows, but which at other times are dry, are not to be considered watercourses.<sup>1</sup>

**Source.** — To constitute a watercourse it is necessary that the water should have a permanent source of supply,<sup>2</sup> but it is not necessary that the source of supply should be a spring.<sup>3</sup> Where a watercourse has its source in a spring,

*Missouri.* — *Rose v. St. Charles*, 49 Mo. 509.

*Nebraska.* — *Pyle v. Richards*, 17 Neb. 182; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768.

*Nevada.* — *Barnes v. Sabron*, 10 Nev. 236.

*New Jersey.* — *Shields v. Arndt*, 4 N. J. Eq. 234; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Schneitzius v. Bailey*, (N. J. 1888) 13 Atl. Rep. 247.

*New York.* — *Barkley v. Wilcox*, 86 N. Y. 143, 40 Am. Rep. 519, affirming 19 Hun (N. Y.) 320; *Jeffers v. Jeffers*, 107 N. Y. 650; *Spink v. Corning*, 172 N. Y. 626, affirming 61 N. Y. App. Div. 84; *Mann v. Retsof Min. Co.*, 49 N. Y. App. Div. 454.

*Oregon.* — *West v. Taylor*, 16 Oregon 172; *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *Mace v. Mace*, 40 Oregon 586.

*Pennsylvania.* — *Wolf v. Crothers*, 21 Pa. Co. Ct. 627; *Rhoads v. Davidheiser*, 133 Pa. St. 226, 19 Am. St. Rep. 630.

*West Virginia.* — *Neal v. Ohio River R. Co.*, 47 W. Va. 316.

*Washington.* — *Geddis v. Parrish*, 1 Wash. 587.

*Wisconsin.* — *Eulrich v. Richter*, 37 Wis. 226, 41 Wis. 318.

In *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, *Andrews, J.*, said: "It is not essential to constitute a watercourse that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural watercourse because in times of drought the flow may be diminished or temporarily suspended."

In *Spink v. Corning*, 61 N. Y. App. Div. 84, *Laughlin, J.*, said: "For more than fifty years, and as far back as the recollection of the oldest inhabitants extends, and before the hand of man had done anything to affect the drainage in this locality, the stream ran continuously, except for a few months in very dry seasons, through the premises now owned by the respective parties to this litigation, in the channel which defendant has obstructed, draining a very large watershed, and supplied by living springs. This constituted a natural watercourse."

**1. Swales, Slough, and Ravines**—*United States.* — *Hagge v. Kansas City S. R. Co.*, 104 Fed. Rep. 391. See also *Howard v. Ingersoll*, 13 How. (U. S.) 427.

*California.* — *Los Angeles Cemetery Assoc. v. Los Angeles*, 103 Cal. 461.

*Indiana.* — *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22; *Hill v. Cincinnati, etc., R. Co.*, 109 Ind. 511; *Robinson v. Shanks*, 118 Ind. 125; *Carroll County v. Bailey*, 122 Ind. 46.

*Kansas.* — *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Chicago, etc., R. Co. v. Morrow*, 42 Kan. 339.

*Michigan.* — *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797.

*Missouri.* — *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 251; *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 620.

*New Jersey.* — *Shields v. Arndt*, 4 N. J. Eq. 234.

*New York.* — *Wagner v. Long Island R. Co.*, 5 Thomp. & C. (N. Y.) 163, 2 Hun (N. Y.) 633; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Jeffers v. Jeffers*, 107 N. Y. 650.

*Oregon.* — *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727. Compare *Mace v. Mace*, 40 Oregon 586.

*Wisconsin.* — *Hoyt v. Hudson*, 27 Wis. 661, 9 Am. Rep. 473; *Eulrich v. Richter*, 37 Wis. 226.

*Canada.* — *Murray v. Dawson*, 19 U. C. C. P. 314.

A mere ravine in which grass is grown and hay is cut, and through which mere surface water flows during a portion of the year in consequence of rain and the melting of snow, without a regular channel or bank, is not a watercourse. *Shields v. Arndt*, 4 N. J. Eq. 234.

**2. Source.** — *Gregory v. Bush*, 64 Mich. 37, 8 Am. St. Rep. 797; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Jeffers v. Jeffers*, 107 N. Y. 650; *Mann v. Retsof Min. Co.*, 49 N. Y. App. Div. 454; *Arthur v. Grand Trunk R. Co.*, 25 Ont. 37, 22 Ont. App. 89.

**3. Palmer v. Waddell**, 22 Kan. 352; *McKinley v. Chosen Freeholders*, 29 N. J. Eq. 171; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Eulrich v. Richter*, 41 Wis. 320; *Beer v. Stroud*, 19 Ont. 10.

In *Beer v. Stroud*, 19 Ont. 10, *Ferguson, J.*, said: "It was urged that there was no spring or underground source of these waters—that it was merely surface water. I think that makes no difference whatever. The beginning of a defined stream may be surface water only. There need not be a spring shown to be from the depth or bowels of the earth to be the source whence a stream starts. In a basin the surface water may collect, and a stream may form running therefrom between defined banks."

In *Arthur v. Grand Trunk R. Co.*, 22 Ont. App. 89, *MacLennan, J. A.*, said: "A watercourse must always have some point of commencement, and it may not be quite easy in every case to say just precisely where that point is. If a stream is traced up towards its source a point will always be reached where it ceases to be definable by a bed and banks; but until that point is reached it must be a watercourse, whether its origin be a spring, or several springs, or the rain or snowfall of a district collected naturally, and flowing away for the first time in a visible course or channel. All our lakes, rivers, and streams have their source in the clouds of the sky precipitated in the form of rain or snow, and the sole question in every case is whether the water thus precipi-

such source is itself a part of the watercourse.<sup>1</sup>

Distinguished from Ponds or Lakes. — The distinction between a watercourse and a pond or lake is fully pointed out in another title.<sup>2</sup>

Question of Law and Fact. — Where the facts as to the nature of an alleged watercourse are not in dispute, the question whether there is or is not a watercourse is one of law;<sup>3</sup> but if the evidence is conflicting as to the facts, the question is one of fact.<sup>4</sup>

2. **Riparian Rights in General.** — Certain correlative rights and duties exist between the owners of land through which a watercourse runs. These rights are vested property rights of which the riparian proprietor cannot be deprived even by the state without compensation as in the case of the taking of other property,<sup>5</sup> and are entitled to protection to the same extent as other property rights;<sup>6</sup> and the jurisdiction of courts of equity in cases affecting the rights of riparian owners is well established.<sup>7</sup> So these rights are not easements or appurtenances, but are inseparably annexed to the land and are parcel of the land itself,<sup>8</sup> and have been designated as natural rights and said to exist *jure nature*.<sup>9</sup> In nearly all jurisdictions the common-law doctrine as to the rights of riparian owners is recognized,<sup>10</sup> though in a few of the Western states it is not recognized to its full extent.<sup>11</sup>

3. **Who Are Entitled to Riparian Rights.** — The rights which the riparian proprietor has with respect to the water of watercourses are derived from and dependent on his ownership of land abutting on the watercourse.<sup>12</sup> He need

tated has formed for itself a visible course or channel, and is of sufficient magnitude or volume to be serviceable to the persons through or along whose lands it flows."

In *Barnes v. Sabron*, 10 Nev. 236, it appeared that a certain creek was partly supplied at certain seasons of the year from springs having their rise and flow along its banks and bed, but mostly from the melting snow on the mountains. There was no regularity as to the quantity of water, for, to quote the language of the witnesses, "no two seasons were alike," the amount of water flowing being dependent upon the character of the weather during the preceding winter. After a cold season when deep snow had fallen, the water flowed in greater quantity and for a longer time than after an open winter with but little snow; hence the amount of water varied in the summer season, according to statements made by different witnesses, from nothing to five thousand inches. It was held on these facts that the creek was a watercourse, and not mere surface drainage.

1. *Dudden v. Guardians of Poor*, 1 H. & N. 627; *Tate v. Parrish*, 7 T. B. Mon. (Ky.) 325; *Colrick v. Swinburne*, 105 N. Y. 503; *Fleming v. Davis*, 37 Tex. 173.

2. **Distinguished from Lakes and Ponds.** — See the title *LAKES AND PONDS*, vol. 18, p. 130, and see *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199.

3. **Question of Law or Fact.** — *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169.

4. *Kislinski v. Gilboy*, 19 Pa. Super. Ct. 453.

5. **Riparian Rights as Property.** — *McCord v. High*, 24 Iowa 336; *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232; *People v. Hulbert*, 131 Mich. 156, 9 Detroit Leg. N. 257; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 267; *Bell v. Gough*, 23 N. J. L. 624; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; 7 Am. Dec. 526; *Standen v. New Rochelle Water Co.*, 91 Hun (N. Y.) 272; *Canal Fund Com'rs v. Kemp-*

shall, 26 Wend. (N. Y.) 404; *Walker v. Board of Public Works*, 16 Ohio 540; *Irving v. Media*, 194 Pa. St. 648. And see the title *RIPARIAN RIGHTS*, vol. 24, p. 981.

6. *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781; *McKee v. Delaware, etc., Canal Co.*, 52 Hun (N. Y.) 52.

7. *Baltimore v. Appold*, 42 Md. 442; *State v. Minneapolis Mill Co.*, 26 Minn. 229; *Patten v. Marden*, 14 Wis. 473.

8. **Nature of Rights.** — See the title *RIPARIAN RIGHTS*, vol. 24, p. 981, and see *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781; *Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402.

9. *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 682; *Dickinson v. Grand Junction Canal Co.*, 21 L. J. Exch. 241, 7 Exch. 282; *Chesmore v. Richards*, 7 H. L. Cas. 384, 29 L. J. Exch. 81; *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 8 Am. St. Rep. 679.

10. *Schwab v. Beam*, 86 Fed. Rep. 41 (law of *Colorado*); *Clark v. Cambridge, etc., Irrigation, etc., Co.*, 45 Neb. 798; *Slattery v. Harley*, 58 Neb. 575; *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781; *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912.

11. *Reno Smelting, etc., Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364; *Walsh v. Wallace*, 26 Nev. 299; *Stowell v. Johnson*, 7 Utah 215. See also *Austin v. Chandler*, (Ariz. 1895) 42 Pac. Rep. 483; *Moyer v. Preston*, 6 Wyo. 308.

12. **Who Are Entitled to Riparian Rights** — *England.* — *Stockport Waterworks Co. v. Potter*, 3 H. & C. 326; *North Shore R. Co. v. Pion*, 14 App. Cas. 612.

*Canada.* — *Re Jenison*, 28 Ont. 136; *Buchanan v. Ingersoll Waterworks Co.*, 30 Ont. 456.

*United States.* — *St. Louis Public Schools v.*

not, however, be the owner of the bed of the watercourse.<sup>1</sup> Where a land-owner grants land abutting on a watercourse, the riparian rights as regards the land granted pass to the grantee as an incident to the land; but the grant by a riparian owner of a portion of his lands not abutting on the watercourse does not carry with it any riparian rights.<sup>2</sup> So it has been held that a riparian proprietor cannot by express grant confer upon his grantee riparian rights disconnected with the ownership of land abutting on the watercourse for the interruption of which by a third person the grantee can sue in his own name.<sup>3</sup> All persons, natural as well as artificial, owning lands abutting on a watercourse are entitled to the usual riparian rights.<sup>4</sup> The owner of the fee in the land abutting on the watercourse is entitled to the riparian rights though an easement of way over such land is in a third person;<sup>5</sup> but the owner of such easement of way is not a riparian owner and hence is not entitled to riparian rights.<sup>6</sup> A person need not, however, be the owner of the fee to entitle him to exercise the rights of a riparian owner; it is sufficient if he is entitled to the exclusive possession and use of the abutting land.<sup>7</sup> The owners of an island in a watercourse as well as the owners of the mainland are entitled to riparian rights.<sup>8</sup>

**4. Rights in Bed of Stream.** — It is a well-settled rule that as between the general public and individuals the title to the bed of nonnavigable watercourses is *prima facie* in the riparian proprietors.<sup>9</sup> As between proprietors

Risley, 10 Wall. (U. S.) 91; *Manigault v. Ward*, 123 Fed. Rep. 707.

*California*. — *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217.

*Florida*. — *Sullivan v. Moreno*, 19 Fla. 200.

*Illinois*. — *School Trustees v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Elgin v. Elgin Hydraulic Co.*, 85 Ill. App. 182.

*Iowa*. — *Hoehl v. Muscatine*, 57 Iowa 444.

*Maine*. — *Warren v. Westbrook Mfg. Co.*, 88 Me. 69.

*Michigan*. — *Stark v. Miller*, 113 Mich. 465.

*Minnesota*. — *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 8 Am. St. Rep. 679.

*Missouri*. — *Sweringen v. St. Louis*, 151 Mo. 348.

*Nebraska*. — *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781.

See also *Bardwell v. Ames*, 22 Pick. (Mass.) 333, and see the title RIPARIAN RIGHTS, vol. 24, p. 981.

One who owns land on one creek opposite the mouth of another creek which flows into the former is not a riparian owner as regards the latter creek. *Manigault v. Ward*, 123 Fed. Rep. 707.

2. *Lord v. Sydney*, 12 Moore P. C. 473; *Att-rill v. Platt*, 10 Can. Sup. Ct. 425; *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248, 24 Am. Rep. 399. See also the title RIPARIAN RIGHTS, vol. 24, pp. 980, 981.

3. *Stockport Waterworks Co. v. Potter*, 3 H. & C. 326.

4. *Stockport Waterworks Co. v. Potter*, 3 H. & C. 326; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 8 Am. St. Rep. 679.

Thus, a riparian owner cannot confer upon a nonriparian owner to whom he grants the right to abstract the water from the watercourse the legal right to have the waters of the watercourse remain unpolluted so as to enable such nonriparian owner to sue an upper riparian owner who pollutes the waters. *Stockport Waterworks Co. v. Potter*, 3 H. & C. 326.

4. *Atty.-Gen. v. Great Eastern R. Co.*, 23 L. T. N. S. 344, affirmed L. R. 6 Ch. 572, 19 W. R. 788; *Jones v. Conn.*, 39 Oregon 30, 87 Am. St. Rep. 634; *Society, etc. v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41; *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912. See, however, *Hopkinsville Bank v. Western Kentucky Insane Asylum*, 108 Ky. 357. *Compare Kirchhoffer v. Stanbury*, 25 Grant Ch. (U. C.) 413.

**Municipality as Riparian Owner.** — *Canton v. Shock*, 66 Ohio St. 19, 90 Am. St. Rep. 557. See, however, *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.

Thus, a water company owning a strip of land along the banks of a stream, contiguous to and touching the flow of the stream, is a riparian proprietor on the stream and entitled to all riparian rights. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970.

**Federal Government as Riparian Owner.** — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

**State Institution for Insane.** — *Filbert v. Dechert*, 22 Pa. Super. Ct. 362.

5. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Brisbine v. St. Paul, etc., R. Co.*, 23 Minn. 114; *Prior v. Comstock*, 17 R. I. 1.

6. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970; *Ruch v. New Orleans*, 43 La. Ann. 275.

7. *Hanford v. St. Paul, etc., R. Co.*, 43 Minn. 104.

**A Mere Possessor of Unsurveyed Government Land** has no riparian rights in the use of a stream of water flowing through it. *Lake v. Tolles*, 8 Nev. 285. See also *Silver Creek, etc., Land, etc., Co. v. Hayes*, 113 Cal. 142.

8. *Warren v. Westbrook Mfg. Co.*, 86 Me. 100.

**9. Ownership of Bed of Stream** — *United States*. — *Tyler v. Wilkinson*, 4 Mason (U. S.) 397;



on the opposite sides of a stream, their ownership *prima facie* extends to the thread of the watercourse,<sup>1</sup> and under this principle is determined the title to islands in nonnavigable streams.<sup>2</sup> Where the channel of a watercourse suddenly changes, the division between the opposite riparian owners remains the old thread of the watercourse;<sup>3</sup> but where the change is gradual, by way of accretions upon one bank and erosion from the other, the division line changes with the change in the thread of the channel.<sup>4</sup> In extending the side lines of adjoining proprietors upon the same side of the stream they are to be extended at right angles to the thread of the stream.<sup>5</sup> The riparian proprietor as owner of the bed of the stream may convey such bed alone, or may convey the riparian land, reserving title to the bed of the stream.<sup>6</sup> The question whether a deed of land bordering on a nonnavigable watercourse carries title to the thread of the stream has been heretofore fully discussed.<sup>7</sup>

**5. Right to Flow of Watercourse.** — As a general rule, a riparian owner is entitled, in the absence of grant, license, or prescription limiting his rights, to have the watercourse which washes his land flow as it is wont by nature to flow, without material alteration or diminution as to either quantity or quality.<sup>8</sup> The right to the natural flow of the watercourse is subject, how-

Grand Rapids, etc., R. Co. v. Butler, 159 U. S. 87.

California. — Lux v. Haggin, 69 Cal. 255.

Illinois. — Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Braxon v. Bressler, 64 Ill. 488; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196.

Indiana. — Ross v. Faust, 54 Ind. 471, 23 Am. Rep. 655; Smith v. Holloway, 124 Ind. 329.

Iowa. — Moffett v. Brewer, 1 Greene (Iowa) 348.

Kentucky. — Neale v. Cogar, 1 A. K. Marsh. (Ky.) 589.

Maine. — Nickerson v. Crawford, 16 Me. 245; Low v. Knowlton, 26 Me. 128, 45 Am. Dec. 100; Granger v. Avery, 64 Me. 292.

Massachusetts. — Knight v. Wilder, 2 Cush. (Mass.) 199, 48 Am. Dec. 660; Ingraham v. Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; Bardwell v. Ames, 22 Pick. (Mass.) 354; Hatch v. Dwight, 17 Mass. 299, 9 Am. Dec. 145.

Michigan. — Norris v. Hill, 1 Mich. 202.

New Hampshire. — Greenleaf v. Kilton, 11 N. H. 531.

New York. — People v. Gutches, 48 Barb. (N. Y.) 656; Starr v. Child, 20 Wend. (N. Y.) 149; Luce v. Carley, 24 Wend. (N. Y.) 451; Halsey v. McCormick, 13 N. Y. 296; Coleman v. State, 134 N. Y. 564; Wyandanch Club v. Davis, 33 N. Y. App. Div. 598.

North Carolina. — Williams v. Buchanan, 1 Ired. L. (23 N. Car.) 535, 35 Am. Dec. 760; Smith v. Ingram, 7 Ired. L. (29 N. Car.) 175; State v. Glen, 7 Jones L. (52 N. Car.) 321; Hodges v. Williams, 95 N. Car. 335, 59 Am. Rep. 242.

Pennsylvania. — Barclay R., etc., Co. v. Ingham, 36 Pa. St. 194; Gring v. Sinking Spring Water Co., 7 Pa. Super. Ct. 63.

South Carolina. — Cates v. Wadlington, 1 McCord L. (S. Car.) 580, 10 Am. Dec. 699; Noble v. Cunningham, McMull. Eq. (S. Car.) 289; Shands v. Triplet, 5 Rich. Eq. (S. Car.) 76; State v. Columbia, 27 S. Car. 137.

Tennessee. — Martin v. Nance, 3 Head (Tenn.) 649.

Texas. — Victoria v. Schott, 9 Tex. Civ. App. 332.

Virginia. — Home v. Richards, 4 Call (Va.) 441, 2 Am. Dec. 574; Hayes v. Bowman, 1 Rand. (Va.) 417; Mead v. Haynes, 3 Rand. (Va.) 33; Crenshaw v. Slate River Co., 6 Rand. (Va.) 245; Mairs v. Gallahue, 9 Gratt. (Va.) 94.

Washington. — Griffith v. Holman, 23 Wash. 347, 83 Am. St. Rep. 821; New Whatcom v. Fairhaven Land Co., 24 Wash. 493.

Wisconsin. — Olson v. Merrill, 42 Wis. 203.

Canada. — Farquharson v. Imperial Oil Co., 29 Ont. 206.

1. See the title BOUNDARIES, vol. 4, p. 828, and see in addition to the cases there cited Wishart v. Wyllie, 1 Macq. H. L. 389; Jones v. Williams, 2 M. & W. 326, M. & H. 51, 6 L. J. Exch. 107; Bickett v. Morris, 14 L. T. N. S. 835, 12 Jur. N. S. 803; Edleston v. Crossley, 18 L. T. N. S. 15; Bissel v. Southworth, 1 Root (Conn.) 269; Illinois, etc., Canal v. Haven, 10 Ill. 548; Houck v. Yates, 82 Ill. 179; Strange v. Spalding, (Ky. 1895) 29 S. W. Rep. 137; Arthur v. Case, 1 Paige (N. Y.) 447; Adams v. Barney, 25 Vt. 225.

**Bank of Watercourse Boundary Between States.** — In Jones v. Water Lot Co., 18 Ga. 539, it was held that as the boundary of the state of Georgia is the western bank of the Chattahoochee river, the rights of riparian proprietors thereon extend beyond the middle of the stream to that bank.

2. See the title ISLANDS, vol. 17, p. 532.

3. Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 544; Halsey v. McCormick, 13 N. Y. 296.

4. See the title ACCRETION, vol. 1, p. 469 et seq.

5. See the title BOUNDARIES, vol. 4, p. 832, and see Newton v. Eddy, 23 Vt. 319.

6. Knight v. Wilder, 2 Cush. (Mass.) 199, 48 Am. Dec. 660.

7. See the title BOUNDARIES, vol. 4, p. 828 et seq.

**8. Right to Flow of Watercourse — England.** — Miner v. Gilmour, 3 L. T. N. S. 98, 12 Moo. P. C. 131, 7 W. R. 328; Mason v. Hill, 5 B. &

ever, to the limitation that each riparian proprietor is entitled to a reasonable use of the water for certain purposes though such use may diminish the natural flow of the watercourse to lower riparian proprietors.<sup>1</sup> The respective rights of the several riparian owners must, for the protection of their mutual rights, be enjoyed in such a reasonable manner as not to injure unnecessarily the rights of others.<sup>2</sup> One riparian owner is not required to maintain artificial

Ad. 1, 27 E. C. L. 11; *Bealey v. Shaw*, 6 East 208; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Bickett v. Morris*, 14 L. T. N. S. 835, 12 Jur. N. S. 803; *Norbury v. Kitchin*, 15 L. T. N. S. 501; *Holker v. Poritt*, L. R. 8 Exch. 107, 42 L. J. Exch. 85, 21 W. R. 414.

*Canada*.—*McLaren v. Cook*, 3 U. C. Q. B. 299; *Mitchell v. Barry*, 26 U. C. Q. B. 416.

*United States*.—*Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970.

*Alabama*.—*Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

*Connecticut*.—*Buddington v. Bradley* 10 Conn. 213, 26 Am. Dec. 386; *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

*Georgia*.—*Grant v. Kuglar*, 81 Ga. 637, 12 Am. St. Rep. 348.

*Illinois*.—*Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106.

*Indiana*.—*Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385.

*Iowa*.—*Moffett v. Brewer*, 1 Greene (Iowa) 348.

*Kansas*.—*Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 24.

*Maine*.—*Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

*Maryland*.—*Baltimore v. Appold*, 42 Md. 442.

*Michigan*.—*Treat v. Bates*, 27 Mich. 390; *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527.

*Nebraska*.—*Plattsmouth Water Co. v. Smith*, 57 Neb. 579; *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781.

*New Hampshire*.—*Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1.

*New Jersey*.—*Society, etc. v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41; *Merritt v. Parker*, 1 N. J. L. 526; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Brakely v. Sharp*, 10 N. J. Eq. 206; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366.

*New York*.—*Corning v. Troy Iron, etc., Factory*, 39 Barb. (N. Y.) 311; *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Gillespie v. Forrest*, 18 Hun (N. Y.) 110; *Gilzinger v. Saugerties Water Co.*, 66 Hun (N. Y.) 173; *Standen v. New Rochelle Water Co.*, 91 Hun (N. Y.) 272; *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82.

*North Carolina*.—*Pugh v. Wheeler*, 2 Dev. & B. L. (19 N. Car.) 50.

*Pennsylvania*.—*Irving v. Media*, 10 Pa. Super. Ct. 132, 7 Del. Co. Rep. (Pa.) 378; *Beech v. Kuder*, 15 Pa. Super. Ct. 89; *Fricke v.*

*Quinn*, 188 Pa. St. 474, 43 W. N. C. (Pa.) 292.

*South Carolina*.—*Omelvany v. Jagers*, 2 Hill L. (S. Car.) 634, 27 Am. Dec. 417.

*Vermont*.—*Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Miller v. Lapham*, 44 Vt. 416.

*West Virginia*.—*Rogers v. Coal River Boom, etc., Co.*, 41 W. Va. 593.

1. *England*.—*Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590; *Wright v. Howard*, 1 Sim. & St. 190; *Williams v. Morland*, 2 B. & C. 910, 9 E. C. L. 269; *Wood v. Waud*, 3 Exch. 748; *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11; *Bealey v. Shaw*, 6 East 208; *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. 212, 15 Jur. 633; *Bickett v. Morris*, 12 Jur. N. S. 803, 14 L. T. N. S. 835; *Duncombe v. Randall*, Het. 32.

*Canada*.—*Dickson v. Carnegie*, 1 Ont. 110.

*Alabama*.—*Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

*Iowa*.—*McCord v. High*, 24 Iowa 342.

*Maryland*.—*Baltimore v. Appold*, 42 Md. 442.

*Massachusetts*.—*Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160; *Merrifield v. Worcester*, 110 Mass. 219, 14 Am. Rep. 592.

*New Hampshire*.—*Holden v. Winnipisseege Lake Cotton, etc., Mfg. Co.*, 53 N. H. 552.

*New Jersey*.—*Shreve v. Voorhees*, 3 N. J. Eq. 25.

*New York*.—*Ex p. Jennings*, 6 Cow. (N. Y.) 518, 16 Am. Dec. 447; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Canal Comrs v. People*, 5 Wend. (N. Y.) 423; *Standen v. New Rochelle Water Co.*, 91 Hun (N. Y.) 272.

*North Carolina*.—*Hardin v. Ledbetter*, 103 N. Car. 90.

*Oregon*.—*Jones v. Conn*, 39 Oregon 30, 87 Am. St. Rep. 634.

2. *England*.—*Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11; *Embrey v. Owen*, 6 Exch. 353; *Miner v. Gilmour*, 12 Moo. P. C. 131; *Kensit v. Great Eastern R. Co.*, 27 Ch. D. 122.

*Canada*.—*Dickson v. Carnegie*, 1 Ont. 110; *Ellis v. Clemens*, 21 Ont. 227.

*United States*.—*Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450; *Tyler v. Wilkinson*, 4 Mason (U. S.) 400.

*Alabama*.—*Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453, 29 Ala. 127, 65 Am. Dec. 394; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

*California*.—*Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128.

*Connecticut*.—*Twiss v. Baldwin*, 9 Conn.

works upon his land to facilitate the flow of the watercourse to the land of another.<sup>1</sup>

**6. Right to Use of Water** -- *a.* IN GENERAL. -- The riparian owner has no title to the water which flows by his land,<sup>2</sup> but each riparian owner may make a reasonable use thereof.<sup>3</sup> On the other hand, a riparian owner cannot make an unreasonable use of the water if such use interferes with its reasonable

291; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Parker v. Hotchkiss*, 25 Conn. 321; *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

*Illinois*. -- *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230.

*Indiana*. -- *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224.

*Maine*. -- *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.

*Maryland*. -- *Baltimore v. Appold*, 42 Md. 442.

*Massachusetts*. -- *Tourtellot v. Phelps*, 4 Gray (Mass.) 376; *Haskins v. Haskins*, 9 Gray (Mass.) 390; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Chandler v. Howland*, 7 Gray (Mass.) 350, 66 Am. Dec. 487; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Hinckley v. Nickerson*, 117 Mass. 213.

*Michigan*. -- *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Woodin v. Wentworth*, 57 Mich. 278.

*Minnesota*. -- *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 37 Am. Rep. 399; *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194; *Pinney v. Luce*, 44 Minn. 367.

*Nevada*. -- *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788.

*New Hampshire*. -- *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

*New York*. -- *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306, 8 Am. Dec. 404; *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525.

*North Carolina*. -- *Williamson v. Locks Creek Canal Co.*, 78 N. Car. 156.

*Vermont*. -- *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723.

In *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373, *Grover, J.*, said: "When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor in the use of the water as it flows, for that would be to deny any valuable use of it. \* \* \* The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation or acceleration, of the natural current, indispensable for the general and valuable use of the water, properly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively or sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into

extravagant looseness which would destroy private rights."

1. *Mace v. Mace*, 40 Oregon 586.

2. **No Title to Water**. -- See the title RIPARIAN RIGHTS, vol. 24, p. 980, and see *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

3. **Right to Reasonable Use of Water** -- *England*. -- *Sandwich v. Great Northern R. Co.*, 10 Ch. D. 707.

*Alabama*. -- *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

*California*. -- *Van Bibber v. Hilton*, 84 Cal. 585; *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195.

*Connecticut*. -- *Perkins v. Dow*, 1 Root (Conn.) 535; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391.

*Iowa*. -- *McCord v. High*, 24 Iowa 336.

*Kentucky*. -- *Thurman v. Morrison*, 14 B. Mon. (Ky.) 297.

*Maine*. -- *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; *Auburn v. Union Water Power Co.*, 90 Me. 576.

*Massachusetts*. -- *Weston v. Alden*, 8 Mass. 136; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

*Michigan*. -- *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

*Minnesota*. -- *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 37 Am. Rep. 399; *State v. Minneapolis Mill Co.*, 26 Minn. 229; *Reeves v. Backus-Brooks Co.*, 83 Minn. 339.

*New Hampshire*. -- *Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645.

*New York*. -- *Honsee v. Hammond*, 39 Barb. (N. Y.) 89; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

*North Carolina*. -- *Williamson v. Locks Creek Canal Co.*, 78 N. Car. 156.

*Ohio*. -- *McElroy v. Goble*, 6 Ohio St. 187; *Walker v. Board of Public Works*, 16 Ohio 540; *Lembeck v. Nye*, 47 Ohio St. 336.

*Oregon*. -- *Shook v. Colohan*, 12 Oregon 239; *Bowman v. Bowman*, 35 Oregon 279; *Jones v. Conn*, 39 Oregon 30, 46.

*Pennsylvania*. -- *Philadelphia v. Spring Garden*, 7 Pa. St. 348; *Brown v. Kistler*, 190 Pa. St. 499.

*South Dakota*. -- *Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402.

*Utah*. -- *Salt Lake City v. Salt Lake City Water, etc., Co.*, 25 Utah 456.

*Wisconsin*. -- *Coldwell v. Sanderson*, 69 Wis. 52.

And see the title RIPARIAN RIGHTS, vol. 24, p. 979.

In *Cary v. Daniels*, 8 Met. (Mass.) 466, 41 Am. Dec. 532, the rule was thus stated by *Shaw, C. J.*: "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress



use by other riparian owners.<sup>1</sup> The question whether a reasonable or unreasonable use of the water is being made, having regard to the common rights of others, is to be determined by the circumstances of each particular case,<sup>2</sup> due consideration being given to the character and size of the watercourse and the uses to which it may be applied,<sup>3</sup> as well as to the general usage of the country in similar cases,<sup>4</sup> and is, as a general rule, a question for the jury.<sup>5</sup>

**Ordinary and Extraordinary Wants.** — The wants of riparian owners in respect to the water of a stream are sometimes classified as ordinary or natural wants and extraordinary or artificial wants, the former being wants the satisfaction of which is absolutely necessary, such as use for domestic purposes and for watering stock, and the latter being wants the satisfaction of which is merely for the comfort or prosperity of the proprietor; and the latter wants are said to be subservient to the former.<sup>6</sup> This classification is, however, of no prac-

of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream, above and below."

1. **Unreasonable Use** — *England*. — *Miner v. Gilmour*, 12 Moo. P. C. 131.

*Canada*. — *Ellis v. Clemens*, 21 Ont. 227, 22 Ont. 216.

*United States*. — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

*California*. — *Wiggins v. Muscupiabe Land, etc., Co.*, 113 Cal. 182, 54 Am. St. Rep. 337; *Senior v. Anderson*, 130 Cal. 290.

*Maine*. — *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

*Massachusetts*. — *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160.

*Nebraska*. — *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713.

*New Jersey*. — *Farrell v. Richards*, 30 N. J. Eq. 511.

*New York*. — *Silby Mfg. Co. v. State*, 104 N. Y. 562; *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Gallagher v. Kingston Water Co.*, 164 N. Y. 502, affirming 25 N. Y. App. Div. 82.

*Pennsylvania*. — *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657.

*Texas*. — *Baker v. Brown*, 55 Tex. 377.

2. *United States*. — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

*California*. — *Learned v. Tangeman*, 65 Cal. 334.

*Connecticut*. — *Mason v. Hoyle*, 56 Conn. 255.

*Illinois*. — *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 235.

*Massachusetts*. — *Haskins v. Haskins*, 9 Gray (Mass.) 390; *Brace v. Yale*, 10 Allen (Mass.) 447; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

*Nebraska*. — *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713.

*New Hampshire*. — *Hubbard v. Concord*, 35 N. H. 60, 69 Am. Dec. 520.

*New York*. — *Pollitt v. Long*, 3 Thomp. & C. (N. Y.) 232; *Prentice v. Geiger*, 74 N. Y. 341.

*Oregon*. — *Weiss v. Oregon Iron, etc., Co.*, 13 Oregon 496.

*Pennsylvania*. — *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313; *Hetrich v. Deachler*, 6 Pa. St. 32; *Wheatley v. Chrisman*, 24 Pa. St. 302, 64 Am. Dec. 657.

*South Dakota*. — *Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402.

*Wisconsin*. — *Timm v. Bear*, 29 Wis. 265.

*Canada*. — *Ellis v. Clemens*, 21 Ont. 227.

See also the title RIPARIAN RIGHTS, vol. 24, p. 980.

In *Baltimore v. Appold*, 42 Md. 457, *Robinson, J.*, said: "The limits which separate the lawful from the unlawful use of a stream it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others."

In *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657, the defendant claimed that he had a legal right to use a reasonable quantity of water for the purposes of his business, but it was held that his business might reasonably require more than he could take consistently with the rights of the plaintiff, and that the reasonable use should be with respect to the rights of others. *Black, J.*, said: "We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. \* \* \* The defendant had a right to such use as he could make of the water, without materially diminishing it in quantity or corrupting it in quality. If he needed more he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor."

3. *Springfield v. Harris*, 4 Allen (Mass.) 496, 81 Am. Dec. 715; *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713.

4. *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Timm v. Bear*, 29 Wis. 265.

5. *Parker v. Hotchkiss*, 25 Conn. 321; *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141; *Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645; *Pollitt v. Long*, 3 Thomp. & C. (N. Y.) 232; *Canton v. Shock*, 66 Ohio St. 19, 90 Am. St. Rep. 557. And see the title RIPARIAN RIGHTS, vol. 24, p. 980.

6. **Ordinary and Extraordinary Wants.** — *Miner v. Gilmour*, 12 Moo. P. C. 131; *Smith v. Corlitt*, 116 Cal. 587; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Elgin v. Elgin Hydraulic Co.*, 85 Ill. App. 182; *Anderson v. Cin-*

tical importance, as the question whether the use made of the water is proper or improper depends upon the inquiry whether it is reasonable or unreasonable; and in determining this all the circumstances are to be considered, both the use to which the water is put and the corresponding deprivation occasioned thereby to other proprietors.<sup>1</sup> The fact that a riparian owner claims under a grant from the government does not give to him any greater right in the use of the water than have other riparian proprietors.<sup>2</sup> And the relative amounts of watershed owned by adjoining riparian owners do not affect their individual rights to the use of the water.<sup>3</sup> So the use is not necessarily rendered unreasonable by the fact that the volume of water in the watercourse is thereby diminished,<sup>4</sup> or by the fact that the riparian owner adopts mechanical means to withdraw the water.<sup>5</sup>

**Contracts Between Riparian Owners.** — Riparian owners may, as between themselves, make such contracts or stipulations with respect to the use of the water of the watercourse as they may think proper.<sup>6</sup>

**Personal Right.** — The right to the use of the waters of a watercourse is a right personal to the riparian owners in connection with the riparian land,<sup>7</sup> and a riparian owner who does not desire to divert the water for authorized purposes cannot, as against other riparian owners, authorize a nonriparian owner to divert it for a use disconnected with the riparian land;<sup>8</sup> but it seems that if such diversion does not injuriously affect other riparian owners, the latter have no cause of action therefor.<sup>9</sup>

**b. DOMESTIC PURPOSES.** — Every riparian proprietor has a right to the reasonable use of the water flowing past his land for his domestic purposes and for his cattle,<sup>10</sup> without regard to the effect which such use may have, in

cinnati Southern R. Co., 86 Ky. 44, 9 Am. St. Rep. 263; Auburn v. Union Water Power Co., 90 Me. 576; Baker v. Brown, 55 Tex. 377.

1. Lux v. Haggin, 69 Cal. 255.

2. Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177.

3. Standen v. New Rochelle Water Co., 91 Hun (N. Y.) 272, wherein Pratt, J., said: "We also think that the extent of watershed of the two parties to this suit was not material evidence upon the issues in this case, and that its admission was error. The plaintiff was not limited in her use of the water by the fact that the defendant owned a larger watershed than she did. She was entitled to the beneficial use of all the water that flowed in the stream, except such as was reasonably used by the defendant. The rights of the parties did not at all depend upon the extent of watershed owned by them. The lower riparian owner had a right to all the water that ran in the stream, except such as the defendant had a right to reasonably use for its own purposes."

4. Auburn v. Union Water Power Co., 90 Me. 576.

5. Charnock v. Higuerra, 111 Cal. 473, 52 Am. St. Rep. 195.

Thus, a riparian proprietor has a right, by means of water-wheels and machinery erected by him for that purpose, to pump up water from a natural stream flowing past his land to a reservoir, and to convey it thence by pipes to his dwelling house, upon another estate at a distance from the stream, and he may there apply such water to his domestic and other necessary purposes of utility, provided he takes only a reasonable quantity, with reference to the size of the stream and the rights of his neighbor; but he has no right to take more

water by means of wheels and machinery than he would have a right to take otherwise. Norbury v. Kitchin, 9 Jur. N. S. 132.

6. Northam v. Hurley, 1 El. & Bl. 665, 72 E. C. L. 665, 17 Jur. 672; Hamel v. Mayor, 16 L. C. Rep. 129.

7. Hayden v. Long, 8 Oregon 244. See also *supra*, this section, *Who Are Entitled to Riparian Rights*.

8. Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183; Broadmoor Dairy, etc., Co. v. Brookside Water, etc., Co., 24 Colo. 541. See, however, Gillis v. Chase, 67 N. H. 161, 68 Am. St. Rep. 645.

9. Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

In Kensit v. Great Eastern R. Co., 27 Ch. D. 122, the taking by nonriparian owners, of water from a river, and after using it to cool certain apparatus returning it to the river unpolluted and undiminished, was held to be no ground for an injunction against the taker of the water or the riparian owner through whose land it was taken.

**10. Domestic Purposes.** — Brown v. Best, 1 Wils. C. Pl. 174; Norbury v. Kitchin, 9 Jur. N. S. 132, 7 L. T. N. S. 685; Miner v. Gilmour, 12 Moo. P. C. 131; Spence v. McDonough, 77 Iowa 460; Auburn v. Union Water Power Co., 90 Me. 576; Helfrich v. Catonsville Water Co., 74 Md. 269, 28 Am. St. Rep. 245; Johnson v. Boston, 130 Mass. 452; Smith v. Adams, 6 Paige (N. Y.) 435; Arnold v. Foot, 12 Wend. (N. Y.) 330; Slack v. Marsh, 11 Phila. (Pa.) 543, 32 Leg. Int. (Pa.) 355; Filbert v. Dechert, 22 Pa. Super. Ct. 362.

In Hazeltine v. Case, 46 Wis. 391, 32 Am. Rep. 715, where the defendant's appropriation of water for his stock interfered with the appro-

case of a deficiency, upon the proprietors lower down the watercourse.<sup>1</sup> So the riparian owner may adopt artificial means for using the water for domestic purposes;<sup>2</sup> but the mode adopted for facilitating such use must be reasonable with regard to the rights of the lower proprietors.<sup>3</sup> Thus, it is not a reasonable use of water for a riparian proprietor who desires to use it for watering cattle and for domestic purposes to erect dams across the stream whereby the water is lost by evaporation and absorption so as to injure a lower riparian owner in his right to use it.<sup>4</sup> And a municipal corporation or other riparian owner has no right as such to divert the waters of a watercourse for the purpose of supplying the inhabitants of a village or city with water to the material injury of proprietors below the point of diversion.<sup>5</sup>

**No Right to Specific Quantity of Water.**—The right to use the water for domestic

priation by a lower proprietor of the water for domestic purposes, it was held to be proper to instruct that if, in its natural state, the stream was useful both for domestic uses and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to the more valuable use; but that its reasonable use for all purposes should be preferred if possible.

1. *England*.—Wilts, etc., Canal Nav. Co. v. Swindon Waterworks Co., L. R. 9 Ch. 451; *Miner v. Gilmour*, 12 Moo. P. C. 131.

*Alabama*.—Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453, 29 Ala. 127, 65 Am. Dec. 394; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758.

*California*.—Ferrea v. Knipe, 28 Cal. 343, 87 Am. Dec. 128; *Lux v. Haggin*, 69 Cal. 255; *Swift v. Goodrich*, 70 Cal. 105.

*Illinois*.—Evans v. Merriweather, 4 Ill. 495, 38 Am. Dec. 106.

*Iowa*.—Spence v. McDonough, 77 Iowa 460.

*Kentucky*.—Redman v. Forman, 83 Ky. 214;

*Anderson v. Cincinnati Southern R. Co.*, 86 Ky. 45, 9 Am. St. Rep. 263.

*New York*.—Arnold v. Foot, 12 Wend. (N. Y.) 330.

*Pennsylvania*.—Slack v. Marsh, 11 Phila. (Pa.) 543, 32 Leg. Int. (Pa.) 355; *Philadelphia v. Spring Garden*, 7 Pa. St. 348; *Philadelphia v. Collins*, 68 Pa. St. 106.

*Texas*.—Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

*Vermont*.—Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334.

See also *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Shook v. Colohan*, 12 Oregon 339.

In *Miner v. Gilmour*, 12 Moo. P. C. 131, *Kingsdown, L. J.*, said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream."

**A State Hospital**, having inmates to the number of nine hundred, situated on the banks of a stream, has been held to be entitled to take from the stream all the water necessary for the natural wants of the inmates, although such taking resulted in a loss to a lower riparian

owner. *Filbert v. Dechert*, 22 Pa. Super. Ct. 362.

2. Thus, the riparian owner may facilitate the use of the water by ordinary and appropriate means, as by a tub near the brook, receiving water therefrom, and an aqueduct thence to his house and barn. *Chatfield v. Wilson*, 31 Vt. 358.

3. *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128.

4. *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128. See also *Barneich v. Mercy*, 136 Cal. 205.

5. **Municipal Water Supply**—*England*.—Swindon Waterworks Co. v. Wilts, etc., Canal Nav. Co., L. R. 7 H. L. 697; *Medway River Nav. Co. v. Romney*, 9 C. B. N. S. 575, 99 E. C. L. 575; *Belfast Rope Works Co. v. Boyd*, L. R. 21 Ir. 560.

*United States*.—*Pine v. New York*, 103 Fed. Rep. 337. See also *Saunders v. Bluefield Waterworks, etc., Co.*, 58 Fed. Rep. 133.

*Alabama*.—Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

*California*.—*Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *People v. Elk River Mill, etc., Co.*, 107 Cal. 221, 48 Am. St. Rep. 125.

*Connecticut*.—*Harding v. Stamford Water Co.*, 41 Conn. 87; *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147.

*Kansas*.—*Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265.

*Massachusetts*.—*Ætna Mills v. Waltham*, 126 Mass. 422.

*Montana*.—*Creek v. Bozeman Water Works Co.*, 15 Mont. 121.

*New Jersey*.—*Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.

*New York*.—*Standen v. New Rochelle Water Co.*, 91 Hun (N. Y.) 272; *Gallagher v. Kingston Water Co.*, 164 N. Y. 602, affirming 25 N. Y. App. Div. 82; *Duesler v. Johnstown*, 24 N. Y. App. Div. 608; *Gilzinger v. Saugerties Water Co.*, 66 Hun (N. Y.) 173; *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.*, 84 N. Y. App. Div. 92.

*North Carolina*.—*Geer v. Durham Water Co.*, 127 N. C. 349.

*Pennsylvania*.—*Standard Plate-Glass Co. v. Butler Water Co.*, 5 Pa. Super. Ct. 563; *Lehigh Coal, etc., Co. v. Scranton Gas, etc., Co.*, 6 Pa. Dist. 291; *Irving v. Media*, 104 Pa. St. 648, 10 Pa. Super. Ct. 132, 7 Del. Co. Rep. (Pa.)



purposes gives no right to a specific quantity of it; and therefore a riparian owner cannot, to the injury of lower proprietors, withdraw an equivalent amount for another purpose.<sup>1</sup>

*c. MECHANICAL PURPOSES.* — The riparian owner has the right to appropriate to himself and apply to any useful and beneficial purpose the force to be derived from the natural flow of the watercourse as it passes over his lands, subject only to the limitation that he does not thereby injuriously affect the common and equal rights of other proprietors of lands above or below his own upon the same watercourse;<sup>2</sup> but he cannot make an unreasonable use of the water for such purpose,<sup>3</sup> and it has been held that a use which deprives other riparian owners of the use of the water for domestic purposes is unreasonable.<sup>4</sup> In accordance with these principles, a riparian proprietor may use the water in a reasonable manner to generate power by steam,<sup>5</sup> but he cannot make an unreasonable use of the water for such purpose to the injury of the rights of lower proprietors to use it.<sup>6</sup>

*d. MINING PURPOSES.* — In the Western states the right of riparian owners to make a reasonable use of the water for mining purposes, as in case of placer mines, is fully recognized.<sup>7</sup>

*e. IRRIGATION.* — The right of riparian owners to use the water for irrigation has been heretofore fully discussed.<sup>8</sup>

**7. Diversion** — *a. IN GENERAL.* — One riparian owner has no right unreasonably to divert the waters of a watercourse to the injury of the rights of riparian proprietors below the point of diversion;<sup>9</sup> but the mere fact that in

378; Philadelphia, etc., *R. Co. v. Pottsville Water Co.*, 18 Pa. Co. Ct. 501; Haupt's Appeal, 125 Pa. St. 211. See, however, Philadelphia *v.* Collins, 68 Pa. St. 106.

*Washington.* — Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 576; New Whatcom *v.* Fairhaven Land Co., 24 Wash. 493.

See, however, Auburn *v.* Union Water Power Co., 90 Me. 576; Elgin *v.* Elgin Hydraulic Co., 85 Ill. App. 182; Canton *v.* Shock, 66 Ohio St. 19, 90 Am. St. Rep. 557.

1. Atty.-Gen. *v.* Great Eastern R. Co., 23 L. T. N. S. 344; Blanchard *v.* Baker, 8 Me. 253, 23 Am. Dec. 504; Arnold *v.* Foot, 12 Wend. (N. Y.) 330.

2. **Mechanical Purposes** — *England.* — Miner *v.* Gilmour, 12 Moo. P. C. 131.

*Massachusetts.* — Bardwell *v.* Ames, 22 Pick. (Mass.) 354.

*New Jersey.* — Harper *v.* Mountain Water Co., (N. J. 1899) 43 Atl. Rep. 984.

*New York.* — Pollitt *v.* Long, 3 Thomp. & C. (N. Y.) 232; People *v.* Smith, 70 N. Y. App. Div. 543.

*Ohio.* — Walker *v.* Board of Public Works, 16 Ohio 540; Canton *v.* Shock, 66 Ohio St. 19, 90 Am. St. Rep. 557.

*Pennsylvania.* — M'Calmont *v.* Whitaker, 3 Rawle (Pa.) 84, 23 Am. Dec. 102.

*Rhode Island.* — Dyer *v.* Cranston Print Works Co., 22 R. I. 506.

*Vermont.* — Miller *v.* Lapham, 46 Vt. 525.

3. Canton *v.* Shock, 66 Ohio St. 19, 90 Am. St. Rep. 557.

4. Evans *v.* Merriweather, 4 Ill. 492, 38 Am. Dec. 106; Auburn *v.* Union Water Power Co., 90 Me. 576.

5. Bliss *v.* Kennedy, 43 Ill. 67.

**Railroad May Use Water for Engines.** — Sandwich *v.* Great Northern R. Co., 10 Ch. D. 707; Louisville, etc., *R. Co. v.* Beauchamp, (Ky. 1897) 40 S. W. Rep. 679; Elliot *v.* Fitchburg

R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85. See also Philadelphia, etc., *R. Co. v. Pottsville Water Co.*, 182 Pa. St. 418.

6. Atty.-Gen. *v.* Great Eastern R. Co., L. R. 6 Ch. 572, 19 W. R. 788; Anderson *v.* Cincinnati Southern R. Co., 86 Ky. 44, 9 Am. St. Rep. 263; Louisville, etc., *R. Co. v.* Beauchamp, (Ky. 1897) 40 S. W. Rep. 679; Bliss *v.* Kennedy, 43 Ill. 67; Garwood *v.* New York Cent., etc., R. Co., 83 N. Y. 400, 38 Am. Rep. 452; Pennsylvania R. Co. *v.* Miller, 112 Pa. St. 34; Clark *v.* Pennsylvania R. Co., 145 Pa. St. 438, 27 Am. St. Rep. 710, 29 W. N. C. (Pa.) 49.

7. **Mining.** — Travis Placer Min. Co. *v.* Mills, 37 C. C. A. 536; Sims *v.* Smith, 7 Cal. 149, 68 Am. Dec. 233; Mattis *v.* Hosmer, 37 Oregon 523; Walton *v.* Mills, 86 N. Car. 280.

The owner of a mining claim on a creek has a right to have the tailings of his sluices carried off by the stream, and it is an unlawful detention for another, by the erection of a dam lower down, to prevent their being carried off. Sims *v.* Smith, 7 Cal. 149, 68 Am. Dec. 233.

8. **Irrigation.** — See the title IRRIGATION, vol. 17, p. 485, and see the following late cases: Eaton *v.* Swansea Waterworks Co., 17 Q. B. 267, 79 E. C. L. 267, 20 L. J. Q. B. 482; Crippen *v.* White, 28 Colo. 298; Meng *v.* Coffey, (Neb. 1903) 93 N. W. Rep. 713; Crawford Co. *v.* Hathaway, (Neb. 1903) 93 N. W. Rep. 781; Boyce *v.* Cupper, 37 Oregon 256; Jones *v.* Conn, 39 Oregon 30, 87 Am. St. Rep. 634; Salem Flouring Mills Co. *v.* Lord, 42 Oregon 82, 815; Lone Tree Ditch Co. *v.* Cyclone Ditch Co., 15 S. Dak. 519; Cornick *v.* Arthur, 31 Tex. Civ. App. 579.

9. **Diversion** — *England.* — Frankum *v.* Fal-mouth, 2 Ad. & El. 452, 29 E. C. L. 140; Mason *v.* Hills, 2 N. & M. 747, 5 B. & Ad. 1, 27 E. C. L. 11; St. Louis *v.* St. Louis, 3 Moo. P. C. 398; Waller *v.* Manchester, 6 H. & N. 667; Harrop

the use made of the water by a riparian owner the volume thereof is diminished does not necessarily render such use unreasonable and constitute a wrongful diversion.<sup>1</sup> The general prohibition against the diversion of the

*v. Hirst*, 38 L. J. Exch. 1, L. R. 4 Exch. 43, 19 L. T. N. S. 426.

*Canada*. — *Saunders v. William Richards Co.*, 2 N. Bruns. Eq. Rep. 303.

*United States*. — *Dexter v. Providence Aqueduct Co.*, 1 Story (U. S.) 387; *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *U. S. Freehold Land, etc., Co. v. Gallegos*, (C. C. A.) 89 Fed. Rep. 769.

*California*. — *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408; *Crandall v. Woods*, 8 Cal. 136; *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84; *Heilbron v. 76 Land, etc., Co.*, 80 Cal. 189; *Mott v. Ewing*, 90 Cal. 231; *Bartlett v. O'Connor*, (Cal. 1894) 36 Pac. Rep. 513; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Silver Creek, etc., Land, etc., Co. v. Hayes*, 113 Cal. 142; *Williams v. Harter*, 121 Cal. 47; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158; *Churchill v. Louie*, 135 Cal. 608; *Parker v. Gregg*, 136 Cal. 413.

*Colorado*. — *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77; *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 267, 83 Am. St. Rep. 80.

*Connecticut*. — *Agawam Canal Co. v. Edwards*, 36 Conn. 497; *New Haven Water Co. v. Wallingford*, 72 Conn. 293.

*Georgia*. — *Southern Marble Co. v. Darnell*, 94 Ga. 231; *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141.

*Illinois*. — *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

*Indiana*. — *Blessing v. Blair*, 45 Ind. 546; *Robinson v. Shanks*, 118 Ind. 125.

*Iowa*. — *Moffett v. Brewer*, 1 Greene (Iowa) 348; *Hinkle v. Avery*, 88 Iowa 47, 45 Am. St. Rep. 224.

*Kansas*. — *Atchison, etc., R. Co. v. Long*, 46 Kan. 701, 26 Am. St. Rep. 165; *Campbell v. Grimes*, 62 Kan. 503; *Montague v. Jefferson County*, 7 Kan. App. 160.

*Kentucky*. — *Redman v. Forman*, 83 Ky. 214.

*Maine*. — *Masonic Temple Assoc. v. Harris*, 79 Me. 250.

*Maryland*. — *Washington County Water Co. v. Garver*, 91 Md. 398; *Aberdeen v. Bradford*, 94 Md. 670.

*Massachusetts*. — *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Tourtellot v. Phelps*, 4 Gray (Mass.) 376; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Gleason v. Assabet Mfg. Co.*, 101 Mass. 72; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

*Michigan*. — *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527; *Hilliker v. Coleman*, 73 Mich. 170.

*Minnesota*. — *Bennett v. Murtaugh*, 20 Minn. 153.

*Mississippi*. — *Chapman v. Copeland*, 55 Miss. 476.

*Montana*. — *Columbia Min. Co. v. Holter*, 1 Mont. 206.

*Nebraska*. — *Crawford Co. v. Hathaway*, 60 Neb. 754.

*New Jersey*. — *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.

*New York*. — *Curtiss v. Ayrault*, 5 Thomp. & C. (N. Y.) 611, 3 Hun (N. Y.) 487; *Vandenberg v. Van Bergen*, 13 Johns. (N. Y.) 212; *Crooker v. Bragg*, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555; *Marsh v. Delaware, etc., R. Co.*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 376; *Garwood v. New York Cent., etc., R. Co.*, 116 N. Y. 649; *Covert v. Cranford*, 141 N. Y. 521, 38 Am. St. Rep. 826; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643.

*North Carolina*. — *Williamson v. Lock's Creek Canal Co.*, 78 N. Car. 156; *Fleming v. Wilmington, etc., R. Co.*, 115 N. Car. 676; *Hotcutt v. Wilmington, etc., R. Co.*, 124 N. Car. 214.

*Oregon*. — *Miller v. Vaughn*, 8 Oregon 333; *Weiss v. Oregon Iron, etc., Co.*, 13 Oregon 496; *Cox v. Bernard*, 39 Oregon 53; *Mace v. Mace*, 40 Oregon 586; *Britt v. Reed*, 42 Oregon 76.

*Pennsylvania*. — *Myers v. Philadelphia, etc., Pass. R. Co.*, 12 Montg. Co. Rep. (Pa.) 46; *Philadelphia, etc., R. Co. v. Pottsville Water Co.*, 18 Pa. Co. Ct. 501, 182 Pa. St. 418; *Hart v. Evans*, 8 Pa. St. 13; *Miller v. Miller*, 9 Pa. St. 74, 49 Am. Dec. 545; *Marshall v. Hershey*, 185 Pa. St. 238.

*South Carolina*. — *Haymes v. Gault*, 1 McCord. L. (S. Car.) 543.

*Tennessee*. — *Webster v. Harris*, (Tenn. 1902) 69 S. W. Rep. 782.

*Texas*. — *Cape v. Thompson*, 21 Tex. Civ. App. 681.

*Washington*. — *Shotwell v. Dodge*, 8 Wash. 337.

**Diversion by State.** — *Green Bay, etc., Canal Co. v. Kaukauna Water Power Co.*, 90 Wis. 370, 48 Am. St. Rep. 937.

**Withdrawing Water for Salt Manufactory Unreasonable.** — *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643.

**Withdrawing Water for Ornamental Fountain Unreasonable.** — *Filbert v. Dechert*, 22 Pa. Super. Ct. 362.

**Withdrawing Water for Manufacture of Ice for Sale Unreasonable.** — *Filbert v. Dechert*, 22 Pa. Super. Ct. 362.

**1. Diversion Through Reasonable Use—England.** — *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. 212.

*Maine*. — *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; *Auburn v. Union Water Power Co.*, 90 Me. 576.

*Massachusetts*. — *Weston v. Alden*, 8 Mass. 130.

*Nebraska*. — *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781.

*New Jersey*. — *Harper v. Mountain Water Co.*, (N. J. 1899) 43 Atl. Rep. 984.

*Pennsylvania*. — *Brown v. Kistler*, 190 Pa. St. 499.

*Vermont*. — *Ford v. Whitlock*, 27 Vt. 265.

See also *supra*, this section, *Right to Use of Water*.

waters of a watercourse prohibits also the diversion of the waters of head springs forming the source of a watercourse;<sup>1</sup> and *a fortiori* after the water from a spring on the land of one person has reached the watercourse, the source of the water does not increase his right to divert it from the watercourse.<sup>2</sup> So where a lake or a pond constitutes the source of a watercourse, the diversion of the waters thereof so as to affect the flow of the watercourse is prohibited.<sup>3</sup>

**The Diversion of Percolating or Surface Waters** before they reach the channel of a watercourse cannot be considered a diversion of the waters of the watercourse.<sup>4</sup>

**The Detention of the Waters of a Stream by a Dam** so that the water in the artificial pond is materially diminished by evaporation and percolation may constitute a wrongful diversion.<sup>5</sup>

**Change in Channel.** — The owner of the land on both sides of a watercourse may divert the water by an artificial channel upon his own land, provided he returns the water to the watercourse above the land of the adjoining lower proprietor without material diminution in volume;<sup>6</sup> but to justify such a diversion, the water must be returned to the watercourse before it reaches the land of a lower proprietor.<sup>7</sup> Of course a riparian owner has no right to change the channel of a stream and cast the waters upon the land of another

**1. Diversion of Head Springs.** — *Mostyn v. Atherton*, (1899) 2 Ch. 360, 81 L. T. N. S. 356; *Bunting v. Hicks*, 7 Reports 293; *Dudden v. Guardians of Poor*, 26 L. J. Exch. 146, 1 H. & N. 627; *Bruening v. Dorr*, 23 Colo. 195; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Colrick v. Swinburne*, 105 N. Y. 503; *Leavenworth v. Prospect Rock Water Co.*, 8 Kulp (Pa.) 310; *Lord v. Meadville Water Co.*, 135 Pa. St. 122, 20 Am. St. Rep. 864; *Howe v. Norman*, 13 R. I. 488; *Boynton v. Gilman*, 53 Vt. 17. See also *Washington County Water Co. v. Garver*, 91 Md. 398.

**2.** *Barneich v. Mercy*, 136 Cal. 205.

**3. Head Ponds and Lakes.** — *Buckers Irrigation, etc., Co. v. Platte Valley Irrigation Co.*, 28 Colo. 187; *Stock v. Jefferson Tp.*, 114 Mich. 357; *Bennett v. Murtaugh*, 20 Minn. 151.

**4. Percolating and Surface Waters.** — *Wilson v. Ward*, 26 Colo. 39; *Farwell v. Sturgis Water Co.*, 10 S. Dak. 421. See also *Mitchell v. Parks*, 26 Ind. 354. But see *Smith v. Brooklyn*, 160 N. Y. 357, affirming 32 N. Y. App. Div. 257. See further *supra*, this title, *Underground Waters*; *Surface Waters*.

**5.** *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Barneich v. Mercy*, 136 Cal. 205; *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141.

**6. England.** — *Ewing v. Colquhoun*, 2 App. Cas. 839; *Elmhirst v. Spencer*, 2 Macn. & G. 45; *Sandwich v. Great Northern R. Co.*, 10 Ch. D. 707.

**California.** — *Moore v. Clear Lake Water-Works*, (Cal. 1885) 5 Pac. Rep. 494; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Creighton v. Kaweah Canal, etc., Co.*, 67 Cal. 221.

**Indiana.** — *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385.

**Kansas.** — *Missouri Pac. R. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249.

**Maine.** — *Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507.

**Michigan.** — *Pettibone v. Smith*, 37 Mich. 579.

**New Jersey.** — *Society, etc., v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41.

**New York.** — *Garwood v. New York Cent., etc., R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452.

**South Carolina.** — *Brisbane v. O'Neill*, 3 Strobb. L. (S. Car.) 348.

**Tennessee.** — *Webster v. Fleming*, 2 Humph. (Tenn.) 518.

**Texas.** — *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540.

**Vermont.** — *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

See also *Canal Com'rs v. East Peoria*, 75 Ill. App. 450.

In *Cincinnati, etc., R. Co. v. Carr*, 38 Ohio St. 448, 43 Am. Rep. 428, it was held that one owning land abutting on a river through which a creek flowed and emptied into the river might, as against the proprietors on the opposite side of the river, change the channel and mouth of the creek upon his own land for his own protection and convenience, if in doing so he exercised reasonable care and caution not to injure others; but that he could not do so if, in the exercise of such privilege, increased danger of inundation and overflow on the opposite side of the river might be anticipated.

**7. Return of Water to Stream.** — *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158; *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 24; *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Weiss v. Oregon Iron, etc., Co.*, 13 Oregon 496; *Kimberly, etc., Co. v. Hewitt*, 79 Wis. 334; *Green Bay, etc., Canal Co. v. Kaukauna Water Power Co.*, 90 Wis. 370, 48 Am. St. Rep. 937; *Ellis v. Clemens*, 21 Ont. 227, 22 Ont. 216. See also *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 1 Am. St. Rep. 822. *Compare Austyn v. Chandler*, (Ariz. 1895) 42 Pac. Rep. 483.

**The Act of a Third Person** preventing the return of the water to the watercourse is not a sufficient excuse for failure to return it. *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394.



away from the natural channel.<sup>1</sup> By consent of the riparian owners the natural channel of a watercourse may be changed and the water diverted into a new channel which will itself have the character of a watercourse;<sup>2</sup> but by so diverting a stream the riparian owner does not necessarily lose his right to return it to its natural channel,<sup>3</sup> though he may lose such right by lapse of time.<sup>4</sup>

**Artificial Increase of Flow.** — Where a riparian owner increases by artificial means the volume of water in a stream, he may withdraw therefrom the amount of the increased supply without being guilty of a wrongful diversion,<sup>5</sup> and *a fortiori* where by artificial means a person leads an increased water supply to a watercourse he may cut off such supply at his pleasure.<sup>6</sup>

**b. DIVERSION BY NATURAL CAUSES.** — Where the channel of a stream is changed by natural causes lower riparian owners have no right to demand that the water be returned to its old channel;<sup>7</sup> and the escape of water from a watercourse by reason of the natural formation of its banks cannot be considered a wrongful diversion.<sup>8</sup> But if the change in the channel is due partly

1. *England.* — *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Fletcher v. Smith*, 2 App. Cas. 781; *Ewing v. Colquhoun*, 2 App. Cas. 839; *Menzies v. Breadalbane*, 3 Bligh N. S. 414.

*Alabama.* — *Roberts v. Vest*, 126 Ala. 355.

*California.* — *Learned v. Castle*, 78 Cal. 454.

*Georgia.* — *Cheeves v. Danielly*, 80 Ga. 114.

*Illinois.* — *East St. Louis, etc., R. Co. v. Eisentraut*, 134 Ill. 96.

*Iowa.* — *Preston v. Hull*, 77 Iowa 309; *Meir v. Kroft*, (Iowa 1899) 80 N. W. Rep. 521.

*Kansas.* — *Union Pac. R. Co. v. Dyche*, 31 Kan. 120.

*New Jersey.* — *Shields v. Arndt*, 4 N. J. Eq. 234.

*New York.* — *Vernum v. Wheeler*, 35 Hun (N. Y.) 53; *Wright v. Syracuse, etc., R. Co.*, 49 Hun (N. Y.) 445.

*North Carolina.* — *Hocutt v. Wilmington, etc., R. Co.*, 124 N. Car. 214; *Porter v. Durham*, 74 N. Car. 767.

*Ohio.* — *Longstreet v. Harkrader*, 17 Ohio St. 23.

*West Virginia.* — *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

*Wisconsin.* — *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687; *Young v. Chicago, etc., R. Co.*, 28 Wis. 171.

2. *Meir v. Kroft*, (Iowa 1899) 80 N. W. Rep. 521; *Matheson v. Ward*, 24 Wash. 407, 85 Am. St. Rep. 955.

3. *Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234; *Peter v. Caswell*, 38 Ohio St. 518.

Where a railroad crossing a stream obstructed the flow of the water, and the landowner diverted it to a new channel, his right to have it flow in the old channel was held not to be extinguished unless he intended permanently to abandon it, this being a question for the jury. *Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234.

4. *Delaney v. Boston*, 2 Harr. (Del.) 489; *Murchie v. Gates*, 78 Me. 300; *Mathewson v. Hoffman*, 77 Mich. 420; *Shepardson v. Perkins*, 58 N. H. 354; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344; *Ford v. Whitlock*, 27 Vt. 265.

Where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time

necessary to establish a prescriptive right perpetually to maintain it, the riparian owners along such stream of water who have improved their property with reference to the change and in reliance on the continuance thereof acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream or caused the diversion of the waters, and all those claiming under or through him, are estopped on principles of equity from restoring the waters to their natural channel or state to the injury of such riparian owners. *Kray v. Muggli*, 84 Minn. 90, 87 Am. St. Rep. 332.

5. *Wilcox v. Hausch*, 64 Cal. 461; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Society, etc., v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41. Compare *Schulz v. Sweeny*, 19 Nev. 359, 3. Am. St. Rep. 888.

6. *Brymbo Water Co. v. Lester's Lime Co.*, 8 Reports 329.

7. **Diversion by Natural Causes.** — *Withers v. Purchase*, 60 L. T. N. S. 819; *Wholey v. Caldwell*, 108 Cal. 95, 49 Am. St. Rep. 64. See also *Duncan v. Bancroft*, 110 Mass. 267. See, however, *M'Swiny v. Haynes*, 1 Ir. Eq. 322; *Cox v. Bernard*, 39 Oregon 53.

In *Wholey v. Caldwell*, 108 Cal. 95, 49 Am. St. Rep. 64, *Henshaw, J.*, said: "The foundation of the riparian proprietor's right rests upon the universally accepted maxim adopted by the common law from the civil law: *Aqua currit et debet currere ut currere solebat ex jure nature*. These rights thus draw their support from the laws of nature, but they do not rise superior to those laws. When by their operation the flow is lost the right is lost with it. The new channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in extraordinary and perpetual servitude. If, by the forces of nature, the stream should change its course at a point miles above him he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountain-head of the stream. Such a doctrine could not be tolerated."

8. Thus, a bill in equity to restrain a diver-

to the acts of the riparian owner in weakening the banks, he cannot escape liability for a wrongful diversion on the ground that the watercourse would sooner or later by an entirely natural change have taken the new channel.<sup>1</sup> Where the channel of a watercourse is changed by natural causes, the riparian owner across whose land the new channel is formed may return the water to its old channel,<sup>2</sup> though by lapse of time he may lose his right to do so,<sup>3</sup> and in preventing the inundation of his own land by the change in the channel, he has no right to cause the water to flow onto the land of another, except in its old channel.<sup>4</sup> If by reason of *débris* deposited by a freshet the channel of a watercourse is changed so that the water ceases to flow to the lands of former riparian owners, when the obstruction to the old channel is removed the return of the water to the old channel inures to the benefit of the former riparian owners, and it cannot be subsequently diverted to the injury of such owners.<sup>5</sup>

**A Riparian Owner May Improve His Lands** though thereby the waters of a watercourse are diminished through natural causes, and the motive with which the improvement is made is immaterial as affects the right to make it.<sup>6</sup>

**c. EMINENT DOMAIN.** — In furtherance of a public use, such as supplying the inhabitants of a municipality with water for domestic purposes<sup>7</sup> or the maintenance of mills,<sup>8</sup> the right to divert the waters of a watercourse for nonriparian purposes, to the injury of proprietors below the point of diversion, may be acquired under the power of eminent domain.<sup>9</sup>

**d. CONTRACT RIGHTS.** — As against himself a riparian owner may, by

sion of water from a stream cannot be maintained where it appears that the defendant dug a ditch extending into his land from a creek; that from time immemorial the water had been accustomed to flow from the creek and return to it below; and that the ditch merely served to draw the water into a narrower channel and give to it a more direct course without any material increase of the quantity of water escaping from the creek. *Potter v. Burden*, 38 Ala. 651.

1. *McLean v. Crosson*, 33 U. C. Q. B. 448.

2. *Farquharson v. Farquharson*, cited in *Menzies v. Breadalbane*, 3 Bligh N. S. 421; *Brymbo Water Co. v. Lester's Lime Co.*, 8 Reports 329; *York County v. Rolls*, 27 Ont. App. 72; *Slater v. Fox*, 5 Hun (N. Y.) 544; *Pierce v. Kinney*, 59 Barb. (N. Y.) 56; *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301. See also *Colbran v. Barnes*, 11 C. B. N. S. 246, 103 E. C. L. 246.

Where a stream running across the defendant's land, and thence upon the plaintiff's land below, during a flood broke through its bank, making an opening sufficient to carry the water ordinarily running, and through this new channel the water would have continued to run, if not prevented, it was held that the defendant had a right, for his own protection, to erect an embankment across the crevasse for the purpose of confining the waters within their original channel, provided he did not build such barrier too high, nor project it into the stream so as to interfere with the accustomed flow. *Pierce v. Kinney*, 59 Barb. (N. Y.) 56.

3. *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420; *Smith v. Musgrove*, 32 Mo. App. 241; *Woodbury v. Short*, 17 Vt. 388, 44 Am. Dec. 344. See also *Ford v. Whitlock*, 27 Vt. 265.

Where the course of a stream, running across

the land of the defendant to the plaintiff's land, was changed by a sudden and unusual flood so as to run upon the defendant's land, without passing over the plaintiff's land, and the defendant permitted the water to run in the new channel, thus formed, for ten years, it was held that he was bound by his acquiescence, and that he had no right, after such lapse of time, to obstruct the stream upon his own land so as to divert it into the channel in which it had formerly passed across the plaintiff's land. *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344.

4. *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301.

5. *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84.

6. *Fisher v. Feige*, 137 Cal. 39, 92 Am. St. Rep. 77, holding that timber on the bank or watershed may be felled though the result thereof is a diminution of the water by evaporation.

7. **Eminent Domain — Municipal Water Supply.** — *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *New Britain v. Sargent*, 42 Conn. 137; *Warren v. Spencer Water Co.*, 143 Mass. 155; *Ipswich Mills v. Essex County*, 108 Mass. 363; *Fay v. Salem, etc., Aqueduct Co.*, 111 Mass. 27; *Nemasket Mills v. Taunton*, 166 Mass. 540; *Lewis v. Springfield Water Co.*, 176 Pa. St. 230; *Philadelphia, etc., R. Co. v. Pottsville Water Co.*, 182 Pa. St. 418.

8. **Maintenance of Mills.** — *Larsh v. Test*, 48 Ind. 130.

9. *Hinckley v. Nickerson*, 117 Mass. 213; *Blackwell v. Phinney*, 126 Mass. 458; *Howe v. Weymouth*, 148 Mass. 605; *Washburn, etc., Mfg. Co. v. Worcester*, 153 Mass. 494; *Bigelow v. Draper*, 6 N. Dak. 152; *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 2 Va. Sup. Ct. 648. See also the title **EMINENT DOMAIN**, vol. 10, pp. 1061 *et seq.*, 1129 *et seq.*

contract, confer upon another the right to divert the waters of the watercourse.<sup>1</sup>

**c. PRESCRIPTIVE RIGHTS.** — A Lower Riparian Owner cannot by prescription acquire as against an upper riparian owner the right to divert the water of the watercourse, as the upper owner cannot be injured by such diversion, and therefore has no legal ground to object thereto;<sup>2</sup> nor can he acquire by prescription as against the upper owner any right to have the waters of the stream come down to him uninterrupted by a reasonable use by the latter.<sup>3</sup> And where an upper riparian owner constructs a storage reservoir on a stream and operates it so that it confers an incidental benefit upon lower riparian owners, the latter cannot by prescription acquire a right to demand the continued maintenance of the reservoir.<sup>4</sup>

An Upper Riparian Owner may acquire by prescription the right to divert the waters of the stream as against the riparian owners below the point of diversion.<sup>5</sup> In the acquisition of such right the general principles appertaining to the law of prescription are fully applicable. Thus, the diversion must be adverse and hostile to the rights of the lower riparian owners under a claim of right, and must operate as an invasion of the rights of the one against

**1. Contract Rights.** — *Liggins v. Inge*, 5 M. & P. 712, 7 Bing. 682, 20 E. C. L. 287; *Churchill v. Baumann*, 104 Cal. 369.

**2. Prescriptive Rights — As Against Upper Riparian Owner.** — *Stockport Waterworks Co. v. Potter*, 3 H. & C. 326; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181.

**3. England.** — *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590, 3 Jur. N. S. 243; *Brymbo Water Co. v. Lester's Lime Co.*, 8 Reports 329.

**California.** — *Lakeside Ditch Co. v. Crane*, 80 Cal. 181; *Settlers' Ditch Co. v. Hayes*, (Cal. 1889) 22 Pac. Rep. 1152; *Hargrave v. Cook*, 108 Cal. 72; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158; *Patterson v. Mills*, (Cal. 1902) 68 Pac. Rep. 1034; *Walker v. Lillingston*, 137 Cal. 401.

**Maine.** — *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

**Nebraska.** — *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781; *Dunn v. Thomas*, (Neb. 1903) 96 N. W. Rep. 142.

**New York.** — *Townsend v. McDonald*, 12 N. Y. 382, 64 Am. Dec. 508.

**Oregon.** — *Wimer v. Simmons*, 27 Oregon 1, 50 Am. St. Rep. 685.

**Pennsylvania.** — *Butz v. Ihrie*, 1 Rawle (Pa.) 218; *Hopper v. Hopper*, 146 Pa. St. 365.

**Texas.** — *Mud Creek Irrigation, etc., Mfg. Co. v. Vivian*, 74 Tex. 170.

See also *Vliet v. Sherwood*, 35 Wis. 229.

**4. Weare v. Chase, 93 Me. 264; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.**

**5. As Against Lower Riparian Owners — England.** — *Wood v. Sutcliffe*, 2 Sim. N. S. 163, 21 L. J. Ch. 253, 16 Jur. 75; *Greensdale v. Halliday*, 6 Bing. 379, 19 E. C. L. 106, 8 L. J. C. Pl. O. S. 124; *Bealey v. Shaw*, 6 East 208; *French Hoek Com'rs v. Hugo*, 10 App. Cas. 336.

**United States.** — *Hazard v. Robinson*, 3 Mason (U. S.) 272; *Tyler v. Wilkinson*, 4 Mason (U. S.) 397.

**Alabama.** — *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453.

**Arizona.** — *Kleyenstuber v. Robinson*, (Ariz. 1898) 52 Pac. Rep. 1117.

**California.** — *Crandall v. Woods*, 8 Cal. 136; *Evans v. Ross*, (Cal. 1885) 8 Pac. Rep. 88;

*Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554; *Cox v. Clough*, 70 Cal. 345; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598; *Oneto v. Restano*, 78 Cal. 374; *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217; *Riverside Water Co. v. Gage*, 89 Cal. 410; *Frederick v. Dickey*, 91 Cal. 358; *Chauvet v. Hill*, 93 Cal. 407; *Santa Cruz v. Enright*, 95 Cal. 105; *Gallaher v. Montecito Valley Water Co.*, 101 Cal. 242; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Smith v. Green*, 109 Cal. 228; *Senior v. Anderson*, 115 Cal. 496; *Hayes v. Silver Creek, etc., Land, etc., Co.*, 136 Cal. 238; *Strong v. Baldwin*, 137 Cal. 432.

**Georgia.** — *Phinizy v. Augusta*, 47 Ga. 260.

**Kentucky.** — *Manier v. Myers*, 4 B. Mon. (Ky.) 514.

**Maine.** — *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

**Massachusetts.** — *Cary v. Daniels*, 8 Met. (Mass.) 466, 4 Am. Dec. 532; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241.

**Michigan.** — *Mastenbrook v. Alger*, 110 Mich. 414.

**Nebraska.** — *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713.

**New Hampshire.** — *Bucklin v. Truell*, 54 N. H. 122; *Keysar v. Covell*, 62 N. H. 283; *Taylor v. Blake*, 64 N. H. 392.

**New Jersey.** — *Shields v. Arndt*, 4 N. J. Eq. 311.

**New Mexico.** — *Trambley v. Luterma*, 6 N. Mex. 15.

**New York.** — *Hoyt v. Carter*, 16 Barb. (N. Y.) 212; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Smith v. Adams*, 6 Paige (N. Y.) 435.

**Oregon.** — *Huston v. Bybee*, 17 Oregon 140; *McDougal v. Lame*, 39 Oregon 212; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 200, 93 Am. St. Rep. 701; *Britt v. Reed*, 42 Oregon 76.

**Pennsylvania.** — *Allen v. Clifton*, 10 Pa. St. 298, 64 Am. Dec. 657; *Messinger's Appeal*, 109 Pa. St. 285; *Horn v. Miller*, 142 Pa. St. 557; *Irving v. Media*, 194 Pa. St. 648.

**Texas.** — *Evans v. Ross*, 8 Cal. 136; *Evans v. Ross*, 8 Cal. 136, 211, 57 Am. Dec. 711.



whom the prescription is claimed,<sup>1</sup> must be open and notorious or such as to give notice to others of the adverse claim,<sup>2</sup> and must be continuous and uninterrupted for the requisite period;<sup>3</sup> but to render the diversion continuous it is not necessary that it should be constant.<sup>4</sup>

*South Carolina.*—Jordan v. Lang, 22 S. Car. 159.

*Texas.*—Cape v. Thompson, 21 Tex. Civ. App. 681.

*Vermont.*—Rogers v. Bancroft, 20 Vt. 250.

**1. What Necessary to Acquisition of Prescriptive Right**—*England.*—Cooper v. Barber, 3 Taunt. 99; Chasemore v. Richards, 7 H. L. Cas. 349; Webb v. Bird, 13 C. B. N. S. 841, 106 E. C. L. 841.

*United States.*—Union Mill, etc., Co. v. Ferris, 2 Sawy. (U. S.) 176.

*Alabama.*—Stewart v. White, 128 Ala. 202.

*California.*—Feliz v. Los Angeles, 58 Cal. 73; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185; Cox v. Clough, 70 Cal. 345; Heilbron v. Kings River, etc., Canal Co., 76 Cal. 11; Oneto v. Restano, 78 Cal. 374; Heintzen v. Binninger, 79 Cal. 5; Alta Land, etc., Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217; Paige v. Rocky Ford Canal, etc., Co., 83 Cal. 84; Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1; Ball v. Kehl, 95 Cal. 606; Faulkner v. Rondoni, 104 Cal. 140; Schirmer v. Drexler, 134 Cal. 134; Churchill v. Louie, 135 Cal. 608.

*Connecticut.*—Manning v. Smith, 6 Conn. 289; Parker v. Hotchkiss, 25 Conn. 321.

*Idaho.*—Brossard v. Morgan, 7 Idaho 215; Hall v. Blackman, 8 Idaho 272.

*Iowa.*—Preston v. Hull, 77 Iowa 309.

*Maine.*—Donnell v. Clark, 19 Me. 174; Morse v. Williams, 62 Me. 445.

*Massachusetts.*—Pratt v. Lamson, 2 Allen (Mass.) 275; Brace v. Yale, 10 Allen (Mass.) 441; Gould v. Boston Duck Co., 13 Gray (Mass.) 442; Pitts v. Lancaster Mills, 13 Met. (Mass.) 156.

*Montana.*—Crawford v. Minnesota, etc., Land, etc., Co., 15 Mont. 153; Smith v. Hope Min. Co., 18 Mont. 432.

*Nebraska.*—Meng v. Coffey, (Neb. 1903) 93 N. W. Rep. 713.

*Nevada.*—Winter v. Winter, 8 Nev. 129; Smith v. Logan, 18 Nev. 149.

*New Jersey.*—Holman v. Boiling Springs Bleaching Co., 14 N. J. Eq. 335.

*New York.*—Haight v. Price, 21 N. Y. 241; Dexter v. Jefferson Paper Co., (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 389.

*North Carolina.*—Felton v. Simpson, 11 Ired. L. (33 N. Car.) 84.

*Oregon.*—Huston v. Bybee, 17 Oregon 140; North Powder Milling Co. v. Coughanour, 34 Oregon 9; Lavery v. Arnold, 36 Oregon 84; Boyce v. Copper, 37 Oregon 256; Mattis v. Hosmer, 37 Oregon 523.

*Pennsylvania.*—Knights of Pythias Benev. Assoc. v. Leadbeter, 2 Pa. Super. Ct. 461.

*Utah.*—Center Creek Water, etc., Co. v. Lindsay, 21 Utah 192; Smith v. North Canyon Water Co., 16 Utah 194.

*Vermont.*—Rogers v. Page, Brayt. (Vt.) 169; Mason v. Horton, 67 Vt. 266, 48 Am. St. Rep. 817.

*Virginia.*—Stokes v. Upper Appomatox Co., 3 Leigh (Va.) 318.

*Wisconsin.*—Fox River Flour, etc., Co. v. Kelley, 70 Wis. 287.

And see generally the title PRESCRIPTION, vol. 22, p. 1192 et seq.

**2.** Fogarty v. Fogarty, 129 Cal. 46; Churchill v. Louie, 135 Cal. 608; Salem Flouring Mills Co. v. Lord, 42 Oregon 82, 103; Britt v. Reed, 42 Oregon 76; Center Creek Water, etc., Co. v. Lindsay, 21 Utah 192. See also generally the title PRESCRIPTION, vol. 22, p. 1209.

**3.** *England.*—Eaton v. Swansea Waterworks Co., 17 Q. B. 267, 79 E. C. L. 267.

*United States.*—Union Mill, etc., Co. v. Dangberg, 81 Fed. Rep. 73.

*California.*—Heilbron v. Kings River, etc., Canal Co., 76 Cal. 11; Alta Land, etc., Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217; Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1; Ball v. Kehl, 95 Cal. 606; Bree v. Wheeler, 129 Cal. 145.

*Connecticut.*—Manning v. Smith, 6 Conn. 289; King v. Tiffany, 9 Conn. 162.

*Idaho.*—Brossard v. Morgan, 7 Idaho 215.

*Nevada.*—Authors v. Bryant, 22 Nev. 242.

*Oregon.*—Faull v. Cooke, 19 Oregon 455, 20 Am. St. Rep. 836.

*Utah.*—Center Creek Water, etc., Co. v. Lindsay, 21 Utah 192; Smith v. North Canyon Water Co., 16 Utah 194; Wasatch Irrigation Co. v. Fulton, 23 Utah 466.

And see generally the title PRESCRIPTION, vol. 22, p. 1203 et seq.

**What Constitutes Interruption of Use.**—Hesperia Land, etc., Co. v. Rogers, 83 Cal. 10, 17 Am. St. Rep. 209; Alta Land, etc., Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217; Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. (Mass.) 241; Authors v. Bryant, 22 Nev. 242; Oregon Constr. Co. v. Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701.

**4.** See generally the title PRESCRIPTION, vol. 22, p. 1204.

The fact that, because of the drying up of the stream during portions of the year, the diversion of the water is not continued during the whole year will not prevent the diversion from being continuous where the water is diverted whenever there is sufficient for the prescripitor's use. McDougal v. Lame, 39 Oregon 212.

To render the use continuous it is not necessary that the same quantity of water be diverted each year. Jordan v. Lang, 22 S. Car. 159.

In Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. (Mass.) 241, where the plaintiff had for more than twenty years, by means of a canal, adversely diverted and used the water of a stream, subject to a reservation, in favor of the owners of a meadow through which the canal was cut, of the right to turn the water down the natural channel for six weeks in each year for the purpose of getting hay more conveniently and digging clay, it was held that such reservation did not prevent the plaintiff from acquiring the right of diverting the water by an actual use and diversion substantially

**The Mere Fact that the Right to Divert the Water Is Disputed** by the lower riparian owner will not prevent the prescriptive right from being acquired where there is no interruption of the diversion.<sup>1</sup>

**Prescriptive Period.**—To create a prescriptive right, the diversion, in the absence of express statutory provision, must be exercised for the period necessary to create a bar by adverse possession to the recovery of land.<sup>2</sup>

**The Time for Prescription Begins to Run** only from the time of the actual diversion;<sup>3</sup> but where there is an actual diversion the time begins then to run though the prescriptor does not immediately make a beneficial use of the waters diverted.<sup>4</sup>

**Where the Federal Government Is a Riparian Owner** below the point of diversion, no prescriptive right to divert the water can be acquired as against such government.<sup>5</sup> As against a grantee of the federal government, of course, the right may be acquired;<sup>6</sup> but to establish a prescriptive right of diversion as against such grantee the right must have been exercised for the full prescriptive period after the federal government had granted the land.<sup>7</sup>

**The Extent of the Prescriptive Right** to divert the waters of a watercourse is fixed by the actual extent of the continued diversion for the prescriptive period.<sup>8</sup>

general and continuous, but operated only as a limitation of the right acquired.

1. *Cox v. Clough*, 70 Cal. 345; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701. Compare *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450. See generally the title **PRESCRIPTION**, vol. 22, p. 1205.

2. **Prescriptive Period—England.**—*Balston v. Bensted*, 1 Campb. 463; *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11; *Prescott v. Phillips*, cited in *Bealey v. Shaw*, 6 East 208.

*United States.*—*Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 539.

*Alabama.*—*Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424.

*California.*—*Crandall v. Woods*, 8 Cal. 136; *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 509, 85 Am. Dec. 145; *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217; *Spargur v. Heard*, 90 Cal. 221; *Jatunn v. Smith*, 95 Cal. 154.

*Connecticut.*—*Sherwood v. Burr*, 4 Day (Conn.) 244, 4 Am. Dec. 211; *Ingraham v. Hutchinson*, 2 Conn. 591; *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386.

*Georgia.*—*Phinizz v. Augusta*, 47 Ga. 260.

*Illinois.*—*Rudd v. Williams*, 43 Ill. 385.

*Maine.*—*Murchie v. Gates*, 78 Me. 300; *Dority v. Dunning*, 78 Me. 381.

*Massachusetts.*—*Campbell v. Talbot*, 132 Mass. 174.

*Missouri.*—*House v. Montgomery*, 19 Mo. App. 170; *Smith v. Musgrove*, 32 Mo. App. 241.

*Nevada.*—*Boynton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781.

*New Hampshire.*—*Gilman v. Tilton*, 5 N. H. 231; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Burnham v. Kempton*, 44 N. H. 78; *Bucklin v. Truell*, 54 N. H. 122.

*New Jersey.*—*Campbell v. Smith*, 8 N. J. L. 140, 14 Am. Dec. 400.

*New York.*—*Terry v. Smith*, 47 Hun (N. Y.) 333; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Smith v. Adams*, 6 Paige (N. Y.) 435; *Haight v. Price*, 21 N. Y. 241.

*North Carolina.*—*Pugh v. Wheeler*, 2 Dev. & B. L. (19 N. Car.) 50; *Geer v. Durham Water Co.*, 127 N. Car. 349.

*Ohio.*—*Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732.

*Pennsylvania.*—*Strickler v. Todd*, 10 S. & R. (Pa.) 63, 13 Am. Dec. 649; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313; *Darlington v. Painter*, 7 Pa. St. 473; *Messinger's Appeal*, 109 Pa. St. 285; *Horn v. Miller*, 142 Pa. St. 557.

*Texas.*—*Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Baker v. Brown*, 55 Tex. 377.

*Utah.*—*Center Creek Water, etc., Co. v. Lindsay*, 21 Utah 192.

*Vermont.*—*Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220; *Ford v. Whitlock*, 27 Vt. 265.

And see generally the title **PRESCRIPTION**, vol. 22, p. 1212 *et seq.*

3. *Lavery v. Arnold*, 36 Oregon 84.

4. *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701.

5. **Against Federal Government.**—*Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Wilkins v. McCue*, 46 Cal. 656; *Jatunn v. Smith*, 95 Cal. 154. See generally the title **PRESCRIPTION**, vol. 22, p. 1189.

6. **Against Grantee of Federal Government.**—*Jatunn v. Smith*, 95 Cal. 154.

7. *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

8. **Extent of Prescriptive Right—England.**—*Kenchin v. Knight*, 1 Wils. C. Pl. 253; *Paddock v. Forrester*, 3 M. & G. 903, 42 E. C. L. 470; *Strutt v. Bovingdon*, 5 Esp. 56.

*California.*—*Faulkner v. Rondoni*, 104 Cal. 140; *Wood v. Etiwanda Water Co.*, 122 Cal. 152; *Smith v. Corbit*, 116 Cal. 587.

*Massachusetts.*—*Brace v. Yale*, 99 Mass. 488.

*Michigan.*—*Mastenbrook v. Alger*, 110 Mich. 414.

*Nebraska.*—*Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713.

*New Hampshire.*—*Watkins v. Peck*, 13 N. H. 360.

*New Jersey.*—*Carlisle v. Cooper*, 21 N. J. Eq. 576.

In *England* it has been held that a prescriptive right to divert the waters of the stream at a particular place and in a particular manner will not authorize a diversion at another place and in another manner.<sup>1</sup> In the *United States*, however, it has been held that where a prescriptive right to divert a certain amount of water has been acquired, a change in the mode or object of the use without increasing the quantity is not wrongful.<sup>2</sup>

**Loss of Right.** — Where a person has acquired a prescriptive right to divert the waters of a stream, he does not lose such right by mere nonuser.<sup>3</sup>

**§. REMEDIES FOR DIVERSION.** — (1) *Action for Damages.* — The riparian proprietor below the point at which the waters of a stream are wrongfully diverted may, of course, maintain an action for damages suffered by reason of such diversion;<sup>4</sup> and where there is a wrongful diversion of the water of a stream which materially diminishes its natural flow over the lands of a proprietor below he may maintain an action and is entitled to nominal damages

*Pennsylvania.* — *Darlington v. Painter*, 7 Pa. St. 473; *Irving v. Media*, 10 Pa. Super. Ct. 132, 7 Del. Co. Rep. (Pa.) 378, 44 W. N. C. (Pa.) 131, *affirmed* 194 Pa. St. 648.

See also generally the title **PRESCRIPTION**, vol. 22, p. 1211 *et seq.*

1. *McIntyre v. McGavin*, (1893) A. C. 268. But in *Saunders v. Newman*, 1 B. & Ald. 258, *Abbott, J.*, said: "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different."

2. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55; *Terry v. Smith*, 47 Hun (N. Y.) 333; *Darlington v. Painter*, 7 Pa. St. 473. See also *Smith v. Adams*, 6 Paige (N. Y.) 435. Compare *Simpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228.

In *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454, 32 Am. Dec. 382, where for more than twenty years a party had used a certain quantity of water at a particular dam, it was held that he might open his gates and draw that quantity without using it there, in order to use it at other works below on the same stream.

3. **Loss of Right — Nonuser.** — *Haight v. Morris Aqueduct*, 4 Wash. (U. S.) 601; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

In *Shields v. Arndt*, 4 N. J. Eq. 234, where a lower riparian owner suffered an upper owner to divert water of the stream from his land for twenty years, during which period none ran to the land of such lower proprietor, and then the upper proprietor turned the water so that it ran again upon the lower proprietor's land, continuing to do so for a time less than the prescriptive period, it was held that such upper proprietor might again divert it upon his own land, without becoming liable to the lower proprietor.

4. **Lower Riparian Owner — England.** — *Blake-more v. Glamorganshire Canal Co.*, 1 Gale 78, 2 C. M. & R. 133, 5 Tyrw. 603, 4 L. J. Exch. 146; *Wright v. Howard*, 1 Sim. & St. 190; *Ewing v. Colquhoun*, 2 App. Cas. 839; *Frankum v. Falmouth*, 4 N. & M. 330, 2 Ad. & El. 452, 29 E. C. L. 140, 1 H. & W. 1.

*United States.* — *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189.

*Alabama.* — *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

*California.* — *Green v. State*, 73 Cal. 29.

*Kansas.* — *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 24; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265.

*Maine.* — *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 564.

*Massachusetts.* — *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160.

*Michigan.* — *Pettibone v. Smith*, 37 Mich. 579; *Hilliker v. Coleman*, 73 Mich. 170.

*Missouri.* — *Welton v. Martin*, 7 Mo. 307.

*New Hampshire.* — *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355.

*New Jersey.* — *Vanwinkle v. Curtis*, 3 N. J. Eq. 427; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26; *Koch v. Delaware, etc., R. Co.*, 54 N. J. L. 401.

*New York.* — *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *Elridge v. Hill*, 2 Johns. Ch. (N. Y.) 281; *Van Hoesen v. Coventry*, 10 Barb. (N. Y.) 518; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Colrick v. Swinburne*, 105 N. Y. 503; *Neal v. Rochester*, 156 N. Y. 213, *affirming* 88 Hun (N. Y.) 614; *Covert v. Valentine*, (Supm. Ct. Gen. T.) 50 N. Y. St. Rep. 516.

*North Carolina.* — *Fleming v. Wilmington*, etc., R. Co., 115 N. Car. 676.

*Ohio.* — *Thayer v. Brooks*, 17 Ohio 489, 49 Am. Dec. 474.

*Oregon.* — *Weiss v. Oregon Iron, etc., Co.*, 13 Oregon 496.

*Pennsylvania.* — *Hart v. Evans*, 8 Pa. St. 13; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438, 27 Am. St. Rep. 710.

*Vermont.* — *Kimball v. Ladd*, 42 Vt. 747; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828; *Clement v. Gould*, 61 Vt. 573.

*Wisconsin.* — *Kimberly, etc., Co. v. Hewitt*, 79 Wis. 334.

**Limitation of Actions.** — *Green Bay, etc., Canal Co. v. Kaukauna Water Power Co.*, 112 Wis. 223.

**Venue.** — The action for damages for diversion of a watercourse is local, and not transitory. *Mersey, etc., Nav. Co. v. Douglas*, 2 East



although he has as yet made no use of the waters or although water enough is left in the stream for the purpose of his business as then conducted.<sup>1</sup>

**The Measure of Damages** for the wrongful diversion of a watercourse is the actual damage which directly results from the wrongful act.<sup>2</sup>

(2) *Equitable Relief*. — A court of equity will generally grant relief by way of injunction to prevent the continued wrongful diversion of a watercourse,<sup>3</sup> and such relief may be granted though the complainant has suffered no

497; *Williams v. Land*, 4 Taunt. 729; *Watts v. Kinney*, 23 Wend. (N. Y.) 484; *Conant v. Deep Creek, etc.*, *Irrigation Co.*, 23 Utah 627. See also *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538; *Banigan v. Worcester*, 30 Fed. Rep. 392.

**1. Necessity for Special Damages** — *England*. — *Marzetti v. Williams*, 1 B. & Ad. 415, 20 E. C. L. 412; *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590; *Mellor v. Spateman*, 1 Saund. 343; *Turner v. Lewis*, 1 Chitty 265, 18 E. C. L. 74; *Fineux v. Hovenden*, Cro. Eliz. 664; *Bower v. Hill*, 1 Bing. N. Cas. 549, 27 E. C. L. 489; *Harrop v. Hirst*, L. R. 4 Exch. 43; *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11.

*United States*. — *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 190.

*Alabama*. — *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72. See, however, *Burden v. Mobile*, 21 Ala. 309.

*California*. — *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Creighton v. Evans*, 53 Cal. 55.

*Connecticut*. — *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401; *Watson v. New Milford Water Co.*, 71 Conn. 442.

*Georgia*. — *Southern Marble Co. v. Darnell*, 94 Ga. 231.

*Illinois*. — *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199.

*Maine*. — *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Butman v. Hussey*, 12 Me. 407; *Munroe v. Stickney*, 48 Me. 462.

*Massachusetts*. — *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *White v. Chapin*, 12 Allen (Mass.) 516; *Lund v. New Bedford*, 121 Mass. 286; *Ware v. Allen*, 140 Mass. 513. See, however, *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

*Mississippi*. — *Chapman v. Copeland*, 55 Miss. 476.

*New Hampshire*. — *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Blodgett v. Stone*, 60 N. H. 167.

*New York*. — *Allaire v. Whitney*, 1 Hill (N. Y.) 487; *Standen v. New Rochelle Water Co.*, 91 Hun (N. Y.) 272; *Crooker v. Bragg*, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555; *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575, reversing (Supm. Ct. Gen. T.) 10 N. Y. Supp. 872. Compare *Sumner v. Gloversville*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 523.

*Vermont*. — *Chatfield v. Wilson*, 27 Vt. 670.

**2. Measure of Damages** — *California*. — *Williams v. Harter*, 121 Cal. 47; *Churchill v. Rose*, 136 Cal. 576.

*Illinois*. — *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Fitzsimmons v. Munch*, 79 Ill. App. 538.

*Kentucky*. — *Hopkinsville Bank v. Western Kentucky Insane Asylum*, 108 Ky. 357.

*Maine*. — *Williams v. Camden, etc.*, *Water Co.*, 79 Me. 543.

*Maryland*. — *Addison v. Hack*, 2 Gill (Md.) 221, 41 Am. Dec. 421; *Washington County Water Co. v. Garver*, 91 Md. 398; *Aberdeen v. Bradford*, 94 Md. 670.

*Massachusetts*. — *Washburn, etc., Mfg. Co. v. Worcester*, 153 Mass. 494.

*Montana*. — *Carron v. Wood*, 10 Mont. 500; *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543.

*New Jersey*. — *Read v. Barker*, 30 N. J. L. 378; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.

*New York*. — *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306, 8 Am. Dec. 404; *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82, 164 N. Y. 602; *Reisert v. New York*, 69 N. Y. App. Div. 302; *Kinsey v. New York*, 75 N. Y. App. Div. 262; *Rider v. Amsterdam*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 375.

*North Carolina*. — *Geer v. Durham Water Co.*, 127 N. Car. 349.

*Pennsylvania*. — *Hart v. Evans*, 8 Pa. St. 13; *Bare v. Hoffman*, 79 Pa. St. 71, 21 Am. Rep. 42; *Little Schuylkill Nav., etc., Co. v. French*, 81\* Pa. St. 366; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438, 27 Am. St. Rep. 710, 29 W. N. C. (Pa.) 49; *Lewis v. Springfield Water Co.*, 176 Pa. St. 237; *Irving v. Media*, 194 Pa. St. 648; *Craig v. Shippensburg*, 11 Pa. Super. Ct. 490.

*Wisconsin*. — *Green Bay, etc., Canal Co. v. Kaukauna Water Power Co.*, 112 Wis. 323.

In *Colrick v. Swinburne*, 105 N. Y. 503, in an action for an injury caused by the diversion of a stream from the plaintiff's tannery, it was held that the diminished rental value during the period of diversion was the proper measure of damages.

In *Pollitt v. Long*, 58 Barb. (N. Y.) 20, where the diversion of the water by the defendant resulted in depriving the plaintiffs of the use of the water for their factory, it was held that the true measure of damages was the value of the use of the water to the plaintiffs during the time when they were wrongfully deprived of it.

**3. Equitable Relief** — *England*. — *Robinson v. Byron*, 1 Bro. C. C. 588; *Swain v. Rogers, Cary*, 26; *Dewhurst v. Wrigley*, Coop. Pr. Cas. 319; *Anonymous*, 3 Eq. Cas. Abr. 522, pl. 3; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, 46 L. J. Ch. 773, 37 L. T. N. S. 149, 25 W. R. 874.

*Canada*. — *Saunders v. William Richards Co.*, 2 N. Bruns. Eq. Rep. 303.

*United States*. — *Cole Silver Min. Co. v. Vir-*

material damage by reason of the diversion,<sup>1</sup> as otherwise the continued diversion might ripen into a prescriptive right<sup>2</sup> or require a multiplicity of suits;<sup>3</sup> but in such a case the injunction will be made only broad enough to preserve the complainant's rights, and the diversion should be enjoined only in so far as it may result in actual injury to the complainant.<sup>4</sup> A judgment at law for the wrongful diversion of the water is, as a general rule, conclusive between the parties in a subsequent suit in equity to enjoin the continuance

ginia, etc., *Water Co.*, 1 *Sawyer*. (U. S.) 470; *Dexter v. Providence Aqueduct Co.*, 1 *Story* (U. S.) 387; *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Pine v. New York*, 103 Fed. Rep. 337. See also *Mason v. Cotton*, 2 *McCrary* (U. S.) 82.

*Alabama*.—*Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Potier v. Burden*, 38 Ala. 651; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Roberts v. Vest*, 126 Ala. 355.

*California*.—*Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84; *Conkling v. Pacific Imp. Co.*, 87 Cal. 296; *Barrows v. Fox*, (Cal. 1892) 30 Pac. Rep. 768; *Churchill v. Baumann*, 95 Cal. 541; *Vineland Irrigation Dist. v. Azusa Irrigation Co.*, 126 Cal. 486; *Wallace v. Farmers' Ditch Co.*, 130 Cal. 578.

*Connecticut*.—*Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Williams v. Wadsworth*, 51 Conn. 277.

*Kansas*.—*Atchison, etc., R. Co. v. Long*, 46 Kan. 701, 26 Am. St. Rep. 165; *Campbell v. Michiges*, 62 Kan. 503.

*Michigan*.—*Hilliker v. Coleman*, 73 Mich. 170.

*Minnesota*.—*Bennett v. Murtaugh*, 20 Minn. 153.

*New Jersey*.—*Shields v. Arndt*, 4 N. J. Eq. 234; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Sparks Mfg. Co. v. Newton*, 60 N. J. Eq. 399.

*New York*.—*Corning v. Troy Iron, etc., Factory*, 39 Barb. (N. Y.) 311; *West Point Iron Co. v. Reymert*, 45 N. Y. 705; *Smith v. Rochester*, 38 Hun (N. Y.) 612, *affirmed* 104 N. Y. 674; *Chace v. Warsaw Water Works Co.*, 79 Hun (N. Y.) 151; *Rider v. Amsterdam*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 375; *Whaley v. New York*, 83 N. Y. App. Div. 6; *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.*, 84 N. Y. App. Div. 92; *Duesler v. Johnstown*, 24 N. Y. App. Div. 608; *Mudge v. Salisbury*, 110 N. Y. 413; *Gallagher v. Ings-ton Water Co.*, 25 N. Y. App. Div. 82.

*Ohio*.—*Detwiler v. Toledo*, 3 Ohio Cir. Dec. 177, 5 Ohio Cir. Ct. 360.

*Tennessee*.—*Webster v. Harris*, (Tenn. 1902) 69 S. W. Rep. 782.

*Wisconsin*.—*Fox River Flour, etc., Co. v. Kelly*, 70 Wis. 287.

See also *Fairhaven Marble, etc., Co. v. Adams*, 46 Vt. 496; *Chesapeake, etc., R. Co. v. Bobbett*, 5 W. Va. 138. Compare *Jordan v. Woodward*, 38 Me. 423.

**Preliminary Injunction Refused Where No Substantial Injury Shown.**—*Pine v. New York*, 76 Fed. Rep. 418, *affirmed* (C. C. A.) 96 Fed. Rep. 1665.

**Relief Necessary to Prevent Multiplicity of Suits.**—*Pine v. New York*, 103 Fed. Rep. 337.

**1. Material Damage Not Necessary—United States.**—*Pine v. New York*, 103 Fed. Rep. 337. Compare *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73.

*Alabama*.—*Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Franklin v. Pollard Mill Co.*, 88 Ala. 318.

*California*.—*Conkling v. Pacific Imp. Co.*, 87 Cal. 296; *Mott v. Ewing*, 90 Cal. 231; *Gould v. Eaton*, 117 Cal. 539. See, however, *Modoc Land, etc., Co. v. Booth*, 102 Cal. 151; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Fifield v. Spring Valley Water Works*, 130 Cal. 552. Compare *Nevada County, etc., Canal Co. v. Kidd*, 37 Cal. 282.

*Georgia*.—*Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 118 Ga. 255.

*New York*.—*Smith v. Rochester*, 38 Hun (N. Y.) 612, *affirmed* 104 N. Y. 674; *Gilzinger v. Saugerties Water Co.*, 66 Hun (N. Y.) 173; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, *affirming* 13 N. Y. App. Div. 42. Compare *Smith v. Adams*, 6 Paige (N. Y.) 435.

*Oregon*.—*Weiss v. Oregon Iron, etc., Co.*, 13 Oregon 496; *Jones v. Conn*, 39 Oregon 30, 87 Am. St. Rep. 634.

*Vermont*.—*Adams v. Barney*, 25 Vt. 225.

*Washington*.—*Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

*Wisconsin*.—*McEvoy v. Gallagher*, 107 Wis. 331.

Compare *Minnesota L. & T. Co. v. St. Anthony Falls Water Power Co.*, 82 Minn. 505.

**2.** *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 118 Ga. 255.

**3.** *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 118 Ga. 255.

**4.** *Franklin v. Pollard Mill Co.*, 88 Ala. 318; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Garwood v. New York Cent., etc., R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452.

Thus, in *Garwood v. New York Cent., etc., R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, which was a suit to prevent a railroad company as riparian owner from diverting water from a running stream by pipes and reservoirs for the use of its locomotive engines to the detriment of a lower proprietor who was a mill owner and who claimed that the diversion diminished the grinding power of his mill, the defendant was restrained only "from diverting the water to the injury of the plaintiff."

In *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, the defendant was enjoined from diverting the water "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use" for it.

of such wrongful diversion.<sup>1</sup> The general rule of equity, however, that the granting of an injunction rests in each particular case in the sound discretion of the court, exercised according to the principles of equity,<sup>2</sup> applies to the granting of injunctions against the diversion of the waters of a watercourse,<sup>3</sup> and an injunction against such diversion should not be granted where it would be productive of great hardship or oppression or great public or private mischief.<sup>4</sup> Thus, applying these principles, an injunction against the diversion of the waters of a watercourse for the purpose of supplying the inhabitants of a municipality with water has been denied.<sup>5</sup> An injunction against the continued diversion of the water of a watercourse may be granted though in order to comply therewith it may be necessary for the defendant to perform specific acts.<sup>6</sup>

**Effect of Laches.** — As in other cases, if a riparian owner is guilty of unreasonable delay in applying for an injunction, he may thereby forfeit his claim to that specific form of remedy.<sup>7</sup>

(3) *Criminal Prosecution.* — In some jurisdictions the wrongful diversion of a watercourse is made punishable criminally.<sup>8</sup>

(4) *Who May Sue for Diversion.* — As a general rule, only riparian owners who are injured by reason of the wrongful diversion of the waters of a watercourse can sue on account of such diversion,<sup>9</sup> and hence a riparian owner above the point of diversion cannot sue, as he is not injured by the defendant's act.<sup>10</sup> But the action may be maintained by lower riparian owners<sup>11</sup> or by one rightfully in possession of riparian lands, though he may not have the fee or legal title thereto, as, for example, a pre-emptor of public lands.<sup>12</sup> Of course, if the diversion is with the consent of the lower riparian owner he cannot recover damages therefor.<sup>13</sup>

**Persons Who Are Not Riparian Owners,** and therefore not entitled to riparian rights, cannot sue for the wrongful diversion of the waters of a watercourse.<sup>14</sup>

(5) *Who Liable for Diversion.* — Only those who participate in the wrongful diversion of the waters of a watercourse are liable therefor.<sup>15</sup> Thus,

1. *Potier v. Burden*, 38 Ala. 651.

2. **Discretion of Court.** — See the title INJUNCTIONS, vol. 16, pp. 345-347.

3. *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147; *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.*, 84 N. Y. App. Div. 92.

4. *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147.

5. *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147; *New Haven Water Co. v. Wallingford*, 72 Conn. 293; *Murphy v. Stanford Water, etc., Co.*, (Ky. 1899) 50 S. W. Rep. 835.

6. Thus, the court may grant an injunction to prevent the wrongful diversion of the water from its natural course although the effect of the order may be to require the defendant to destroy a ditch or do other acts necessary to restore the water to its natural channel. *Goodrich v. Georgia R., etc., Co.*, 115 Ga. 340.

7. **Laches.** — *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147; *Thomas v. Woodman*, 23 Kan. 217, 33 Am. Rep. 156. See also *Jacox v. Clark, Walk, (Mich.)* 249. And see the title INJUNCTIONS, vol. 16, p. 356.

8. **Criminal Prosecutions.** — *Paragon Paper Co. v. State*, 19 Ind. App. 314; *Armfield v. State*, 27 Ind. App. 488, the latter case holding, however, that the *Indiana* statute which prescribes a punishment for any one who unlawfully "diverts" any stream of water from its natural course does not necessarily render punishable the "obstruction" of the water.

9. **Who May Sue for Diversion.** — *Miner v. Gil-*

*mour*, 12 Moo. P. C. 131; *Creighton v. Kaweah Canal, etc., Co.*, 67 Cal. 221; *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77; *Rathbone v. McConnell*, 20 Barb. (N. Y.) 311.

Thus, the diversion of water from a watercourse will not be restrained at the suit of one who owns land located on another watercourse, to which the former is an occasional tributary, unless such diversion diminishes the quantity of water which would otherwise have flowed into the other watercourse by a natural channel, or shortens the period of its natural flow, and it will be restrained only as to such quantity and period. *Creighton v. Kaweah Canal, etc., Co.*, 67 Cal. 221.

10. **Upper Riparian Owner.** — *Stockport Waterworks Co. v. Potter*, 3 H. & C. 326; *Larimer, etc., Reservoir Co. v. Water Supply, etc., Co.*, 7 Colo. App. 225.

11. **Lower Riparian Owner.** — *Hogg v. Connells-ville Water Co.*, 168 Pa. St. 456.

Where an upper riparian owner wrongfully diverts the waters from the watercourse, a subsequent purchaser of lower riparian property may maintain an action for damages by reason of the continuance of the diversion. *Chapman v. Copeland*, 55 Miss. 476.

12. *Conkling v. Pacific Imp. Co.*, 87 Cal. 296.

13. *Churchill v. Baumann*, 104 Cal. 369.

14. **Nonriparian Owners.** — *Silver Creek, etc., Land, etc., Co. v. Hayes*, 113 Cal. 142.

15. **Who Liable for Diversion.** — *Covert v. Cran-*



where the tenant of an upper riparian owner diverts the water without the consent of the landlord, the latter is not liable therefor to a lower riparian owner.<sup>1</sup> On the other hand, all persons who participate in the diversion of the water are liable,<sup>2</sup> and where the diversion was by a tenant, the landlord, after the termination of the tenancy, will be required to take measures to prevent such continued diversion.<sup>3</sup>

**8. Detention and Obstruction of Flow** — *a. DETENTION OF FLOW.* — A riparian owner has no right, in order to facilitate his use of the waters of a watercourse, unreasonably to detain them by means of dams and reservoirs.<sup>4</sup> It is otherwise, however, if under the circumstances of the case such a detention of the waters is reasonable for the proper and profitable enjoyment of them.<sup>5</sup> The question whether a particular detention is reasonable or unrea-

ford, 141 N. Y. 521, 38 Am. St. Rep. 826; *Standart v. Vivion*, 22 Tex. Civ. App. 142.

1. *Les Ecclesiastiques, etc., v. Kieffer*, 11 Quebec K. B. 173; *Gould v. Stafford*, 91 Cal. 146.

2. *Hughes v. Mung*, 3 Har. & M. (Md.) 441; *Covert v. Cranford*, 141 N. Y. 521, 38 Am. St. Rep. 826; *Gallagher v. Kingston Water Co.*, 164 N. Y. 602, *affirming* 25 N. Y. App. Div. 82; *Covert v. Valentine*, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 219; *Clement v. Gould*, 61 Vt. 573; *Barnes v. Gerberg*, 27 Wash. 126.

3. *Les Ecclesiastiques, etc., v. Kieffer*, 11 Quebec K. B. 173.

4. **Unreasonable Detention** — *England.* — *Shears v. Wood*, 7 Moo. 345, 17 E. C. L. 76, 1 L. J. C. Pl. O. S. 3; *Miner v. Gilmour*, 12 Moo. P. C. 131.

*Canada.* — *Ellis v. Clemens*, 21 Ont. 227, 22 Ont. 216.

*United States.* — *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189.

*California.* — *Ferreira v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Bliss v. Johnson*, 76 Cal. 597, 602; *Barneich v. Mercy*, 136 Cal. 205.

*Connecticut.* — *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386.

*Maine.* — *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Toothaker v. Winslow*, 61 Me. 123; *Weare v. Chase*, 93 Me. 264.

*Maryland.* — *Brooke v. Winters*, 39 Md. 505.

*Massachusetts.* — *Brace v. Yale*, 10 Allen (Mass.) 441; *Bearse v. Perry*, 117 Mass. 211; *Brown v. Dean*, 123 Mass. 254; *Clapp v. Herrick*, 129 Mass. 292; *Ware v. Allen*, 140 Mass. 513; *Potter v. Howe*, 141 Mass. 357.

*Michigan.* — *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Hall v. Ionia*, 38 Mich. 493; *Wooden v. Mt. Pleasant Lumber, etc., Co.*, 106 Mich. 412.

*New Hampshire.* — *Fuller v. Daniels*, 63 N. H. 395.

*New York.* — *Silshy Mfg. Co. v. State*, 104 N. Y. 562; *McKee v. Delaware, etc., Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740; *Woodford v. Brinker*, 168 N. Y. 662, *affirming* 47 N. Y. App. Div. 632; *Hoyt v. Cline*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 337; *Pierson v. Speyer*, 82 N. Y. App. Div. 556.

See also the title DAMS, vol. 8, p. 706.

**Impounding Water for Ornamental Purposes Held to Be Unreasonable.** — *Pierson v. Speyer*, 82 N. Y. App. Div. 556.

**Ornamental Pond.** — *Weare v. Chase*, 93 Me. 264.

**Tapping New Sources of Supply.** — It is no jus-

tification of a detention that the one detaining the water has tapped new sources of supply, whereby the complainant receives more water than before. The justification must be a reasonable use; and arbitrary and capricious detention is not such a reasonable use. *Ware v. Allen*, 140 Mass. 513.

**5. Reasonable Detention** — *England.* — *Ewing v. Colquhoun*, 2 App. Cas. 839; *Miner v. Gilmour*, 3 L. T. N. S. 98, 12 Moo. P. C. 131, 7 W. R. 328; *Belfast Rope Works Co. v. Boyd*, L. R. 21 Ir. 560.

*Canada.* — *Ellis v. Clemens*, 21 Ont. 227, 22 Ont. 216.

*United States.* — *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189.

*Alabama.* — *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

*California.* — *Drew v. Coles*, (Cal. 1893) 32 Pac. Rep. 229.

*Colorado.* — *Larimer County Reservoir Co. v. People*, 8 Colo. 614.

*Connecticut.* — *Betts v. Davenport*, 3 Conn. 286.

*Iowa.* — *Gehlen v. Knorr*, 101 Iowa 700, 63 Am. St. Rep. 416.

*Maine.* — *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.

*Maryland.* — *Williams v. Gale*, 3 Har. & J. (Md.) 231; *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191.

*Massachusetts.* — *Lawrence v. Fairhaven*, 5 Gray (Mass.) 110; *Hinckley v. Nickerson*, 117 Mass. 213.

*Minnesota.* — *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 37 Am. Rep. 399.

*New Hampshire.* — *Curtice v. Thompson*, 19 N. H. 471; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Griffin v. Bartlett*, 55 N. H. 119; *Schoff v. Upper Connecticut River, etc., Imp. Co.*, 57 N. H. 110.

*New Jersey.* — *Perrine v. Bergen*, 14 N. J. L. 355, 27 Am. Dec. 63; *Oliver v. New York Bay Cemetery Co.*, 38 N. J. Eq. 109.

*New York.* — *Honsee v. Hammond*, 39 Barb. (N. Y.) 89; *Sackrider v. Beers*, 10 Johns. (N. Y.) 241; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306, 8 Am. Dec. 404; *Pollitt v. Long*, 3 Thomp. & C. (N. Y.) 232; *Kerr v. Joslin*, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 929.

*North Carolina.* — *Shaw v. Ethridge*, 7 Jones L. (52 N. Car.) 225.

*Ohio.* — *Cooper v. Hall*, 5 Ohio 321.

sonable is, as a general rule, for the jury,<sup>1</sup> and is to be determined upon a consideration of the capacity of stream, the adaptation of the machinery to it, and all attendant circumstances.<sup>2</sup> One whose rights are not affected by the detention of the water has no ground for complaint.<sup>3</sup> The maintenance of a fence across a nonnavigable watercourse is permissible.<sup>4</sup>

**Stagnant Waters.** — Of course a riparian owner has no right to detain the waters, if they are thereby caused to become stagnant and injurious to the health of the neighboring landowners.<sup>5</sup>

**Prescriptive Right.** — As against riparian owners below the point of detention, the right to detain the waters of a watercourse may be acquired by prescription.<sup>6</sup> In order to establish such prescriptive right, however, the detention must have been adverse and of such character as to invade the rights of the

*Oregon.* — *Blair v. Boswell*, 37 Oregon 168; *Union Light, etc., Co. v. Lichty*, 42 Oregon 563. *Pennsylvania.* — *Beissell v. Sholl*, 4 Dall. (Pa.) 211; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313; *Hetrich v. Deachler*, 6 Pa. St. 32; *James v. Sterrett*, 137 Pa. St. 234.

*South Carolina.* — *White v. Whitney Mfg. Co.*, 60 S. Car. 254.

*Vermont.* — *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

*Virginia.* — *Mumpower v. Bristol*, 90 Va. 151, 44 Am. St. Rep. 902.

*Wisconsin.* — *Vliet v. Sherwood*, 35 Wis. 229.

See also the title DAMS, vol. 8, p. 705.

**Fish Ponds.** — To retain the water by a dam for the purposes of a fish pond, constantly maintained, and therefore allowing the natural flow of water to pass unimpeded to the plaintiff's mill, is a just and reasonable exercise of the defendant's right to use the water as it passes through his land. *Wood v. Edes*, 2 Allen (Mass.) 580.

**Ice Pond.** — *Gehlen v. Knorr*, 101 Iowa 700, 63 Am. St. Rep. 416; *De Baun v. Bean*, 29 Hun (N. Y.) 236.

**1. Reasonableness of Detention Question for Jury.** — *Denison Paper Mfg. Co. v. Robinson Mfg. Co.*, 74 Me. 116; *Springfield v. Harris*, 4 Allen (Mass.) 496, 81 Am. Dec. 715; *Thurber v. Martin*, 2 Gray (Mass.) 396, 61 Am. Dec. 468; *Holden v. Winnepiseogee Lake Cotton, etc., Mfg. Co.*, 53 N. H. 552; *White v. Whitney Mfg. Co.*, 60 S. Car. 254; *Mabie v. Matteson*, 17 Wis. 1. See also the title DAMS, vol. 8, p. 706, note.

In *Hetrich v. Deachler*, 6 Pa. St. 32, the plaintiffs, the owners of an ancient gristmill, complained of the defendant, the owner of a modern sawmill, that he detained the water from three to five days, and, besides using the water for driving his mill, applied it to irrigating his land. It was urged that such a detention must necessarily be objectionable, but the court declined so to hold, and submitted the question to the jury, referring, as a test of what might be done, to the "reasonableness of the detention, depending, as it must, on the nature and size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case."

**2.** *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; *White v. Whitney Mfg. Co.*, 60 S. Car. 254; *Timm v. Bear*, 29 Wis. 254.

**3.** *Wooden v. Mt. Pleasant Lumber, etc., Co.*, 106 Mich. 412; *Groat v. Moak*, 26 Hun (N. Y.) 380, affirming 94 N. Y. 115.

**4. Fence.** — *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821.

**5. Stagnant Waters — England.** — *Rex v. Wharton*, 12 Mod. 510.

*California.* — *Ramsay v. Chandler*, 3 Cal. 90.

*Georgia.* — *Morris v. McCamey*, 9 Ga. 160; *Nelms v. Clark*, 44 Ga. 617; *Central R., etc., Co. v. Wood*, 51 Ga. 515; *Ellington v. Bennett*, 56 Ga. 158; *Montezuma v. Minor*, 73 Ga. 484.

*Indiana.* — *State v. Bush*, 29 Ind. 110.

*Iowa.* — *State v. Close*, 35 Iowa 570; *Watson v. Van Meter*, 43 Iowa 76.

*Kentucky.* — *Neale v. Cogar*, 1 A. K. Marsh. (Ky.) 589; *Com. v. Clarke*, 1 A. K. Marsh. (Ky.) 323.

*Michigan.* — *Treat v. Bates*, 27 Mich. 390.

*Mississippi.* — *Thomas v. Calhoun*, 50 Miss. 80.

*New Jersey.* — *Carlisle v. Cooper*, 21 N. J. Eq. 576, 19 N. J. Eq. 257.

*New York.* — *People v. Townsend*, 3 Hill (N. Y.) 479; *Munson v. People* (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 16; *Mills v. Hall*, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160.

*North Carolina.* — *Daughtry v. Warren*, 85 N. Car. 136.

*Ohio.* — *Story v. Hammond*, 4 Ohio 376.

*South Carolina.* — *State v. Purse*, 4 McCord L. (S. Car.) 472.

*Tennessee.* — *State v. Gainer*, 3 Humph. (Tenn.) 39.

*Virginia.* — *Spencer v. Com.*, 2 Leigh (Va.) 751; *Miller v. Trueheart*, 4 Leigh (Va.) 570; *Mayo v. Turner*, 1 Munf. (Va.) 405; *Com. v. Webb*, 6 Rand. (Va.) 726.

*Wisconsin.* — *Luning v. State*, 1 Chand. (Wis.) 178, 2 Pin. (Wis.) 215, 52 Am. Dec. 153; *Douglass v. State*, 4 Wis. 387; *Stoughton v. State*, 5 Wis. 291; *Rooker v. Perkins*, 14 Wis. 79.

See also the title DAMS, vol. 8, p. 716.

**6. Prescriptive Right.** — *Drewett v. Sheard*, 7 C. & P. 465, 32 E. C. L. 585; *Holland v. Deakin*, 7 L. J. K. B. O. S. 145; *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386; *Pierce v. Travers*, 97 Mass. 306; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396; *Terry v. Smith*, 47 Hun (N. Y.) 333; *Marcy v. Shults*, 29 N. Y. 346; *Dexter v. Jefferson Paper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 389; *Miner v. Thomas Furnace Co.*, 12 Ohio Cir. Dec. 490; *Vickery v. Providence*, 17 R. I. 651.

persons against whom the prescription is claimed.<sup>1</sup>

*b. OBSTRUCTION OF FLOW*—(1) *In General*.—As a general rule the upper riparian owner has, as against the lower riparian owner, the right to have the watercourse flow from his land according to nature,<sup>2</sup> and a lower owner has no right to pen back or obstruct the flow of the water so as to flood the lands of upper owners,<sup>3</sup> or, by raising the level of the water in the channel, interfere with the drainage of the upper land,<sup>4</sup> or subtract from

1. *Church v. Stillwell*, 12 Colo. App. 43; *Carson v. Hayes*, 39 Oregon 97; *Hughesville Water Co. v. Person*, 182 Pa. St. 450.

2. *Obstruction of Flow*.—*Warren v. Westbrook Mfg. Co.*, 86 Me. 32; *Treat v. Bates*, 27 Mich. 390.

3. *England*.—*Wright v. Howard*, 1 Sim. & St. 190, 1 L. J. Ch. O. S. 94; *Palmer v. Persse*, 11 Ir. Eq. 616; *Bickett v. Morris*, 14 L. T. N. S. 835, 12 Jur. N. S. 803; *McGlone v. Smith*, 22 L. R. Ir. 559. *Compare Alder v. Savill*, 5 Taunt. 454, 1 E. C. L. 156, 15 Rev. Rep. 551.

*Canada*.—*Neely v. Peter*, 5 Ont. L. Rep. 381; *Dickson v. Burnham*, 14 Grant Ch. (U. C.) 594; *Jones v. Fisher*, 17 Can. Sup. Ct. 515; *Wright v. Mitten*, 34 N. Bruns. 14; *Wadsworth v. McDougall*, 30 U. C. Q. B. 369.

*United States*.—*Hagge v. Kansas City S. R. Co.*, 104 Fed. Rep. 391.

*Alabama*.—*Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369; *Alabama Lumber Co. v. Keel*, 125 Ala. 603.

*California*.—*Richardson v. Kier*, 37 Cal. 263; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Conniff v. San Francisco*, 67 Cal. 45.

*Connecticut*.—*Taylor v. Keeler*, 50 Conn. 346; *State v. Ousatonic Water Co.*, 51 Conn. 137.

*Georgia*.—*Rucker v. Athens Mfg. Co.*, 54 Ga. 84; *Ford v. Lukens*, 81 Ga. 633.

*Illinois*.—*Ohio, etc., R. Co. v. Webb*, 142 Ill. 404; *People v. Utica Cement Co.*, 22 Ill. App. 159; *Ohio, etc., R. Co. v. Nuetzel*, 43 Ill. App. 108.

*Indiana*.—*Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236. *Compare Cleveland, etc., R. Co. v. Wisheart*, 161 Ind. 208.

*Kentucky*.—*Kentucky Lumber Co. v. King*, 65 S. W. Rep. 156, 23 Ky. L. Rep. 1422.

*Maine*.—*China v. Southwick*, 12 Me. 238; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

*Massachusetts*.—*Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Warren v. Carey*, 145 Mass. 78; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Babbitt v. Safety Fund Nat. Bank*, 169 Mass. 361.

*Michigan*.—*Stone v. Roscommon Lumber Co.*, 59 Mich. 24; *Davis v. Munro*, 66 Mich. 485; *Richards v. Peter*, 70 Mich. 286; *Baumgartner v. Sturgeon River Boom Co.*, 120 Mich. 321; *Carley v. Jennings*, 131 Mich. 385, 9 Detroit Leg. N. 369.

*Minnesota*.—*Dorman v. Ames*, 12 Minn. 451; *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245; *Weaver v. Mississippi, etc., Boom Co.*, 28 Minn. 534; *McKenzie v. Mississippi, etc., Boom Co.*, 29 Minn. 288; *Hempsted v. Cargill*, 46 Minn. 118.

*Mississippi*.—*Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234; *Ferris v. Wellborn*, 64 Miss. 29; *Liles v. Cawthorn*, 78 Miss. 559.

*Missouri*.—*Rose v. St. Charles*, 49 Mo. 509; *Payne v. Kansas City, etc., R. Co.*, 112 Mo. 6.

*Nevada*.—*Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240.

*New Jersey*.—*Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Dunklee v. Wilton R. Co.*, 24 N. H. 498.

*New Jersey*.—*Hutchinson v. Coleman*, 10 N. J. L. 74; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Oliver v. New York Bay Cemetery Co.*, 38 N. J. Eq. 109; *Bailey v. Schnitzius*, 45 N. J. Eq. 178; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201.

*New York*.—*Dean v. Benn*, 69 Hun (N. Y.) 519; *Mundy v. New York, etc., R. Co.*, 75 Hun (N. Y.) 479; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Brewster v. J., etc., Rogers Co.*, 42 N. Y. App. Div. 343; *Spink v. Corning*, 61 N. Y. App. Div. 84; *Hartshorn v. Chaddock*, (Supm. Ct. Gen. T.) 40 N. Y. St. Rep. 953.

*North Carolina*.—*Knight v. Albemarle, etc., R. Co.*, 111 N. Car. 80.

*Pennsylvania*.—*M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Bell v. McClintock*, 9 Watts (Pa.) 119, 34 Am. Dec. 507; *McCoy v. Danley*, 20 Pa. St. 85, 57 Am. Dec. 680; *Casebeer v. Mowry*, 55 Pa. St. 419, 93 Am. Dec. 766; *Pittsburg, etc., R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 98; *Keller v. Stoltz*, 71 Pa. St. 356; *Knoll v. Light*, 76 Pa. St. 268; *Shaw v. Susquehanna Boom Co.*, 125 Pa. St. 324; *Bierer v. Hurst*, 155 Pa. St. 523.

*Rhode Island*.—*Miner v. Nichols*, 24 R. I. 190.

*South Carolina*.—*Brisbane v. O'Neill*, 3 Strobb. L. (S. Car.) 348.

*Tennessee*.—*Neal v. Henry, Meigs (Tenn.)* 17, 33 Am. Dec. 125; *Allen v. McCorkle*, 3 Head (Tenn.) 181; *Harmon v. Carter*, (Tenn. Ch. 1900) 59 S. W. Rep. 656.

*Vermont*.—*Goodrich v. Dorset Marble Co.*, 60 Vt. 280; *Ames v. Dorset Marble Co.*, 40 Vt. 10.

*West Virginia*.—*Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894; *Rogers v. Coal River Boom, etc., Co.*, 41 W. Va. 593.

*Wisconsin*.—*Alexander v. Milwaukee*, 16 Wis. 247; *Sabine v. Johnson*, 35 Wis. 185; *Allen v. Chippewa Falls*, 52 Wis. 430, 38 Am. Rep. 748; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107, 41 Am. Rep. 12; *Murray v. Scribner*, 74 Wis. 602.

*Overflow from Negligently Driving Logs*.—*Alabama Lumber Co. v. Keel*, 125 Ala. 603.

4. See the title DAMS, vol. 8, p. 717, and see *Hastings v. Livermore*, 15 Gray (Mass.) 10.



the water power of the upper owner.<sup>1</sup> But a riparian owner is not required to improve the channel of the watercourse or remove natural obstructions so as to prevent the flooding of upper lands.<sup>2</sup> In *Ohio* it has been held that a lower riparian owner incurs no liability to an upper owner when he merely pens back the water so as to raise the level in the channel of the watercourse, and inflicts thereby no substantial injury upon the upper riparian owner.<sup>3</sup>

Where Bridges, Culverts, etc., Are Constructed across watercourses, by railroad companies, municipalities, or other corporations, or by individuals, due care must be taken not to obstruct the natural flow, including that at seasons of either low or usual high water, and the failure to do so will render the offender liable for injuries to landowners caused by the penning back of the waters and the overflow of their lands;<sup>4</sup> but such structures need not be constructed

1. *England*.—*Saunders v. Newman*, 1 B. & Ald. 258, 19 Rev. Rep. 312.

*Canada*.—*Bannerman v. Hamelin*, 10 Quebec K. B. 68; *Watson v. Perine*, 13 U. C. C. P. 229.

*Kansas*.—*Ball v. Hardesty*, 38 Kan. 540.

*Maine*.—*Lincoln v. Chadbourne*, 56 Me. 197.

*Nebraska*.—*Stumbo v. Seeley*, 23 Neb. 212.

*New York*.—*Rothery v. New York Rubber Co.*, 24 Hun (N. Y.) 172, affirming 90 N. Y. 30; *Newland v. Hudson River Water Power, etc., Co.*, 62 Hun (N. Y.) 618, 16 N. Y. Supp. 654.

*North Carolina*.—*Burnett v. Nicholson*, 86 N. Car. 99; *Hardin v. Ledbetter*, 103 N. Car. 90.

*Pennsylvania*.—*Good v. Dodge*, 3 Pittsb. (Pa.) 557.

*Tennessee*.—*Webster v. Fleming*, 2 Humph. (Tenn.) 518.

*West Virginia*.—*Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819.

The water power of a riparian owner consists of the difference of level between the surface of the stream at its entry on and the surface at its exit from his land; but though instrumental leveling shows more fall on the land than the owner has height at his dam, yet, if the actual visible facts show a swelling back of the water upon the adjoining owner's land further than before the erection of the dam complained of, the instrumental measurements must give way to the actual facts as shown on the ground. *Brown v. Bush*, 45 Pa. St. 61.

2. *Geddis v. Bann Reservoir*, 3 App. Cas. 438.

3. *Cooper v. Hall*, 5 Ohio 321.

4. **Bridges and Culverts** *United States*.—*Smith v. Philadelphia, etc., R. Co.*, 57 Fed. Rep. 903.

*Alabama*.—*Southern R. Co. v. Plott*, 131 Ala. 312.

*Arkansas*.—*St. Louis, etc., R. Co. v. Harris*, 47 Ark. 340.

*Illinois*.—*Chicago, etc., R. Co. v. Schaffer*, 124 Ill. 112; *Ohio, etc., R. Co. v. Neutzel*, 143 Ill. 46; *Ohio, etc., R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 43 Ill. App. 78; *Kankakee, etc., R. Co. v. Horan*, 30 Ill. App. 552; *St. Louis, etc., R. Co. v. Winkelmann*, 47 Ill. App. 276; *Wabash R. Co. v. Sanders*, 58 Ill. App. 213; *Gilliland v. Mohlenhoff*, 86 Ill. App. 443.

*Indiana*.—*New Albany, etc., R. Co. v. Higman*, 18 Ind. 77.

*Iowa*.—*Van Orsdol v. Burlington, etc., R. Co.*, 56 Iowa 470; *Sullens v. Chicago, etc., R.*

*Co.*, 74 Iowa 659, 7 Am. St. Rep. 501; *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263; *Noe v. Chicago, etc., R. Co.*, 76 Iowa 360; *Houghtaling v. Chicago G. W. R. Co.*, 117 Iowa 540.

*Kansas*.—*Union Trust Co. v. Cuppy*, 26 Kan. 754; *Orchard Place Land Co. v. Brady*, 53 Kan. 420.

*Kentucky*.—*West v. Louisville, etc., R. Co.*, 8 Bush (Ky.) 404; *Downing v. Mason County*, 87 Ky. 208, 12 Am. St. Rep. 473.

*Louisiana*.—*Hamilton v. Vicksburg, etc., R. Co.*, 34 La. Ann. 970, 44 Am. Rep. 451.

*Massachusetts*.—*Lawrence v. Fairhaven*, 5 Gray (Mass.) 110; *Talbot v. Whipple*, 7 Gray (Mass.) 123; *Sprague v. Worcester*, 13 Gray (Mass.) 193; *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491.

*Minnesota*.—*McClure v. Red Wing*, 28 Minn. 186; *Byrne v. Minneapolis, etc., R. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668; *Treichel v. Great Northern R. Co.*, 80 Minn. 96.

*Mississippi*.—*Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 383; *Sinai v. Louisville, etc., R. Co.*, 71 Miss. 547.

*Missouri*.—*McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359, 35 Am. Rep. 431; *Payne v. Kansas City, etc., R. Co.*, 112 Mo. 6; *Talbot v. Hore*, 17 Mo. App. 175; *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177; *James v. Kansas City, etc., R. Co.*, 69 Mo. App. 431; *Powers v. St. Louis, etc., R. Co.*, 71 Mo. App. 540; *Temple v. St. Louis, etc., R. Co.*, 83 Mo. App. 64; *Edwards v. Missouri, etc., R. Co.*, 97 Mo. App. 103.

*Nebraska*.—*Omaha, etc., R. Co. v. Standen*, 22 Neb. 343; *McCleneghan v. Omaha, etc., R. Co.*, 25 Neb. 523, 13 Am. St. Rep. 508; *Omaha, etc., R. Co. v. Brown*, 20 Neb. 492.

*New Hampshire*.—*March v. Portsmouth, etc., R. Co.*, 19 N. H. 373.

*New York*.—*Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 95; *Gillespie v. Forrest*, 18 Hun (N. Y.) 110; *Mundy v. New York, etc., R. Co.*, 27 N. Y. Supp. 469, 75 Hun (N. Y.) 479; *Drake v. New York, etc., R. Co.*, 75 Hun (N. Y.) 422; *Van Duzer v. Elmira, etc., R. Co.*, 75 Hun (N. Y.) 487; *Higgins v. New York, etc., R. Co.*, 78 Hun (N. Y.) 567.

*North Carolina*.—*Emery v. Raleigh, etc., R. Co.*, 102 N. Car. 209, 11 Am. St. Rep. 727; *Knight v. Albemarle, etc., R. Co.*, 111 N. Car. 80.

*Pennsylvania*.—*Riddle v. Delaware County*, 156 Pa. St. 643; *Fick v. Pennsylvania R. Co.*, 157 Pa. St. 622; *Brown v. Pine Creek R. Co.*,

in such a manner as to permit the unobstructed flow of the watercourse in times of unprecedented and extraordinary freshets.<sup>1</sup>

**Contract Rights.**—Of course, a lower riparian owner may by contract with an upper riparian owner acquire the right to pen back the water so as to flow the lands of the latter.<sup>2</sup>

(2) *Prescriptive Right.*—The right to pen back the waters of a watercourse and thereby flow the upper riparian lands may be acquired by prescription.<sup>3</sup> In determining the existence of such right the general rules of prescription, which have been fully treated elsewhere in this work,<sup>4</sup> are, of course, applicable. Thus, the right must have been exercised adversely,<sup>5</sup> continuously,<sup>6</sup> and for the necessary prescriptive period, which does not begin to run until there has been an actual setting back of the water.<sup>7</sup> So the right cannot be acquired as against the government.<sup>8</sup>

**The Extent of the Right** to set back the waters of the stream is coextensive with the manner of its actual exercise during the prescriptive period;<sup>9</sup> but

183 Pa. St. 38; *Berninger v. Sunbury*, etc., R. Co., 203 Pa. St. 516.

*Rhode Island.*—*Spencer v. Hartford*, etc., R. Co., 10 R. I. 14.

*South Carolina.*—*Brisbane v. O'Neill*, 3 Strobb. L. (S. Car.) 348; *Lampley v. Atlantic Coast Line R. Co.*, 63 S. Car. 462; *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 181.

*Tennessee.*—*Carriger v. East Tennessee*, etc., R. Co., 7 Lea (Tenn.) 388.

*Texas.*—*Houston*, etc., R. Co. v. *Parker*, 50 Tex. 330; *Gulf*, etc., R. Co. v. *Pomeroy*, 67 Tex. 498; *Gulf*, etc., R. Co. v. *Nicholson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 54; *Gulf*, etc., R. Co. v. *Dunlap*, (Tex. Civ. App. 1894) 26 S. W. Rep. 655.

*Vermont.*—*Norris v. Vermont Cent. R. Co.*, 28 Vt. 102; *Haynes v. Burlington*, 38 Vt. 350.

*West Virginia.*—*Taylor v. Baltimore*, etc., R. Co., 33 W. Va. 39.

1. *Central Trust Co. v. Wabash*, etc., R. Co., 57 Fed. Rep. 441; *Chicago*, etc., R. Co. v. *Schaffer*, 26 Ill. App. 280; *Patterson v. Illinois Cent. R. Co.*, (Miss. 1901) 29 So. Rep. 93; *Morrissey v. Chicago*, etc., R. Co., 38 Neb. 406; *Emery v. Raleigh*, etc., R. Co., 102 N. Car. 209, 11 Am. St. Rep. 727; *Fick v. Pennsylvania R. Co.*, 157 Pa. St. 622; *Brown v. Pine Creek R. Co.*, 183 Pa. St. 38; *Berninger v. Sunbury*, etc., R. Co., 203 Pa. St. 516; *Mills v. Greenville*, etc., R. Co., 13 S. Car. 97; *Gulf*, etc., R. Co. v. *Calhoun*, (Tex. Civ. App. 1893) 24 S. W. Rep. 362. See also *Patterson v. Peterborough*, 28 U. C. Q. B. 505.

**Burden of Proof as to Character of Freshet.**—*Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 181.

2. **Contract Rights.**—*Stafford v. Maddox*, 87 Ga. 537; *Warren v. Carey*, 145 Mass. 78; *Albee v. Hayden*, 25 Minn. 267; *Dean v. Benn*, 69 Hun (N. Y.) 519; *Oregon Iron Co. v. Trullinger*, 3 Oregon 1; *Wright v. Shindler*, 17 Oregon 404.

3. **Prescriptive Rights.**—See the title DAMS, vol. 8, p. 711 *et seq.*, and see *Lynn v. Thomson*, 17 S. Car. 129.

4. See the title PRESCRIPTION, vol. 22, p. 1180.

5. *Polly v. McCall*, 37 Ala. 20; *Betts v. Davenport*, 3 Conn. 286; *Nelson v. Butterfield*, 21 Me. 221; *Wood v. Kelley*, 30 Me. 47; *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93.

6. *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Harmon v. Carter*, (Tenn. Ch. 1900) 59 S. W. Rep. 656.

In *Emery v. Raleigh*, etc., R. Co., 102 N. Car. 210, 11 Am. St. Rep. 727, where it was claimed that a railroad company had acquired a prescriptive right to use a culvert, it was held that the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow had, at regular or irregular intervals during the twenty years, covered the very land in controversy.

**Requisites of Continuity.**—In order to satisfy the requirement of continuity it is sufficient that the right is exercised for a period during each year when necessary. *Hall v. Swift*, 4 Bing. N. Cas. 381, 33 E. C. L. 383; *Wood v. Kelley*, 30 Me. 47; *Powers v. Osgood*, 102 Mass. 454; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Swan v. Munch*, 65 Minn. 500, 60 Am. St. Rep. 491; *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. St. Rep. 484; *Hall v. Augsburg*, 46 N. Y. 622; *Gerenger v. Summers*, 2 Ired. L. (24 N. Car.) 229; *Haag v. Delorme*, 30 Wis. 591; *Johnson v. Boorman*, 63 Wis. 268.

Still, it must have been exercised for a portion of each year. *Augusta v. Moulton*, 75 Me. 284.

**Mere Objections to the Penning Back** of the water do not break the continuity of the exercise of the right. *McGeorge v. Hoffman*, 133 Pa. St. 381.

7. See the title DAMS, vol. 8, p. 713.

8. *Vansickle v. Haines*, 7 Nev. 256; *Wattier v. Miller*, 11 Oregon 329. See generally the title PRESCRIPTION, vol. 22, p. 1189.

9. **Extent of Right**—*Georgia.*—*Baker v. McGuire*, 53 Ga. 245; *Maguire v. Baker*, 57 Ga. 109.

*Kentucky.*—*Manier v. Myers*, 6 B. Mon. (Ky.) 132.

*Massachusetts.*—*Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241.

*New Hampshire.*—*Sargent v. Stark*, 12 N. H. 332; *Burnham v. Kempton*, 44 N. H. 90.

*New Jersey.*—*Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Horner v. Stillwell*, 35 N. J. L. 307.

*New York.*—*Russell v. Scott*, 9 Cow. (N. Y.) 279; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 175.

the fact that during such period the prescriptor has increased the penning back of the waters does not affect his power to exercise the right to the same extent as at the beginning of the prescriptive period.<sup>1</sup>

**Loss of Right.** — The right to pen back the waters of a stream so as to flow the lands of upper riparian owners, when once acquired by prescription, is not lost by mere nonexercise.<sup>2</sup> So after such right is acquired it cannot be lost by any acknowledgment on the part of the prescriptor.<sup>3</sup> But the right may be lost by abandonment with the intention of not again exercising it.<sup>4</sup>

**c. REMEDIES FOR DETENTION AND OBSTRUCTION.** — A person who is injured by the wrongful detention or obstruction of the waters of a watercourse may maintain an action at law for the damages suffered,<sup>5</sup> and courts of equity will, as a general rule, grant relief by injunction against the continued detention or obstruction.<sup>6</sup> So the obstruction of a watercourse in such manner as to flood the lands of an upper riparian owner may constitute a nuisance which he may abate in so far as will remedy the injury.<sup>7</sup>

**9. Increasing Flow.** — An upper riparian owner has no right, by emptying into a stream an artificial supply of water or the water of another watercourse, so to increase the amount of water in the stream as to injure a lower riparian owner;<sup>8</sup> and where the water is ponded by a dam the owner has no right by discharging the contents of the pond to increase the flow of the watercourse

*North Carolina.* — *Jenkins v. Conley*, 70 N. Car. 353.

*Oregon.* — *Tucker v. Salem Flouring Mills Co.*, 13 Oregon 28.

*Wisconsin.* — *Smith v. Russ*, 17 Wis. 227, 84 Am. Dec. 739.

See also the title DAMS, vol. 8, pp. 713, 714, and see generally the title PRESCRIPTION, vol. 22, p. 1214 *et seq.*

In *Powell v. Lash*, 64 N. Car. 456, where successive dams at a certain point on a creek had thrown the water back upon the plaintiff's land to a certain extent for more than twenty years, and after that a new dam, no higher than the former dams, but tighter, erected six feet lower down the creek, filled up the bed of the stream with sand, and sobbed the plaintiff's land to a considerably greater extent than before, although it did not pond the water further back, it was held that the easement acquired by the adverse possession, upon the maxim *tantum præscriptum quantum possessum*, did not protect the owner of the dam from liability on account of the new injury.

1. *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. St. Rep. 484.

2. **Loss of Right — Nonuser.** — *Maguire v. Baker*, 57 Ga. 109; *Hall v. State*, 72 N. Y. App. Div. 360. See also generally the title PRESCRIPTION, vol. 22, pp. 1204, 1206.

3. *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93. See also *Arbuckle v. Ward*, 29 Vt. 45.

4. See the title DAMS, vol. 8, p. 714.

In *Mowry v. Sheldon*, 2 R. I. 369, it was held that the proprietor of a dam who represented that he intended to abandon the dam for mill purposes was estopped from denying that such was his intent, as against another who had been influenced by his representations to build a dam below, which flowed water back upon the one above. The facts of leaving the dam, not only unoccupied for a length of time, but so injured as not to pond water, and taking a gate out of the bulkhead, were held to be calculated to mislead the owner below, when he went

on and erected his dam in the belief that the privilege had been abandoned.

5. **Action for Damages.** — *De Baker v. Southern California R. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237; *Norris v. Glenn*, 1 Idaho 590; *Thompson v. Moore*, 2 Allen (Mass.) 350; *Kyner v. Upstill*, 29 Neb. 768.

**Limitation of Actions.** — *Omaha, etc., R. Co. v. Standen*, 22 Neb. 343.

**Successive Actions.** — *Ohio, etc., R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359; *Chicago, etc., R. Co. v. Schaffer*, 26 Ill. App. 280.

**Measure of Damages.** — *Kankakee, etc., R. Co. v. Horan*, 30 Ill. App. 552; *Richards v. Peter*, 70 Mich. 286; *Brewster v. J., etc., Rogers Co.*, 42 N. Y. App. Div. 343; *Woodford v. Brinker*, 168 N. Y. 662, *affirming* 47 N. Y. App. Div. 632.

**Prospective Damages.** — *Cleveland, etc., R. Co. v. Kline*, 29 Ind. App. 390.

**Permanent Injuries.** — *Kentucky Lumber Co. v. King*, 65 S. W. Rep. 156, 23 Ky. L. Rep. 1422.

**Damage to Crops.** — *Lamley v. Atlantic Coast Line R. Co.*, 63 S. Car. 462.

**Loss of Water Power.** — *Hottell v. Farmers' Protective Assoc.*, 25 Colo. 67, 71 Am. St. Rep. 109; *Woodford v. Brinker*, 168 N. Y. 662, *affirming* 47 N. Y. App. Div. 632; *Hardin v. Ledbetter*, 103 N. Car. 90; *Ehrgood v. Moscow Water Co.*, 4 Lack. Leg. N. (Pa.) 151.

**Exemplary Damages.** — *Walker v. Butz*, 1 Yeates (Pa.) 574.

6. **Equitable Relief.** — *Spargur v. Heard*, 90 Cal. 221; *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263; *Stumbo v. Seeley*, 23 Neb. 212; *Gillespie v. Forrest*, 18 Hun (N. Y.) 110; *Beech v. Kuder*, 15 Pa. Super. Ct. 89; *Harmon v. Carter*, (Tenn. Ch. 1900) 59 S. W. Rep. 656; *Brickner Woolen-Mills Co. v. Henry*, 73 Wis. 229.

7. **Abatement of Nuisance.** — *Liles v. Cawthorn*, 78 Miss. 559. See also *Cobb v. Massachusetts Chemical Co.*, 179 Mass. 423.

8. **Increasing Flow.** — *Baltimore v. Appold*, 42



beyond its natural capacity, to the injury of the lower proprietors.<sup>1</sup> So due diligence must be exercised in constructing or maintaining a dam or embankment across a watercourse, so that it will be sufficient to withstand the pressure of the water and will not give way, thereby flooding the lands of the proprietors below;<sup>2</sup> but if the structure is sufficient to withstand such freshets as are ordinary and usually to be expected, no liability is incurred because it is unable to withstand an extraordinary freshet which was not to be anticipated in the exercise of ordinary and reasonable foresight.<sup>3</sup> The right, however, to detain the flow of the watercourse in order to make a reasonable and proper use of the water includes, of course, the right to discharge the water so detained in a reasonable manner, having due regard to the capacity of the channel.<sup>4</sup> So a riparian owner has the right to clean out and improve the channel of the watercourse though the flow of the water may be increased,<sup>5</sup> and the same is true as to the improvement of a head spring;<sup>6</sup> but he cannot improve and change the channel of the watercourse so as greatly to increase the flow of the water therein to the material injury of lower riparian owners.<sup>7</sup> The riparian owner may also by artificial drainage lead the surface waters on his land to the watercourse which is their natural outlet, having due regard to the capacity of the stream, though the flow of the water is thereby increased.<sup>8</sup>

**10. Pollution of Watercourses — a. IN GENERAL.** — Every riparian owner is entitled to have the watercourse flow by his land in an unpolluted condition, and one riparian owner has no right unreasonably to corrupt or pollute its waters to such an extent as essentially to impair its purity.<sup>9</sup> Thus, it is

Md. 442; *Mathewson v. Hoffman*, 77 Mich. 420; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355, *Sloan v. James*, 13 Pa. Super. Ct. 399.

Thus, in *Baltimore v. Appold*, 42 Md. 442, it was held that a municipality had no right as against a riparian owner to empty into a small stream an artificial supply of water to the extent of ten million gallons in every twenty-four hours, the object in so doing being to have this artificial supply of water pass down the watercourse to supply reservoirs maintained by the municipality.

1. See the title DAMS, vol. 8, p. 717, and see *Banks v. Frazier*, 111 Ky. 909; *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527; *Hoyt v. Cline*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 337; *Union Light, etc., Co. v. Lichty*, 42 Oregon 563.

2. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 541; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Wabash R. Co. v. Sanders*, 58 Ill. App. 213; *Shrewsbury v. Smith*, 12 Cush. (Mass.) 177; *New York v. Bailey*, 2 Den. (N. Y.) 433; *Lapham v. Curtis*, 5 Vt. 379, 26 Am. Dec. 310; *Rich v. Keshena Imp. Co.*, 56 Wis. 287.

3. *Central Trust Co. v. Wabash, etc., R. Co.*, 57 Fed. Rep. 441. See also the title DAMS, vol. 8, p. 714.

4. *Brown v. Atlanta*, 66 Ga. 71; *Drake v. Hamilton Woolen Co.*, 99 Mass. 574; *Boyington v. Squires*, 71 Wis. 276; *Wegenast v. Ernst*, 8 U. C. C. P. 456.

5. *Canal Com'rs v. East Peoria*, 179 Ill. 214.

6. *Waffle v. Porter*, 61 Barb. (N. Y.) 130; *Spink v. Corning*, 172 N. Y. 626, *affirming* 61 N. Y. App. Div. 84.

7. *Kay v. Kirk*, 76 Md. 41, 35 Am. St. Rep. 468.

In *Georgia* it was held that where a stream flowed through two adjoining tracts of land, the property of different owners, and in the bed of the stream on the upper tract there was a natural ledge of rock which retarded the flow of the water so as to protect the lower tract from overflow, the proprietor of the upper tract had no right to remove such ledge of rock and thereby so vary the natural flow of the stream as to occasion damage to the lower tract by causing water and sand to overspread portions of it which but for the alteration would not be so affected; and this notwithstanding there was no damage at the point where the stream entered the lower tract, but only farther down. *Grant v. Kuglar*, 81 Ga. 637, 12 Am. St. Rep. 348.

8. *Waffle v. New York Cent. R. Co.*, 53 N. Y. 11, 13 Am. Rep. 467; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Spink v. Corning*, 172 N. Y. 626, *affirming* 61 N. Y. App. Div. 84. See also *supra*, this title, *Surface Waters*.

**9. Pollution of Watercourse — England.** — *Goldsmid v. Tunbridge Wells Imp. Com'rs*, L. R. 1 Ch. 349; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Young v. Bankier Distillery Co.*, (1893) A. C. 691; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Wood v. Waud*, 3 Exch. 748; *Hodgkinson v. Ennor*, 4 B. & S. 229, 116 E. C. L. 229; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 679; *Swindon Waterworks Co. v. Wilts, etc., Canal Nav. Co.*, L. R. 7 H. L. 697; *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 127; *Aldred's Case*, 9 Coke 59; *Booth v. Ratté*, 15 App. Cas. 188, *affirming* 14 Ont. App. 419; *Atty.-Gen. v. Hackney Local Board*, L. R. 20 Eq. 626, 44 L. J. Ch. 545.

*United States.* — *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970; *Montana Co. v. Gehring*, (C. C. A.) 75 Fed.

unlawful to cause the pollution of a watercourse by the discharge therein of noxious or poisonous refuse from mills and factories,<sup>1</sup> distilleries,<sup>2</sup>

Rep. 384; *Travis Placer Min. Co. v. Mills*, (C. A.) 94 Fed. Rep. 909.

*Alabama*.—*Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177.

*California*.—*Peterson v. Santa Rosa*, 119 Cal. 387.

*Colorado*.—*Fairplay Hydraulic Min. Co. v. Weston*, 29 Colo. 125.

*Delaware*.—*Jessup, etc., Paper Co. v. Ford*, 6 Del. Ch. 52.

*Georgia*.—*Satterfield v. Rowan*, 83 Ga. 187.

*Illinois*.—*Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367.

*Indiana*.—*Weston Paper Co. v. Pope*, 155 Ind. 394.

*Iowa*.—*Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319; *Spence v. McDonough*, 77 Iowa 460.

*Maryland*.—*Gladfelter v. Walker*, 40 Md. 1; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96.

*Massachusetts*.—*McGenness v. Adriatic Mills*, 116 Mass. 177; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *Harris v. Mackintosh*, 133 Mass. 228; *Woodward v. Worcester*, 121 Mass. 245.

*New Jersey*.—*Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Beach v. Sterling Iron, etc., Co.*, 54 N. J. Eq. 65; *Grey v. Paterson*, 58 N. J. Eq. 1.

*New York*.—*Seaman v. Lee*, 10 Hun (N. Y.) 607; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *O'Riley v. McChesney*, 3 Lans. (N. Y.) 278; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Mann v. Willey*, 168 N. Y. 664, *affirming* 51 N. Y. App. Div. 169; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643.

*Ohio*.—*State v. Frieberg*, 49 Ohio St. 585.

*Pennsylvania*.—*Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656; *Com. v. Russell*, 172 Pa. St. 506; *Keppel v. Lehigh Coal, etc., Co.*, 200 Pa. St. 649; *Stevenson v. Ebervale Coal Co.*, 201 Pa. St. 112, 88 Am. St. Rep. 805; *Magee v. Pennsylvania Schuylkill Valley R. Co.*, 13 Pa. Super. Ct. 187; *Sloan v. James*, 13 Pa. Super. Ct. 399; *Rudolph v. Dobson*, 11 Montg. Co. Rep. (Pa.) 197; *Rarick v. Smith*, 17 Pa. Co. Ct. 627.

*Rhode Island*.—*Richmond Mfg. Co. v. Atlantic De Laine Co.*, 10 R. I. 106, 14 Am. Rep. 658; *Silver Spring Bleaching, etc., Co. v. Wanskuck Co.*, 13 R. I. 611.

*South Carolina*.—*Threatt v. Brewer Min. Co.*, 49 S. Car. 95.

*Wisconsin*.—*Greene v. Nunnemacher*, 36 Wis. 50.

See generally the title NUISANCES, vol. 21, p. 679.

In *Baltimore v. Warren Mfg. Co.*, 59 Md. 96, Alvey, J., said: "When we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense, as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or dis-

charge therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose."

**1. Mills and Factories**—*England*.—*Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77; *St. Helens Chemical Co. v. St. Helens*, 1 Ex. D. 196; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Laing v. Whaley*, 3 H. & N. 675; *Russell v. Haig*, 3 Pater. Sc. App. 403; *Hodgkinson v. Ennor*, 4 B. & S. 229, 116 E. C. L. 229, 8 L. T. N. S. 451; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160.

*United States*.—*Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970, 57 Fed. Rep. 1000.

*Alabama*.—*Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177.

*Colorado*.—*Suffolk Gold Min., etc., Co. v. San Miguel Consol. Min., etc., Co.*, 9 Colo. App. 407.

*Delaware*.—*Jessup, etc., Paper Co. v. Ford*, 6 Del. Ch. 52.

*Indiana*.—*Weston Paper Co. v. Pope*, 155 Ind. 394; *Muncie Pulp Co. v. Martin*, 23 Ind. App. 558.

*Iowa*.—*Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319; *State v. Glucose Sugar Refining Co.*, 117 Iowa 524.

*Maryland*.—*Baltimore v. Warren Mfg. Co.*, 59 Md. 96.

*Massachusetts*.—*Merrifield v. Lombard*, 13 Allen (Mass.) 16, 90 Am. Dec. 172.

*Mississippi*.—*Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546.

*Missouri*.—*Smith v. McConathy*, 11 Mo. 517.

*New Jersey*.—*Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

*New York*.—*Townsend v. Bell*, 62 Hun (N. Y.) 306.

*Rhode Island*.—*Richmond Mfg. Co. v. Atlantic De Laine Co.*, 10 R. I. 106, 14 Am. Rep. 658.

*South Carolina*.—*Threatt v. Brewer Min. Co.*, 49 S. Car. 95.

*Wisconsin*.—*Middlestadt v. Waupaca Starch, etc., Co.*, 93 Wis. 1.

In *O'Riley v. McChesney*, 3 Lans. (N. Y.) 278, it was held that it was not a reasonable or an ordinary use of the defendant's water privileges to allow flax sheaves from his mill to pass down the stream and impair the use of the plaintiff's mill, and that the expense incurred by the plaintiff in removing the deposit of sheaves was directly the result of the injury, for which he might recover damages.

**Discharge from Salt Factory**.—*Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, *reversing* 24 N. Y. App. Div. 626.

**2. Distilleries**.—*Schumacher v. Shawhan*, 93

tanneries,<sup>1</sup> gasworks,<sup>2</sup> cheese factories,<sup>3</sup> sawmills,<sup>4</sup> mines,<sup>5</sup> or slaughter houses;<sup>6</sup> by the discharge of sewage either by a private individual<sup>7</sup> or by a municipal or quasi-municipal corporation;<sup>8</sup> by the maintenance of extensive cattle and

Mo. App. 573; *Greene v. Nunnemacher*, 36 Wis. 50.

1. **Tanneries.** — *Moore v. Webb*, 1 C. B. N. S. 673, 87 E. C. L. 673; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654; *Honsee v. Hammond*, 39 Barb. (N. Y.) 89; *Winchester v. Osborne*, 61 N. Y. 555; *Howell v. M'Coy*, 3 Rawle (Pa.) 256; *Seely v. Alden*, 61 Pa. St. 302, 100 Am. Dec. 642.

In *Aldred's Case*, 9 Coke 58, it was laid down as an established rule that if a man has a watercourse running in a ditch from the river to his house, for his necessary use, and a Glover sets up a lime pit for calfskins and sheepskins so near to such watercourse that the lime pit has corrupted it, for which cause his tenants leave the house, an action on the case lies.

2. **Gasworks Refuse.** — See the title GAS COMPANIES, vol. 14, p. 935.

3. **Cheese Factory.** — *Snow v. Williams*, 16 Hun (N. Y.) 468.

4. **Sawmills.** — *Potter v. Froment*, 47 Cal. 165; *People v. Rogers*, 12 Colo. 278; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Waterman v. Buck*, 58 Vt. 519.

5. **Mines** — *England*. — *Young v. Bankier Distillery Co.*, (1893) A. C. 691; *Wright v. Williams*, 1 M. & W. 77, 1 Gale 410; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Magor v. Chadwick*, 11 Ad. & El. 571, 39 E. C. L. 169, 3 Per. & Dav. 367.

*Alabama*. — *Tennessee Coal, etc., Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48; *Drake v. Lady Ensley Coal, etc., Co.*, 102 Ala. 501, 48 Am. St. Rep. 77.

*California*. — *Hill v. Smith*, 32 Cal. 166; *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412, 40 Am. Rep. 118.

*Georgia*. — *Satterfield v. Rowan*, 83 Ga. 187.

*New Jersey*. — *Beach v. Sterling Iron, etc., Co.*, 54 N. J. Eq. 65; *Sterling Iron, etc., Co. v. Sparks Mfg. Co.*, (N. J. 1897) 38 Atl. Rep. 426.

*Ohio*. — *Columbus, etc., Coal, etc., Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528.

In *Tennessee Coal, etc., Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, a corporation using the waters of a stream for washing ore, in such a manner as to foul the water so that stock would not drink it, and destroying it for domestic purposes, was held liable for the damage sustained, although the ore was valueless without the washing, and the stream furnished the only available water supply for the purpose, and the company used the customary and best means for purifying the water after being used.

In *Pennsylvania*, in view of the great industrial interests which would be hampered by any other doctrine, it is held that the primary or domestic uses are subservient to the right of a mine owner to use the stream in the development of his property. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, *overruling Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 27 Am. Rep. 711.

But the mine owner must not unreasonably pollute the watercourse. *Long v. Trexler*, (Pa. 1887) 8 Atl. Rep. 620; *Getting v. Union Imp. Co.*, 7 Kulp (Pa.) 493; *Elder v. Lykens Valley*

*Coal Co.*, 157 Pa. St. 490, 37 Am. St. Rep. 742, 33 W. N. C. (Pa.) 333; *Hindson v. Markle*, 171 Pa. St. 138, 37 W. N. C. (Pa.) 162; *Keppel v. Lehigh Coal, etc., Co.*, 200 Pa. St. 649; *Stevenson v. Ebervale Coal Co.*, 201 Pa. St. 112, 88 Am. St. Rep. 805, 203 Pa. St. 316.

In *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, 37 Am. St. Rep. 742, the doctrine that a mine owner was not liable for the pollution of a stream by drainage from his mines was recognized; but it was held that he had no right to throw culm and refuse into the stream, or leave it on his own land in such a manner as to let it down upon the lands of others. In this case the court said: "It may be convenient or economical for the coal owner to throw the refuse of his mines into the streams, but that is not enough. He is bound to consider the rights of others. If he takes the risk of injuring others to save trouble and expense for himself, he makes himself liable for the loss his conduct may inflict on his neighbors."

6. **Slaughter Houses.** — *Durango v. Chapman*, 27 Colo. 169; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419.

If the intended use of a slaughter house about to be erected will, by the discharge of blood of slaughtered animals into a creek, corrupt and pollute the stream for most of the purposes for which it may be used by the owners of lands which border on it below, and so affect it as to make its waters offensive to houses in the neighborhood, an injunction will be granted to prohibit the discharge of blood into the stream. *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415.

7. **Sewage.** — *Watson v. Toronto Gas-light, etc., Co.*, 4 U. C. Q. B. 158; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Jackman v. Arlington Mills*, 137 Mass. 277; *Trevett v. Prison Assoc.*, 98 Va. 332, 81 Am. St. Rep. 727.

8. *England*. — *Goldsmid v. Tunbridge Wells Imp. Com'rs*, L. R. 1 Ch. 349; *Atty.-Gen. v. Birmingham*, 4 Kay & J. 528; *Blackburne v. Somers*, L. R. 5 Ir. 1; *Lillywhite v. Trimmer*, 16 L. T. N. S. 318; *Atty.-Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Wood v. High, etc., Harrogate Imp. Com'rs*, 22 W. R. 763; *Atty.-Gen. v. Guardians of Poor*, 20 Ch. D. 595; *Atty.-Gen. v. Acton Local Board*, 22 Ch. D. 221; *Southall Norwood Urban Dist. Council v. Middlesex County Council*, 83 L. T. N. S. 742.

*United States*. — *Missouri v. Illinois, etc.*, 180 U. S. 208.

*California*. — *People v. San Luis Obispo*, 116 Cal. 617; *Peterson v. Santa Rosa*, 119 Cal. 387.

*Connecticut*. — *Kellogg v. New Britain*, 62 Conn. 232; *Nolan v. New Britain*, 69 Conn. 668; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345; *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335.

*Delaware*. — *State v. Luce*, (Del. 1885) 6 Cent. Rep. 862.

*Georgia*. — *Smith v. Atlanta*, 75 Ga. 110.



hog pens upon or near the banks of the stream;<sup>1</sup> or by the under-drainage therein of the water from a cemetery.<sup>2</sup> If an upper riparian owner deposits in the stream matter which by the natural action of the water is carried upon the land of lower riparian owners, he is liable for the injuries caused thereby.<sup>3</sup>

*b. CONTRIBUTING CAUSES OF POLLUTION.* — Where several upper riparian owners contribute to the pollution of a watercourse one cannot escape liability to a lower riparian owner because of such contribution by the others.<sup>4</sup> It

*Illinois.* — *Jacksonville v. Lambert*, 62 Ill. 519; *Mason v. Mattoon*, 95 Ill. App. 525.

*Indiana.* — *Columbus v. Hydraulic Woollen Mills Co.*, 33 Ind. 435. Compare *Richmond v. Test*, 18 Ind. App. 482.

*Iowa.* — *Hollenbeck v. Marion*, 116 Iowa 69.

*Kansas.* — *Kansas City v. Slangstrom*, 53 Kan. 431.

*Massachusetts.* — *Child v. Boston*, 4 Allen (Mass.) 41, 81 Am. Dec. 680; *Perry v. Worcester*, 6 Gray (Mass.) 544, 66 Am. Dec. 431; *Sprague v. Worcester*, 13 Gray (Mass.) 193; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Butler v. Worcester*, 112 Mass. 547; *Woodward v. Worcester*, 121 Mass. 245; *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Waltham*, 126 Mass. 422; *Worcester Gas Light Co. v. County Com'rs*, 138 Mass. 289; *Washburn, etc., Mfg. Co. v. Worcester*, 153 Mass. 494.

*Michigan.* — *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552.

*Minnesota.* — *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470.

*Missouri.* — *Smith v. Sedalia*, 152 Mo. 283.

*Nebraska.* — *Todd v. York*, (Neb. 1902) 92 N. W. Rep. 1040.

*New Jersey.* — *Grey v. Paterson*, 58 N. J. Eq. 1; *Doremus v. Paterson*, 63 N. J. Eq. 605.

*New York.* — *Sleight v. Kingston*, 11 Hun (N. Y.) 594; *Searing v. Saratoga Springs*, 39 Hun (N. Y.) 307; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366; *Gillett v. Kinderhook*, 77 Hun (N. Y.) 604; *New York Cent., etc., R. Co. v. Rochester*, 127 N. Y. 591; *Gale v. Syracuse*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 465; *Sammons v. Gloversville*, 81 N. Y. App. Div. 332; *Bütler v. White Plains*, 59 N. Y. App. Div. 30.

*Ohio.* — *Mansfield v. Hunt*, 10 Ohio Cir. Dec. 567, 19 Ohio Cir. Ct. 488.

*Pennsylvania.* — *Good v. Altoona*, 162 Pa. St. 493, 42 Am. St. Rep. 840; *Owens v. Lancaster*, 193 Pa. St. 436.

*Rhode Island.* — *Clark v. Peckham*, 9 R. I. 455; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

*Texas.* — *San Antonio v. Rivas*, (Tex. Civ. App. 1900) 57 S. W. Rep. 855.

See also the title DRAINS AND SEWERS, vol. 10, p. 248. Compare *Hiscox v. Lander*, 24 Grant Ch. (U. C.) 250.

In *Merrimack River Locks, etc. v. Lowell*, 7 Gray (Mass.) 223, it was held that a canal corporation might maintain an action of tort against a city for laying down sewers and drains over lands purchased by the corporation for the use of its canal, and emptying sewage into the canal, though the city was authorized by its charter to lay down drains and common

sewers through streets and private lands, and though the canal was constructed in the channel of an ancient natural watercourse.

The fact that the public health and convenience will be best subserved by discharging sewage into the stream makes no difference. *Atty.-Gen. v. Hackney Local Board*, L. R. 20 Eq. 626.

**1. Cattle and Hog Yards.** — *People v. Elk River Mill, etc., Co.*, 107 Cal. 214, 48 Am. St. Rep. 121; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Smith v. McConathy*, 11 Mo. 518; *Barton v. Union Cattle Co.*, 28 Neb. 350; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Greene v. Nunnemacher*, 36 Wis. 50.

In *Barton v. Union Cattle Co.*, 28 Neb. 350, the injury complained of by the lower riparian owner was the pollution of a stream on his land, which was used for general farming purposes and for stock, caused by the filth which was washed from the defendant's stable, in which he kept and fed seven hundred and fifty head of cattle; the defendant was restrained by injunction from continuing the nuisance.

**2. Cemeteries.** — *Barrett v. Mt. Greenwood Cemetery Assoc.*, 159 Ill. 385, 50 Am. St. Rep. 168, reversing 57 Ill. App. 401. See also the title CEMETERIES, vol. 5, p. 791.

**3. Robinson v. Black Diamond Coal Co.**, 57 Cal. 412, 40 Am. Rep. 118; *Crosby v. Bessey*, 49 Me. 539, 77 Am. Dec. 271; *Threatt v. Brewer Min. Co.*, 49 S. Car. 95.

**4. Contributing Causes of Pollution.** — *England.* — *Crossley v. Lightowler*, L. R. 2 Ch. 478; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Blair v. Deakin*, 57 L. T. N. S. 522.

*California.* — *Hill v. Smith*, 32 Cal. 166.

*Connecticut.* — *Morgan v. Danbury*, 167 Conn. 484; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345.

*Indiana.* — *Weston Paper Co. v. Pope*, 155 Ind. 394.

*Iowa.* — *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319.

*Maryland.* — *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191.

*New Jersey.* — *Beach v. Sterling Iron, etc., Co.*, 54 N. J. Eq. 65; *Sterling Iron, etc., Co. v. Sparks Mfg. Co.*, 55 N. J. Eq. 824.

*New York.* — *Townsend v. Bell*, 62 Hun (N. Y.) 306; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Strobel v. Kerr Salt Co.*, 161 N. Y. 303, 70 Am. St. Rep. 643, reversing 24 N. Y. App. Div. 626; *Butler v. White Plains*, 59 N. Y. App. Div. 30.

See also *Tennessee Coal, etc., Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48.

**That Joint Tortfeasors Are Severally as Well**

has been held, however, that where the lower riparian owner also wrongfully pollutes the watercourse and thereby directly contributes to the injuries of which he complains, he cannot hold the upper proprietor liable for contributing to the pollution;<sup>1</sup> but if the injury to the plaintiff from the defendant's acts can be specifically ascertained it is no defense that the plaintiff has also polluted the watercourse.<sup>2</sup> So the fact that the plaintiff had in previous years polluted the watercourse is no defense to its present pollution by the defendant;<sup>3</sup> and it has been held that it was no defense that the plaintiff polluted another stream flowing upon the land of a third person.<sup>4</sup> Where the pollution complained of is caused by the act of several, acting independently, all may be restrained in a court of equity in one suit.<sup>5</sup>

**c. POLLUTION FROM REASONABLE USE.**—The right of a riparian owner to have the water unimpaired as to its purity is subject to the right of other riparian owners to make a reasonable use of the stream, and if such use is reasonable, the fact that it incidentally impairs the purity of the water gives no right of action.<sup>6</sup> Thus, it has been held that a riparian owner may water his cattle and other stock, or allow them to have access to the watercourse, though they may befoul the water.<sup>7</sup> So the maintenance of a sawmill upon a watercourse is not necessarily wrongful though the purity of the water may be slightly impaired.<sup>8</sup> And the same has been held true with regard to the pollution of a watercourse by the usual impurities flowing from the street of

**as Jointly Liable** for their acts see generally the title CONTRIBUTION AND EXONERATION, vol. 7, p. 364.

Where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that their combined acts render it utterly unfit for further use, each cannot successfully defend an action on the ground that his act alone did not materially affect the water. *Hill v. Smith*, 32 Cal. 166.

In *Little Schuylkill Nav., etc., Co. v. Richards*, 57 Pa. St. 142, 98 Am. Dec. 211, where a dam was filled up by deposits of coal dirt from different mines on the stream above it, some worked by the defendants and others by persons entirely unconnected with them, it was held that it was error for the court to charge that if, at the time when the defendants were engaged in throwing their coal dirt into the river, the same thing was being done at other collieries, and the defendants knew of this, they were liable for the combined results of all the deposits. If others above on a stream contribute to such pollution, the defendant cannot be held liable for the injury done by them; his part of the pollution or wrong must be separated by means of the best proof the nature of the case affords. See also *Seely v. Alden*, 61 Pa. St. 306, 100 Am. Dec. 642.

**1. Plaintiff Contributing.**—*Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319; *Wheeler v. Fisher Oil Co.*, 9 Ohio Dec. 294, 6 Ohio N. P. 309.

In a suit to enjoin a municipality from discharging sewage into a watercourse and thereby polluting it, the fact that the plaintiff owned property in the municipality which, pursuant to municipal ordinances, drained into its sewers and thus into the watercourse, was held not to show such a contribution by him to the pollution as to deprive him of the right to equitable relief. *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335.

**2. Jackman v. Arlington Mills**, 137 Mass.

277. See also *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576, 14 Am. St. Rep. 319; *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191.

**3. Watson v. New Milford**, 72 Conn. 561, 77 Am. St. Rep. 345.

**4. West Arlington Imp. Co. v. Mt. Hope Retreat**, 97 Md. 191.

**5. Lockwood Co. v. Lawrence**, 77 Me. 297, 52 Am. Rep. 763.

**6. Pollution from Reasonable Use.**—*Elmhirst v. Spencer*, 2 Macn. & G. 45; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Robertson v. Stewart*, 11 Sc. Sess. Cas. Macph. 189; *Atty.-Gen. v. Gee*, L. R. 10 Eq. 131; *Lingwood v. Stowmarket Paper Co.*, 11 Jur. N. S. 993; *People v. Elk River Mill, etc., Co.*, 107 Cal. 221, 48 Am. St. Rep. 125; *Fisher v. Feige*, 137 Cal. 39, 92 Am. St. Rep. 77; *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 28 Am. St. Rep. 245; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Townsend v. Bell*, 70 Hun (N. Y.) 557; *Wheeler v. Fisher Oil Co.*, 9 Ohio Dec. 294, 6 Ohio N. P. 309. See also *supra*, this section, *Right to Use of Water*, and see the title RIPARIAN RIGHTS, vol. 24, pp. 979, 980.

**7. Helfrich v. Catonsville Water Co.**, 74 Md. 269, 28 Am. St. Rep. 245; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715. See also *Spence v. McDonough*, 77 Iowa 460.

In *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, which was an action by a lower against an upper riparian owner on a stream, for polluting the stream by means of a hog yard, and depriving him of its use for domestic purposes, an instruction that if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses the upper owner had a right reasonably so to use it, in spite of the injury complained of, was held to be correct.

**8. People v. Elk River Mill, etc., Co.**, 107 Cal. 221, 48 Am. St. Rep. 125; *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am.

a municipality,<sup>1</sup> and with regard to the maintenance and operation of mills and factories adapted to the stream, since running streams cannot be used for commercial and manufacturing purposes and retain their pristine clearness and purity.<sup>2</sup> So a riparian owner may without liability use the watercourse to bathe in, though this may have a tendency to pollute the water;<sup>3</sup> and even the discharge in a watercourse by a sanitarium of the water in which patients have bathed has been held not to be a wrongful pollution.<sup>4</sup> The question whether the use causing the pollution of the watercourse is reasonable or unreasonable is for the jury, and is to be determined from a consideration of all the circumstances of the case, including the nature of the watercourse, its adaptability for particular purposes, the extent of the detriment suffered by the lower riparian owners, etc.;<sup>5</sup> but evidence of a usage in the deposit or discharge of similar polluting matter into the watercourse is not to be considered.<sup>6</sup>

*d. PRESCRIPTIVE RIGHT.* — An upper riparian owner may by prescription acquire the right to pollute the waters of a stream to the injury of a lower owner;<sup>7</sup> but in accordance with the general principles discussed elsewhere in this work,<sup>8</sup> in order to establish prescription the right to pollute must have been exercised adversely to the one against whom the prescription is claimed and under a claim of right,<sup>9</sup> and must have been enjoyed for the necessary time after it has worked an injury to the lower riparian owner.<sup>10</sup> A prescriptive right to pollute a watercourse so as to render it a public nuisance cannot be acquired.<sup>11</sup>

The Extent of the Prescriptive Right must be commensurate in character and extent with the adverse enjoyment.<sup>12</sup> Thus, the practice of discharging saw-

Rep. 194; *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

1. *Robb v. La Grange*, 158 Ill. 21, modifying 57 Ill. App. 386; *Wheeler v. Worcester*, 10 Allen (Mass.) 591; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592. See also *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129.

In *Bainard v. Newton*, 154 Mass. 255, it was held that an injunction would not lie to restrain a city from discharging the surface drainage of streets into a stream which afterwards ran through the plaintiff's land.

2. *Townsend v. Bell*, 70 Hun (N. Y.) 557; *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525.

3. *People v. Hulbert*, 9 Detroit Leg. N. 257.

4. *Barnard v. Shirley*, 151 Ind. 160.

5. *Question for Jury.* — See the title RIPARIAN RIGHTS, vol. 24, p. 980, and see *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763, wherein it was held that in regard to manufacturing purposes there must certainly be more or less refuse matter which, by ordinary care, could be prevented from falling into the stream, in which case the reasonableness of the use of the water must determine the right, and this must be governed by the extent of detriment received by the riparian proprietors below.

6. *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105.

7. *Prescriptive Right.* — *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Murgatroyd v. Robinson*, 7 El. & Bl. 391, 90 E. C. L. 391; *Bealey v. Shaw*, 6 East 208; *Gaved v. Martyn*, 19 C. B. N. S. 732, 115 E. C. L. 732; *Nolan v. New Britain*, 69 Conn. 668; *Masonic Temple Assoc. v. Harris*, 79 Me. 250; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Weir v.*

*Claude*, 16 Can. Sup. Ct. 575. Compare *Goldsmid v. Tunbridge Wells Imp. Com'rs*, L. R. 1 Ch. 349; *Van Egmond v. Seaforth*, 6 Ont. 599.

8. See the title PRESCRIPTION, vol. 22, p. 1180.

9. *Smith v. Sedalia*, 152 Mo. 283.

10. In *Goldsmid v. Tunbridge Wells Imp. Com'rs*, L. R. 1 Ch. 349, the pollution of a stream by the discharge of sewage from a town therein which was complained of had been going on for over twenty years and was continuous, and was sought to be maintained on the ground of prescriptive right. It was held, however, that such prescriptive right had not been acquired, because during the early period the discharge of the sewage did not prejudicially affect the lower riparian owners on account of the small amount discharged, and became prejudicial only when, from the increase in the size of the town, a greater amount was discharged.

11. *Blackburne v. Somers*, L. T. 5 Ir. 1. And see the title NUISANCES, vol. 21, p. 733.

*Pollution of Stream Supplying City.* — After the taking of the waters of a stream for the purpose of supplying a city with pure water, a prescriptive right to pollute the stream cannot be acquired. *Morton v. Moore*, 15 Gray (Mass.) 573; *Brookline v. Mackintosh*, 133 Mass. 215; *Martin v. Gleason*, 139 Mass. 183. And see *Kelley v. New York*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 516.

12. *Extent of Right* — *England.* — *McIntyre v. McGavin*, 1 Reports 246, (1893) A. C. 268; *Moore v. Webb*, 1 C. B. N. S. 673, 87 E. C. L. 673; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Blackburne v. Somers*, L. R. 5 Ir. 1; *Murga-*



dust in the stream cannot establish the right of discharging poisonous or noxious drugs, and the practice of discharging a small quantity of noxious matter in the stream cannot establish the right to discharge therein a greatly increased quantity; <sup>1</sup> and the prescriptive right of a municipality to discharge surface drainage into a watercourse cannot be extended so as to permit the discharge therein of noxious sewage. <sup>2</sup>

**Loss of Right.** — A prescriptive right to pollute a watercourse may be lost by abandonment. <sup>3</sup>

**c. EMINENT DOMAIN.** — The right to pollute a watercourse, as for the purpose of an outlet for the sewage of a municipality, may be acquired under the power of eminent domain. <sup>4</sup>

**f. CONTRACT RIGHTS.** — An upper riparian owner may by contract with the lower riparian owner acquire, as against him, the right to pollute the watercourse. <sup>5</sup>

**g. REMEDIES FOR POLLUTION.** — A riparian owner may, of course, maintain an action for damages for the pollution of the waters of the watercourse. <sup>6</sup> So courts of equity have unhesitatingly granted injunctions to restrain pollu-

troyd *v.* Robinson, 7 El. & Bl. 391, 90 E. C. L. 391; Hill *v.* Cock, 26 L. T. N. S. 185; Clarke *v.* Somerseshire Drainage Com'rs, 57 L. J. M. C. 96, 59 L. T. N. S. 670; Brown *v.* Best, 1 Wils. C. Pl. 174.

*Connecticut.* — Platt *v.* Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335.

*Maine.* — Crosby *v.* Bessey, 49 Me. 539, 77 Am. Dec. 271.

*Massachusetts.* — Middlesex Co. *v.* Lowell, 149 Mass. 509.

*Mississippi.* — Mississippi Mills Co. *v.* Smith, 69 Miss. 299, 30 Am. St. Rep. 546.

*Missouri.* — Smith *v.* Sedalia, 152 Mo. 283; Schumacher *v.* Shawhan, 93 Mo. App. 573.

*New Jersey.* — Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335.

*Pennsylvania.* — Jones *v.* Crow, 32 Pa. St. 398; McCallum *v.* Germantown Water Co., 54 Pa. St. 40, 93 Am. Dec. 656.

And see generally the title **PRESCRIPTION**, vol. 22, p. 1214 *et seq.*

The defendant, the owner of an ancient paper mill where paper had been made from rags, introduced new vegetable fibre, and carried works upon the same scale for making paper from this new material. For more than twenty years before this change, the refuse arising from the paper manufacture had been discharged into a stream flowing through the plaintiff's premises. In a suit to restrain the use, it was held that the easement to which the defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper, in the reasonable and proper course of such manufacture, using any proper materials for the purpose not increasing the pollution, and that the burden of proof lay on the plaintiff to prove any increase. Baxendale *v.* McMurray, L. R. 2 Ch. 790.

1. Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335.

2. Platt *v.* Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335.

3. **Loss of Right.** — Magor *v.* Chadwick, 11 Ad. & El. 571, 39 E. C. L. 169; Crossley *v.*

Lightowler, L. R. 2 Ch. 478, 36 L. J. Ch. 584. See also the title **NUISANCES**, vol. 21, p. 736.

In Crossley *v.* Lightowler, L. R. 2 Ch. 478, it was held that the mere suspension of the exercise of the prescriptive right was not sufficient to destroy it, without some evidence of intention to abandon it; but where dye works had not been used for more than twenty years, and had been allowed to go to ruin, it was held that any right of fouling the stream attached to them was lost.

4. **Eminent Domain.** — Worcester Gas Light Co. *v.* County Com'rs, 138 Mass. 289; Martin *v.* Gleason, 139 Mass. 183; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129.

5. **Contract Rights.** — Hall *v.* Lund, 1 H. & C. 676, 32 L. J. Exch. 113, 9 Jur. N. S. 205.

6. **Action for Damages.** — Whaley *v.* Laing, 2 H. & N. 476; Potter *v.* Froment, 47 Cal. 165; Weston Paper Co. *v.* Pope, 155 Ind. 394; Trevett *v.* Prison Assoc., 98 Va. 332, 81 Am. St. Rep. 727; Greene *v.* Nunnemacher, 36 Wis. 50.

**Limitation of Actions.** — Mansfield *v.* Hunt, 10 Ohio Cir. Dec. 567, 19 Ohio Cir. Ct. 488.

**Measure of Damages.** — *Alabama.* — Eufaula *v.* Simmons, 86 Ala. 515.

*Connecticut.* — Platt *v.* Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335; Watson *v.* New Milford, 72 Conn. 561, 77 Am. St. Rep. 456.

*Indiana.* — Weston Paper Co. *v.* Pope, 155 Ind. 394.

*Iowa.* — Loughran *v.* Des Moines, 72 Iowa 384; Shively *v.* Cedar Rapids, etc., R. Co., 74 Iowa 170, 7 Am. St. Rep. 471; Randolph *v.* Bloomfield, 77 Iowa 50, 14 Am. St. Rep. 268; Ferguson *v.* Firmenich Mfg. Co., 77 Iowa 576, 14 Am. St. Rep. 319; Hollenbeck *v.* Marion, 116 Iowa 69.

*Maryland.* — Gladfelter *v.* Walker, 40 Md. 1. *Mississippi.* — Mississippi Mills Co. *v.* Smith, 69 Miss. 299, 30 Am. St. Rep. 546.

*Missouri.* — Smith *v.* Sedalia, 152 Mo. 283.

*New York.* — Smith *v.* Cranford, 84 Hun (N. Y.) 318; Chapman *v.* Rochester, 110 N. Y. 273, 6 Am. St. Rep. 366.

*Pennsylvania.* — Seeley *v.* Alden, 61 Pa. St. 302, 100 Am. Dec. 642; Owens *v.* Lancaster, 193 Pa. St. 436; Keppel *v.* Lehigh Coal, etc.,

tion of a continuous nature,<sup>1</sup> and a contemplated or threatened use of a stream or the riparian property which would result in the pollution of the watercourse may be enjoined,<sup>2</sup> but in the latter instance it must clearly appear that pollution would follow such contemplated use.<sup>3</sup>

**Indictment.**—The pollution of the waters of a watercourse may constitute a public nuisance for which an indictment will lie,<sup>4</sup> and in many jurisdictions statutes have been enacted expressly punishing persons who pollute

Co., 200 Pa. St. 649; *Stevenson v. Ebervale Coal Co.*, 201 Pa. St. 112, 88 Am. St. Rep. 805. *South Carolina*.—*Threatt v. Brewer Min. Co.*, 49 S. Car. 95.

*Texas*.—*Umscheid v. San Antonio*, (Tex. Civ. App. 1902) 69 S. W. Rep. 496.

**Duty to Take Steps to Avoid Injury.**—*Satterfield v. Rowan*, 83 Ga. 187.

**1. Equitable Relief**—*England*.—*Goldsmid v. Tunbridge Wells Imp. Com'rs*, L. R. 1 Ch. 349; *Young v. Bankier Distillery Co.*, (1893) A. C. 691; *Tipping v. Eckersley*, 2 Kay & J. 264; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769; *Atty.-Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Wood v. High*, etc., *Harrogate Imp. Com'rs*, 22 W. R. 763.

*United States*.—*Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Missouri v. Illinois*, etc., 180 U. S. 208; *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970.

*California*.—*People v. Elk River Mill*, etc., Co., 107 Cal. 214, 48 Am. St. Rep. 121; *Glassell v. Verdugo*, 108 Cal. 503; *People v. San Luis Obispo*, 116 Cal. 617; *Peterson v. Santa Rosa*, 119 Cal. 387.

*Connecticut*.—*Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335.

*Illinois*.—*Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367; *Barrett v. Mt. Greenwood Cemetery Assoc.*, 159 Ill. 385, 50 Am. St. Rep. 168, reversing 57 Ill. App. 401; *Mason v. Mattoon*, 95 Ill. App. 525.

*Indiana*.—*Weston Paper Co. v. Pope*, 155 Ind. 394.

*Maine*.—*Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763.

*Maryland*.—*Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191.

*Massachusetts*.—*Merrifield v. Lombard*, 13 Allen (Mass.) 16, 90 Am. Dec. 172; *Woodward v. Worcester*, 121 Mass. 245; *Harris v. Mackintosh*, 133 Mass. 228.

*Nebraska*.—*Barton v. Union Cattle Co.*, 28 Neb. 350; *Todd v. York*, (Neb. 1902) 92 N. W. Rep. 1040.

*New Jersey*.—*Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415; *Beach v. Sterling Iron*, etc., Co., 54 N. J. Eq. 65; *Sterling Iron*, etc., Co. v. *Sparks Mfg. Co.*, 55 N. J. Eq. 824; *Grey v. Paterson*, 58 N. J. Eq. 1; *Board of Health v. Diamond Paper Mills Co.*, 64 N. J. Eq. 793, affirming 63 N. J. Eq. 111.

*New York*.—*Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643; *Mann v. Willey*, 168 N. Y. 664, affirming 51 N. Y. App. Div. 169; *Townsend v. Bell*, 62 Hun (N. Y.) 306; *Butler v. White Plains*, 59 N. Y. App. Div. 30; *Gale v. Syracuse*, (Supm. Ct.

Spec. T.) 35 Misc. (N. Y.) 465; *Sammons v. Gloversville*, 81 N. Y. App. Div. 332.

*Pennsylvania*.—*Getting v. Union Imp. Co.*, 7 Kulp (Pa.) 493; *Keppel v. Lehigh Coal*, etc., Co., 200 Pa. St. 649.

*Rhode Island*.—*Richmond Mfg. Co. v. Atlantic De Laine Co.*, 10 R. I. 106, 14 Am. Rep. 658; *Silver Spring Bleaching*, etc., Co. v. *Wanskuck Co.*, 13 R. I. 611.

*Wisconsin*.—*Greene v. Nunnemacher*, 36 Wis. 50; *Middlestadt v. Waupaca Starch*, etc., Co., 93 Wis. 1.

In *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, an injunction was granted to restrain the defendants from diverting water from their colliery into a stream, by which the water in use for a cotton mill of the plaintiff was corrupted. In answer to the suggestion that, in lieu of the remedy sought, damages should be awarded, it was said: "The rights of the plaintiffs as riparian owners are not limited to their present modes of enjoyment. \* \* \* It is impossible to foresee what modes of enjoyment the plaintiffs or their successors in title may resort to, or the extent of damages which would be a compensation for the injury which the continued pollution might cause to such new modes of enjoyment."

**Suit Between States.**—In *Missouri v. Illinois*, etc., 180 U. S. 208, it was held that one state could maintain a suit in the Supreme Court of the United States to enjoin another state from discharging sewage into a river upon which the two states bordered, whereby the public health of the inhabitants of the complainant state was threatened through the pollution of their water supply.

**Laches.**—*Grey v. Paterson*, 58 N. J. Eq. 1.

**Preliminary Injunction.**—*Grey v. Paterson*, 58 N. J. Eq. 1; *Jessup*, etc., *Paper Co. v. Ford*, 6 Del. Ch. 52.

Although the fact that a nuisance has begun raises a presumption that it will continue, still, where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of the defendants, and it was shown that no such refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and that if the nuisance was increasing at all it was not through the act of the defendants, the court refused an interlocutory injunction restraining the further continuance of such nuisance. *Swan v. Adams*, 23 Grant Ch. (U. C.) 220.

**2.** *Missouri v. Illinois*, etc., 180 U. S. 208.

**3.** *Columbia Ave. Sav. Fund*, etc., Co. v. *Prison Commission*, 92 Fed. Rep. 801.

**4. Indictment.**—*People v. Townsend*, 3 Hill (N. Y.) 479; *In re Yost*, 14 York Leg. Rec. (Pa.) 25. See also *Com. v. Yost*, 197 Pa. St.

watercourses.<sup>1</sup>

**Who May Sue for Pollution.** — All persons whose rights are injured by the pollution of a watercourse may sue therefor,<sup>2</sup> and several riparian owners may join in a suit to enjoin such pollution.<sup>3</sup> But one whose rights are not affected by the pollution cannot sue therefor.<sup>4</sup> Thus, as a general rule, a nonriparian owner cannot sue.<sup>5</sup>

**11. Levees and Embankments.** — The owner of land which is subject to overflow from a watercourse in time of high water may erect levees or embankments upon his own land, and not in the channel of the watercourse, to protect it from overflow waters,<sup>6</sup> and a riparian owner may erect levees or strengthen the banks of the watercourse upon his side so as to prevent any change in the watercourse whereby it will encroach upon his land.<sup>7</sup> Still it is generally held that a riparian owner on one side of a watercourse has no right to build levees upon his side which will prevent the escape of the flood

1. *England.* — *Smith v. Barnham*, 34 L. T. N. S. 774; *Ribble River Joint Committee v. Halliwell*, 68 L. J. Q. B. 984, (1899) 2 Q. B. 385, 81 L. T. N. S. 38; *West Riding of Yorkshire Rivers Board v. Rawson*, 89 L. T. N. S. 363.

*California.* — *People v. Borda*, 105 Cal. 636; *People v. Elk River Mill, etc., Co.*, 107 Cal. 221, 48 Am. St. Rep. 125.

*Colorado.* — *Durango v. Chapman*, 27 Colo. 169.

*Connecticut.* — *Blydenburgh v. Miles*, 39 Conn. 484.

*Iowa.* — *State v. Glucose Sugar Refining Co.*, 117 Iowa 524.

*New Jersey.* — *State v. Diamond Mills Paper Co.*, 63 N. J. Eq. 111.

*Ohio.* — *State v. Frieberg*, 49 Ohio St. 585.

*Utah.* — *People v. McCune*, 14 Utah 152.

*West Virginia.* — *State v. Mitchell*, 47 W. Va. 789.

*Wisconsin.* — *Oberich v. Gilman*, 31 Wis. 495.

2. **Who May Sue.** — *Crossley v. Lightowler*, 36 L. J. Ch. 584, L. R. 2 Ch. 478, 16 L. T. N. S. 638, 15 W. R. 801; *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297.

3. *Grey v. Paterson*, 58 N. J. Eq. 1; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, reversing 24 N. Y. App. Div. 626.

4. *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Greene v. Nunnemacher*, 36 Wis. 50. See also *Cone v. Hartford*, 28 Conn. 363.

5. *Conrad v. Arrowhead Hot Springs Hotel Co.*, 103 Cal. 399.

6. **Levees and Embankments** — *England.* — *Nield v. London, etc., R. Co.*, L. R. 10 Exch. 4; *Ridge v. Midland R. Co.*, 55 J. P. 55.

*United States.* — *Gulf, etc., R. Co. v. Clark*, 101 Fed. Rep. 678, 41 C. C. A. 597.

*California.* — *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 2 Am. St. Rep. 775; *McDaniel v. Cummings*, 83 Cal. 515; *Grey v. McWilliams*, 98 Cal. 157, 35 Am. St. Rep. 163. Compare *Montgomery v. Locke*, (Cal. 1886) 11 Pac. Rep. 874.

*Georgia.* — *Collins v. Macon*, 69 Ga. 542.

*Indiana.* — *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Schlichter v. Phillips*, 67 Ind. 201; *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205.

*Iowa.* — *Hoard v. Des Moines*, 62 Iowa 226.

*Louisiana.* — *Mailhot v. Pugh*, 30 La. Ann. 1359.

*Missouri.* — *Shane v. Kansas City, etc., R. Co.*, 71 Mo. 237, 36 Am. Rep. 480; *St. Louis, etc., R. Co. v. Schneider*, 30 Mo. App. 620; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271, 53 Am. Rep. 581, overruling *McCormick v. Kansas City, etc., R. Co.*, 70 Mo. 359, 35 Am. Rep. 431.

See also *Diamond Match Co. v. New Haven*, 55 Conn. 510.

And see *supra*, this title, *Surface Waters*.

In *Cairo, etc., R. Co. v. Stevens* 73 Ind. 278, 38 Am. Rep. 139, *Woods, J.*, thus stated the rule: "With reasonably near approximation to accuracy, it may be laid down as a general rule that upon the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. This is in accordance with the general principle that such waters are a common enemy which each proprietor may fight off as he will."

In *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, it appeared that there was a frequent overflow in the Ohio river, and that the defendant had planted a row of trees on his land the effect of which was to cause the driftwood, which theretofore had been carried by the overflow across and beyond the plaintiff's land, without damage to him, to lodge upon the plaintiff's land and cover five acres of it with driftwood to the depth of from two to ten feet, whereby such five acres became of no value. It was held that this gave to the plaintiff no cause of action.

7. *Barnes v. Marshall*, 68 Cal. 569; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Pierce v. Kinney*, 59 Barb. (N. Y.) 56; *Farquharson v. Farquharson*, cited in *Menzies v. Breadalbane*, 3 Blyth. N. S. 421.

**Encroachment by Sea.** — An owner of land bordering on the sea may make levees upon his



waters, in times of ordinary flood, over his side and cast them upon the land of the owner on the opposite side; <sup>1</sup> and an upper riparian owner has no right to restrict by embankments the ordinary channel of the watercourse during high water and thereby cast the waters in increased velocity upon the land of a lower riparian owner. <sup>2</sup> *A fortiori*, a riparian owner cannot erect obstructions in the bed of the watercourse and thereby cause the lands of other riparian owners to be flooded, the level of the watercourse being raised by such obstruction. <sup>3</sup> Where the owner on one side of a watercourse erects a levee which will cast the flood waters upon the other side, he cannot complain if the owner on the latter side also erects a levee to protect himself from overflow. <sup>4</sup> One riparian owner is under no liability to other owners to maintain levees or embankments to protect the land of the latter from overflow, <sup>5</sup> though of course such liability may be assumed by contract. <sup>6</sup> As heretofore stated, where from natural causes, as in time of freshet, a watercourse changes its channel, a riparian owner may, by works on his own land, return the waters to the old bed. <sup>7</sup>

land to protect it from encroachments by the sea, though the water is thereby caused to beat with greater violence against the land of an adjoining owner. *Rex v. Sewer Com'rs*, 8 B. & C. 355, 15 E. C. L. 237.

**Encroachment by Lake Michigan.**—*Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248, 24 Am. Rep. 399; *Miller v. Milwaukee*, 14 Wis. 642.

1. *Rex v. Trafford*, 1 B. & Ad. 874, 20 E. C. L. 498; *Cairo, etc., R. Co. v. Brevoort*, 62 Fed. Rep. 129; *Gulf, etc., R. Co. v. Clark*, 2 Indian Ter. 319; *Crawford v. Rambo*, 44 Ohio St. 279; *Menzies v. Breadalbane*, 3 Bligh N. S. 414; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589; *Burwell v. Hobson*, 12 Gratt. (Va.) 322, 65 Am. Dec. 247. Compare *Bickett v. Morris*, 14 L. T. N. S. 835, 12 Jur. N. S. 803; *Ridge v. Midland R. Co.*, 55 J. P. 55; *Byrd v. Blessing*, 11 Ohio St. 362.

In *Burwell v. Hobson*, 12 Gratt. (Va.) 322, 65 Am. Dec. 247, Moncure, J., said: "The maxim *sic utere tuo ut alienum non ladas* emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream or any part of it from its accustomed course, to the injury of other persons. This is a plain proposition laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee. But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. *Angell on Watercourses*, § 333. But he has no right for his greater convenience and benefit to build anything which, in times of

ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them."

2. *Cairo, etc., R. Co. v. Brevoort*, 62 Fed. Rep. 129.

3. *Meyers v. St. Louis*, 8 Mo. App. 266; *Gerish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165.

4. *Farquharson v. Farquharson*, cited in *Menzies v. Breadalbane*, 3 Bligh N. S. 421; *Avery v. Empire Woolen Co.*, 82 N. Y. 582. See also *Harding v. Whitney*, 40 Ind. 379.

In *Wilhelm v. Burleyson*, 106 N. Car. 381, where there was an action of damages for erecting a dam upon the bank of a creek so that the water overflowed the plaintiff's land, and it appeared that the plaintiff had previously erected a dam which obliged the defendant to erect one for his own protection, it was said: "It is true, as a general rule, that a riparian proprietor of land is restricted in the management of his property by the maxim *sic utere tuo ut alienum non ladas*, and cannot, therefore, take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor that may lie opposite or above his own premises, either when the water is at its usual height or in an ordinary freshet, or that so obstructs its flow as to prevent the land of the other riparian owner from being properly drained. \* \* \* If the defendant's evidence was sufficient to satisfy the jury that the plaintiff first built a wall on his side of the creek, and thereby caused the water to overflow the defendant's land on the other side and lower down, the defendant had a right to build a dam on the north bank to stop the overflow brought about in that way, and if, in effecting that object, it became necessary to obstruct the flow of water in the creek, and cause it to 'eddy,' so as in freshets to flood more of the plaintiff's land than had previously been covered in freshets, the defendant was not answerable in damages for such additional overflow."

5. *Savannah, etc., R. Co. v. Lawton*, 75 Ga. 192; *Collins v. Macon*, 69 Ga. 542 (liability of municipality). Compare *Grant v. McDonogh*, 7 La. Ann. 447.

6. *Savannah, etc., R. Co. v. Lawton*, 75 Ga. 192.

7. See *supra*, this section, *Diversion*.

**12. Rights Between Opposite Riparian Owners.** — Opposite riparian owners upon the channel of a watercourse have a common and equal right to the use of all the waters flowing in the channel, and neither can alter the natural and accustomed flow without the consent and to the injury of the other,<sup>1</sup> but as against an owner on the opposite side of the watercourse, a riparian proprietor may by an artificial channel divert a reasonable quantity of the water.<sup>2</sup> If the volume and flow of water be limited, the use by each opposite owner may be limited by judicial action in proportion, so that the enjoyment, like the right, will be kept equal.<sup>3</sup> Where an island divides the channel of a watercourse, the several riparian owners upon the island and the mainland are entitled to have the watercourse flow through the two channels according to nature; neither can claim a right to more than the natural flow.<sup>4</sup>

**13. Appropriation of Waters** — *a.* **IN GENERAL.** — In some of the early English cases the judges express the opinion that a riparian owner might acquire a right to the waters of a watercourse by applying them to a beneficial use,<sup>5</sup> but it is now well settled, both in England and in many of the jurisdictions of the United States, that mere prior appropriation or use of the waters of a watercourse confers no exclusive rights to their continued use as against other riparian owners.<sup>6</sup> Thus, as between riparian owners the mere priority

**1. Rights Between Opposite Riparian Owners.** — *Warren v. Westbrook Mfg. Co.*, 86 Me. 32; *Pratt v. Lamson*, 2 Allen (Mass.) 275; *Chaffield v. Wilson*, 31 Vt. 358.

**2.** *Pinney v. Luce*, 44 Minn. 367.

**3.** *Warren v. Westbrook Mfg. Co.*, 86 Me. 32.

**4.** *Warren v. Westbrook Mfg. Co.*, 86 Me. 32; *Crooker v. Bragg*, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555.

In *Warren v. Westbrook Mfg. Co.*, 86 Me. 32, Emery, J., said: "Where \* \* \* the waters of a river are divided by an island so that, as alleged in the bill, they flow past the island in two distinct channels, and where the island is itself divided in ownership, as also alleged in the bill, the riparian owners on the two main shores opposite the island are not opposite riparian owners with common and equal right to the use of all the water flowing between them. On the contrary, each such owner has for an opposite the owner of that part of the island facing his land. Their equal and common right is confined to the flow of the water in the channel between them. They have no legal right in common or in severalty in the water naturally flowing between other owners on another channel on the other side of the island where they have no land."

Where the water of a river is divided by an island so that only one-fourth of the water descends on one side of the island, and the residue on the other, the owner of the shore where the larger quantity of water flows is entitled to the use of the whole natural flow on that side, and the owner of the other shore has no right to place obstructions at the head of the island to cause one-half of the water to descend on his side of the river. *Crooker v. Bragg*, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555.

**5. Appropriation.** — *Williams v. Morland*, 2 B. & C. 910, 9 E. C. L. 269; *Bealey v. Shaw*, 6 East 208, *per* Le Blanc, J.; *Liggins v. Inge*, 7 Bing. 682, 20 E. C. L. 287; *Canham v. Fisk*, 2 Crompt. & J. 126, 2 Tyrw. 155, 1 L. J. Exch. 61.

**6. Common-law Rule — England.** — *Wright v. Howard*, 1 Sim. & St. 190; *Chasemore v. Richards*, 2 H. & N. 168; *Mason v. Hill*, 5 B. & Ad.

1, 27 E. C. L. 11; *Embrey v. Owen*, 6 Exch. 353.

*United States.* — *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538.

*Connecticut.* — *Ingraham v. Hutchinson*, 2 Conn. 592; *King v. Tiffany*, 9 Conn. 163; *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Gillett v. Johnson*, 30 Conn. 180. See also *Keeney, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 582.

*Illinois.* — *Stout v. M'Adams*, 3 Ill. 67, 33 Am. Dec. 441; *Bliss v. Kennedy*, 43 Ill. 67.

*Kentucky.* — *Tye v. Catching*, 78 Ky. 463.

*Maine.* — *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

*Massachusetts.* — *Pratt v. Lamson*, 2 Allen (Mass.) 288; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 357; *Thurber v. Martin*, 2 Gray (Mass.) 394, 61 Am. Dec. 468; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Hatch v. Dwight*, 17 Mass. 296, 9 Am. Dec. 145; *Drake v. Hamilton Woolen Co.*, 99 Mass. 574; *Bearse v. Perry*, 117 Mass. 211. See also *Hapgood v. Brown*, 102 Mass. 451; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39. *Compare* *Cary v. Daniels*, 8 Met. (Mass.) 466, 41 Am. Dec. 532.

*Michigan.* — *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

*Nebraska.* — *Meng v. Coffey*, (Neb. 1903) 93 N. W. Rep. 713; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781.

*New Hampshire.* — *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55; *Gilman v. Tilton*, 5 N. H. 231; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Norway Plains Co. v. Bradley*, 52 N. H. 86.

*New York.* — *Palmer v. Mulligan*, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *People v. Platt*, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 310, 8 Am. Dec. 404; *Crooker v. Bragg*, 10 Wend. (N. Y.) 264, 25 Am. Dec. 555; *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355.

of appropriation of the waters for the driving of machinery for a mill gives no superior right.<sup>1</sup> It would seem, however, that the prior use of the waters for a particular purpose, long continued, may be considered in determining whether such use is reasonable or unreasonable as regards the right of other riparian owners.<sup>2</sup>

In Canada an ordinance was enacted in 1865 expressly authorizing the appropriation of waters for particular purposes.<sup>3</sup>

**Doctrine in Western States.** — In the Western states and territories, because of the peculiar conditions of the settlers on public lands, and their necessity for water for the successful operation of mines and the pursuit of agricultural interests, a doctrine contrary to that of the common law arose from usage and custom, to the effect that one who first appropriates the waters of a stream passing through the public lands acquires a special property therein, and the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality or quantity shall not be impaired so as to defeat the purpose of his appropriation.<sup>4</sup>

*North Carolina.* — *Burnett v. Nicholson*, 72 N. Car. 334.

*Pennsylvania.* — *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313.

*Vermont.* — *Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; *Johns v. Stevens*, 3 Vt. 308.

In *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11, a leading case on this subject in *England*. Denman, C. J., in an opinion in which he reviewed the earlier cases, said: "The position that the first occupant of running water for a beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it, to his prejudice. In this as in other cases of injuries to real property, possession is a good title against a wrongdoer; and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill." And further commenting upon the early English decisions, he said: "None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier, or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water."

And in *Pugh v. Wheeler*, 2 Dev. & B. L. (19 N. Car.) 55, a leading case in the *United States*, Ruffin, C. J., said: "The defendants say that such one of the owners as may first apply the water to any particular purpose gains thereby, and immediately, the exclusive right to that use of the water. That is true in this sense, that any other proprietor above or below cannot do any act whereby that particular enjoyment would be impaired, without answering for the damages which are occasioned by the loss of the particular enjoyment. Whereas, before the particular application of the water to that purpose, the damages would not have included that possible application of the water, but been con-

fined to the uses then subsisting. But to render the proposition even thus far true, the use supposed must be a legitimate one; that is, it must not interfere with any previously existing right in another proprietor; for usurpation does not justify itself. If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built he could only recover for the natural uses of the water, as needed for his family, his cattle, and irrigation. But if, instead of building a mill, he had diverted the stream itself, he cannot justify it, against a proprietor below, on the ground that he had thus made an artificial use of the water before the other had made any such application of it. The truth is that every owner of land on a stream, necessarily and at all times, is using water running through it — if in no other manner, in the fertility it imparts to his land and the increase in the value of it. There is, therefore, no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a particular new application or artificial use of the water does not, therefore, create the right to that use; but the existence or nonexistence of that application, at a particular time, measures the damages incurred by the wrongful act of another, in derogation of the general right to the use of the water as it passes to, through, or from the land of the party complaining. The right is not founded in the user, but is inherent in the ownership of the soil; and when a title by use is set up against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant, and thus constitute a title under the proprietor of the land."

1. *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

2. *Keeney, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576.

3. **Rule in Canada.** — *Canadian Pac. R. Co. v. Parke*, 6 British Columbia 6; *Centre Star Min. Co. v. British Columbia Southern R. Co.*, 8 British Columbia 214; *War Eagle Consol. Min., etc., Co. v. British Columbia Southern R. Co.*, 8 British Columbia 381; *Martley v. Carson*, 20 Can. Sup. Ct. 634.

4. **Doctrine in Western States — United States.**



This right of appropriation was soon recognized and confirmed by the several state legislatures, and the federal government at an early date confirmed the right to acquire by appropriation exclusive rights in the waters on the public domain.<sup>1</sup>

*b. PURPOSES OF APPROPRIATION.*—The appropriation may be for any beneficial purpose,<sup>2</sup> as for irrigation,<sup>3</sup> for mining,<sup>4</sup> for mill or power

— *Atchison v. Peterson*, 20 Wall. (U. S.) 507; *Jennison v. Kirk*, 98 U. S. 453; *Broder v. Natoma Water, etc., Co.*, 101 U. S. 276; *Sturr v. Beck*, 133 U. S. 541; *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, *affirming* 10 N. Mex. 177; U. S. Freehold Land, etc., Co. v. Gallegos, 89 Fed. Rep. 769, 61 U. S. App. 13; *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73.

*Arizona.*—*Hill v. Lenormand*, 2 Ariz. 354.

*California.*—*Tartar v. Spring Creek Water, etc., Co.*, 5 Cal. 398; *Stoakes v. Barrett*, 5 Cal. 39; *Irwin v. Phillips*, 5 Cal. 143, 63 Am. Dec. 113; *Conger v. Weaver*, 6 Cal. 556, 65 Am. Dec. 528; *Hoffman v. Stone*, 7 Cal. 46; *Butte Canal, etc., Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Rupley v. Welch*, 23 Cal. 455; *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571; *Lux v. Haggin*, 69 Cal. 447; *Sharp v. Hoffman*, 79 Cal. 404.

*Colorado.*—*Yunker v. Nichols*, 1 Colo. 551; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245.

*Idaho.*—*Drake v. Earhart*, 2 Idaho 750.

*Nevada.*—*Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Reno Smelting, etc., Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364.

*Oregon.*—*Curtis v. La Grande Hydraulic Water Co.*, 20 Oregon 34; *Carson v. Gentner*, 33 Oregon 512; *Brown v. Baker*, 39 Oregon 66.

*Utah.*—*Crane v. Winsor*, 2 Utah 248; *Munroe v. Ivie*, 2 Utah 535; *Elliot v. Whitmore*, 8 Utah 253; *Stowell v. Johnson*, 7 Utah 215.

*Washington.*—*Isaacs v. Barber*, 10 Wash. 124, 45 Am. St. Rep. 772; *Offield v. Ish*, 21 Wash. 277.

*Wyoming.*—*Farm Invest. Co. v. Carpenter*, 9 Wyo. 110.

In *Atchison v. Peterson*, 20 Wall. (U. S.) 507, Field, J., after clearly setting out the common law with reference to prior appropriation, said: "This equality of right, among all proprietors on the same stream, would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship, with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general ex-

ploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation, and enforced by the courts in those states and territories."

**1. Statutory Enactments.**—*Jacob v. Lorenz*, 98 Cal. 332; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781; *Curtis v. La Grande Hydraulic Water Co.*, 20 Oregon 34.

**As to Appropriation for Purposes of Irrigation**, see the title IRRIGATION, vol. 17, p. 494 *et seq.*

**As Affecting the Right to Maintain Dams**, see the title DAMS, vol. 8, p. 708.

Rev. Stat. U. S., §§ 2339, 2340, embodying the provisions of Act Cong. July 26, 1866, c. 262, provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

**2. Purposes of Appropriation.**—*Silver Peak Mines v. Valcaldia*, 79 Fed. Rep. 886; *Osgood v. El Dorado Water, etc., Co.*, 56 Cal. 571; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777.

In *Basey v. Gallagher*, 20 Wall. (U. S.) 682, Field, J., said: "No distinction is made, in those states and territories, by the custom of miners or settlers, or by the courts, in the rights of the first appropriator, from the use made of the water, if the use be a beneficial one."

**3. Irrigation.**—See the title IRRIGATION, vol. 17, p. 494 *et seq.*, and see *Senior v. Anderson*, 130 Cal. 290; *Willey v. Decker*, 11 Wyo. 496.

**4. Mining.**—*United States.*—*Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450, 81 Fed. Rep. 73.

*California.*—*Sims v. Smith*, 7 Cal. 148, 68 Am. Dec. 233; *Hoffman v. Stone*, 7 Cal. 45;

purposes,<sup>1</sup> or for domestic purposes.<sup>2</sup> It must, however, be for a beneficial purpose;<sup>3</sup> appropriation for purely speculative purposes is not authorized.<sup>4</sup>

*c. WHO MAY APPROPRIATE.* — In order to acquire water rights by appropriation, the appropriator need not be a riparian owner,<sup>5</sup> but such owner may also make a valid appropriation.<sup>6</sup> The appropriator need not have title to the land on which the beneficial use of the water is made.<sup>7</sup> Several persons may jointly appropriate water rights.<sup>8</sup> Where the local statutes designate the persons who may appropriate, the person claiming the right of appropriation must come within the statutes.<sup>9</sup>

*d. WHAT WATERS MAY BE APPROPRIATED.* — As a general rule, the waters of all watercourses which have not been theretofore appropriated are the subject of appropriation,<sup>10</sup> and the fact that there is a riparian owner upon

Phoenix Water Co. *v.* Fletcher, 23 Cal. 481; Natoma Water, etc., Co. *v.* McCoy, 23 Cal. 490; Hill *v.* Smith, 27 Cal. 476.

*Colorado.* — Fuller *v.* Swan River Placer Min. Co., 12 Colo. 12; Hector Min. Co. *v.* Valley View Min. Co., 28 Colo. 315.

*Idaho.* — Branstetter *v.* Williams, 6 Idaho 574.

*Oregon.* — Oviatt *v.* Big Four Min. Co., 39 Oregon 118; Carson *v.* Hayes, 39 Oregon 97.

*Canada.* — Centre Star Min. Co. *v.* British Columbia Southern R. Co., 8 British Columbia 214.

**Injury to Prior Appropriator.** — Where a tract of land in the mining region, bordering on a natural stream, is enclosed and appropriated for garden purposes, one who subsequently appropriates for mining purposes the waters of the stream running through the land must use the water thus appropriated so as not to interfere with the enjoyment of the garden. Wixon *v.* Bear River, etc., Water, etc., Co., 24 Cal. 367, 85 Am. Dec. 69.

**1. Mills.** — North American Exploration Co. *v.* Adams, (C. C. A.) 104 Fed. Rep. 404; Copper King *v.* Wabash Min. Co., 114 Fed. Rep. 991; McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220; Salt Lake City *v.* Salt Lake City Water, etc., Co., 24 Utah 249.

**2. Domestic Purposes.** — Brosnan *v.* Harris, 39 Oregon 148, 87 Am. St. Rep. 649.

**3. Necessity that Purpose Be Beneficial.** — Union Mill, etc., Co. *v.* Dangberg, 81 Fed. Rep. 73; Weaver *v.* Eureka Lake Co., 15 Cal. 271; Power *v.* Switzer, 21 Mont. 523; Toohey *v.* Campbell, 24 Mont. 13; Dick *v.* Caldwell, 14 Nev. 167; Simmons *v.* Winters, 21 Oregon 35, 28 Am. St. Rep. 727.

**4. Weaver *v.* Eureka Lake Co., 15 Cal. 271; Combs *v.* Agricultural Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275; Toohey *v.* Campbell, 24 Mont. 13; Dick *v.* Caldwell, 14 Nev. 167.**

**5. Who May appropriate — Nonriparian Owners.** — Krall *v.* U. S., 79 Fed. Rep. 241, 48 U. S. App. 351; Smith *v.* Denniff, 24 Mont. 20; Martley *v.* Carson, 20 Can. Sup. Ct. 634.

**6. Riparian Owner.** — Healy *v.* Woodruff, 97 Cal. 464; Kaler *v.* Campbell, 13 Oregon 596. See also Edgar *v.* Stevenson, 70 Cal. 286.

In Healy *v.* Woodruff, 97 Cal. 464, it was contended that the plaintiff's grantor, having acquired title to land on the stream, and become a riparian proprietor, could not acquire further rights by appropriation. McFarland, J., said: "The fact that plaintiff or his grantor was a riparian owner does not warrant the con-

clusion that he could not be an appropriator — there is, as is said in a play, 'No consonancy in the sequel.' The notion seems to be that becoming a riparian owner estops one, in some sort of a way, from being an appropriator of water, although there be no one in existence in whose favor the estoppel can be invoked. When the ditch was enlarged, there was no person having any rights on the stream except plaintiff's grantor himself, and, therefore, the enlargement of the ditch encroached upon nobody's vested or prior rights. Respondent argues that if appellant's position be correct the first riparian owner could monopolize all the waters of the stream. But he admits that an appropriator who is not a riparian owner can take all the water of a stream on the public lands, if he be the prior or first appropriator. And it would certainly be strange if the first comer to a stream who acquired title to some land upon it has less rights in the water of the stream than one who owns no land there at all. At the time of the enlargement of the ditch, there was no riparian owner on the stream except plaintiff's grantor. If some other person had been the riparian owner, instead of plaintiff's grantor, the latter, with the consent of such riparian owner, or by adverse user, could have diverted the waters of the stream, and held them against all subsequent comers, and certainly his own consent to the appropriation was equal, at least, to the consent of another person who might have occupied his position. Counsel for respondents seems to think that because plaintiff's grantor, as a riparian owner, could have prevented subsequent appropriators from diverting the water above his land and away from it, therefore he could not divert the water himself; but that is a confusion of the distinction between *meum* and *tuum*. Counsel complain that this view gives great advantage to the first possessor and appropriator of the water of a stream. This is no doubt true, but it is the advantage which the law gives, and which necessarily follows prior occupancy and appropriation."

**7. Williams *v.* Harter, 121 Cal. 47. And see the title IRRIGATION, vol. 17, p. 497.**

**Appropriations by Aliens and Indians Upheld.** — See the title IRRIGATION, vol. 17, p. 497.

**8. Kimball *v.* Gearhart, 12 Cal. 27; Schilling *v.* Rominger, 4 Colo. 100; Miller *v.* Lake Irrigation Co., 27 Wash. 447.**

**9. Slosser *v.* Salt River Valley Canal Co., (Ariz. 1901) 65 Pac. Rep. 332.**

**10. Waters of Head Springs may be appro-**

the watercourse does not prevent the acquisition of water rights therein by appropriation.<sup>1</sup> Where there has been a partial appropriation of the waters of a stream the surplus waters are still subject to appropriation,<sup>2</sup> and one who by artificial means increases the water supply of a stream may, as against prior appropriators of the original waters of such stream, make a valid appropriation of the increased flow.<sup>3</sup> Rights by appropriation cannot be acquired in percolating waters.<sup>4</sup>

c. WHAT CONSTITUTES APPROPRIATION. — To constitute an appropriation the water must be applied to a beneficial use,<sup>5</sup> and therefore there must be an actual diversion of the water, if the appropriation is for use away from the watercourse.<sup>6</sup> An actual user of the water for a beneficial purpose constitutes a valid appropriation.<sup>7</sup>

appropriated. *Ely v. Ferguson*, 91 Cal. 187; *Scott v. Toomey*, 8 S. Dak. 639.

1. Thus, under the British Columbia land ordinance of 1865 authorizing the appropriation of any "unoccupied" water, the waters of a stream may be considered as unoccupied though there is a riparian owner thereon. *Martley v. Carson*, 20 Can. Sup. Ct. 634.

2. **Surplus After Partial Appropriation** — *United States*. — *Montana Co. v. Gehring*, 75 Fed. Rep. 384, 44 U. S. App. 629.

*Arizona*. — *Egan v. Estrada*, (Ariz. 1899) 56 Pac. Rep. 721.

*California*. — *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Brown v. Smith*, 10 Cal. 510; *Butte Canal, etc.*, *Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Ortman v. Dixon*, 13 Cal. 33; *McDonald v. Bear River, etc.*, *Water, etc.*, *Co.*, 13 Cal. 220; *Higgins v. Barker*, 42 Cal. 233; *Smith v. O'Hara*, 43 Cal. 371; *Edgar v. Stevenson*, 70 Cal. 286; *Natoma Water, etc.*, *Co. v. Hancock*, 101 Cal. 42. See also *Heilbron v. 76 Land, etc.*, *Co.*, 80 Cal. 189; *Modoc Land, etc.*, *Co. v. Booth*, 102 Cal. 151.

*Colorado*. — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 587, 3 Am. St. Rep. 603; *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320; *Water Supply, etc.*, *Co. v. Larimer, etc.*, *Reservoir Co.*, 25 Colo. 87.

*Montana*. — *Thorp v. Freed*, 1 Mont. 651.

*Nevada*. — *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Bloss v. Grayson*, 24 Nev. 422; *Walsh v. Wallace*, 26 Nev. 299.

*Oregon*. — *Low v. Schaffer*, 24 Oregon 239.

*Utah*. — *Hague v. Nephi Irrigation Co.*, 16 Utah 421, 67 Am. St. Rep. 634; *Salt Lake City v. Salt Lake City Water, etc.*, *Co.*, 25 Utah, 456.

Thus, where water is appropriated for running a mill, and after such use is allowed to go down the stream in its accustomed course, other parties may subsequently appropriate it below the mill. *Ortman v. Dixon*, 13 Cal. 36.

3. **Increase by Artificial Means**. — *Churchill v. Rose*, 136 Cal. 576. See also *Steinberger v. Meyer*, 130 Cal. 156.

4. **Percolating Waters**. — *Cardelli v. Comstock Tunnel Co.*, 26 Nev. 284; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 70 Am. St. Rep. 810. See also the title IRRIGATION, vol. 17, p. 496, and see *supra*, this title, *Underground Waters*.

5. **Application to Beneficial Use** — *United States*. — *Bear Lake, etc.*, *Water Works, etc.*, *Co. v. Garland*, 164 U. S. 1; *Cruse v. McCauley*, 96

Fed. Rep. 369; *Union Mill, etc.*, *Co. v. Dangberg*, 81 Fed. Rep. 73.

*California*. — *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408; *McDonald v. Bear River, etc.*, *Water, etc.*, *Co.*, 13 Cal. 220; *Perego v. McKissick*, 79 Cal. 572; *Senior v. Anderson*, 115 Cal. 496, 130 Cal. 290; *Cardoza v. Calkins*, 117 Cal. 106; *Smith v. Hawkins*, 120 Cal. 86.

*Colorado*. — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275; *Ft. Morgan Land, etc.*, *Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259; *Wyatt v. Larimer, etc.*, *Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, *overruling* 1 Colo. App. 480; *Wellington v. Beck*, (Colo. 1901) 65 Pac. Rep. 626.

*Nevada*. — *Dick v. Bird*, 14 Nev. 161; *Dick v. Caldwell*, 14 Nev. 167; *Walsh v. Wallace*, 26 Nev. 299.

*New Mexico*. — *Millheiser v. Long*, 10 N. Mex. 99.

*Oregon*. — *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *Hindman v. Rizor*, 21 Oregon 112; *Smyth v. Neal*, 31 Oregon 105.

*South Dakota*. — *Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402.

*Utah*. — *Becker v. Marble Creek Irrigation Co.*, 15 Utah 225; *Salt Lake City v. Salt Lake City Water, etc.*, *Co.*, 24 Utah 249.

*Compare* *Hall v. Blackman*, 8 Idaho 272.

6. **Necessity of Actual Diversion**. — *Rincon Water, etc.*, *Co. v. Anaheim Union Water Co.*, 115 Fed. Rep. 543; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Maeris v. Bicknell*, 7 Cal. 261, 68 Am. Dec. 257; *Thompson v. Lee*, 8 Cal. 275; *Cache La Poudre Reservoir Co. v. Water Supply, etc.*, *Co.*, 25 Colo. 161; *Pyke v. Burnside*, 8 Idaho 487; *Carron v. Wood*, 10 Mont. 500; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Walsh v. Wallace*, 26 Nev. 299. See also the title IRRIGATION, vol. 17, p. 497.

In *Low v. Rizor*, 25 Oregon 551, it was said that to constitute a valid appropriation of water, three elements must exist. First, an intent to apply it to a beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel, by means of a ditch, canal, or other structure; and third, an application of it to some industry within a reasonable time.

7. **Actual User**. — *Silver Peak Mines v. Val-*



**Notice of Appropriation.** — The statutes generally require, as a preliminary to the appropriation of water rights, the posting of a notice by the appropriator of the intention to appropriate the waters.<sup>1</sup> The purpose of this requirement, however, is generally considered to be merely to notify third persons of the intention to divert the water, and by relation back to the time of notice to fix the time of appropriation, and the failure to give such notice has been held not to render invalid an actual appropriation.<sup>2</sup>

**Application for Right to appropriate.** — Under the British Columbia land ordinance of 1865, a person desiring to appropriate waters is required to make application therefor to particular officers and obtain their consent to the appropriation;<sup>3</sup> and in some of the Western states similar statutes are in force.<sup>4</sup>

**Means of Appropriation.** — The method by which the water appropriated is taken from the watercourse is not material.<sup>5</sup> Dams may be constructed in the stream to effect the diversion,<sup>6</sup> and the appropriator may tap the watercourse for the diversion of the water upon his own land,<sup>7</sup> and may construct his ditch or flume for conveying the water to the place of use across the public lands,<sup>8</sup> and will thereby acquire an easement for the maintenance of the ditch as against a subsequent grantee of the government.<sup>9</sup> But after the grant of the land by the government, the appropriator cannot make alterations in his means of conveying the water and thus change the character of his easement.<sup>10</sup> The appropriator has no right to construct his ditch or flume across the lands of private individuals without their consent,<sup>11</sup> though in some instances provision is made by statute for the acquisition of such right by condemnation proceedings,<sup>12</sup> and of course the appropriator may by contract with a landowner acquire an easement of way for the maintenance of his ditch.<sup>13</sup> So an easement of way for a ditch over lands of an individual may be acquired by prescription.<sup>14</sup> A ditch for the diversion of the water may be used by several

calda, 79 Fed. Rep. 886; Nevada Ditch Co. v. Bennett, 30 Oregon 59, 60 Am. St. Rep. 777.

1. **Notice of Appropriation.** — Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1; Taylor v. Abbott, 103 Cal. 421; Floyd v. Boulder Flume, etc., Co., 11 Mont. 435; Martley v. Carson, 20 Can. Sup. Ct. 634. See also the title IRRIGATION, vol. 17, p. 497.

2. See the title IRRIGATION, vol. 17, p. 498.

3. **Application.** — Centre Star Min. Co. v. British Columbia Southern R. Co., 8 British Columbia 214; War Eagle Consol. Min., etc., Co. v. British Columbia Southern R. Co., 8 British Columbia 374; Martley v. Carson, 20 Can. Sup. Ct. 634.

Where two different officials are called upon to exercise their functions in regard to applications for water rights in respect of the same water, the official who is determining the later application should stay his hand until the final result of the prior application before the other official is known. *In re* Water Claims Consolidation Act; War Eagle Consol. Min., etc., Co. v. British Columbia Southern R. Co., 8 British Columbia 381.

4. Lakeside Ditch Co. v. Crane, 80 Cal. 181; Settlers' Ditch Co. v. Hayes, (Cal. 1889) 22 Pac. Rep. 1152; Whalon v. North Platte Canal, etc., Co., 11 Wyo. 313.

5. **Means of Appropriation.** — Thomas v. Guiraud, 6 Colo. 530. And see the title IRRIGATION, vol. 17, p. 499.

6. Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685.

7. Brown v. Baker, 39 Oregon 66, rehearing denied 39 Oregon 75.

In California it is held that the place of

diversion must be upon the public lands. Cave v. Tyler, 133 Cal. 566.

8. Bear Lake, etc., Water Works, etc., Co. v. Garland, 164 U. S. 1, affirming 9 Utah 350; Silver Peak Mines v. Valcalda, 79 Fed. Rep. 886; Natoma Water, etc., Co. v. Hancock, 101 Cal. 42; Jacob v. Lorenz, 98 Cal. 332; Gregory v. Nelson, 41 Cal. 278; Childs v. Sharai, 8 Idaho 378; Toyaho Creek Irrigation Co. v. Hutchins, 21 Tex. Civ. App. 274.

9. Tynon v. Despain, 22 Colo. 240; Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129; Childs v. Sharai, 8 Idaho 378; Carson v. Gentner, 33 Oregon 512.

**Abandonment of Easement for Ditch.** — Stalling v. Ferrin, 7 Utah 477; Smith v. Hawkins, 110 Cal. 122.

**Forfeiture of Rights to Maintain Ditch — Failure to Repair.** — Stalling v. Ferrin, 7 Utah 477. Oliver v. Agase, 132 Cal. 297.

Thus, where the appropriator conveyed the water by an open ditch across the public domain, he cannot, as against a subsequent grantee of the land over which the ditch was constructed, substitute a pipe line for such ditch. Oliver v. Agase, 132 Cal. 297.

11. **Constructing Ditch over Land of Third Person.** — McGuire v. Brown, 106 Cal. 660; Carter v. Wakeman, 42 Oregon 147; Toyaho Creek Irrigation Co. v. Hutchins, 21 Tex. Civ. App. 274.

12. Castle Rock Irrigation, etc., Co. v. Jurisch, (Neb. 1903) 93 N. W. Rep. 690; Toyaho Creek Irrigation Co. v. Hutchins, 21 Tex. Civ. App. 274.

13. Low v. Schaffer, 24 Oregon 239.

14. Strong v. Baldwin, 137 Cal. 432.

appropriators.<sup>1</sup> In conveying the water to the place where it is to be used the appropriator may make use of natural watercourses<sup>2</sup> or of natural ravines,<sup>3</sup> and may use ditches already constructed, but which have been abandoned by the builder.<sup>4</sup> In *Canada* it has been held, under the ordinance requiring the appropriator "to construct a ditch for conveying the water to the place where it is intended to be used," that the ditch may be constructed partially through the lands of the United States;<sup>5</sup> and in the United States an appropriation of water by diversion at a point in one state for use on lands in another has been upheld.<sup>6</sup>

*f. EXTENT OF RIGHTS.* — As between several appropriators of water, the extent of the rights of the first one is fixed by his appropriation.<sup>7</sup> An appropriator of water for any particular beneficial use may make a change in the use provided such change works no additional injury to others,<sup>8</sup> and subject to the same qualification he may make a change in the means or point of diversion.<sup>9</sup>

1. *Biggs v. Utah Irrigating Ditch Co.*, (Ariz. 1900) 64 Pac. Rep. 494.

2. *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *McCall v. Porter*, 42 Oregon 49; *Covert v. Pettijohn*, 9 British Columbia 118.

3. *Hoffman v. Stone*, 7 Cal. 46; *Brosnan v. Harris*, 39 Oregon 148, 87 Am. St. Rep. 649. And see the title IRRIGATION, vol. 17, p. 499.

4. See the title IRRIGATION, vol. 17, p. 500.

5. *Covert v. Pettijohn*, 9 British Columbia 118.

6. *Willey v. Decker*, 11 Wyo. 496.

7. **Extent of Rights** — *United States*. — *Atchison v. Peterson*, 20 Wall. (U. S.) 514; *Rodgers v. Pitt*, 89 Fed. Rep. 420; *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73.

*California*. — *Bear River, etc., Water, etc., Co. v. New York Min. Co.*, 8 Cal. 327, 68 Am. Dec. 325; *Hill v. King*, 8 Cal. 336; *White v. Todd's Valley Water Co.*, 8 Cal. 443, 68 Am. Dec. 338; *O'Keeffe v. Cunningham*, 9 Cal. 590; *Weaver v. Conger*, 10 Cal. 233; *Brown v. Smith*, 10 Cal. 508; *Ortman v. Dixon*, 13 Cal. 34; *McKinney v. Smith*, 21 Cal. 374; *James v. Williams*, 31 Cal. 211; *Nevada County, etc., Canal Co. v. Kidd*, 37 Cal. 282; *Peregoy v. McKissick*, 79 Cal. 572; *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1; *Riverside Water Co. v. Gage*, 89 Cal. 410; *Harris v. Harrison*, 93 Cal. 676.

*Colorado*. — *Suffolk Gold Min., etc., Co. v. San Miguel Consol. Min., etc., Co.*, 9 Colo. App. 407; *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315; *Butterfield v. O'Neill*, (Colo. App. 1903) 72 Pac. Rep. 807.

*Idaho*. — *Stickney v. Hanrahan*, 7 Idaho 424; *Pyke v. Burnside*, 8 Idaho 487.

*Montana*. — *Caruthers v. Pemberton*, 1 Mont. 111; *Carron v. Wood*, 10 Mont. 500; *Sweetland v. Olsen*, 11 Mont. 27; *Quigley v. Birdseye*, 11 Mont. 439; *McDonald v. Lannen*, 19 Mont. 78; *Toohey v. Campbell*, 24 Mont. 13.

*Nevada*. — *Chiatovich v. Davis*, 17 Nev. 133; *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788; *Winter v. Fulstone*, 20 Nev. 260.

*Oregon*. — *North Powder Milling Co. v. Coughanour*, 34 Oregon 9; *Browning v. Lewis*, 39 Oregon 11; *Brown v. Baker*, 39 Oregon 66.

*Utah*. — *Elliot v. Whitmore*, 23 Utah 342; *Salt Lake City v. Salt Lake City Water, etc., Co.*, 24 Utah 249.

See also the title IRRIGATION, vol. 17, pp. 502, 503.

In *Ortman v. Dixon*, 13 Cal. 36, the water was first appropriated by the defendant for mill power; subsequently, the plaintiffs, by a ditch above the mill, used the water for mining purposes when the mill was not running, and still later the defendant dug a ditch above the plaintiffs, and conducted the water off for mining purposes. It was held that "the measure of the right, as to extent, follows the nature of the appropriation or the use for which it is taken. \* \* \* If A erects a mill on a running stream, this shows an appropriation of the water for the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use."

**8. Changing Use.** — *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472; *Santa Paula Water Works v. Peralta*, 113 Cal. 38; *Ramelli v. Irish*, 96 Cal. 214; *Power v. Switzer*, 21 Mont. 523; *Wimer v. Simmons*, 27 Oregon 1, 50 Am. St. Rep. 685. See also the title IRRIGATION, vol. 17, p. 499.

In *Davis v. Gale*, 32 Cal. 30, 91 Am. Dec. 554, *Sanderson, J.*, said: "A party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges."

**9. Change in Means and Place of Diversion** — *United States*. — *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73.

*Arizona*. — *Miller v. Douglas*, (Ariz. 1900) 60 Pac. Rep. 722.

*California*. — *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 221; *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Butte Table Mountain Co. v. Morgan*, 19 Cal. 609;

and the place of use;<sup>1</sup> but no change in use or place of diversion which will work an injury to intermediate appropriators can be made.<sup>2</sup> The rights acquired by appropriation include the right to the upper source of the stream, and a subsequent appropriator cannot to the injury of such rights divert the waters from such upper sources;<sup>3</sup> but one who by artificial means increases the water supply of a stream or its source may divert such increased flow without infringing the right of prior appropriators of the waters of the stream.<sup>4</sup> In *Colorado* it has been held that an appropriator may maintain a bill to enjoin a subsequent lower appropriator from diverting water when the effect of such diversion, if permitted, would be to compel the complainant to surrender a part of his accustomed supply of water in favor of a prior appropriator still lower down on the stream.<sup>5</sup> Appropriators have no rights antecedent to the date of their appropriation, and if others have, prior thereto, caused a deterioration in the quality of the water of the stream, the subsequent appro-

*Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554; *Jacob v. Lorenz*, 98 Cal. 332; *Gallaher v. Montecito Valley Water Co.*, 101 Cal. 242; *Junkans v. Bergin*, 67 Cal. 267; *Kirman v. Hunnewill*, 93 Cal. 519; *Ramelli v. Irish*, 96 Cal. 214; *Byers v. Colonial Irrigation Co.*, 134 Cal. 553. Compare *Nevada Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685.

*Colorado*.—*Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258; *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12; *Knowles v. Clear Creek, etc., Mill, etc., Co.*, 18 Colo. 209; *Greer v. Heiser*, 16 Colo. 306.

*Idaho*.—*Walker v. McGinness*, 8 Idaho 540.

*Montana*.—*Woolman v. Garringer*, 1 Mont. 535.

*Nevada*.—*Roeder v. Stein*, 23 Nev. 92.

*Utah*.—*Salt Lake City v. Salt Lake City Water, etc., Co.*, 24 Utah 249.

*Wyoming*.—*Stoner v. Mau*, 11 Wyo. 366.

And see the title IRRIGATION, vol. 17, p. 500.

In all cases the effect of the change upon the rights of others is the controlling consideration, and in the absence of injurious consequences to others any change which the parties choose to make is reasonable and proper. *Kidd v. Laird*, 15 Cal. 162, 76 Am. Dec. 472.

The adoption of any other rule, it is said, would destroy the utility of the appropriation. *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257.

**1. Change in Place of Use.**—*Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12; *Cache La Poudre Irrigating Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, affirming 8 Colo. App. 237. See also the title IRRIGATION, vol. 17, p. 501.

**Notice of Change Not Necessary.**—A prior appropriator of water who posts notices of his appropriation near the stream and immediately constructs his dams and ditches is not required to give to subsequent appropriators any actual notice of his intention to extend his ditches, reclaim the waste water from his mining operations, and use the water at another place. *Woolman v. Garringer*, 1 Mont. 535.

**2. Change Must Not Be Prejudicial to Others—United States.**—*Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, 49 Fed. Rep. 430.

*California*.—*Butte Table Mountain Co. v. Morgan*, 19 Cal. 609; *Nevada Water Co. v.*

*Powell*, 34 Cal. 109, 91 Am. Dec. 685; *Byers v. Colonial Irrigation Co.*, 134 Cal. 553.

*Colorado*.—*Handy Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 515.

*Idaho*.—*Walker v. McGinness*, 8 Idaho 540.

*Montana*.—*Creek v. Bozeman Water Works Co.*, 15 Mont. 121; *Gassert v. Noyes*, 18 Mont. 216.

*Oregon*.—*Cole v. Logan*, 24 Oregon 304. Compare *Wimer v. Simmons*, 27 Oregon 1, 50 Am. St. Rep. 685.

*Utah*.—*Hague v. Nephi Irrigation Co.*, 16 Utah 421, 67 Am. St. Rep. 634.

Where A appropriated the waters of a creek at a certain point in 1865, and B appropriated the same water above A in 1867, for the use of a mill, and returned the water into the creek so that A had the benefit thereof, it was held that A had no right to change his point of diversion of the water in 1869, and appropriate above B's mill, thereby depriving B of the use of the water. *Columbia Min. Co. v. Holter*, 1 Mont. 296.

**3. California.**—*Glassell v. Verdugo*, 108 Cal. 503; *Baxter v. Gilbert*, 125 Cal. 580.

*Colorado*.—*Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77; *Medano Ditch Co. v. Adams*, 29 Colo. 317.

*Idaho*.—*Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411.

*Nevada*.—*Tonkin v. Winzell*, (Nev. 1903) 73 Pac. Rep. 593.

*Oregon*.—*Low v. Schaffer*, 24 Oregon 239; *Low v. Rizer*, 25 Oregon 551.

*Utah*.—*Herriman Irrigation Co. v. Butterfield Min., etc., Co.*, 19 Utah 453; *Howcroft v. Union, etc., Irrigation Co.*, 25 Utah 311.

**4. Butte Canal, etc., Co. v. Vaughn**, 11 Cal. 143, 70 Am. Dec. 769; *Burnett v. Whitesides*, 15 Cal. 35; *Wilcox v. Hausch*, 64 Cal. 461; *Churchill v. Rose*, 136 Cal. 576; *Buckers Irrigation, etc., Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62; *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77; *Herriman Irrigation Co. v. Butterfield Min., etc., Co.*, 19 Utah 453; *Herriman Irrigation Co. v. Keel*, 25 Utah 96.

**5. Water Supply, etc., Co. v. Larimer, etc., Reservoir Co.**, 25 Colo. 87, reversing 7 Colo. App. 225.



priator cannot complain.<sup>1</sup> As a result of the proposition that waters can be appropriated for a beneficial purpose alone, a prior appropriator has no right to make a wasteful use of the waters appropriated.<sup>2</sup>

g. PRIORITIES. — The priorities as between the several appropriators are to be determined by the priorities in time of their several appropriations,<sup>3</sup> and a person appropriating a water right on a stream already appropriated acquires a right to the surplus or residuum which he appropriates, and those who acquired prior rights, whether above or below him on the stream, can in no way extend their use of the water to his prejudice, but are limited to the rights enjoyed when he acquired his.<sup>4</sup> In determining the time when a right to water by appropriation begins, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam, ditch, flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.<sup>5</sup> If, however, the work for the actual appropriation of the water is not prosecuted with reasonable diligence, the time of appropriation will not relate back to the beginning of the work.<sup>6</sup> The

1. *Conrad v. Arrowhead Hot Springs Hotel Co.*, 103 Cal. 399.

2. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Barrows v. Fox*, (Cal. 1892) 30 Pac. Rep. 768; *Barnes v. Sabron*, 10 Nev. 217; *Roeder v. Stein*, 23 Nev. 92; *Hague v. Nephi Irrigation Co.*, 16 Utah 421, 67 Am. St. Rep. 634.

3. **Priorities of Appropriation Rights** — *United States*. — *Schwab v. Beam*, 86 Fed. Rep. 41.

*Arizona*. — *Huning v. Porter*, (Ariz. 1898) 54 Pac. Rep. 584; *Egan v. Estrada*, (Ariz. 1899) 56 Pac. Rep. 721.

*California*. — *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Santa Paula Water Works v. Peralta*, 113 Cal. 38; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181; *San Jose Land, etc., Co. v. San Jose Ranch Co.*, 129 Cal. 673; *Senior v. Anderson*, 130 Cal. 290; *Patterson v. Mills*, (Cal. 1902) 68 Pac. Rep. 1034.

*Colorado*. — *Roberts v. Arthur*, 15 Colo. 456; *Jarvis v. State Bank*, 22 Colo. 309, 55 Am. St. Rep. 129; *Colorado Milling, etc., Co. v. Larimer, etc., Irrigation Co.*, 26 Colo. 47; *Cache La Poudre Reservoir Co. v. Water Supply, etc., Co.*, 27 Colo. 532; *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315; *Wellington v. Beck*, (Colo. 1901) 65 Pac. Rep. 626, 30 Colo. 409; *Medano Ditch Co. v. Adams*, 29 Colo. 317; *Great Plains Water Co. v. Lamar Canal Co.*, 31 Colo. 96; *Church v. Stillwell*, 12 Colo. App. 43.

*Idaho*. — *McGinness v. Stanfield*, 6 Idaho 372; *Branstetter v. Williams*, 6 Idaho 574; *Branstetter v. Williams*, 8 Idaho 257; *Brossard v. Morgan*, 7 Idaho 215; *Pyke v. Burnside*, 8 Idaho 487.

*Montana*. — *McDonald v. Lannen*, 19 Mont. 78.

*Nevada*. — *Chiatovich v. Davis*, 17 Nev. 133.

*Oregon*. — *Speake v. Hamilton*, 21 Oregon 3; *Smyth v. Neal*, 31 Oregon 105; *Carson v. Hayes*, 39 Oregon 97; *McCall v. Porter*, 42 Oregon 49.

*Washington*. — *Longmire v. Smith*, 26 Wash. 439.

*Wyoming*. — *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110; *Willey v. Decker*, 11 Wyo. 496.

*Canada*. — *Dunkerly v. McCarty*, 8 L. C. Rep.

132; *Covert v. Pettijohn*, 9 British Columbia 118.

See also the title IRRIGATION, vol. 17, p. 505 et seq.

Priority according to date of appropriation is not affected by the fact that the actual diversion by the appropriation is made in different states. *Morris v. Bean*, 123 Fed. Rep. 618, following *Howell v. Johnson*, 89 Fed. Rep. 556.

4. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Branstetter v. Williams*, 6 Idaho 574.

5. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Stark v. Barnes*, 4 Cal. 412; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571; *Wells v. Kreyenhagen*, 117 Cal. 329; *Sieber v. Frink*, 7 Colo. 148; *Water Supply, etc., Co. v. Larimer, etc., Irrigation Co.*, 24 Colo. 322; *Nevada Ditch Co. v. Bennett*, 38 Oregon 59, 60 Am. St. Rep. 777.

6. *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310; *New Loveland, etc., Irrigation, etc., Co. v. Consolidated Home-Supply Ditch, etc., Co.*, 27 Colo. 525; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

**Excuses for Delay**. — *Kimball v. Gearhart*, 12 Cal. 27.

In *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550, *Lewis, C. J.*, said: "The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs, such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. \* \* \* It would be a most dangerous doctrine to hold that ill health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time, or the diligence which is usually required in the prosecution of the work necessary for the purpose. We find no recognition of such doctrine in the law, nor are we disposed to adopt it as the rule to govern cases of this kind."

priority of right is not affected by the purpose or use for which the water is appropriated.<sup>1</sup> Thus, a subsequent appropriation for purposes of irrigation does not have precedence over a prior appropriation for mining or milling purposes.<sup>2</sup> Where the doctrine of riparian rights obtains, an appropriation is subject to a reasonable use of the watercourse by riparian owners;<sup>3</sup> hence the appropriator does not acquire a right to the use of the amount of water appropriated so as to prevent either upper<sup>4</sup> or lower<sup>5</sup> riparian owners at the time of appropriation from making a reasonable use of the flow of the stream for riparian purposes. Third persons who have no right to the waters of the watercourse cannot justify their interference with rights of an appropriator on the ground that his appropriation was an invasion of the rights of the lower riparian owners.<sup>6</sup> Priority to the extent of the appropriation is acquired as against subsequent grantees from the government of upper riparian lands.<sup>7</sup>

**Notice of Appropriation.** — Under statutes in some jurisdictions providing for the filing of a notice of intention to appropriate waters the priority between appropriators is fixed by the time of such notice,<sup>8</sup> provided the work of actual appropriation is begun within a reasonable time and prosecuted with reasonable diligence.<sup>9</sup> The date recited in statutory notice is not conclusive against the appropriator, but he may show a prior actual appropriation, as against one who made an appropriation thereafter but prior to the date recited in the notice.<sup>10</sup>

**h. LOSS AND ABANDONMENT OF RIGHTS.** — The rights acquired by appropriation are not lost by a mere nonuser without the intention to abandon,<sup>11</sup> but they may be lost by an act of abandonment showing an intention

1. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73.

2. *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Colorado Milling, etc., Co. v. Larimer, etc.*, *Irrigation Co.*, 26 Colo. 47.

3. *Senior v. Anderson*, 130 Cal. 290. And see generally the title *IRRIGATION*, vol. 17, pp. 492 *et seq.*, 503.

4. **Rights Against Riparian Owners.** — *Cruse v. McCauley*, 96 Fed. Rep. 369; *Lux v. Haggin*, 69 Cal. 257; *Santa Cruz v. Enright*, 95 Cal. 105; *Hargrave v. Cook*, 108 Cal. 72; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158; *Cave v. Tyler*, 133 Cal. 566; *Rice v. Meiners*, 136 Cal. 292; *Nippel v. Forker*, 9 Colo. App. 106; *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781; *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 15 S. Dak. 519; *Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402; *Northport Brewing Co. v. Perrot*, 22 Wash. 243.

5. *Nippel v. Forker*, 9 Colo. App. 196; *Browning v. Lewis*, 39 Oregon 11.

6. *Browning v. Lewis*, 39 Oregon 11.

7. See the title *IRRIGATION*, vol. 17, pp. 506, 508, and the following cases:

*United States.* — *Atchison v. Peterson*, 20 Wall. (U. S.) 511.

*California.* — *Ramelli v. Irish*, 96 Cal. 214; *Shenandoah Min., etc., Co. v. Morgan*, 106 Cal. 409; *Williams v. Harter*, 121 Cal. 47.

*Colorado.* — *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Thomas v. Guiraud*, 6 Colo. 530.

*Idaho.* — *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411.

*Nebraska.* — *Crawford Co. v. Hathaway*, (Neb. 1903) 93 N. W. Rep. 781.

*Oregon.* — *Kaler v. Campbell*, 13 Oregon 596; *Cole v. Logan*, 24 Oregon 304; *Mattis v. Hosmer*, 31 Oregon 522; *Brown v. Harris*, 39

*Oregon* 148, 87 Am. St. Rep. 649; *Britt v. Reed*, 42 Oregon 76.

*Washington.* — *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572; *Isaacs v. Barber*, 10 Wash. 124, 45 Am. St. Rep. 772.

8. **Notice of Appropriation.** — *Oviatt v. Big Four Min. Co.*, 39 Oregon 118. See also *Salt Lake City v. Salt Lake City Water, etc., Co.*, 24 Utah 249. And see *supra*, this subsection, *What Constitutes Appropriation*.

9. *Cruse v. McCauley*, 96 Fed. Rep. 369.

10. *Cruse v. McCauley*, 96 Fed. Rep. 369.

11. **Nonuser Without Intention to Abandon.** — *United States.* — *Integral Quicksilver Min. Co. v. Altoona Quicksilver Min. Co.*, 75 Fed. Rep. 379, 44 U. S. App. 566; *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *North American Exploration Co. v. Adams*, 104 Fed. Rep. 404, 45 C. C. A. 185.

*California.* — *Partridge v. McKinney*, 10 Cal. 181.

*Colorado.* — *Rominger v. Squires*, 9 Colo. 329; *People v. Farmers High Line Canal, etc., Co.*, 25 Colo. 202; *Cache La Poudre Irrigating Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, *affirming* 8 Colo. App. 237; *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 267, 83 Am. St. Rep. 80; *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315; *Butterfield v. O'Neill*, (Colo. App. 1903) 72 Pac. Rep. 807.

*Idaho.* — *Welch v. Garrett*, 5 Idaho 639.

*Montana.* — *Carron v. Wood*, 10 Mont. 500.

*Nevada.* — *Irwin v. Strait*, 18 Nev. 436.

*Oregon.* — *Dodge v. Marden*, 7 Oregon 456; *Moss v. Rose*, 27 Oregon 595, 50 Am. St. Rep. 743; *Wimer v. Simmons*, 27 Oregon 1, 50 Am. St. Rep. 685; *Lavery v. Arnold*, 36 Oregon

to forsake all right in the waters appropriated,<sup>1</sup> and nonuser is evidence of an intention to abandon.<sup>2</sup> An appropriator does not abandon his right by making a wrongful change in the location of his ditch.<sup>3</sup> So turning the water from an artificial ditch into a natural watercourse for the purpose of conducting it to another point, whereby its identity is destroyed by the mingling with the natural water of the stream, is not an abandonment;<sup>4</sup> but if the water is turned into a natural stream for the purpose of getting rid of it, without any intention to reclaim it, there is an abandonment;<sup>5</sup> and water rights acquired by appropriation may be lost through an adverse user by a third person.<sup>6</sup>

**Deprivation of Right.** — The appropriator of water rights has a property right therein, and cannot be deprived of his right without his consent, even for a public use, without compensation.<sup>7</sup>

**1. TRANSFER OF RIGHTS.** — Water rights acquired by appropriation are recognized as property which may be transferred by the appropriator, so as to confer upon his transferee all the rights which he possessed.<sup>8</sup> So there may

And see the title *IRRIGATION*, vol. 17, pp. 516, 517.

In *McCauley v. McKeig*, 8 Mont. 389, where the evidence showed that the defendant had appropriated water for placer-mining purposes in 1869, that in 1872 the plaintiff had appropriated the water of the same stream for irrigating his land, and that during the years 1878, 1879, 1880, 1882, and 1883 the defendant had not used the water, but that in certain of such years the supply was not sufficient for his purposes, it was held that there had been no abandonment by the defendant of his prior right.

**1. Abandonment.** — *Dougherty v. Creary*, 30 Cal. 290, 89 Am. Dec. 116; *Kirman v. Hunnewell*, 93 Cal. 519; *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525; *Colorado Land, etc., Co. v. Rocky Ford Canal, etc., Co.*, 3 Colo. App. 545; *Nichols v. Lantz*, 9 Colo. App. 1; *Dodge v. Marden*, 7 Oregon 456. See also the title *IRRIGATION*, vol. 17, p. 516.

In *Kirman v. Hunnewell*, 93 Cal. 519, it was held that after a ditch by which the waters of a creek were appropriated for mining purposes has fallen into disuse and has been abandoned, the water right is destroyed by abandonment; and where, after such abandonment, the water of the creek has continuously flowed over lands belonging to a riparian owner, and has been used by him for irrigation and for domestic and general purposes for many years, no person claiming under the appropriators can revive the old ditch and water right, so as to divert the water to the injury of the riparian owner.

Where water was appropriated for mining purposes and the appropriator allowed the mining premises to be sold for taxes and for eighteen years failed to make any claim to the water right, an abandonment was held to have been shown. *Oviatt v. Big Four Min. Co.*, 39 Oregon 118.

**The Burden of Proving an Abandonment** is upon the party alleging it. *Beaver Brook Reservoir, etc., Co. v. St. Vrain Reservoir, etc., Co.*, 6 Colo. App. 130; *Hall v. Lincoln*, 10 Colo. App. 360.

**2. Integral Quicksilver Min. Co. v. Altoona Quicksilver Min. Co.**, (C. C. A.) 75 Fed. Rep.

379; *Oviatt v. Big Four Min. Co.*, 39 Oregon 118. And see the title *IRRIGATION*, vol. 17, p. 517.

The facts that water was appropriated for a particular purpose, that the purpose has been fully accomplished, and that when accomplished the appropriators dispersed the water and allowed a long time to elapse without using the ditch, and then sold it for a nominal sum, may be received in evidence as tending to show abandonment. *Davis v. Gale*, 32 Cal. 36, 91 Am. Dec. 554.

**3.** *McGuire v. Brown*, 106 Cal. 660.

**4.** *Butte Canal, etc., Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769.

**5.** *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408; *Adams v. Slater*, 8 Ill. App. 73.

**6.** *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 509, 85 Am. Dec. 145; *American Co. v. Bradford*, 27 Cal. 360; *Frederick v. Dickey*, 91 Cal. 358; *Woolman v. Garringer*, 1 Mont. 544. And see the title *IRRIGATION*, vol. 17, pp. 518, 519.

In *Ledu v. Jim Yet Wa*, 67 Cal. 346, where the plaintiff pleaded adverse possession in himself, it was held to be error to instruct the jurors that if they believed that the plaintiff was the first to appropriate and use the waters in dispute, that his appropriation and use thereof were prior to that of the defendant and those under whom he claimed adversely to the plaintiff, that his possession was continuous, exclusive, and notorious, and that he had not parted with his right thereto or forfeited it, they should find for him. Such instruction would authorize the jury to find for the plaintiff without considering the defense of adverse possession.

**7.** *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Fisher v. Bountiful City*, 21 Utah 29; *Salt Lake City v. Salt Lake City Water, etc., Co.*, 24 Utah 249; *Willey v. Decker*, 11 Wyo. 496. See generally the title *IRRIGATION*, vol. 17, p. 514.

**8. Transfer of Water Rights — California.** — *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 220; *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 509, 85 Am. Dec. 145; *Reed v. Spicer*, 27 Cal. 57; *McDonald v. Askew*, 29 Cal. 200; *Henderson v. Nicholas*, 67 Cal. 152;



be a transfer of a part of such rights.<sup>1</sup>

*j.* PROTECTION OF RIGHTS. — Rights in a watercourse acquired by appropriation are entitled to the protection of the courts when interfered with by third persons,<sup>2</sup> and not only may damages suffered by a wrongful interference with such rights be recovered,<sup>3</sup> but a court of equity will grant relief and restrain by injunction the invasion of such rights;<sup>4</sup> and a suit to quiet title and settle priorities as to water appropriations may be maintained.<sup>5</sup> But when, because of the drying up of a part of the stream, the water diverted by the defendant could not in any case have reached the plaintiff, the diversion will not be enjoined;<sup>6</sup> and so long as an appropriator is receiving the

*Painter v. Pasadena Land, etc., Co.*, 91 Cal. 74;  
*Senior v. Anderson*, 138 Cal. 716.

*Colorado.* — *Combs v. Agricultural Ditch Co.*,  
17 Colo. 146, 31 Am. St. Rep. 275.

*Idaho.* — *Hall v. Blackman*, 8 Idaho 272.

*Montana.* — *Barkley v. Tieleke*, 2 Mont. 59.

*Nevada.* — *Chiatovich v. Davis*, 17 Nev. 133.

*Oregon.* — *Nevada Ditch Co. v. Bennett*, 30  
Oregon 59, 60 Am. St. Rep. 777; *North Powder  
Milling Co. v. Coughanour*, 34 Oregon 9.

*Texas.* — *Toyaho Creek Irrigation Co. v.  
Hutchins*, 21 Tex. Civ. App. 274.

*Utah.* — *Salina Creek Irrigation Co. v. Salina  
Stock Co.*, 7 Utah 456.

And see the title IRRIGATION, vol. 17, pp.  
515, 516.

**Mortgage.** — These rights may be made the  
subject of mortgage. *Union Water Co. v. Mur-  
phy's Flat Fluming Co.*, 22 Cal. 620; *Bradley  
v. Harkness*, 26 Cal. 69; *Hungarian Hill Gravel  
Min. Co. v. Moses*, 58 Cal. 168; *Smith v. Den-  
niff*, 24 Mont. 20.

**The Party Who Buys a Mining Claim and Its  
Appurtenances**, and who asserts that a ditch  
and its water rights passed to him by the con-  
veyance, as appurtenances to the claim, must, in  
order to hold them as such, prove that they  
were appurtenances. *Quirk v. Falk*, 47 Cal. 453.

**If by the Erection of a Mill**, and the acqui-  
sition of a possessory right of land on a stream,  
the water right be acquired, the transfer of the  
possession of the property to a vendee, as  
owner, passes the water right. *McDonald v.  
Bear River, etc., Water, etc., Co.*, 13 Cal. 220.

1. *Larimer, etc., Reservoir Co. v. Cache la  
Poudre Irrigating Co.*, 8 Colo. App. 237.

2. **Protection of Water Rights** — *United States.*  
— *Morris v. Bean*, 123 Fed. Rep. 618; *Montana  
Co. v. Gehring*, 75 Fed. Rep. 384, 44 U. S. App.  
629.

*California.* — *Parke v. Kilham*, 8 Cal. 77, 68  
Am. Dec. 310; *Tuolumne Water Co. v. Chap-  
man*, 8 Cal. 392; *White v. Todd's Valley Water  
Co.*, 8 Cal. 443, 68 Am. Dec. 338; *Phoenix  
Water Co. v. Fletcher*, 23 Cal. 481; *McDonald  
v. Askwed*, 29 Cal. 200; *Lower Kings River  
Water Ditch Co. v. Kings River, etc., Canal  
Co.*, 60 Cal. 408; *Junkans v. Bergin*, 67 Cal.  
267; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181;  
*Settlers' Ditch Co. v. Hayes*, (Cal. 1889) 22  
Pac. Rep. 1152.

*Colorado.* — *Saint v. Guerrero*, 17 Colo. 448,  
31 Am. St. Rep. 320; *Lower Latham Ditch  
Co. v. Loudon Irrigating Canal Co.*, 27 Colo.  
267, 83 Am. St. Rep. 80; *Rio Grande Land,  
etc., Co. v. Prairie Ditch Co.*, 27 Colo. 225;  
*Hector Min. Co. v. Valley View Min. Co.*, 28  
Colo. 315.

*Montana.* — *Harris v. Shontz*, 1 Mont. 212;  
*Fabian v. Collins*, 3 Mont. 215; *Anderson v.  
Cook*, 25 Mont. 330.

*New Mexico.* — *De Baca v. Santo Domingo*,  
10 N. Mex. 38.

*Oregon.* — *Carson v. Hayes*, 39 Oregon 97.

*Utah.* — *Herriman Irrigation Co. v. Butter-  
field Min., etc., Co.*, 19 Utah 453.

*Wyoming.* — *Stoner v. Mau*, 11 Wyo. 366.

See also the title IRRIGATION, vol. 17, pp.  
520, 521.

**Withdrawal of Water Within Limits of Another  
State.** — *Howell v. Johnson*, 89 Fed. Rep. 556.

3. **Recovery of Damages.** — *White v. Brash*,  
(Ariz. 1890) 73 Pac. Rep. 445; *Natoma Water,  
etc., Co. v. McCoy*, 23 Cal. 490; *Parks Canal,  
etc., Co. v. Hoyt*, 57 Cal. 44; *Ellis v. Tone*, 58  
Cal. 289; *Arnett v. Linhart*, 21 Colo. 188;  
*Carron v. Wood*, 10 Mont. 500.

4. **Injunction.** — *Copper King v. Wabash  
Min. Co.*, 114 Fed. Rep. 991; *Rodgers v. Pitt*,  
89 Fed. Rep. 420; *Marius v. Bicknell*, 10 Cal.  
217; *Fuller v. Swan River Placer Min. Co.*, 12  
Colo. 12; *Bruening v. Dorr*, 23 Colo. 195;  
*Medano Ditch Co. v. Adams*, 29 Colo. 317;  
*Platte Valley Irrigation Co. v. Buckers Irriga-  
tion, etc., Co.*, 25 Colo. 77; *Beach v. Spokane  
Ranch, etc., Co.*, 25 Mont. 379; *Carson v.  
Hayes*, 39 Oregon 97; *Stenger v. Tharp*, (S.  
Dak. 1903) 94 N. W. Rep. 402; *Longmire v.  
Smith*, 26 Wash. 439; *Stoner v. Mau*, 11 Wyo.  
384, 401; *Willey v. Decker*, 11 Wyo. 496.

5. **Quieting Title** — *United States.* — *Rincon  
Water, etc., Co. v. Anaheim Union Water Co.*,  
115 Fed. Rep. 543.

*California.* — *Riverside Water Co. v. Gage*, 89  
Cal. 410; *Spargur v. Heard*, 90 Cal. 221; *Bath-  
gate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep.  
158.

*Colorado.* — *Broadmoor Dairy, etc., Co. v.  
Brookside Water, etc., Co.*, 24 Colo. 541; *Cache  
La Poudre Reservoir Co. v. Water Supply, etc.,  
Co.*, 27 Colo. 532; *Hector Min. Co. v. Valley  
View Min. Co.*, 28 Colo. 315; *Buckers Irriga-  
tion, etc., Co. v. Farmers' Independent Ditch  
Co.*, 31 Colo. 62.

*Idaho.* — *Hall v. Blackman*, 8 Idaho 272.

*New Jersey.* — *Van Horn v. Clark*, 56 N. J.  
Eq. 476.

*Oregon.* — *Brown v. Baker*, 39 Oregon 66.

*Utah.* — *Deseret Irrigation Co. v. McIntyre*,  
16 Utah 398; *Salt Lake City v. Salt Lake City  
Water, etc., Co.*, 24 Utah 249.

*Washington.* — *Miller v. Lake Irrigation Co.*,  
27 Wash. 447.

*Wyoming.* — *State v. Ausherman*, 11 Wyo.  
419, 438; *Willey v. Decker*, 11 Wyo. 496.

6. *Raymond v. Wimsette*, 12 Mont. 551, 33

full amount of water to which he is entitled he cannot complain of the diversion of the surplus water by others.<sup>1</sup>

**WATER'S EDGE.** — See note 2.

**WATERS OF THE STATE.** — See note 3.

**WATERS OF THE UNITED STATES.** — See note 4.

**WATER WAY.** — See note 5.

Am. St. Rep. 604; West Point Irrigation Co. v. Moroni, etc., Irrigation Ditch Co., 21 Utah 229.

1. Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320.

2. **Water's Edge.** — A grantor owning land on both sides of a stream conveyed a piece on the south side described as extending "to the *water's edge* of K. creek; then keeping along the *water's edge* of said creek with the stream until,' etc., reserving a road fifteen feet wide along the edge of the bank." This was held to pass the land to the centre of the stream. Kains v. Turville, 32 U. C. Q. B. 17. See generally the title BOUNDARIES, vol. 4, p. 756.

3. **Waters of the State.** — A statute prohibited seining in any of the *waters of the state*, but excepted the Mississippi river. It was held that under this statute seining was forbidden within a lake entirely within the state, but con-

nected with the Mississippi river by a stream. State v. Haug, 95 Iowa 413.

A bayou extending back from Lake Contrary, a public body of water in Buchanan county, and into which from the lake fish had free and uninterrupted access, and not being wholly on premises belonging to the defendant, falls within the description *waters of the state* in Missouri Revised Statutes, section 1625, which forbids the erecting or maintaining of any seine, net, or trap, etc., in any *waters of the state*, and the catching of fish therein by any such means. State v. Blount, 85 Mo. 543.

4. **Waters of the United States.** — See The Daniel Ball, 10 Wall. (U. S.) 563; U. S. v. Burlington, etc., County Ferry Co., 21 Fed. Rep. 333. And see the title NAVIGABLE WATERS, vol. 21, p. 424.

5. **Water Way.** — See Central R. Co. v. Assessors, 48 N. J. L. 3.

# WATERWORKS AND WATER COMPANIES.

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**I. CHARACTER OF CORPORATION AND NATURE OF BUSINESS — 1. In General.** — Every government which regards the welfare of its people will exert its highest power to preserve the public health and safety. To that end the supply of pure water is essential. To secure it involves the exercise by the state not only of the power of eminent domain, but also of the police power.<sup>1</sup>

**2. Quasi-public Corporations.** — Water companies, engaged in carrying out their corporate functions, are necessarily the beneficiaries of valuable privileges from the state and subserve a public purpose. They are classed as *quasi*-public corporations, and are subject in their operations to the limitations and control which the law imposes on such bodies, in order that the public interest may not suffer.<sup>2</sup>

**II. GRANT OF FRANCHISE — RIGHTS AND PRIVILEGES — 1. In General.** — The business of furnishing the inhabitants of a city with water, though not in the exercise of the powers of sovereignty, is undoubtedly a business which is public in its nature, and belongs to that class of occupations upon which the public interest is impressed. It may, where proper legislative authority is given, be carried on by a municipal or private corporation, acting under a proper franchise granted to it by the state for that purpose.<sup>3</sup>

**2. Grant to Private Corporations — a. IN GENERAL.** — A franchise may be granted to a private corporation to supply a city and its inhabitants with water for public and private purposes. But a water company, however organized, has no power to perform its functions except by express permission from the legislature directly, or from such inferior legislative bodies as have been designated by the legislature to act as its agent for local purposes in granting such permission.<sup>4</sup>

**b. LEGISLATIVE AUTHORITY.** — As the business of furnishing a city and its inhabitants with water is public in its nature, the legislative power to grant that right is absolute.<sup>5</sup>

1. Van Reipen *v.* Jersey City, 58 N. J. L. 262.

2. **Water Company Assumes a Public Duty.** — Crosby *v.* Montgomery, 108 Ala. 498; McCrary *v.* Beaudry, 67 Cal. 120; Crow *v.* San Joaquin, etc., Canal, etc., Co., 130 Cal. 309; Wagner *v.* Rock Island, 146 Ill. 139; Smith *v.* Lincoln, 170 Mass. 488; New York State Trust Co. *v.* Duluth, 70 Minn. 257; American Water-Works Co. *v.* State, 46 Neb. 194, 50 Am. St. Rep. 610; Crumley *v.* Watauga Water Co., 99 Tenn. 424.

**Water Companies Are Quasi-public Corporations.** — Crosby *v.* Montgomery, 108 Ala. 498; Hieronymus *v.* Bienville Water Supply Co., 131 Ala. 447; Price *v.* Riverside Land, etc., Co., 56 Cal. 431; White *v.* Farmers' Highline Canal, etc., Co., 22 Colo. 191; Danville *v.* Danville Water Co., 178 Ill. 299, 69 Am. St. Rep. 304, citing 29 AM. AND ENG. ENCYC. OF LAW, pp. 11-13; Rogers Park Water Co. *v.* Fergus, 178 Ill. 571, affirmed 180 U. S. 624; Danville *v.* Danville Water Co., 180 Ill. 235; Smith *v.* Lincoln, 170 Mass. 488; Olmsted *v.* Morris Aqueduct, 47 N. J. L. 333, *disapproving* Paterson Gas Light Co. *v.* Brady, 27 N. J. L. 245, 72 Am. Dec. 360; Van Reipen *v.* Jersey City, 58 N. J. L. 262; Raton Waterworks Co. *v.* Raton, 9 N. Mex. 70; Geer *v.* Durham Water Co., 127 N. Car. 349; Griffin *v.* Goldsboro, 122 N. Car. 206; Haugen *v.* Albina Light, etc., Co., 21 Oregon 411; Com. *v.* Russell, 172 Ia. St. 506; Watauga Water Co. *v.* Wolfe, 99 Tenn. 429, 63 Am. St. Rep. 1841; City Water Co. *v.* State, (Tex. Civ. App. 1895) 33 S. W. Rep. 259. See *infra*, this title, *Regulation and Control*.

In State *v.* Butte City Water Co., 18 Mont. 199, the court said: "A waterworks company

is a *quasi*-public corporation. It must supply water to all who apply therefor and offer to pay rents.' (Cook on Stock and Stockholders, § 932.) The account of which the grant was given was a public purpose. (Lumbard *v.* Stearns, 4 Cush. (Mass.) 61.) Therefore 'the grant is subject to an implied condition that the company shall assume an obligation to fulfil the public purpose on account of which the grant was made.' Morawitz on Priv. Corp., § 1120."

**The Property of a Water Company May Be Condemned** for other public purposes where the public exigency requires it. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685; Kennebec Water Dist. *v.* Waterville, 96 Me. 234; Road in Herrick Tp., 16 Pa. Super. Ct. 579.

3. Wagner *v.* Rock Island, 146 Ill. 139.

4. **Franchise to Private Corporation.** — New Orleans Water-Works Co. *v.* Rivers, 115 U. S. 679; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1; Andrews *v.* National Foundry, etc., Works, (C. C. A.) 61 Fed. Rep. 782.

In State *v.* Butte City Water Co., 18 Mont. 199, the court said: A water company in no case "can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner."

**When Recording of Charter is made essential** by statute to the proper incorporation of every corporation, the corporate existence of a water company does not date from the issuance of the patent, but from the date of recording its charter. Braddock *v.* Penn Water Co., 180 Pa. St. 370.

5. **Power of Legislature.** — In Gas, etc., Co. *v.*

*c. LEGISLATIVE AGENCY.* — It is not essential that the franchise to a water company be granted directly by the legislature; it is sufficient if it be made through a legitimate legislative agency, and the state may delegate the right to grant a franchise to a water company to such inferior legislative bodies as in its judgment is desirable for local purposes.<sup>1</sup>

**3. Grant to Municipal Corporations** — *a. IN GENERAL.* — A municipality has no implied power, from the mere fact of its creation, to engage in the business of supplying its citizens with water for pay. It cannot do so except by virtue of legislative authority either express or necessarily implied.<sup>2</sup>

**Municipality Acts as Private Corporation.** — A municipal corporation which supplies its inhabitants with water does so in the capacity of a private corporation, and not in the exercise of the power of local sovereignty.<sup>3</sup>

*b. LEGISLATIVE AUTHORITY* — (1) *Express Authority.* — Waterworks for the supplying of cities and towns with water are undoubtedly for public and municipal purposes,<sup>4</sup> and the legislature may confer authority upon municipalities, whether they be incorporated under special charters or under the

Downingtown, 175 Pa. St. 341, it was held that the legislative authority to confer power to erect waterworks is absolute, and if it confers that power on a city, and the city fails to execute it, the state may confer an exclusive power on a private company to do so, which when executed, excludes the city from ever erecting waterworks therein.

In *Mayo v. Dover, etc., Fire Co.*, 96 Me. 539, it was held that the legislature may grant to any public corporation, whether its municipal power be general or limited, power to construct, or to purchase and maintain, a system of waterworks to furnish water for municipal purposes and for the use of inhabitants for domestic and sanitary purposes.

**1. Franchise Granted by Legislative Agency.** — *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Wagner v. Rock Island*, 146 Ill. 139; *Ashland v. Wheeler*, 88 Wis. 607; *State v. Portage City Water Co.*, 107 Wis. 441.

In *Fidelity Trust, etc., Co. v. Fowler Water Co.*, 113 Fed. Rep. 560, the court said: "The making of a contract for the supply of water was a matter delegated to the board of trustees of the town of Fowler, to be exercised according to its discretion; and in the absence of fraud, or of an abuse of discretion so gross as to evince bad faith, its action, while within the authority delegated to it, is not subject to review by the courts."

**2. White v. Meadville**, 177 Pa. St. 653; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 177, 72 Am. Dec. 730.

**Not a Police Power.** — In *North Springs Water Co. v. Tacoma*, 21 Wash. 517, the court said: "Supplying water to the inhabitants of the city and to itself does not originate in an exercise of the ordinary police powers of a municipal corporation."

**Power Derived Solely by Statute.** — In *Wagner v. Rock Island*, 146 Ill. 139, it was held that the power of the city to build and maintain waterworks and furnish water to the inhabitants for a consideration is derived from and is governed solely by statute.

**Unauthorized Contract to Purchase Waterworks.** — In *Pedrick v. Ripon*, 73 Wis. 622, it was held that a court of equity would not interfere to prevent the enforcement of a resolution to contract for waterworks, although wholly unauthor-

ized, where nothing further had been done than the adoption of the resolution.

**3. Municipality Stands on Same Footing as Would an Individual or Private Corporation.** — *Wagner v. Rock Island*, 146 Ill. 139; *Bailey v. New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175, 72 Am. Dec. 730; *Brumm's Appeal*, (Pa. 1888) 12 Atl. Rep. 855.

**City's Liability for Negligence Same as That of Private Corporation or Individual.** — When a municipal corporation undertakes to construct and maintain waterworks, in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water at rates established by the city, its liability for the negligent construction or maintenance of the works is the same as that of a private corporation or individual, as the city owns the works in its private or proprietary, and not in its public or governmental, capacity. And this is true, even though the works are constructed and operated by a committee appointed by the state as the agents of the city for the conduct of the undertaking. *Esberg-Gunst Cigar Co. v. Portland*, 34 Oregon 282, *distinguishing* *David v. Portland Water Committee*, 14 Oregon 98.

**Municipality Operating Waterworks as a Private Company.** — In *Wolverhampton v. Bilston*, (1891) 1 Ch. 315, where the undertaking of a waterworks company was transferred by statute to a borough, and the profits of the waterworks were, under a subsequent statute, to be transferred to the borough improvement fund, or, at the option of the corporation, to be applied in the reduction of prices to consumers, it was held that the corporation was a water company supplying water for its own profit.

**Municipality May Operate Water Plant for Gain.** — In *Preston v. Water Com'rs*, 117 Mich. 580, it was held that a city is not obliged, by reason of its ownership of a water plant, to make the cost of its construction and extension a general city charge, but may properly derive a profit from consumers, and apply the same in payment of the cost of the plant.

**4. Waterworks Are for Public and Municipal Purposes.** — In *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222, the court said: "It is quite clear that the establishment and control of waterworks for the benefit of the inhabitants of



general incorporation law,<sup>1</sup> to erect and operate such works, or to purchase works already established,<sup>2</sup> and to that end incur expenditures,<sup>3</sup> levy taxes, issue bonds, and exercise the right of eminent domain.<sup>4</sup> Though not expressly granted, the power given to a city to erect waterworks impliedly confers the power to levy a tax for that purpose.<sup>5</sup>

(2) *Implied Authority.* — This authority is to be strictly construed against the municipality.<sup>6</sup> Still it has been held to be implied from the grant to a

the city is a matter that pertains to the municipality, as distinguished from the state at large."

1. *Cities Acting under Special Charters, or under General Incorporation Laws.* — In *Grant v. Davenport*, 36 Iowa 404, a general statute conferring the power upon "all cities and incorporated towns" to construct waterworks, was held to apply to cities acting under special charters, as well as to those under the general incorporation laws.

2. *Purchase of Uncompleted Works.* — In *Slingerland v. Newark*, 54 N. J. L. 62, it was held that under an act authorizing a city to purchase waterworks, the purchase might be made by the city before completion of the works for which it provides.

*Contract to Purchase Works When Completed — Acceptance by City.* — In *Aurora Water Co. v. Aurora*, 129 Mo. 540, it was held that where, after waterworks contracted for by a city had been completed, the city council appointed a committee to inspect them and the committee recommended their acceptance, the receiving of water from the works and the payment of an instalment due under the contract amounted to a ratification of the report of the committee and an acceptance of the works by the city, and the failure of the city to pass an ordinance of acceptance would not defeat it.

*The Montana Constitution Prohibits Levying Taxes for Municipal Purposes* (Const., art. 12, § 4), therefore the Political Code, § 4800, subd. 64, providing that if a municipality desires to obtain a water-supply plant it shall purchase or condemn that owned by private persons, is in conflict with the state constitution. *Helena Consol. Water Co. v. Steele*, 20 Mont. 1.

*Ultra Vires Contract to Purchase Ratified by Legislature.* — In *Mayo v. Dover, etc., Fire Co.*, 96 Me. 539, it was held that though a contract made by a city to purchase waterworks was *ultra vires*, it became valid by a subsequent act of the legislature ratifying and confirming it, and also by acquiescence in the contract by the city after such authority and it therefore could be enforced.

*Limitation of Time for Purchase.* — Where a statute authorized a city to purchase the plant of a water company "when and at such price" as might be agreed on by the city and the company, and provided that in case of disagreement as to price the city should have the power to acquire the property by the right of eminent domain at any time within two years after the passage of the act, it was held that notwithstanding the connection and manner in which the word "when" was used, the statute conferred no power on the city to acquire the property by either purchase or condemnation after the expiration of two years. *Ziegler v. Chapin*, 126 N. Y. 342.

3. *Validity of Ordinance — Ascertaining Cost.* — In *Taylor v. McFadden*, 84 Iowa 262, it was held that a city ordinance establishing a system of waterworks and appropriating a specified sum of money for sinking an artesian well is not invalid on the ground that the system adopted may prove a failure, or that the cost cannot be ascertained in advance.

4. *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Grant v. Davenport*, 36 Iowa 402; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400; *State v. Babcock*, 19 Neb. 230; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Lexington v. Lafayette County Bank*, 165 Mo. 671; *Armstrong v. Ft. Edward*, 159 N. Y. 315; *Keith v. Du Quoin*, 89 Ill. App. 36.

*Contract for Construction of Works Without Ordinance.* — In *National Tube-Works Co. v. Chamberlain*, 5 Dak. 54, it was held that where the city had power to construct a system of waterworks, it was not necessary that its council, before entering into a contract with reference to it, should pass an ordinance authorizing the works to be constructed, or the contract to be made, when the charter did not require it.

*Under the Constitution of Ohio*, a city is prohibited from raising money for, or loaning its credit to or in aid of, a company, corporation, or association; and therefore a city cannot be a joint owner of waterworks with a private corporation. *Alter v. Cincinnati*, 56 Ohio St. 47.

5. *Implied Authority to Levy Tax.* — *Taylor v. McFadden*, 84 Iowa 262; *Quincy v. Jackson*, 113 U. S. 332; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Parkersburg v. Brown*, 106 U. S. 489.

In *U. S. v. New Orleans*, 98 U. S. 381, the court said: "When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess — so seldom, indeed, as to be exceptional — any means to discharge their pecuniary obligations except by taxation."

6. *Implied Power.* — The power to purchase an existing waterworks plant cannot be implied from an authorization to construct waterworks. *Austin v. McCall*, 95 Tex. 565.

*Alteration of Plans.* — It is not *ultra vires* for a city council after submitting to qualified voters plans for the erection of waterworks to change the plans in the mere matters of detail with the contractors without submitting such changes to the voters. *Johnson v. Rock Hill*, 57 S. Car. 371.

*Power to Contract Is Not Power to Operate.* — See *National Foundry, etc., Works v. Oconto Water Co.*, 52 Fed. Rep. 33.

municipal corporation of the power to make all contracts which may be deemed necessary for the general welfare,<sup>1</sup> or to provide for means of extinguishing fires.<sup>2</sup>

The Power to Contract for a Water Supply is necessarily involved in the general welfare of the municipality, and need not be expressly granted to it in its charter by specific words. This power has been implied from the grant of the right to prevent and extinguish fires, or to provide for the general health and welfare of the city.<sup>3</sup>

**4. Grant of Exclusive Franchise — a. BY LEGISLATURE.** — The legislature may grant to a private corporation the exclusive right to lay pipes and mains through the streets of a municipality, to supply it and its inhabitants with water for general and public use,<sup>4</sup> unless restrained by the constitution.<sup>5</sup>

**b. BY INFERIOR LEGISLATIVE BODIES.** — Neither a municipal corporation, nor a town council acting as its agent, has the power to grant an exclusive franchise to a water company, unless authorized to do so in express terms or by necessary implication by the legislature.<sup>6</sup> Where a municipality is

In *People v. McClintock*, 45 Cal. 11, it was held that an act authorizing a municipal corporation to enter into a contract with a party to supply the city with water does not authorize the municipal authorities to erect works to be owned by the city.

**Power Dependent on Majority Vote of Electors.** — In *Brown v. Carl*, 111 Iowa 608, where the Code, § 720, provided that no waterworks shall be authorized, established, or erected by a town unless a majority of the legal electors voting thereon vote in favor of the same, the construction of waterworks by a town is not authorized by a majority vote at a special election upon the question: "Shall the town issue bonds for the purpose of erecting, maintaining, and operating a system of waterworks?"

**Power of Committee to Introduce New and Expensive Works.** — In *Nashville v. Hagan*, 9 Baxt. (Tenn.) 495, it was held that the power to make a contract for the introduction of a new and expensive improvement in a system of waterworks, being equivalent to the power to levy, collect, and disburse taxes, must be exercised in the same manner and by the same authority, that is, by a corporate act; and, in the absence of a general law or ordinance modifying this rule, a waterworks committee has no power to bind the corporation by a contract of this character.

**1. Implied Authority — General Welfare.** — In *Rome v. Cabot*, 28 Ga. 50, under such a general authority to make contracts, it was held that a city had the right to make contracts for the construction of waterworks.

In *Livingston v. Pippin*, 31 Ala. 542, it was held that a city council, having power to provide for the ordinary expenses of the town, had power to procure a supply of water in a public square, and were themselves the judges of the mode best calculated to accomplish that object, on the ground that nothing was more important as a sanitary and police regulation than an abundant supply of water.

*Compare Savidge v. Spring Lake*, 112 Mich. 91.

**2. Implied Authority — Means for Extinguishing Fires.** — *Hardy v. Waltham*, 3 Met. (Mass.) 163; *Lexington v. Lafayette County Bank*, 165 Mo. 671.

**3. Webb City, etc., Waterworks Co. v. Webb**

*City*, 78 Mo. App. 422; *Aurora Water Co. v. Aurora*, 129 Mo. 540.

**4. Exclusive Franchise — Legislative Power.** — *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Atlantic City Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367; *Gas, etc., Co. v. Downingtown*, 175 Pa. St. 341. And see the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 20, p. 844.

**5. Constitutional Restriction Against Perpetuities and Monopolies.** — In *Brenham v. Brenham Water Co.*, 67 Tex. 542, it was held that the constitutional inhibition against the creation of perpetuities and monopolies forbade the grant of an exclusive privilege even for a term of years. And that in order to constitute a monopoly, the right to exercise the exclusive privilege need not extend to all places—the monopoly exists if it operates in and to the hurt of one community; and that it need not continue indefinitely so as to amount to a perpetuity if the privilege is exclusive for a term of years.

In *Davenport v. Kleinschmidt*, 6 Mont. 502, it was held that the grant of the exclusive right of selling to the city water required by it for sewerage and fire protection for a period of twenty years, at a minimum rate fixed by contract, was a monopoly, notwithstanding the grant did not prevent other people from selling water to private citizens.

But in *Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495, it was held that the grant of the privilege formerly enjoyed by the city, by legislative enactment, to a private corporation for a term of years of supplying the city with water by means of waterworks, was not in conflict with section 22, article 1, of the constitution of *Tennessee*, declaring that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

**Constitutional Restriction — Special Laws.** — In *Atlantic City Water Works Co. v. Consumers Water Co.*, 44 N. J. Eq. 427, it was held that a statute granting the exclusive right was void, as being in conflict with the provision of the constitution prohibiting the legislature from passing any local or special law conferring exclusive corporate franchise.

**6. Power of Municipality.** — *Kirkwood v. Mera-*

empowered to grant such a franchise it must strictly follow and cannot exceed the provisions of the statute giving it that power.<sup>1</sup>

**The Validity of an Ordinance** conferring an exclusive franchise may not be contested by a mere taxpayer, but only by some other company or individual after claiming a similar right.<sup>2</sup>

**5. Nature of Right — a. CONSTITUTIONAL GUARANTY — (1) Acceptance and Performance.** — The grant of the right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of the franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it.<sup>3</sup> An ordinance when accepted by a water company is in the nature of a contract and is property within the meaning of the law.<sup>4</sup> It is, however, necessary that the water company accepts and acts upon the provisions of its franchise in order that it may be protected by the constitutional guaranty of such contracts.<sup>5</sup>

**(2) Limited Franchise Powers.** — Water companies acquire only those rights granted to them expressly or by necessary implication, and hence it has been held that the right to supply water to a city from a designated source is not impaired by the grant of a similar right to another company to supply from a different source;<sup>6</sup> nor is a contract to supply water for hydrants

*mec Highlands Co.*, 94 Mo. App. 637; *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Altgelt v. San Antonio, etc., Co.*, 81 Tex. 436; *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167.

In *Smith v. Westerly*, 19 R. I. 437, the court said that where a franchise of a corporation is "drawn into question and is claimed to have been obtained by virtue of a contract of this sort, the power of the town council to enter into such a contract must be free from doubt, or, as said by the court in *State v. Cincinnati Gaslight, etc., Co.*, 18 Ohio St. 262, 'It must be found on the statute book, in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear.'"

**Grant of Exclusive Privilege a Monopoly.** — In *Davenport v. Kleinschmidt*, 6 Mont. 502, after holding that the grant of an exclusive privilege to supply a city with water was a monopoly, it was further held that the city council had no power to grant to any person a monopoly, even when no express prohibition was found in the charter or in other acts of the legislature.

**1. Municipality in Granting Franchise Restricted to Statute Provisions.** — *Hall v. Cedar Rapids*, 115 Iowa 199; *Sullivan v. Bailey*, 125 Mich. 104; *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547.

**2. Grant v. Davenport**, 36 Iowa 396; *Dodge v. Council Bluffs*, 57 Iowa 560.

**3. Constitutional Guaranty.** — *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *State v. Great Falls*, 19 Mont. 518; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 147; *Ashland v. Wheeler*, 88 Wis. 607; *Moore v. New Orleans Waterworks Co.*, 114 Fed. Rep. 380.

**Wilful Neglect.** — In *Crosby v. Montgomery*, 108 Ala. 498, it was held that a wilful violation or neglect of such public duty may be declared a misdemeanor and punished as such, although growing out of a contract between the water company and the city, without impairing the obligation of such contract.

**City Bound by Terms of Ordinance Contract.** — In *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, where a city leased its water-works for a term of thirty years, giving power to the lessees to furnish water and collect rents therefor, but reserving to itself the right to regulate the water rates, provided that they should not be reduced to less than those then charged by the lessees, it was held that after the lessees had complied with the conditions it was not in the power of the city authorities, by ordinance or otherwise, to impose additional burdens as a condition to the exercise of the rights and privileges granted, nor to reduce the rates below those prevailing at the date of the contract.

**4. City Cannot Annul Ordinance Contract When Acted upon.** — *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Anoka Water Works, etc., Co. v. Anoka*, 109 Fed. Rep. 580; *State v. Topeka Water Co.*, 61 Kan. 547.

**Estoppel to Attack Ordinance.** — A water company which accepts the benefits accruing to it by reason of a franchise granted it by an incorporated village is estopped from asserting that the village had no authority to grant the franchise. *Bolivar v. Bolivar Water Co.*, 62 N. Y. App. Div. 484.

**5. Davenport v. Kleinschmidt**, 6 Mont. 502; *Gas, etc., Co. v. Downingtown*, 175 Pa. St. 341.

**6. Power to Obtain Water from Certain Source.** — *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, *distinguishing* *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64.



impaired by the city furnishing itself with water for other purposes.<sup>1</sup>

*b. REPEAL AND ALTERATION OF CHARTER.* — Unless there is an express grant to the contrary the charter of a water company is subject to repeal or alteration by the state, and the state may exercise its power to regulate and control water companies in order to insure proper performance of their public duties.<sup>2</sup>

**6. Eminent Domain** — *a. NATURE AND EXTENT OF POWER.* — The supplying of water to a city and its inhabitants is undoubtedly a public purpose, to accomplish which the legislature may confer upon a city, or a company organized to carry out that purpose, the right to condemn private property upon payment of just compensation.<sup>3</sup>

**Public Uses.** — The right of eminent domain is restricted to taking of private property for public uses, and will not be sanctioned for mere private gain.<sup>4</sup>

**1. Limited Charter Powers.** — In *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, a water company which had been organized under the state laws contracted with a city to supply it with water for certain hydrants at an agreed sum. In this contract there was no express provision for furnishing the inhabitants with water, and there was no express stipulation that the company would do so. The city had power to make this contract and was also authorized by the legislature to build or otherwise acquire waterworks of its own to supply water to itself and its inhabitants for the extinguishment of fires, and for sanitary and domestic purposes, and in its contract with the *Bienville* company the city did not agree not to do so. It was held that the city might construct its own waterworks, and in doing so it did not impair its contract with the water company. See also *Cunningham v. Cleveland*, (C. C. A.) 98 Fed. Rep. 657; *Austin v. Bartholomew*, (C. C. A.) 107 Fed. Rep. 349.

**Contract for Street Sprinkling.** — In *McKnight v. New Orleans*, 24 La. Ann. 412, it was held that one who had the exclusive privilege from the city, of using water from hydrants for the purpose of sprinkling the streets, could not complain if the privilege were taken from him and given to another, who paid more for the water than he had paid, because it was within the power of the city through its administrators to withhold altogether, and from all persons, the use of water from hydrants for the purpose of street sprinkling.

**2.** See the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 620. See also *infra*, this title, *Regulation and Control*.

**3. Power of Eminent Domain** — *Alabama.* — *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758.

*California.* — *Cummings v. Peters*, 56 Cal. 593; *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659; *Lake Pleasant Water Co. v. Contra Costa Water Co.*, 67 Cal. 659.

*Maine.* — *Riche v. Bar Harbor Water Co.*, 75 Me. 91; *Ingraham v. Camden*, etc., *Water Co.*, 82 Me. 335; *Wright v. Woodcock*, 86 Me. 113; *Moseley v. York Shore Water Co.*, 94 Me. 83. *Maryland.* — *Graff v. Baltimore*, 10 Md. 544; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Kane v. Baltimore*, 15 Md. 240.

*Massachusetts.* — *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Wayland v. Middlesex County*, 4 Gray (Mass.) 500; *Lowell v. Boston*, 111 Mass. 464; *Opinion of Justices*, 150 Mass. 596; *New-*

*ton v. Perry*, 163 Mass. 319; *Lynch v. Forbes*, 161 Mass. 302, 42 Am. St. Rep. 402; *Tyler v. Hudson*, 147 Mass. 609.

*Montana.* — *Helena v. Rogan*, 26 Mont. 452.

*Nevada.* — *Thorn v. Sweeney*, 12 Nev. 251.

*New Jersey.* — *Tide-water Co. v. Coster*, 18 N. J. Eq. 518; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311; *Slingerland v. Newark*, 54 N. J. L. 62.

*New York.* — *Stamford Water Co. v. Stanley*, 39 Hun (N. Y.) 424; *Matter of New Rochelle Water Co.*, 46 Hun (N. Y.) 525; *Witcher v. Holland Water-Works Co.*, 66 Hun (N. Y.) 619.

*Oregon.* — *David v. Portland Water Committee*, 14 Oregon 98.

*Pennsylvania.* — *Keller v. Riverton Water Co.*, 161 Pa. St. 422; *Philadelphia*, etc., *R. Co. v. Pottsville Water Co.*, 182 Pa. St. 418; *Road in Herrick Tp.*, 16 Pa. Super. Ct. 579.

*Wisconsin.* — *Atty.-Gen. v. Eau Claire*, 37 Wis. 400.

And see generally the title *EMINENT DOMAIN*, vol. 10, p. 1043.

In *Lumbard v. Stearns*, 4 Cush. (Mass.) 60, the charter grant of the right of eminent domain to a water company was not unconstitutional, although it contained no express provision requiring the corporation to supply, on reasonable terms all persons applying for water.

**Right of Eminent Domain Must Be Clearly Granted.** — In *Van Reipen v. Jersey City*, 58 N. J. L. 262, the court said: "The right 'to take private property, or the property of a corporation, must be clearly granted by the legislature.'"

**Strict Compliance with Legislative Enactment Necessary.** — In *Hampton v. Clinton Water*, etc., *Co.*, 65 N. J. L. 158, it was held that there can be no power to condemn private property for public use by a water company unless the company has strictly complied with the legislative enactments, attempting to give such power.

**Under Statute City May Delegate Power to Water Board.** — Where a town is empowered by statute to exercise the "rights, powers, and authorities" given by the act "in such manner and by such commissions, officers, agents, and servants as said town shall from time to time choose, ordain, appoint, and direct," it may delegate power under the act to the water board to condemn land for a water supply. *Lynch v. Forbes*, 161 Mass. 302, 42 Am. St. Rep. 402.

**4. Public Uses.** — See *Olmsted v. Morris*  
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But although water taken must be for a public purpose, the fact that as an incident to the securing of a public supply more water is obtained than is needed for present public uses and the city disposes of the surplus for an outside use, does not divest the condemnation of land for the water supply of its public character.<sup>1</sup>

**Extent of Power.** — Where a water company is given the right of eminent domain it may take land within or without the district it has been chartered to supply;<sup>2</sup> but the grant of this power is not to be extended by implication or inference, and is restricted to what is reasonably necessary for the purpose.<sup>3</sup>

**b. TAKING OF WATER RIGHTS** — (1) *In General.* — Condemnation of the water in lakes, ponds, and streams is recognized as within the unquestioned limits of the power of eminent domain.<sup>4</sup> The fact that water rights are held by individuals or corporations for a quasi-public use furnishes no insur-

Aqueduct, 46 N. J. L. 495. The fact that the water supply is not for the benefit of the state, does not prevent it being a public use. It is sufficient if it benefit a large portion of the inhabitants of a particular community. *Wayland v. Middlesex County*, 4 Gray (Mass.) 500.

**"Other Purposes" Mean Other Public Purposes of Kind Enumerated.** — *In re Barre Water Co.*, 62 Vt. 27.

**Mining Claims.** — In *Lorenz v. Jacobs*, 63 Cal. 73, it was held that the right of eminent domain may not be exercised in favor of the owners of mining claims to enable them to obtain water for their own use in working such claims, though their intention may also be to supply water to others for mining and irrigation purposes.

**Injunction.** — Where an act authorized the trustees of a village to supply the village with water by means of conduits, and for that purpose to enter on the lands of other persons, make reservoirs, etc., and provide compensation for the owners of such land, and also for the owner of the land on which the spring or source from which the water was to be conducted was situated, but made no provision for indemnifying the owners of lands through which the stream flowed, though such spring had run from time immemorial, for the injury suffered by diverting the course of the stream from their farms, it was held that an injunction might be granted to prevent any proceeding to divert the stream until provision was made for compensation to those injured thereby. *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526. See also *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

1. *Slingerland v. Newark*, 54 N. J. L. 62, 40 Am. & Eng. Corp. Cas. 33.

**What Constitutes Taking.** — Under a statute authorizing a town to take the water of a certain pond for the purpose of supplying the inhabitants thereof with water, the town accepted the act and took land on the shore of the pond, and there dug a water gallery and pumping well and made connection by pipes between the well and pond, but did not use these pipes, all the water coming into the well either by percolation from the pond or from underground streams; it was held that there had been a taking of the waters within the meaning of the act. *Bailey v. Woburn*, 126 Mass. 416.

Such an equivocal act as the temporary use of water for less than a year, which use has been

abandoned and is not afterwards resumed, is not a legal taking of that water under Mass. Stat. 1881, c. 167, § 2, as against a person who has rights in the water in question and who has not elected to treat the temporary use as a taking of the water. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365.

2. **Geographical Limits.** — *Newton v. Perry*, 163 Mass. 319; *West Boylston Mfg. Co. v. Metropolitan Water Board*, 183 Mass. 267; *Keller v. Riverton Water Co.*, 161 Pa. St. 422.

The grant of the power to exercise the right of eminent domain is not unconstitutional either because it does not define the limits of the property that may be taken, or because it gives the company the unrestricted right to determine to what extent and within what limits it would exercise that right. *Moseley v. York Shore Water Co.*, 94 Me. 83.

3. **Extent of Power.** — *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123; *Atty.-Gen. v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361; *Bishop v. North Adams Fire Dist.*, 167 Mass. 364; *Rockport v. Webster*, 174 Mass. 385; *Framingham Water Co. v. Old Colony R. Co.*, 176 Mass. 404; *Harback v. Boston*, 10 Cush. (Mass.) 295; *Olmsted v. Morris Aqueduct*, 46 N. J. L. 495.

**Determination of Necessity by City.** — Where the statute leaves the determination of what is necessary to take to the city, acting by its water board, the decision of the members of the board upon the question of necessity is final, so long as they act regularly and in good faith. *Burnett v. Boston*, 173 Mass. 173.

**The Grant of Power to Take Water for Certain Purposes** does not permit the taking of more water for other purposes. *In re Barre Water Co.*, 62 Vt. 27; *Bailey v. Woburn*, 126 Mass. 416.

4. **Water Rights Subject to Condemnation.** — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *White v. Farmers' High-line Canal, etc., Co.*, 22 Colo. 191; *Ingraham v. Camden, etc., Water Co.*, 82 Me. 335; *Moseley v. York Shore Water Co.*, 94 Me. 83; *Fay v. Salem, etc., Aqueduct*, 9 Allen (Mass.) 577; *Philadelphia, etc., R. Co. v. Pottsville Water Co.*, 182 Pa. St. 418.

A city when given the right of eminent domain may take the water from a stream, provided compensation is made to the riparian owners. *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Santa Cruz v. Enright*, 95 Cal. 105;



mountable obstacle to an appropriation of such rights to the uses of the state for the preservation of public health and safety, upon just compensation being made.<sup>1</sup>

(2) *Taking as Riparian Owner.* — Where a water company takes water in a lake or stream, not by the exercise of the right of eminent domain but by its right as a riparian owner, it has no other or higher rights in the water than an ordinary riparian owner.<sup>2</sup>

(3) *Damages.* — Where the taking of water affects the supply of an adjacent or riparian owner, the water company will be held liable in damages therefor.<sup>3</sup>

*Tileston v. Brookline*, 134 Mass. 438; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; *Tyler v. Hudson*, 147 Mass. 609.

A city which is authorized by its charter and by statute to provide itself with water has authority to use all reasonable means to supply the people within its borders with water for all usual and beneficial purposes, and to that end may acquire the necessary water rights by appropriation and use or other lawful modes. *Springville v. Fullmer*, 7 Utah 450.

In *Montana* the Political Code, § 4800, as amended by Laws of 1897, p. 203, gives a city the right to acquire, by condemnation proceedings, water rights for the purpose of establishing a water-supply system. *Helena v. Rogan*, 26 Mont. 452.

**Ponds and Streams.** — "It has long been settled that ponds and streams may constitutionally be taken in the exercise of the right of eminent domain for the purpose of supplying the inhabitants of cities and towns with pure water for domestic and other similar purposes." *Watson v. Needham*, 161 Mass. 404; *Opinion of Justices*, 150 Mass. 592.

**1. Condemnation of Canal.** — *Van Reipen v. Jersey City*, 58 N. J. L. 262. See also *Reading v. Althouse*, 93 Pa. St. 400.

**Condemnation of Water-supply System** — In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, the court said: "That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it — all may be taken for public uses upon payment of just compensation."

**2. As Riparian Owner.** — *Philadelphia, etc., R. Co. v. Pottsville Water Co.*, 182 Pa. St. 418; *Albert Lea v. Nielsen*, 80 Minn. 101, 81 Am. St. Rep. 242; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237. In *Lord v. Meadville Water Co.*, 135 Pa. St. 122, 20 Am. St. Rep. 864, a water company by the mere purchase of land upon which a spring issues, creating a stream which flows in a natural channel and through the land of others, was held not to acquire a right to divert the water of such spring into another channel without first paying or securing compensation to lower riparian owners.

A water company which is a riparian owner, and which contracts to supply others with water for its own private gain, cannot, without acquiring the right by condemnation proceedings,

take the water of the stream to the injury of other riparian owners. *Saunders v. Bluefield Waterworks, etc., Co.*, 58 Fed. Rep. 133.

In *Ætna Mills v. Waltham*, 126 Mass. 422, the fact that a municipality authorized to take water of a stream was a riparian owner was held not to relieve it of liability in damages to other riparian owners injured by the taking. See generally the title **WATERS AND WATER-COURSES**, *ante*.

**3. Damages for Injury to Riparian Owner.** — *People v. Elk River Mill, etc., Co.*, 107 Cal. 221, 48 Am. St. Rep. 125; *Centralia v. Wright*, 58 Ill. App. 51; *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Cowdrey v. Woburn*, 136 Mass. 409; *Albert Lea v. Nielsen*, 80 Minn. 101, 81 Am. St. Rep. 242; *Westphal v. New York*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 684; *Rider v. Amsterdam*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 375; *Higgins v. Flenington Water Co.*, 36 N. J. Eq. 538; *Lord v. Meadville Water Co.*, 135 Pa. St. 122, 20 Am. St. Rep. 864; *Irving v. Media*, 10 Pa. Super. Ct. 132.

**Mitigation of Damages.** — In a proceeding by mill owners against several towns, for the assessment of damages for the taking of the water of a pond, it was held that the towns were not entitled to prove, in mitigation of damages, that a certain amount of the waters used by them would necessarily be returned by percolation, after use, to the river below the pond, and become available to the mill owners for mill purposes, for the reason that damages were to be assessed as for a permanent taking, and there was a possibility that at some time in the future the towns might use all the water taken. *Monatiquot River Mills v. Randolph*, 157 Mass. 345 (three of seven judges dissenting).

**Estoppel.** — The rights of riparian owners cannot be interfered with without the payment of damages; but it was held that if an owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying him damages, to erect works for a water supply, by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel so that he will not be protected by injunction, but will be left to assert his rights at law. *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 109.

**Measure of Damages.** — See *Leonard v. Rutland*, 66 Vt. 105; *Lewis v. Springfield Water Co.*, 176 Pa. St. 237.

In *Maine* by the Colonial Ordinance of 1641-7 the waters in the great ponds are vested in the state, and therefore the state may grant to a



**7. Forfeiture of Franchise** — *a. IN GENERAL.* — Water companies in accepting their charters assume a public duty, and the rights and privileges conferred are dependent upon their continued compliance with the duties and obligations imposed. A failure to perform those duties will render the charter liable to a forfeiture in an action by the state.<sup>1</sup>

**Other Adequate Remedies.** — A forfeiture of a water company's franchise will not, however, be decreed where there are other adequate and available remedies to compel the water company to comply with the law and perform its public duties.<sup>2</sup>

**Revoking Right Conferred on City.** — Legislative authority to confer the right to erect waterworks is absolute, and if it confers that power on a city and the city fails to execute it, the state may confer an exclusive power on a private company to do so, which, when executed, excludes the city from ever erecting waterworks therein.<sup>3</sup>

**Wilful Disregard of Duties.** — Where a water company wilfully and persistently disregards its charter duties, restrictions, or obligations, its charter will be forfeited.<sup>4</sup>

water company the use thereof without rendering it liable to a mill owner who claims riparian rights by prior use. *Auburn v. Union Water Power Co.*, 90 Me. 576.

**1. Nonfeasance.** — *Farmers' L. & T. Co. v. Galesburg*, 133 U. S. 156, affirming *Galesburg v. Galesburg Water Co.*, 34 Fed. Rep. 675; *Foster v. Joliet*, 27 Fed. Rep. 899; *Winfield v. Winfield Water Co.*, 51 Kan. 70; *City Water Co. v. State*, (Tex. Civ. App. 1895) 33 S. W. Rep. 259; *Stedman v. Berlin*, 97 Wis. 505.

**Forfeiture of Exclusive Privilege** — **Accepting Later Statute.** — In *Tyrone Gas, etc., Co. v. Tyrone*, 195 Pa. St. 566, where a company which had an exclusive privilege accepted the provision of a later statute, which did not permit exclusive privileges, it was held that the company forfeited the exclusive privilege as though it was incorporated under the later law.

**The State Is Not Deprived of the Right to Demand a Forfeiture** of the charter, by the fact that another company is furnishing the people with water as the pretended successor of the corporation which was granted the franchise. *City Water Co. v. State*, (Tex. Civ. App. 1895) 33 S. W. Rep. 259; *State v. Capital City Water Co.*, 102 Ala. 231.

**In California a Mere "Rate Payer" Is Not Such a "Party Interested"** that he can under the code sue to have the franchise of a water company forfeited for failure of the officials to fix the water rate at the proper time for the ensuing year. *Fitch v. San Francisco*, 122 Cal. 285.

**In Iowa** under the code a citizen taxpayer has sufficient "interest" to prosecute a *quo warranto* to ascertain the right of one assuming to be appointed as trustee of the waterworks to act as such. *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222.

**2. Topeka v. Topeka Water Co.**, 58 Kan. 349; *State v. Galena Water Co.*, 63 Kan. 317.

**Faithful Performance of Charter Duties** — **No Forfeiture.** — Where a water company continues faithfully to supply water to the borough for the supply of which it was chartered, its charter cannot be forfeited because it entered into an agreement with another water company supplying an adjoining borough, temporarily to supply

that company with water, but only on condition that it could terminate the agreement upon twenty-four hours' notice whenever it might need all its water for supplying its customers. Such an agreement cannot possibly be construed as such a conveyance of the property and franchises as will incapacitate the first company from performing its corporate duties. *Com. v. Punxsutawney Water Co.*, 197 Pa. St. 569.

**The Failure of a Water Company to File a Sworn Report** with the city clerk as required by statute does not subject the company to forfeiture of its charter, where there are other adequate and available remedies for its neglect of duty, such as fine, and forfeiture of its right to collect charges for water furnished to the city. *State v. Galena Water Co.*, 63 Kan. 317.

**3. Gas, etc., Co. v. Downingtown**, 175 Pa. St. 341.

**4. Failure to Perform Corporate Duties.** — The failure of a water company to elect directors or officers or to hold any meetings of directors or officers or to perform any corporate act for nearly eight years, and the attempted sale and surrender of all its property to another corporation, thereby rendering itself incapable of performing its corporate duties, must be regarded as wilful violations of corporate duties, and sufficient grounds to entitle the state to a forfeiture of its charter. *City Water Co. v. State*, (Tex. Civ. App. 1895) 33 S. W. Rep. 259.

**Failing to Furnish Water According to the Terms of the Contract.** — Where a water company is required to furnish pure water, the city, in an action to forfeit the charter of the water company, is not estopped from maintaining such an action by the fact that the same kind of water had been furnished for a number of years, and accepted by the city, especially if the city had repeatedly complained thereof. *St. Cloud v. Water, etc., Co.*, 88 Minn. 329.

**Charging Higher Rates than Allowed by Charter.** — *State v. New Orleans Water Works Co.*, 107 La. 1.

**Forfeiture of Charter Does Not of Itself Abrogate Contract Between City and Owners of Waterworks.** — In *Weatherly v. Capital City Water Co.*, 115 Ala. 156, where a water company,

**b. OFFER OF PERFORMANCE AFTER BREACH.** — An offer by a water company to perform its charter duties after a breach thereof is ineffectual to prevent a forfeiture of its charter.<sup>1</sup>

**c. RIGHT OF STATE INDEPENDENT OF CITY'S RIGHT TO ANNUL CONTRACT.** — The right of a city to rescind an ordinance contract, for breach thereof by the water company, does not defeat the right of the state to forfeit the company's charter because of breach of its charter duties, or abuse or misuse of its charter privileges.<sup>2</sup>

**III. CONSTRUCTION OF LEGISLATIVE GRANTS** — 1. **In General.** — When a water company is authorized to supply a city and its inhabitants with water, it can exercise only those rights conferred upon it by its charter, either expressly or by necessary implication,<sup>3</sup> and within the geographical limits designated by its charter.<sup>4</sup> It cannot sell, lease, or assign its corporate rights so as to render it powerless to perform its corporate duties, without express permission to do so.<sup>5</sup>

which had a contract with a city to supply it and its inhabitants with water, was dissolved by having its charter forfeited, pending the winding up and settlement of the affairs of the defunct corporation, it was held that the city could insist upon a continuance of the water supply, and if the discontinuance should occur or be threatened, the duty of continuance could be compelled.

**1. Performance of Charter Duties After Breach.** — *Capital City Water Co. v. State*, 105 Ala. 406; *Clow v. Brown*, 134 Ind. 287; *Tyler v. Plainfield*, 54 N. J. L. 526; *Bolivar v. Bolivar Water Co.*, 62 N. Y. App. Div. 484.

**2. Right of City to Annul Ordinance Contract.** — *Capital City Water Co. v. State*, 105 Ala. 406.

In *St. Cloud v. Water, etc., Co.*, 88 Minn. 329, it was held that a city may annul an ordinance contract for sufficient cause shown, where by statute it has authority to grant such a franchise, and it is not necessary to have the state bring a *quo warranto* proceeding in its own name.

In *Palestine Water, etc., Co. v. Palestine*, 91 Tex. 540, where the city reserved the right in its ordinance contract to forfeit the "exclusive" franchises granted thereby to a water company in case of its failure to comply with its undertakings, it was held not to be a waiver of any right of action to forfeit the company's franchises which the city might have independent of the terms of such contract.

**3. Incidental Rights.** — As an incident to its business of securing and selling water, a water company may purchase and hold the privilege of damming waters and flooding a meadow, but the running of a mill is beyond its charter powers. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365.

**Right Not Implied.** — Where the charter of a water company authorized it to take water for a city and the inhabitants thereof, for the extinguishment of fires, and for domestic, sanitary, and other purposes, it was held that the words "other purposes" referred to purposes of the same kind as those specifically mentioned and that therefore the company was not authorized to take water for private use for a manufacturing purpose, such as the polishing of granite by private persons or corporations. *Smith v. Barre Water Co.*, 73 Vt. 310.

**4. Geographical Limits.** — *Bly v. White Deer Mountain Water Co.*, 197 Pa. St. 80.

In *Forty Fort v. Forty Fort Water Co.*, 9 Kulp (Pa.) 241, a charter to a water company authorizing it to supply water to any "town, borough, city or district" (under a general act) need not be restricted to a single municipality, but may be granted to a "district" composed of two contiguous counties.

In *Quincy v. Boston*, 148 Mass. 389, the statute authorizing the city of Boston to purchase and distribute a supply of water, was held not to confer the right upon the city to convey water to Long Island, a small island situated three miles out in Boston harbor.

In *Armstrong Water Co. v. Rayburn Water Co.*, 24 Pa. Co. Ct. 13, it was held that the grant in the charter of a water company of the exclusive right to supply a borough with water conferred no exclusive rights outside the limits of the borough, notwithstanding the fact that the grant was coupled with permission to supply water to persons, partnerships, and corporations in the adjacent territory; but the question as to whether or not the company might supply any water at all outside the limits of the borough was not decided.

But in *Dodge v. Council Bluffs*, 57 Iowa 560, it was held that the field of general operation of a water company is not necessarily confined to the territorial limits of the state in which it is organized, but it may own and exercise franchises in other states, although not expressly authorized so to do by the laws of the state of its incorporation.

Where a city is empowered to distribute water within its own limits, it is not in excess of its powers to deliver water to a person who for his own use distributes the water throughout his own premises, which lie partly without the municipal limits. *Lawrence v. Methuen*, 166 Mass. 206.

**5. Power to Convey Corporate Rights.** — *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. Rep. 776. See also *City Water Co. v. State*, (Tex. Civ. App. 1895) 33 S. W. Rep. 259.

In *Ogden City v. Bear Lake, etc., Water-Works, etc., Co.*, 16 Utah 446, the provision of a city charter, authorizing it to lease, convey, and dispose of property, real and personal, for

**2. Exclusive Franchise — Strict Construction.** — It is a well-settled principle of construction, applicable alike to direct legislative grants and to those made through the agency of municipal corporations,<sup>1</sup> that exclusive rights are not favored, and that a statute which thus has the effect to impair the power of the legislature from further action should be construed most strongly against the creation of such exclusive right. Power to exercise exclusive privileges is never implied, and if there be ambiguity or reasonable doubt arising from the terms employed by the granting body as to whether an exclusive privilege has been conferred, or authorized to be conferred, the doubt is to be resolved against the corporation or individual claiming such a grant.<sup>2</sup>

**Grant Protected by Federal Constitution — Impairing Obligation of Contracts.** — But when the right has been once granted, and accepted and acted upon by the water company, it constitutes a contract protected by the Federal Constitution against impairment by state legislation.<sup>3</sup>

**3. Power of Municipality After Grant of Franchise — *a.* IN GENERAL.** — In general, where a municipality is empowered by the legislature with the right to supply itself and its inhabitants with water, it may exercise that right in any manner provided for in the act. But whether a city which has provided for a water supply by granting an ordinance franchise as agent of the state, or by entering into a contract with a water company for a term of years, may grant a similar right to another company, or erect waterworks of its own during that term, depends upon whether the city has or has not exhausted its power as agent of the state in granting the franchise to the former company, or has or has not bound itself by covenant not to erect waterworks

its benefit, was held not to authorize the city to lease or otherwise transfer its waterworks system, or its water rights used in supplying its inhabitants with water, but a special provision is required to authorize the transfer of property so used.

**Acquiescence by the City.** — Where for more than eight years after the sale of its property and the assignment of its contract with the city by a water company to a new company the city acquiesced to the fullest extent in the assignment and accepted from the new company the performance of the contract, it was held that the city could not repudiate the arrangement and claim that it was illegal for the purpose of escaping performance of the contract on its part. *Austin v. Bartholomew*, (C. C. A.) 107 Fed. Rep. 349.

**1. Construction of Ordinance Franchise.** — In *State v. Manitowoc Waterworks Co.*, 114 Wis. 487, it was held that a municipal ordinance granting a franchise to a water company is to be construed — in case of ambiguity — by the same rules that govern the construction and interpretation of statutes.

**2. Exclusive Privilege Never Implied.** — *Skaneateles Water Works Co. v. Skaneateles*, 184 U. S. 354; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Matter of Brooklyn*, 143 N. Y. 596; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Warsaw Water Works Co. v. Warsaw*, 161 N. Y. 176; *Colby University v. Canandaigua*, 69 Fed. Rep. 671.

**3. Impairment of Obligation of Contract.** — *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *National Waterworks Co. v. Kansas City*, 65 Fed. Rep. 601; *Crosby v. Montgomery*, 108 Ala. 498; *Rockland*

*Water Co. v. Camden, etc., Water Co.*, 80 Me. 544; *Welsh v. Beaver Falls*, 186 Pa. St. 578.

**An Exclusive Franchise** conferred upon a corporation to supply water to the inhabitants of a city by means of pipes and mains laid through the public streets, is violated by a grant to an individual in the city to supply his premises with water by means of a pipe or pipes so laid. *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64.

**Reservation of Right to Revoke.** — In *Citizens Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, where the legislature had reserved the right, in granting the water company's charter, to recall the franchise at its pleasure, it was held that this provision did not authorize the legislature to set aside or impair the contract which the city had entered into for the sole use of its streets by the water company, so long as the latter should supply the city with water, which contract the charter had recognized and confirmed.

**The Grant of the Sole Privilege to Take Water from a Particular Source** for supplying a municipality for a term of years, is not impaired, within the meaning of the contract clause of the constitution, by a grant to another party of the privilege to supply it with water from a different source. *Stein v. Bienville Water Supply Co.*, 141 U. S. 67.

**Exclusive Franchise — Effect of Annexation of Town upon Existing Contract.** — Where a water company is given the exclusive privilege of supplying a given district or town with water, and such district or town is subsequently incorporated within the limits of an adjoining city, the rights of such water company are not affected thereby. *Matter of Long Island Water Supply Co.*, (Supm. Ct. Spec. T.) 30 Abb. N. Cas. (N. Y.) 36, 143 N. Y. 596, 166 U. S. 685; *Grand*



during the term of the former water company's franchise.<sup>1</sup>

*b. EXCLUSIVE FRANCHISE — CITY CANNOT COMPETE.* — Where a city has entered into a contract with a water company, which has an exclusive charter from the state for a water supply for a term of years, reserving to itself the right to purchase at the end of the contract period, it cannot, according to some cases, erect its own plant or grant a similar privilege to others without first acquiring the property of the water company;<sup>2</sup> if it does so it is liable to the water company for the injuries sustained.<sup>3</sup>

*After Termination of Franchise.* — After the franchise period of a water company has terminated the city may build waterworks of its own, without acquiring the system of the water company, unless it has bound itself by contract to do so.<sup>4</sup>

*c. RIGHT TO ACQUIRE PROPERTY OF WATER COMPANY NOT MANDATORY.* — Other courts hold that such statutes do not make it mandatory upon the city to acquire by purchase or condemnation the property of the private corporation organized to supply the city with water, and which has constructed a system of pipes and acquired from the city authorities a franchise to lay and maintain the same without any exclusive right, but it may grant a similar franchise to others or erect waterworks of its own.<sup>5</sup>

*Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606; *Baltimore v. Baltimore County Water, etc.*, Co., 95 Md. 232.

1. See *Bienville Water Supply Co. v. Mobile*, 95 Fed. Rep. 539; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (*distinguishing* *Wilson v. Rochester*, 180 Pa. St. 509); *Boyetown Water Co. v. Boyertown*, 200 Pa. St. 394, *following* *Centre Hall Water Co. v. Centre Hall*, 186 Pa. St. 74, and *distinguishing* *White v. Meadville*, 177 Pa. St. 643, and *Metzger v. Beaver Falls*, 178 Pa. St. 1.

2. *National Waterworks Co. v. Kansas City*, 65 Fed. Rep. 691; *Baltimore v. Baltimore County Water, etc.*, Co., 95 Md. 232; *White v. Meadville*, 177 Pa. St. 643, *overruling* *Millvale Borough*, 162 Pa. St. 374, and *distinguishing* *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515; *Metzger v. Beaver Falls*, 178 Pa. St. 1; *Wilson v. Rochester*, 180 Pa. St. 509; *Carlisle Gas, etc., Co. v. Carlisle Water Co.*, 182 Pa. St. 17; *Troy Water Co. v. Troy*, 200 Pa. St. 453; *Nelson v. Warren*, 200 Pa. St. 504; *Wilson v. Rochester*, 180 Pa. St. 509; *Welsh v. Beaver Falls*, 186 Pa. St. 578.

*In Pennsylvania, under the Present Legislation*, a municipality is authorized to adopt one of two methods of supplying itself with water: (1) it may construct and operate its own works by municipal taxation; or (2) it may contract with a private corporation to construct works and supply the municipality. It has no power to adopt both methods and have them in operation at the same time. The selection of one under the law is a final rejection of the other so long as the first continues to supply according to law. *Carlisle Gas, etc., Co. v. Carlisle Water Co.*, 188 Pa. St. 51.

*And — Or — Construed.* — In *Elyria Gas, etc., Co. v. Elyria*, 57 Ohio St. 374, where a statute confers power on a city council to sell city bonds "for the erection 'or' purchase of waterworks," a resolution of the board to sell city bonds "for the purpose of the purchase 'and' erection of waterworks" is invalid, as the two purposes are entirely distinct and the city has no power to do both.

3. *Damages.* — *Bennett Water Co. v. Millvale*, 200 Pa. St. 613; *White v. Meadville*, 177 Pa. St. 643.

*Measure of Damages.* — In *Bennett Water Co. v. Millvale*, 200 Pa. St. 613, 202 Pa. St. 616, it was held that the jury may take into consideration the gross amount of water rents collected by the borough, less the amount it would cost the water company to put such sum in its treasury.

4. *After Termination of Franchise Period.* — In *Skaneateles Water Works Co. v. Skaneateles*, 184 U. S. 354, it was held that after the term of the franchise to a water company had expired the village might construct its own works and in doing so would not be liable to the water company for the decrease in the value of its property. The court said: "Not being bound by the statute to take the property of the plaintiff as a condition of building its own plant, there is \* \* \* no implication of a contract to do that which the statute itself does not direct."

In *Philipsburg Water Co. v. Philipsburg*, 203 Pa. St. 562, it was held that where a borough made a contract for the supply of water for twenty years for municipal purposes, and during the continuance of the contract the water company had lost its exclusive privilege by reason of having paid a dividend of eight per cent. for a period of five years, the borough may upon the expiration of twenty years contract with another water company to operate in the borough. *Distinguishing* *White v. Meadville*, 177 Pa. St. 643.

*Reservation of Option to Purchase.* — Where a city, in its contract with a water company, reserved to itself the option to purchase the company's water plant, but nowhere bound itself, either in express terms or by reasonable implication, to exercise that option, it was held that the contract imposed on the city no requirement or duty to purchase instead of constructing a new system of its own. *Thomas v. Grand Junction*, 13 Colo. App. 80.

5. *Right to Acquire Waterworks Not Mandatory.* — *Rockland Water Co. v. Camden, etc., Water*

*d. CITY NOT ESTOPPED BY GRANTING FRANCHISE.* — A grant empowering a city to construct waterworks "or" authorize the construction of the same by others, in the absence of words of limitation or exclusion, is not a grant in the alternative, and the city, by electing to authorize private persons to do it, does not estop itself from afterwards entering the field as a competitor.<sup>1</sup>

**IV. REGULATION AND CONTROL — 1. By State — a. IN GENERAL.** — As the corporation, municipal<sup>2</sup> or private,<sup>3</sup> furnishing water to a city and its inhabitants performs a public duty, and derives its existence and powers from the state, it is accountable to the state for the exercise of good faith in the conduct of its business,<sup>4</sup> for the reasonableness of its charges,<sup>5</sup> and for the

Co., 80 Me. 544; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Matter of Brooklyn*, 143 N. Y. 596; *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 157, *affirming* 33 N. Y. App. Div. 642; *Warsaw Water Works Co. v. Warsaw*, 16 N. Y. App. Div. 502. See also *Colby University v. Canandaigua*, 69 Fed. Rep. 671, 96 Fed. Rep. 449 (N. Y. statute); *Cunningham v. Cleveland*, (C. C. A.) 98 Fed. Rep. 657.

**Competition by City with Private Company.** — Where a city in granting to a water company a franchise for twenty years bound itself to furnish an ample supply of wholesome water for five years, but expressly stipulated that the grant should neither give the company exclusive rights nor conclude the city "from the construction or maintenance of sewer works or other works or plants of a public nature," it was held that the city did not surrender the right to construct a plant of its own within the life of the franchise, except possibly for the term of five years. *Helena v. Helena Waterworks Co.*, (C. C. A.) 122 Fed. Rep. 1.

In *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547, it was held that legislative authority to a city to provide a system of waterworks, to grant the right to a private corporation to establish such a system and to supply the city with water, and to contract therefor, did not give the municipality authority to grant an exclusive franchise so as to disable the municipal corporation for the period of thirty years from itself establishing waterworks and a system of supply.

**1. Hamilton Gas Light, etc., Co. v. Hamilton**, 146 U. S. 258; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Thomson Houston Electric Co. v. Newton*, 42 Fed. Rep. 724; *Colby University v. Canandaigua*, 69 Fed. Rep. 671, 96 Fed. Rep. 449; *Donahue v. Morgan*, 24 Colo. 389; *Thomas v. Grand Junction*, 13 Colo. App. 80; *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262; *State v. Hamilton*, 47 Ohio St. 52; *North Springs Water Co. v. Tacoma*, 21 Wash. 517.

**2. City Charter Giving It Power to Furnish Water.** — In *Gas, etc., Co. v. Downingtown*, 175 Pa. St. 341, it was held that a city is a mere agency of the state for governmental purposes. Its charter is not a contract within the prohibition impairing the obligation of contracts, and it has no vested rights to its powers and franchises. Thus, the authority to furnish water is a revocable agency.

**3. Private Corporations Subject to Regulation.** — Water companies chartered under the general laws of the state, and endowed with the right

of eminent domain and all the powers, privileges, and franchises necessary to carry their purposes into effect, are essentially public corporations in contradistinction from private corporations. They are engaged in a public business, under a public grant and contract, and are therefore charged with public duties. *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841. And it is immaterial that the statutes denominate them "private corporations."

"The name by which they are called does not change their attitude toward the public, nor does it affect the nature of their rights and duties. They are none the less subject to legislative and municipal control. The reservation of the power to exercise such control was a part of the contract which they had with the state when they obtained franchises to become corporations for the purposes named in their articles." *Boise City Artesian Hot, etc., Water Co. v. Boise City*, (C. C. A.) 123 Fed. Rep. 232.

**4. Requiring Company to File Statement of Accounts.** — In *Leavenworth v. Leavenworth City, etc., Water Co.*, 62 Kan. 643, it was held that an act which requires a water company to file itemized statements of income and expense accounts with the city clerk is not unconstitutional because allowing an unjustifiable scrutiny into its private affairs, and the making of the report may be compelled by mandamus.

In *Com. v. Russell*, 172 Pa. St. 506, the court said: "The state in the exercise of its police power asserts its right to inquire into the efficiency and good faith which 'the public use' is served, and to correct, through the courts, any defects or abuse in the conduct of the business of gathering or distributing the supply, or of securing a quality of the commodity furnished that is suitable for use."

**5. Regulation of Charges.** — *Spring Valley Water Works v. San Francisco*, 82 Cal. 329, 16 Am. St. Rep. 116; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Spring Valley Water Works v. Bartlett*, 8 Sawy. (U. S.) 555; *Munn v. People*, 69 Ill. 80, *affirmed* 94 U. S. 113; *Ruggles v. People*, 91 Ill. 256; *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411. See also *infra*, this title, *Water Rates*.

In *Janvrin, Petitioner*, 174 Mass. 514, the court said: "Cases establish the power of the legislature to fix [water] rates, subject to the qualification that they shall not be unreasonably low." *Citing Atty.-Gen. v. Old Colony R. Co.*, 160 Mass. 62; *Budd v. New York*, 143 U. S. 517.

In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, the court said: "That it is within the power of the government to regulate



proper performance of its public duty.<sup>1</sup> Though it is not essential to the exercise of this power by the state, the power has often been reserved in a general statute or in the statute creating the water company.<sup>2</sup>

**b. EXEMPTION FROM LEGISLATIVE CONTROL.**— This power of regulation and control resides in the state in its sovereign capacity, and is continuing in its nature. It can only be bargained away by words of positive grant or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power.<sup>3</sup>

**c. POLICE POWER.**— As the franchise and property of a water company is affected with a public interest, it is properly subject to the exercise of the police power of the state, to the extent of the public interest therein.<sup>4</sup>

**d. PROTECTION OF COMPANY.**— As the state may regulate and control water companies, there is a reciprocal duty imposed upon it to protect the company which is clothed with a public duty to supply the city and its

the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt."

**1. Performance of Public Duty.**— *Danville v. Danville Water Co.*, 180 Ill. 235; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, *affirmed* 180 U. S. 624; *Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304; *White v. Farmers' Highline Canal, etc., Co.*, 22 Colo. 191; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 592, 3 Am. St. Rep. 603.

**Legislative Control—Right of Citizen.**— In *Pocatello Water Co. v. Standley*, 7 Idaho 155, the court said: "The fact that private property is affected with a public use does not confer upon the citizen the right to interfere with the management and control of the property. Such management and control is vested in the owner, subject only to the law that authorized and granted the franchise."

**2. Reservation by State of Right of Control.**— Where a section of the general incorporation act provided that the general assembly should at all times have the power to prescribe such regulations and provisions as it might deem advisable, which regulations and provisions should be binding on any and all corporations formed under the provisions of the act, it was held that the language was sufficiently broad to reserve to the general assembly the right to regulate the rates at which water should be supplied by a water company organized under the provisions of the act. *Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304.

Companies deriving their authority from the legislature, and invested with the franchise of supplying municipalities and their inhabitants with water through the instrumentality of pipes and mains laid in the public streets, are, when exercising such functions, performing services of a public nature, within the meaning of section 30, article 16, Const. 1885, and their business is affected with a public interest so as to subject them to regulation by requiring them to charge reasonable rates, and such regulation does not violate the "due process" clause of the Federal Constitution. *Tampa v. Tampa Waterworks Co.*, (Fla. 1903) 34 So. Rep. 631.

**3. Right of Exemption Must Be Clearly Granted.**— *Freeport Water Co. v. Freeport*, 180 U. S. 587; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

In *Ashland v. Wheeler*, 88 Wis. 607, it was held that where by statute the common council of a city is delegated the authority by the legislature to grant a franchise to a water company its power there ends. The common council has thereby no implied authority to alter, repeal, or impair the franchise granted, and an ordinance which attempts to do so is void. This power remains in the legislature.

In *Gas, etc., Co. v. Downingtown*, 175 Pa. St. 341, a borough which was incorporated under the General Borough Act of April 3, 1851, was empowered in said act "to provide a supply of water for the use of its inhabitants." The power was not exercised by the borough, and on March 22, 1867, an act was passed incorporating a water company with the "exclusive" authority to supply gas, light, and water to the borough and its vicinity." Works were erected and water was supplied in the borough by the company. It was held that the legislative power to confer the power to erect waterworks was absolute, and the borough having failed to do so under the prior act, the company obtained the exclusive right to erect and maintain its waterworks under the subsequent act.

**4. Police Power.**— *Moore v. New Orleans Waterworks Co.*, 114 Fed. Rep. 380; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *New York State Trust Co. v. Duluth*, 70 Minn. 257.

In *Com. v. Russell*, 172 Pa. St. 506, the court said: "By reason of this public interest in the business of the company, the state assumes a visitatorial control over it, inquires into the quantity and quality of the water furnished by it, and makes such orders as may be necessary to secure for the public a wholesome and an adequate supply."

In *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79, it was said that "water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it." See also *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659; *People v. Stephens*, 62 Cal. 209; *Price v. Riverside Land, etc., Co.*, 56 Cal. 431.



inhabitants with water. Thus, the state may protect the source of the water company's supply from pollution;<sup>1</sup> or impose a penalty for turning on the water of a water company without authority;<sup>2</sup> or prohibit the supply of water until indebtedness for water previously supplied has been discharged.<sup>3</sup>

**2. By Municipality** — *a.* IN GENERAL. — The power to regulate and control water companies, performing a public service in supplying a city and its inhabitants with water, may be granted either to the municipality itself<sup>4</sup> or to the board of water commissioners,<sup>5</sup> or to such other inferior legislative

**1. Protection of Water Supply.** — *Com. v. Russell*, 172 Pa. St. 506; *Durango v. Chapman*, 27 Colo. 169.

In *State v. Streeper*, 5 N. J. L. J. 115, it was held that an act prohibiting the depositing of offal calculated to render impure any stream from which a water supply is obtained, is within the police power of the legislature.

**An Injunction Will Be Granted** to prevent pollution of water supply. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970, affirmed 57 Fed. Rep. 1000; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96. *Contra*, *People v. Elk River Mill, etc., Co.*, 107 Cal. 221, 48 Am. St. Rep. 125; *Topeka Water Supply Co. v. Potwin*, 43 Kan. 404.

**Right to Pollute Waters of a Stream Cannot Be Acquired by Prescription.** — *Kelley v. New York*, 89 Hun (N. Y.) 246, 6 Misc. (N. Y.) 516; *Martin v. Gleason*, 139 Mass. 183.

**2. Penalty for Turning on Water Without Authority.** — In *Tyrone Gas, etc., Co. v. Burley*, 19 Pa. Super. Ct. 348, it was held that an act imposing a penalty for turning on water of a water company is a legitimate exercise of the police power of the commonwealth, and is intended to protect the interests of the public by investing those who have undertaken to discharge a duty to the public with the absolute control of the instrumentalities for discharging that duty.

**3. Compelling Payment of Water Rates.** — *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841; *Tacoma Hotel Co. v. Tacoma Light, etc., Co.*, 3 Wash. 316, 28 Am. St. Rep. 35; *Shiras v. Ewing*, 48 Kan. 170.

*Jones v. Nashville*, 109 Tenn. 550, where an ordinance declaring it unlawful to furnish water to those indebted for water until said indebtedness is discharged, and prohibiting the supply of water to such consumers until all their indebtedness for water previously supplied shall have been discharged, is in conformity with the general rules and principles, and is therefore valid. *Distinguishing Crumley v. Watauga Water Co.*, 99 Tenn. 420; *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610. See also *infra*, this title, *Water Rates*.

**4. Grant to Municipality.** — In *Freeport Water Co. v. Freeport*, 186 Ill. 179, it was held that the Act of June 6, 1891 (Laws 1891, p. 85), empowering a city to fix reasonable rates for water, is constitutional and valid, and a city may under its provisions reasonably reduce for future supply, water rates it had previously agreed to pay to a water company organized under the General Incorporation Act, notwithstanding its contract provides for a fixed rate for a period of thirty years, since a city cannot bind itself by such a long contract. *Fol-*

*lowing Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304, 180 Ill. 235.

An act of the legislature is sufficient to grant the power sought to be conferred, which provides "that the corporate authorities of any city, town, or village now or hereafter incorporated under any general or special law of this state in which any individual, company, or corporation has been, or may hereafter be, authorized by such city, town, or village to supply water to such city, town, or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation to such city, town, or village and the inhabitants thereof; such charges to be just and reasonable: Provided, That this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town, or village and any person, firm, or corporation for the supply of water to such city, town, or village or its inhabitants. But this act shall not be held to validate any contract heretofore made." *Tampa v. Tampa Waterworks Co.*, (Fla. 1903) 34 So. Rep. 631.

**Removal of Mains from Streets.** — In *Asher v. Hutchinson Water, etc., Co.*, 66 Kan. 496, the court held that a contract by ordinance between a city and a water company that the latter will lay water mains and supply the inhabitants with water on certain streets of the city, may, after such mains are laid, be so modified and changed by the city and water company as to require the latter to remove its mains from certain streets where, in the judgment of the council, public necessity no longer requires their continuance, to other portions of the city where public necessity requires that mains should be laid; and an injunction will not lie, at a suit of an individual, to prohibit the city and water company from making such change, notwithstanding it has greatly decreased the value of his property.

**5. Water Commissioners.** — In *New York* the Law of 1850, c. 235, § 19, authorizes the water commissioners to make necessary regulations which, when ratified by the common council, shall have the same force and effect as any ordinance. *Brass v. Rathbone*, 8 N. Y. App. Div. 78.

The legislature has the power to create a board of water commissioners and place under the control and management of such board a waterworks plant owned by a city. Legislation for such purpose is properly within the state's police power. If it does not result in the diversion of the city's property to objects or uses other than those for which it was acquired, it affects no vested right of the city as against the state. It is not violative of the constitutional prohibition against taking property without

bodies as may be designated by the legislature to insure the faithful performance of the public duty undertaken by the water company. This right, when granted, is continuing in its nature,<sup>1</sup> but it seems that it may be waived by the action of the city in making an irrevocable contract with the water company under due authority.<sup>2</sup> It has been held that a delegation to a subordinate authority of the power to regulate water companies is void, unless the grant is coupled with such restrictions on its use as will insure its exercise in a reasonable manner, and with some provision by which the rights of the persons to be affected may have the protection of judicial determination.<sup>3</sup>

**Conditions Imposed in Ordinance Franchise.** — In granting a franchise a city is exercising its public and governmental function, and may impose such conditions and enforceable penalties as it deems necessary and proper to secure the objects sought to be obtained.<sup>4</sup>

**b. VALIDITY OF REGULATIONS.** — There is no arbitrary rule by which the reasonableness or unreasonableness of ordinances can be tried and tested, but much depends upon the surrounding circumstances and the nature, purpose, and operation of the ordinance in question.<sup>5</sup>

**V. RULES AND REGULATIONS — 1. Power to Make Reasonable Regulations.** — A water company, supplying a city and its inhabitants with water, has the power to make and enforce all such rules and regulations for its convenience

due process of law. *Coyle v. Gray*, 7 Houst. (Del.) 44, 40 Am. St. Rep. 109.

**1. The City Has a Continuing Right to regulate the charges for water,** limited only by the condition that such rates shall not be unreasonable and oppressive. It cannot waive this right by contract, unless its charter gives it the express power to make an irrevocable contract with the water company for such purpose. *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

**City May Alter Rates During Contract Period.** — In *Danville v. Danville Water Co.*, 180 Ill. 235, where a city was empowered by statute to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not exceeding thirty years, a subsequent statute empowering a city to fix reasonable water rates is constitutional, and an ordinance passed under the latter statute reducing the existing rates and fixing them is valid, although the city enacting it has, under the earlier statute, attempted by ordinance to fix water rates at a certain figure for the unexpired period of thirty years.

**2. Waiver of Right to Regulate.** — *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, affirming 88 Fed. Rep. 720.

**3. Delegation of Power Must Be Coupled with Restrictions.** — This principle was applied where a city, acting under authority conferred by the legislature, sought to fix a schedule of rates for water to be supplied to the city and the inhabitants thereof by any firm or corporation. The court, without questioning the power of the legislature itself by direct act to regulate rates in cases not covered by previous contracts or vested rights, held that the legislature could not constitutionally delegate such power to a city which was itself a consumer, either in its municipal capacity or through its inhabitants, without any provision for a judicial investigation of the reasonableness of the rates fixed by such authorities. *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6, following *Chicago, etc., R. Co. v.*

*Minnesota*, 134 U. S. 418, and *Cleveland Gaslight, etc., Co. v. Cleveland*, 71 Fed. Rep. 614. Compare *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647 (criticising *Cleveland Gaslight, etc., Co. v. Cleveland*, 71 Fed. Rep. 614), which holds that while the legislature cannot constitutionally delegate to a city the power to fix water rates without liability to judicial investigation of the reasonableness of the rates so fixed, it is not necessary that a provision for such investigation be incorporated in an ordinance fixing rates, as the law will imply one, and preserve to the company the right to litigate the question of reasonableness.

**4. Conditions.** — In *New York State Trust Co. v. Duluth*, 70 Minn. 257, the court said: "In accepting this ordinance the water company accepted it with all its terms and conditions. Hence we do not think that the ordinary rules which apply to a contract between private parties with reference to business 'not affected with a public interest' have any application in determining whether this provision is or is not a nonenforceable penalty."

**5. What Are Reasonable Ordinances.** — *Jones v. Nashville*, 109 Tenn. 550. See generally the title ORDINANCES, vol. 21, p. 943.

In *Lancaster Hotel Co. v. Lancaster*, 7 Pa. Super. Ct. 159, a joint resolution of councils fixing the rates for a certain class of consumers at a fixed annual amount, irrespective of the quantity consumed, and of certain others on a basis of quantity, was held valid.

**Meters.** — It is not an unreasonable regulation that the meter should be supplied by the party furnishing water. *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116.

**Relocation — New Supply.** — In *Com. v. Russell*, 172 Pa. St. 506, it was held that a water company could be required to be diligent in its efforts to procure for the municipality a sufficient supply of pure water, if it can be had from sources reasonably accessible to its plant, and it can be restrained from collecting rents if such

and security as are reasonable and just, and which do not discriminate.<sup>1</sup> The same rule applies to a municipality operating the waterworks.<sup>2</sup>

**2. Requiring Compliance with Regulations.**—In such cases the water company is not limited to an action for damages,<sup>3</sup> but may enforce its rules and regulations by refusing to supply, or cutting off the water from the premises of, those who fail to comply therewith.<sup>4</sup>

**Waste of Water.**—Thus, it may reserve the right to shut off water from the premises of a consumer who wastes it.<sup>5</sup>

**3. Payment in Advance.**—Payment in advance, by a consumer, may be required as a condition precedent to his being supplied with water.<sup>6</sup>

**4. Where Applicant or Consumer Is Indebted to Company.**—A regulation

water is not furnished. The company cannot, however, be required to relocate its plant and seek a new supply to reach which would involve an expense greater than the entire capital stock.

**1. Reasonable Regulations.**—*Shiras v. Ewing*, 48 Kan. 170; *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *Crumley v. Watauga Water Co.*, 99 Tenn. 424.

In *State v. Butte City Water Co.*, 18 Mont. 199, the court said that a water company in no case can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner; and if it has adopted a by-law in conflict with its franchise, or unreasonable or oppressive, the subordinate rule or by-law will be set aside.

**A Rule Requiring a Special Permit** where more than one hundred and fifty gallons is used in any building per day is valid. *Brass v. Rathbone*, 8 N. Y. App. Div. 78.

**2. Municipality Operating Waterworks.**—*Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293; *Atlanta v. Burton*, 90 Ga. 486; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. St. 393; *Com. v. Philadelphia*, 132 Pa. St. 288.

**3. Not Limited to an Action for Damages.**—*Shiras v. Ewing*, 48 Kan. 170; *Sheward v. Citizens Water Co.*, 90 Cal. 635; *Thomas v. Peterson*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1125; *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273.

**Measure of Damages for Refusal to Take Water.**—*Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460.

**4. May Cut Off Water Supply for Noncompliance with Rules.**—*Hieronimus v. Bienville Water Supply Co.*, 131 Ala. 447; *Atlanta v. Burton*, 90 Ga. 486; *Shiras v. Ewing*, 48 Kan. 170; *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610; *Krumenaker v. Dougherty*, 74 N. Y. App. Div. 452; *Treadwell v. Van Schaick*, 30 Barb. (N. Y.) 444; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. St. 393; *Com. v. Philadelphia*, 132 Pa. St. 288; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841, approved *Jones v. Nashville*, 109 Tenn. 550; *Tacoma Hotel Co. v. Tacoma Light, etc., Co.*, 3 Wash. 316, 28 Am. St. Rep. 35.

**May Require Consumer to Pay Cost of Repair to Lateral Service Pipes.**—Where a householder, who owns the lateral service pipes, refuses to deposit the cost of repairing a leak in such pipes on his premises, which connect with the

city mains, the city may cut off his water supply though he has paid up his water rent. *Jackson v. Ellendale*, 4 N. Dak. 478.

**In New York the Legislature Is Authorized** to confer upon municipal water authorities the power to enforce compliance with their rules by cutting off the supply of water to private consumers. *Brass v. Rathbone*, 153 N. Y. 435, affirming 8 N. Y. App. Div. 78.

**Right Dependent on Authorized Regulations.**—Where the control of the public water supply and the sole right to turn on water and cut it off were in the borough council, it was held that in the absence of any regulation of the council itself that water should not be turned on until a certificate from the board of health had been obtained that the plumbing conformed to their ordinances or plans, or that it should be cut off after it had been turned on, by reason of failure to comply with the ordinances of the board of health, the borough council had no right to cut off the water supply from a property owner by reason of such failure, its right to cut off the water being dependent upon its own reasonable regulations in that respect. *Johnston v. Belmar*, 58 N. J. Eq. 354.

**5. Waste of Water.**—*Shiras v. Ewing*, 48 Kan. 170.

A water company may properly charge for water wasted by consumers a rate higher than that charged for water reasonably consumed, and for nonpayment of the excess rate the company is not confined to an action at law for the recovery thereof, but has the right to shut off the consumers' supply. *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273.

A regulation by a water company requiring a consumer to keep his hydrant closed when he is not using the water is reasonable, and the water company may shut off water from the premises of one who failed to comply therewith. *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841.

**6. Payment in Advance.**—*Hieronimus v. Bienville Water Supply Co.*, 131 Ala. 447; *Rockland Water Co. v. Rockland*, 84 Me. 472, 30 Am. St. Rep. 368; *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. Rep. 266; *State v. Butte City Water Co.*, 18 Mont. 199; *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610.

**Penalty for Nonpayment.**—A rule is reasonable which requires quarterly payment of water bills, and imposes a penalty for delay in payment, and provides that for nonpayment within a specified time the water may be shut off. Such a rule is enforceable against consumers who have notice



by a water company that no person shall be entitled to be supplied until he has paid all dues for previous supplies, is reasonable and valid, and is binding on all consumers having notice of it.<sup>1</sup>

**Cutting Off Water Supply.** — Thus, a water company may, within reasonable limitations,<sup>2</sup> cut off the supply of those who refuse to pay water rents due.<sup>3</sup> But it cannot as a further penalty require the payment of an arbitrary sum for cutting off the water nor for turning it on again.<sup>4</sup>

**Excessive Rates.** — Where the water company is itself at fault, or is charging an excessive rate, it will not be permitted to cut off the supply of a private consumer for nonpayment thereof.<sup>5</sup>

**5. Meters.** — Such companies may make reasonable rules and regulations

thereof. *Tacoma Hotel Co. v. Tacoma Light, etc., Co.*, 3 Wash. 316, 28 Am. St. Rep. 35.

In *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, a rule of a water company that the users of water should be liable to pay for water for the whole year, whether they actually used it for that length of time or not, and that payment should be made yearly in advance, was held to be unreasonable and void.

**1. Applicant Indebted to Company.** — *Sheward v. Citizens Water Co.*, 90 Cal. 635; *Atlanta v. Burton*, 90 Ga. 486; *Shiras v. Ewing*, 48 Kan. 170; *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. St. 393; *Com. v. Philadelphia*, 132 Pa. St. 288; *Brumm's Appeal*, (Pa. 1888) 12 Atl. Rep. 855; *Tacoma Hotel Co. v. Tacoma Light, etc., Co.*, 3 Wash. 316, 28 Am. St. Rep. 35.

In *McEntee v. Kingston Water Co.*, 165 N. Y. 27, the court said: "If the company supplying water \* \* \* has fully performed its contract and the customer refuses to pay his bills, it is entitled to cut off the supply of the latter under its rules and regulations."

**2. Credit Given for Pre-existing Indebtedness.** — But in *Crumley v. Watauga Water Co.*, 99 Tenn. 420, it was held that the company cannot refuse to supply an inhabitant at the usual rates because he refuses to pay a pre-existing indebtedness for which the company had extended credit and taken his note.

**Acceptance of Payment of a Subsequent Instalment of Water Rates** is held to be a waiver of a claim for payment of an old, overdue disputed instalment which will prevent the water company from cutting off the supply for the nonpayment thereof. *Wood v. Auburn*, 87 Me. 287.

**3. Cutting Off Water Supply.** — *Atlanta v. Burton*, 90 Ga. 486; *State v. Butte City Water Co.*, 18 Mont. 199; *McEntee v. Kingston Water Co.*, 165 N. Y. 27; *Tyrone Gas, etc., Co. v. Burley*, 19 Pa. Super. Ct. 348; *Smith v. Scranton Gas, etc., Co.*, 5 Lack. Leg. N. (Pa.) 235; *Brumm's Appeal*, (Pa. 1888) 12 Atl. Rep. 855.

**4. Charge for Cutting Off and Turning On Water.** — *Parker v. Boston*, 1 Allen (Mass.) 361; *Red Star Line Steamship Co. v. Jersey City*, 45 N. J. L. 246.

In *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610, it was held that a rule requiring the payment of one dollar by every person from whose premises water had been cut off for nonpayment of water rents, as a charge for turning off water and then

turning it on again, is unreasonable and void, and the company may be compelled by mandamus to turn on such water on the payment or tender to it of the same price as it would be turned on for a person who had not before used the water, and had, therefore, never been in default.

In *People v. Monroe*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 198, it was held that the charge for cutting off water was not an item covered by the consumer's contract, but a penalty, and that the city water commissioner had no power to make any rules or regulations which would have the effect of importing into the contract an obligation on the part of the consumer to pay whatever amount might be claimed as the cost of cutting off the water supply for a violation of the rules.

**Penalty Enforceable Only "by Process of Law."** — Where there is a dispute as to what was the proper cost of the work entailed in cutting off the water for a violation of the rules, the reasonableness of the charge made should be determined "by process of law." Hence, the city water commissioner has no right to refuse to turn on the water until the charge is paid, but must establish the claim for services rendered by a proceeding at law. *People v. Monroe*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 198.

**5. Excessive Rates — Injunction to Restrain Cutting Off Supply.** — *Smith v. Birmingham Water Works Co.*, 104 Ala. 315; *Wood v. Auburn*, 87 Me. 287; *McGregor v. Case*, 80 Minn. 214; *Sickles v. Manhattan Gas Light Co.*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 33; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; *Cleburne Water, etc., Co. v. Cleburne*, 13 Tex. Civ. App. 141; *Jenkins v. Columbia Land, etc., Co.*, 13 Wash. 502.

**An Injunction Restraining the Cutting Off of the water supply** was granted *pendente lite* where the consumer claimed that the charges were excessive, because based on the measurement of a meter installed by the city water commissioner without authority. *Foster v. Monroe*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 449.

**Water Company in Default — Injunction Pendente Lite.** — If the water company is in default of its contract, express or implied, the rights of the parties must be determined by the courts, and the company will be enjoined *pendente lite* from cutting off the customer from such system. *McEntee v. Kingston Water Co.*, 165 N. Y. 27, reversing 19 N. Y. App. Div 632.

concerning the installation<sup>1</sup> or removal<sup>2</sup> of meters, and the examination of meters in houses at reasonable times.<sup>3</sup> But the company cannot require a consumer to purchase a meter at his own expense as a condition precedent to his being supplied with water,<sup>4</sup> though the contrary has been held.<sup>5</sup>

**6. Concerning Tenant or Owner of Premises.** — A water company cannot adopt a rule that it will deal only with the owners of property which is to be supplied,<sup>6</sup> but it must supply the tenant or lessee of property, when the rate which the company is entitled to charge is tendered, though his predecessor may have failed to pay for water supplied him.<sup>7</sup> It makes no difference, it has been held, that the tenant who tenders the rate may be in arrears for water furnished him while occupying premises owned by another landlord.<sup>8</sup> But a landlord cannot enjoin the water commissioners of a city from cutting off the supply of water of his tenant for failure of a property regulation, as the injury is to the tenant and not to the landlord.<sup>9</sup>

**7. Unreasonable Regulations.** — Regulations which impair existing contracts are void.<sup>10</sup> A water company will not be permitted to make and enforce any

**1. Installation of Meter.** — Where the ordinance granting a franchise to a water company provided that the consumer should have the option of paying for the water used by him, on the basis of an estimated measurement, or of demanding that a meter be installed, and that in the event the consumer chose the latter method he must pay the expense of the meter, it was held that the water company was bound to supply water to a consumer who has put in a meter of satisfactory character, and for its refusal a mandamus will lie. *State v. Joplin Water Works*, 52 Mo. App. 312.

**2. Removal of Meter.** — See *Ladd v. Boston*, 170 Mass. 332.

**Removal of Meter Enjoined Where Consumer Not at Fault.** — *Healy v. New York*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 27.

**3.** See *State v. Butte City Water Co.*, 18 Mont. 199.

**4.** See *Smith v. Birmingham Water Works Co.*, 104 Ala. 315; *Spring Valley Water Works v. San Francisco*, 52 Cal. 112, 82 Cal. 286, 16 Am. St. Rep. 116.

**Requiring Consumer to Pay for Meter.** — In *Albert v. Davis*, 49 Neb. 579, the court said: "We think that the affirmative grant of power to fix and collect charges for the use of water meters excludes by implication the power to compel consumers to furnish their own meters."

**5.** *Sheffield Water Works Co. v. Bingham*, 25 Ch. D. 451; *Jackson v. Ellendale*, 4 N. Dak. 478.

In *Red Star Line Steamship Co. v. Jersey City*, 45 N. J. L. 246, it was held that a board of public works could not charge a certain water consumer with an expensive meter, put in by them to regulate the supply and rent to be paid, without the consent of the person charged; nor impose the penalty for cutting off the water for nonpayment of the price of the meter.

**6. Refusal to Supply Water to Lessee.** — *State v. Butte City Water Co.*, 18 Mont. 199; *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610.

**But When the Charter Secures the Right to treat with the owner of an office building, rather than with the several tenants, the owner cannot impose upon the board of water commis-**

sioners the duty of collecting water rates from each tenant separately by merely supplying shut-offs with locks and keys to each room, and tendering the keys to the commissioners. *Kelsey v. Fire, etc., Com'rs*, 113 Mich. 215.

**Tender of Payment by Tenant.** — In *Young v. Boston*, 104 Mass. 95, it was held that a person occupying a suite of rooms with his family in a building also occupied by other families, who had separate water attachments connected with a pipe which supplied the whole building, and on the pipe a meter was fixed, could restrain the company by injunction from cutting off his supply because he insisted upon paying for water used by himself, rather than have the owner of the building pay therefor under a regulation of the water board.

**7. Payment by Householder — Predecessor in Arrears.** — In *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, it was held that where a householder has made payment in advance for a year's supply, the water may not be cut off from his premises during the year for the reason that his predecessor did not pay the rent for the year preceding.

**Owner in Arrears.** — In *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, it was held that a water company has no right to refuse to supply water to the lessee of a house connected with its system on the ground that the owner of the house had not paid the rates for the previous year; and a regulation of the company that "in all cases of nonpayment of rates fifteen days after same are due the water may be shut off without further notice, and not be again turned on until rates are paid," so far as it may be construed as giving such a right, is unreasonable and void.

**8. Tender — Tenant in Arrears for Other Premises.** — *Dayton v. Quigley*, 20 N. J. Eq. 77.

**9. Tenant Refusing to Comply with Regulations.** — *Brass v. Rathbone*, 8 N. Y. App. Div. 78, 153 N. Y. 435.

**10.** *Edwards v. Milledgeville Water Co.*, 116 Ga. 201; *Jenkins v. Columbia Land, etc., Co.*, 13 Wash. 502.

**Power to Fix Rates.** — An ordinance is unconstitutional which, in attempting to fix rates, provides that if the city pay its bills the amount so paid shall be credited by the water company

regulation which is oppressive, unjust, or discriminating amongst its customers.<sup>1</sup>

**VI. WATER RATES — 1. General Nature — Are Not Taxes.** — Water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity.<sup>2</sup> The obligation to pay for the use of water rests either on express or implied contract on the part of the consumer to make compensation for water which he has applied for and received, on the terms and conditions made public.<sup>3</sup>

**It Is Not an Exemption from Taxation** to provide in an ordinance contract that a city shall pay for water used a sum equal to the tax levied on the water company's plant.<sup>4</sup>

**Actual Use Necessary to Justify Water Charge.** — The general result of the decisions seems to be that water rents imposed on property to which no water is actually furnished are assessments for public improvement, to be based on special benefits to the property, like assessments for sewers or similar improvements. In this point of view either the benefit for fire protection or the right to water when needed would seem clearly sufficient to sustain a charge for a portion of the cost of the construction of the waterworks. But except as property may thus be specially benefited the actual use of the water would seem to be necessary to justify a charge for water rents.<sup>5</sup>

**Lien on Premises.** — Though water rates do not constitute a lien on the premises as do taxes,<sup>6</sup> the legislature may declare them to be such, and that

to private consumers, as it does not fix the rates. *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.

**1. Unreasonable Regulations.** — See *Ward v. Folkestone Waterworks Co.*, 24 Q. B. D. 334; *Franke v. Paducah Water Supply Co.*, 88 Ky. 467; *Mulrooney v. Ohear*, 171 Mo. 613.

A regulation by a city operating waterworks, requiring the consumer to release the city from its obligation to furnish water of proper quality and sufficient quantity, or to supply water in case of fire, is unreasonable, and will not justify cutting off such consumer's supply upon his refusal to make such contract. *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293.

**2. Water Rates Are Not Taxes.** — *Wagner v. Rock Island*, 146 Ill. 139; *Young v. Boston*, 104 Mass. 95; *Jones v. Water Com'rs*, 34 Mich. 273; *Preston v. Water Com'rs*, 117 Mich. 589; *Water Com'rs v. Parks, etc.*, *Com'rs*, 126 Mich. 459; *Silkman v. Water Com'rs*, 71 Hun (N. Y.) 37, 152 N. Y. 327; *Alter v. Cincinnati*, 56 Ohio St. 47.

**The Furnishing of a Water Supply for a City Is Not a Necessary Expense** within the meaning of section 7, article 7 of the constitution of *North Carolina*, so as to prevent a levy of tax beyond the authorized amount. *Charlotte v. Shepard*, 120 N. Car. 411; *Thrift v. Elizabeth City*, 122 N. Car. 31; *Edgerton v. Goldsboro Water Co.*, 126 N. Car. 93.

**3. Obligation to Pay for Water Rests on Contract Express or Implied.** — *Provident Sav. Inst. v. Jersey City*, 113 U. S. 514; *Sheward v. Citizens Water Co.*, 90 Cal. 635; *Atlanta v. Burton*, 90 Ga. 486; *Young v. Boston*, 104 Mass. 95; *Vreeland v. O'Neil*, 36 N. J. Eq. 399; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. St. 393; *Com. v. Philadelphia*, 132 Pa. St. 288.

In *Wagner v. Rock Island*, 146 Ill. 139, the court said: "Water rates are imposed and collected merely as the compensation or equivalent to be paid by those who choose to receive and use the water, for the commodity thus furnished

them by the city. No one is compelled to receive or use the water so as to be under obligation to pay for it, except at his own election; and when he does receive and use it, with knowledge of the rates charged by the city therefor, he by implication agrees to pay those rates, and his obligation to make payment rests upon contract, rather than upon an exercise by the state of the taxing power."

**4. Monroe Water Works Co. v. Monroe**, 110 Wis. 11; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480; *Alpena City Water Co. v. Alpena*, 130 Mich. 518.

**5. Water Rates Charged Only Against Premises Benefited.** — *Wagner v. Rock Island*, 146 Ill. 139; *Remsen v. Wheeler*, 105 N. Y. 573; *Matter of Union College*, 129 N. Y. 308; *Silkman v. Water Com'rs*, 152 N. Y. 327; *Dasey v. Skinner*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 821; *Hennessy v. Volkening*, (N. Y. Super. Ct. Tr. T.) 30 Abb. N. Cas. (N. Y.) 100; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Stehmeyer v. Charleston*, 53 S. Car. 259; *Allen v. Drew*, 44 Vt. 174. See also *Baker v. Gartside*, 86 Pa. St. 498. But compare *Hughes v. Momence*, 163 Ill. 535; *Hewes v. Glos*, 170 Ill. 436; *Vreeland v. Jersey City*, 43 N. J. L. 135; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667.

**6. Rates Not Lien on Premises.** — *Leighton v. Ricker*, 173 Mass. 564; *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432; *Cornelius's Estate*, 13 Pa. Super. Ct. 531.

It seems that "water rates" should be included in the term "taxes," used in a statute which gives priority of such a claim against estates in the hands of receivers. *Waite v. Worcester Brewing Co.*, 176 Mass. 285.

But in *Fresno Canal, etc., Co. v. Park*, 129 Cal. 437, the court held in the absence of any law regulating water rates, a water company engaged in the irrigation of lands may enforce a lien upon the lands to which water is supplied, as against a subsequent purchaser thereof, for



the lien shall be paramount to any subsequent alienation or incumbrance thereon.<sup>1</sup>

**2. State or Municipal Regulation.** As has been seen, the right conferred upon a corporation to supply a municipality and its inhabitants with water, is a franchise granted by the state upon condition of the performance of a public duty. By reason of this public interest the state, or municipality, assumes a visitatorial control to regulate the price at which water may be sold to the public,<sup>2</sup> or to suspend the collection of water rates for the nonperformance of the public duty.<sup>3</sup> By reason of this power a city may alter the rates fixed in an ordinance franchise at any time during the franchise period.<sup>4</sup>

**Absence of State or Municipal Regulation.** — A water company may be protected by the terms of its franchise against legislative control in the matter of its rates;<sup>5</sup> when it is so protected or when there is no legislation to the contrary the company may fix and collect rates for furnishing water, provided they are reasonable and just and do not discriminate.<sup>6</sup>

nonpayment of the water rates fixed by contract with the original owner, when the contract makes the water supplied thereunder an appurtenance to the land upon which it is to be used, and contains a covenant binding the owner of the land, his heirs, and assigns and successors in interest, to pay a fixed sum per year to the water company, although technically such covenant does not run with the land.

**1. Made So by Statute.** — *Provident Sav. Inst. v. Jersey City*, 113 U. S. 506; *Vreeland v. O'Neil*, 36 N. J. Eq. 399; *Hennessey v. Volkening*, (N. Y. Super. Ct. Tr. T.) 30 Abb. N. Cas. (N. Y.) 100.

**2. Regulation of Water Rates.** — *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Budd v. New York*, 143 U. S. 517; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Spring Valley Water Works v. San Francisco*, 82 Cal. 329, 16 Am. St. Rep. 116; *Munn v. People*, 69 Ill. 80, *affirmed* 94 U. S. 113; *Levy v. New Orleans Waterworks Co.*, 38 La. Ann. 25; *Janvrin, Petitioner*, 174 Mass. 514; *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411.

**3. Suspension of Water Rates.** — In *New York State Trust Co. v. Duluth*, 70 Minn. 257, a provision in an ordinance franchise as to the suspension of water rentals during the default of the company in performance of its duty was held valid and enforceable, although the same provision in a contract between private individuals might be construed as a mere nonenforceable penalty, and not as stipulated damages.

**4. Ordinance Franchise Fixing Rates, Not Binding for Full Period.** — An ordinance granting a corporation the right to use the public street for thirty years for a waterworks system and fixing the rates to be charged for that period, is merely declaratory that such rates are reasonable, and is not a contract which binds the city to recognize such rates as reasonable for the full period. *Freeport Water Co. v. Freeport*, 180 U. S. 587; *Wagner v. Rock Island*, 146 Ill. 139; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, *affirmed* 180 U. S. 624; *Carlyle v. Carlyle Water, etc., Co.*, 52 Ill. App. 577.

Where, under and by virtue of powers granted in its charter, an incorporated city makes a contract with certain parties and their assigns to construct certain waterworks, and to furnish

the city with water for fire purposes, upon the payment of a stipulated sum by the city, and the parties proceed to construct such works, and the same are accepted by the city, and the water supplied and paid for as stipulated for a series of years, the validity of the contract cannot be impeached or impaired by the enactment of a law by the legislature which went into effect some three months after the contract was made. *Bellevue Water Co. v. Bellevue*, 3 Idaho 739.

**City Held Bound by Rates Fixed in Contract.** — See *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. Rep. 711.

**5.** *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339.

**6. Management Vested in Owner, Subject Only to Legislative Control.** — In *Pocatello Water Co. v. Standley*, 7 Idaho 155, the court said: "The fact that private property is affected with a public use does not confer upon the citizen the right to interfere with the management and control of the property. Such management and control is vested in the owner, subject only to the law that authorized and granted the franchise." See also *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116; *Jacobs v. San Francisco*, 100 Cal. 121; *Treadwell v. Van Schaick*, 30 Barb. (N. Y.) 444.

"Domestic Rates" signify rates allowed to be charged for "domestic purposes." The reasonable use of water in bath tubs and water closets of a dwelling house or otherwise for the comfort and convenience of those residing in the house, is a domestic use. *Crosby v. Montgomery*, 108 Ala. 498; *Birmingham Water Works Co. v. Truss*, 135 Ala. 530.

**Each Building on a United States Military Reservation may be treated as a separate "dwelling."** *U. S. v. American Water Works Co.*, 37 Fed. Rep. 747.

**Water for "Private Residences."** — Under a schedule of rates fixing the maximum charge for a "residence occupied by one family for domestic purposes," and further specifying a tariff for a bath, etc., and water basins, and providing that special rates should be made for supplies not enumerated, it was held that the tariff fixed for private residences did not in-

**3. Judicial Functions.** — As the Fixing of Water Rates Is Purely a Legislative Act it cannot be delegated to the courts,<sup>1</sup> although it may be proper for the courts to pass upon the reasonableness of the rates established and to protect the public from oppressive charges.<sup>2</sup>

This Supervisory Power would not justify the court in fixing the tariff of water rates, and compelling the company to supply water at those rates,<sup>3</sup> nor to interfere with or direct the official discretion of its officers; but the court may enjoin the water company from collecting rates where it fails to furnish water that can be used.<sup>4</sup> The courts will not interfere unless the rates are manifestly unreasonable.<sup>5</sup>

**Body Designated by Law.** — But where the law designates a body to fix the rates, resort must first be had to such body before the aid of the courts can be invoked.<sup>6</sup>

**Protection of Water Company.** — Regulations fixing rates are *prima facie* valid,<sup>7</sup> but this power to fix or readjust rates to be charged by a water company is not a power of confiscation nor a power to be exercised arbitrarily; and where the rates are fixed so low that water cannot be furnished without loss, the courts will interfere and declare such action void.<sup>8</sup> It is well settled that it is within the scope of judicial power and a part of judicial duty to inquire whether the rates of compensation for water supply, fixed by municipal authorities, operate to deprive the owners of their property without just compensation; and if the court finds from the evidence produced that the rates are manifestly unreasonable, it is its duty to so adjudge and to annul them.<sup>9</sup>

clude or warrant the use of water for the other purposes enumerated, for which special charge was to be made. *Allen v. Duluth Gas, etc., Co.*, 46 Minn. 290.

**1. Courts Cannot Fix Rates.** — *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206.

**2. Protection of Public from Unreasonable Charges.** — *Smith v. Birmingham Water Works Co.*, 104 Ala. 315; *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa 348; *Shiras v. Ewing*, 48 Kan. 170; *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368; *Wood v. Auburn*, 87 Me. 287; *McGregor v. Case*, 80 Minn. 214; *Sickles v. Manhattan Gas-Light Co.*, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 33; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; *Com. v. Russell*, 172 Pa. St. 506; *Schroeder v. Scranton Gas, etc., Co.*, 20 Pa. Super. Ct. 255.

**3. Brymer v. Butler Water Co.**, 179 Pa. St. 231.

**4. Brymer v. Butler Water Co.**, 172 Pa. St. 489, 179 Pa. St. 231.

**5. Leadville Water Co. v. Leadville**, 22 Colo. 297; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa 250.

In *Crosby v. Montgomery*, 108 Ala. 498, it was held that in the absence of evidence to sustain the contention, the court could not judicially say that an ordinance prohibiting a water company from demanding of a consumer a higher domestic rate than six dollars per annum for a building of five rooms or less, and one dollar for each additional room, is on its face oppressive.

**6. Osborne v. San Diego Land, etc., Co.**, 178 U. S. 22.

**7. Rates Are Prima Facie Valid.** — *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa

250; *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79; *San Diego Land, etc., Co. v. Jasper*, 89 Fed. Rep. 274; *Leadville Water Co. v. Leadville*, 22 Colo. 297. See also *State v. Gosnell*, 116 Wis. 606.

**Presumption of Validity of Rates Overcome** where it appeared that a water company had been denied the privilege of being heard pending an investigation by the city authorities in fixing the rates. See *San Diego Water Co. v. San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261.

**8. Unreasonable Regulations Void.** — *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116; *Janvrin, Petitioner*, 174 Mass. 514; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *Com. v. Russell*, 172 Pa. St. 506; *Brymer v. Butler Water Co.*, 179 Pa. St. 231; *Schroeder v. Scranton Gas, etc., Co.*, 20 Pa. Super. Ct. 255.

**Unreasonable Rates Not Binding on Consumer.** — While the water company cannot charge higher rates than those stipulated in the ordinance granting the franchise, those rates are not binding on consumers, who have the right to be protected by the courts against unreasonable charges. Still less can those rates bind consumers if unreasonable or discriminating, since the city has a right to grant a franchise to a water company, but not to stipulate for rates binding on its citizens. *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206.

**9. Just Compensation.** — *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79; *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379; *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222; *Janvrin, Petitioner*, 174 Mass. 514; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *Brymer v. Butler Water Co.*, 172 Pa. St. 489, 179 Pa. St. 231.

In *Janvrin, Petitioner*, 174 Mass. 514, it was

**4. Test of Reasonableness of Rates** — *a. NO ABSOLUTE RULE.* — There is no absolute rule to determine what rates are reasonable for a water company to charge for the supply of water to a municipality and its inhabitants. Ordinarily, where the business is honestly and prudently carried on the company is entitled to earn a fair return upon its investment, but the rights of the consumers are not to be ignored. The public cannot be subjected to unreasonable rates in order that the stockholders may receive dividends.<sup>1</sup>

*b. VALUE OF PLANT.* — When municipal authorities undertake to fix the rates to be charged by a water company, it is the present value of the plant and not its cost that must be taken as a basis upon which to fix reasonable and just rates.<sup>2</sup> Due regard must be had to the cost or maintenance of the plant, depreciation by wear and tear or diminution of the supply,<sup>3</sup> and to the rights of the public.<sup>4</sup>

*c. EARNING CAPACITY.* — The value of the property and not its liabilities, either for the bonded or other indebtedness or the interest thereon, is the basis on which to determine the reasonableness of rates.<sup>5</sup> A corporation is not entitled as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock.<sup>6</sup> But taking the other matters into consideration, the owners of the property are entitled to a return on their money invested not less than the legal rate of interest.<sup>7</sup> Thus, it has been held that the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not altogether conclusive,

held that an act giving to actual water takers within ten miles of the state house of the city of Boston, aggrieved by the rate charged, the right to apply to determine the reasonableness of the rate and what rates are reasonable as far as the interests before the court are concerned, is constitutional.

**1. Reasonable Rates.** — *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79; *Smyth v. Ames*, 169 U. S. 466; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261; *Redlands, etc., Domestic Water Co. v. Redlands*, 121 Cal. 365; *Kennebec Water Dist. v. Waterville*, 97 Me. 185; *Brymer v. Butler Water Co.*, 179 Pa. St. 231.

**2. Present Value of Plant.** — *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79; *San Diego Land, etc., Co. v. Jasper*, 89 Fed. Rep. 274.

**Evidence.** — In *San Diego Land, etc., Co. v. Jasper*, 110 Fed. Rep. 702, affirmed 189 U. S. 439, it was held that the price which a waterworks plant brought at foreclosure is evidence which a board of supervisors when regulating rates may take into consideration in estimating the value of the plant, on which the company is entitled to a fair return from the rates.

**3. Depreciation of Value of Plant.** — In *San Diego Land, etc., Co. v. Jasper*, 110 Fed. Rep. 702, affirmed 189 U. S. 439, it was held that the depreciation in the value of a waterworks plant, and in the value of the services rendered to consumers, due to the diminution in the water supply from a long-continued drought from which the surrounding country has suffered since the passage of an ordinance regulating water rates, may be considered in determining the reasonableness of such rates.

**4. Circumstances to Be Considered in Fixing Rates.** — *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79, affirmed in 174 U. S. 739.

**5. Value of Property — Not Its Liabilities.** — In

*Redlands, etc., Domestic Water Co. v. Redlands*, 121 Cal. 365, quoting from *San Diego Water Co. v. San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261, the court said that for the purpose of fixing rates to be charged or collected for furnishing water to the inhabitants of the city, provision should not be made for the bonded or other indebtedness of the company or of the interest thereon; the rates should be the same whether the works are acquired or constructed by the company from its own resources, or with money borrowed from others; the value of the property which is necessarily used in furnishing water is the basis upon which to determine the amount of revenue to be provided by the ordinance fixing the rates, and while the cost of the plant is an element proper to be considered in determining the value it is not conclusive thereof.

**6. Rights of Public.** — *Smyth v. Ames*, 169 U. S. 466, cited with approval in *Redlands, etc., Domestic Water Co. v. Redlands*, 121 Cal. 369.

**7. Fair Return on Investment.** — In *Brymer v. Butler Water Co.*, 179 Pa. St. 250, the court said: "Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable." See also *San Diego Land, etc., Co. v. Jasper*, 89 Fed. Rep. 274; *Kennebec Water Dist. v. Waterville*, 97 Me. 185.



criterion of the rate of profit which will be deemed reasonable.<sup>1</sup>

# VII. DUTIES AND LIABILITIES — 1. Duty to Furnish Water — a. IN GENERAL.

— The grant of the right to supply water to a municipality and its inhabitants, through pipes and mains laid in the streets, is a grant of a franchise vested in the state in consideration of the performance of a public service by the grantee.<sup>2</sup> A city or a water company having made a contract to supply a consumer with water, is under duty bound to continue the supply to his premises,<sup>3</sup> and will be liable for failure to do so.<sup>4</sup>

**Mandamus** is the proper remedy for enforcing the duty of supplying water to all those who come within the class or community for whose alleged benefit the company was created.<sup>5</sup>

## b. DISCRIMINATION IN RATES AND SERVICE — (1) *Unjust Discrimination.*

— In accepting a franchise, a water company acts, not as a private, but as a *quasi*-public, corporation. It enjoys and must exercise its opportunities for gain subject to its obligation to the public, that it will supply water, without unjust discrimination and at uniform rates, to all those, along the lines of its mains, who apply and tender a reasonable compensation.<sup>6</sup> A water company

**1. Legal Rate of Interest.** — See *San Diego Water Co. v. San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261. See also the preceding note.

**2. Use of Water a Public Use, Though Not Used by City Itself.** — *Smith v. Lincoln*, 170 Mass. 488.

In *California* (Const., art. XIV., § 1, and Statutes of 1885, p. 95) the use of water appropriated "for sale, rental, or distribution" is a public use. *Crow v. San Joaquin, etc., Canal, etc., Co.*, 130 Cal. 309.

**Implied Duty to Furnish Water.** — A water company which has accepted a franchise from the city may be compelled by mandamus to furnish water on reasonable terms to any inhabitant of the city applying for it. *Matter of McGrath*, 56 Hun (N. Y.) 76; *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411.

**3. Injunction to Prevent Shutting Off Water Supply.** — *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556; *Stock v. Boston*, 149 Mass. 410, 14 Am. St. Rep. 430; *Bienville Water Supply Co. v. Mobile*, 112 Ala. 260, 57 Am. St. Rep. 28.

**Though Equity Will Not Decree Specific Performance** of a water company's contract to supply a consumer, yet where the consumer has complied with the terms of the contract, and is not in arrears in the payment of the water rate, equity will enjoin the water company from severing the connection or shutting off the water from the plaintiff's private pipe. *Edwards v. Milledgeville Water Co.*, 116 Ga. 201; *Callery v. New Orleans Water Works Co.*, 35 La. Ann. 798; *Brown v. Frankfort*, (Ky. 1888) 9 S. W. Rep. 384; *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 50. But in *Christian, etc., Grocery Co. v. Bienville Water Supply Co.*, 106 Ala. 124, it was held that where a water company refused to comply with the terms of a contract with an individual, equity will decree specific performance.

In *England* a water company created by Act of Parliament for supplying water to the inhabitants of a town on terms mutually agreed upon cannot be compelled to supply any inhabitant beyond the terms of his contract. *Weale v. West Middlesex Waterworks Co.*, 1 Jac. & W. 358.

**4. Measure of Damages for Failure to Supply.** — *Pallett v. Murphy*, 131 Cal. 192; *Mabb v. Stewart*, 133 Cal. 556.

**5. Mandamus.** — *Weatherly v. Capital City Water Co.*, 115 Ala. 156; *Price v. Riverside Land, etc., Co.*, 56 Cal. 431; *State v. Butte City Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574; *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411; *Troy Water Co. v. Troy*, 200 Pa. St. 453.

**6. Must Not Discriminate Unjustly** — *United States*. — *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674.

*Alabama*. — *Weatherly v. Capital City Water Co.*, 115 Ala. 156; *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379.

*Colorado*. — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603.

*Illinois*. — *Wagner v. Rock Island*, 146 Ill. 139; *Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304, 180 Ill. 235; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, affirmed 180 U. S. 624; *Carlyle v. Carlyle Water, etc., Co.*, 52 Ill. App. 577.

*Indiana*. — *Robinson v. Shanks*, 118 Ind. 125.

*Massachusetts*. — *Parker v. Boston*, 1 Allen (Mass.) 361; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Lowell v. Boston*, 111 Mass. 464; *Burnett v. Com.*, 169 Mass. 417.

*Michigan*. — *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203.

*Montana*. — *State v. Butte City Water Co.*, 18 Mont. 199.

*Nebraska*. — *American Water-Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610.

*New Jersey*. — *Olmsted v. Morris Aqueduct*, 47 N. J. L. 333.

*North Carolina*. — *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206.

*Oregon*. — *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411.

*Tennessee*. — *Crumley v. Watauga Water Co.*, 99 Tenn. 420; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841.

**Every Member of the Community**, by paying the rate fixed for supplying water, has the right to use a reasonable quantity of it in a reasonable manner. *San Diego Land, etc., Co. v. National*

cannot at its election and without good reason serve one part of the community and not the other,<sup>1</sup> thus enhancing or depreciating the value of property.<sup>2</sup> Nor does it make any difference that the pipe from which the supply is refused was laid for a particular individual who paid for it himself.<sup>3</sup>

(2) *Reasonable Discrimination.* — But the rule does not require absolute uniformity of rates nor forbid discrimination by performing the service for one at rates lower than those enacted for others; and a reasonable discretion is lodged in the authorities so long as there is no unjust discrimination.<sup>4</sup>

*c. QUALITY OF WATER FURNISHED* — (1) *General Rule — Of Reasonable Purity.* — A water company engaged in supplying a city and its inhabitants with water does not impliedly warrant the quality of water furnished,<sup>5</sup> and though it is not bound to provide water that is chemically pure,<sup>6</sup> it must furnish water that is reasonably pure and fit for the purposes of the consumers.<sup>7</sup>

(2) *Contract Specifying Quality.* — Where a water company contracts to supply a city and its inhabitants with water of a certain quality, the city is not bound under the contract to accept<sup>8</sup> and pay for water furnished which

City, 74 Fed. Rep. 79; *People v. Stephens*, 62 Cal. 209; *Price v. Riverside Land, etc., Co.*, 56 Cal. 431; *McCrary v. Beaudry*, 67 Cal. 120.

**Duty Imposed by Statute — Tender of Rates.** — The duty imposed on a water company by statute to furnish water upon a tender of the established rates precludes the idea that any other duties can be prescribed or imposed except the tender of the rate, as a condition for supplying water as prescribed by law. *Crow v. San Joaquin, etc., Canal, etc., Co.*, 130 Cal. 309.

**Rates Prescribed by Charter Not Binding on Consumers if Discriminating.** — *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206.

1. *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841.

In *Warsaw Waterworks Co. v. Warsaw*, 161 N. Y. 176, *modifying* 16 N. Y. App. Div. 502, the court held that a legislative act which, by authorizing the imposition of water rates upon property not using water from the municipal water system, disclosed an intent to assist the water commissioners in securing customers from the patrons of an existing private waterworks company was invalid and nonenforceable.

2. *Lumbard v. Stearns*, 4 Cush. (Mass.) 61.

3. *Haugen v. Albina Light, etc., Co.*, 21 Oregon 411.

4. **Reasonable Discrimination.** — *Wagner v. Rock Island*, 146 Ill. 139; *Parker v. Boston*, 1 Allen (Mass.) 361; *Lamar Water, etc., Co. v. Lamar*, 140 Mo. 149; *Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills Co.*, 58 N. J. Eq. 59; *Reid v. New York*, 56 Hun (N. Y.) 156; *Penn Iron Co. v. Lancaster*, 17 Lanc. L. Rev. 161.

**Discrimination Based on Size of Service Pipe.** — Where the ordinance discriminated against consumers using large service pipes, in that it imposed on them the burden of procuring meters, while it left the use of meters to the option of other consumers, the court refused to say as a matter of law that the discrimination was unreasonable. *State v. Gosnell*, 116 Wis. 606.

And in *Goebel v. Grossepointe Waterworks*, 126 Mich. 307, a rate based on the size of the connection pipe was held reasonable, though discriminating.

**The Question of Consumption** is one of the elements to be considered in fixing rates, and it is not unreasonable to provide lower rates when

a larger quantity is used than for a smaller quantity. *Silkman v. Water Com'rs*, 152 N. Y. 327.

**Charges by Hydrant or Gallon.** — Charge may be made to some consumers by hydrant and to others by the gallon consumed, though a company cannot lawfully discriminate between water takers of the same class. *Exchange, etc., Co. v. Roanoke Gas, etc., Co.*, 90 Va. 83.

5. **Quality of Water.** — *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 911.

6. **The Term "Pure Water,"** as used in the grant of a franchise, must be construed to mean wholesome — ordinarily pure. The words must be used as used by the world at large, and not in their abstract or chemical sense. *Com. v. Towanda Water-Works*, (Pa. 1888) 15 Atl. Rep. 440; *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 911.

7. **A Water Company Will Be Enjoined** from collecting water rents where it supplies water utterly unfit for domestic use or for steam purposes. *Brymer v. Butler Water Co.*, 172 Pa. St. 489.

8. **Acceptance Cannot Be Inferred** from the mere fact of occasional use by the city of water actually furnished, but there must be a fair opportunity for examination and rejection. *Winfield Water Co. v. Winfield*, 51 Kan. 104; *Adrian Water Works v. Adrian*, 64 Mich. 584.

**Strict Compliance with Contract May Be Waived by City.** — In *Creston Waterworks Co. v. Creston*, 101 Iowa 687, it was held that strict compliance with the contract as to the quality of water furnished may be waived by the city, where during an unusual season the water supply had been affected, and that the action by the city in auditing the bills of the water company constituted an acceptance of the water furnished.

**Estoppel to Rescind Contract.** — Where the grantee of a franchise did not faithfully carry out his contract, but furnished water which was impure and also insufficient in quantity, it was held that the city could rescind the contract, notwithstanding the fact the grantee of the franchise assigned his contract to a corporation which executed a mortgage on its plant. It was held that the city was not estopped from asserting against the bondholders that the contract had not been complied with by the fact

is not of the quality stipulated for.<sup>1</sup> But the city must give reasonable notice to the water company that the water furnished is not of the proper quality, in order to rely on it in a suit by the water company for rates payable by the city,<sup>2</sup> or by the city to cancel the contract with the water company,<sup>3</sup> or to recover damages for insufficient service.<sup>4</sup>

**2. Liability for Negligence — a. GENERAL RULE STATED.** — A city in carrying on its water department is engaged in a work voluntarily undertaken by it, partly commercial in its character, and for which it receives pay from those making use of the water, and is *quoad hoc* to be regarded as a private corporation. The city is thus liable for personal injuries caused by the negligence of its officers, agents, or employees, while engaged in the construction and operation of its system of waterworks.<sup>5</sup>

that on the completion of the plant the common council passed a resolution declaring that the works were satisfactory. The court held, however, that in view of the circumstances of the case, the city should pay the bondholders a reasonable compensation for the water furnished. *Galesburg v. Galesburg Water Co.*, 34 Fed. Rep. 675, affirmed in 133 U. S. 156.

**1. Construction of Words Designating Quality.** — Where the contract between a town and a water company required that the water should be of good quality and fit for domestic use, but also required that it should be taken from a specified river, and filtered or settled, it was held that in supplying the city the company was confined to such water as the specified river would furnish, and that to determine what was meant by the terms "good quality" and "fit for domestic use," the source from which it should come must be considered. Therefore the contract was not avoided by the fact that the water was hard, and was at times discolored when the river was high and turbid, as the parties obviously intended only that the water should be of as good quality and as fit for domestic use as by filtering or settling could be obtained from that river. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424. But a stipulation for artesian well water is not satisfied by supplying water from other sources, though equally good or better. *Foster v. Joliet*, 27 Fed. Rep. 399.

**Filtered Water — Specific Performance.** — In *Burlington v. Burlington Water Co.*, 86 Iowa 266, a contract between the city and the water company provided that all water admitted to the company's mains must be properly filtered, except when used in extinguishing fires. Under said contract the company held an exclusive franchise, had established its plant, laid its pipes in the city streets, and private consumers had at large expense conducted the water into their houses for domestic purposes. The company having failed to supply the city with filtered water as agreed, it was held that the city was entitled to have performance of said contract enforced by a court of equity, an action for damages being inadequate, and a forfeiture of the exclusive franchise by the water company equally futile, as it would necessitate the erection of new works.

**Where There Is No Claim to Recover as upon a Quantum Meruit,** in an action by the water company to recover the contract price for water furnished to the city, the water company must prove substantial compliance with the contract

not only as to the quality of water but as to quantity as well, before it can recover at all. *Winfield Water Co. v. Winfield*, 51 Kan. 104; *Adrian Water Works v. Adrian*, 64 Mich. 584.

**2. Reasonable Notice Must Be Given to the Water Company,** that the water furnished is not such as is required under the terms of the contract, in order that the city may rely on it as a defense in a suit for the water rents payable by the city. *Lamar Water, etc., Co. v. Lamar*, 140 Mo. 145; *Burlington Water Works Co. v. Burlington*, 43 Kan. 725.

**3. Canceling Contract.** — *Capital City Water Co. v. State*, 105 Ala. 406.

A state of equity will not cancel the contract after the erection and use for a long time of a system of waterworks, unless it appears that the defendant has been fairly notified of the defects in the system, and that the city has made demands for the improvement thereof, and given the company a reasonable time to comply with its contract. *Winfield v. Winfield Water Co.*, 51 Kan. 70; *Kankakee v. Kankakee Water Co.*, 38 Ill. App. 620; *Wilson v. Charlotte*, 110 N. Car. 449.

**4. Insufficient Service — Waiver by City.** — In *Monroe Water Works Co. v. Monroe*, 110 Wis. 11, where for over six years a city had paid a water company the semi-annual hydrant rentals due under its contract, and made no complaint as to the character of service rendered, although it had full knowledge of the imperfect character thereof, such conduct was held to amount to a waiver of a known right, and precluded the city from recovering damages based upon insufficient service.

**5. Municipal Liability for Negligence.** — *White v. Board of Health*, L. R. 10 Q. B. 219; *Scott v. Manchester*, 1 H. & N. 59; *Wilson v. Underhill*, 108 Mass. 361; *Fox v. Chelsea*, 171 Mass. 297; *Lynch v. Springfield*, 174 Mass. 430; *McAvoy v. New York*, (Supm. Ct. Tr. T.) 54 How. Pr. (N. Y.) 245; *Bailey v. New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Esberg-Gunst Cigar Co. v. Portland*, 34 Oregon 282; *Levy v. Salt Lake City*, 3 Utah 63; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 664. See also *New York v. Bailey*, 2 Den. (N. Y.) 433, affirming 3 Hill (N. Y.) 531, 38 Am. Dec. 669. See generally the title MUNICIPAL CORPORATIONS, vol. 20, p. 1123.

**Negligence in Uncovering Pipes — Water Freezing.** — In *Stock v. Boston*, 149 Mass. 410, 14 Am. St. Rep. 430, where the owner of a greenhouse was deprived of his water supply on account of the negligence of the employees of the



**Degree of Care Required.** — But this liability does not extend to insure the citizen against damage for the construction and operation of its works, and it arises only for failure to exercise reasonable care and vigilance.<sup>1</sup> If due diligence is used in laying and maintaining the pipes no one can be held liable for their breaking.<sup>2</sup>

**b. ESCAPE OF WATER.** — A city or a water company is liable in damages for an injury done to private property by the escape of water from its mains and reservoirs, if the escape is the result of the lack of care on the part of its employees;<sup>3</sup> or for obstructing a private sewer whereby the sewage is caused to flow back into the plaintiff's cellar.<sup>4</sup>

**c. IMPURE WATER.** — Though a water company is not an insurer of the purity of water furnished,<sup>5</sup> it must exercise reasonable diligence in preserving the purity of its water supply,<sup>6</sup> and where it knowingly furnishes water dangerous for domestic use it will be held liable for injury resulting therefrom for failure to disclose the danger.<sup>7</sup>

**d. INJURY TO TRAVELERS.** — Liability in damages is incurred from negligently laying and maintaining pipes or hydrants in the streets and highways, whereby travelers are injured.<sup>8</sup>

**3. Liability for Fire Loss from Inadequate Supply** -- *a. AS AGAINST MUNICIPALITY* -- **In General.** — A municipal corporation undertaking by the establishment of waterworks, or through other means, to prevent the destruction by fire of the property of its inhabitants, performs a public or governmental func-

city in leaving the pipe connected with the greenhouse exposed, so that the water therein froze and the owner suffered considerable damage, the city was held liable therefor. But in *Smith v. Philadelphia*, 81 Pa. St. 38, 22 Am. Rep. 731, where the water froze in the mains owing to the negligent laying of the same, it was held the city was not liable for damages resulting from the failure to obtain a water supply, but recovery could be for back rents only, on the ground that the city was under no contract, the introduction of water by the city into private houses being but a license which was paid for.

**Highway Rendered Unsafe.** — In *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434, which was an action against a city for damages resulting from an unsafe highway, the damage being caused by a stream of water thrown from a city hydrant across the highway by an employee of the water commissioner, it was held that the city was liable, the water commissioners and their employees being servants of the city.

**1. Not an Insurer of Public Safety or Private Property.** — *Ring v. Cohoes*, 77 N. Y. 83; *Hunt v. New York*, 109 N. Y. 134; *Jenney v. Brooklyn*, 120 N. Y. 164.

**2. No Liability Where Due Diligence Exercised.** — *Terry v. New York*, 8 Bosw. (N. Y.) 504; *Green v. Chelsea Waterworks Co.*, 70 L. T. N. S. 547.

**3. Dammann v. St. Louis**, 152 Mo. 186.

**4. Kankakee Water Works Co. v. Irwin**, 56 Ill. App. 510.

**5. Contaminated Water.** — A water company is not liable for death resulting from contaminated water supplied to its patrons, in the absence of negligence on its part. *Buckingham v. Plymouth Water Co.*, 142 Pa. St. 221.

**6. Preserving Purity of Water.** — In *Brymer v. Butler Water Co.*, 172 Pa. St. 489, it was held that a water company, having secured a

proper source of supply, is bound to exercise diligence in the effort to preserve the water from pollution and to deliver it to the public in no worse condition than that in which it was taken from the source of supply.

**7. Duty of Disclosing Dangerous Character of Water.** — In *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 911, it was held that where a water company knowingly distributes water which, from a cause not discoverable by the exercise of reasonable care, is dangerous to domestic use, it owes a duty to its customers of disclosing such danger, and a failure to do so is fraud in law, rendering the company liable to any person injured thereby without fault on his part.

**8. Kent v. Board of Health**, 10 Q. B. D. 118; *Hand v. Brookline*, 126 Mass. 324; *Scranton v. Catterson*, 94 Pa. St. 202; *Wilkins v. Rutland*, 61 Vt. 336, 25 Am. & Eng. Corp. Cas. 49.

**If Due Diligence, However, Is Used in laying and maintaining the pipes, no one can be held liable for injuries resulting from their breaking.** *Terry v. New York*, 8 Bosw. (N. Y.) 504.

**Tearing Up Streets.** — In *Chapman v. Fvlde Waterworks Co.*, (1894) 2 Q. B. 599, 9 Reports 582, where a water company has alone a statutory power to break up the streets and repair service pipes connected with its mains, a duty is cast upon the company to keep the streets in repair, and it is liable to passers-by for injuries resulting from nonrepair, even though the service pipes and apparatus were laid by the company at the request and cost of the householders.

**Hydrant on Sidewalk.** — In *Bean v. Maine Water Co.*, 92 Me. 473, which was an action for negligence in maintaining a hydrant in a city sidewalk, it was held that the company must show not only that it had authority to keep hydrants in the streets, but on that particular spot, in order to be relieved from liability.

tion and is not liable to them for the burning of such property in consequence of a failure of such municipality, or any agency employed by it, to accomplish that result.<sup>1</sup>

**No Privy of Interest in Property Owner.** — The owner of premises destroyed by fire has not such an interest in the contract arising from the acceptance of the statute granting a municipality the power to build and maintain water-works, that he can individually maintain an action for failure of the city to perform those duties, as he is not a privy to the contract between the state and municipality.<sup>2</sup>

**b. AS AGAINST WATER COMPANY** — (1) *Rule Stated.* — Under a contract between a city and a water company by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen whose property has been destroyed by fire, through the alleged neglect of the water company in complying with the terms of the contract, has no right of action against the company, as there is no privy of contract between them.<sup>3</sup>

**1. Municipality Not Liable** — *United States.* — Boston Safe-Deposit, etc., Co. v. Salem Water Co., 94 Fed. Rep. 238.

*Georgia.* — Wright v. Augusta, 78 Ga. 241, 6 Am. St. Rep. 256; Fowler v. Athens City Water-Works Co., 83 Ga. 222, 20 Am. St. Rep. 313.

*Indiana.* — Brinkmeyer v. Evansville, 29 Ind. 187; Fitch v. Seymour Water Co., 139 Ind. 214, 47 Am. St. Rep. 258.

*Iowa.* — Vanhorn v. Des Moines, 63 Iowa 447, 50 Am. Rep. 750.

*Louisiana.* — New Orleans v. Crescent Mut. Ins. Co., 25 La. Ann. 390.

*Massachusetts.* — Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90.

*Minnesota.* — Miller v. Minneapolis, 75 Minn. 131.

*Missouri.* — Heller v. Sedalia, 53 Mo. 159, 14 Am. Rep. 444.

*Nebraska.* — Eaton v. Fairbury Water-Works Co., 37 Neb. 546, 40 Am. St. Rep. 510.

*New York.* — Wainwright v. Queens County Water Co., 78 Hun (N. Y.) 146.

*Ohio.* — Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

*Pennsylvania.* — Stone v. Uniontown Water Co., 4 Pa. Dist. 431; Grant v. Erie, 69 Pa. St. 420, 8 Am. Rep. 272.

*Tennessee.* — Foster v. Lookout Water Co., 3 Lea (Tenn.) 42.

*Texas.* — House v. Houston Waterworks Co., 88 Tex. 233; Owen v. New York, etc., Land Co., 11 Tex. Civ. App. 284; Butterworth v. Henrietta, 25 Tex. Civ. App. 467, *disapproving* Lenzen v. New Braunfels, 13 Tex. Civ. App. 335.

*West Virginia.* — Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664.

*Wisconsin.* — Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760.

**Fact of Water Taxes.** — There is no liability on the part of the city although the city taxed the property owner for water, and there was an understanding that there should always be an adequate supply for extinguishing fires. Black v. Columbia, 19 S. Car. 412, 45 Am. Rep. 785; State v. Columbia, 16 S. Car. 412; Vanhorn v. Des Moines, 63 Iowa 447, 50 Am. Rep. 750.

**Proximate Cause.** — In Patch v. Covington, 17 B. Mon. (Ky.) 722, 66 Am. Dec. 186, the

city was held not liable on the ground that the proximate cause of the loss was not the insufficient supply of water, but was the fire which was communicated to the plaintiff's building from one adjoining.

**2. Vanhorn v. Des Moines,** 63 Iowa 447, 50 Am. Rep. 750; **Tainter v. Worcester,** 123 Mass. 311, 25 Am. Rep. 90.

But see *Planters' Oil Mill v. Monroe Water-works, etc., Co.*, 52 La. Ann. 1243, wherein it was held that while the city could not be held liable for the nonfeasance or misfeasance of its officers in failing to compel a water company to perform the duties and obligations which it assumed under its contract, it was not so clear that the company was not liable to citizens for losses directly traceable to its failure to furnish the city with a supply of water adequate to the fire necessities of the city as it had contracted to do; and a judgment of no cause of action against the company was reversed and the cause remanded for a trial on the merits.

**3. General Rule — No Liability — England.** — *Atkinson v. Newcastle, etc., Waterworks Co.*, 2 Ex. D. 441; *Kent v. Board of Health*, 10 Q. B. D. 118.

*United States.* — *Anderson v. Fitzgerald*, 21 Fed. Rep. 294; *Boston Safe-Deposit, etc., Co. v. Salem Water Co.*, 94 Fed. Rep. 238.

*Alabama.* — *Montgomery v. Montgomery Water Works*, 79 Ala. 233.

*Connecticut.* — *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24.

*Georgia.* — *Fowler v. Athens City Water-Works Co.*, 83 Ga. 219, 20 Am. St. Rep. 313.

*Idaho.* — *Bush v. Artesian Hot, etc., Water Co.*, 4 Idaho 618, 95 Am. St. Rep. 161.

*Indiana.* — *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258.

*Iowa.* — *Clark v. Des Moines*, 19 Iowa 212; *McPherson v. Foster*, 43 Iowa 57; *Davis v. Clinton Water Works Co.*, 54 Iowa 59, 37 Am. Rep. 185; *Vanhorn v. Des Moines*, 63 Iowa 447, 50 Am. Rep. 750; *Becker v. Keokuk Waterworks*, 79 Iowa 419, 18 Am. St. Rep. 377.

*Kansas.* — *Mott v. Cherryvale Water, etc., Co.*, 48 Kan. 12, 30 Am. St. Rep. 267.

*Louisiana.* — *Planters Oil Mill v. Monroe Water Works, etc., Co.*, 108 La. 236, 52 La. Ann. 1243.

The Fact that a City Levies and Collects a Tax to create a special fund to pay for a sufficient water supply for use in case of fire, does not create a privity of interest between the water company and the taxpayer whose property is destroyed by fire so as to permit him to maintain an action against the water company.<sup>1</sup>

Nor Has the Municipality Any Cause of Action in such cases. The right of taxation vested in it does not create an interest in the property, but only an expectation depending upon contingencies, which is altogether too remote to be the foundation of a right of action.<sup>2</sup>

An Insurance Company which has been compelled to pay a fire loss on a policy issued on the property destroyed, has no greater rights against the water company than has the assured.<sup>3</sup>

A Contrary View of the liability of water companies has been taken in *Kentucky*.<sup>4</sup>

(2) *Contract to Maintain Certain Water Pressure*. — Nor is the company liable where it contracted with the city to supply hydrants at a designated pressure for extinguishing fires, and loss by fire occurs for want of such pressure, due to an insufficient water supply.<sup>5</sup>

(3) *Contract to Pay Damages*. — It is held that there is no liability on the

*Massachusetts*. — *Hand v. Brookline*, 126 Mass. 324.

*Mississippi*. — *Wilkinson v. Light, etc., Co.*, 78 Miss. 389.

*Missouri*. — *Howsmon v. Trenton Water Co.*, 119 Mo. 313, 41 Am. St. Rep. 654; *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118.

*Nebraska*. — *Eaton v. Fairbury Water-Works Co.*, 37 Neb. 546, 40 Am. St. Rep. 510.

*Nevada*. — *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485.

*New Jersey*. — *Olmsted v. Morris Aqueduct*, 46 N. J. L. 495.

*New York*. — *Wainwright v. Queens County Water Co.*, 78 Hun (N. Y.) 146.

*Ohio*. — *Akron Waterworks Co. v. Brownless*, 5 Ohio Cir. Dec. 1, 10 Ohio Cir. Ct. 620.

*Pennsylvania*. — *Beck v. Kittanning Water Co.*, (Pa. 1887) 11 Atl. Rep. 300; *Stone v. Uniontown Water Co.*, 4 Pa. Dist. 431.

*Tennessee*. — *Foster v. Lookout Water Co.*, 3 Lea (Tenn.) 42.

*Texas*. — *House v. Houston Waterworks Co.*, 88 Tex. 233.

*Vermont*. — *Wilkins v. Rutland*, 61 Vt. 336, 25 Am. & Eng. Corp. Cas. 49.

*Wisconsin*. — *Britton v. Green Bay, etc., Water Works Co.*, 81 Wis. 48, 29 Am. St. Rep. 856.

1. **Fact of Water Tax**. — *Becker v. Keokuk Waterworks*, 79 Iowa 419, 18 Am. St. Rep. 377; *Mott v. Cherryvale Water, etc., Co.*, 48 Kan. 12, 30 Am. St. Rep. 267; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *Wainwright v. Queens County Water Co.*, 78 Hun (N. Y.) 146; *Butterworth v. Henrietta*, 25 Tex. Civ. App. 467; *Nichol v. Huntington Water Co.*, 53 W. Va. 348.

2. *Ferris v. Carson Water Co.*, 16 Nev. 45, 40 Am. Rep. 485.

In *Montgomery v. Montgomery Water-Works*, 79 Ala. 233, it was held, in a suit against a municipality by a water company for water furnished at an agreed price, that the defendant could not set off or recoup damages sustained by private persons, citizens, and property owners, on account of property destroyed by fires

by reason of the insufficiency of the water supplied by the plaintiff to extinguish fires.

3. *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 119.

4. **Contrary View — Kentucky**. — *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 23 Ky. L. Rep. 2149; *Duncan v. Owensboro Water Co.*, (Ky. 1889) 12 S. W. Rep. 557, (Ky. 1891) 15 S. W. Rep. 523.

When the city, after making a contract requiring the company to furnish a plant of a certain capacity, tests the capacity and power of the plant, and declares that the company has fully complied with its contract, the question should not be reopened subsequently at the instance of private individuals who seek to hold the company liable for its failure to supply enough water for fire purposes. *Owensboro Water Co. v. Duncan*, (Ky. 1895) 32 S. W. Rep. 478.

**Comments on That View**. — The court, in *Boston Safe-Deposit, etc., Co. v. Salem Water Co.*, 94 Fed. Rep. 238, said that the only case in all the books where the water company has been held liable for failure to furnish sufficient water for extinguishment of fires is *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, in which case it was unnecessary for the court to have held this doctrine, as there was a private contract between the water company and the consumer for the furnishing of fire pressure; this Kentucky case has been repeatedly criticised by the courts of the various states in which this question has been decided; citing *Mott v. Cherryvale Water, etc., Co.*, 48 Kan. 12, 30 Am. St. Rep. 267; *Britton v. Green Bay, etc., Water Works Co.*, 81 Wis. 48, 29 Am. St. Rep. 856; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *House v. Houston Waterworks Co.*, 88 Tex. 233.

5. *Wilkinson v. Light, etc., Co.*, 78 Miss. 389; *House v. Houston Waterworks Co.*, 88 Tex. 233; *Akron Water-works Co. v. Brownless*, 5 Ohio Cir. Dec. 1, 10 Ohio Cir. Ct. 620.



part of the water company to a private citizen even where the ordinance granting the franchise provides that the company shall pay all damages that may accrue to any citizen of the city by reason of the failure on the part of such company to supply a sufficient amount of water to put out fires.<sup>1</sup>

**A Statute** which authorizes cities to contract with individuals or companies for the building and operating of waterworks does not, in the absence of express provision to that effect, confer power upon the city to contract with such individual or corporation to indemnify a taxpayer, so as to enable him to maintain an action in his own name for breach of contract.<sup>2</sup>

(4) *Special Contract with Consumer.* — A water company which unconditionally contracts with a consumer to supply him water with sufficient pressure for fire purposes is liable for damages sustained by the consumer from fire in consequence of failure in the water pressure.<sup>3</sup> A landlord cannot claim the benefit of a contract made by his tenant with a water company for a supply of water for domestic, sanitary, and fire purposes, so as to hold the company liable for the loss of his building, resulting from the company's failure to furnish a sufficient amount of water for fire protection at the time of the fire.<sup>4</sup>

**VIII. LIABILITY OF CONSUMERS FOR WATER FURNISHED — 1. Where There Is Express Contract** — *a. IN GENERAL.* — Where a water company has contracted to supply a city and its inhabitants with water, the consumers will be bound to pay therefor under the terms of the contract. Should a consumer fail to comply with the contract as to payment of water rentals, a water company, though exercising *quasi*-public functions in supplying the public, may avail itself of the usual rule that where one party to a contract refuses to perform, the other party may treat the contract as ended.<sup>5</sup>

*b. LIABILITY OF MUNICIPALITY* — (1) *In General.* — Where a city is not the builder or owner of waterworks, but a mere consumer under contract, it stands upon the same basis as any private citizen in regard thereto;<sup>6</sup> and where the rates are fixed by the terms of a contract entered into by the city with the company, both parties will be bound thereby.<sup>7</sup>

**1. Contract to Pay Damages.** — *Anderson v. Fitzgerald*, 21 Fed. Rep. 294; *Boston Safe-Deposit, etc., Co. v. Salem Water Co.*, 94 Fed. Rep. 238; *Vanhorn v. Des Moines*, 63 Iowa 447, 50 Am. Rep. 750; *Mott v. Cherryvale Water, etc., Co.*, 48 Kan. 12, 30 Am. St. Rep. 267; *Howson v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654; *Smith v. Great South Bay Water Co.*, 82 N. Y. App. Div. 427.

**2. Becker v. Keokuk Waterworks**, 79 Iowa 419, 18 Am. St. Rep. 377; *Davis v. Clinton Water Works Co.*, 54 Iowa 59, 37 Am. Rep. 185; *Howson v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654.

**3. Special Contracts.** — See *New Orleans, etc., R. Co. v. Meridian Waterworks Co.*, (C. C. A.) 72 Fed. Rep. 227.

And this though the failure to supply at the required pressure was due to a break in the pipes without the water company's fault. *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240.

But where the water company supplied a brewer with water for use in and about his brewery, but had no contract with him to supply water for the extinguishment of fires, it was held that the water company owed the brewer no duty in that respect. *Beck v. Kittanning Water Co.*, (Pa. 1887) 11 Atl. Rep. 300.

**4. Nichol v. Huntington Water Co.**, 53 W. Va. 348.

**5. Nonpayment — Cancellation of Contract.** — *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447.

And where the company fails to comply with its contract the city may treat the contract as ended. *Light, etc., Co. v. Jackson*, 73 Miss. 598.

**6. City Acts in Private Capacity.** — *Du Bois v. Du Bois City Water Works Co.*, 176 Pa. St. 430, 53 Am. St. Rep. 678.

**A City in Making a Contract with a Water Company for the Supply of Water to Its Inhabitants** acts in a *quasi*-business capacity rather than in its governmental capacity, and is therefore governed by the same rules that govern private individuals or private corporations. *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. Rep. 711.

**7. Los Angeles City Water Co. v. Los Angeles**, 103 Fed. Rep. 711; *Smith v. Birmingham Water Works Co.*, 104 Ala. 315.

**Annual Agreements.** — A contract from year to year, made by the city with a water company, does not bind the city for any longer time than the period covered by each annual agreement, and this is true even though the water company, in order to carry out its part of the contract, incurs much greater expenses than otherwise would have been necessary. *Boise City Artesian Hot, etc., Water Co. v. Boise City*, (C. C. A.) 123 Fed. Rep. 232.

(2) *Severable Contract*.—Where a contract between a city and a water company is severable, the city will be liable for water actually supplied in good faith, though at times the service is not according to the terms of the contract.<sup>1</sup> Thus, in a suit for hydrant rentals the city cannot plead as a complete defense failure to supply individual consumers according to the terms of the contract.<sup>2</sup> Though a city is not bound to accept water which does not meet the contract specifications,<sup>3</sup> if it does so it will be liable as on a *quantum meruit*.<sup>4</sup>

(3) *Ultra Vires Contract*.—As the powers of a municipality are limited, a person dealing with it is bound to take notice of that fact, and a city will not be liable upon its contract for water which is *ultra vires* and void from its inception.<sup>5</sup>

(4) *Term of Contract*.—A municipality, when given the proper authority, may enter into a valid contract for a reasonable term of years<sup>6</sup> with a water company, for the supply of water to itself and its inhabitants, agreeing to pay an annual rental for water furnished for fire-hydrant and other public services.<sup>7</sup>

The payment by a borough council for several years for water actually furnished creates no contract to accept and pay for it in the future. *Milford v. Milford Water Co.*, 124 Pa. St. 610.

1. *Hyndman Water Co. v. Hyndman*, 7 Pa. Super Ct. 191; *Sykes v. St. Cloud*, 60 Minn. 442.

City Liable for Water Furnished After Term of Contract Ended.—*Wilson v. Charlotte*, 110 N. Car. 449.

2. *Suit for Hydrant Rentals — Invalid Defense*.—*Greenville v. Greenville Water Works Co.*, 125 Ala. 625.

*Liability for Hydrant Rentals — Failure to Supply Individuals*.—The terms of an ordinance franchise provided that "all water rents shall be suspended" where the company failed to supply good and wholesome water, thereby causing an insufficiency for domestic and other purposes for a period of sixty days. In a suit by the water company against a city for the recovery of hydrant rentals, it was held that the city could not avail itself of the defense that the company failed to furnish pure water to private consumers, and the city must pay therefor as the hydrant rentals were not included in the above-mentioned terms. *New York State Trust Co. v. Duluth*, 70 Minn. 257; *Industrial Trust Co. v. St. Cloud*, 88 Minn. 437.

3. *Where the Contract Requires Pure and Wholesome Water* to be furnished, the city is not required to accept and pay for water that is not of such character. *Winfield Water Co. v. Winfield*, 51 Kan. 104.

4. *Quantum Meruit*.—*Harrodsburg Water Co. v. Harrodsburg*, (Ky. 1903) 73 S. W. Rep. 1032.

In *Higgins v. San Diego*, 118 Cal. 524, it was held that while a contract to supply water to the city was invalid owing to technicalities in the execution thereof on the part of the city, the company might recover reasonable compensation for what had been furnished and used by the city. See also *Nicholasville Water Co. v. Board of Councilmen*, (Ky. 1896) 36 S. W. Rep. 549.

5. *Ultra Vires Contract*.—*Ft. Edward v. Fish*, 156 N. Y. 363; *People v. Sisson*, 75 N. Y. App. Div. 138, affirmed 173 N. Y. 606.

But the fact that a contract between a city

and a water company is *ultra vires* in so far as it grants an exclusive franchise is not available as a defense in an action by the company to recover back taxes alleged to have been levied and collected in violation of said contract. *Monroe Water Works Co. v. Monroe*, 110 Wis. 11.

*Ratification of a Contract* for a longer period than a city was empowered to make, by payment of the hydrant rental, will bind the city for the full term. *Columbus Water-Works Co. v. Columbus*, 48 Kan. 99; *Atlantic City Water Works Co. v. Atlantic City*, 48 N. J. L. 378; *Atlantic City Water Works Co. v. Consumers Water Co.*, 44 N. J. Eq. 427; *Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495.

*Monopoly*.—Where a village is authorized by its charter to contract for a water supply, a contract made pursuant to such authority will not be set aside on the ground that it creates a monopoly, for, though the contract may be void to that extent, the promise to pay for water is valid, and the grant of the franchise is valid to the extent that the village had power to grant it. *Lewick v. Glazier*, 116 Mich. 493.

6. *A Contract to Furnish Water to a City for Thirty Years* is not for so long a time that, as a matter of law, it could be considered unreasonable. *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76; *Hurley Water Co. v. Vaughn*, 115 Wis. 470. *Contra*, *Flynn v. Little Falls Electric, etc., Co.*, 74 Minn. 180.

*A Contract for Fifteen Years*, at fixed rates, is not for an unreasonable length of time. *State v. Great Falls*, 19 Mont. 518.

7. *Power to Contract for Water Implies Power to Pay Therefor*.—In *North Platte v. North Platte Water-Works Co.*, 56 Neb. 403, the court said: "The power to contract with individuals or corporations for a supply of water to be furnished for the use of the city for a term not exceeding twenty-five years implies the power to provide that payments shall be made as the right to receive them accrues, without an appropriation having been previously made with reference to the several payments as they shall mature."

In *Michigan*—The Water Works Act (How. Stat., c. 84), permitting municipal authorities to contract with companies organized there-

(5) *Charter Limitation upon Indebtedness.* — According to the weight of authority, a municipality may contract for a supply of water for a term of years, stipulating for the payment of an annual rental for the water furnished each year, notwithstanding the aggregate of the rentals during the life of the contract may exceed the amount of indebtedness limited by its charter. Such a contract does not create an "indebtedness" on the part of the city for the full amount due thereunder, and for such reason void where such an indebtedness would be beyond the constitutional or statutory limit of the city.<sup>1</sup>

**2. Where There Is No Express Contract — Liability of Private Individuals.** — In the absence of express contract, a consumer will be liable for reasonable rates<sup>2</sup> for water furnished, and of which he has received the benefit according to the terms and conditions made public.<sup>3</sup>

under for a water supply on such terms as they may agree upon, is a substantive and independent enactment, which becomes part of the charter of a municipality availing itself of its provisions; and a general provision of a local charter subsequently enacted, limiting the taxing power of the municipality, will not work a repeal of an earlier act with respect to such municipality, so as to prevent it from entering into a contract thereunder involving an annual expenditure beyond the limitation prescribed in the later act. *Menominee Water Co. v. Menominee*, 124 Mich. 386.

**1. Contract Does Not Create "Indebtedness" for the Full Amount Due** — *United States.* — *Budd v. Budd*, 59 Fed. Rep. 735; *Walla Walla Water Co. v. Walla Walla*, 60 Fed. Rep. 959; *Cunningham v. Cleveland*, (C. C. A.) 98 Fed. Rep. 657; *Anoka Water Works, etc., Co. v. Anoka*, 109 Fed. Rep. 580; *Fidelity Trust, etc., Co. v. Fowler Water Co.*, 113 Fed. Rep. 560.

*California.* — *State v. McCauley*, 15 Cal. 429; *Hoppikus v. State Capitol Com'rs*, 16 Cal. 248; *People v. Pecheco*, 27 Cal. 207.

*Illinois.* — *Carlyle Water, etc., Co. v. Carlyle*, 31 Ill. App. 339, 44 Ill. 445.

*Indiana.* — *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Crowder v. Sullivan*, 128 Ind. 486.

*Iowa.* — *Dively v. Cedar Falls*, 27 Iowa 227; *Grant v. Davenport*, 36 Iowa 401.

*Massachusetts.* — *Smith v. Dedham*, 144 Mass. 179.

*Missouri.* — *Saleno v. Neosho*, 127 Mo. 627, 48 Am. St. Rep. 653; *Neosho City Water Co. v. Neosho*, 136 Mo. 498; *Lamar Water, etc., Co. v. Lamar*, 140 Mo. 145.

*New York.* — *Weston v. Syracuse*, 17 N. Y. 110; *Utica Water Works Co. v. Utica*, 31 Hun (N. Y.) 430.

In *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 19, the court said: "We think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one

where an absolute debt is created at once, as by the issue of railway bonds or for the erection of a public improvement, though such debt be payable in the future by instalments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed."

**It Is Not "Incurring an Indebtedness"** within the charter provisions limiting the authority of the council in such respect, to contract for future services to be paid as rendered. *Crowder v. Sullivan*, 128 Ind. 486; *Seward v. Liberty*, 142 Ind. 551; *Carlyle Water, etc., Co. v. Carlyle*, 31 Ill. App. 325; *Davis v. Des Moines*, 71 Iowa 500; *Smith v. Dedham*, 144 Mass. 177; *Putnam v. Grand Rapids*, 58 Mich. 416; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Stedman v. Berlin*, 97 Wis. 505.

**View that a Contract to Pay upon a Contingency Is in a Sense a "Debt."** — See *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *East St. Louis v. East St. Louis Gas Light, etc., Co.*, 98 Ill. 451; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Beard v. Hopkinsville*, 95 Ky. 239; *Putnam v. Grand Rapids*, 58 Mich. 416; *Niles Water Works v. Niles*, 59 Mich. 311; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Read v. Atlantic City*, 49 N. J. L. 558; *Erie's Appeal*, 91 Pa. St. 398; *Spilman v. Parkersburg*, 35 W. Va. 605.

**Extension of Water System — Creation of Debt — Injunction.** — *Joliet v. Alexander*, 194 Ill. 457.

**2. May Charge Reasonable Rate.** — *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

**But if Such Regulations Are Unreasonable,** a contract to pay for water according to the regulations will not be implied from knowledge of the regulations. *Rockland Water Co. v. Adams*, 84 Me. 473, 30 Am. St. Rep. 368.

**Payment under Compulsion.** — The payment of a water license under threat of turning off the water in case of continued refusal, is payment under compulsion; and if the charge is excessive, the excess may be recovered, and that without tendering the amount really due. *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

**3. Liability for Water Actually Furnished.** — *Provident Sav. Inst. v. Jersey City*, 113 U. S. 506; *Higgins v. San Diego*, 118 Cal. 524; *Contra Costa Water Co. v. Breed*, 139 Cal. 433; *Vreeland v. O'Neil*, 36 N. J. Eq. 399; *Lancaster Hotel Co. v. Lancaster*, 7 Pa. Super. Ct. 159.



**Municipal Liability.** — Where a municipality receives and retains the benefit of a water contract which it was authorized to make, but which is void because irregularly executed, it is liable in an action brought to recover a reasonable value for the benefits received.<sup>1</sup>

**3. Exemption from Water Rates.** — Exemption from payment for water supplied is never inferred,<sup>2</sup> and where a charter or statute requires water to be furnished free of charge to certain institutions, or for certain purposes, this duty will be confined to the uses specifically provided for in the statute and to no other.<sup>3</sup> Where a municipality operates the waterworks, through its agents, it may be supplied with water for certain purposes free of charge.<sup>4</sup>

**IX. PURCHASE BY MUNICIPALITY OF WATERWORKS** - 1. **Power to Purchase.** — A municipality may be authorized by its charter to contract for the supply of water and to purchase the waterworks, pipes, and mains at the end of a term of years.<sup>5</sup> To accomplish this the municipality may grant an ordinance franchise or enter into a contract with a company to supply the town and its

1. *Higgins v. San Diego*, 118 Cal. 532; *Burlington Water Works Co. v. Burlington*, 43 Kan. 725; *Harrodsburg Water Co. v. Harrodsburg*, (Ky. 1903) 73 S. W. Rep. 1032; *Lincoln Land Co. v. Grant*, 57 Neb. 70.

**Secret Use of Water.** — In *St. Louis v. Arnot*, 94 Mo. 275, in an action by the city for the value of water used through a secret pipe not connected with a meter, the city was held entitled to ascertain the amount used, and to recover for the same. And evidence of what the defendant said with reference to such pipe could be shown by any one who had heard it.

In *Milwaukee v. Herman Zoehrlaut Leather Co.*, 114 Wis. 276, it was held that a municipal corporation authorized by law to furnish water may sue and recover for water clandestinely taken and not paid for, the same as an individual or private corporation.

**2. No Duty to Furnish City Free of Charge.** — The board of water commissioners or a private corporation which has been granted a charter by the legislature to furnish water is not required to furnish water to the city for public purposes free of charge, unless the charter expressly requires it to do so. *Water Com'rs v. Parks, etc.*, Com'rs, 126 Mich. 459.

**3. Exemption Not Extended by Implication.** — Where the charter of a city provided that "the several hospitals, orphan asylums, and other charitable and benevolent corporations, societies, and institutions" existing in the city, or which might thereafter be established therein, should be exempt from the payment for water furnished them, it was held that the exemption did not extend to the Young Men's Christian Association, notwithstanding the fact that it was an association, incorporated for charitable work, as the words "hospitals and orphan asylums" must be so construed as to characterize or limit the general words that follow, as though the language were "and all other similar charitable and benevolent corporations." *People v. Willis*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 545, affirmed in 32 N. Y. App. Div. 626.

**Exemption for "City Purposes"** — Injunction. — Where a water company agreed to furnish water for "city purposes," to be used by the city as the city council might direct, it was held that it was not a "city purpose" to furnish water to the board of education for the use of public

schools, and upon refusal of said board to pay for such water, an injunction would not lie to prevent the water company from shutting off the water from the schools. *Water Supply Co. v. Albuquerque*, 9 N. Mex. 441.

**Constitutionality of Act Forbidding Charge for Water.** — Section 2417 of the Revised Statutes of Ohio, which prohibits trustees of waterworks from making any charge for furnishing water to hospitals and other public institutions therein named, is constitutional and embraces state institutions as well as those belonging to the city or cities owning or controlling waterworks. Hence, the trustees will not be enjoined at the instance of the city from furnishing free water to a state institution within the purview of the Act, which is located partly within the corporation limits of the city and partly without. *Gallipolis v. Water Works*, 4 Ohio Dec. 101.

**The Right to Revoke an Offer to Furnish Water Gratuitously to a City**, when exercised, will render the city liable for water subsequently used. *Spring Brook Water Co. v. Pittston*, 203 Pa. St. 223.

**4. Municipality Operating Waterworks — May Use Water Free of Charge.** — Where a municipality erects and maintains waterworks and the board of water commissioners acts as its agent in so doing, the borough may, without the consent of the commissioners, use the water from the waterworks to sprinkle the streets and to lay sewers. *Sewickley Water Works Com'rs v. Sewickley*, 159 Pa. St. 194.

In *Water Com'rs v. Detroit Citizens' St. R. Co.*, 131 Mich. 1, it was held that where a city water board is authorized to fix and collect rates for furnishing water to private consumers, this gives no implied authority to levy rates on the city for water used by it for hydrant and sprinkling purposes.

**5. An Ordinance Providing for the Purchase of a Plant** of a water company and the issuance of bonds in payment thereof was held to be illegal and void where it appeared that several members of the council passing the ordinance were stockholders in the water company. This is in accordance with the fundamental principle that an agent employed to sell cannot himself be the purchaser, and *vice versa*. *Stroud v. Consumers Water Co.*, 56 N. J. L. 422, 45 Am. & Eng. Corp. Co. 60; *People v. Township Board*, 11 Mich. 222; *Smith v. Albany*, 61 N. Y. 444.

inhabitants with water.<sup>1</sup> The proposition whether or not a city shall erect a system of waterworks, may be left to the voters of the community.<sup>2</sup>

2. **Nature of Right — Option.** — Where the city reserves the right to purchase the waterworks at the end of a term of years, it is held that this right is optional with the city.<sup>3</sup> But the right of purchasing waterworks does not give the city the right of obtaining them by condemnation proceedings.<sup>4</sup>

1. **What Is Contract of Purchase.** — It was held that the following clause in a contract between a village and a water company constituted a valid contract on the part of the village to purchase the company's plant and not a mere reservation of the right to make such purchase: "Purchase: The party of the second part reserves the right at the expiration of five years from the date of the completion of the works, and at the expiration of every five years thereafter, to purchase said works as they may then exist by giving to said company one year's notice of such intention, and paying to said company the appraised valuation; the amount so to be paid to be determined by three persons not in the interest or employ of said village or company, the board of trustees of said village choosing one, the company choosing one, and these two persons choosing a third; such valuation by said appraisers in no case to exceed the cost of the said works more than ten per cent.; and the decision and appraisal of these three persons to be final and conclusive on the parties to this contract." *Matter of Water Com'rs*, 71 N. Y. App. Div. 544.

**Acceptance and Performance by Water Company — Estoppel.** — A city entered into a contract in its private capacity with a water company to whom it leased its waterworks, the company to operate and improve the same, which contract was invalid from its inception; but the company having performed all the conditions required of it, the city is estopped from such repudiation of its contract as will enable it to appropriate without compensation all the improvements placed upon the property by the company. *Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647.

**For the Construction of Particular Contracts** see *National Water-Works Co. v. School Dist. No. 7*, 4 McCrary (U. S.) 198; *U. S. v. American Water-Works Co.*, 37 Fed. Rep. 747; *Los Angeles Water Co. v. Los Angeles*, 55 Cal. 178; *Spring Valley Water Works v. San Francisco*, 52 Cal. 112; *Montgomery v. Capitol City Water Co.*, 92 Ala. 361; *Stillwater Water Co. v. Stillwater*, 50 Minn. 498.

2. **Condition Precedent to Exercise of Power.** — Where, upon the approval of the voters of the city, authority was conferred upon it to erect waterworks in order to supply the city with water, when provision should be made for raising the sum required for defraying the expenses, it was held that this latter provision was a prerequisite, and that the work could not be carried on merely upon consent of the voters. *Hornby v. Beverly*, 48 N. J. L. 110.

In *Yesler v. Seattle*, 1 Wash. 308, where the charter of a city granted the power to erect and maintain waterworks, provided a majority of the voters at a general election of the city should vote upon the same, but where a subsequent general law was passed authorizing

cities to extend their indebtedness and construct, purchase, and maintain waterworks, etc., upon the approval of the majority of the voters at a special election held for that purpose, it was held that although the provision of the charter referred to was not repealed, authority could be exercised upon compliance with the general law, that is, upon the approval of the voters at a special election.

**"Majority of the Voters of the City."** — Where it is provided that the proposition for the erection of waterworks by a city must be approved "by a majority of the voters of the city," it is not necessary that the proposition shall be approved by a majority of all the voters of the city, but only by a majority of the votes cast. *Taylor v. McFadden*, 84 Iowa 262; *People v. Wiant*, 48 Ill. 263; *People v. Warfield*, 20 Ill. 160; *Sanford v. Prentice*, 28 Wis. 358. See also *TAXATION*, vol. 27, p. 567.

**Amount to Be Expended.** — In *Lucia v. Montpelier*, 60 Vt. 537, where the legislature delegated to a municipal corporation the power "without limitation" to supply itself with water, the power was held to rest in the discretion of the voters in respect to the amount to be expended therefor, if exercised in good faith.

3. **Municipality's Right to Purchase Optional.** — *Colby University v. Canandaigua*, 96 Fed. Rep. 449; *Thomas v. Grand Junction*, 13 Colo. App. 80; *Farmington v. Farmington Water Co.*, 93 Me. 192; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Matter of Brooklyn*, 143 N. Y. 596; *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154; *Warsaw Water Works Co. v. Warsaw*, 16 N. Y. App. Div. 502.

**Permission to Purchase Not Mandatory.** — In *Colby University v. Canandaigua*, 69 Fed. Rep. 671, it was held that the water commissioners of a village proposing to establish a water system of its own were authorized but not required to acquire by purchase or condemnation the works of an existing water company, by a statute which provides that, whenever any village is supplied with water by a water company, the water commissioners of the village, if they deem it necessary, shall have the power, and it shall be their duty, to examine the property of such company, and if they shall determine that such property is necessary, they shall have the right to acquire the same by condemnation proceedings. "If the board do not deem it necessary that it be acquired, they need not make any examination. If they deem it necessary that it should be acquired, they are to make a thorough examination. After this examination has been made, they are again to exercise their judgment, and determine whether the acquisition is necessary. If they determine that it is, they are permitted to resort to proceedings for judicial condemnation."

4. **Word "Purchasing" Used in Its Popular Sense**

But When the City Has Given Notice to the water company of its election to purchase the plant, a binding contract is consummated from which the city cannot withdraw.<sup>1</sup>

**When Property Passes.** — The property passes to the municipality when it votes to take the plant of the water company.<sup>2</sup> But when the taking depends upon the performance of certain conditions, the property and franchise remain in the water company until those conditions are fulfilled by the city.<sup>3</sup>

**Specific Performance.** — Equity will decree specific performance of the contract to purchase after notice is given by the municipality.<sup>4</sup> So where a city reserves in its contract its right to buy the plant at the end of a term of years, at a price to be fixed by appraisers, equity will compel specific performance by the company of the appointment of its appraisers under the contract.<sup>5</sup>

**Award of Appraisers.** — When the commissioners have complied with the proper rules<sup>6</sup> for determining the value of the company's property to be paid

— **Does Not Include Condemnation.** — In *Enterprise v. Smith*, 62 Kan. 815, where the act was entitled "An act authorizing and empowering cities \* \* \* to obtain \* \* \* water \* \* \* by purchasing or constructing, owning and operating \* \* \* waterworks \* \* \* by such cities," it was held that the word "purchasing" was used in its popular and not technical sense and, therefore, the title of the act did not express the subject of the acquisition of the property by condemnation proceedings, and hence § 12, which purported to authorize such proceedings, was unconstitutional and void.

**1. After Notice — Contract Binding on City.** — *Rockport Water Co. v. Rockport*, 161 Mass. 279; *Smith v. Westerly*, 19 R. I. 437; *Bristol v. Bristol*, etc., *Water Works*, 25 R. I. 189.

Where the city elected to exercise its option to purchase the plant of a water company and gave the notice required by the contract, it was held that a binding contract of purchase was consummated and that the city could not evade performance because of a subsequent failure of the water supply. *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219.

**2. Vote to Take Plant Completes Purchase.** — Where a town's charter gave it the right to take by purchase or otherwise the franchises and corporate property of a water corporation, "on payment to said corporation of the actual cost of its franchise, works, etc.," it was held that the purchase was completed at the time the town voted to make it, and that the statute did not make payment a condition precedent to the taking by the town. The water company sought to enjoin the town from preventing the plaintiff from laying down water pipes after the passage of the vote to purchase, but the court denied the relief, saying, however, if the town should delay payment wrongfully, it might no doubt be enjoined from further interference. *Rockport Water Co. v. Rockport*, 161 Mass. 279.

The town's vote to purchase completes the contract and the town becomes the equitable owner of the franchise of the water company, which cannot be forfeited by any subsequent neglect or act of the water company. If after the vote to purchase, the water company operates the plant, it does so as the trustee of the town, to which it must account for profits. *Bristol v. Bristol*, etc., *Water Works*, 25 R. I. 189.

But in *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, it was held that where a company contracted to supply water for a term of thirty years, and to return the plant to the city at the expiration of the term "upon payment to them of the value of the improvements made," it was held that the city could not reclaim possession from the water company without first paying or tendering the value of the improvements, and an injunction will lie to prevent its so doing.

**3. Conditions Precedent Must Be Fulfilled.** — *Stein v. McGrath*, 128 Ala. 175.

**4. Specific Performance.** — *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219.

In *Bristol v. Bristol*, etc., *Water Works*, 19 R. I. 413, where the contract provided that the city reserved the right to purchase at the end of ten years, on a price set by arbitrators of the city and the company, and the city notified the company that it would purchase but refused to name its arbitrator to fix the price, it was held that equity would decree specific performance of the contract to purchase at the price named by the arbitrator of the company.

**5. Equity Will Compel Appointment of Appraisers.** — *Kennebec Water Dist. v. Waterville*, 96 Me. 234.

In *Farmington v. Farmington Water Co.*, 93 Me. 192, where the contract provided that the city might take over the waterworks, at an appraisal to be fixed by three disinterested men, one to be selected by each of the parties and the third by the two so selected, said appraisal to be the sum at which the plaintiff "shall have the right to buy said rights and works, and for which the said company agree to sell to said corporation the works and rights aforesaid," it was held that the company clearly and expressly yielded an agreement to sell at the appraisal; that the city did not even by inference yield an agreement to buy at the appraisal; that it, however, retained the right to buy; and that this option to purchase was to be exercised after the appraisal; and equity would compel the company to appoint its appraiser under the contract.

**6. Rules Governing Commissioners in Determining Value of Plant.** — *Newburyport Water Co. v. Newburyport*, 168 Mass. 541; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365.

In *Falmouth v. Falmouth Water Co.*, 180 Mass. 325, an act requiring the city to pay the



for by the city, their award is final when accepted by the court,<sup>1</sup> and the city must pay the full value thereof.<sup>2</sup>

**X. PIPES IN HIGHWAYS — 1. Not Additional Servitude.** — The use of the streets of a city, under legislative or municipal sanction, for the purpose of laying mains and water pipes therein, does not constitute an additional burden on the highway<sup>3</sup> for which adjoining property owners can recover damages.<sup>4</sup> This use of streets stands upon the same principle as their use for gas pipes and sewers.<sup>5</sup> A water company which under due authority lays its pipes under the sidewalk of a street is liable to the abutting owner for such damages as may be done in the laying of the pipe by interrupting access to the property or otherwise, but is not liable for consequential injury due to the proximity of the pipes to the premises of the abutting owner.<sup>6</sup>

**2. Subject to Municipal Regulations.** — The right of a water company to break up the public highways of a municipality in the exercise of a franchise conferred upon it is necessarily subject to the reasonable municipal regulations of the district, enacted for the common good of its inhabitants, unless specially excluded by the act conferring the right.

**Illustrations.** — Thus, a company may be required to obtain municipal consent to open the streets,<sup>7</sup> or to pay a license fee for the privilege of making

"actual cost" of the property was held to mean the actual cost to the corporation and not the cost to the original contractor plus a fair profit thereon.

**1. Review by Court.** — See *Newburyport Water Co. v. Newburyport*, 168 Mass. 541.

**2. City Must Pay Amount of Award.** — In *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, it was held that a town is not entitled, in objecting to the award of the commissioners, to avail itself of the fact that the corporation owns property in excess of the amount prescribed by the statute, if it is property which pertains to the purposes of its incorporation. If the city takes a water company's property it must pay the full value adjudged by the appraisers.

**3. Not an Additional Servitude.** — *Newburyport Water Co. v. Newburyport*, 168 Mass. 541; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Lincoln v. Com.*, 164 Mass. 1; *Brooks v. Somerville*, 106 Mass. 271.

**License to Lay Pipes — Estoppel.** — In *National Waterworks Co. v. Kansas City*, 65 Fed. Rep. 691, a railway company which owned the fee along its right of way, was held to be estopped from revoking a license to a water company to lay its mains along its right of way after the license had been acted upon.

**After Termination of Franchise.** — In *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa 250, it was held that where a city granted a corporation the exclusive right to furnish water for a certain period, it must be presumed that the water company should continue to occupy the streets with its pipes after the expiration of the limited period, for a reasonable length of time, to negotiate an extension or renewal of the franchise or close out its business.

**4. Barrows v. Sycamore**, 150 Ill. 588, 41 Am. St. Rep. 400.

**Reservoir in Highway.** — In *West v. Bancroft*, 32 Vt. 367, it was held that the proper public authorities of a town have the right to place a reservoir in the highway for the purpose of retaining water with which to sprinkle the highway, and the owner of the fee of the land may

not maintain an action against such authorities for so doing.

**The Erection of a Water Tank in the Centre of a Street**, occupying one-half of the width thereof, and the erection and operation of a steam engine in connection therewith, even for the purposes of supplying the city and its inhabitants with water, is not a use to which the street can appropriately be put, and the owner of a lot adjoining may maintain an action to recover any damages occasioned thereby. *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77.

**Abutting Owner Owning Fee of Highway.** — In *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, the laying of pipes in a highway, of which the plaintiff owned the fee, was held not to entitle him to damages because the highway is subjected to an additional public use by laying the pipes therein. But in *Johnson v. Jaqui*, 27 N. J. Eq. 552, it was held that the laying of pipes in a country highway, where the fee is in the adjoining proprietor, entitles him to compensation.

**5. Quincy v. Bull**, 106 Ill. 337; *Wood v. National Water Works Co.*, 33 Kan. 590; *Crooke v. Flatbush Water-Works Co.*, 27 Hun (N. Y.) 72, 29 Hun (N. Y.) 245. See also the titles *DRAINS AND SEWERS*, vol. 10, p. 220; *GAS COMPANIES*, vol. 14, p. 915.

**6. Provost v. New Chester Water Co.**, 162 Pa. St. 275.

**7. Municipal Consent to Open Streets.** — *Saddle River Tp. v. Garfield Water Co.*, (N. J. 1895) 32 Atl. Rep. 978; *Pelham Manor v. New Rochelle Water Co.*, 143 N. Y. 532; *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490.

In *Rochester, etc., Water Co. v. Rochester*, 84 N. Y. App. Div. 71, it was held that the city had no right to interfere with the action of a railway company in permitting its tracks to be used by a water company in crossing the city for the purpose of reaching a village which it was incorporated to supply with water.

**Municipality May Impose Reasonable System of Surveillance.** — *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606.

openings.<sup>1</sup> A city may, in the proper exercise of its supervising power, require a water company to lay its pipes at a certain depth, or require them to be of a certain material or character;<sup>2</sup> or require it to extend its mains<sup>3</sup> or remove them<sup>4</sup> when the best interests of the public will be subserved thereby.

**City's Right to Construct Sewers and Repair Streets.** — A water company takes its contract right to lay its pipes in the streets of a city, subject to the paramount and inalienable right of the city to construct its sewers therein and to repair or make any changes in the grade or alignment of the streets whenever, in its judgment, the public interests demand such construction, repairs, or changes. Laying its pipes subject to this right of the city, the water company has no cause of action against the city if in consequence of the exercise of such right it is compelled to relay its pipes, unless the city's action is unreasonable or malicious.<sup>5</sup>

**3. Ownership of Pipes.** — A water company must lay all necessary water pipes within its franchise limits at its own expense, and the pipes used in conveying water from the tap to the franchise limits of the street (the curb line) belong to and are part of its system.<sup>6</sup> But beyond such franchise limits the user of such water must lay his own pipes at his expense.<sup>7</sup>

**Arbitrary Refusal of Consent.** — While the granting of a permit to make an opening in a street is undoubtedly to some extent discretionary with the commissioner of the department of highways of the city of New York, he has no right to refuse a water company permission to open a street for the purpose of disconnecting the premises of an alleged defaulting consumer, on the ground that it has been represented to him that such consumer is not indebted to the water company, for the reason that it is not within his power to pass upon the merits of a controversy arising under a contract between the water company and a consumer. *People v. Keating*, 55 N. Y. App. Div. 555, affirmed in 166 N. Y. 601.

**Company Cannot Be Denied Right to Open Streets, Vested by Its Charter.** — See *Wheat v. Alexandria*, 88 Va. 742.

**Permit Refused — Injunction to Restrain Interference with Right to Lay Conduits.** — *Baltimore v. Baltimore County Water, etc., Co.*, 95 Md. 232.

**1. License Fee.** — *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490.

**2. A City, by Inspecting the Pipes and Water Mains When Laid,** and reporting favorably upon them, is estopped from denying that they are of the material provided for in the contract between the city and the company. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424.

**3. Extension of Mains.** — *Stillwater Water Co. v. Stillwater*, 50 Minn. 498.

**Mandamus** is the remedy to compel a water company to extend its mains in a city, where under a contract between the city and the company it is the duty of the latter to make such extension. *Topeka v. Topeka Water Co.*, 58 Kan. 349; *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312.

**4. Removal of Mains.** — Where a city determined that the public welfare was subserved by removing mains and fire hydrants from a place where there was no demand for fire protection, and but one private consumer, an in-

junction will not lie to restrain such removal, though it would render such party's property practically valueless. *Asher v. Hutchinson Water, etc., Co.*, 66 Kan. 496.

**5. City's Right to Alter Grade of Streets.** — *National Water-Works Co. v. Kansas City*, 28 Fed. Rep. 921; *Montgomery v. Capital City Water Co.*, 92 Ala. 361; *New Haven v. New Haven Water Co.*, 44 Conn. 105; *Rockland Water Co. v. Rockland*, 83 Me. 267; *Belfast Water Co. v. Belfast*, 92 Me. 52; *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490; *Bryn Mawr Water Co. v. Lower Merion Tp.*, 15 Pa. Co. Ct. 527.

In *Asher v. Hutchinson Water, etc., Co.*, 66 Kan. 496, it was held that a contract by ordinance between a city and a water company that the latter would lay water mains and supply the inhabitants with water on certain streets named, may be modified by the parties after the mains are laid, so as to require the company to remove the mains from certain streets where, in the judgment of the council, public necessity no longer required them.

**6. Ownership of Pipes.** — *Pocatello Water Co. v. Standley*, 7 Idaho 155.

**Water Pipes in Alleys** in a subdivision owned by a water company are personality and do not pass to the purchaser of a lot abutting on the alley where the deed thereof contained a general warranty clause "with all the rights, privileges, immunities, and appurtenances thereunto belonging," but the supply pipes in and upon the lot so conveyed do pass as realty to the purchaser. *Mulrooney v. Obear*, 171 Mo. 611.

**7. Pocatello Water Co. v. Standley**, 7 Idaho 155.

**Lateral Service Pipes** put in at private expense, though done by the city, and not included in the general system of waterworks, belong to and must be kept in repair by the private owner. *Jackson v. Ellendale*, 4 N. Dak. 478; *Mulrooney v. Obear*, 171 Mo. 613.

**WAYBILL.** (See also the titles **BILLS OF LADING**, vol. 4, p. 507; **CARRIERS OF GOODS**, vol. 5, p. 154; **CARRIERS OF PASSENGERS**, vol. 5, p. 474; **EXPRESS COMPANIES**, vol. 12, p. 54.) — A waybill is a list of the names of passengers who are carried in a public conveyance, or the description of goods sent with a common carrier by land.<sup>1</sup> When the goods are transported by water route, such list is usually called a bill of lading.<sup>2</sup>

**WAY-GOING CROPS.** — (See also the titles **CROPS**, vol. 8, p. 320; **LANDLORD AND TENANT**, vol. 18, p. 149.) — A phrase formed by elision from "away-going crop," and meaning such crops as the tenant has the right to cut and carry away with him, after the end of his term.<sup>3</sup>

**WAY OF NECESSITY.** (See also the title **PRIVATE WAYS**, vol. 23, p. 131.) — A way of necessity arises where land is granted which is wholly surrounded by the land of the grantor, or partly by the land of the grantor and partly by the land of a stranger.<sup>4</sup>

**WAYS.** (See also the titles **EASEMENTS**, vol. 10, p. 397; **HIGHWAYS**, vol. 15, p. 343; **PRIVATE WAYS**, vol. 23, p. 2; **STREETS AND SIDEWALKS**, vol. 27,

1. Cent. Dict.

**Waybill as Evidence.** (See also the titles **CARRIERS OF GOODS**, vol. 5, pp. 188, 190; **DOCUMENTARY EVIDENCE**, vol. 9, p. 577.) — In *Coupland v. Housatonic R. Co.*, 61 Conn. 531, the plaintiff shipped a mare and colt over the defendant's line from B. to D. During the course of transportation the plaintiff's agent informed the conductor that the mare was becoming frightened and in danger of being killed by further transportation, and requested him to have the car set on a side track at the next stopping place. The defendant offered in evidence a *waybill*, in the ordinary form, describing the property carried, its destination and value, the names of the shipper and consignee, and the rate of charge. It was for the convenience of the company only, and had not been brought to the plaintiff's knowledge. This was held to be admissible as containing matter to be considered by the conductor in determining whether to interrupt the transportation as requested, as it showed the value of the freight, and how much further it was to be carried, and was, so far as appeared, his only source of information concerning the property.

A carrier, who acts as the forwarding agent of the owner of goods in giving direction by *waybills* or otherwise to the successive lines of transportation over which they are to be carried beyond the termination of his own route, is responsible, as such forwarding agent, only for the want of reasonable care and diligence. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.) 254. In this case a *waybill* of iron rails, to be transported over several successive lines of railroad, was made out by the agents of the first line in this form: "*Waybill* of merchandise transported by the F. R. R. Co. from C. to B. November 27, 1852. Consignees, Ogdensburgh RR. Description of articles, rails part lot." This was held to be sufficient to show to the intermediate carriers that the rails were to be carried and delivered to the Ogdensburgh Railroad at B., and to exonerate the first carrier from liability, although the rails were detained and used by one of the intermediate companies, which at the same time was receiving other similar rails over the same route for its own use. See also

*Borster v. Wheeler*, 49 N. H. 9; *Livingston v. New York Cent.*, etc., R. Co., 76 N. Y. 631; and the titles **CONNECTING CARRIERS**, vol. 6, p. 603; **FORWARDERS**, vol. 13, p. 1165.

2. Webst. Dict.

3. **Way-going Crop.** — Abbott's L. Dict.

In *Van Doren v. Everitt*, 5 N. J. L. 532, it is said: "In this state I have always understood it to be the universal custom, and therefore the settled law, that the tenant, after the expiration of his term, should have liberty to enter, cut, and carry away his *way-going crop*, as it is called; that is, all the grain which he had sown, but which was not then yet ripe."

4. **Way of Necessity.** — *Trump v. McDonnell*, 120 Ala. 200.

In *Wooldridge v. Coughlin*, 46 W. Va. 345, it is said: "A *way of necessity* exists where the land granted is completely environed by land of the grantor or partially by his land and the land of strangers. The law implies from these facts that a right of way over the grantor's land was granted to the grantee as appurtenant to the estate."

In *Pettingill v. Porter*, 8 Allen (Mass.) 1, it is held that there is a *way of necessity* where another cannot be got or made without unreasonable labor and expense; and that in determining the question the jury may consider the comparative value of the land and the probable cost of such way, and that the word "necessary" cannot be limited to absolute physical necessity.

**Convenience.** — By *way of necessity* is not meant a way of convenience, but a way of strict necessity. *Cox v. Tipton*, 18 Mo. App. 450.

"Necessity" in this connection means more than mere convenience. *Screven v. Gregorie*, 8 Rich. L. (S. Car.) 158; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 553.

But in *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, it is said: "An inconvenience may be so great as to amount to that kind of necessity which the law requires."

And in *Morris v. Edgington*, 3 Taunt. 31, it is said: "It would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." See



p. 99. And see RIGHT OF WAY, vol. 24, p. 968; ROAD, vol. 24, p. 985.)—A way is an incorporeal hereditament,<sup>1</sup> and imports *ex vi termini* the right of passing over another man's ground along a particular line or route. It may arise either from grant, necessity, or prescription, and is either in gross or appendant to land.<sup>2</sup> A way, in the most general sense, includes public ways

also Barlow v. Rhodes, 1 Crompt. & M. 439; Marvin v. Brewster Iron Min. Co., 55 N. Y. 552.

**Grant.**—In Stewart v. Hartman, 46 Ind. 342, it is said: "A *way of necessity*, when the nature of it is considered, will be found to be nothing else but a way of grant. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant; and, of course, it is as necessary to set forth the title to a *way of necessity* as it is to a way by express grant."

**1. Incorporeal Hereditament.**—Private Road Case, 1 Ashm. (Pa.) 421; Kripp v. Curtis, 71 Cal. 62; Sanxay v. Hunger, 42 Ind. 44; Gidney v. Earl, 12 Wend. (N. Y.) 98; Worley v. State, 7 Lea (Tenn.) 385; Newsom v. Newsom, (Tenn. Ch. App. 1900) 56 S. W. Rep. 31.

A *way*, whether public or private, whether styled a road or a street, leading through town or country, is an incorporeal hereditament. Conner v. New Albany, 1 Blackf. (Ind.) 45.

In Willoughby v. Jenks, 20 Wend. (N. Y.) 99, the court, by Cowen, J., said: "Whether a public *way* be an hereditament in every sense or not, it is certainly a *quasi* hereditament; it is an incumbrance on land which very seriously affects the title to the soil; it is in itself real estate, a right to occupy land subject to a control in the owner very much reduced, and, indeed, destroyed for all the purposes of cultivation."

**A Way Is an Easement.**—San Francisco v. Calderwood 31 Cal. 589; Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361.

In Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen (Mass.) 164, it is said: "A grant of a *way*, without other words indicating an intent to enlarge the natural import of the word, carries an easement only."

**Way Reserved.**—In Hagerty v. Lee, 54 N. J. L. 583, it is said: "A *way* reserved, as the word is used in a popular sense, is strictly an easement newly created by way of grant from the grantee in the deed of the estate to the grantor."

**2. Way.**—Sanxay v. Hunger, 42 Ind. 44; Welch v. Wilcox, 101 Mass. 162, 100 Am. Dec. 113; Private Road Case, 1 Ashm. (Pa.) 421; Lawton v. Rivers, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741; Worley v. State, 7 Lea (Tenn.) 385; Newsom v. Newsom, (Tenn. Ch. 1900) 56 S. W. Rep. 31. See also San Francisco v. Calderwood, 31 Cal. 589; Boyd v. Hand, 65 Ga. 470; Cincinnati, etc., R. Co. v. Sipe, 11 Ind. 68; Cox v. Tipton, 18 Mo. App. 450.

**Particular Line.**—A *way, ex vi termini*, imports a right of passing in a particular line. Jones v. Percival, 5 Pick. (Mass.) 485; Starkie v. Richmond, 155 Mass. 196; Newsom v. Newsom, (Tenn. Ch. 1900) 56 S. W. Rep. 31. See also Wilkes v. Broadbent, 1 Wils. C. Pl. 63; Mitchell v. Reynolds, 10 Mod. 133; Paramore

v. Verall, 2 Ander. 152; Nichols v. Luce, 24 Pick. (Mass.) 104; Russell v. Jackson, 2 Pick. (Mass.) 574; Chase v. Perry, 132 Mass. 582; Jennison v. Walker, 11 Gray (Mass.) 426.

**Way Synonymous with Right of Way.**—See Private Road Case, 1 Ashm. (Pa.) 421.

Mr. Angell says: "The word *way* is derived from the Saxon, and means a right of use for passengers. It may be private or public. By the term 'right of *way*' is generally meant a private *way* which is an incorporeal hereditament of that class of easements in which a particular person, or particular description of persons, have an interest and a right, though another person is the owner of the fee of the land in which it is claimed." Angell on Highways, 1, 2. Adopted by the court in Wild v. Deig, 43 Ind. 458, 13 Am. Rep. 399.

**Ways** have been divided as follows: footways; foot and horse ways; foot, horse, and carriage ways; and driftways. Co. Litt. 56a; Woolrych on Ways 1.

**A Carriageway** will comprehend a footway, Davies v. Stephens, 7 C. & P. 570, 32 E. C. L. 634; and a horse-way, but not a driftway, Heath, J., in Ballard v. Dyson, 1 Taunt. 284.

**A Driftway** is a common way for driving cattle, and the reservation of such a *way* has been held to intend a *way* for the passage of teams. Smith v. Ladd, 41 Me. 320.

**Road and Way Distinguished.**—In Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361, 93 Am. Dec. 409, the court, after quoting from Wood v. Truckee Turnpike Co., 24 Cal. 474, set out below, and referring thereto, said: "The main point here is that the word 'road' is exactly synonymous with *way*. This proposition we conceive to be utterly untenable. It is true that the term *way* is sometimes used in the same sense as 'road.' Sometimes we call a road a street, a lane, etc., a *way*—though this is, perhaps, an improper use of the term *way*. But Mr. Washburn, when defining *way* as an easement, uses the word in a strictly legal sense. *Way*, in its legal, technical sense, means nearly the same thing as 'right of *way*,' or, in other words, the right of one person, or of several persons, or of the community at large, to pass over the land of another. Webster, among other definitions of a road, says it is the 'ground appropriated for travel, forming a communication,' etc. Bouvier defines a road as 'passage through the country for the use of the people.' He also says: 'The public have the use of roads; but the owners of the land through which they are made, or which bounds upon the roads, have *prima facie* a fee in such highway.' Or, in plain English, the public does not usually own the soil over which the roads are constructed, but only a perpetual right to use that soil for some particular purpose. We cannot find that the word 'road' is anywhere used or defined, save in the opin-

as well as private ways.<sup>4</sup>

**WAYS, WORKS, MACHINERY, ETC.** — See *WORKS*, *post*.

**WE.** — See note 2.

ion just quoted, as being synonymous with right of *way*. In fact, we feel certain that it is never so used in common conversation, in ordinary writing, nor in legal works."

In *Newsom v. Newsom*, (Tenn. Ch. 1900) 56 S. W. Rep. 31, it is said: "It will be seen, it is believed, from all the definitions, that the word 'road' includes in some sort the sense of *way*, although the latter word is more generic and refers to many things besides roads."

In *Green v. Morris, etc., R. Co.*, 24 N. J. L. 490, it is said: "The sixth count of the declaration is for neglecting to provide a bridge or passage across the railroad where a *way* of the plaintiff over his own farm crosses the same. Such *way* is not a road in the legal sense of the term — nor can any one have a right of *way* over his own land. A *way*, in law, is the right of going over another man's ground."

And that *way* is a term of larger significance than "road," see *Sherman v. Buick*, 32 Cal. 241; *Smith v. Worn*, 93 Cal. 214; *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 364; *Kister v. Reeser*, 98 Pa. St. 1, 42 Am. Rep. 608.

**Road and Way Used Synonymously.** — In *Wood v. Truckee Turnpike Co.*, 24 Cal. 474, the terms "road" and *way* were declared to be synonymous, it being held that ejectment would not lie to try the right to a road or right of *way*; a road or right of *way* is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments. The court said: "Road is a legal term, strictly synonymous with the term *way*, and in the complaint, and throughout all the title papers of the plaintiffs, their identity is fully recognized. A *way* is an easement, and consists in the right of passing over another man's ground. *Washburn on Easements* 161. It is an incorporeal hereditament, a servitude imposed upon corporeal property, and not a part of it. \* \* \* The authoritative definition which we have given of the term *way* shows that neither land, nor rents of land, nor profits of land, nor any possessory rights in land, are included in its meaning. If the plaintiffs then took anything by force of the term 'road,' they took nothing but a right of *way*." See also *San Francisco v. Grote*, (Cal. 1897) 47 Pac. Rep. 938.

Though not strictly synonymous the words "road" and *way* are frequently used interchangeably. *Newsom v. Newsom*, (Tenn. Ch. 1900) 56 S. W. Rep. 31.

**Same — Grant or Exception.** — By a deed "saving and excepting from the premises hereby conveyed all, and so much, and such part and parts thereof as has or have been lawfully taken for a public road or roads," the fee of the soil of the road, and not simply the public easement therein, is reserved. *Munn v. Worrall*, 53 N. Y. 44, 13 Am. Rep. 470. But in that case the court did not find it necessary to decide whether an exception of a "road" or "highway" includes the fee of the land, or is only a reservation of the easement. In *Peck v. Smith*, 1 Conn. 103, the language of the exception was "saving and excepting a road or

highway laid out." Four of the judges held that the term "highway" or "road" did not necessarily mean the land over which the road or highway passed, and that, therefore, only the easement was excepted. Three others held that the exception was good as an exception of land. One other, that it would have been good if the grantor had had any estate in the land covered by the road. The remaining judge expressed no opinion as to the effect of the exception.

A clause in a deed conveying a tract of land reserved to the grantor "a road ten feet wide along the line of J. B." It was held that this constituted a reservation to the grantor of a right of *way*, and not an exception from the conveyance of a ten foot wide strip of land. The court, by Trunkey, J., said: "The word 'road' has never been defined to mean land; it is difficult to find a definition which does not include the sense of *way*, though the latter word is more generic, referring to many things besides roads. 'Road' is generally applied to highway, street, or lane, often to a pathway or private way, yet strictly it means only one particular kind of *way*. Its sense in this deed is very clear. Taking the entire clause, with reference to the grant, it means the reservation of a *way*. This is as plain as if the word *way* were in place of 'road.'" *Kister v. Reeser*, 98 Pa. St. 4, 42 Am. Rep. 608. See also *Wood v. Truckee Turnpike Co.*, 24 Cal. 487; *Leavitt v. Towle*, 8 N. H. 96; *Graves v. Amoskeag Mfg. Co.*, 44 N. H. 462.

**Road in Sense of Public Way.** — The ordinary and accepted meaning of the term "road" is a *way* for public travel, unless qualified by the adjective "private," or some other qualifying expression. *Horner v. State*, 49 Md. 286; *Respublica v. Arnold*, 3 Yeates (Pa.) 421.

1. Co. Litt. 56a.

**Public Ways**, as applied to *ways* by land, are usually termed highways or public roads, and are such *ways* as every citizen has a right to use. *Kripp v. Curtis*, 71 Cal. 64.

2. **We.** — *We* may be used for first person singular in some cases, but properly it is plural. *Mitchell v. O'Neale*, 4 Nev. 517; *Waul v. Kirkman*, 13 Smed. & M. (Miss.) 608.

**Corporations.** — In *Williams v. Harris*, 198 Ill. 501, it is said: "We do not regard the use of the words 'I or *we*,' in the body of the note, as affecting or changing the legal import of the instrument. There is no personal pronoun which is properly adapted to use by a corporation in making a note. A proper method is to repeat the name of the corporation in the body of the note. *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234. But the word *we* is frequently used by a corporation. *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39. Whether the pronoun 'I' or the pronoun *we* is used in the body of a note, if it is signed by the corporation, acting by its officer or officers, it is the obligation of the corporation." See also *Wilson v. Fite*, (Tenn. Ch. 1897) 46 S. W. Rep. 1056, where it was

**WEAK.** — See **STRONG**, vol. 27, p. 190.

**WEAK-MINDED.** — See note 1.

**WEAPON.** (See also the titles **ASSAULT AND BATTERY**, vol. 2, p. 952; **CARRYING WEAPONS**, vol. 5, p. 729; **MURDER AND MANSLAUGHTER**, vol. 21, p. 83; **SELF-DEFENSE**, vol. 25, p. 256.) — A weapon has been defined to be an instrument of offensive or defensive combat;<sup>2</sup> anything used or designed to be used in destroying, defeating, or injuring an enemy, as a gun, a sword.<sup>3</sup>

held that the pronoun *we* did not make the note the obligation of all of the parties signing it, but only the obligation of the corporation.

In *New Market Sav. Bank v. Gillet*, 100 Ill. 261, the court said: "It is said that the use of the word *we*, in the note, in its connection, to wit, '*We*, the trustees,' etc., leaves it doubtful on the face of the instrument who is bound. But how can this be? *We* is immediately followed by 'the trustees of the First Free Will Baptist Society of Chicago,' and that is the corporate name of a corporation. How can this pronoun denote any one else than the corporation whose corporate name immediately follows it?"

**Town.** — A *venire facias* directed a constable to draw a juror. The constable's return was, "*We* have appointed J. C. a juror," etc. This was objected to, but the court said: "The language is inaccurate, but is perfectly intelligible; by the word *we* is meant the town, of which the constable was an inhabitant." *Fellows's Case*, 5 Me. 334.

**Signature.** — In *The California*, 1 Sawy. (U. S.) 596, 4 Fed. Cas. No. 2,313, it was said: "This certificate contains no direct averment that the three commissioners met and acted in the matter of granting the libellant a branch. If it did, it might be sufficient if only signed by two of them. What it does aver is, that *we*, A. B., C. D., and E. F., 'examined,' and do 'appoint,' etc. Now, who *we* are is only to be ascertained by examining the signatures to the instrument. *We* is used distributively, and each of the persons included in it speaks and signs for himself. Although the body of the instrument may state that *we*, A. B., C. D., and E. F., did so and so, this is no evidence that either of them did anything of the kind, except as to those whose names appear signed to it."

1. **Weak-minded.** (See also the titles **INSANITY**, vol. 16, p. 558; **TESTAMENTARY CAPACITY**, vol. 28, p. 68; and see **SOUND MIND, SOUND AND DISPOSING MIND, ETC.**, vol. 25, p. 1159.) — In *Somers v. Pumphrey*, 24 Ind. 235, it is said: "A clear distinction is drawn in the law between mere weakness of intellect and insanity or unsoundness of mind. Mere *weakness of mind* is not idiocy or insanity, nor does it amount to 'unsoundness of mind,' within the meaning of the law."

2. **Weapon.** — *Bouv. L. Dict.*; *State v. Page*, 15 S. Dak. 613; *Harris v. Cameron*, 81 Wis. 243.

3. *Webster, quoted in State v. Page*, 15 S. Dak. 613; *State v. Calhoun*, 72 Iowa 432.

**Dangerous Weapon.** — A dangerous *weapon* is one likely to produce death or great bodily harm. *U. S. v. Williams*, 2 Fed. Rep. 64; *U. S. v. Reeves*, 38 Fed. Rep. 404; *Skidmore v. State*, 43 Tex. 96.

**Sharp and Dangerous Weapon.** — Clubs, sticks, staves, bricks, stones, and iron bars are not

"sharp, dangerous *weapons*," within 3 New York Rev. Stat. (5th ed.), p. 970, § 24, respecting assaults "with knife, dirk, dagger, or other sharp, dangerous *weapon*." *People v. White*, 55 Barb. (N. Y.) 606.

**Same — Pitchfork.** — A blow given with the handle of a pitchfork, without pushing or thrusting with the tines, is not an assault with a "sharp, dangerous *weapon*," within the meaning of the Act of 1854 (New York Laws of 1854, c. 74), providing for the punishment of assaults with dangerous *weapons*. *Filkins v. People*, 69 N. Y. 104, 25 Am. Rep. 143. Here the court said: "The assault was by a blow, as with a stick or club, and not by pushing or thrusting with the tines. As used, the *weapon* was no more dangerous than it would have been if there had been buttons on the tines to prevent their puncturing the flesh, or than would have been a knife held by the blade, the holder striking with the handle. A blow thus given with the handle of a knife would not be an assault with a knife or sharp instrument, within the statute, any more than would an attempt to discharge a loaded gun, the touch-hole of which was plugged, be an offense under the English statute making it criminal to attempt to discharge a loaded gun at another. *Rex v. Harris*, 5 C. & P. 159, 24 E. C. L. 254; 1 Russell on Crimes 979, marg. 725."

**Deadly Weapon.** — A deadly *weapon* is one likely to produce death or great bodily harm. *People v. Valliere*, 123 Cal. 576; *McNary v. People*, 32 Ill. App. 62; *Skidmore v. State*, 43 Tex. 93; *McReynolds v. State*, 4 Tex. App. 327; *Kouns v. State*, 3 Tex. App. 13; *State v. Rosemer*, 8 Wash. 43. See also *People v. Fuqua*, 58 Cal. 245; *People v. Franklin*, 70 Cal. 641; *People v. Leyba*, 74 Cal. 407.

A deadly *weapon* has been defined as one dangerous to life. *Com. v. Duncan*, 91 Ky. 594, quoting *Bouv. Dict.*

In *Sylvester v. State*, 72 Ala. 206, the court said: "A deadly *weapon* is one, not, as asserted in the instruction, a blow from which would ordinarily produce death, but one from which, as it was used, death would probably result. And an instrument or *weapon* used in inflicting injuries upon the person of another may or may not be esteemed deadly, according to the manner of its use, and the subject on which it is used."

The trial court, in effect, instructed the jury that a deadly *weapon* was any *weapon* or instrument by which death might be produced, or would be likely to be produced, when used in the manner in which it was used in the affray. And on appeal the instruction was sustained. *People v. Rodrigo*, 69 Cal. 601.

**Question of Law or Fact.** — Whether a *weapon* is a deadly or dangerous one is generally not a question of fact for the jury, but of



**WEAR.** — See note 1.

**WEAR AND TEAR.** (See also the title LANDLORD AND TENANT, vol. 18,

law for the court. *Sylvester v. State* 72 Ala. 206; *State v. Craton*, 6 Ired. L. (28 N. Car.) 164; *State v. West*, 6 Jones L. (51 N. Car.) 505; *State v. Phillips*, 104 N. Car. 786.

In *U. S. v. Williams*, 2 Fed. Rep. 64, it is said: "Whether a particular *weapon* is a deadly or dangerous one is generally a question of law. Sometimes, owing to the equivocal character of the instrument as a belaying pin—or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular *weapon* dangerous or not, it is its duty to do so."

But the question what constitutes a deadly *weapon* has been held a question for the jury. *People v. Rodrigo*, 69 Cal. 601; *Barker v. State*, 48 Ind. 163; *Dering v. State*, 49 Ind. 56; *Com. v. Duncan*, 91 Ky. 594. See also *State v. Hammond*, 14 S. Dak. 545; *State v. Page*, 15 S. Dak. 613.

The rule would seem to be that where a *weapon* is one which might or might not be dangerous to life according to the manner of its use, it is for the jury to determine whether it is a deadly *weapon* or not. *Sheffield v. State*, 1 Tex. App. 641; *State v. Calhoun*, 72 Iowa 436.

Thus in *U. S. v. Small*, 2 Curt. (U. S.) 243, the court said: "In many cases it is practicable for the court to declare that a particular *weapon* was, or was not, a dangerous *weapon*, within the meaning of the law. And when it is practicable it is matter of law, and the court must take the responsibility of so declaring. *U. S. v. Wilson*, *Baldw.* (U. S.) 78. But where the question is whether an assault with a dangerous *weapon* has been proved, and the *weapon* might be dangerous to life, or not, according to the manner in which it was used, or according to the part of the body attempted to be struck, I think a more general direction must be given to the jury; and it must be left for them to decide whether the assault, if committed, was with a dangerous *weapon*." *Rex v. Noakes*, 5 C. & P. 326, 24 E. C. L. 342."

**Axe.**—An axe is held to be a dangerous *weapon*. See *State v. Hertzog*, 41 La. Ann. 777. See also *State v. Scott*, 39 La. Ann. 943.

**Chisel.**—A chisel is held to be a deadly *weapon*. *Com. v. Branham*, 8 Bush (Ky.) 387.

**Club.**—The term "club" denotes a deadly *weapon*. *McNary v. People*, 32 Ill. App. 62; *State v. Phillips*, 104 N. Car. 786. See *infra*, this note, *Stick*.

**Cord.**—A cord may be a deadly *weapon*. *State v. Calhoun*, 72 Iowa 436.

**Hammer.**—A hammer has been held to be a deadly *weapon*. *Philpot v. Com.*, 86 Ky. 595.

**A Hoe Held Per Se to Be a Deadly Weapon.**—*Hamilton v. People*, 113 Ill. 38, 55 Am. Rep. 396.

**Knife.**—A knife is a deadly and dangerous *weapon*. *McNary v. People*, 32 Ill. App. 62; *State v. Jacob*, 10 La. Ann. 141; *State v. Henn*, 39 Minn. 476; *Com. v. O'Brien*, 119 Mass. 342.

**Pistol.**—"A loaded pistol is not only a dangerous but a deadly *weapon*." *U. S. v. Williams*, 2 Fed. Rep. 64.

In *State v. Roberts*, 39 Mo. App. 48, the court said: "A pistol is a deadly *weapon* only when carried for use, and all that can be said is that, *prima facie*, the fact of its being carried is evidence that it is carried for use; but the defendant is at liberty to rebut this inference by showing that he carried it as a mere article of merchandise, or, as in this case, as a mere messenger for transmission to a third party, without any intention to use it as a *weapon*."

In *Missouri* carrying a pistol, not for use as a *weapon*, but only for the purpose of delivering it to the owner, is not criminal. *State v. Roberts*, 39 Mo. App. 47.

**Pin Thrust Down Infant's Throat.**—In *State v. Norwood*, 115 N. Car. 789, it was held that the pushing of a pin down an infant's throat, thereby causing its death, was killing it with a deadly *weapon*. The court said: "The question whether an instrument with which a personal injury has been inflicted is a deadly *weapon* depends, not infrequently, more upon the manner of its use than upon the intrinsic character of the instrument itself. (*State v. Huntley*, 91 N. Car. 620.) We may expect death to ensue from pushing such a pin down the throat of an infant, just as we may look for death or serious bodily harm as a consequence of firing a pistol into a crowd of human beings, or at a particular person."

**Pitchfork.**—A pitchfork is a deadly *weapon*, within the meaning of *Kentucky* Gen. Stat., c. 29, art. 6, § 2, prescribing the punishment for wilful and malicious striking with a deadly *weapon*, with intent to kill. In *Evans v. Com.*, (Ky.) 1889) 12 S. W. Rep. 767, the court said: "A pitchfork is an instrument with which life may be readily taken, and therefore a deadly *weapon*." See *supra*, this note, *Sharp and Dangerous Weapon*.

**Razor.**—A razor has been held not to be a dangerous *weapon*. *State v. Nelson*, 38 La. Ann. 942.

**Rock.**—A rock may be a deadly *weapon*. *Com. v. Duncan*, 91 Ky. 594; *State v. Dineen*, 10 Minn. 407.

**Stick.**—A stick has been held to be an offensive *weapon* within a statute against assault. *Rex v. Johnson*, R. & R. C. C. 492. See also *Reg. v. Williams*, 14 Cox C. C. 59. But not a deadly *weapon*. *State v. Porter*, 101 N. Car. 713. See *supra*, this note, *Club*.

**Stone.**—See *supra*, this note, *Rock*.

**Whip.**—A driving whip has been held not to be a deadly or dangerous *weapon*. *State v. Page*, 15 S. Dak. 613.

**1. Wear of the Creek.**—A conveyance described the land conveyed as containing twenty-four and seventy-one one-hundredths acres, "less the *wear* of the creek." During a freshet the creek broke through a bend and abandoned its old course. It was held that this change could not be regarded as the *wear* of the creek; that the *wear* of the creek had reference to the gradual and imperceptible changes in the banks of the creek by which the soil might

pp. 246, 250, and 254.)—A phrase commonly used in leases and contracts of bailment to limit liability for injury to the subject of the contract.<sup>1</sup>

**WEARING APPAREL.** (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 117.)—Wearing apparel is defined as garments worn or made for wearing; dress in general; and embraces all articles which are ordinarily worn.<sup>2</sup>

be taken from one side and deposited on the other. *Henning v. Bennett*, 63 Hun (N. Y.) 592.

**1. Reasonable Wear and Tear.**—In *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507, the court said: "These words ('reasonable wear and tear'), no doubt, include destruction to some extent, *e. g.*, destruction of surface by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party."

**Ordinary Wear and Tear.**—In *Thompson v. Cummings*, 39 Mo. App. 537, it was held that barking and plowing up young apple trees by cultivating a crop among them was not ordinary wear and tear of a farm rented for a year.

If a building falls in consequence of its defects, the loss would be from ordinary wear and tear. *Machen v. Hooper*, 73 Md. 369; *Hess v. Newcomer*, 7 Md. 325.

**Fair Wear and Tear, Etc.**—In *Davies v. Davies*, 57 L. J. Ch. 1095, *Kekewich, J.* said: "If those words, 'fair wear and tear and damage by tempest excepted,' were not there, any dilapidations found at any time, or at the end of the term, by reason of the wear and tear, the wearing out of the walls and floors of a public house, for example, from the constant traffic and so forth—the lessee would be liable to replace, and if, unfortunately, by a storm, his chimney pot was blown down, or he had his roof broken, he would be bound to put it straight, and restore the place to good and substantial repair."

**Natural and Reasonable Wear and Tear.**—In an article of agreement for the sale of real estate, by which the vendor stipulates to deliver possession of the premises, at a future day, in as good repair as they were in at the time of the execution of the contract, "natural and reasonable wear and tear excepted," the exception covers only such decay or depreciation in value, of the property, as may arise from ordinary and reasonable use; and injury to the property by a freshet is not within the exception. *Green v. Kelly*, 20 N. J. L. 547.

**Wear and Tear Distinguished.**—The case of *Bigge v. Bigge*, 9 Jur. 192, illustrates the distinction between wear and tear. In that case a testator had, by his will, worn his will in two—a very different thing from his having torn it in two—so there was no revocation by "tearing" within the statute of wills.

**2. Wearing Apparel.**—*Arnold v. U. S.*, 147 U. S. 496.

**Exemptions—Wearing Apparel Not on the Person.**—In *Freeman on Executions* (2d ed.), § 232, it is said that the exemption from execution of wearing apparel was probably confined at common law to the garments in which the debtor was clad, citing *Cooke v. Gibbs*, 3 Mass. 193; *Sunbolt v. Alford*, 3 M. & W. 248; *Wolf v. Summers*, 2 Campb. 631; *Bowne v.*

*Witt*, 19 Wend. (N. Y.) 475. None of these cases are directly in point, and an examination of the cases following shows no such interpretation has been given the statutes. *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626. See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 67, 68.

**Bags, Bedding, etc.**—Bags are not articles of wearing apparel, nor bedding; nor do they fall within the statutory designation of articles exempt from levy and sale under execution; neither are they necessary for actual use in the preservation of articles declared by statute to be exempt. *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

**Jewelry.**—Articles of jewelry held not wearing apparel. *In re Ludlow*, 1 N. Y. Leg. Obs. 322, 15 Fed. Cas. No. 8,599; *In re Kasson*, 4 Law Rep. 489, 14 Fed. Cas. No. 7,616. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 117.

A watch chain, cord and seal, finger ring, sword and sword belt, were held not to be wearing apparel. *Sawyer v. Sawyer*, 28 Vt. 252.

**Trunk, Jewelry, etc.**—A traveling trunk, mahogany cabinet box, and breastpin are not articles exempted from attachment and execution under the provisions of chapter 184 of the Revised Statutes of New Hampshire, as wearing apparel necessary for the debtor and his family, nor as household furniture. *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

**Shawl.**—Under the Tariff Act of 1846 it was held that shawls, whether worsted shawls, worsted and cotton shawls, silk and worsted shawls, barege shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mouseline de laine shawls, were wearing apparel, and therefore subject to a duty of thirty per cent. under schedule C. *Maillard v. Lawrence*, 16 How. (U. S.) 261. See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 118.

**Shoes.**—As used in the Tariff Act of 1883 wearing apparel is held not to include shoes. *Swayne v. Hager*, 37 Fed. Rep. 782. The court said: "So, also, in my opinion, shoes were not intended to be included in the terms, 'wearing apparel of every description,' in the provision cited from schedule K. By reading it with the context, 'wearing apparel \* \* \* made up or manufactured wholly or in part by a tailor, seamstress, or manufacturer,' it seems evident that Congress intended other manufacturers of a class similar to a 'tailor or seamstress'—'something ejusdem generis.' The principle *noscitur a sociis* appears to me to be applicable. A shoemaker is not in any respect similar to a tailor or seamstress. In ordinary popular use of language no one, I presume, would for a moment think that shoes are included in the terms wearing apparel. See the following decisions supporting and

**WEATHERPROOF INSULATION.** — See note 1.

**WEATHER WORKING DAYS.** — See note 2.

**WEED.** Weed is defined as "any one of those herbaceous plants which are useless and without special beauty, or especially which are positively troublesome. The application of this general term is somewhat relative. Handsome but pernicious plants, as the ox-eye daisy, cone flower, and the purple cow-wheat of Europe, are weeds to the agriculturist, flowers to the æsthetic. There are also plants that are cultivated for use or beauty, as grasses, hemp, carrot, parsnip, morning-glory, which become weeds when they spring up where they are not wanted. The exotics of cool countries are sometimes weeds in the tropics." <sup>3</sup>

illustrating the construction adopted: *Oates v. Montgomery First Nat. Bank*, 100 U. S. 244; *Bend v. Hoyt*, 13 Pet. (U. S.) 270; *Adams v. Bancroft*, 3 Sumn. (U. S.) 386; *Reiche v. Smythe*, 13 Wall. (U. S.) 162."

**Stock of Clothing.** — *Wearing apparel* does not include a stock of clothing kept for sale. *In re Lentz*, 97 Fed. Rep. 487.

**Watch.** — A watch held to be *wearing apparel*. See *Sellers v. Bell*, (C. C. A.) 94 Fed. Rep. 805; *Mack v. Parks*, 8 Gray (Mass.) 517; *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626; *Sawyer v. Sawyer*, 28 Vt. 252. And see EXEMPTIONS (FROM EXECUTION), vol. 12, p. 117.

Watch held not *wearing apparel*. See *In re Ludlow*, 1 N. Y. Leg. Obs. 322, 15 Fed. Cas. No. 8,599.

In *Gooch v. Gooch*, 33 Me. 535, it was held that a watch which the testator had been in the habit of carrying upon his person did not pass by a bequest of his *wearing apparel*.

**Necessary Wearing Apparel.** — The *New Hampshire* statute exempting from attachment the necessary *wearing apparel* for immediate use, exempts suitable apparel for labor, with an extra suit for days of religious worship, and an overcoat at all seasons of the year. In *Peverly v. Sayles*, 10 N. H. 357, the court said: "The *wearing apparel* necessary for immediate use must be such an amount of clothing as is necessary to meet the varying changes of our climate, and the customary habits and ordinary necessities of the mass of the people. The clothing worn by the individual while about his daily toil might be all that was necessary for the time, but be wholly insufficient when such labor ceased; and the clothing suitable and proper for days of labor might not be such as the common sentiment of the community would deem necessary and proper for use on days set apart for religious assembling and worship; a common privilege, which our laws accord to all, and which it deems necessary to all. The suitable overcoat also is no luxury but a necessity; always required to be on hand as a protection against the frequent changes and inclement seasons of our climate. We regard, then, the instructions of the court as fully within the requirements of the statute; and that, in the words of the charge, the statute is designed to exempt from attachment, as necessary *wearing apparel*, 'an outside, or great-coat, at all seasons of the year; and, in addition to decent and comfortable every-day *wearing apparel*, a full suit, suitable to wear abroad or to meeting.'" See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 117.

**Revenue Laws.** — A citizen of the United States, arriving home from a visit to Europe with his family, at the end of September, by a vessel, brought with him *wearing apparel*, bought there for his and their use, to be worn here during the season then approaching, "not excessive in quantity for persons of their means, habits, and station in life," and their ordinary outfit for the winter. A part of the articles had not been worn, and on these duties were exacted by the collector. It was held that, under the statute exempting from duty "*wearing apparel* in actual use and other personal effects (not merchandise) \* \* \* of persons arriving in the United States," the proper rule to be applied was to exempt from duty such of the articles as fulfilled the following conditions: (1) *wearing apparel* owned by the passenger, and in a condition to be worn at once without further manufacture; (2) brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; (3) suitable for the season of the year which was immediately approaching at the time of arrival; (4) not exceeding in quantity, or quality, or value, what the passenger was in the habit of ordinarily providing for himself and his family at that time, and keeping on hand for his and their reasonable wants, in view of their means and habits in life, even though such articles had not been actually worn. *Astor v. Merritt*, 111 U. S. 202.

**1. Weatherproof Insulation.** — See *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa 451.

**2. Weather Working Days.** — The term *weather working days*, as used in a charter-party, has been defined to mean a day, otherwise a working day, when the weather will reasonably permit the carrying on of the work contemplated. It is an exceptive term, and the burden of proof of the exception is upon him who alleges it. *The India*, 2 U. S. App. 83, 49 Fed. Rep. 76. See generally the titles CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 181; DEMURRAGE, vol. 9, pp. 222, 230, 235.

**3. Weed.** — *St. Louis v. Galt*, 179 Mo. 13, quoting Cent. Dict. In this case a city ordinance prohibited lot owners from allowing *weeds* on their lots to the height of over one foot, and defined *weed* as follows: "The word *weeds*, as used herein, shall be held to include all rank vegetable growth which exhale unpleasant and noxious odors, and also high and



**WEEK.** (See also the title *TIME (COMPUTATION OF)*, vol. 28, p. 289.) — The word “week,” both in law and in common conversation or writing, has two separate and distinct meanings. Sometimes it means a period of time commencing on Sunday morning and ending Saturday at midnight; at other times the term is used as signifying a period of time of seven days’ duration, without any reference to when that period commences, whether on Sunday, Monday, or Saturday.<sup>1</sup>

rank vegetable growth that may conceal filthy deposits.” It was held that *weeds* in this sense meant *weeds* as they were commonly known to mankind and to lexicographers.

**1. Week.**—State *v.* Yellow Jacket Silver Min. Co., 5 Nev. 430.

**Sunday to Sunday.**—A period of time commencing on the first day of the *week*—Sunday—and ending the last day of the *week*—Saturday. *Kopmeier v. O’Neil*, 47 Wis. 595; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 360. See also State *v.* Arlin, 39 N. H. 179; *Marion v. State*, 20 Neb. 233.

Though “a *week*” usually means any consecutive seven days, it will sometimes be interpreted to mean the ordinary notion of a *week* reckoning from Sunday to Sunday. *Bazalgette v. Lowe*, 24 L. J. Ch. 368, 416.

A *week* means a period of time beginning on Sunday and ending on Saturday following, and, where a notice is required to be published beginning the first *week* of a certain month, it is held that if it is published first during the first full *week* of such month, beginning on Sunday and ending on Saturday, the requirements of the statute are satisfied, even though the publication was not made during the first seven days of the month. *Medland v. Linton*, 60 Neb. 249.

**Same—Once a Week.**—Where a statute for the maintenance of public schools provided that to impose an additional school tax, an election should be called by posting notices for twenty days, and, “if there is a newspaper in the county, by advertisement therein once a *week* for three *weeks*,” it was held that it was not necessary for the call to be published twenty-one days before the day of election, but that three insertions upon three successive *weeks* and at any time in any of such *weeks* before the election were sufficient. State *v.* Yellow Jacket Silver Min. Co., 5 Nev. 415.

The first publication of a notice of a sale under a power contained in a mortgage, which requires the notice to be published “once each *week* for three successive *weeks*,” need not be made three *weeks* before the time appointed for the sale. *Dexter v. Shepard*, 117 Mass. 480. See also *Frothingham v. March*, 1 Mass. 247.

In *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 361, the court said: “The words of the law are, ‘once a *week*.’ Does this limit the publication to a particular day of the *week*? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday *week* succeeding? The object of the notice is as well answered by such a publication as if it had been made on the following Monday. A *week* is a definite period of time, commencing on Sunday and ending on Saturday. By this construction the notice in this case must be

held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the *week* succeeding the notice of the sixth. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a *week*. If published once a *week*, for three months, the law is complied with, and its object effectuated.”

In *Steinle v. Bell*, (C. Pl. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 172, it was held that a *week* is a definite period of time, commencing on Sunday and ending on Saturday; and under the rule requiring service by publication to be made, by publication “not less than once a *week* for six *weeks*,” the notice need not be published on the same day in each *week*, but may be on any day in each *week* during the six *weeks*. Seven days’ interval between publications is not essential.

**“For Six Successive Weeks at Least Once in Each Week”**—Term *Week* Means Calendar *Week*.—*Finlayson v. Peterson*, 5 N. Dak. 587.

**Same—Statute Prescribing Time for Capital Executions.**—A “*week* of time,” within the meaning of the *Colorado* statute prescribing that such *week* shall be appointed within which a condemned person shall be executed, means a period beginning and ending Saturday at midnight. *In re Tyson*, 13 Colo. 482.

**Seven Days.**—In *Boyd v. McFarlin*, 58 Ga. 208, the court, in construing section 2647 of the Code of *Georgia*, which required notices of sheriffs’ sales of land to be published weekly for four *weeks*, held that the statute was not met by publication for a shorter period of time than twenty-eight days; in other words, that, when the statute fixed the period at once a *week* for four *weeks*, it meant to use the term *week* as a period of time consisting of seven days, and that when there should be a publication weekly for four *weeks*, it meant once in seven days, so as to give notice of such sales for twenty-eight days before the sale should take place. See also *Bird v. Burgsteiner*, 100 Ga. 486.

And, probably, a *week* usually means seven clear days; thus where a statute provided that notice of appeal should be given “within one *week*” before such appeal was to be heard, and notice was given on the twenty-second for the twenty-ninth, it was held that the notice was insufficient. *R. v. Sweeney*, 2 Ir. L. R. 278.

**“Week Next Preceding.”**—The word *week* in the provision of the *Nevada* Act of 1873, for the removal of the county seat of Humboldt county, that all the offices shall be removed to W. “on the *week* next preceding May 1, 1873,” does not mean the *week* ending

**WEEKLY.**—See note 1.

**WEEKLY PAYMENT LAWS.**—See the title MASTER AND SERVANT, vol. 20, p. 21.

**WEIGHAGE.**—A duty or toll imposed by the English law, to be paid for weighing merchandise, as for weighing wool at the king's beam, or for weighing other avoirdupois goods.<sup>2</sup>

**WEIGHT.** (See the title WEIGHTS AND MEASURES, *post.*)—See also note 3.

at twelve o'clock on Saturday night, but the seven days prior to May 1, 1873. *Evans v. Job*, 8 Nev. 322.

**Successive Weeks.**—Where a publication was to be "once in each *week* for at least twelve successive *weeks*," the court, in *Early v. Doe*, 16 How. (U. S.) 610, said: "The preposition 'for' means of itself duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be presumed that the legislature, in making this statute, did not mean to use it in the same way. Twelve successive *weeks* is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve *weeks*, or that it shall not be done for twelve *weeks*, after the happening of a fact which is to precede it, we mean that it may be done in twelve *weeks* or eighty-four days, or, as the case may be, that it shall not be done before."

**"Per Week."**—A theatrical engagement at so much "per *week*," may be shown, by usage, to mean, "per *week* during every *week* that the theatre is open." *Grant v. Maddox*, 16 L. J. Exch. 227.

**1. Weekly Paper.**—Trustees, in selling certain church property, under *Ontario Rev. Stat.* (1887), c. 237, § 13, advertised on the same day of the week for four successive weeks in a daily paper. It was held that this was not a compliance with the provision of the statute directing publication in a "*weekly* paper," to make a proper sale of the lands, and that the purchaser had good grounds for refusing to accept the title offered. *East Presb. Church v. McKay*, 16 Ont. 30.

**Weekly Salary.**—The proprietor of a theatre engaged a manager at a "*weekly* salary of forty dollars per week." Upon the construction of this contract the court, in *Leavitt v. Kennicott*, 157 Ill. 238, said: "The contract says, 'at a *weekly* salary of forty dollars per week,' but fixes no time during which the *weekly* salary is to be paid. If it could be shown that the 'weeks' here referred to were, by the custom and usage of the theatrical profession, the weeks of the theatrical season, and not all the weeks of the whole year, we see no reason why testimony to that effect was not al-

lowable." See the title THEATRES AND AMUSEMENTS, vol. 28, p. 121.

**2. Weighage.**—*Hoffman v. Jersey City*, 34 N. J. L. 176. Here it was said that this royal duty or toll had never been conferred upon *weigh*-masters and measurers in any of the charters and ordinances of our cities.

**3. Weight.**—In *Louisville Public Warehouse Co. v. Surveyor*, 6 U. S. App. 61, it is said: "The word *weight* is given its primary and ordinary meaning, such as the quantity of heaviness, the quality of being heavy, or the degree and extent of downward pressure under the influence of gravity, or the quantity of matter as estimated by the balance or scale."

**Miner's Weight.**—In *Drake v. Lacoe*, 157 Pa. St. 33, it is said: "As to the meaning of the term 'miner's *weight*,' much of the oral testimony was that of miners and mine operators; they testified as to their experience and observation, and gave in some cases their opinions; very often they were at variance. Without any testimony on the subject we would not hesitate to say that the obvious meaning of the term was such quantity of coal as was computed at a ton in paying the miner who mined by the ton. It did not mean a net ton of two thousand pounds or a gross ton of two thousand two hundred and forty pounds, or the parties would have so said."

**Revenue Act.**—See *Louisville Public Warehouse Co. v. Collector of Customs*, (C. C. A.) 49 Fed. Rep. 561.

**Extraordinary Traffic and Excessive Weight Distinguished—English Highways and Locomotion Act of 1878.**—See *Hill v. Thomas*, (1893) 2 Q. B. 333.

**Evidence.** (See also the title EVIDENCE, vol. 11, p. 491.)—Great *weight*, as applied to evidence, implies more than a preponderance. *Carstens v. Earles*, 26 Wash. 676; *Lundon v. Chicago*, 83 Ill. App. 208.

**Weight and Preponderance Distinguished.**—Where there is a conflict of testimony upon a plea of payment, an instruction to the jury that the defendant is entitled to a verdict, if, upon the whole testimony in the cause, his plea appears to be sustained by the *weight* of evidence, should not be given. The word *weight* is not synonymous with "preponderance." *Shinn v. Tucker*, 37 Ark. 580.

# WEIGHTS AND MEASURES.

BY JOHN SIMPSON.

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**I. DEFINITION.** — Weight is a system of units for expressing the weight or mass of bodies; specifically, a weight is a body of determinate mass, intended to be used on a balance or scale for measuring the weight or mass of the body in the other pan or part of the scale (as the platform in a platform-scale). Measure is a system of measurement; a scheme of denominations or units of length, surface, volume, or the like. A measure is a unit or standard adopted to determine the linear dimensions, volume, or other quantity of other objects by the comparison of them with it; a standard for the determination of a unit of reckoning.<sup>1</sup>

**II. FIXING OF STANDARD.** — The necessity for one uniform weight and one uniform measure has been recognized in all countries from the earliest times. The first mention of the fixing of a standard of weights and measures dates back four thousand years ago, when the regent of the Chinese Empire "made of one fashion the pipes and the rule, the bushel and the balances."<sup>2</sup> Hebrew legislation was directed against "divers weights and measures." In England it was declared in Magna Charta that there should be only "one weight and measure throughout the kingdom;" and the standard of weights

1. Century Dictionary.

2. Fixing of Standard. — The Shi King, Legge's Chinese Classics, vol. 1, p. 36.



and measures was thereafter, from time to time, the subject of legislation to put this into effect, and is now regulated by the consolidating Weights and Measures Act of 1878 and amending statutes.<sup>1</sup>

**In the United States.**—The power to regulate the standard of weights and measures in the United States is vested in Congress by the Constitution.<sup>2</sup> Congress, however, has not availed itself of the power so conferred except in regard to the standard troy pound weight.<sup>3</sup> Professor Hassler, under resolution of the Senate, adopted May 29, 1830, prepared standards of weights and measures for the use of the custom houses and the states. These were similar to those in use in England prior to the passing of the Act of Uniformity in May, 1834. Thus, the old measures of England, superseded there by the imperial standard, with such modifications as local custom or state laws have grafted upon them, may be regarded as a general standard adopted in the United States.<sup>4</sup> Although it has been doubted whether states can interfere by legislation with the standard of weights and measures established by

1. 41 & 42 Vict., c. 49; Weights and Measures Act of 1889, 52 & 53 Vict., § 21.

2. U. S. Const., art. 1, § 8.

3. **Congressional Legislation.**—The principal enactment by Congress with regard to weights and measures is the provision that the brass troy pound weight procured by the minister of the United States in London in 1827 for the use of the mint should be the standard troy pound of the mints of the United States. U. S. Rev. Stat., § 3548.

U. S. Rev. Stat., § 3549, provides that a series of corresponding standard weights shall be kept at each mint and assay office.

**Other Congressional Legislation.**—The other acts of Congress passed from time to time on the subject of weights and measures are as follows:

That all invoices shall be made out in the weights and measures of the country from which the importation is made. U. S. Rev. Stat., § 2837.

Sanction of the metric system. U. S. Rev. Stat., §§ 3569, 3570.

Provision that masters of merchant vessels shall keep on board proper weights and measures for weighing provisions. U. S. Rev. Stat., § 4571.

Authority given to the commissioner of internal revenue to prescribe the weighing apparatus to be used in the examination of materials used in the production of distilled spirits and to prescribe rules and regulations to secure a uniform system of weighing and gauging spirits. U. S. Rev. Stat., § 3249.

Imposition of a penalty of fine and imprisonment on persons using false weights or measures for materials to be used for distillation. U. S. Rev. Stat., § 3306.

Imposition of a penalty for the debasement of the coinage by officers of the mints. U. S. Rev. Stat., § 5460.

Provision for sets of the standard weights and measures to be delivered to the agricultural colleges. Res. of March 3, 1881, U. S. Rev. Stat., Supp. (1874-91) 329.

Provision for the repair and adjustment of the standards furnished to the states and territories and United States custom houses and other United States offices. Act of July 11, 1890, U. S. Rev. Stat., Supp. (1874-91) 772.

Establishment of units of electrical measure.

Act of July 12, 1894, U. S. Rev. Stat., Supp. (1892-1901) 194.

A provision for the replacement of the standard weights and measures. Act of Aug. 18, 1894, U. S. Rev. Stat., Supp. (1892-1901) 253.

Act for the appointment of a sealer of weights and measures in the District of Columbia, and various provisions as to his duties and articles to be weighed. Act of March 2, 1895, U. S. Rev. Stat., Supp. (1892-1901) 422.

As the English standard of weights and measures had been adopted by long custom in every state, it was perhaps unnecessary for Congress to interfere other than it has done. For as the standard of the London Tower weights and the English terms of dimensions used to represent their fractions and multiples were universally adopted in the United States, and of course uniform, nothing was required of Congress unless to change entirely its standard and introduce decimal fractions or multiples for greater facility of calculation, as it has done in our coin. The *Miantinomi*, 3 Wall. Jr. (C. C.) 46.

4. *Caldwell v. Dawson*, 4 Met. (Ky.) 121; *Mays v. Jennings*, 4 Humph. (Tenn.) 102.

The Act of June 14, 1836, 5 Stat. at L. 133, which has not been carried into the Revised Statutes, authorizes the delivery of a set of standard weights and measures to the governor of each state.

**Weights.**—The weights now generally used in the United States are the same as those of England; they are of two kinds, *avoirdupois* weight and troy weight. 2 Bouv. L. Dict.

**Unit of Measure.**—The fundamental unit of English long measure is the imperial yard, to the prototype of which the United States office of weights and measures conforms, though without express legislative authority. Cent. Dict.

As to measurement of distance, see the definition *DISTANCE*, vol. 9, p. 614.

**"The Unit of the Chain or Measure Used by Surveyors** of land in this state is the standard yard furnished by the United States to this state, in accordance with a joint resolution of Congress, approved June 14, 1836. This standard yard measure is in charge of a superintendent of weights and measures, appointed by the governor, lieutenant-governor, and secretary of state, or any two of them, and holds his office during their pleasure. It is the duty of

custom or congressional legislation,<sup>1</sup> it appears to be well settled that states may establish a standard of weights and measures by statute so long as Congress refrains from exercising its powers of regulation, and many states have passed statutes dealing with the subject.<sup>2</sup>

**III. POWER OF REGULATION — 1. State Legislation.** — The inspection and regulation of weights and measures are within the police power of the states, and laws passed by the legislatures for such inspection and regulation, requiring dealers and traders to conform thereto, and for the appointment or election of officers thereunder, are in the nature of police regulations.<sup>3</sup> The prevailing

such superintendent to provide the cities and counties of the state with such standard, and to compare them with those in his possession as often as once in ten years. The supervisors of each county appoint a sealer of weights and measures, whose duty it is, among other things, to take charge of the county standards; to seal and mark with a certain device all weights and measures compared by them." *Palmer v. Robinson*, (Buffalo Super. Ct. Spec. T.) 11 Misc. (N. Y.) 151.

1. *The Miantinomi*, 3 Wall. Jr. (C. C.) 46.

**The Power Conferred upon Congress** by clause 5, § 8, art. 1, of the Constitution, to fix the standard of weights and measures in connection with the power to coin money, regulate the value thereof and of foreign coin, was in pursuance of the general policy that dictated the delegation of the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. This effectually prevented the several states from fixing standards that might vary, and hence prove a hindrance to trade and the interchange of commodities. The standard weights and measures of England were brought to the colonies and governed therein as a part of the common law. *Thompson v. District of Columbia*, 21 App. Cas. (D. C.) 395.

**District of Columbia.** — The Act of Congress, giving to the sealer of weights and measures in the District of Columbia the custody and control of such standard weights and measures as now are or may hereafter be provided by the District of Columbia, does not give the commissioners of the district power to fix a standard of their own, but, in the absence of a standard fixed by Congress, the English standard which was brought to the colonies and has been recognized by congressional legislation is the standard which they are given power to enforce. *Thompson v. District of Columbia*, 21 App. Cas. (D. C.) 395.

**2. Establishment of Standards by States.** — *Higgins v. California Petroleum, etc., Co.*, 109 Cal. 304; *Harris v. Rutledge*, 19 Iowa 383, 87 Am. Dec. 441; *Caldwell v. Dawson*, 4 Met. (Ky.) 123; *Evans v. Myers*, 25 Pa. St. 114; *Weaver v. Fegely*, 29 Pa. St. 27, 70 Am. Dec. 151; *Cooley's Const. Limitations* (6th ed.) 744. See also note to *Mays v. Jennings*, 4 Humph. (Tenn.) 102.

The standards prepared by Professor Hassler were adopted by the legislature of *Kentucky* by the Act of 1839, 3 Stat. Laws 583, and by c. 105, § 1, Rev. Stat. *Caldwell v. Dawson*, 4 Met. (Ky.) 121.

The *Michigan* statutes provide for supplying each county and township with weights and measures compared with the standards in the

office of the state treasurer, supplied under the Act of Congress of June, 1836, and they further provide for an annual comparison in each township of all scales, weights, and measures, and for the sealing of them. It is improper to permit any comparison of scales or weights except by reference to this standard. *McGeorge v. Walker*, 65 Mich. 5.

**Other States** have similar provisions and these standards have been generally adopted in all the states. See the statutes.

**Hundredweight and Ton.** — In the majority of the states the hundredweight has been fixed by legislation as containing one hundred pounds avoirdupois, and the ton, twenty hundredweight. See the local statutes. In *Canada* this is the only unit of weight for all kinds of grain. In *England* the new hundredweight of one hundred pounds has been substituted for the old hundredweight of one hundred and twelve pounds, which grew to the prevalence it attained by the ancient practice of so hanging the scales as to give the purchaser an advantage of ten or twelve pounds in the hundredweight. See *Giles v. Jones*, 11 Exch. 393.

**The Heaped Measure** abolished in *England* by 5 & 6 Will. IV., c. 63, § 7, has been the subject of legislation in many of the states. See the local statutes.

**Particular Commodities.** — The weight of the bushel of particular commodities has been variously fixed by the statutes of the several states. Reference is made to the state statutes; as, for example, *Alabama*, Acts of 1890-91, p. 1353; *Idaho*, Laws of 1890-91, p. 204, § 12. The barrel of various commodities and the cord of wood have also been the subject of special state legislation.

In *New York*, although in general the term "bushel" in a contract calls for a quantity equal to eight gallons under Rev. Stat., § 10; in respect to wheat, rye, and Indian corn, under § 40, the term "bushel" is satisfied by a quantity equal in weight to the statute requisition, unless the parties have otherwise agreed. *Milk v. Christie*, 1 Hill (N. Y.) 102.

**3. Power of Regulation — State Legislation.** — *Vega Steamship Co. v. Consolidated Elevator Co.*, 75 Minn. 308, 74 Am. St. Rep. 484; *People v. Rochester*, 45 Hun (N. Y.) 102; *Gaines v. Coates*, 51 Miss. 335; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590; *State v. Peel Splint Coal Co.*, 36 W. Va. 819. See also *Cooley's Const. Lim.* (6th ed.) 744. And see the title **POLICE POWER**, vol. 22, p. 934. If not repugnant to the United States Constitution or the constitution of the state they are valid.

**Must Not Be Unconstitutional.** — *Gaines v. Coates*, 51 Miss. 335; *Johnson v. Martin*, 75 Tex. 33; *Yates v. Milwaukee*, 12 Wis. 673.



opinion is that acts providing for the weighing of coal at coal mines before screening, and for the payment of miners on the basis of such weighing, are unconstitutional.<sup>1</sup>

**2. Municipal Ordinances.**— This power of regulation may be conferred by the legislature upon municipal corporations, which may make ordinances carrying the power into effect.<sup>2</sup> The power to make provision for weighing a commodity necessarily implies the power to provide the means for so doing, and hence a municipality may establish an official set of scales.<sup>3</sup> And the power to appoint a weighmaster implies a power to compel his employment.<sup>4</sup>

**Provisions Not Unconstitutional.**— A law providing for the appointment of coal and coke boat gaugers and making it compulsory upon all persons selling coal or coke in a barge to have the same inspected, does not work an unconstitutional discrimination between coal imported by land and by water. *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590; *State v. Pittsburg, etc., Coal Co.*, 41 La. Ann. 465.

A general law providing that in all cities or towns or railroad stations which receive annually less than one hundred thousand bales of cotton the county commissioners' courts of the respective counties may, if they deem it necessary to protect the sellers, order an election of one or more public weighers, is not unconstitutional. It is not a delegation of legislative power, but merely a discretionary right to put an existing law in force. *Johnson v. Martin*, 75 Tex. 33.

**Unconstitutional Provisions.**— Where a state statute provided that the weighmaster should supervise and have exclusive control of the weighing of grain and other property which might be subject to inspection, and that his action and certificates should be conclusive upon all parties, it was held, in an action by common carriers against elevator men to recover the amount of a deduction from freight made on account of a deficiency in weight found by the weighmaster, that it is unconstitutional for the legislature to make such weighing conclusive, because the state cannot force an umpire upon one of the parties against his will and then close his mouth so that he cannot show that the umpire has made a substantial mistake, whether that mistake is the result of fraud or bad faith, or merely of negligence. *Vega Steamship Co. v. Consolidated Elevator Co.*, 75 Minn. 308, 74 Am. St. Rep. 484.

A statute providing that the standard half-bushel measure shall be used in purchasing wheat from the original producer to the exclusion of all other dealers in wheat is unconstitutional, its terms being unequal and not applying uniformly to all citizens; though it would have been within the power of the legislature to provide generally that in the purchase and sale of wheat only the standard half-bushel measure should be used. *Yeazill v. State*, 10 Ohio Cir. Dec. 794.

**1. "Screening" Acts Unconstitutional.**— *In re House Bill No. 203*, 21 Colo. 27; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Ramsey v. People*, 142 Ill. 380; *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344; *In re Preston*, 63 Ohio St. 428, 81 Am. St. Rep. 642; *Com. v. Brown*, 8 Pa. Super. Ct. 339; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863.

Undoubtedly, if these sections fall within the police power, they may be maintained on that ground; but it is quite obvious that they do not. Their requirements have no tendency to insure the personal safety of the miner, or to protect his property or the property of others. They do not have reference to the comfort, the safety, or the welfare of society. *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869. *Contra*, *State v. Wilson*, 61 Kan. 32; *State v. Peel Splint Coal Co.*, 36 W. Va. 802.

**2. Municipal Ordinances.**— *People v. Rochester*, 45 Hun (N. Y.) 102; *Yates v. Milwaukee*, 12 Wis. 673; *St. Charles v. Elsner*, 155 Mo. 671; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566; *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141; *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474.

**Local Authorities in England.**— The Weights and Measures Act 1889, § 28, empowers local authorities from time to time to make and alter by-laws regulating the sale of coal in quantities not exceeding two hundred-weight, requiring weighing instruments to be carried with vehicles in which coal is carried for sale or delivery, and imposing fines to be recoverable summarily.

**3. Implied Power.**— Where power is given by the state laws to cities of a certain class to provide by ordinance for the inspection, weighing, and measuring of coal, hay, corn, and other commodities and to fix the fees therefor and to collect a license tax, the power to make provision for the weighing necessarily implies the power to provide the means of weighing, and the ordinance is not invalid in providing for the maintenance of public scales. *St. Charles v. Elsner*, 155 Mo. 671.

A statute providing that cities and towns shall have the power "to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article for sale," evidently confers on cities and towns the power to provide scales, a competent weighmaster, and correct weights or balances. *Davis v. Anita*, 73 Iowa 325.

**4. Stokes v. New York**, 14 Wend. (N. Y.) 89.

**Powers Not Implied.**— Power given by general statute to cities and villages to regulate the inspection, weighing, and measuring of articles of merchandise does not include the power to appoint weighmasters and compel sellers of coal to have the same weighed by, and obtain certificates of weight from, such officers before offering the coal for sale. *Savanna v. Robinson*, 81 Ill. App. 471, *distinguishing Stokes v. New York*, 14 Wend. (N. Y.) 87, and *Davis v. Anita*, 73 Iowa 325.



Such ordinances must be reasonable, and if reasonable are valid.<sup>1</sup> And local ordinances should not, of course, be repugnant to the laws of the state,<sup>2</sup> nor grant exclusive privileges without legislative authority.<sup>3</sup> Where authorized by their charters<sup>4</sup> or by the state laws, municipal corporations may provide for the appointment of inspectors of weights and measures or official weighers, and prescribe their duties,<sup>5</sup> regulate the compulsory inspection of weights and measures,<sup>6</sup> fix reasonable fees therefor,<sup>7</sup> compel retailers to keep weights

**1. Reasonable Ordinances.** — *Stokes v. New York*, 14 Wend. (N. Y.) 87; *People v. Rochester*, 45 Hun (N. Y.) 102; *Gaines v. Coates*, 51 Miss. 335; *State v. Tyson*, 111 N. Car. 687; *Yates v. Milwaukee*, 12 Wis. 673; *St. Charles v. Elsner*, 155 Mo. 671; *Thompson v. District of Columbia*, 21 App. Cas. (D. C.) 395; *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474; *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.

**Periodical Inspection Reasonable.** — An ordinance providing for the inspection of weights and measures every six months, and as much oftener as the inspector thinks proper, is not an unreasonable one. *People v. Rochester*, 45 Hun (N. Y.) 102.

**Restriction to One Set of Scales Reasonable.** — An ordinance requiring the use of but one set of scales for a town of six hundred inhabitants is not unreasonable. *Davis v. Anita*, 73 Iowa 325.

**Presumption of Reasonableness.** — A municipal ordinance imposing a penalty for using, in weighing, a balance out of order or incorrect is presumed to be reasonable. *New York v. Hewitt*, 91 N. Y. App. Div. 445.

**Classification Reasonable.** — An ordinance requiring all persons selling or buying coal in quantities of more than fifteen bushels to have the same weighed at the public scales creates no discrimination, all of the same class under the same circumstances being treated alike, and the classification is reasonable. *St. Charles v. Elsner*, 155 Mo. 671.

**Unreasonable By-law.** — A by-law made under the Weights and Measures Act 1889, § 28, which empowers any purchaser, inspector, or constable to require the weighing of coal, was held unreasonable. *Alty v. Farrell*, 18 Cox C. C. 321. Lord Russell, C. J., said: "In the first place, we must see whether the legislature have given authority to make by-laws on the particular subject; and in the second place, if they have given authority, then we must consider whether that authority has been reasonably exercised in the case of the particular by-law in question."

**2. Ordinances Should Conform to State Laws.** — *Yates v. Milwaukee*, 12 Wis. 673.

**Act and Ordinance Not in Conflict.** — A special act making the mine inspectors of the state *ex officio* inspectors of weights and measures in their respective districts was held not to repeal, in whole or in part, a city ordinance providing for the appointment of a city inspector of weights and measures and prescribing his duties. *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.

In *Alty v. Farrell*, 18 Cox C. C. 321, it was considered doubtful whether local authorities had any power to make by-laws as to the weighing of coal under a section of the Weights and Measures Act 1889, where provision there-

for had been made by other sections of the act itself. But in *Kent County Council v. Humphrey*, 18 Cox C. C. 163, such a by-law was held to be valid.

**3. Exclusive Privilege.** — In the absence of legislative permission a municipality has no power to grant to a private individual a license to erect scales in the public street in front of his property for his personal profit. Such a right would be in the nature of a franchise or exclusive privilege. *State v. Stroud*, (Tenn. Ch. 1898) 52 S. W. Rep. 697.

**Relief from Invalid Ordinance.** — Conceding that an ordinance providing for the regulation of weighing coal is invalid, a dealer is entitled to injunctive relief from it, the fact of the ordinance being continuous and his business being continuous giving him no adequate remedy at law. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566.

**4. People v. Wagner**, 86 Mich. 594, 24 Am. St. Rep. 141; *Huddleson v. Ruffin*, 6 Ohio St. 604.

**5. Appointment of Inspectors and Weighers.** — *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432; *State v. Tyson*, 111 N. Car. 687; *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474; *Huddleson v. Ruffin*, 6 Ohio St. 604.

**6. Compulsory Inspection.** — *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474; *People v. Rochester*, 45 Hun (N. Y.) 102.

But not the compulsory inspection of private weights and measures where the empowering statute only applies to those of vendors. *Hettenbach v. New York Cent., etc., R. Co.*, 18 Hun (N. Y.) 129.

The Ohio general law requiring the state scaler to furnish the town sealers of incorporated towns and cities with copies of the original state standard of weights and measures, and authorizing town sealers to mark and seal weights and measures, does not forbid the use of weights and measures which are not sealed; but a city council has power where its charter permits it to provide that all weights and measures in the city shall be compared with the state standard and be marked and sealed by the town scaler. *Huddleson v. Ruffin*, 6 Ohio St. 604.

**7. Fix Fees for Inspection.** — *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 471.

And provide that such fee shall be a debt, though the services were unsolicited, payable to the inspector by the person for whom the inspection is made. *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474.

**Power Not Implied.** But where the state legislation for two hundred years shows that the policy of the state is that sealers of weights and measures shall not charge fees for unsolicited

and measures,<sup>1</sup> prohibit the use of spring weighing machines,<sup>2</sup> prohibit the sale or the offering for sale of commodities, such as coal,<sup>3</sup> oats,<sup>4</sup> hay,<sup>5</sup> cotton,<sup>6</sup> unless weighed or measured by the official weigher or inspector,<sup>7</sup> and require the weigher to furnish certificates of weighing and fix his fees therefor.<sup>8</sup> A statute requiring the provision of a set of weights and measures by municipal authorities may be mandatory and enforced by the imposition of a penalty.<sup>9</sup>

**3. Particular Commodities** -- *a.* IN GENERAL. — Both in *England* and the *United States* statutes have been passed compelling the sale of bread and coal in certain quantities by weight, and otherwise regulating such sale.

*b.* SALE OF BREAD BY WEIGHT. — In *England* and *Scotland* under the Act of 1822, 3 Geo. IV., c. 106 (the London Bread Act), and the Act of 1836, 6 and 7 Will. IV., c. 37 (the General Bread Act), all bread must be sold by standard weight and in no other manner, under a penalty, with the exception of French or fancy bread or rolls,<sup>10</sup> and all sellers of bread in shops or in the street must be provided with beams, scales, and weights, under a penalty, and must weigh the bread in the presence of the purchaser when required.<sup>11</sup> Ordinances regulating the weight of bread are valid police regulations and

services, it will not be inferred that such power has been delegated to a municipality in the absence of an express statutory provision. *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474.

**1. Compel Keeping of Weights and Measures.** — Under Consol. Stat. U. C., c. 58, all merchants therein mentioned are impliedly bound to keep weights and measures, though the statute contains no provision making this obligatory. It enables owners to have their weights and measures stamped, and enables inspectors to enter premises to examine the same and to forfeit them if light or unjust, and subjects persons having incorrect weights, refusing to produce their machines for examination, or obstructing the inspector in his duties, to penalties. *Snell v. Belleville*, 30 U. C. Q. B. 81.

**Where No Penalty Provided.** — Where a statute (6 & 7 Will. IV., c. 37, § 6) directs proper weights and scales to be kept in a shop, if it does not provide a penalty for the breach of the duty, such breach does not constitute an offense cognizable by a court of summary jurisdiction. *Reg. v. Smith*, 17 Cox C. C. 735.

**2. Prohibit Spring Weighing Machines.** — An act providing that retailers of meat or other articles of provision shall keep scales, weights, and measures, but prohibiting the use of spring scales, balances, or weighing machines, is valid. *Snell v. Belleville*, 30 U. C. Q. B. 81.

**3. Coal.** — *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323; *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751; *Milk v. Christie*, 1 Hill (N. Y.) 102; *Libby v. Downey*, 5 Allen (Mass.) 299.

**Anthracite.** — *Stokes v. New York*, 14 Wend. (N. Y.) 87.

**4. Oats.** — *Raleigh v. Sorrell*, 1 Jones L. (46 N. Car.) 49.

**5. Hay.** — *Yates v. Milwaukee*, 12 Wis. 673.

**6. Cotton.** — *State v. Tyson*, 111 N. Car. 687; *Planters' Compress Assoc. v. Hanes*, 52 Miss. 469.

**7.** *Gaines v. Coates*, 51 Miss. 335.

**8. Certificates of Weighing and Fees.** — *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566; *St. Charles v. Elsner*, 155 Mo. 671;

*Yates v. Milwaukee*, 12 Wis. 673; *State v. Tyson*, 111 N. Car. 687; *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751.

The fee for giving a weigher's certificate is not beyond a power expressly given to tax and regulate retailers of coal. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566.

**9. Statute May Be Mandatory to Municipality.** — Where a statute declares that "the selectmen of every town in this state shall provide one complete set of weights and measures," under a penalty, they have their whole year of office within which to comply with the provision. If they do not they are liable, but only in one penalty. It is a permanent obligation, and if the weights and measures are lost they must be replaced. *Pike v. Jenkins*, 12 N. H. 255.

**10. Sale of Bread by Weight — England.** — *Jones v. Huxtable*, L. R. 2 Q. B. 460; *Williams v. Deggan*, L. R. 16 L. T. N. S. 492; *Mitton v. Troke*, 20 L. T. N. S. 563; *Reg. v. Wood*, L. R. 4 Q. B. 559; *Reg. v. Kennett*, L. R. 4 Q. B. 565; *Hill v. Browning*, L. R. 5 Q. B. 453; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355; *London County Council v. Read*, 19 Cox C. C. 415; *V. V. Bread Co. v. Stubbs*, 18 Cox C. C. 336; *Copeland v. Walker*, 17 Cox C. C. 331.

**11.** *R. v. Kingsley*, 16 L. T. N. S. 408; *Robinson v. Cliff*, 1 Exch. D. 294, 45 L. J. M. 109.

This requirement applies to those who deliver bread at a customer's premises pursuant to a general order previously given. *Robinson v. Cliff*, 1 Exch. D. 294; *Ridgway v. Ward*, 14 Q. B. D. 110. *Contra*, *Daniel v. Whitfield*, 15 Q. B. D. 408.

To entitle bread to the exception allowed to fancy bread the distinction from ordinary household bread must be plain to the eye. *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355; *V. V. Bread Co. v. Stubbs*, 18 Cox C. C. 336.

Selling by weight within the statute does not mean merely selling by weight as distinguished from selling by measure, but selling a particular loaf (as a two pound loaf) according to the true weight of that particular loaf; so, putting a half-quarter loaf in the scale pan which does

are not contrary to the constitutions of the states or the *United States Constitution*.<sup>1</sup>

*c. SALE OF COAL BY WEIGHT.* — Statutes may enforce and regulate the sale of coal by weight, or by boat load or truck load,<sup>2</sup> and provide for the weighing by a sworn weigher,<sup>3</sup> and the furnishing of delivery tickets or certificates.<sup>4</sup>

*d. MEASUREMENT OF LUMBER.* — Several states provide by statute for the inspection and measurement of logs and lumber by an official surveyor or scaler, and such statutes have been held to be constitutional.<sup>5</sup>

not move a two pound weight in the other scale is not a selling by weight. *Cox v. Bleines*, 20 Cox C. C. 188.

1. *Paige v. Fazackerly*, 36 Barb. (N. Y.) 394; *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141; *Guillotte v. New Orleans*, 12 La. Ann. 432; *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441. But in this last case it was questioned whether the imposition of a penalty which condemned to forfeiture such bread as is of less weight than the ordinance requires can be supported.

An ordinance establishing the weight of loaves of bread offered for sale within a city and fixing a penalty for selling short-weight loaves is within the provision of its charter empowering the common council to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspection thereof. *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141.

2. *Sale of Coal by Weight.* — *Smith v. Campbell*, 68 Me. 268; *Libby v. Downey*, 5 Allen (Mass.) 299.

3. *Smith v. Campbell*, 68 Me. 268; *Libby v. Downey*, 5 Allen (Mass.) 299.

**What Is a Correct Weighing of Coal.** — A correct weighing, under section 22, subsection 2 of the *Weights and Measures Act 1889*, of coal exceeding two hundred-weight sold in bulk in a vehicle, is correctly ascertained by a weighing instrument at or near the place from which the coal is brought, and not at the place and time of delivery to the purchaser. *Knowles v. Sinclair*, 18 Cox C. C. 681.

But under section 21 of that act a weighing at the place of delivery is sufficient, as the statute is not for the protection of the seller against his servants, but for the protection of the buyer. *Edwards v. Purnell*, 19 Cox C. C. 236.

Where a statute directs coal delivered in sacks to be weighed, if required, each sack with the coal, and afterward each sack without the coal, it was held that a weighing by putting the sacks of coal successively in one scale against weights equal to the weight which each sack should contain and an empty sack in the other scale, was not a weighing, according to the statute. *Meredith v. Holman*, 16 M. & W. 798, 16 L. J. Exch. 126; *Smith v. Wood*, 24 Q. B. D. 23.

In an action for a penalty for selling less than two thousand pounds by weight to a ton of coal, where the plaintiff's proof is directly to the effect that the coal was weighed by a weighmaster on scales designated by the mayor as public scales, the only way satisfactorily to meet this proof is to show that when it left the defendant's yard the coal weighed two thousand pounds. The fact that the scales were owned by a competitor of the defendant in busi-

ness is not allowed to override the evidence of the plaintiff's witnesses that the weighing was accurately done. *New York v. Henderson*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 351.

4. **Delivery Tickets.** — *Smith v. Campbell*, 68 Me. 268; *Libby v. Downey*, 5 Allen (Mass.) 299.

Where the total weight of a number of sacks of coal sold and delivered is correct, it is not a contravention of the *Weights and Measures Act 1889*, section 21, if some of the sacks weigh less and some more than the weight of each sack stated in the weight ticket. *Godfrey v. Radford*, 18 Cox C. C. 417.

Where a delivery ticket is required by statute to be sent with coal, under a penalty for non-observance, the omission to deliver a ticket is a bar to an action for the sale and delivery of coal. *Cundell v. Dawson*, 4 C. B. 376, 56 E. C. L. 376; *Little v. Poole*, 9 B & C. 192, 17 E. C. L. 355. See also *infra*, this title, VIII. *Weights and Measures in Contracts*.

When a statute prescribes a penalty for the failure to accompany the delivery of a ton of coal with a delivery ticket, the fact that the dealer delivered full weight will not defeat recovery of the penalty if a ticket is not delivered. *New York v. Bruns*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 635.

Where an ordinance of the city of Chicago provided that "any person engaged in the business of selling coal in the city of Chicago, to be delivered in said city, shall deliver to the purchaser at the time of the delivery of the coal purchased, a certificate signed by a city weigher, showing the weight of the coal so delivered, and the weight of the wagon or cart," it was held that the ordinance was intended to apply to sales of coal by weight to be delivered by wagon or cart, and that an allegation that coal was so sold and delivered is necessary to state a case under the ordinance. *Ruddy v. Philadelphia, etc., C., etc., Co.*, 70 Ill. App. 320.

5. **Measurement of Lumber.** — The scaling or measurement of logs or lumber as regulating contracts for the sale thereof is fully treated in the title *LOGS AND LUMBER*, vol. 19, p. 542 *et seq.*

When any lumber is sold the price for which is to depend upon the number of thousands, which are to be ascertained by the survey or inspection of some person, the surveyor must be an official surveyor, or the sale is void; and the same rule must apply to shingles as to other lumber. By *Rev. Stat. Me.*, § 17, c. 41, if shingles are offered for sale before they are surveyed and branded, "unless the parties otherwise agree," the property becomes wholly forfeited to the town. By section 21, same chapter, there is a penalty of two dollars per thousand for delivery of shingles on sale without inspection



**IV. INSPECTORS AND WEAHERS — 1. Appointment and Removal — Provision for Appointment.** — The appointment of inspectors and scalers of weights and measures, and public weighers, is usually provided for by the ordinances of municipal corporations in virtue of their statutory or charter powers.<sup>1</sup> The corporation may delegate its power of appointment.<sup>2</sup> And it is no objection to the appointment that the incumbent has paid the city a sum for it.<sup>3</sup>

**Removal.** — Where the power of regulating and inspecting weights and measures has not been conferred upon any city or parish, the inspectors of weights and measures are state and not city or parish officers, and are removable by the governor alone, on cause shown.<sup>4</sup> The state laws must always be scrutinized for authority for the appointment and removal of such officers.<sup>5</sup>

**2. Powers and Duties — a. GENERALLY.** — The powers and duties of inspectors and weighers are derived from the laws and ordinances under which they are appointed, and are, generally, to inspect and seal correctly weights and measures brought to them or examined by them, to compare with the standard measures,<sup>6</sup> to seize false weights and measures, and to weigh

and survey, and there is no immunity from the penalty because of any agreement of the parties. To give a consistency to both sections, the construction must be that if there be an agreement the penalty of a total forfeiture is not incurred, but the penalty of two dollars per thousand is incurred whether there be an agreement or not. *Richmond v. Foss*, 77 Me. 590.

**Culling and Branding Hoops.** — By Rev. Stat. Me., c. 41, § 21, no person shall deliver on sale any hoops, before they have been culled and branded by the proper officer, and a certificate thereof given by him specifying the number, quality, and quantity thereof, under a penalty of two dollars a thousand. *Durgin v. Dyer*, 68 Me. 143.

**1. Provision for Appointment.** — Where a general law allows cities to pass ordinances respecting the appointment of surveyors of lumber, and a city passes no ordinance, but appoints a surveyor, the passing of the ordinance not being compulsory, but the city still having the duty of appointing surveyors, the statutory provisions as to having lumber surveyed, numbered, and marked apply, and sales in contravention thereof are void. *Prescott v. Battersby*, 119 Mass. 285.

**2. Delegation of Power of Appointment.** — An ordinance of the city of Cincinnati passed in pursuance of the twelfth section of the Act of March 5, 1860, "relating to cities of the first class," etc. (2 S. & C. Stat. 1559), providing for the appointment of an inspector and sealer of weights and measures by the city solicitor from among persons designated by the board of officers of the chamber of commerce, is a valid ordinance; and when such inspector and sealer is duly appointed in accordance with the provisions of such ordinance, and thereupon tenders to the city council for their acceptance an official bond in all respects unobjectionable, the city council have no discretion left, and must accept the bond. *State v. Cincinnati*, 11 Ohio St. 544.

**3. Payment for Appointment.** — *Yates v. Milwaukee*, 12 Wis. 673.

**4. Removal.** — *State v. Lamantia*, 33 La. Ann. 446.

**5. State Laws as to Appointment and Removal.** — By section 25 of chapter 325 of the Laws of 1873, an inspector of weights and measures can

only be lawfully removed by the mayor after he has been afforded an opportunity to be heard, and after that the removal cannot take effect without the approval of the governor in writing. *People v. Kneissel*, (Supm. Ct. Gen. T.) 58 How. Pr. (N. Y.) 404.

**In Canada.** — The Dominion Acts of 1873, containing provisions for the weighing and branding of flour and meal, repealed all acts, laws, or charter provisions providing for the inspection or appointment of inspectors of the articles therein provided for. *Halifax v. Cunningham*, 19 Nova Scotia 14.

**In England.** — Under the Consolidating Weights and Measures Act, 1878, § 50, sched. 4, as amended by 51 & 52 Vict., c. 41, §§ 3 (xii.) 39, and the Act of 1893, the power of appointment of inspectors of weights and measures was declared to be in the Court of Quarter Sessions (now the county council) in counties, and town councils in the larger boroughs, as local authorities.

In England it was decided that superintendents and inspectors of rural police may be made inspectors, *Reg. v. Jarvis*, 3 El. & Bl. 640, 77 E. C. L. 640, and the practice is to appoint policemen.

**Leet Jury in England.** — The custom in a manor for the leet jury to break and destroy measures found by them to be false is still lawful. 41 & 42 Vict., c. 49, § 68; *Wilcock v. Windsor*, 3 B. & Ad. 43, 23 E. C. L. 29. All the members of the jury must be present and concurring at the breaking, otherwise it is unlawful. *Sheppard v. Hall*, 3 B. & Ad. 433, 23 E. C. L. 110; *Holland v. Heath*, 2 Jur. 234.

The custom to swear the jurors at one court leet to inquire and return their presentments at the next court is bad. *Davidson v. Mo Scrop*, 2 East 56.

Obstruction of the jury in their examination is punishable by fine, but the presentment must state what the act of obstruction was. *Frost v. Lloyd*, 9 Q. B. 130, 58 E. C. L. 130, 11 Jur. 59.

**6. Comparison Necessary.** — Under 5 & 6 Wm. IV., c. 63, § 28, an inspector is not authorized in seizing any weight without having first compared it with the standard, to ascertain whether it be just or not. *Kershaw v. Johnson*, 1 C. & K. 329, 47 E. C. L. 329.

correctly.<sup>1</sup>

*b. INSPECTION AND SEIZURE.* — An inspector of weights and measures, duly appointed, is usually empowered to enter any premises within his district, where goods are exposed or kept for sale, at all seasonable times, to examine and seize false weights and measures, and need not have a special warrant for each particular case.<sup>2</sup> An inspector can only stamp the weights and measures of persons residing in his own district. He is liable in a penalty for stamping weights and measures of persons residing in other districts than his own.<sup>3</sup> The statute or ordinance determines what may be seized by the inspector.<sup>4</sup> Whatever is used as a measure is liable to seizure if found, on examination, to be unjust, although it is stamped.<sup>5</sup>

**3. Fees — Validity.** — Fees of official weighers are not a tax, and consequently statutes and ordinances imposing such fees are not on that account unconstitutional.<sup>6</sup> Fees imposed for inspection and weighing should be reasonable.<sup>7</sup> Unless there is some law to the contrary, a sealer is not entitled

**1. Weigh Correctly.** — In the Mass. statute, 1830, c. 99, § 6, which enacts "that if any side or sides of sole leather shall vary, when thoroughly dried, so as to weigh five per cent. more or less than the weight marked thereon by any inspector, the inspector who inspected the same shall be subject to the payment of the whole variation, at a fair valuation, to be recovered by the party injured thereby," the words "thoroughly dried" mean that the leather is to be suitably and sufficiently dried, so as to be in a proper state for sale and use, and to make the inspector liable would require a variation of five per cent. on a reweighal of the leather in a similar state, and not after being subjected to other conditions. *Tenney v. How*, 24 Pick. (Mass.) 335. See also *Grant v. Culbard*, 19 Ont. 20. And see the various statutes and ordinances.

**2. Duly Appointed.** — The officer must be specially appointed for the duty, and a by-law empowering any constable to perform the duty was held to be unreasonable and bad. *Alty v. Farrell*, 18 Cox C. C. 321.

**Inspection and Seizure — To Enter Premises.** — *Hutchings v. Reeves*, 9 M. & W. 747, 6 Jur. 439; *Kershaw v. Johnson*, 1 C. & K. 329, 47 E. C. L. 329. And the same privilege extends to a servant assisting such inspector in the discharge of his duty, but who has not himself received any warrant or authority in writing from the quarter sessions or a justice of the peace. *Hutchings v. Reeves*, 9 M. & W. 747, 6 Jur. 439.

By section 29 of the *Weights and Measures Act*, 1889, an inspector of weights and measures or other officer appointed by the local authority may, at reasonable time, enter any building or place where coal is sold or exposed for sale, and may stop any vehicle carrying coal for sale or delivery and weigh any coal found. *Alty v. Farrell*, 18 Cox C. C. 321.

**Where No Power to Enter.** — An act merely imposing a penalty for selling cordwood under the prescribed standard measure does not give the corder power to enter a private wharf unless wood is taken there subject to seizure. So long as the wood is of the required size it does not need to be officially measured. *Com. v. Gillam*, 8 S. & R. (Pa.) 50.

**3. In Own District.** — *Reg. v. Skelton*, 1 FJ. & El. 816, 102 E. C. L. 816; *Weights and Measures Act*, 1878, § 44, substantially re-enacting 5 & 6 Wm. IV., c. 63, § 25.

**4. What May Be Seized.** — Under former acts, scales, balances, steelyards, and weighing machines could not be seized unless they were being used in the streets, though weights and measures could be seized. *Thomas v. Stephenson*, 2 El. & Bl. 108, 75 E. C. L. 108. The *Weights and Measures Act*, 1878, § 48, makes provision for the seizure of the former also; see also §§ 25, 26, 27.

**5. Stamped or Unstamped Measure.** — Whatever is used as a measure, such as an earthenware jug or drinking cup, if when examined it turns out to be unjust, is liable to be seized and forfeited under 5 & 6 Wm. IV., c. 63, § 28. It does not apply merely to stamped weights and measures. *Washington v. Young*, 5 Exch. 403; *Reg. v. Aulton*, 3 El. & El. 568, 107 E. C. L. 568. See also the title *PUBLIC OFFICERS*, vol. 23, p. 363.

**6. Fees.** — *State v. Tyson*, 111 N. Car. 687; *Raleigh v. Lorrell*, 1 Jones L. (46 N. Car.) 49; *Stokes v. New York*, 14 Wend. (N. Y.) 87; *Gaines v. Coates*, 51 Miss. 335; *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751.

If charges fixed for weighing coal amount to more than the actual expense of maintaining the scales, still, express power to exact a license tax being given by statute, the ordinance is valid. *St. Charles v. Elsner*, 155 Mo. 671.

**7. Reasonable Fees.** — A fee to the sealer of weights and measures of fifty cents per hundred bottles of milk inspected and sealed, was held not excessive or unreasonable on its face. *Thompson v. District of Columbia*, 21 App. Cas. (D. C.) 395.

A town ordinance providing that the commissioners shall elect a cotton-weigher, who shall receive eight cents compensation for every bale weighed by him, one-half to be paid by the buyer and the other by the seller, and prescribing a penalty for buying or selling in the corporate limits without having it weighed by such cotton weigher, is a valid and reasonable regulation. *State v. Tyson*, 111 N. Car. 687.

A charge of twelve cents for weighing a load of hay and giving a certificate of the weight was held not to be unreasonable or exorbitant. *Yates v. Milwaukee*, 12 Wis. 673.

In *Morin v. Lord*, 22 L. C. Jur. 211, it was held (1) that a tierce of oil is a third of a pipe and contains from forty-two to sixty-three gal-



to collect a fee from a user of weights and measures for an unsolicited examination thereof.<sup>1</sup>

**Compulsory Sealing.** — But it is held that a common council may, under a power to require every seller by weights and measures to submit the same to the inspection of the city sealer, and to have them sealed, provide that the sealer's fee shall be paid by the owner of the weights and measures.<sup>2</sup>

**V. PRIVATE WEIGHING.** — The laws of the state or local ordinances may forbid private weighing where a public weigher is appointed,<sup>3</sup> or limit such right of private weighing,<sup>4</sup> and the person contravening such laws or ordi-

lons Winchester or wine measure; and (2) the tierce being an old French measure, the Canadian statute, 36 Vict., c. 47, § 4, enacting that the imperial gallon shall be the only standard measure for liquids, does not apply to the measure of tierces; (3) that the inspector of fish and fish oils has a right to exact a fee of twenty centimes for each tierce of oil which he inspects.

**1. Unsolicited Examinations.** — *Ford v. New York Cent., etc., R. Co.*, 33 N. Y. App. Div. 474; *Fausnaugh v. Rogers*, 62 N. Y. App. Div. 535.

Whenever the sealer is used by the public authorities to detect crime, or to discover whether the citizen is amenable to a criminal charge for using false weights and measures, or for the purpose of insuring the public against fraud and deception by such use, it is the public which is served, and the sealer then becomes a servant of the public, and there would seem to be no good reason, in the absence of any statute to the contrary, why the fee should not be paid by the city or town which causes the examination to be made. *Fausnaugh v. Rogers*, 62 N. Y. App. Div. 535.

**2. Bangasser v. Citizens' Gas Co.**, 19 Alb. L. J. 400, in which case it was held that where the ordinance requires the sealer to put or stamp a brand on the scale-beams which he ascertains to conform to the standard, and provides a distinct fee for the testing and branding, the sealer is entitled to recover his fee for the testing and sealing, notwithstanding his neglect to stamp the scale.

**3. May Forbid Private Weighing.** — Where a city ordinance makes it unlawful for any one but the city weigher to weigh cotton in the city, all persons who interfere with the city weigher's rights are liable in an action at his instance for damages sustained by reason of such unlawful weighing, but not for the sums of money received for the weighing, and his remedy is at law, not in equity. *Planters' Compress Assoc. v. Hanes*, 52 Miss. 469.

**4. May Limit Private Weighing.** — Where a statute (*Texas Act of 1879*, p. 116, § 8) prohibited under penalties any person other than a public weigher or his deputy from weighing cotton, wool, etc., sold or offered for sale in any city having a public weigher duly qualified, but provided that any owner shipping such produce to any such city may by written instructions authorize his factor or agent to have it weighed by a private weigher if he preferred, it was held that a private weigher who kept scales in a city for such business was not liable on a quo warranto to the official weigher on account of weighing produce under such written instructions. *Watts v. State*, 61 Tex. 184.

And under an amendatory statute (*Act of 1893*, § 1) owners personally present may lawfully give verbal instruction to private weighers to weigh their cotton. *Martin v. Johnson*, 11 Tex. Civ. App. 628; *Smith v. Wilson*, 18 Tex. Civ. App. 24.

The Act of 1879, amended by 1883, allows any one to weigh cotton, etc., on the request of the owner in writing. *Ex p. Hunter*, 34 Tex. Crim. 114.

*Texas Gen. Laws 1899*, c. 155, p. 264, was intended to do away with private weighing for other persons in the instances specified therein, where there is a public weigher, except by the owner in person, and is not confined alone to transactions in which factors and commission merchants, or their agents, are engaged. It is not unconstitutional. A public weigher has under it a remedy by injunction against one contravening a statute. *Davidson v. Sadler*, 23 Tex. Civ. App. 600.

*Texas Gen. Laws, 1899*, p. 266, provides for the election of public weighers and forbids the employment of any other person to weigh any cotton or merchandise offered for sale, but states that nothing in the act shall prevent any person from weighing his own cotton or other merchandise in person. It forbids the employment of commissioners, factors, or other person or persons to weigh cotton. The purpose of the statute is not to protect the public weigher in an office created for his benefit, but to protect owners of produce from the fraudulent conduct of their factors and agents in rendering a false account of the weights of produce shipped to them. Therefore the phrase "other person or persons" has been held to mean persons of the same kind or class of persons as factors and commission merchants, and the statute does not prevent warehousemen from weighing the cotton of their customers, or farmers offering produce for sale from having it weighed by the purchaser or other person. The statute is highly penal in its character, and it is only for wilful disregard of the law that the penalty should be inflicted. The cases of *Watts v. State*, 61 Tex. 187; *Martin v. Johnson*, 11 Tex. Civ. App. 639, and *Smith v. Wilson*, 18 Tex. Civ. App. 24, were decided upon the Act of 1879, as amended by the Act of 1883, which provided for weighing at the request or upon the written instructions of the owner. The Act of 1899 is a repeal of all previous laws, and omits any provision for weighing upon the instruction or at the request of the owner, providing, however, that nothing in the act "shall prevent any person from weighing his own cotton, wool, sugar, hay, or grain in person." The construction given to the law of 1899, in *Davidson v. Sadler*, 23 Tex. Civ. App. 600, is doubted.



nances will be liable in damages to the public weigher. But the mere appointment of a public weigher does not imply that no other person than he can weigh or measure.<sup>1</sup> A private weigher is not bound to weigh for all comers, and is only bound to use reasonable diligence to know that his scales are correct, and reasonable care to avoid mistakes in using them.<sup>2</sup> Where private weighers are prohibited from weighing commodities for sale, it has been held that a bill for an account and injunction will lie by the public weigher against a contravener of the ordinance.<sup>3</sup>

**VI OBLIGATIONS ON VENDORS — 1. To Have Weights and Measures Sealed and Stamped.** — Statutes and ordinances requiring weights and measures to be sealed and stamped must be complied with according to their terms, otherwise the statutory penalty is incurred and all sales by such weights and measures are void.<sup>4</sup> The fact that the municipal authority or public officer intrusted with a duty under the statute is also at fault will not excuse the user of the unsealed weights or measures.<sup>5</sup> So, where a statute provides that the weights and measures must be sealed in the town where the user resides or has his usual place of business, sealing by the sealer of another town is of no effect.<sup>6</sup> But the contravention must come clearly under the statute,<sup>7</sup> and no penalty except that authorized by statute can be

*Whitfield v. Terrell Compress Co.*, 26 Tex. Civ. App. 235.

And the right under the Act of 1899 of owners of produce to hire others than the public weighers to weigh it includes the right of private persons to equip themselves as private weighers and perform the service. *Davis v. McInnis*, (Tex. Civ. App. 1904) 81 S. W. Rep. 75; *Galt v. Holder*, (Tex. Civ. App. 1903) 75 S. W. Rep. 568, *overruling Davidson v. Sadler*, 23 Tex. Civ. App. 600.

**1. Prohibition Not Implied.** — Where a city ordinance provided for the appointment of a weighmaster, to perform his duties whenever called upon to do so, it is not implied that no other person than he can weigh and measure in the city, and a conviction of a person employed by a seller to measure plaster as it was taken from a vessel at the dock and delivered on the cars, because it was alleged he was exercising the office of a weighmaster without appointment by the common council, is illegal. *Hoffman v. Jersey City*, 34 N. J. L. 172.

**2.** *McGeorge v. Walker*, 65 Mich. 5.

**3. Remedy Against Private Weighing.** — A bill for an account and injunction will lie by a city cotton weigher against a corporation which has weighed cotton and charged fees for the same to which the weigher would have been entitled under an ordinance prohibiting the sale of cotton weighed without the city by any other person than the city cotton weigher. *Gaines v. Coates*, 51 Miss. 335.

**4. Obligation to Have Weights and Measures Sealed and Stamped.** — *Miller v. Post*, 1 Allen (Mass.) 434; *Bisbee v. McAllen*, 39 Minn. 143. See also *infra*, this title, *Weights and Measures in Contracts*.

**Glass Bottles Used by a Milk Dealer** as a means of distribution are measures in contemplation of the law, notwithstanding the fact that the dealer first measures his milk in cans of forty pounds capacity at his dairy or distributing centre, and then decants it into small bottles, claiming these to be simply a means of distribution and not measures. *Thompson v. District of Columbia*, 21 App. Cas. (D. C.) 395.

**To Exhibit Weights and Measures.** — And a merchant is bound to exhibit his weights and measures to the sealer appointed, as required by a city ordinance passed by authority of statute. *People v. Rochester*, 45 Hun (N. Y.) 102.

A servant left temporarily in charge of his employer's premises is not liable to conviction for refusing to allow an inspector of weights and measures to inspect the weights and measures, they not being "in his possession" within the meaning of section 48 of the Weights and Measures Act, 1878. *Smith v. Webb*, 60 J. P. 517.

**5. Want of Facilities for Sealing, etc., No Excuse.** — Where a statute requires measures to be stamped under a penalty, the fact that a local authority has not fixed times and places for such stamping as required by the statute is no defense to a prosecution by the local authority for using unstamped measures. *Hayley v. Taylor*, 19 Cox C. C. 538.

And the fact that a local authority has not appointed a superintendent of scales as required by a general statute will not legalize a sale of goods weighed on scales not sealed in accordance with the statute. *Sawyer v. Smith*, 109 Mass. 220.

By the *Georgia Code*, § 1592, ordinaries are required to give notice by publication or otherwise when standard weights and measures are obtained by them, and under the general rule that all public officers are presumed to do their duty, the ordinaries will be presumed to have given such notice. But a failure to give such notice would not relieve one selling goods by weights and measures from his obligation to have them duly marked as required by section 1589. *Finch v. Barclay*, 87 Ga. 393. To the same effect is *Bisbee v. McAllen*, 39 Minn. 143. And the rule holds good though the state sealer should refuse to seal the weights and measures at the statute price. *Miller v. Post*, 1 Allen (Mass.) 434.

**6. Sealing in Town Where Vendor Resides.** — *Smith v. Arnold*, 106 Mass. 269; *Palmer v. Kellner*, 111 Mass. 301.

**7. Must Be Refusal, if Statute So Indicates.** —

imposed.<sup>1</sup> Weights and measures in the maker's or dealer's stock for sale do not require to be stamped.<sup>2</sup> Where weights and measures have once been stamped, there being no statutory provision for re-stamping, a penalty will not be incurred if the stamp becomes obliterated, the weights and measures being otherwise unobjectionable.<sup>3</sup> And a statute requiring persons selling by weights and measures to have their weights and measures marked as correct does not apply to persons buying by weights and measures.<sup>4</sup> Such statutes do not apply to the use by individuals of weights and measures for their private purposes.<sup>5</sup>

**2. To Have Commodities Weighed and Measured.**—Laws requiring commodities sold or offered for sale to be weighed and measured by the appointed officer must also be complied with in like manner.<sup>6</sup> But such laws are not to be extended beyond their obvious meaning.<sup>7</sup>

**VII. FALSE WEIGHTS AND MEASURES — 1. Cheating by False Weights and Measures — At Common Law.**—It is indictable at common law to cheat by means of false weights and measures.<sup>8</sup> So, a false affirmation of the weight

Under Stat. 1870, c. 218, providing that all persons using scales, weights, measures, or milk cans for the sale of commodities shall have them sealed by the proper sealer, and that on complaint the sealer shall examine and test any weights and measures, and if they are incorrect stamp them as "condemned," and imposing a penalty for the subsequent use thereof, a recovery can be had for the price of milk sold in milk cans not sealed as required by the statute, or of articles not sold by weights and measures as required thereby, if the sealer has not been refused permission to test them and if they have not been condemned by him. *Ritchie v. Boynton*, 114 Mass. 431; *Eaton v. Kegan*, 114 Mass. 433.

A person is not liable to a penalty for selling meat by weights not sealed and stamped under a statute requiring a person before selling to allow and permit his weights and measures to be sealed and stamped, until after his refusal to allow the standard keeper to seal and stamp the weights. *Sutton v. Phillips*, 117 N. Car. 228.

**Branding.**—An act to prevent fraud in over-estimating the weight of butter contained in package upon its sale and transfer in market provided for the branding of each butter tub sold. It was held that marking the weight complied with the statute. *Dibble v. Hathaway*, 11 Hun (N. Y.) 571.

**1. Only Statutory Penalty Enforceable.**—A city ordinance providing for the forfeiture of baskets not stamped in accordance with its provisions cannot be enforced in the absence of a legislative enactment authorizing such a penalty. It can only impose a certain pecuniary penalty. *Phillips v. Allen*, 41 Pa. St. 481, 82 Am. Dec. 486.

**2. Does Not Apply to Weights and Measures in Stock.**—The *Pennsylvania* Act of April 15, 1895, providing for the testing and sealing of weights and measures every year, only applies to those used in buying and selling, and not to those in the maker's factory or vendor's store for sale. *Stolle v. Gabel*, 14 Phila. (Pa.) 616, 37 Leg. Int. (Pa.) 30.

**3. Where Stamp Obliterated.**—*Starr v. Stringer*, L. R. 7 C. P. 383.

**4. Does Not Apply to Buyers.**—*Southwestern R. Co. v. Cohen*, 49 Ga. 627.

**5. Apply to Vendors Only.**—A city ordinance, passed under the authority of a charter giving power to make such ordinances "in relation to the inspection and sealing of weights and measures, and enforcing the keeping and use of proper weights and measures by vendors," does not apply to the inspection of scales used by elevatormen in their grain elevators; both clauses of the provisions must be read together and apply only to vendors. *Hettenbach v. New York Cent., etc., R. Co.*, 18 Hun (N. Y.) 129.

**6. To Have Commodities Weighed and Measured.**—*Libby v. Downey*, 5 Allen (Mass.) 299; *Smith v. Campbell*, 68 Me. 268; *Levy v. Gowdy*, 2 Allen (Mass.) 320. See also *infra*, this title, *Weights and Measures in Contracts*.

**7. Act Must Clearly Apply.—Hog Scales.**—*Gass v. Greenville*, 4 Sneed (Tenn.) 62.

**Measurement of Bark.**—*Huntington v. Knox*, 7 Cush. (Mass.) 371.

**Grain.**—*Gill v. Cacy*, 49 Md. 243.

**Survey of Timber.**—*Briggs v. A Light Boat*, 7 Allen (Mass.) 287; *Bruce v. Sidelinger*, 82 Me. 318.

**Firewood and Bark.**—*Duren v. Gage*, 72 Me. 118.

**A Contract to Sell Boards** sufficient to make a certain number of sugar box shooks is legal and binding though no survey was ever made, under Rev. Stat., c. 66, §§ 2, 17, a survey of lumber being in the circumstances useless. *Rogers v. Humphrey*, 39 Me. 382.

**Paper Weighed upon Scales Not Marked.**—*Southwestern R. Co. v. Cohen*, 49 Ga. 627.

**8. Cheating by False Weights and Measures — At Common Law.**—See the title *FALSE PRETENSES AND CHEATS*, vol. 12, pp. 796 and 843. See also *State v. Perry*, 5 Jones L. (50 N. Car.) 252.

It was held in *Reg. v. Eagleton*, Dears 515, that where a person contracted with parish guardians to supply outdoor poor with loaves of bread of a certain weight, and supplied loaves of deficient weight, and attempted to get credit for the contract weight in his accounts with the guardians, it was not a sale of goods by false pretense of their weight, but an attempt to obtain money by the false and fraudulent representation of an antecedent fact, and that he could not be convicted of the former offense though he was properly convicted of the latter.

of an article sold by weight, with intent to defraud, is an indictable false pretense.<sup>1</sup> Receiving on storage for hire, or purchasing, grain by false weights, in the business of a warehouseman and merchant, was a misdemeanor at common law; where the offense is incorporated into a statute, the misdemeanor is merged in the statutory offense.<sup>2</sup>

**Knowledge of Buyer Eliminates Element of Fraud.** — Although it is indictable at common law to cheat by means of false weights or false measures, when more than the proper amount is openly exacted and is submitted to by the opposite party with the knowledge of the fact there is no fraud, which is a necessary ingredient to constitute the offense.<sup>3</sup> This also applies to cases under statutes.<sup>4</sup>

**2. Keeping False Weights and Measures.** — Whether the keeping of false weights and measures must be coupled with their use in trade to constitute an offense depends very much upon the words of the statute.<sup>5</sup>

**What Is False Weighing Machine.** — As to what is or is not a false weighing machine various decisions have been given.<sup>6</sup>

1. See the title FALSE PRETENSES AND CHEATS, vol. 12, p. 843.

2. **Statutes.** — *People v. Fish, Sheld.* (N. Y.) 537, 4 Park. Crim. (N. Y.) 206.

The common-law offense of cheating by buying or selling by the use of false weights is incorporated into section 4819 of the *Kentucky* statute, and under section 1127 the punishment prescribed by the statute only can be inflicted; and an indictment must charge facts sufficient to constitute the offense under the statute. *Com. v. Ramsey*, (Ky. 1902) 68 S. W. Rep. 1098.

**Beer in Hogshead, etc.** — A general allegation in a declaration for deceit that the defendant had fraudulently delivered to the plaintiff less and deficient quantities of beer sold in punch-eons, hogsheads, etc., is not a charge of fraud in selling by short and defective measures. *Miles v. Dell*, 3 Stark. 23, 14 E. C. L. 150.

**Mining Coal.** — Where a miner is paid a certain sum for a certain number of pounds of coal mined, he cannot, in an action of trespass against his employer to recover a sum in excess of what he had been paid, maintain his action without clear and satisfactory evidence that the employer knowingly and fraudulently used false weights with intent to cheat and defraud the employee. *Nelson v. Steen*, 192 Pa. St. 581.

3. *State v. Perry*, 5 Jones L. (50 N. Car.) 252. See generally the title FALSE PRETENSES AND CHEATS, vol. 12, p. 792.

4. It was held not to be a fraud under 41 & 42 Vict., c. 49, § 26, where a grocer, in selling sugar, tea, and currants, weighed the paper bag containing the articles, the purchaser knowing of the practice and not complaining. *Harris v. Allwood*, 57 J. P. 7.

A sale of coal at twenty-two pounds to the bushel, instead of eighty pounds as prescribed by law, was held not to be a contravention of the statute authorizing a conviction, where the buyer knew he was only getting the weight supplied. *Blanchard v. State*, 3 Ind. App. 395, followed in *Zinns v. State*, 13 Ind. App. 396, a similar case.

5. **Keeping False Weights and Measures.** — A receiver of the metropolitan police was held not indictable under 5 & 6 Wm. IV., c. 63, §§ 21, 28, for keeping within the station house

light weights, and a weighing machine which gave light weight, and for using these in weighing coal allowed to constables, the station house not being a store, etc., where goods were exposed or kept for sale or weighed for conveyance or carriage within the meaning of the act. *Wray v. Reynolds*, 1 El. & El. 165, 102 E. C. L. 165.

And where a farmer had in his barn or out-house a balance or portable weighing machine and two iron weights, which were found by the inspector of weights and measures to be light, he was held not liable to conviction, the inspector seeing no produce about the premises and not being able to prove that the farmer exposed or kept for sale or weighed for conveyance or carriage any goods or produce. *Griffiths v. Place*, 20 L. T. N. S. 484.

In *Reg. v. Justices*, 24 Q. B. D. 181, it was held that sections 25 and 29 of the Weights and Measures Act, 1878, do not apply to a postmaster who is also a baker, where the scales belong to the post office and are the property of the crown.

Where a statute imposes a penalty for taking more than one-eighth part of toll for grinding corn and wheat, and makes the owner of a mill liable to indictment for keeping a false toll-dish, the true measure of a toll-dish being a half gallon, the owner of a mill who keeps two toll-dishes, one containing a seventh and the other a sixth of a half bushel, is liable under the statute, notwithstanding that the toll-dishes contained the measure they import. *State v. Perry*, 5 Jones L. (50 N. Car.) 252.

But an indictment under this statute for keeping a false toll-dish is not sustained by proof that the mill-owner took one-sixth part of each of the bushels of corn with a half-gallon toll-dish, — the true measure. *State v. Nixon*, 5 Jones L. (50 N. Car.) 257.

6. **What Is False Weighing Machine.** — The keeping of scales which had hanging upon the weight end of the beams a hollow brass ball, which could be unscrewed at the neck, and contained shot, and could be lifted off the beams, so that when removed the scales were unjust and against the purchaser, makes the persons keeping such scales liable to the penalty under 5 & 6 Wm. IV., c. 63, § 28, for keeping incorrect or otherwise unjust weighing



**3. Using False Weights and Measures.** — The use of false weights and measures is an offense irrespective of the elements of fraud or intention,<sup>1</sup> and a court cannot dispense with the imposition of a penalty for the use thereof as a matter of benignity.<sup>2</sup> The user need not necessarily be a vendor.<sup>3</sup> The offense under the statute or ordinance founded on must be established.<sup>4</sup> The act of knowingly using false weights is not a continuous offense.<sup>5</sup>

**VIII. WEIGHTS AND MEASURES IN CONTRACTS — 1. In General.** — The provision of a penalty for the sale of goods otherwise than by weight, or by weights and measures not proved and sealed in accordance with a general law, or weighed otherwise than by the sworn weigher, implies a prohibition of such sale, and no action lies for the price.<sup>6</sup> In states where logs or lumber

machines. *Carr v. Stringer*, L. R. 3 Q. B. 433.

Where a steelyard which, from atmospheric conditions and other causes, was liable to be thrown out of gear, had an adjusting ball affixed to the long arm, with which it could be adjusted, it was held that though the inspector, who examined it without adjusting it, found it incorrect, it was not a weighing machine found incorrect under 5 & 6 Wm. IV., c. 63, § 28, and the owner was not liable to conviction, it being only the use of the machine which was incorrect. *London, etc., R. Co. v. Richards*, 2 B. & S. 326, 110 E. C. L. 326, 8 Jur. N. S. 539.

It is to the possession, rather than to the use, of false weights and machines, that the penalty under 5 & 6 Wm. IV., c. 63, § 28, attaches, and a weighing machine worked by a spring, used at a railway station for weighing parcels and passengers' excess baggage, disordered so that the index stood at four pounds instead of at zero, rendered the railway company liable to conviction. *Great Western R. Co. v. Bailie*, 5 B. & S. 928, 117 E. C. L. 928, 11 Jur. N. S. 264, *distinguishing* *London, etc., R. Co. v. Richards*, 2 B. & S. 326, 110 E. C. L. 326.

A paper placed under the scoop of a weighing machine to facilitate the weighing of tea, makes the machine a false or unjust balance, and the user liable to a conviction for having in his possession for use in his trade a false or unjust weighing machine within section 25 of the Weights and Measures Act, 1878. *Lane v. Rendall*, 19 Cox C. C. 399.

**What Is False Measure.** — A milk churn or can gauged inside to show the capacity, on which the purchaser and carrier rely, is a trade measure within section 25 of the Weights and Measures Act, 1878, and if it is false a conviction of the seller for having in his possession for use false trade measures is right. *Harris v. London County Council*, 18 Cox. C. C. 65.

**1. Using False Weights and Measures — Intent.** — Proof of intent or guilty knowledge is not necessary in an action for a penalty prescribed by a municipal ordinance for the use of a false balance, the ordinance not requiring such proof. *New York v. Hewitt*, 91 N. Y. App. Div. 445.

Where justices convicted a person of wilfully selling an unjust weighing machine, which was so constructed that only articles placed exactly in the centre of the scale were weighed correctly, it was held on appeal that the question of what was an unjust weighing machine

was a question of fact, and the justice's decision would be affirmed. *Reg. v. Baxendale*, 44 J. P. 763. See also *Lane v. Kendall*, 19 Cox C. C. 399.

2. *New York v. Hewitt*, 91 N. Y. App. Div. 445.

**3. Other than Vendor.** — A relieving officer who used a weight to check the delivery of bread supplied to a union for the purposes of outdoor relief was held liable to be convicted if the weight used by him was unjust. *Painter v. Seers*, 40 J. P. 549.

**4. Statutory Offense Must Be Established.** — In an action based upon an ordinance to the effect that if any person should use "in weighing or measuring as aforesaid" any weight, measure, etc., which should not conform "to such standard," or should use in weighing as aforesaid any scale beam, patent balance, steelyard or other instrument which should be out of order or incorrect, he should forfeit a certain penalty, evidence that certain scale weights found at the defendant's grocery store were "short," and that they were "used there" was held to be insufficient to sustain a judgment, the failure to give proof of the matter to which the words "as aforesaid" referred failing to establish the ordinance upon which the plaintiff relied. *New York v. Spatz*, (Supm. Ct. App. T.) 85 N. Y. Supp. 353.

An indictment under a statute making the "use" of false weights an offense which charges the defendants with unlawfully and fraudulently keeping false weights and with knowingly buying cattle weighed therewith, without any averment that they used the weights, does not state an offense. *State v. Jamison*, 110 Iowa 337.

**Proof of Use of False Weights.** — In a criminal prosecution under a statute, for using false weights, it was held competent to prove that at or about the time of the alleged offense the defendant used or caused to be used in the buying of grain and stock a heavier weight than other correct weights kept by him. *State v. Kellner*, 22 Neb. 668.

**Where Balance Against Seller.** — A conviction under 22 & 23 Vict. 6, 56, § 3, for selling by a false spring balance in the street, was not sustained where the balance was against the seller. *Brooke v. Shadgate*, L. R. 8 Q. B. 352.

5. *State v. Jamison*, 110 Iowa 337.

**6. Penalty Imposed Implies Prohibition of Sale.** — *Prescott v. Battersby*, 119 Mass. 285; *Miller v. Post*, 1 Allen (Mass.) 434; *Libby v. Downey*, 5 Allen (Mass.) 299; *Sawyer v. Smith*, 109 Mass. 220; *Smith v. Arnold*, 106 Mass. 269;

offered for sale are required by statute to be surveyed or measured by a sworn inspector, no action lies for the price unless the statute is complied with.<sup>1</sup> Although no facilities have been provided for official weighing or sealing, the sale is nevertheless void.<sup>2</sup> To avoid the contract there must be a clear contravention of the statute.<sup>3</sup> And parties to a contract may expressly contract for a different measure of quantity than that defined by the statute, unless the statute expressly forbids it.<sup>4</sup> Where a different measure is not expressed in the contract the statutory measure will control,<sup>5</sup> and in the absence of an agreed standard that of the place where the commodity is purchased will govern the contract.<sup>6</sup> A statute may provide for a sworn measurer's measurement unless the purchaser in a contract otherwise agrees.<sup>7</sup> Where sales are, by statute, required to be by the standard measure, that must be conformed to, though no penalty is attached to a contravention.<sup>8</sup> Where a party

*Palmer v. Kelleher*, 111 Mass. 320; *Bisbee v. McAllen*, 39 Minn. 143; *Pray v. Burbank*, 10 N. H. 377.

A statute providing that the seller of coal shall not maintain a suit for the price thereof, unless he has caused the same to be weighed by a sworn weigher and a certificate of the weight delivered to the buyer, is not complied with when the weigher is either the owner of the coal or sells it on commission. *Smith v. Campbell*, 68 Me. 268.

The onus of proving the illegality (in this instance that a measure used for measuring lime was not stamped as required by the act), is on the defendant seeking to avail himself of such illegality. *Hanbury v. Chambers*, 10 Manitoba 167.

It was so held in *Forster v. Taylor*, 5 B. & Ad. 887, 27 E. C. L. 230, as to a contract for the sale of butter in firkins not marked in accordance with the statutory provision.

The omission to deliver a ticket in accordance with the provisions of 142 Vict., c. 101, § 3, is a bar to an action for the sale and delivery of coals exceeding in quantity 560 lbs. *Cundell v. Dawson*, 4 C. B. 376, 56 E. C. L. 376; *Little v. Poole*, 9 B. & C. 192, 17 E. C. L. 355.

A statute requiring butter to be packed for sale in vessels marked with the seller's name and the weight of the contents, under a penalty, being for the protection of the public gives a purchaser a defense to an action for the price in case of contravention. *Forster v. Taylor*, 5 B. & Ad. 887, 27 E. C. L. 230, citing *Tyson v. Thomas*, 11 C. L. 119; *Little v. Poole*, 9 B. & C. 192, 17 E. C. L. 355.

**Unstamped Gas Meter.**—A statute prohibiting the fixing of a gas meter which has not been verified or stamped, and imposing a penalty, implies a prohibition against supplying gas through it, and the gas company cannot recover for the price of the gas. "It is clear that the sole object of the statute is the protection of the public. It contemplates no revenue but such as shall be necessary to the carrying out of the act itself." *Manitoba Electric, etc., Co. v. Gerrie*, 4 Manitoba 210.

**Price Paid Cannot Be Recovered.**—After payment of goods sold by illegal measure the money cannot be recovered, and a settlement of accounts by an offset is equivalent to payment. *Owens v. Denton*, 1 C. M. & R. 711.

1. See the title LOGS AND LUMBER, vol. 19, p. 544.

2. **No Facilities Provided for Sealing.**—*Finch v. Barclay*, 87 Ga. 393; *Sawyer v. Smith*, 109 Mass. 220; *Levy v. Gowdy*, 2 Allen (Mass.) 320; *Bisbee v. McAllen*, 39 Minn. 143.

Or even although the state scaler refuse to seal the weights and measures at the statute price. *Miller v. Post*, 1 Allen (Mass.) 434.

3. **Must Be Clear Contravention of Statute.**—*Williams v. Tappan*, 23 N. H. 385; *Abbott v. Goodwin*, 37 Me. 203; *Howe v. Norris*, 12 Allen (Mass.) 82. See also *Coombs v. Emery*, 14 Me. 404.

4. **Express Contract.**—*Harrison v. Mora*, 8 Pa. Co. Ct. 224. Compare *Wheeler v. Russell*, 17 Mass. 258; *Pray v. Burbank*, 10 N. H. 377; *Pray v. Burbank*, 12 N. H. 267.

5. **Where Measure Not Expressed.**—*Farmers' High School v. Potter*, 43 Pa. St. 134.

Where general laws provide that the standard of a ton shall be two thousand pounds, a contract to provide one lot of coal at two thousand two hundred and forty pounds to the ton, and another lot of coal without mentioning the standard, must be read as a whole, and the first part of the contract is evidence of an intention to use the same standard for the second, a different standard not being expressed. *Sise v. Rockingham County*, 62 N. H. 441.

A contract for so many barrels of a liquid is presumed to be made on the basis of the statutory number of gallons in a barrel; but where there is evidence that barrels of a different content were in contemplation of the parties, it is proper to leave the question to the jury. *Forsyth v. North American Oil Co.*, 53 Pa. St. 168.

**Where a Statute Provided for the Weighing of Coal by a Sworn Weigher "Unless the Parties Otherwise Agreed,"** it was held that proof that the purchaser had accepted the coal without objection, and upon presentation of the bill offered to give his note for it, and that he had paid for former lots weighed as this was by the seller's bookkeeper, did not amount to proof that the parties "otherwise agreed." *James v. Josselyn*, 65 Me. 138.

6. **Standard of Place of Purchase.**—*Richardson v. Cornforth*, (C. C. A.) 118 Fed. Rep. 325.

7. *Duren v. Gage*, 72 Me. 118.

8. **Where No Express Prohibition or Penalty.**—As, by the Ga. Stat., c. 49, § 63, sales of oats and meal must be by the bushel, an action cannot be maintained for their price if sold by the bag, although the statute does not in terms prohibit other sales, or attach a penalty to the



contracts to buy by weight he is entitled to insist on a correct weight.<sup>1</sup>

**2. Selling by Other than Standard Weights and Measures.**—In *England* all sales by other than the standard weights and measures or by weights and measures not duly sealed or stamped, are now illegal.<sup>2</sup>

**3. Usages and Customs.**—A local custom or the custom of a particular trade cannot prevail against a standard of weights or measures prescribed by statute,<sup>3</sup> unless it is a matter of special contract between the parties,<sup>4</sup> or unless the custom is so general that the parties must be presumed to have contracted with reference to it, or unless an intention so to contract is evidenced by their previous course of dealing with each other.<sup>5</sup> Usage will be admitted to explain a contract where it does not alter the effect of the statute.<sup>6</sup>

violation of the provision. *Eaton v. Kegan*, 114 Mass. 433.

**1. Where a Person Contracted to Buy Cattle by Weight** and the cattle were weighed on the buyer's scales, and these were found to be incorrect, the seller is entitled to have the stock weighed correctly, the fraudulent or incorrect weighing not being a weighing within the meaning of the contract; and where the buyer refuses to weigh the stock correctly the opinion of experienced witnesses is admissible in evidence for the purpose of establishing the falsity of such weight. *Filley v. Billings*, 26 Neb. 537.

**2. Selling by Other than Standard Weights and Measures.**—By 5 & 6 Wm. IV., c. 63, § 6, it was made illegal to sell by any denomination of measure other than one of the imperial measures, but no mention was made of sales by weight, therefore it became a question whether a sale was by measure or weight. A sale by hobbett was declared to be illegal where the hobbett was a measure, and not reducible to imperial standard. *Owens v. Denton*, 1 C. M. & R. 711; *Tyson v. Thomas*, M'Clel. & Y. 119.

But where the hobbett was a weight and the multiple of a pound it was held to be a legal sale under section 11 of the act. *Hughes v. Humphreys*, 3 El. & Bl. 954, 77 E. C. L. 954, 23 L. J. Q. B. 356; *Tyson v. Thomas*, M'Clel. & Y. 119.

But by the Weights and Measures Act of 1878, it was made illegal to sell by any measure or any weight other than imperial measure or weight. 41 & 42 Vict., c. 49, § 29.

For other *English* cases, see *Robertson v. Good*, (1858) 20 Sc. Sess. Cas. (2d ser.) 1170; *Rosseter v. Cahlmann*, 8 Exch. 361; *Payne v. Thomas*, 17 Cox C. C. 212, 60 L. J. M. C. 3; *Smith v. Cartwright*, 6 Exch. 927, 20 L. J. Exch. 401.

**Articles Not Sold by Measure.**—A conviction under a clause in a statute providing for a penalty for selling by other measures than the standard is error where the article sold was meat, which is not sold by measure. *Sutton v. Phillips*, 116 N. Car. 502.

**Where an Act Obviously Requires a Sale of Liquor in a Stamped Measure**, it must be handed to or shown to the purchaser in the measure, and the fact that it was actually put into the measure is not sufficient if that was not done in the customer's presence. *Addy v. Blake*, 19 Q. B. D. 478.

**Sale of Corn.**—By 22 & 23 Car. II., c. 12, the buyer of corn bought by any other than the Winchester measure forfeited the penalty thereby imposed as well as the value of the corn. *Rex v. Arnold*, 5 T. R. 353.

**Threshing Grain.**—A thresher could not recover from a farmer for threshing so many bushels of grain at a price per bushel where it was run into bags supposed to contain two bushels each, but not measured with a Dominion standard measure or by weighing. *Macdonald v. Corrigan*, 9 Manitoba 284.

**3. Usages and Customs.**—*Rex v. Major*, 4 T. R. 750; *Noble v. Durell*, 3 T. R. 271; *St. Cross Hospital v. De Walden*, 6 T. R. 338; *Hockin v. Cooke*, 4 T. R. 314; *Harris v. Rutledge*, 19 Iowa 388, 87 Am. Dec. 441; *Green v. Moffett*, 22 Mo. 529; *Rogers v. Allen*, 47 N. H. 529; *Paull v. Lewis*, 4 Watts (Pa.) 402; *Evans v. Myers*, 25 Pa. St. 114; *Harrison v. Mora*, 8 Pa. Co. Ct. 224; *Mays v. Jennings*, 4 Humph. (Tenn.) 102; *Southwest Virginia Mineral Co. v. Chase*, 95 Va. 50; *Johnson v. Burns*, 39 W. Va. 658.

**Wills.**—Where a testator bequeathed so many acres of his estate in Ireland it was held that extrinsic evidence was inadmissible to show that he meant Irish and not statute acres. The statutory definition in 5 Geo. IV., c. 74, § 2, attaches to the word whether used in a will or other voluntary instrument or in a contract. *O'Donnell v. O'Donnell*, L. R. 1 Ir. 284.

**4. Special Contract.**—*Caldwell v. Dawson*, 4 Met. (Ky.) 121.

Where contracts do not show upon their face that they were made in reference to a custom the provisions of a state statute in regard to weights and measures will govern. *Harris v. Rutledge*, 19 Iowa 388, 87 Am. Dec. 441.

**5. General Usage.**—*Godcharles v. Wigeman*, 113 Pa. St. 431; *Robinson v. Grannis*, (Supm. Ct. Spec. T.) 33 N. Y. Supp. 291; *The Miantinomi*, 3 Wall. Jr. (C. C.) 46; *Higgins v. California Petroleum, etc., Co.*, 109 Cal. 304. Compare *Higgins v. California Petroleum, etc., Co.*, 120 Cal. 629.

**6. Where Usage Admitted—Time of Weighing.**—*Conner v. Robinson*, 2 Hill L. (S. Car.) 354; *Jones v. Hoey*, 128 Mass. 585.

**Mode of Weighing.**—*Frazier v. Warfield*, 13 Md. 279.

**State of Commodity.**—*Richardson v. Cornforth*, (C. C. A.) 118 Fed. Rep. 325.

**Sale by Bag.**—*Eldridge v. McDermott*, 178 Mass. 256, distinguishing *Eaton v. Kegan*, 114 Mass. 433.

**Volume and Weight.**—*Smith v. Brown*, 46 Neb. 230.

**Cord of Wood.**—*Kennedy v. Oswego, etc., R. Co.*, 67 Barb. (N. Y.) 169.

**Sale by Multiple of Standard Weight Good.**—*Hughes v. Humphreys*, 3 El. & Bl. 954, 77 E. C. L. 954; *Giles v. Jones*, 11 Exch. 393.



**WEIR.** — A weir is a dam across a river.<sup>1</sup>

**WELFARE.** — See note 2.

**WELL.** — See note 3.

**WELL KNOWING.** (See KNOWING, vol. 18, p. 67.) — See note 4.

**WELLS.** (See also the titles WATERS AND WATERCOURSES, *ante*; WORKING CONTRACTS, *post*.) — A well is defined as a hole dug in the ground in order to obtain water.<sup>5</sup>

**Sale of Hemp — Hundredweight.** — Helm v. Bryant, 11 B. Mon. (Ky.) 64.

**Evidence of Weigher's Returns.** — Bissel v. Campbell, 54 N. Y. 353.

**No Trivial Error** or trivial variation between different weights is sufficient to impeach the weighing of the state weighmaster. Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 308, 74 Am. St. Rep. 484.

1. **Weir.** — Arnold v. Mundy, 6 N. J. L. 55.

*Connecticut Gen. Stat.*, tit. 23, § 2, provides that "whoever shall first make a *weir* for catching fish on any flat within any river, cove, creek, or harbor, shall not be interrupted in the enjoyment of it by any other person, etc." This statute is an ancient one and was passed before modern fishing pounds were used. It was held, however, that these pounds, being used for the same purpose as *weirs*, and in substantially the same way, are to be regarded as *weirs* within the statute. Stannard v. Hubbard, 34 Conn. 375.

2. **Welfare.** — The main consideration to be acted upon in the exercise by the court of chancery of its jurisdiction over infants is the *welfare* of the child. Upon the meaning of *welfare* in this connection, Kay, L. J., in Reg. v. Gyngall, (1893) 2 Q. B. 248, said: "Again, the term *welfare* in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent, acting for the true interests of the child, would or ought to do." See also the title PARENT AND CHILD, vol. 21, p. 1034.

**Public Welfare.** — See PUBLIC, vol. 23, p. 306.

3. **Well and Faithfully Serve.** — In Caden v. Farwell, 98 Mass. 137, it was held that the inability of an apprentice to work, caused by sickness, without his fault, was no breach of the covenant that he should "*well* and faithfully serve and give and devote his whole time and labor."

**Well and Faithfully Execute the Office.** — The words "*well* and faithfully execute the office, and in all things relating to the same, *well* and faithfully behave," have been held to mean substantially the same as "faithfully perform the trust reposed in them." U. S. Bank v. Brent, 2 Cranch (C. C.) 699.

**Well and Sufficiently Proved.** — This phrase has been held to mean proved according to law. Beall v. Lynn, 6 Har. & J. (Md.) 350.

**"Well Broke."** — In Bordutha v. Phelon, 2 Allen (Mass.) 347, it was held that under a declaration alleging that the defendant warranted a horse to be perfectly gentle, whereas, in fact, he was ungente, the plaintiff cannot recover damages on the ground that he was not "*well* broke."

**Well Conditioned.** — In Tarbox v. Eastern

Steamboat Co., 50 Me. 339, it was held that it was not important whether the phrase "in good order," or "*well* conditioned," or both, are used in a receipt or bill of lading, the phrases being substantially synonymous.

4. **Well Knowing the Premises.** — To an action on a marine insurance policy the defendant pleaded that the vessel was unseaworthy, and should have been repaired by the plaintiff; yet the plaintiff, *well knowing* the premises, did not repair and render her seaworthy. Denman, C. J., said: "In the first place it is not distinctly averred that the plaintiff knew the precise danger, for the words '*well knowing* the premises' do not amount to such an averment. And, secondly, it is not said that, but for gross negligence, the ship might have been restored to a seaworthy state before the loss actually happened." Hollingworth v. Brodrick, 7 Ad. & El. 40, 34 E. C. L. 28.

**Payments Well and Truly Made.** — A vendor covenanted in the bond for title as follows: "For which payments *well* and truly made in good and lawful money of Kentucky, I relinquish all my right, title, and interest in the tannery." In construing this provision the court, in Young v. Singleton, 6 J. J. Marsh. (Ky.) 319, said: "When the entire sentence is considered, and especially when it is connected with the precedent recital to which it must be understood as referring, it does not mean that the four instalments had been actually paid, nor that they must be so paid before the title can be demanded. 'Payments *well* and truly made' may mean either 'payments when *well* and truly made,' or 'payments *well* and truly to be made;' and if the covenant contained no relinquishment, but only an undertaking to convey, the interpretation of 'to be' might be as proper as the insertion of 'when,' or of any other word or phrase. If the ellipsis be filled with 'to be' there is no precedent condition. But when the whole sentence is considered it is not consistent or reasonable, as already suggested, to interpret the expressions, '*well* and truly made,' as meaning 'when made,' because then they would have one import when applied to one branch of the sentence, and the opposite import when applied to another branch of the same sentence."

5. **Wells.** — Littrell v. Wilcox, 11 Mont. 83.

**Whether Well Includes Land.** — In Johnson v. Rayner, 6 Gray (Mass.) 107, where the grant, in addition to the fee of a house and land, conveyed "also a *well* of water, with the curbs, pumps, and all utensils belonging to them, as the same now stands in the said other land," it was held that the fee to a plot of ground enclosing the *well* passed to the grantee. See also Ocean Causeway v. Gilbert, 54 N. Y. App. Div. 122.

**WELSH MORTGAGE.** (See also the title MORTGAGES, vol. 20, p. 888.) — The Welsh mortgages which are mentioned in the English books, though they have now gone out of use, resembled the *vicum radium* of Coke, or the *mortuum radium* of Glanville; for though in them the rents and profits were a substitute for the interest, and the land was to be held until the mortgagor refunded the principal, yet, if the value of the rents and profits was excessive, equity would, notwithstanding any agreement to the contrary, decree an account.<sup>1</sup>

**WEST; WESTERLY, ETC.** (See also the title BOUNDARIES, vol. 4, p. 756.) — See note 2.

**WET OIL.** — See note 3.

**WHARF BOAT.** — See note 4.

In *Mixer v. Reed*, 25 Vt. 257, the court, by Redfield, C. J., said: "The *well* included, *ex vi termini*, not only the orifice which reached down to the water, but the whole opening in the earth, before it was stoned, and the stone, and the stone laid into the wall, and the water therein. And this, we think, must be regarded as the thing intended to be conveyed, and not the water merely, which only imports the right to use the water, and by which term nothing passes but the easement, or right to take the water."

**Upon What Land Obligation Rests.** — A grant was made to the plaintiff of a dwelling house and land, "together with the privilege of drawing water from a pipe laid in the ground from a *well* on my adjoining land to said Davis house as now used." In construing this clause the court, in *Davis v. Spaulding*, 157 Mass. 431, said: "The language of the clause is satisfied by holding that it gives the plaintiff the right to draw water whenever that portion of land designated as the *well*, remaining intact as a structure adapted to receive and hold such water as may percolate into it, contains water which will gravitate to the house through the pipe. It is impossible to know in what direction percolating water finds its way into a *well*, perhaps only through the bottom of the excavation, and perhaps through the surrounding as well as the subjacent land. Its ways of approach, and its amount, vary with the operation of obscure natural causes, not controllable by the owner of the land through which it passes. If the grant of such a *well*, or the privilege of drawing water from it, were held to impose an obligation upon all the land from which the *well* might derive a supply of water, the burden would be very indefinite, uncertain, and shifting, and would tend, without any adequate corresponding benefit, to prevent the improvement of land by buildings, and its use for mining, quarrying, and many other useful purposes."

**Agreement to Dig a Well.** — An agreement to dig a *well* does not imply that water other than surface water shall be obtained. *Littrell v. Wilcox*, 11 Mont. 83.

**Artesian Well.** — See ARTESIAN WELL, vol. 2, p. 944, and see the title WATERS AND WATER-COURSES, *ante*.

**1. Welsh Mortgage.** — 4 Kent's Com. (13th ed.), p. 137.

A *Welsh mortgage* is where the mortgagee enters at once and takes the rents instead of interest, and is by agreement, or distinct understanding, to have no remedy for

the principal. "It is true likewise that it must have been a mortgage at first, or *ab initio*, and not by any subsequent parol agreement.

\* \* \* This case was of that character, confessedly on both sides at first, in 1824. And if once a mortgage in any way, no subsequent or collateral agreement to prevent a redemption is allowed to bar it; as once a mortgage, it is always a mortgage until a foreclosure, regular and designed as one. *Jennings v. Ward*, 2 Vern. 520; *Spurgeon v. Collier*, 1 Eden 59; *Seton v. Slade*, 7 Ves. Jr. 273." *Bentley v. Phelps*, 2 Woodb. & M. (U. S.) 444.

**2. West.** — In *Schmitz v. Schmitz*, 19 Wis. 210, it is said: "The words *west* and *west* half, as applied to lots and parcels of land, have, both in ordinary conversation and in deeds, sometimes a very precise and exact meaning, and sometimes they are used very loosely and indefinitely."

In *Reed v. Tacoma Bldg., etc., Assoc.*, 2 Wash. 198, it was held that where a deed describes the land conveyed as commencing at a point *west* of the northeast corner of a certain section, the presumption is that the point is due *west*, although the north line of the section is not on the true meridian, but that such presumption may be rebutted by extraneous testimony.

**Westerly Part of a Street.** — In *Jones v. Portland*, 57 Me. 46, it is said: "It is objected that the description of the street is too indefinite. 'The *westerly* part of Congress street' is the part of the street to be straightened and altered. The street is definite. It is not denied there is such a street well defined and legally established. The *westerly* portion thereof must mean the *westerly* half of the street, and that is sufficiently clear and definite."

**Westwardly.** — "The term *westwardly*, with nothing to control it, may perhaps mean *west* or due *west*, but it is evident that such is not its precise signification, and hence it is readily controlled by any circumstance which goes to show that a due *west* course could not have been intended." *Spruill v. Davenport*, 1 Jones L. (46 N. Car.) 206. See also *Brandt v. Ogden*, 1 Johns. (N. Y.) 155.

**3. Wet Oil.** — See *Warde v. Stuart*, 1 C. B. N. S. 88, 87 E. C. L. 88; *Lucas v. Bristow*, El. Bl. & El. 907, 96 E. C. L. 907.

**4. Wharf Boat.** — In *Galbreath v. Davidson*, 25 Ark. 490, it was held that a *wharf boat* was subject to a mechanics' lien, as it was attached to the soil and savored of the realty.

# WHARVES AND WHARFINGERS.

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### CROSS-REFERENCES.

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**I. WHARF DEFINED** — 1. **In General.** — A wharf may be defined as a structure, or a space of ground artificially prepared, or a platform of timber, stone, or other material built upon a support, erected on the shores of a harbor, river, or other navigable water, for the convenience of loading or unloading vessels, receiving and landing passengers, and also to enable ships, vessels, and other watercraft to lie in port in safety.<sup>1</sup>

**1. Wharf Defined.** — And, L. Dict.; Bouv. L. Dict.; Cent. Dict.; Cyclopedic L. Dict.; *Ex p. Easton*, 95 U. S. 68; *Geiger v. Filor*, 8 Fla. 325; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196; *Langdon v. New York*, 93 N. Y. 129; *Rex v. Regent's Canal Co.*, 6 B. & C. 720, 13 E. C. L. 304; *Sacramento v. The Steamer New World*, 4 Cal. 42; *Shreveport v. Red River, etc., Line*, 37 La. Ann. 562, 55 Am. Rep. 504; *Lesesne v. Young*, 33 S. Car. 543.

**Wharf Is Extension of Shore.** — "A wharf is but an improvement or extension of the shore; it is real estate." This language was used in *The Ottawa*, Brown Adm. 356, wherein it was held that an injury to a wharf by a vessel was not a marine tort cognizable in admiralty. See also *The Haxby*, 94 Fed. Rep. 1016, holding to the same effect in regard to a pier.

**Wharf as Appurtenant to Land.** — A wharf is not land within the construction of the maxim that land cannot pass as appurtenant to land. Tide flats may pass as appurtenant to a wharf,

notwithstanding that maxim, if necessary to its use and usually used with it. *Brown v. Carkeek*, 14 Wash. 443.

**Wharves as Public Highways.** — In the city of New York the general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent water, the highway is by operation of law extended by the length of the added structure. *Knickerbocker Ice Co. v. Forty-Second St., etc., Ferry R. Co.*, 176 N. Y. 408; *Matter of Brooklyn*, 73 N. Y. 179; *People v. Lambier*, 5 Den. (N. Y.) 9.

"The public wharves in New York and Brooklyn are, in general, extensions of public streets." *Woodruff v. Havemeyer*, 106 N. Y. 120.

A wharf erected at the terminus of a street has been held not to be subject to all the incidents of a highway. Such a wharf in the city of Detroit is not a part of the public highway.

**2. Structures Similar to Wharves.** — Docks, piers, and other artificial constructions erected and used for the convenience of commerce and navigation, come within the same category as wharves in reference to the application of many of the principles of law concerning wharves proper. The terms "dock" and "wharf" are commonly used interchangeably, but, strictly speaking, the term "dock" denotes the space between wharves,<sup>1</sup> or an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of cargoes.<sup>2</sup>

**A Dry Dock** differs from an ordinary dock in the fact that it is provided with machinery for pumping out the water in order that the vessel may be repaired.<sup>3</sup>

**A Pier** is a projecting quay, wharf, or other landing place.<sup>4</sup>

The Term "Quay" is said to designate a space of ground appropriated to public use: such a use as the convenience of commerce requires.<sup>5</sup>

**3. Necessity for Artificial Construction.** — The construction of a structure, in order to come within the designation of a wharf, need not be that of any special design, as that of the ordinary wharf composed of a platform resting upon spiles which is commonly used by vessels in harbors and seaports. The only necessary requirement for a place where vessels land to be termed a wharf, is that there must be some artificial improvement as distinguished from a mere unimproved natural landing place on the banks or shores of a river, harbor, or bay, as the case may be.<sup>6</sup>

**4. Structures Held to Be Wharves.** — It has been held that a paved street,

*Horn v. People*, 26 Mich. 222; *Kemp v. Stradley*, (Mich. 1903) 97 N. W. Rep. 41. See also *Scott v. Layng*, 59 Mich. 49.

Where a wharf or dock is placed in a public highway, although individuals may have interest in the structure, the structure is intrinsically a public establishment, and a part of the highway as much as a turnpike or toll bridge, and is held under the control of public regulation. A warehouse has none of these properties. A grant to construct a wharf or dock in a public highway gives no right to erect a warehouse. *Bingham v. Doane*, 9 Ohio 165.

**Wharf as Part of Port.** — A wharf in a great public seaport, which is parcel of a public place dedicated to commerce, a place to which all have a right to resort, subject to certain legal regulations, must always be viewed as a part of the port in which it is situated; it cannot be considered as a thing unconnected with the port itself, because it is subject to the law of the port; and the claim of wharfage, whoever may be allowed to profit by it, must be controlled by that law. *Wharf Case*, 3 Bland (Md.) 362.

**Wharf as Land for Purposes of Taxation.** — A wharf has been held to be an interest in land and to be within the meaning of the term "land" under a statute designating land as a subject of taxation. *People v. Tax, etc., Com'rs*, 10 Hun (N. Y.) 207.

**Wharf Privileges in Texas** have been held to be liable to assessment for taxation distinct from the tangible property used for wharf purposes. *Galveston County v. Galveston Wharf Co.*, 72 Tex. 557.

**Taxability of Right to Collect Wharfage.** — In *De Witt v. Hays*, 2 Cal. 463, it was held that a right to collect wharfage, which was merely an incorporeal hereditament or a franchise, could not be taxed.

**Right to Wharf Out Is Taxable.** — *State v. Sipfel*, 25 N. J. L. 530.

**For a Full Discussion of the Subject of Taxation,** see the title TAXATION, vol. 27, p. 567.

**1. Dock Defined.** — *Bouv. L. Dict.*; *Rapalje & L. L. Dict.*; *Black L. Dict.*; *Cyclopedic L. Dict.*; *Boston v. Lecraw*, 17 How. (N. Y.) 434. See also *Dock*, vol. 9, p. 875.

"A dock is a place for vessels, either excavated from the land, or surrounded by wharves." *Bingham v. Doane*, 9 Ohio 165.

**Dock as Fixture.** — *Flanders v. Wood*, 24 Wis. 572.

**Dock Berth Defined.** — *Decker v. Jaques*, 1 E. D. Smith (N. Y.) 80.

**Slip Defined.** — See *SLIP*, vol. 25, p. 1126.

**2. Artificial Basin.** — *The Robert W. Parsons*, 191 U. S. 33.

**3. Dry Dock Defined.** — *The Robert W. Parsons*, 191 U. S. 33; *The Vidal Sala*, 12 Fed. Rep. 207.

**Floating Dry Dock.** — *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625.

**Dockage.** — See that title, vol. 9, p. 874.

**4. Pier Defined.** — *English L. Dict.*; *Cent. Dict.*; *People v. New York, etc., Ferry Co.*, 7 Hun (N. Y.) 108; *The Haxby*, 94 Fed. Rep. 1016. See also *PIER*, vol. 22, p. 812.

"Whether a structure be a pier or not, depends upon its location, its physical character, and its adaptation to the purposes for which piers are used." *Per McCunn, J.*, in *Stevens v. Rhineland*, 5 Robt. (N. Y.) 285.

**5. Quay.** — The definition given in the text is that of Justice M'Lean, in *New Orleans v. U. S.*, 10 Pet. (U. S.) 715. See also *QUAY*, vol. 23, p. 542.

In the *Civil Code of Louisiana*, a quay is said to be common property, to the use of which all the inhabitants of a city, and even strangers, are entitled in common, such as the streets and public walks. *New Orleans v. U. S.*, 10 Pet. (U. S.) 715.

**6. Must Be Improvement or Artificial Structure.** — *Rex v. Regent's Canal Co.*, 6 B. & C. 720,



extending to the edge of the water and used for wharf purposes by vessels, is a wharf,<sup>1</sup> and a sea wall used for landing freight has also been held to be a wharf.<sup>2</sup> A wharf-boat, used for wharf purposes, stationed at and attached to a wharf, is considered to be a part of the wharf to which it is attached.<sup>3</sup>

**5. Natural Landings.**—A parcel of natural land which has no artificial construction has been held not to constitute a wharf. Such is a mere landing place.<sup>4</sup> It has been held that a vessel landing at and using the natural banks of a river is not thereby rendered liable for wharfage dues for using a wharf, under a city ordinance imposing a charge upon every boat which shall receive or discharge any freight at the wharf of the city.<sup>5</sup>

**II. GENERAL NECESSITY, UTILITY, AND PURPOSES OF WHARVES.**—Wharf accommodation is a necessity of navigation, and it is indispensable for ships and vessels, whether employed in carrying freight or passengers, or engaged in the fisheries. Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay. The general purpose of such erections is to advance commerce and navigation, by furnishing resting places for ships, vessels, and all kinds of watercraft, and to facilitate their operation in loading and unloading cargo and receiving and landing passengers.<sup>6</sup>

13 E. C. L. 304; *Muscatine v. Hershey*, 18 Iowa 39; *Shreveport v. Red River, etc.*, Line, 37 La. Ann. 562, 55 Am. Rep. 504; *Cape Girardeau v. Campbell*, 26 Mo. App. 12.

"According to the best authorities, \* \* \* a wharf is properly an artificial construction, and to such its meaning must be limited." *Per Heydenfeldt, J.*, in *Sacramento v. The Steamer New World*, 4 Cal. 42.

**1. Paved Street Extending to Water.**—*Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196. Compare *Shreveport v. Red River, etc.*, Line, 37 La. Ann. 562, 55 Am. Rep. 504.

**A Bulkhead** may be a wharf. *Decker v. Jaques*, 1 E. D. Smith (N. Y.) 80.

**2. Sea Wall.**—In *Fitchburg R. Co. v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 58, a sea wall used for landing freight was held to be a wharf within the purview of an act authorizing a wharf company to extend its wharves to the harbor line.

**3. Wharf-boat Part of Wharf.**—"It is a matter within the common knowledge of all men that a wharf-boat, stationed and used at a particular wharf, is for all the purposes of commerce a part of the wharf itself, so long as it continues to be so stationed and used. It constitutes one of the landing facilities at the wharf, and the landing of a vessel alongside of and against such a wharf-boat is, in legal contemplation, a landing at the wharf to which it is attached." *Davis v. Reamer*, 105 Ind. 318. See also *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644, modified *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302.

**4. Natural Landing.**—*Rex v. Regent's Canal Co.*, 6 B. & C. 731, 13 E. C. L. 304. In this case it was held that such a place as described in the text was not ratable as a wharf under the Act of Parliament. *Littledale, J.*, said: "That term [wharf] usually denotes something built or constructed by the art and industry of man; and though it may have been used for some of the purposes for which a wharf is used, it does not therefore follow that it is a wharf.

Goods may be, and frequently are, landed upon the seabeach, but the beach is not therefore a wharf." See also *Muscatine v. Hershey*, 18 Iowa 39; *Shreveport v. Red River, etc.*, Line, 37 La. Ann. 562, 55 Am. Rep. 504; *Cape Girardeau v. Campbell*, 26 Mo. App. 12.

**5. Use of Natural Shore Not Use of Wharf.**—*Cape Girardeau v. Campbell*, 26 Mo. App. 12. See also *infra*, this title, *Rights of Wharfingers*—*Right to Wharfage or Dockage; Improvements Necessary to Create Liability*.

**6. Necessity and Utility of Wharves.**—*Ex p. Easton*, 95 U. S. 68. See also *The Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 62; *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435; *Geiger v. Filor*, 8 Fla. 325.

"Wharves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river." *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 701, *per Bradley, J.*

"No foreign or interstate commerce can be carried on with the citizens of a state without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received." *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 205, *per Field, J.*

"It has been generally recognized by the courts that wharves are almost as essential to commerce as the waterways themselves." *Cobb v. Lincoln Park*, 202 Ill. 434, 95 Am. St. Rep. 258.

"Wharves and piers are almost as necessary to navigation as vessels, and shipyards or places for the construction of vessels are indispensable." *Rice v. Ruddiman*, 10 Mich. 145.

"The navigable streams of the country would be of little value for that purpose [navigation] if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the

**III. KINDS OF WHARVES — PUBLIC AND PRIVATE — CIRCUMSTANCES DETERMINING CHARACTER** — 1. **In General.** — Wharves may be private, or they may be in their nature public. A structure may be a public wharf although the property may be in an individual owner, as where a wharf becomes in its nature public from use,<sup>1</sup> or where a wharf is made public by the conditions and limitations under which it is permitted to be erected or maintained.<sup>2</sup> The owner of a wharf may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage.<sup>3</sup> On the other hand, the owner of a wharf, if the structure is private, may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use.<sup>4</sup> Whether wharves are private or public may depend, in case of dispute, upon several considerations, involving the purposes for which they were built, the uses to which they have been applied, the place where they are located, and the nature and character of the structure.<sup>5</sup> The mere fact that

stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce." *Per* Miller, J., in *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 393.

**1. Character of Wharf May Be Determined by Use.** — *Barrington v. Commercial Dock Co.*, 15 Wash. 170. See also *Dutton v. Strong*, 1 Black (U. S.) 23; *Thousand Island Steamboat Co. v. Visger*, 179 N. Y. 206.

**Legal and Sufferance Wharves.** — In *England* there are two kinds of wharves — 1st, legal, which are certain wharves in all seaports, appointed by commission from the Court of Exchequer, or legalized by Act of Parliament; 2d, sufferance, which are places where certain goods may be landed and shipped, by special sufferance granted by the Crown for that purpose. *Wharton's Law Lex.* 804.

**2. Limitations Governing Character of Wharf.** — *Harper v. Williams*, 110 N. Y. 260; *Thousand Island Steamboat Co. v. Visger*, 179 N. Y. 206.

**3. Right of Public to Use Wharf.** — *Bolt v. Stennett*, 8 T. R. 606; *Harper v. Williams*, 110 N. Y. 260, *affirming* (Supm. Ct. Spec. T.) 1 N. Y. Supp. 106; *Barrington v. Commercial Dock Co.*, 15 Wash. 170.

The public has the right to use any wharf or pier upon the public highway subject to the legal charges for wharfage, and such right or easement in the public constitutes the only possession there can be of the wharf itself; the possession of the owner being of the franchise merely. *Taylor v. Beebe*, 3 Robt. (N. Y.) 262.

Where an individual is the owner of any such wharf to which all persons may lawfully come for the purpose of lading or unloading their goods, he may be allowed by law to demand and receive certain specified and reasonable tolls for its use, because of his having expressly undertaken the charge of maintaining and repairing it. But in all cases where the entire right of soil has been vested in the public, or where the wharf itself, or the place on which it has been built by public authority, has been condemned, or dedicated in any way to the use of the public, there no toll of any kind can be demanded; for a toll is in the nature of a tax upon the people, and no tax of any description can be levied without the express sanction of the general assembly. *Wharf Case*, 3 Bland (Md.) 362.

**Exclusive Use of Public Dock.** — While a private party may be entitled to the same privileges as are open to the public in common to use a public dock, a private party cannot assume exclusive control of such a dock for his own benefit, to the exclusion of the public, and if he attempts to do so by refusing access to others, the proper authorities may lawfully remove his boats and appliances. *Ewing v. Minneapolis*, 86 Minn. 51.

**4. Owner's Right to Exclusive Use of Wharf.** — *Dutton v. Strong*, 1 Black (U. S.) 23; *Coney v. Brunswick, etc., Steamboat Co.*, 116 Ga. 222; *O'Neill v. Annett*, 27 N. J. L. 290, 72 Am. Dec. 364; *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384; *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 380; *Thousand Island Steamboat Co. v. Visger*, 86 N. Y. App. Div. 126, *affirmed* 179 N. Y. 206.

**The Shore** of an adjoining proprietor on a navigable river cannot be used as a public landing without the proprietor's consent, even though such user has existed twenty years. *Pearsall v. Post*, 20 Wend. (N. Y.) 111, *affirmed* 22 Wend. (N. Y.) 425. See also *Compton v. Hankins*, 90 Ala. 411, 24 Am. St. Rep. 823.

**5. Circumstances Determining Character of Wharf.** — *Dutton v. Strong*, 1 Black (U. S.) 23; *Harper v. Williams*, 110 N. Y. 260, *affirming* (Supm. Ct. Spec. T.) 1 N. Y. Supp. 106; *Barrington v. Commercial Dock Co.*, 15 Wash. 170. See also *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672.

"Whether a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure. If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if it be at the terminus of a public highway, and practically forms a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing. The right to erect a landing on a navigable stream having its foundation in the ownership of the land, when erected by an individual at his own expense, it is private property." *Compton v. Hankins*, 90 Ala. 411, 24 Am. St. Rep. 823.

Receiving compensation for the use of a pub-

a wharf or pier extends out into navigable waters or the waters of the ocean beyond the line of low water, cannot justify the characterizing of the structure as a public wharf or pier and subjecting it to public use.<sup>1</sup>

**2. Legal Consequences of Wharf's Status** — *a.* IN GENERAL. — The status of a wharf, in reference to whether it is public or private, is often a question of importance in determining the rights and liabilities of parties, which in many cases depend upon whether a particular structure is a public or private wharf.<sup>2</sup>

*b.* PUBLIC WHARVES. — A public wharf as distinguished from the private structure discussed in the following subdivision, may be lawfully used by vessels for safety or convenience upon the payment of reasonable charges.<sup>3</sup> A person who goes upon a public wharf or who fastens his vessel to it, does not, by so doing, necessarily make himself a trespasser, as may be the case where a private wharf is so used.<sup>4</sup> The keeping of a wharf or dock which all persons navigating public waters are licensed by law to occupy, in the manner and for the purposes contemplated by the owner, and for which the structure is constructed, is said to be like keeping an inn, and confers a general license to all persons to occupy it for lawful purposes.<sup>5</sup> If the owner of such a structure casts away a vessel lawfully moored to the wharf without reasonable notice to leave, he may be held liable for damages sustained to the vessel resulting from his act.<sup>6</sup>

*c.* PRIVATE WHARVES. — Since the owner of a private wharf has the right to the exclusive use and possession of the structure, no one has a right to use the wharf without the proprietor's express or implied consent, and where a

lic wharf does not deprive it of its public character. See *Galveston Wharf Co. v. Galveston*, 63 Tex. 14.

**Question of Fact for Jury.** — In *Brown v. Elliott*, 2 Md. 75, it was held that the question whether a wharf was or was not a public wharf is a question of fact for the jury.

**Nature Determined by Title.** — In *District of Columbia v. Johnson*, 1 Mackey (D. C.) 51, the court, in speaking of the distinction between public and private wharves on the river front of the city of Washington, said: "The distinction between private and public wharves along the river front of the city and district is determined by the title to the property."

**1. Wharf or Pier Extending into Navigable Waters.** — *Coney v. Brunswick, etc., Steamboat Co.*, 116 Ga. 222; *Wetmore v. Brooklyn Gas Light Co.*, 42 N. Y. 384; *Smith v. Berndt*, (Supm. Ct. Spec. T.) 1 N. Y. Supp. 108; *Harper v. Williams*, (Supm. Ct. Spec. T.) 1 N. Y. Supp. 106, affirmed 110 N. Y. 260.

**2. Effect of Wharf's Status on Rights of Parties.** — See *supra* and *infra*, this section, and the cases cited in the notes.

In *Vandewater v. New York*, 2 Sandf. (N. Y.) 258, it was held that an ordinance of the city of New York prohibiting the obstruction of public wharves did not apply to wharves owned by private parties. The court said: "The distinction between the wharves and piers owned by the city, and which are usually designated as public wharves, and those owned by individuals, is uniformly maintained in the laws of the state relating to this city."

**3. Use of Public Wharves.** — *Barrington v. Commercial Dock Co.*, 15 Wash. 170.

**4. Trespass.** — In *Degan v. Dunlap*, 15 Phila. (Pa.) 69, 39 Leg. Int. (Pa.) 32, the facts were as follows: A schooner was fastened to the

end of the defendant's wharf without his express permission. A stevedore, in attempting to move the schooner into the dock, took hold of a plank fastened on the top of the cap-log, which, being loose or rotten, fell upon him, inflicting an injury for which he sought compensation in damages from the owner of the wharf. At the trial he was nonsuited, on the ground that he was a trespasser. It was held that as the wharf was public, the plaintiff was not a trespasser and that the nonsuit was improper.

Where a wharf has been thrown open to the public, free to the passage of all at their pleasure, one passing over such a structure cannot be made a trespasser until notice has been given of the changed character of the place. *New Orleans, etc., R. Co. v. Hanning*, 15 Wall. (U. S.) 640.

In *Robert v. Haight*, 20 Barb. (N. Y.) 251, it was held that where a wharfinger gave notice to a person not to enter again upon his wharf, an entry by the person subsequent to the notice constituted an actionable trespass.

**5. Maintaining Public Wharf Similar to Keeping Inn.** — *Heaney v. Heaney*, 2 Den. (N. Y.) 625. See also *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 205; *Robert v. Haight*, 20 Barb. (N. Y.) 251.

"The owner is under the same obligation as an innkeeper to receive those who call, provided he has room and they tender a reasonable compensation." *Per Biddle, J.*, in *Degan v. Dunlap*, 15 Phila. (Pa.) 69, 39 Leg. Int. (Pa.) 32.

A steamboat company, by the departure and arrival of its boats, gives an invitation to all who desire to approach its boats to pass over its wharf. *New Orleans, etc., R. Co. v. Hanning*, 15 Wall. (U. S.) 640.

**6. Liability for Casting Vessel Away.** — *Heaney v. Heaney*, 2 Den. (N. Y.) 625.



vessel ties up to such wharf without authority, it becomes a trespasser, and if the wharf proprietor cuts the vessel loose in order to preserve his own rights, he is not liable for damages, notwithstanding the vessel is thereby placed in hazard and is damaged.<sup>1</sup> So also where a party is damaged while occupying a wharf without authority,<sup>2</sup> or is injured while trespassing upon a private wharf, the fact that he is a trespasser may be influential in precluding a recovery of damages against the proprietor.<sup>3</sup> Where a wharf is private, in the absence of an agreement, no action can be maintained against the proprietor thereof for refusing to allow a vessel to tie up or land freight or passengers.<sup>4</sup> The character of a wharf in respect to whether it is public or private may be important in determining the right of the owner to wharfage. It has been held that where the owner of a private wharf did not hold out an invitation to the public to use it, no implied contract to pay wharfage for its use by a vessel in an emergency would be raised.<sup>5</sup>

*d. CHARACTER OF WHARVES IN REFERENCE TO TAXATION — MUNICIPAL WHARF PROPERTY.* — The character of wharf property may be important in determining its liability to taxation, as for instance, where a municipality has two characters of property — one governmental or public, the other private or proprietary; and the property which is of a proprietary character is subject to taxation. Under such circumstances wharf property which is of a proprietary character may be taxed.<sup>6</sup>

#### IV. ERECTION OF WHARVES — RIGHT TO ERECT — 1. Riparian Proprietor —

*a. AT COMMON LAW IN ENGLAND.* — According to the common law of England a wharf erected without license below high-water mark upon lands covered by the sea and the arms thereof where the tide ebbcd and flowed, was a purpresture.<sup>7</sup>

*b. IN UNITED STATES.* — Wharves, piers, quays, and landing places for the loading and unloading of vessels were constructed at an early period of the colonial times in the navigable waters of the Atlantic states by riparian proprietors. The right to build such erections has been claimed and exer-

1. **Casting Away Vessel Trespassing on Private Wharf.** — *Dutton v. Strong*, 1 Black (U. S.) 23.

In *Harrington v. Edwards*, 17 Wis. 604, it was held that a raftman had no right to moor his raft so as to cut off the right of access to a wharf, and where such a raft is untied by a wharf proprietor in order to clear the right of way to the wharf there is no liability on the part of the wharf owner for a consequent loss.

**Right to Land in Cases of Necessity.** — A craft navigating the river has, perhaps, a right to land upon the shore or bank of the riparian proprietor in case of necessity. *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302.

The better opinion seems to be, that by the common law, except in case of danger or necessity, no one has a right to land goods upon the private property of another on the shore of a navigable river. *O'Neill v. Annett*, 27 N. J. L. 290, 72 Am. Dec. 364.

2. **Unauthorized Occupation of Wharf.** — *Onderdonk v. Smith*, 27 Fed. Rep. 874.

3. **Right of Trespasser to Recover Damages.** — *Malloy v. Staten Island Rapid Transit R. Co.*, 78 Hun (N. Y.) 166.

Where extensive building operations were in progress upon a wharf which had been used by the public, such building operations impliedly revoked the implied invitation of the public to use the wharf as a safe place, and where a party without permission went upon the wharf and was injured by the operations through no

fault or negligence of the defendant, it was held that he had no cause for damages. *Downes v. Elmira Bridge Co.*, 179 N. Y. 136.

4. **Action Not Maintainable for Denying Use of Wharf.** — *Compton v. Hankins*, 90 Ala. 411, 24 Am. St. Rep. 823; *O'Neill v. Annett*, 27 N. J. L. 290, 72 Am. Dec. 364.

5. **Implied Contract to Pay Wharfage.** — *Heron v. The Marchioness*, 42 Fed. Rep. 173, reversing 40 Fed. Rep. 330.

6. **Taxation of Municipality's Wharf Property.** — *Com. v. Louisville*, (Ky. 1898) 47 S. W. Rep. 865. See generally the title TAXATION, vol. 27, p. 567.

7. **Wharves Purprestures at Common Law.** — *San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co.*, (Cal. 1904) 77 Pac. Rep. 823; *Brookhaven v. Smith*, 98 N. Y. App. Div. 212; *Weber v. Harbor Com'rs*, 18 Wall. (U. S.) 57.

"In the Absence of \* \* \* Legislation or Usage, \* \* \* the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains." *Weber v. Harbor Com'rs*, 18 Wall. (U. S.) 57.

"The Proceeding at the Common Law to Obtain Leave to Build a Wharf on the king's tide land was by a writ of *ad quod dampnum* to ascertain what injury would ensue. Upon the return of a favorable verdict, the proposed work was authorized by the king's license. Without such a writ and a favorable inquisition thereof, those who erected such purprestures did it at their

cised, subject to the limitation against the impairment of the public easement or servitude, by the owner of the adjacent land from the first settlement of the country to the present time.<sup>1</sup> Lawfully constructed wharves are considered to be an aid to commerce and navigation rather than an obstruction, and it is on this theory that many of the doctrines supporting the right to wharf out rest. This subject is intimately connected with the ownership of the soil under the water of the sea, lake, or navigable stream.<sup>2</sup> Rights pertaining to the soil covered by navigable waters differ in many of the states, consequently caution is necessary in applying the precedents in one state to cases arising in another.<sup>3</sup> Obviously the owner of land may erect a wharf on his own land subject to police regulations by the government. It is when a wharf projects out upon land owned by the state or held by the state's grantee, that authority must be found for the right to wharf out.<sup>4</sup> The right of the riparian owner to have access to the channel or navigable part of the adjacent water, and, by reason of general legislation or immemorial usage, to erect a wharf or pier for that purpose, subject to the rules and regulations prescribed by law for the protection of the public, has been recognized in a large number of cases,<sup>5</sup> and there is authority to the effect that for the deprivation of this right compensation must be made to the owner,<sup>6</sup> unless the right is lost resulting from improvements made by the government in aid of navigation. This latter doctrine has been denied.<sup>7</sup> A number of American cases sus-

peril, and took the risk of the structure being pronounced a nuisance or abated." *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258.

1. **Early Construction of Wharves in United States.** — *Leverich v. Mobile*, 110 Fed. Rep. 170; *Dutton v. Strong*, 1 Black (U. S.) 23; *Compton v. Hankins*, 90 Ala. 411, 24 Am. St. Rep. 823.

2. **Ownership of Soil.** — See generally the titles *LAKES AND PONDS*, vol. 18, p. 120; *NAVIGABLE WATERS*, vol. 21, p. 424; *RIPARIAN RIGHTS*, vol. 24, p. 978.

3. **Estoppel of State to Claim Wharf Lands.** — The fact that the statutes of a state and the ordinance of a city levy taxes on wharves, involves no matter of equitable estoppel against the state or city to assert whatever legal title either may have to the shore lots upon which the wharves are located. *Turner v. Mobile*, 135 Ala. 73.

3. **How the American Colonies Modified the Common Law** to suit their needs, both by custom and usage and by statute, is elaborately discussed by Mr. Justice Gray, in *Shively v. Bowlby*, 152 U. S. 1. His conclusion is that "there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

4. See *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.

5. **Right to Erect Wharves and Piers.** — See the titles *LAKES AND PONDS*, vol. 18, pp. 135, 136; *NAVIGABLE WATERS*, vol. 21, pp. 437, 438; and *RIPARIAN RIGHTS*, vol. 24, p. 970; and see the following cases: *Leverich v. Mobile*, 110 Fed. Rep. 170; *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186; *Lewis v. Johnson*, 1 Alaska 529; *White v. Nassau Trust Co.*, 168 N. Y.

149; *Montgomery v. Shaver*, 40 Oregon 244; *McCarthy v. Murphy*, 119 Wis. 159.

The right or privilege of constructing a wharf is a right appurtenant to the land. It is not personal to the shore owner, so that it must be exercised by him alone or not at all, but is the subject of grant, and may be severed from the upland. *Montgomery v. Shaver*, 40 Oregon 244.

The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incidental to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387.

**Parol License from Shore Owner.** — A parol license by the shore owner authorizing the owner of the upland to erect wharves may be revoked at the option of the shore owner, notwithstanding the fact that acts have been performed under the license. *Turner v. Mobile*, 135 Ala. 73.

**Proof of Title to Wharf.** — In an action for obstructing the use of a wharf the possession of the wharf by the defendant under color and with a claim of title is sufficient to put the plaintiff upon proof of a better title to the wharf, or at least of an equal right with the defendant to its use. *Linthicum v. Ray*, 9 Wall. (U. S.) 241.

6. **Right to Compensation.** — See the titles *NAVIGABLE WATERS*, vol. 21, p. 438; *EMINENT DOMAIN*, vol. 10, pp. 1129, 1130.

7. See title *NAVIGABLE WATERS*, vol. 21, p. 438.

taining the right of the riparian owner to wharf out are founded on the rule of the state extending the ownership of the riparian owner's property to the centre thread of the stream, and a large number of cases merely determine the riparian owner's right of access, and the right to wharf out was not in controversy. It has been squarely decided in this country that under the common law, unmodified by local usage, custom, or statute, a riparian owner has no right to build any structure on the submerged lands in front of his own land unless he owns such submerged lands or has a license to do so. The title of the owner of such submerged lands is not burdened with an easement in favor of the owner of the adjoining upland to build wharves out to navigable water.<sup>1</sup>

c. **EXTENT OF RIGHT**—(1) *In General*.—An interference with the right of navigation produced by a wharf or pier unlawfully erected into navigable waters may constitute a nuisance.<sup>2</sup> Where a structure, such as a pier or wharf, is unlawfully erected into navigable water, the person responsible for the obstruction may be liable in damages for an injury to a vessel that comes in contact with the obstruction.<sup>3</sup> Wharves, piers, and landing places erected in conformity to the regulations of law and which do not obstruct the paramount right of navigation are not nuisances, but are deemed to be material aids to commerce and navigation. Where no law or regulation has been violated in the erection of wharves, piers, and landing places, and these structures are confined to the shore, the presumption is that they do not constitute obstructions to navigation, and he who charges the contrary must prove it. A wharf is not a nuisance *per se*.<sup>4</sup> It is not enough that a city declares a wharf to be a nuisance when in fact it is not a nuisance and does not constitute an obstruction to navigation.<sup>5</sup> The subject of nuisances has been fully treated in a prior title of this work.<sup>6</sup>

(2) *Location in Navigable Water*.—Wharves, piers, and landing places are commonly allowed in a part of the water which can be used for navigation, on the ground that these structures are essential aids to navigation itself. To be of any value to commerce, wharves and piers used for the accommodation of vessels must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there.<sup>7</sup>

1. **Common-law Right in United States**.—*Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258; *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.

2. **Obstructions to Navigation—Nuisance**.—*Rex v. Grosvenor*, 2 Stark. 511, 3 E. C. L. 509. See also generally the title *NAVIGABLE WATERS*, vol. 21, p. 424; *NUISANCES*, vol. 21, p. 679.

The right to construct and use a wharf is subject to the paramount right of the public to navigate and use the river as a common highway, and can in no way interfere with such use of the river by the public. *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302.

In *Reg. v. Randall*, 1 C. & M. 496, 41 E. C. L. 272, the court left to the jury the question whether a wharf occasioned any hindrance to the navigation of the river by vessels of any description, and the jury was told not to consider whether the erection of the wharf had caused a benefit to the navigation in general.

3. **Injury to Vessel**.—In *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 389, it was held that where a pier, erected as a part of a boom for saw-logs for the riparian owner's exclusive use, projected out into the navigable waters of the Mississippi river, the owner was

liable for damages done to a vessel by striking the obstruction. Such a structure was held not to be within the category of aids to commerce and navigation such as are wharves and piers lawfully constructed.

4. **Wharf Not Nuisance Per Se**.—*Dutton v. Strong*, 1 Black (U. S.) 23; *People v. Davidson*, 30 Cal. 379. See also *Rex v. Russell*, 6 B. & C. 566, 13 E. C. L. 254.

Wharves are not necessarily nuisances, but may become such. They may extend too far into a narrow channel, so as to obstruct the free passage of vessels, or may become decayed or be the means of collecting filth. *Geiger v. Filor*, 8 Fla. 325; *Laughlin v. Lamasco City*, 6 Ind. 223.

**Right to Wharf Out Terminates at Point of Navigability**.—*Dutton v. Strong*, 1 Black (U. S.) 23.

In England it is generally held that wharf property may extend to low-water mark. In this country, to the point of navigability. *Clifford v. U. S.*, 34 Ct. Cl. 223.

5. **Power to Declare Wharf Nuisance**.—*Yates v. Milwaukee*, 10 Wall. (U. S.) 497.

6. See generally the title *NUISANCES*, vol. 21, p. 679.

7. **Necessity for Extending into Navigable**



(3) *Wharf Lines.* — In nearly all incorporated towns or cities located on navigable waters there is conferred by their charters or by some general statute of the state, either express or implied, power for the establishment and regulation of wharves, piers, and landings. This may be done by the legislature of the state, or by authority expressly or impliedly delegated to the local municipal government. In all such cases there is exercised a control over the location, erection, and use of the wharves and landings, which will prevent them from becoming obstructions to navigation and standing menaces of danger. The wharves or piers are generally located by lines bearing such a relation to the shore and to the navigable waters as to present no danger to vessels, and the control which the state exercises over them is such as to secure their usefulness and safety.<sup>1</sup>

**2. Erection by Government — *a.* UNITED STATES.** — It requires no citation of authority to the proposition that the United States has the power to construct and maintain wharves, piers, and docks which are necessary or convenient in the discharge of its powers and functions, such, for example, as the construction of wharves and docks for naval purposes. Under the authority vested in Congress over interstate and foreign commerce, which includes the power to prescribe the rules by which commerce is to be governed, and may comprehend navigation within the limits of the states, no doubt can exist as to the powers of the federal government to construct wharves and piers when these structures become necessary or convenient to the exercise of its functions and powers in respect to commerce and navigation.<sup>2</sup>

**Water.** — *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 389.

A wharf is a building which is always an encroachment on navigable water; because, unless its boundary wall were to extend beyond high-water mark, vessels could not approach and lay at it. *Wharf Case*, 3 Bland (Md.) 362.

"Water of sufficient depth to float vessels is an essential part of every wharf, a necessary incident thereof, or appurtenance thereto, without which there can be no wharf and no wharfage. Indeed, a wharf cannot be defined or conceived except in connection with adjacent navigable water." *Langdon v. New York*, 93 N. Y. 151.

Wharves, if they would subserve the only purpose for which they exist, must approach at least to the edge of that portion of the river that is practically navigable. The right to place and maintain them even beyond this point, provided they do not necessarily obstruct navigation, is a well-established incident to riparian title. *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644.

The existence of wharves does not necessarily make the water navigable. "Navigability cannot be affected by the conditions on the adjacent land, such as there being a large town or [on] the shore, with numerous streets and wharves." *State v. Twiford*, (N. Car. 1904) 48 S. E. Rep. 586.

**1. Wharf Lines.** — *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 389; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435; *Turner v. Mobile*, 135 Ala. 73; *Portland v. Montgomery*, 38 Oregon 215; *Com. v. Alger*, 7 Cush. (Mass.) 53.

The city of Albany in the state of New York was empowered at an early date to make by-laws to prevent the docks and slips and the

river opposite thereto from being in any way obstructed. *Hart v. Albany*, 9 Wend. (N. Y.) 571, *affirming* 3 Paige (N. Y.) 213.

**Who May Object to Lines.** — Under the *Pennsylvania* Act of April 6, 1850 (P. L. 371), which provided for the establishment of wharf lines on the Schuylkill river, it was held that only riparian owners could make objections before the court. *In re Port Warden's Line*, 13 Phila. (Pa.) 453, 36 Leg. Int. (Pa.) 320.

**2. Erection of Wharves by United States.** — As bearing on the power of the federal government to erect wharves, piers, and other structures, under its power over commerce and navigation, see *Scranton v. Wheeler*, 179 U. S. 141.

In *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, it is said, "We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

An appropriation of a water front for the purposes of wharfage to the United States can only be made by an act of Congress. *U. S. v. North-West Trading Co.*, 1 Alaska 5, *citing* *U. S. v. Fitzgerald*, 15 Pet. (U. S.) 407.

**Impairment of Usefulness of United States Wharves or Piers.** — Congress has enacted that it shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any wharf, pier, or other work built by the United States, nor remove for ballast or other purposes

*b. STATE.* — To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state, and through it, by the municipality which governs and controls the port. The standard by which to judge of the duty consists in the necessities of the business. If a permanent pier and an exclusive right to its use is a necessity for large steamship lines, without which business cannot be properly transacted, and in the absence of which the steamers will be sent to some other port, the duty rests with the state or municipality to furnish such quarters for a fair compensation, or else the state is bound to permit the steamship companies to obtain such accommodation from private owners.<sup>1</sup>

*c. MUNICIPALITY* — (1) *In General.* — The power to erect wharves and other artificial facilities on the banks of navigable rivers and to charge tolls for the use thereof, is a franchise which the municipality can only derive from legislative grant.<sup>2</sup> The power of erecting and maintaining wharves and charging wharfage for the use thereof is generally conferred on municipal corporations by their charters or by statutory enactments.<sup>3</sup>

(2) *Under Statutory Authority* — (a) *Power of Legislature to Authorize.* — The legislature of the state may relinquish its authority to provide for the erection

any stone or other material composing such works: Provided, That the secretary of war may, on the recommendation of the chief of engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest. 30 U. S. Stat. at L. 1152.

1. *State's Duty to Furnish Wharf Accommodation.* — *Matter of New York*, 135 N. Y. 253, 31 Am. St. Rep. 825.

2. *Power a Franchise* — *United States*. — *Pollard v. Hagan*, 3 How. (U. S.) 212; *New Orleans v. U. S.*, 10 Pet. (U. S.) 735; *Weber v. State Harbor Com'rs*, 18 Wall. (U. S.) 57; *The Geneva*, 16 Fed. Rep. 874.

*California.* — *People v. Broadway Wharf Co.*, 31 Cal. 34; *People v. Contra Costa County*, 122 Cal. 421.

*Louisiana.* — *First Municipality v. Pease*, 2 La. Ann. 538; *Carrollton R. Co. v. Winthrop*, 5 La. Ann. 36; *Worsley v. Second Municipality*, 9 Rob. (La.) 324, 41 Am. Dec. 333; *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293.

*Maryland.* — *Wharf Case*, 3 Bland (Md.) 383.

*New Jersey.* — *State v. Jersey City*, 25 N. J. L. 525.

*New York.* — *Wiswall v. Hall*, 3 Paige (N. Y.) 313.

*West Virginia.* — *Christie v. Malden*, 23 W. Va. 667.

*Private Wharf on Public Land.* — If a private person constructs a wharf upon land belonging to a city, he acquires no rights in it apart from what belong to the public at large, and in such an event possession of the wharf could be recovered by the city in ejectment, and afterwards used as the city thought expedient. *Northwestern Union Packet Co. v. Atlee*, 2 Dill. (U. S.) 479; *Walker v. State Harbor Com'rs*, 17 Wall. (U. S.) 648; *People v. Davidson*, 30 Cal. 379.

3. *Power of Municipalities to Erect.* — *Pollard v. Hagan*, 3 How. (U. S.) 212; *New Orleans*

*v. U. S.*, 10 Pet. (U. S.) 737; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *First Municipality v. Pease*, 2 La. Ann. 538; *Worsley v. Second Municipality*, 9 Rob. (La.) 324, 41 Am. Dec. 333.

*Particular Municipalities* — *New York*: For the rights and powers of the city of New York in respect to wharves, see *Hill v. New York*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 399; *Kingsland v. New York*, 110 N. Y. 569; *Williams v. New York*, 105 N. Y. 419; *Langdon v. New York*, 93 N. Y. 129; *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 448; *People v. Green*, 65 Barb. (N. Y.) 505; *People v. Mallory*, 2 Thomp. & C. (N. Y.) 76; *New York v. Huntington*, 114 N. Y. 631, 21 N. E. Rep. 998; *Hoeft v. Seaman*, 38 N. Y. Super. Ct. 62; *Bigler v. New York*, 9 Hun (N. Y.) 253; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90; *The Craigendoran*, 31 Fed. Rep. 87; *Crocker v. New York*, 15 Fed. Rep. 405.

For powers of the corporation, under various statutes, to construct and extend piers abutting on the wharf or street called "South street," or to require proprietors of adjacent lots to do so, and rights to wharfage, see *Marshall v. Guion*, 4 Den. (N. Y.) 581; *New York v. Whitney*, 7 Barb. (N. Y.) 485; *Thompson v. New York*, 3 Sandf. (N. Y.) 487; *Murray v. Sharp*, 1 Bosw. (N. Y.) 539.

*Brooklyn*: *Brooklyn v. New York Ferry Co.*, 87 N. Y. 204; *Atlantic Dock Co. v. Brooklyn*, 1 Abb. App. Dec. (N. Y.) 24.

*New Orleans*: *The Lizzie E.*, 30 Fed. Rep. 876; *Silver v. Tobin*, 28 Fed. Rep. 545; *New Orleans v. Wilmot*, 31 La. Ann. 65; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166.

*Baltimore*: *Hazlehurst v. Baltimore*, 37 Md. 199.

For a Full Discussion of the powers of municipal corporations, see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1123 *et seq.*

*Title to Wharves Vested in Commissioners by Pennsylvania Act of March 16, 1819.* — *Spring Garden v. Northern Liberties*, 1 Whart. (Pa.) 25.

and maintenance of public wharves and the regulation of charges for their use by delegating it to municipal corporations,<sup>1</sup> subject to the provisions of the Constitution of the *United States* and the acts of the national legislature regulating interstate commerce.<sup>2</sup> And the legislature may of its own will impose this duty upon a municipality without the consent to, or acceptance by, the municipality of the grant, even though the exercise of the powers and duties involves the outlay of money.<sup>3</sup> Such restrictions upon the exercise of this power may be imposed by the legislature in granting it as it may see fit.<sup>4</sup>

(b) **Extent of Powers** — *aa. IN GENERAL.* — The powers of a municipal corporation with regard to the erection and maintenance of wharves and the regulation of wharfage are, as a general rule, dependent upon legislative authority and are confined within the limits imposed by the statute or charter granting them.<sup>5</sup> A general grant of authority to build and maintain wharves, piers,

**1. Power of Legislature.** — The *Geneva*, 16 Fed. Rep. 874; *Mobile v. Moog*, 53 Ala. 561; *New Orleans v. New Orleans*, etc., R. Co., 112 La. 1011; *Corpus Christi v. Central Wharf*, etc., Co., 8 Tex. Civ. App. 94; *Farnum v. Johnson*, 62 Wis. 620. See also *Galveston v. Menard*, 23 Tex. 349.

**On Navigable Rivers.** — Cities, when authorized by the legislature, may build wharves on streets bordering on the Mississippi river and make other improvements thereon. *Barney v. Keokuk*, 94 U. S. 324; *Illinois*, etc., R., etc., Co. v. St. Louis, 2 Dill. (U. S.) 70.

"In the litigation arising in towns on the Mississippi and Ohio rivers, questions relating to the dedication and use of the river bank or front as a landing for the convenience of river commerce have been considered and decided on the theory that a dedication of such ground to public use implies and vests in the public a right to use the same as a highway, quay, landing, or levee, without any grantee being named or in existence; and that the legislature, as the representative of the general public, may regulate such use, and promote the same by the improvement of the premises, directly or through the agency of the corporation within whose limits the same are situated." *Coffin v. Portland*, 27 Fed. Rep. 412.

**On Private Property.** — That a municipal corporation may be authorized to establish a public wharf upon private property on making compensation to the owner of the land, see *Waddingham v. St. Louis*, 14 Mo. 190; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Page v. Baltimore*, 34 Md. 558; *State v. Jersey City*, 34 N. J. L. 390.

**Grant of Exclusive Right.** — It is competent for the legislature to confer on municipal corporations, in aid of the navigation of the river, the exclusive right to construct wharves within their corporate limits between ordinary high-water mark and low-water mark without compensation to the adjacent lot owner for the land so taken for that purpose. *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485.

A grant of a right to erect a public toll wharf is not a contravention of the *Mississippi* Constitution, art. 1, § 1, which provides that no one shall have exclusive public emoluments or privileges from the community but in con-

sideration of public service; such a grant is presumed to be for the public good. *Martin v. O'Brien*, 34 Miss. 21.

**2. Cooley v. Philadelphia**, 12 How. (U. S.) 299; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Cisco v. Roberts*, 36 N. Y. 292; *New Orleans v. Ship Martha J. Ward*, 14 La. Ann. 289; *New Orleans v. Prats*, 10 Rob. (La.) 459; *Chapman v. Miller*, 2 Spears L. (S. Car.) 769; *Com. v. Alger*, 7 Cush. (Mass.) 82; *Jeffersonville v. Steam Ferryboat John Shallcross*, 35 Ind. 19; *Mobile Harbormaster*, etc. v. *Southernland*, 47 Ala. 511. See *infra*, this section, *Powers as to Wharfage Charges*.

**Below Low-water Mark.** — A state government may authorize the construction of wharves on navigable streams, within its own territorial limits, even below low-water mark, where the power of Congress has not been exercised in the premises. *Savannah v. State*, 4 Ga. 26.

**3. Easton, etc., R. Co. v. *Central R. Co.*, 52 N. J. L. 267.**

**4. Weber v. State Harbor Com'rs**, 18 Wall. (U. S.) 57; *New Orleans*, etc., R. Co. v. *Ellerman*, 105 U. S. 166; *Mobile v. Moog*, 53 Ala. 561; *Baltimore v. White*, 2 Gill (Md.) 444; *Wilson v. Inloes*, 11 Gill & J. (Md.) 351; *Waddingham v. St. Louis*, 14 Mo. 190; *Fuller v. Edings*, 11 Rich. L. (S. Car.) 239; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485.

**5. Extent of Powers** — *United States*. — *Illinois*, etc., R., etc., Co. v. *St. Louis*, 2 Dill. (U. S.) 70; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *New Orleans*, etc., R. Co. v. *Ellerman*, 105 U. S. 166; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672; *The Geneva*, 16 Fed. Rep. 874; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90; *Chester v. Hagan*, 116 Fed. Rep. 223; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80.

*Alabama*. — *Webb v. Demopolis*, 95 Ala. 116; *Mobile v. Moog*, 53 Ala. 561.

*California*. — *People v. Broadway Wharf Co.*, 31 Cal. 34; *San Pedro v. Southern Pac. R. Co.*, 101 Cal. 333.

*Indiana*. — *Snyder v. Rockport*, 6 Ind. 237; *Jeffersonville v. Steam Ferryboat John Shallcross*, 35 Ind. 19.

*Iowa*. — *Muscatine v. Hershey*, 18 Iowa 39; *Dubuque v. Stout*, 32 Iowa 80, 7 Am. Rep. 171; *Keokuk v. Keokuk Northern Line Packet Co.*,



and slips along the water front of the city, carries with it the right to occupy and possess the lands of the state under water, as far as is necessary for the construction and maintenance of the wharves.<sup>1</sup> Such a grant also implies a right of approach for vessels over the land of the state lying under the water in front of the wharf.<sup>2</sup> Where the city is given by the terms of its charter exclusive authority to establish and regulate wharves and docks within the city, to regulate wharfage and the stationary anchorage and mooring of all boats landing within the city limits, as a necessary part of the exercise of this power it may prohibit the establishment of other wharves or landings; prohibit the landing of boats and rafts at any other places than those prescribed in the regulations made by the city council. These are necessary police powers, which are conferred on the city for the proper conduct of commercial intercourse. Under this power it may forbid a person owning a lot abutting upon the water, and upon which no wharf or public landing has been established, from using such lot as a wharf or landing without the permission of

45 Iowa 196; *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

*Kentucky.*—*Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

*Louisiana.*—*First Municipality v. Pease*, 2 La. Ann. 538; *Carrollton R. Co. v. Winthrop*, 5 La. Ann. 36; *Ellerman v. McMains*, 30 La. Ann. 190, 31 Am. Rep. 218; *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293; *New Orleans v. New Orleans, etc.*, R. Co., 112 La. 1011.

*Maryland.*—*Wharf Case*, 3 Bland (Md.) 361.

*Missouri.*—*St. Louis v. Shields*, 52 Mo. 351; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

*New Jersey.*—*State v. Jersey City*, 25 N. J. L. 525.

*New York.*—*Wiswall v. Hall*, 3 Paige (N. Y.) 313.

*Texas.*—*Corpus Christi v. Central Wharf, etc.*, Co., 8 Tex. Civ. App. 94.

*West Virginia.*—*Christie v. Malden*, 23 W. Va. 667.

*Wisconsin.*—*Farnum v. Johnson*, 62 Wis. 620.

Under the second section of the Act of April, 1806, providing that in all cases where "the mayor, aldermen, and commonalty of the city of New York shall think it for the public good to enlarge any of the slips in the said city, they shall be at liberty and have full power so to do, and upon paying one-third of the expenses of building the necessary piers and bridges, shall be entitled not only to the slipage of that side of the said piers which shall be adjacent to such slips respectively, but also to one-half of the wharfage to arise from the outermost end of the said piers," the corporation has the power to erect piers, and to extend them into the river, for the purpose of enlarging the slips. *Thompson v. New York*, 3 Sandf. (N. Y.) 487, affirmed 11 N. Y. 115.

**Power to Alter or Extend.**—"The charter of the city, passed in 1851, grants the power to the city authorities 'to erect, repair, and regulate public wharves and docks,' and the amended charter of 1860-1 declares, 'when it shall become necessary to take private property for opening, widening, or altering any public street, lane, avenue, alley, wharf or square, the

mayor shall cause certain proceedings,' etc. It is insisted, that the power to erect does not *ex vi termini* include a power to establish; and if it does, it does not include a power to extend a wharf already established. We cannot perceive the force of this nice discrimination. It is clear that the legislature in 1861 understood the previous charter as granting the power 'to open, widen, or alter public wharves,' and made provision for exercising this power. A power to alter a wharf would seem to mean a power to extend it or diminish it." *Hannibal v. Winchell*, 54 Mo. 172.

**Land Which May Be Acquired.**—"The power of the board of aldermen of Jersey City to acquire lands whereon to build wharves, which shall be the property of the city, is that granted by the twelfth subdivision of the fifty-fifth section of the charter of 1870, and (except in that part of the city south of Grand street) is restricted to lands lying at the termination of streets. The powers contained in the eleventh subdivision of the same section are simply such as enable the board of aldermen to prescribe rules and regulations for the construction and use of wharves which are built by private owners on their own lands." *State v. Jersey City*, 34 N. J. L. 390.

**Wharf Line.**—The effect of the Act of 1857 (c. 763, Laws of 1857), which moved the wharf or bulkhead line on the Hudson river front further into the stream to what is known as "the harbor commissioners' line," was to give to the city, under its general right of building wharves, authority to locate them upon the land of the state under water at the new line, with the right to fill up and occupy the space up to the new line. The establishment of the new line, therefore, carried with it a surrender by the state to the city or its grantees or the upland owners, of its land under water behind the new wharves, whenever they should be constructed and the said land filled up. *Williams v. New York*, 105 N. Y. 419.

**Powers of Commissioners of Port of New Orleans under Act No. 70 of 1896.**—*Fleitas v. New Orleans*, 51 La. Ann. 1.

**1. Lands under Water.**—*Williams v. New York*, 105 N. Y. 419.

**2. Right of Approach.**—*Langdon v. New York*, 93 N. Y. 129; *Williams v. New York*, 105 N. Y. 419.

the city.<sup>1</sup> But where the grant merely authorizes the city to maintain and operate wharves on any lands bordering on any navigable bay within the corporate limits of the city or contiguous thereto, the authority so given does not clothe the city with an absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others. By such a grant it is intended to confer upon the city the same authority to do the acts therein enumerated which a natural person would possess, and to give to its acts a sanction which they would not otherwise have. The authority so given does not authorize it to prevent the erection of a wharf by another person who has a right to do so, or who does not infringe upon any of the rights of municipality.<sup>2</sup>

**A General Power to Regulate, Lay Out, and Ordain Streets, lanes, and alleys, and to exercise all other needful jurisdiction over them does not, it seems, authorize the construction of wharves by the city.**<sup>3</sup>

**Contract for Free Wharf.** — Where the declared object of the provisions of the charter under which the city is authorized to erect and maintain or acquire wharves and to lay and collect wharf charges for the use thereof is for the purpose of raising a revenue on such wharves, the city cannot enter into a contract for the acquisition of an existing wharf whereby it binds itself that the use of the wharf so acquired shall be free.<sup>4</sup>

**bb. POWER TO CONDEMN PRIVATE PROPERTY.** — The authority to erect wharves includes the power to condemn private property for that purpose, upon making proper compensation to the owner, and also the power to extend or diminish those already in existence.<sup>5</sup>

**Condemnation of an Existing Wharf** is not authorized by a statute which confers power on the city to establish and construct a wharf.<sup>6</sup>

**Exercise of Power.** — Where by statute the authority and discretion of determining the quantity of land required by the public for wharf purposes are vested in the municipality the action of the municipality in entering upon private property for this purpose is final where it acts in good faith and the property so taken is intended to be used for the purposes for which appropriated.<sup>7</sup>

**1. Prohibiting Other Wharves.** — *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196.

"Where the city, pursuant to its charter, has provided wharves and designated the uses to which they shall be appropriated, it is very clear, upon both principle and authority, that it may require all boats, rafts, lumber, and merchandise to be landed there and collect reasonable wharfage therefor, or if landed elsewhere, even on the premises of the owner, may require the payment of the same, or other reasonable wharfage from such owner. The right to prohibit the use of other places as wharves, and to collect wharfage if boats, rafts, etc., are landed there, is essential and necessary in order to the beneficial enjoyment of the power to provide wharves and fix the rate of wharfage. The right of the owner of property within a city, to use it for any purpose he pleases is necessarily subordinate to the public interest, and to the exercise of the rightfully granted municipal authority." *Dubuque v. Stout*, 32 Iowa 47.

"A municipality situated on such a river may prohibit the use for landing or mooring purposes of the banks of the river at any other place than where such wharves or landings are constructed. *Cincinnati, etc., Packet Co. v.*

*Catlettsburg*, 105 U. S. 599." *The Lizzie E.*, 30 Fed. Rep. 876.

**2.** *San Pedro v. Southern Pac. R. Co.*, 101 Cal. 333.

**Exclusive Grant Not Presumed.** — Unless clearly intended, no exclusive right of wharfage passes as incident to a grant, by the state, of land under water, below high-water mark, in a harbor or navigable stream. *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90. See also *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

**3.** *The Geneva*, 16 Fed. Rep. 874; *Snyder v. Rockport*, 6 Ind. 237.

**4.** *Mobile v. Moog*, 53 Ala. 561.

**5. Condemnation.** — *Hannibal v. Winchell*, 54 Mo. 172.

**Property of Public Corporation.** — The power of condemnation may be exercised over property of a corporation authorized to hold its property exempt from condemnation where the lands so condemned by the city are held by the corporation for uses and purposes for which it is not by law authorized to condemn private property. *Iron R. Co. v. Ironton*, 19 Ohio St. 290.

**6. Existing Wharf.** — *Madison v. Daley*, 58 Fed. Rep. 751.

**7. Exercise of Power.** — *Iron R. Co. v. Ironton*, 19 Ohio St. 290.

**Using Property for Other Purposes.** — The city cannot, however, condemn private property for use as a wharf, and use it for any other purpose.<sup>1</sup>

**Compensation.** A private wharf erected upon land within the limits of a municipal corporation, but not dedicated to the public, cannot be taken by the city without compensation, nor can the authorities collect wharfage at the same. Such right is not conferred by a clause in the city charter authorizing the city to regulate the erection and repair of private wharves and the rate of wharfage thereat.<sup>2</sup> Where a city government has authority and proposes to erect a wharf for public convenience, it is not bound to accept the offer of the owners of the land on which it is proposed to erect it, to build the wharf at their own expense, to be under the control of the city.<sup>3</sup>

**cc. POWER TO ACQUIRE BY PURCHASE.** — Where by statute the city is authorized to acquire, by agreement or condemnation, any rights, terms, easements, and privileges pertaining to any wharf not already owned by the city, it may acquire by purchase from a person his right and interest in an existing wharf in which it already has certain interests and privileges.<sup>4</sup>

**Land Outside of Corporate Limits.** — Though among the enumerated charter powers of a city, no express power is conferred upon the city to purchase, hold, or receive land for wharf purposes beyond its corporate limits; and while it is true that the city, in that regard, must act within the express or implied authorization of its charter, yet where it has a general authority under statute

**1. Use for Different Purpose.** — In *Illinois, etc., R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70, the court, by Dillon, J., said: "A wharf differs in many material respects from a street. The latter is primarily intended for the purposes of passage or travel, and any erection in it, without legislative authority, is a nuisance; but a wharf is intended to afford convenience for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which the wares discharged from vessels or awaiting shipment may be laid or deposited; and it would seem that structures or appliances of any kind intended, and which have the effect to facilitate the handling and preservation of merchandise arriving at the wharf, erected upon it under municipal authority, and remaining at all times subject to municipal control, would be lawful and within the purposes for which the wharf property was acquired or dedicated. We do not say that the municipal authorities could use the wharf property for mere warehouse purposes, though we have no doubt that it would be competent for them to erect, or authorize the erection thereon, of such structures, for the receipt and shipment of goods by water, as they might deem expedient in order to promote the trade and commerce of the city. And we are clearly of opinion that the erection, under the sanction of the city, of an elevator to be used in handling grain at the wharf, and at all times under the direction and control of the municipal authorities, is such a use of wharf property as does not fall without the scope of dedication, and such a structure would not, therefore, be a public nuisance."

**Erecting Warehouse on Wharf.** — In *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 10 Mo. App. 401, the court held that a city which had condemned property for use as a wharf, under legislative authority, might have, for a limited time, a portion thereof for the erection of an elevator warehouse; but on appeal to the Supreme Court, in *Belcher Sugar*

*Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121, the court held that while the city, in order to meet the demands of commerce and the changed methods of handling grain, might license the erection of elevators and warehouses to be used in connection with the wharves without violating the rights of the owners of the land, it had no right to lease any portion of it for a term of years without a reservation of the right to cancel the lease — that without such a reservation it was but a lease of a portion of land condemned solely for public use for wharf purposes, for the private use and private gain of the lessee.

**2. Compensation.** — *Grant v. Davenport*, 18 Iowa 179.

Where the owner of a plantation owned a private wharf which yielded him a considerable income, and the legislature authorized a public wharf to be made near the private one, on the same plantation, and directed the appointment of commissioners to estimate the amount of compensation which should be made to the owner "for the value of the premises taken for public use, as well as for the damages generally to the same," the owner is not entitled to compensation for the damages he may sustain for the loss of income from his private wharf. *Fuller v. Edings*, 11 Rich. L. (S. Car.) 239.

In *Steers v. Brooklyn*, 101 N. Y. 51, the plaintiff owned the fee of the street extending to the river. He constructed a wharf on the water line and had the right to collect wharfage. The city, without his consent, built a pier at the end of the street, shutting the plaintiff's wharf off from the water. The court held that the pier belonged to the plaintiff by accretion, and that the city must account to him for all wharfage collected, without allowing expense of collecting the same.

**3. Waddingham v. St. Louis**, 14 Mo. 190.

**4. Purchase.** — *Bell v. New York*, 77 N. Y. App. Div. 437.



to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited by its charter, and no express restriction is found in the charter against the purchase of real estate for wharf purposes, it would seem that the city, under its general statutory power, can receive and hold property beyond its corporate limits within the limit fixed by its charter, and essentially necessary for the purpose of carrying out one of its proper corporate functions and duties, as the establishment, construction, and maintenance of a general wharf system along its water front.<sup>1</sup>

*dd. POWER TO LEASE.* — A city authorized by its charter to erect wharves on its own property, to obtain control over other wharves in the city, and to raise revenue therefrom, has no power to take a lease of a wharf containing a provision that it should be kept as a free wharf.<sup>2</sup>

(c) *Delegation of Power.* — Where the only powers delegated to the city by the legislature in respect to wharves are to erect, repair, and regulate them, to pass ordinances to promote the welfare, commerce, and trade of the city, these are public or legislative powers incapable, in their nature, of delegation or of surrender by the municipality.<sup>3</sup> It is true that a city may do by agent many things which it is empowered to perform. In order to build and operate the wharves, piers, etc., and do other things specified in its charter, it may employ agents. But without express authorization from the legislature it cannot surrender the exercise of the powers granted to it into the unrestricted control of any person, and thus abandon the discretion which it is expected at all times to employ.<sup>4</sup>

(d) *Revocation of Power.* — The powers of municipal corporations with regard to the erection and maintenance of wharves and the regulation of wharfage being derived from the legislature are subject at any time to revocation by the same body, provided this revocation does not apply to any property of the municipality actually acquired in the course of administration. So, notwithstanding the legislature has granted to a city the right to erect and maintain wharves and to collect wharfage therefor, the legislature may lawfully grant to a railroad company a portion of the water front for its own wharf purposes, free from the control of the city.<sup>5</sup>

1. *Land Not in Limits.*—Hafner v. St. Louis, 161 Mo. 34.

2. *Lease.*—Mobile v. Moog, 53 Ala. 561.

3. *Power Not Capable of Delegation.*—Illinois, etc., R., etc., Co. v. St. Louis, 2 Dill. (U. S.) 70; Dingman v. People, 51 Ill. 277; Brimmer v. Boston, 102 Mass. 19; Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; Jackson v. Bowman, 39 Miss. 671; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; New York v. Cunard Steamship Co., 61 Hun (N. Y.) 346; Johnson v. Philadelphia, 60 Pa. St. 445.

A board of trustees of a city gave the defendants the exclusive privilege of laying out, establishing, and constructing wharves, etc., in the city for a term of thirty-seven years. It was held that the ordinance under which the grant was made was void as being a transfer of the corporate powers of the board, and that the powers delegated by the government to municipal corporations were trusts not subject to be delegated by the corporations. Oakland v. Carpentier, 13 Cal. 540.

*Time of Surrender Immaterial.*—"An attempt to surrender the control over a street or public wharf for fifty years is just as objectionable in principle as where the surrender is without

limit as to time. The principle is, indeed, the same." Illinois, etc., R., etc., Co. v. St. Louis, 2 Dill. (U. S.) 70. Compare Doe v. Jones, 11 Ala. 63, in which case it was said: "But conceding that the fee of the soil appropriated to the street is vested in the plaintiffs, and it may be asked if it was not competent for the corporate authorities of Mobile to have erected a wharf or other convenience for the mooring or anchorage of vessels at the eastern terminus of the street. If the corporation could have done this, and demanded wharfage or other kindred charges, what inhibition is there either in law or reason to prevent it from leasing to an individual the privilege of erecting a wharf with a license to receive these charges upon the payment of a yearly rent to the corporation?"

4. *Corpus Christi v. Central Wharf, etc., Co.*, 8 Tex. Civ. App. 94.

Wharves may be constructed by a city either by direct construction on its own part or by contract with others, giving them the revenue for a period of time to compensate for the erection. Geiger v. Filor, 8 Fla. 325.

5. *Revocation.*—New Orleans, etc., R. Co. v. Ellerman, 105 U. S. 166. See also New Orleans v. New Orleans, etc., R. Co., 112 La. 1011. Compare Ellerman v. McMains, 30 La. Ann.

(3) *In Absence of Statutory Authority* — (a) **Rights as Riparian Owner.** — But where a municipal corporation is a riparian owner, it seems that in the absence of charter or statutory prohibition it may erect a wharf and collect wharfage from those landing goods there, just as any other proprietor of a private wharf.<sup>1</sup>

(b) **Extension of Streets.** — The city may improve, ornament, and grade its streets for public convenience, either by enlargement or extension, and with a view to public accommodation may erect at their termini suitable wharves or landings.<sup>2</sup> Also, when one of its streets, as laid off and dedicated to the public by the original proprietors of the land, extends along the margin of the river through its limits, the city necessarily has the implied right to construct suitable and convenient approaches to the water line, and to make structures or excavations even beyond the water line, such as are reasonably necessary and proper to enable the public to avail themselves of the rights of commerce and transportation afforded by the river.<sup>3</sup> It has been stated that

190, 31 Am. Rep. 218, in which case it was said that where a municipal corporation, under the express authority of an act of the legislature, is clothed with the exclusive right to collect wharfage rates from all vessels that shall make use of its wharves, the right is a vested right, and cannot be abrogated or impaired by any subsequent act of the legislature.

**Right Not Vested.** — It was held that the power given to a city to erect, repair, and regulate public wharves, to regulate the erection and repairs of private wharves, and to fix the rate of wharfage, did not vest in the city any property interest in the wharves. *People v. Broadway Wharf Co.*, 31 Cal. 33.

**Under Its Power to Alter or Repeal Acts** giving powers to municipal corporations, where the language of the act does not show that it has parted with that power, the legislature may repeal a statute authorizing a municipality to collect wharfage, and such a statute will not be held unconstitutional as an impairment of contract obligations. This is true, even though in pursuance of authority conferred by the statute, the city has made loans and issued bonds, for the payment of which, under the terms of the statute, the wharfage was set apart. *St. Louis v. Shields*, 52 Mo. 351.

**1. Rights as Riparian Owner.** — *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, affirming 33 Fed. Rep. 730; *The Geneva*, 16 Fed. Rep. 874; *The Lizzie E.*, 30 Fed. Rep. 876; *Ex p. Easton*, 95 U. S. 68; *Sheperd v. Third Municipality*, 6 Rob. (La.) 349, 41 Am. Dec. 269; *Com. v. Roxbury*, 9 Gray (Mass.) 519.

"It is further urged, that the city council has no right to collect toll at this wharf, because there is no provision in its charter authorizing it to do so. We infer from the deed found in the record leasing this wharf to those under whom the defendant claims, that the title to the wharf is in the city, and such being the fact, it had the same right as any other proprietor, to collect wharfage from those landing goods there. This right, resulting from its proprietary interest, is not a franchise, but a right of property. It is true, that as this is a matter which affects the public, the legislature may

regulate its exercise, by declaring what tolls or wharfage an individual shall be allowed to receive; but this does not make the right a franchise, but is merely a restraint upon the exercise of one of the rights of property." *Murphy v. Montgomery*, 11 Ala. 586.

**2. Street Extensions.** — *Russell v. The Brig Empire State*, Newb. Adm. 541, 21 Fed. Cas. No. 12,145; *Barney v. Baltimore*, 1 Hughes (U. S.) 118; *New Orleans v. U. S.*, 10 Pet. (U. S.) 717; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672; *Webb v. Demopolis*, 95 Ala. 116; *Shirley v. Benicia*, 118 Cal. 344; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *Dugan v. Baltimore*, 5 Gill & J. (Md.) 357; *McMurray v. Baltimore*, 54 Md. 103; *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447; *Kemp v. Stradley*, (Mich. 1903) 97 N. W. Rep. 41; *Newark Line, etc., Mfg. Co. v. Newark*, 15 N. J. Eq. 65.

"The corporation will not be restrained from grading main street simply because, if that street is graded, the river end of it will accidentally be a wharf. The corporation has the right to improve that street, to grade it down to the river, to dispose of the surplus earth, etc., and, if in doing all this in a manner pointed out by law, a wharf or steamboat landing results, we should suppose it perfectly legal and a peculiarly fortunate incident to the town." *Snyder v. Rockport*, 6 Ind. 237.

When a city has acquired the right of extending streets over the flats to the channel, it has the like right to erect wharves in front of the streets. *Galveston v. Menard*, 23 Tex. 349.

**Filling Slips.** — Although the Acts of 1798 and 1813, giving to the city of New York the right to lay out and complete a street or wharf of the width of seventy feet, in front of those parts of the city adjoining the East river, give no right, in express terms, to fill up a slip beyond the then existing boundary of the city, yet the city has a general right to fill up slips; and is not guilty of an illegal assumption of power if the result of the exercise of such a right is the making of a street of the width authorized by statute. *New York v. Whitney*, 7 Barb. (N. Y.) 485.

**3. Potomac Steamboat Co. v. Upper Potomac Steamboat Co.**, 109 U. S. 672; *Webb v. Demopolis*, 95 Ala. 116; *Rowan v. Portland*, 8 B.

this right to create a wharf by the extension of a street does not exist where the fee within the lines of the street is in a private owner.<sup>1</sup> But according to other authorities, the right of a city to erect wharves under such circumstances is not affected by the question whether the street has been regularly opened and condemned as a highway, or its use as such has been acquired by dedication;<sup>2</sup> and it is unimportant with regard to the exercise of this right whether the law of the state does or does not recognize in the bank owner a title to the land under the water to the middle of the stream.<sup>3</sup>

(4) *Powers as to Wharfage Charges* — (a) *In General.* — The ultimate control over the use of public places, such as wharves, being in the legislature, and the only powers in this respect possessed by the city being, as has been seen, derivative and resting upon legislative grant,<sup>4</sup> and the privilege granted by the legislature to a municipal corporation of collecting wharfage for the use of its wharves being in derogation of common right, the municipality claiming it must show a plain legislative grant of the franchise.<sup>5</sup>

**A Grant of Power to Create and Regulate Streets** and alleys, to exercise all other needful jurisdiction over them, and to make ordinances and regulations for the good order and government of the borough, which are consistent with the general laws, does not by implication confer on a city the right to charge wharfage for the use of wharves erected by it.<sup>6</sup>

**Grant of Power Constitutional.** — It is well settled that a city or town does not infringe the constitutional provisions concerning tonnage taxes and the regulation of commerce where it exacts a reasonable compensation for facilities afforded to vessels by wharves constructed and maintained by it on its navigable waters.<sup>7</sup>

(b) *Facilities Must Be Provided.* — The right to collect wharfage must follow and not precede the establishing of wharves. The sole ground of the right of the city to collect wharfage is that it is a reasonable compensation which the city is allowed by law to charge for the actual use of wharf facilities and like structures provided at its expense for the convenience of vessels engaged in navigation. Even though the charter or statute authorizes the city to build wharves and regulate wharfage the city cannot collect wharfage at a point where it had provided no wharf facilities.<sup>8</sup>

Mon. (Ky.) 232; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

**1. Ownership of Fee.** — *People v. Pacific Rolling Mills Co.*, 60 Cal. 323; *People v. San Francisco Gas Light Co.*, 60 Cal. 349; *In re Cramp*, 13 Phila. (Pa.) 16, 36 Leg. Int. (Pa.) 284.

**Right of Adjoining Proprietor.** — Where a city constructed a wharf at the end of a dedicated street leading to the water, it was held that the adjoining proprietor was not the owner of the wharf and could not eject the city therefrom. *Doe v. Jones*, 11 Ala. 63.

**2. Barney v. Baltimore**, 1 Hughes (U. S.) 118; *McMurray v. Baltimore*, 54 Md. 103. See also *Dugan v. Baltimore*, 5 Gill & J. (Md.) 375; *Haight v. Keokuk*, 4 Iowa 199; *Barney v. Keokuk*, 94 U. S. 324.

**Land Dedicated as Common.** — Where a proprietor of lands laid out a town on a navigable river, and dedicated the land along it for a common, it was held that the town authorities had thereby the right to build wharves upon it. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

**3. Backus v. Detroit**, 49 Mich. 110, 43 Am. Rep. 447.

**4. Power to Charge Wharfage.** — Illinois, etc., R., etc., Co. v. St. Louis, 2 Dill. (U. S.) 70. See also *supra*, this section, *Erection by Govern-*

*ment* — *Municipality* — *Under Statutory Authority.*

**5. Proof of Grant Essential.** — *The Geneva*, 16 Fed. Rep. 874; *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293.

**6.** *The Geneva*, 16 Fed. Rep. 874.

**7.** See *infra*, this title, VII. 1. b. (4) *Wharfage Not Duty of Tonnage.*

**8. Charge Must Be for Wharf Facilities** — *United States.* — *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Guy v. Baltimore*, 100 U. S. 434; *Vicksburg v. Tobin*, 100 U. S. 430; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166; *The Lizzie E.*, 30 Fed. Rep. 876; *Leathers v. Aiken*, 9 Fed. Rep. 679.

*Iowa.* — *Dubuque v. Stout*, 32 Iowa 47.

*Louisiana.* — *First Municipality v. Pease*, 2 La. Ann. 538; *New Orleans v. Wilmot*, 31 La. Ann. 65; *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293; *Shreveport v. Red River, etc., Line*, 37 La. Ann. 562, 55 Am. Rep. 504.

*Missouri.* — *Cape Girardeau v. Campbell*, 26 Mo. App. 12.



**Insufficiency of Facilities.** — But where a municipal corporation is authorized by law to establish, improve, and regulate a wharf, and to collect from boats using it a moderate wharfage to defray the expenses incurred, and has accordingly expended money in such improvement, one using the wharf may not resist payment of wharfage on the ground that it had not been well built, or that it needed further improvement.<sup>1</sup>

(c) **Intention to Charge Not Presumed.** — As cities are incorporated for the promotion of the public good, the erection of a wharf will be presumed to be for the benefit of the public; and, in the absence of any express intention to require compensation for the use of its wharves, the presumption is that none was intended.<sup>2</sup> But it will not be presumed, because the city has merely abstained from control of the wharf that it has dedicated it thereby to any other public use.<sup>3</sup>

**Wharf on Public Land.** — It would seem that the city may charge wharfage for the use of a wharf erected on land dedicated to the public by the proprietor.<sup>4</sup>

"The city could not collect wharfage for the use of the unimproved shore of the river, or for that which was not, in any fair business sense, a wharf." *Vicksburg v. Tobin*, 100 U. S. 430.

"In all the cases in which the existence of such powers in municipal corporations has been recognized, it will be found that the legislative authority has been express and unequivocal, and that the power to erect wharves or provide other artificial facilities, and the power to charge fees or tolls for the use thereof, are conferred together and in such connection as to make the right to charge the fees entirely contingent upon the duty of providing and maintaining the artificial facilities referred to." *St. Martinsville v. Steamer Mary Lewis*, 32 La. Ann. 1293. Compare *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196, in which case it was said: "But it is claimed the ordinances in the case before us are void because they provide for wharfage fees where boats are not moored to a wharf; that all the river bank within the city is declared to be wharves, and the city cannot exact compensation from vessels that land at the bank where no wharves have been constructed. There are two answers to this objection. The first is that under *The City of Dubuque v. Stout*, 32 Iowa 80, the city may control the landing of vessels, fixing places by ordinance or otherwise where they shall receive and discharge freight and passengers. The ordinances in these cases are intended to have the effect of preventing boats, in order to escape charges lawfully made for the use of a wharf, from discharging and receiving freight at places where no wharves have been constructed, which would be to the inconvenience and loss of shippers and consignees." See also *Muscataine v. Hershey*, 18 Iowa 39.

**Charges for Facilities to Be Provided in the Future.** — "No charges can be made on vessels landing at wharves of a municipal corporation for facilities not furnished. The commerce of this year cannot be taxed to furnish facilities for the next year. It is immaterial what disposition is made of the funds collected, except as showing what the collection is based on. No charges can be made on the promise to furnish facilities to commerce." *Leathers v. Aiken*, 9 Fed. Rep. 670.

**1. Want of Repair No Defense to Liability.** — *Jeffersonville v. Louisville, etc., Steam Ferry*

*Co.*, 27 Ind. 100, 89 Am. Dec. 495; *Jeffersonville v. Steam Ferry Boat John Shallcross*, 35 Ind. 19; *Prescott v. Duquesne*, 48 Pa. St. 118.

**2. No Presumption of Intent to Charge.** — *Muscataine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

Authority given by the charter to control the landing on a river and build wharves and regulate the landing and wharfage of all water craft, and an ordinance enacted in pursuance of this authority, fixing a wharfage for rafts "landed and sold or drawn out" within the city limits, do not confer on the city power to collect wharfage for a raft in the city limits at a point where there is no wharf and before the raft has landed and sold or drawn out. *Muscataine v. Hershey*, 18 Iowa 39.

Where the ordinance fixing the wharfage charges specifies the companies running regular packet lines to which the charges shall apply, wharfage cannot be collected from companies running regular lines which are not specified in the ordinance, nor from successors of companies which are specified in the ordinance. This is true though the ordinance is also made applicable to "tow boats, transient boats, or watercrafts." *Keokuk Northern Line Packet Co. v. Quincy*, 81 Ill. 422.

**3.** In *Boston v. Lecraw*, 17 How. (U. S.) 426, the court, by Grier, J., said: "The people of Boston, who owned this land as their common and private property, acted through a corporation, whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to any other public of wider extent. Whether it was called 'town dock' or 'public dock' (which were used as synonymous terms), it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city."

**4. Dedication.** — *Newport v. Taylor*, 16 B. Mon. (Ky.) 700.

"The right of the city corporation to take the wharf into their keeping, and to charge a toll or fee for its use, is not denied. The dedication of it to public use by the original proprietor in his plan of the town, the provisions of the city charter, and the uniform exercise of the right for nearly forty years, would

But where the wharf is formed by an extension of the street it would seem that there is no authority for the collection of wharfage.<sup>1</sup>

(a) **Ordinances.** — Ordinances fixing fees for the use of wharves erected by a city under power given by its charter to erect wharves and regulate wharfage are valid where the fees so fixed do not exceed such amount as will bring a fair remuneration for the use of the facilities afforded.<sup>2</sup> The fees should be fixed and certain, and not left to the judgment of the officer of the city collecting the fees. They should be so graduated as to be equal upon all boats.<sup>3</sup>

**Compliance with Statutory Requirements Requisite.** — As the power of a city to charge and collect wharfage for the use of public wharves is dependent upon statutory enactments, the statutory method of exercising the power is exclusive and must be complied with. Therefore, where the statute authorizes cities of a certain class to enact ordinances for the purpose of collecting wharfage for the use of the wharves, in order that a city of that class may collect wharfage it must act under a duly enacted ordinance granting such authority. The absence of such an ordinance does not authorize a recovery on the basis of a *quantum meruit*.<sup>4</sup> Also, where the charter authorizes the city to regulate the landing, wharfage, and dockage of boats, the city cannot, in the absence

have effectually silenced such an objection if it had been made." *Pittsburgh v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65.

For effect of the ordinance of 1852, passed by the council of the city of San Francisco, setting apart one of its water lots to the public as a free dock, see *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542.

**1. Street Extensions.** — "In the case of *Russell v. The Brig Empire State*, Newb. Adm. 541, it was held that while the authorities of the city of Detroit might erect wharves at the termini of their streets, suitable for landings, such erections became free to the public as extensions of the streets, and the city had no authority to exact toll for ingress or egress." *The Geneva*, 16 Fed. Rep. 874.

"The mayor and city council of Baltimore, who are the successors of the commissioners of Baltimore Town, 1796, c. 68, can have no right whatever to charge wharfage for the use of these wharves, although they are the owners of the soil; because no such right has been reserved or given to them in the grant by which they make title to the property; or has been reserved by the owner thereof at the time of its dedication to the use of the public; and further, because it is strongly to be inferred from the manner in which the grant itself speaks of a public wharf, that the right to collect tolls was intentionally withheld; and, moreover, because these are public wharves, and the right to charge wharfage for the use of all such wharves is expressly prohibited by a late act of assembly, which leaves them free for the use of all, and like the public streets, to be repaired at the common expense of the city." *Wharf Case*, 3 Bland (Md.) 361.

**The New York Act of 1813** confers on the city the right of wharfage on wharves to be built out by it from extended streets and the control of wharfage rights. Subsequent acts have repeatedly confirmed this right. *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90.

But not unless the vessel is made fast thereto or to another vessel which is fastened thereto. *Taylor v. Atlantic Mut. Ins. Co.*, 37 N. Y. 275.

**2. Ordinances.** — *North-Western Union Packet Co. v. St. Louis*, 4 Dill. (U. S.) 10; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196; *New Orleans v. Wilmot*, 31 La. Ann. 65.

"Where a municipal corporation is authorized to impose a wharfage charge as a compensation for keeping the wharves in a proper condition for the safe and expeditious shipping and landing of merchandise, a court will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose. The question of the extent to which this right may be exercised is purely administrative." *First Municipality v. Pease*, 2 La. Ann. 538.

**Remedy for Excessive Charges.** — In *Silver v. Tobin*, 28 Fed. Rep. 545, the plaintiff sought by injunction to attack a contract whereby the city of New Orleans had farmed out the right to collect wharfage on the public wharves. The court held that he had mistaken his remedy, his right being to resist the payment of excessive wharfage, should such be demanded of him.

In *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 565, the remedy in the case of excessive rates of wharfage is pointed out to be by an action at law to determine the excess; and, the excess being thus legally established, then, by injunction from a court of equity, to restrain the excess.

**3. Keokuk v. Keokuk Northern Line Packet Co.**, 45 Iowa 196.

**Discrimination.** — A city ordinance which compels vessels laden with the products of other states to pay, for the use of the public wharves of the city, fees which are not exacted from vessels laden with the products of its own state, is void. *Guy v. Baltimore*, 100 U. S. 434.

**4. Compliance with Statute.** — *Chester v. Hagan*, 116 Fed. Rep. 223.



of an ordinance fixing the wharfage dues, or providing for the payment of a compensation for the use of the wharf, claim or collect wharfage. Until the city claims the right and assumes the responsibilities under the power given in the charter to regulate, not only the landing, but the wharfage and dockage of boats, no rights can be acquired thereunder.<sup>1</sup>

(5) *Power of Municipality to Lease* — (a) *In General.* — The powers delegated to a municipal corporation by the legislature, authorizing it to erect, maintain, repair and regulate wharves, and to charge and collect wharfage for their use, are public or legislative powers and incapable of delegation or of surrender by the municipality. A municipality cannot therefore surrender the powers by leasing the exclusive use and control of all or any portion of its wharves for any period of time.<sup>2</sup> So it cannot empower another to fix its rates of wharfage charges.<sup>3</sup> The fact that in such a lease a maximum rate of charges is prescribed, and that it is stipulated that vessels shall be allowed to lie at wharves free of charge, does not alter the case. As this is an exercise of a portion of the legislative power intrusted to the city, it does not justify the surrender of the residue for the term of the lease. It is of the essence of this power, and of the duty which results, that the city shall be at all times free to alter these regulations or to make others, as the interests of the public demand.<sup>4</sup> It seems, however, that where the rates have been fixed by ordinance, the municipality may grant to private persons a franchise to collect the wharfage.<sup>5</sup> But a city, like any other proprietor, may, unless specially restricted, make an irrevocable dedication of land owned in fee by it to the use of the public as a wharf, and the public may make every use of it, under the control and regulation of the city authorities, or of the legislature, which falls within, but no use which falls without, the scope and meaning of such a dedication.<sup>6</sup> Thus, as a wharf is intended to afford convenience for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which goods discharged and waiting shipment may be deposited, it would seem that structures or appliances of any kind so intended and which have the effect of facilitating the handling and preservation of merchandise arriving at the wharf, may be lawfully erected upon it under municipal authority and subject at all times to municipal control. Its right to appropriate different parts of the bank, called the wharf, to different uses of a proper character, admits of no doubt. It may set apart a portion exclusively

1. *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

2. *Lease.* — *Illinois, etc., R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Corpus Christi v. Central Wharf, etc., Co.*, 8 Tex. Civ. App. 94. See also *Wood v. San Francisco*, 4 Cal. 191.

"As the Supreme Court of the United States said in *Merriwether v. Garrett*, 102 U. S. 513: 'In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses.'" *Knickerbocker Ice Co. v. Forty-second street, etc., Ferry R. Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 27.

In Canada, it has been held that "although trustees of public property cannot alienate the property of the trust in perpetuity, and although all rights granted must be for a limited time only, nevertheless an alienation or grant of ex-

clusive occupation of wharves by harbor commissioners for forty years, for the due fulfilment of the objects of the trust, is not in excess of their powers." *Taylor v. Montreal Harbour Com'rs*, 17 Quebec Super. Ct. 275.

The Plea of *Ultra Vires* will not relieve the lessee holding under such a lease where the contract has been fully performed on the part of the municipality and the lessee has received the full benefit of the lease. *Corpus Christi v. Central Wharf, etc., Co.*, 8 Tex. Civ. App. 94.

3. *Farming Wharfage.* — *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

4. *Corpus Christi v. Central Wharf, etc., Co.*, 8 Tex. Civ. App. 94.

5. *Farnum v. Johnson*, 62 Wis. 620.

6. *Purposes for Which Lease Authorized.* — *Illinois, etc., R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70. See also *Georgetown v. Chew*, 5 Cranch (C. C.) 508.

Construction of Warehouse Not Authorized by grant of privilege to construct a wharf or dock in a public highway. *Bingham v. Doane*, 9 Ohio 165.



for steamboats, and require them to land there and not elsewhere. So it may require rafts, wood boats, coal boats, grain boats, etc., to land at specified and separate parts of the wharf; and such is shown by its ordinances to be the practice of the city in regulating the use of the bank of the river.<sup>1</sup>

**Under Statutory Authority.** — Where express power is granted to the city by its charter or by statute to lease wharfing and landing privileges upon any of the public wharves, such a lease may be made.<sup>2</sup>

(b) **Rights of Lessee.** — The lease of a public wharf only entitles the lessee to the wharfage which accrues thereat.<sup>3</sup> So a lease by a city granting the lessee the wharfage which may accrue for the use and occupation of the wharf, in the manner and at the rates prescribed by law, and of the right to enter and collect the wharfage, does not constitute a lease of the wharf, but merely the incorporeal right to collect wharfage. Under such a lease the wharf, as distinguished from the right of wharfage, remains in the possession of the city, as trustee for the public, for the common use of its citizens, and vessels may be assigned thereto by the harbor authorities;<sup>4</sup> and all vessels, including those of the lessee, resorting to it are subject to the general rules of law regulating the use of wharves.<sup>5</sup>

**Setting Aside Lease.** — An action by the city to set aside a lease made by corporate officers of wharves and piers is maintainable.<sup>6</sup>

1. *Illinois, etc., R., etc., Co. v. St. Louis*, 2 Dill. (U. S.) 70.

A lease, giving the sole and exclusive right to use the public wharf for the lessee's ferry-boats, does not authorize him to charge wharfage as to other vessels mooring there. *Russell v. The Brig Empire State*, Newb. Adm. 541, 21 Fed. Cas. No. 12,145.

In the case of *Leonard v. Baton Rouge*, 39 La. Ann. 275, the court held that the use of property as a landing and wharf for the reception of coal boats and coal is a public use, the public character of which is not destroyed by the fact that it is temporarily farmed out to particular parties.

A city may authorize a steamboat company to erect a building on or near the banks of a river in front of land belonging to a private owner, reserving, however, public control over the structure. *Barney v. Keokuk*, 4 Dill. (U. S.) 593, affirming 94 U. S. 324.

2. **Statutory Authority.** — *Morgan City v. Dalton*, 112 La. 9; *Horn v. People*, 26 Mich. 221; *Kemp v. Stradley*, (Mich. 1903) 97 N. W. Rep. 41; *Cummings v. Huse, etc., Ice, etc., Co.*, 156 Mo. 28.

The lessee is not released from the payment of rent because it is compelled by an officer of the lessor to discontinue dredging the approach to the wharf which was insufficient for large vessels, the lessee having had knowledge of the depth of the water when the lease was made. *Bennett v. Schoellkopf*, 12 N. Y. App. Div. 98.

3. **Lessee's Rights.** — *Pilot Com'rs v. Clark*, 33 N. Y. 251; *Radway v. Briggs*, 37 N. Y. 256.

For the right to collect wharfage for the use of certain wharves, constructed under a peculiar arrangement between the town commissioners and private parties, see *Dugan v. Baltimore*, 5 Gill & J. (Md.) 357; *Mobile v. Moog*, 53 Ala. 561; *The Volusia*, 3 Wall. Jr. (C. C.) 375.

**Use for Storage Purposes.** — A lease of a wharf and landing from the city does not give the tenant a right to store street dirt on its

whole length, the wharf being part of the street. *Struthers v. Bickley*, 9 Phila. (Pa.) 539, 29 Leg. Int. (Pa.) 188.

**Farming Out Wharfage — Instrument Construed.** — *The Clearwater*, (C. C. A.) 75 Fed. Rep. 399.

**Indemnifying Lessee.** — Under an agreement by a city leasing a wharf for a certain period to indemnify the lessee if the "right to collect wharfage be suspended for any period by the intervention of third parties," it was held that a diminution of trade on the river caused by the rebellion did not interfere with the right "to collect," and hence there could be no claim for indemnity from the city. *Marshall v. Vicksburg*, 15 Wall. (U. S.) 146. In this case it was further held that, under the clause providing that "in case the right to collect wharfage or rents shall be interrupted or defeated permanently through the instrumentality or with the aid" of the mayor and council of the city, the city should grant certain indemnity, this right was not defeated by an ordinance reducing wharf charges which the lessee himself caused to be passed, nor by a tax other than wharfage which the city had a right to lay, nor by a quarantine embargo laid with the lessee's consent.

**Damages for Failure to Put Lessee in Possession.** — The measure of damages for a failure of the city to put the lessee in possession of the granted right to collect wharfage is not the value of the use of the wharf for the purposes of the lessee's private business, but it is the difference between the rent reserved and the value of the use of the wharf at the rate of wharfage fixed by law. *Eastman v. New York*, 152 N. Y. 468.

4. *Eastman v. New York*, 152 N. Y. 468.

5. *Pilot Com'rs v. Clark*, 33 N. Y. 251.

6. **Setting Aside Lease.** — *New York v. Union Ferry Co.*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 138; *New York v. North Shore Staten Island Ferry Co.*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 154.

(6) *Duties and Liabilities as Wharf Owner.* — The duties and liabilities of a municipal owner of a public wharf to the public using its wharf are the same as those of any other wharfinger.<sup>1</sup> It is bound, in assuming control of wharves and landings, to provide safe wharves for the landing of goods, and is liable for whatever damages are occasioned by any neglect in this respect.<sup>2</sup> It must protect the boats against the dangers of ordinary floods,<sup>3</sup> must use the precautions and the appliances for securing and holding boats and rafts which a diligent man would ordinarily employ for the protection of his own boat at his own wharf,<sup>4</sup> and is liable for injury to boats occasioned by its failure to remove at reasonable intervals an accumulation from drains at public wharves to which boats are invited and at which the city collects wharfage.<sup>5</sup>

**Proof of Title in City Not Essential.** — In order to establish the liability of a city for negligence in maintaining a wharf, it is not necessary to show title in the city, and that it is empowered to exercise control over the wharf. It is enough if it can be shown that it is in possession of the wharf, controlling and charging toll for its use, and it is not material whether the city has adopted ordinances for the regulation of the wharf or, having such, neglected to enforce them.<sup>6</sup>

**Duty to Repair.** — Where a city has erected and maintains a wharf, receiving wharfage therefor, it is its duty to keep the wharf in repair, and it is liable for damages occasioned by its neglect to do so.<sup>7</sup>

1. See *infra*, this title, *Liabilities, Obligations, and Duties of Wharfingers.*

**The Liability of Public Trustees** who have been vested by statute with the control of wharves and docks, differs in no way from that of absolute owners levying tolls for their own benefit. *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686.

But when trustees are not vested with any such control, and the duty of removing obstructions imposed by statute is discretionary and not compulsory, no liability attaches. *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116. And harbor trustees cannot be held liable for failing to cleanse, deepen, or remove obstructions from harbors, when they have no funds to enable them to do so. *Grant v. Sligo Harbour Com'rs*, Ir. R. 11 C. L. 190.

2. **Duty to Provide Safe Wharf.** — *Jeffersonville v. Louisville*, etc., *Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495; *Fennimore v. New Orleans*, 20 La. Ann. 124; *McGuinness v. New York*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 450.

3. **Protecting Boats Against Ordinary Floods.** — *Shinkle v. Covington*, 1 Bush (Ky.) 617.

4. **Precautions Required.** — *Willey v. Allegheny*, 118 Pa. St. 490, 4 Am. St. Rep. 608. See also *Shinkle v. Covington*, 1 Bush (Ky.) 617; *People v. Albany*, 11 Wend. (N. Y.) 539; *Buckbee v. Brown*, 21 Wend. (N. Y.) 110.

5. *The Dave & Mose*, 49 Fed. Rep. 389.

6. *Pittsburgh v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65.

7. **Damages Caused by Neglect to Repair Wharf.** — *Jeffersonville v. Louisville*, etc., *Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495; *Pittsburgh v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65; *Allegheny v. Campbell*, 107 Pa. St. 530, 52 Am. Rep. 478.

But a city is not liable to an individual because its common council refuses to repair certain docks which it is directed to repair. For this purpose the common council is an

agent of the state and not of the city. *New York, etc., Saw-Mill, etc., Co. v. Brooklyn*, 8 Hun (N. Y.) 37.

When, however, it is made by statute the duty of the department of docks of a city to keep a wharf belonging to the city in repair, although the use of the dock is solely for the benefit of the department of charities, and in its custody, the city is liable for damages caused to a vessel rightfully using the dock, by the failure of the department of docks, as its agent, to keep the dock in repair. *Philadelphia, etc., R. Co. v. New York*, 38 Fed. Rep. 159.

**No Liability in Absence of Notice.** — The libellant occupied a portion of a public wharf, under a lease from the city, with floats used by him as a coal yard. In a sudden flood, the chains by which his floats were held to a mooring post on the wharf broke, and his floats were swept away, the mooring post remaining firm. He sought to recover of the city on the ground of its negligence in not replacing posts which were cut down by a railroad company, to which it had granted a right of way along the wharf, and which he might have used in time of flood for additional moorings. It was held that the city was not liable, in the absence of any evidence that the libellant complained of the cutting of the posts, or notified the city to replace them; he not being entitled to the same degree of care due from a wharfinger to navigators using its wharf. *Jackson v. Allegheny*, 41 Fed. Rep. 886.

**Indictment for Failure to Repair.** — When a charter of a city imposes upon it the duty of repairing its wharves, an indictment will lie for a failure to do so. *Lyme Regis v. Henley*, 3 B. & Ad. 77, 23 E. C. L. 32. See also *People v. Albany*, 11 Wend. (N. Y.) 539.

**"Mandamus Would Perhaps Lie** to compel the borough to provide adequate facilities of wharfage, in case of neglect, or an injunction, at the suit of some agent of the public, to restrain



## V. GOVERNMENTAL CONTROL OVER ERECTION AND MAINTENANCE OF WHARVES

—1. **State and Municipal Control.** — In the absence of conflicting paramount authority, the state and its municipalities duly authorized have the power to control and regulate the erection, maintenance, and use of wharves to the end that they may not become nuisances or detrimental to the rights of the public. Thus, in the exercise of the police power, harbor lines may be established to limit the extent to which a wharf or pier may be built out into the water;<sup>1</sup> wharfage rates for the use of public wharves may be fixed,<sup>2</sup> and regulations providing for the safety of public wharves and landing places are a legitimate exercise of legislative power. Conditions may be prescribed upon which a wharf may be built, such, for example, as the necessity of obtaining a permit from the proper authorities.<sup>3</sup> Numerous statutory provisions concerning wharves exist in many of the states.<sup>4</sup>

2. **Federal Control** — *a. IN GENERAL.* — Congress, under the authority vested in it by the Federal Constitution, has the authority to prescribe rules

them from collecting fees for inadequate performance. In either of these modes the question could be tried once for all parties interested." *Prescott v. Duquesne*, 48 Pa. St. 118.

**For Effect of a Grant of the Wharfage** to be collected at a public pier upon the obligation of the corporation to repair, see *Taylor v. New York*, 4 E. D. Smith (N. Y.) 559.

1. **Harbor Lines.** — See *supra*, this title, *Erection of Wharves* — *Right to Erect* — *Riparian Proprietor* — *Extent of Right* — *Wharf Lines*.

The right to build wharves below high-water mark is one which in *Rhode Island* is attached to the upland, but which the state may regulate in the interest of the public right of navigation. *Carr v. Carpenter*, 22 R. I. 528.

**Duty of Towns in North Carolina to Locate Wharf Lines.** — *Wool v. Edenton*, 115 N. Car. 10.

2. **Wharfage Rates.** — See *infra*, this title, *Rights of Wharfingers* — *Right to Wharfage or Dockage*; *Amount of Wharfage* — *Regulation of Wharfage Rates* — *Right to Regulate*.

**Legislature May Control Collection of Wharfage.** — *Baltimore v. White*, 2 Gill (Md.) 444.

3. **Consent to Build Wharves.** — *State v. Levee Com'rs*, 109 La. 403; *Baltimore v. White*, 2 Gill (Md.) 444.

4. **State and Municipal Control.** — *Dubuque v. Stout*, 32 Iowa 80; *Montgomery v. Shaver*, 40 Oregon 244; *Portland v. Montgomery*, 38 Oregon 215.

A public wharf may be so regulated as to be made more generally and equally beneficial to all. *Wharf Case*, 3 Bland (Md.) 362.

A wharfinger exercises a public employment, and his business is, therefore, to some extent at least, subject to legislative control. But the power to regulate does not include the power to destroy. *Langdon v. New York*, 93 N. Y. 129.

In the exercise of their public powers the cities of the state may control the landing of boats, designating the place they shall receive or discharge freight and passengers. *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196.

"Wharves, levees, and landing places \* \* \* are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local state laws. Congress has never yet interposed to supervise

their administration; it has hitherto left this exclusively to the states. There is little doubt, however, that Congress, if it saw fit, in case of prevailing abuses in the management of wharf property—abuses materially interfering with the prosecution of commerce—might interpose and make regulations to prevent such abuses. When it shall have done so, it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted. But until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance." *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691.

**Discriminating Regulations.** — A regulation by which vessels from another state are required to pay fees not exacted from domestic vessels is invalid, such fees being regarded as a mere expedient to foster domestic commerce at the expense of other states. *Guy v. Baltimore*, 100 U. S. 434.

**Jurisdiction and Powers of California Harbor Commissioners.** — *People v. Pacific Imp. Co.*, 130 Cal. 442; *Morton v. Pacific Coast Steamship Co.*, 122 Cal. 352.

In *Union Transp. Co. v. Bassett*, (Cal. 1896) 46 Pac. Rep. 907, it was held that the courts could review the rules and regulations of the California state harbor commissioners and declare them invalid if unreasonable. It was also held that whether a regulation changing the docking of a steamboat company was unreasonable, was a conclusion of law for the court.

**Jurisdiction of New York Fire Department Over Wharves and Piers.** — *Fire Department v. Atlas Steamship Co.*, 106 N. Y. 566.

**Power of State to Compel Removal of Pier.** — Where a riparian owner, in the absence of a grant from the state, built a pier in shoal water adjoining his premises and the pier did not constitute a nuisance or obstruct navigation, it was held that the state could not, in the absence of a public necessity therefor, remove the structure. *People v. Mould*, 37 N. Y. App. Div. 35.

**The Police Power** of the state and the subjects which are within its control, are fully discussed in the title *POLICE POWER*, vol. 22, p. 914.



and regulations for the protection of commerce and navigation. Congress has enacted legislation controlling to some extent and limiting the power to erect wharves and piers.<sup>1</sup>

**b. LIMITATIONS ON RIGHT TO BUILD WHARVES AND PIERS.** — In 1899 congressional legislation was enacted that prohibited the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, and it was made unlawful to build or commence the building of any wharf, pier, dolphin, boom, weir, break-water, bulkhead, jetty or other structure in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war.<sup>2</sup>

**c. ESTABLISHMENT OF HARBOR LINES.** — Congress has provided that where it is made manifest to the secretary of war that the establishment of harbor lines is essential to the preservation and protection of harbors, he may cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended, or deposits made, except under such regulations as may be prescribed from time to time by the secretary of war.<sup>3</sup>

**d. PERMISSION TO EXTEND WHARVES AND PIERS.** — It is further provided that whenever the secretary of war grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under the authority of the United States, he shall cause to be ascertained the amount of tide water displaced by any such structure or by any such deposits, and he shall, if he deems it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tide-water channels between high and low-water mark, to such an extent as to create a basin for as much tide water as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.<sup>4</sup>

**e. CRIMINAL PROSECUTIONS.** — It is provided that every person and every corporation that shall violate any of the above provisions or any rule or regulation made by the secretary of war in pursuance of the provisions of section eleven, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars or less than five hundred dollars, or by imprisonment (in case of a natural person) not exceeding one year, or by both such punishments, in the discretion of

1. **Congressional Legislation.** — See 30 U. S. Stat. at L., c. 425, §§ 10, 11, 12.

"Though the use of public wharves may be regulated by Congress as a part of the commercial power, it certainly does not belong to that class of subjects which are in their nature national, requiring a single uniform rule, but to that class which are in their nature local, requiring a diversity of rules and regulations." *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691.

2. **Limitations.** — 30 U. S. Stat. at L., c. 425, § 10.

**Act Held to Be Prospective.** — *Kansas City, etc., R. Co. v. Wiggul*, 82 Miss. 223.

3. **Harbor Lines.** — 30 U. S. Stat. at L., c. 425, § 11.

**Congress Has Authority to Establish Harbor Lines.** — *Navigable Waters—Harbor Lines*, 22 Op. Atty.-Gen. 501.

4. **Permission from Secretary of War.** — 30 U. S. Stat. at L., c. 425, § 11.

**Effect of Permission from Secretary of War.** —

*San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co.*, (Cal. 1904) 77 Pac. Rep. 823.

In *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258, it was held that a party who did not have by the law of *Illinois* the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right, without his neighbor's consent, by obtaining a license from the secretary of war. The court said, "We are of the opinion that the act prohibiting the erection of wharves without the consent of the secretary of war is a mere regulation for the benefit of commerce and navigation, and that the license or permission of the secretary of war is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the

the court.<sup>1</sup>

*f. INJUNCTION.* — It is further provided that the removal of any structures or parts of structures erected in violation of the above provisions may be enforced by the injunction of any Circuit Court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the attorney general of the United States.<sup>2</sup>

*g. OPERATION AND EFFECT OF FEDERAL LEGISLATION.* — Under the existing legislation it is held that Congress has not indicated its purpose wholly to ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits, and that the right of private persons to erect structures such as wharves and piers, in a navigable body of water of the United States which is entirely within the limits of a state, cannot be said to be complete and absolute without the concurrent or joint assent of both the federal and state governments.<sup>3</sup>

**VI. WHARFINGERS** — **1. Definitions.** — A wharfinger is a natural or artificial person who maintains for hire a wharf for the purpose of receiving goods, either to forward the goods or to deliver them to the consignee upon the wharf.<sup>4</sup> A wharfinger may also be defined as one who for hire maintains a wharf for the purpose of accommodating vessels in the loading and unloading of freight, or the receiving and landing of passengers.<sup>5</sup>

**2. Status as Bailee.** — A wharfinger is a bailee for hire and in many respects is similar to a warehouseman.<sup>6</sup> The relation of a wharfinger to the bailor is as well defined by law as that of a warehouseman or common carrier, and may be established by the same kind of proof. Whether or not a party occupies the relation of a wharfinger to another party, is for the determination of the jury from the evidence submitted.<sup>7</sup> A wharfinger is not a common carrier, but may assume under certain circumstances the common carrier's status as a bailee. So also a common carrier may be a wharfinger.<sup>8</sup> The status of a wharfinger will be more particularly considered in the discussion concerning the wharfinger's rights and liabilities.

**3. Who May Be Wharfingers.** — Not only private persons may be wharfingers, but artificial bodies such as private and public corporations may occupy the status of wharfingers. Municipalities situated on navigable waters often occupy the status of a wharfinger by maintaining wharves and charging compensation for the use thereof. Even the state may occupy the status of a wharfinger.<sup>9</sup>

submerged land on which it is his purpose to build."

**1. Criminal Prosecutions.** — 30 U. S. Stat. at L., c. 425, § 12.

**2. Injunction.** — 30 U. S. Stat. at L., c. 425, § 12.

**3. Effect of Federal Legislation.** — *Montgomery v. Portland*, 190 U. S. 89, affirming 38 Oregon 215; *Cummings v. Chicago*, 188 U. S. 410.

**4. Wharfinger Defined.** — And. L. Dict.; *Bouv. L. Dict.*; *Cyclopedic L. Dict.*; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158; *Rodgers v. Stophel*, 32 Pa. St. 111, 72 Am. Dec. 775.

**5.** See *supra*, this title, *Wharf Defined*.

**Wharfinger Not Materialman.** — *The Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 60.

**6. Similarity to Warehouseman.** — *Buckingham v. Fisher*, 70 Ill. 121. See also the title *WAREHOUSES AND WAREHOUSEMEN*, *ante*, p. 35.

**Insurability of Wharfinger's Interest.** — A wharfinger has an insurable interest in all goods intrusted to his care, and such interest will be included in a policy covering "goods in trust."

In case of loss, where the policy provides against all damage, he can recover the full amount of the insurance, but is liable to pay over to the owner all in excess of his charges. He may, at his own expense and without notice to the owner, keep a floating policy for the benefit of all who may become his customers. *Waters v. Monarch F., etc., Assur. Co.*, 5 El. & Bl. 870, 85 E. C. L. 870.

**A General Discussion of Bailments and the principles of law governing the class of bailees to which wharfingers belong, will be found under the title BAILMENTS**, vol. 3, p. 732.

**7. Question for Jury.** — *Rodgers v. Stophel*, 32 Pa. St. 111, 72 Am. Dec. 775.

**8. Wharfinger as Common Carrier.** — *Maving v. Todd*, 1 Stark. 72, 2 E. C. L. 37.

In *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175, it is said: "Wharfingers frequently combine the character of wharfingers, warehousemen, and common carriers."

**9. State as Wharfinger.** — *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158.

**VII. RIGHTS OF WHARFINGERS — 1. Right to Wharfage or Dockage — a. IN GENERAL.** — It may be stated generally that a natural or artificial person or a duly authorized municipal corporation<sup>1</sup> that erects or maintains a wharf or dock for the accommodation of vessels in mooring and loading or unloading goods, for hire, is entitled to compensation in consideration of the conveniences afforded. This compensation is commonly called wharfage or dockage. In reference to the meaning and application of the terms "wharfage" and "dockage" and the nature of the charges, there have been established important and controlling principles of law which will be seen from the discussion in the following subdivisions.<sup>2</sup>

**1. Municipal Corporation.** — *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Murphy v. Montgomery*, 11 Ala. 586; *Sacramento v. The Steamer New World*, 4 Cal. 42; *People v. Roberts*, 92 Cal. 659; *Jeffersonville v. Steam Ferryboat John Shalldross*, 35 Ind. 19; *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185; *Albany v. Trowbridge*, 5 Hill (N. Y.) 71, *affirmed* 7 Hill (N. Y.) 429.

It is in the power of a municipality, under legislative authority, to exact reasonable wharfage for the privilege of landing at an improved wharf, care being had to prevent the municipality from imposing tonnage or other prohibited rates or taxes under the pretense of collecting wharfage dues. *North-Western Union Packet Co. v. St. Louis*, 4 Dill. (U. S.) 10, *affirmed* 100 U. S. 423.

The character of the service is the same whether the wharf is built and offered for use by a state, a municipal corporation, or a private individual. *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80.

**Necessity for Imposing Charges by Ordinance.** — Where a statute provides that charges for the use of a city's wharves are to be made by ordinance, there can be no wharfage collected for the use of the wharves unless an ordinance covering the subject has been passed. *Chester v. Hagan*, 116 Fed. Rep. 223.

**Wharfage Voluntarily Paid** to a municipality which has no right to collect it, cannot be recovered back. *Muscatine v. Keokuk Northern Line Packet Co.*, 45 Iowa 185.

**2. Right to Wharfage in General.** — *The Dora Mathews*, 31 Fed. Rep. 619; *De Bary Baya Merchants' Line v. Jacksonville, etc., R. Co.*, 40 Fed. Rep. 392; *People v. Roberts*, 92 Cal. 659; *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495.

Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred. *Ex p. Easton*, 95 U. S. 68; *The Gem, Brown Adm.* 37, 10 Fed. Cas. No. 5393.

The law as to wharf property is that where a person enters upon the wharf of another he does so either under an express agreement or under an implied contract to pay to the true owner a reasonable compensation. Proof of

use and occupancy is sufficient to establish the contractual relation. *Clifford v. U. S.*, 34 Ct. Cl. 223.

Where a wharf, like a road or a street, has been once laid open and made free to all, no toll of any kind can afterwards be charged for the use of it by any individual or body politic which may happen to be the owner of the soil on which the wharf has been erected, or over which the road or street passes. *Wharf Case*, 3 Bland (Md.) 362.

**Origin of Wharfage Rights.** — The riparian owner, having the right to the exclusive use of the banks to the low-water mark, the person navigating the river cannot land against the will of the riparian owner, and becomes a trespasser if he does so without his consent; and as vessels, in prosecuting their business, have occasion to land frequently for the purpose of receiving and discharging freight and passengers, it is but reasonable that when the riparian owner shall improve and provide a commodious landing at a convenient place, for the purpose of receiving and discharging passengers and freight, he should receive a reasonable compensation. *Ensminger v. People*, 47 Ill. 387, 95 Am. Dec. 495. See also *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644.

The right to wharfage is a riparian right, a right to charge for the use of the bank or shore of the river, and for such facilities as were furnished for this use, by the erection of wharves and other accommodations. *Rowan v. Portland*, 8 B. Mon. (Ky.) 232.

When a riparian owner erects a landing place upon his land, and affords facilities for lading and unloading of goods, and these facilities are used, he is entitled to compensation. He grants a *quid pro quo* — a valuable consideration for the benefit he receives, in allowing a use of his property and in maintaining the structures for use. *Leverich v. Mobile*, 110 Fed. Rep. 170.

The right to take wharfage does not rest upon the same foundation as the right to erect toll bridges and to establish ferries over navigable waters. The fact is notoriously otherwise. Wharves exist in every port, city, and landing place in the country, and wharfage is collected independently of any regulating act from legislative or municipal authority. The authorities in Great Britain and the United States show there is a wide difference. *Leverich v. Mobile*, 110 Fed. Rep. 175.

The right to collect wharfage may exist in either of two ways: (1) It may exist as a franchise conferred by legislative grant; or (2) it may exist as an incident to the ownership of land abutting on a navigable river, being a



**Right to Collect Wharfage a Franchise.** — The right to collect wharfage may rest entirely upon a statute and constitute a franchise dependent upon a grant from the sovereign power.<sup>1</sup>

**b. WHARFAGE DEFINED — MEANING OF TERM AND NATURE OF CONTRACT** — (1) *Term Used to Denote Berth at Wharf.* — The term "wharfage" is used in maritime matters to denote two things, one of which is the berthage or the provision of accommodation of a vessel at a wharf.<sup>2</sup> In admiralty the term "wharfage," as used with the above meaning, indicates the use of a wharf furnished in the ordinary course of navigation.<sup>3</sup>

(2) *Term Used to Denote Compensation.* — The other meaning of the term "wharfage" is commonly used to denote the fee, money, or charge paid for mooring vessels to a wharf or for loading goods upon a wharf or shipping them from it.<sup>4</sup> But it has been held that the term "wharfage" may apply to a charge for landing goods, whether upon an artificial erection or a natural landing.<sup>5</sup> In admiralty matters the charge of wharfage relates to the navigation, business, or commerce of the sea, and has always been regarded as among the usual and necessary port charges of a vessel.<sup>6</sup>

(3) *Wharfage Distinguished from Tax.* — Reasonable wharfage fees and charges imposed by law as compensation for the use of wharves built and maintained by municipalities for the benefit of vessels engaged in commerce, cannot be regarded as a tax. A charge for services rendered or for con-

riparian right of the proprietor, and as such a right of property, subject, of course, to reasonable legislative regulation. *Demopolis v. Webb*, 87 Ala. 659.

**Estoppel to Deny Wharfinger's Title.** — A party who uses a wharf with the understanding of paying wharfage, cannot refuse payment by questioning the wharfinger's property in the wharf. *The Idlewild*, (C. C. A.) 64 Fed. Rep. 603.

**Contract to Furnish Dock Privileges Includes Wharfage.** — *The Brooklyn*, 46 Fed. Rep. 132.

**Effect of Custom.** — A wharfinger in Charleston, South Carolina, may recover wharfage from the owner of goods shipped by a factor to his customer in the country, if it is not paid by the factor, although it is shown to be the custom in that city for the factors to pay the wharfage in such cases. *Fitzsimons v. Milner*, 2 Rich. L. (S. Car.) 370.

**Lessee from Municipal Corporation.** — In an action to recover the wharfage of a public wharf leased to the plaintiff by the agent of a city, the plaintiff must show that the lease was made in the mode designated by law, or the complaint will be dismissed. *Taylor v. Beebe*, 3 Robt. (N. Y.) 262.

**Right of California Harbor Commissioners to Collect Wharfage.** — *People v. Pacific Rolling Mills Co.*, 60 Cal. 323; *People v. San Francisco Gas Light Co.*, 60 Cal. 349; *Soule v. Pope*, 60 Cal. 567.

**1. Franchise.** — *Flandreau v. Elsworth*, 151 N. Y. 473, affirming (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 340; *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 448; *Demopolis v. Webb*, 87 Ala. 659; *Lansing v. Smith*, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89.

**2. Term Used to Denote Berth.** — Cent. Dict.

Wharfage in its most general legal sense includes the mooring of vessels for the purposes of protection and safety, as well as for loading and unloading the cargo. *The Geo. E. Berry*, 25 Fed. Rep. 780.

A wharfage service, as respects immediate need, and the absence of opportunity for personal dealing or inquiry, is most analogous to towage, pilotage, salvage, which, aside from statute, give a lien on domestic vessels. *The Allianca*, 56 Fed. Rep. 609.

**Anchorage at Wharf Is Not Wharfage.** — *The Gem*, Brown Adm. 37, 10 Fed. Cas. No. 5,303.

**3. Use in Ordinary Course of Navigation.** — *The James T. Furber*, 129 Fed. Rep. 808.

**4. Term Used to Denote Compensation.** — And. L. Dict.; Bouv. L. Dict.; Cyclopedic L. Dict.; Whart. L. Lex.; Eng. L. Dict.; *The Brooklyn*, 46 Fed. Rep. 132; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196; *Langdon v. New York*, 93 N. Y. 129; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Ex p. Easton*, 95 U. S. 68.

Wharfage is given as a compensation to persons who, under the authority of law, have constructed piers and wharves, and to remunerate them for the outlay made for the convenience and safety of vessels and the benefit conferred thereby upon commerce and navigation. *Flandreau v. Elsworth*, 151 N. Y. 473, affirming (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 340; *Clifford v. O'Neill*, 12 N. Y. App. Div. 17.

In Hargrave's Law Tracts, p. 76, different duties are enumerated that arise by reason of the interest in the shore adjacent to a port, and among the duties enumerated is "Wharfage or keyage, a toll or duty for the pitching or lodging of goods upon a wharf."

**The Terms "Dockage" and "Wharfage"** are synonymous. *The Brooklyn*, 46 Fed. Rep. 132.

**5. Charge for Use of Natural Landing.** — *Sacramento v. The Steamer New World*, 4 Cal. 42. See also *Sacramento v. The Steamer Confidence*, 4 Cal. 45.

**6. Usual Port Charge of Vessel.** — *Ex p. Easton*, 95 U. S. 68; *The James T. Furber*, 129 Fed. Rep. 809.

conveniences provided is in no sense a tax. Wharfage is claimed under the right of proprietorship, while a tax is imposed by virtue of sovereignty.<sup>1</sup>

(4) *Wharfage Not Duty of Tonnage.* — The fact that wharfage fees imposed by law are graduated by the tonnage of vessels does not make the fees a duty of tonnage, within the meaning of the Federal Constitution. The tonnage of the vessels using the wharves affords merely a convenient and just measure of the fees charged, which is varied according to the size of the vessels, the larger occupying more space at the wharves than those of less capacity.<sup>2</sup> But a charge imposed by law which is by its terms due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it is in the channel of the stream, or out in a bay, or at a natural river bank, cannot be treated as wharfage or compensation for the use of a wharf. On the contrary, such a charge is a tax, and when measured by the tonnage of vessels, it violates the inhibition of the Federal Constitution providing that no state shall, without the consent of Congress, lay any duty of tonnage.<sup>3</sup>

(5) *Nature of Contract — Whether Maritime or Not.* — A contract relating to "wharfage," as understood in the laws and usages of maritime affairs, is clearly a maritime contract, where it relates to the navigation, business, or commerce of the sea; and such a contract is cognizable in admiralty.<sup>4</sup> But where a vessel has been withdrawn from commerce and navigation, and is laid up at a wharf for storage, such wharfage does not constitute a maritime

**1. Wharfage Not Tax.** — *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196. See also *Schwartz v. Thirty-two Flatboats*, 14 La. Ann. 240. See generally the title *TAXATION*, vol. 27, p. 567.

**Taxation of Interstate Commerce.** — Exactions in the name of wharfage, but which tax interstate commerce, are unlawful. *Guy v. Baltimore*, 100 U. S. 434.

**2. Wharfage Not Duty of Tonnage.** — *Vicksburg v. Tobin*, 100 U. S. 430; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *People v. Roberts*, 92 Cal. 659; *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196; *Ellerman v. McMains*, 30 La. Ann. 190, 31 Am. Rep. 218.

**3. When Charge Is Tonnage Duty.** — *Cannon v. New Orleans*, 20 Wall. (U. S.) 577.

No city, under pretense of wharfage dues, is permitted, in order to replenish its treasury, to levy a tax in the nature of tonnage duty upon vessels of commerce; nor can it do so by way of discrimination. *North-Western Union Packet Co. v. St. Louis*, 4 Dill. (U. S.) 10, affirmed 100 U. S. 423.

"Whenever the state shall have constructed or acquired wharves in the interest of commerce, it may collect wharfage, as proprietor, for the use of the wharves; to attempt to impose 'wharfage' (so-called) in advance of such construction or acquisition, would be an attempt to lay a duty of tonnage." *Per Myrick, J.*, in *People v. Pacific Rolling Mills Co.*, 60 Cal. 323.

Citizens of the United States, engaged in running steamboats or vessels to the port of New Orleans, and compelled thereby to use the wharves and landings of the city of New Or-

leans, have a right to see that they are not charged excessive wharfage; and if they are charged excessive wharfage, they may resist, and refuse to pay the same, so far as it is excessive. *Silver v. Tobin*, 28 Fed. Rep. 545.

**Wharfage Must Not Violate Congressional Regulations of Commerce.** — *Wharf Case*, 3 Bland (Md.) 362.

**4. Maritime Contract.** — *Ex p. Easton*, 95 U. S. 68; *The James T. Furber*, 129 Fed. Rep. 808; *Braisted v. Denton*, 115 Fed. Rep. 428. See also the title *ADMIRALTY JURISDICTION*, vol. 1, pp. 661, 662. And see the title *SHIPPING*, 20 ENCYC. OF PL. AND PR. 260.

"From an early period, wharfage demands have been treated as one class of the well-recognized maritime demands, regulated by maritime codes and enforced by maritime courts. They are so treated under the régime of the marine ordinance — an ordinance which, upon its promulgation, became the common maritime code of the commercial world. The spirit and main features of the ordinance were perpetuated in the *Code de Commerce*, in which wharfage was advanced from a place in the sixth class of liens, which was its position under the ordinance, to a place in the second class in order of payment. The reason assigned for the change is that wharfage is inseparable from the ship, and incurred for the benefit of all interested therein." *The Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 60.

**Account Not Maritime.** — A libel for a balance of an account between a wharfinger and a steamboat, most of the terms of which were not maritime, was held not to be maintainable. *The Saginaw*, 32 Fed. Rep. 176.

**Domestic Vessel.** — Wharfage furnished to a domestic vessel is maritime in its nature and within the jurisdiction of admiralty. *Braisted v. Denton*, 115 Fed. Rep. 428.

*Contra.* — *Jeffersonville v. Steam Ferryboat John Shallcross*, 35 Ind. 19.

contract of which admiralty has jurisdiction.<sup>1</sup> It has also been held that a lease of wharf accommodation at a yearly rent, which is merely a lease of real estate and which creates the relation of landlord and tenant, is not a maritime contract cognizable in admiralty. There is a marked difference between a claim for "wharfage" and a claim for the "rent of a wharf."<sup>2</sup>

**c. DOCKAGE DEFINED.** — The term "dockage" is commonly used interchangeably with wharfage to designate the berthage or provision of accommodation of a vessel at a wharf, and also to denote the compensation or charge for the use of a wharf and its conveniences.<sup>3</sup> But a distinction between dockage and wharfage has been made in *California*, and the word "wharfage" has been used to designate the charge against merchandise for the use of a wharf, while the word "dockage" has been used to designate the charge against the vessels for the privilege of mooring to the wharves or in the slips.<sup>4</sup>

**2. Creation of Liability for Wharfage.** — Use cannot be made of a wharf, even for a few minutes, without incurring a liability for wharfage.<sup>5</sup> The question is constantly arising, however, as to whether the nature of the use made of a wharf is of a kind to subject one to liability for wharfage. In order for a valid claim for wharfage or dockage to arise, there must be a use made of the wharf or dock or the conveniences that will create the liability. What constitutes such a use of a wharf, dock, or pier as to attach a liability for wharfage depends greatly upon the facts and circumstances of each particular case.<sup>6</sup> Where wharfage is claimed under a statute or ordinance designating the rates of wharfage and the watercraft subject thereto, also when the liability to wharfage arises, the character of the use and watercraft making use of the wharf may be material.<sup>7</sup> So also in admiralty, for the purposes of juris-

**1. Storage of Vessel.** — *The C. Vanderbilt*, 86 Fed. Rep. 785, *affirmed* (C. C. A.) 93 Fed. Rep. 986.

**2. Lease of Wharf Not Maritime Contract.** — *The James T. Furber*, 129 Fed. Rep. 808.

The money paid for the aid to the vessel in her business, which she derives from the use of the wharf, is not rent, but wharfage. *The Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 60.

**3. Dockage Defined.** — Cent. Dict. See also *supra*, this section, *Wharfage Defined — Meaning of Term and Nature of Contract*. In the cases cited in this title the terms "wharfage" and "dockage" are used interchangeably.

**4. Distinction Between Wharfage and Dockage.** — *People v. Roberts*, 92 Cal. 659.

**5. Extent of Use Immaterial.** — *Easby v. The Whitburn*, 14 Phila. (Pa.) 600, 38 Leg. Int. (Pa.) 206.

**6. Uses Held to Create Liability.** — *The Geo. E. Berry*, 25 Fed. Rep. 780; *Barge No. 6*, 27 Fed. Rep. 472; *The Hercules*, 28 Fed. Rep. 475; *The Win. H. Brinsfield*, 39 Fed. Rep. 215; *Muller v. Spreckels*, 48 Fed. Rep. 574; *The Thomas Melville*, (C. C. A.) 62 Fed. Rep. 749; *The J. H. Starin*, 15 Blatchf. (U. S.) 473; *Union Wharf, etc. v. Hemingway*, 12 Conn. 293; *Robertson v. Wilder*, 69 Ga. 340; *Elwell v. Fabre*, 52 Hun (N. Y.) 70; *Easby v. The Whitburn*, 14 Phila. (Pa.) 600, 38 Leg. Int. (Pa.) 206.

**Use of Several Wharves, etc.** — A vessel which uses several piers or wharves or bulkheads, is liable for the use of each and all. *The Virginia Rulon*, 13 Blatchf. (U. S.) 519, 28 Fed. Cas. No. 16,974.

But when a berth at a wharf is owned by different persons, the statutory charge must be justly apportioned among the several owners.

*The Steamboat City of Hartford*, 10 Ben. (U. S.) 150, 5 Fed. Cas. No. 2,751, *distinguishing* *The Virginia Rulon*, 13 Blatchf. (U. S.) 519, 28 Fed. Cas. No. 16,974.

**Mooring for Protection and Safety.** — Wharfage may accrue from the use of the dock or wharf in mooring for the purpose of protection and safety only. *The Brooklyn*, 46 Fed. Rep. 132.

**Liability for Cost of Improving Wharf.** — Where the defendant was the owner of a ferry, with the right to land his boats at any point within the city limits, and the wharves of the city were used by the ferry, it was held, in an action by the city against the defendant, that the latter was not liable for wharfage, but that he was liable for a proportion of the cost of improving the landing and the wharf. *Kennedy v. Covington*, 17 B. Mon. (Ky.) 567.

**Uses Held Not to Create Liability.** — *Pelham v. The B. F. Woolsey*, 16 Fed. Rep. 418; *The Lizzie E.*, 30 Fed. Rep. 876; *Heron v. The Marchioness*, 42 Fed. Rep. 173, *reversing* 40 Fed. Rep. 330; *The Allianca*, 56 Fed. Rep. 609; *The Davidson*, 122 Fed. Rep. 1006; *The Steamship Cornwall*, 10 Ben. (U. S.) 108; *Taylor v. Atlantic Mut. Ins. Co.*, 2 Bosw. (N. Y.) 106, 9 Bosw. (N. Y.) 369, *affirmed* in 37 N. Y. 275; *Camden, etc., R. Co. v. Finch*, 5 Sandf. (N. Y.) 48; *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 448.

**The Occupation by Anchorage or otherwise, of a navigable river open to all, in the vicinage of a wharf, implies no contract of wharfage, because it is no use of the wharf for either the landing or the reception of passengers or merchandise.** *The Gem*, Brown Adm. 37, 10 Fed. Cas. No. 5,303.

**7. Character of Watercraft and Use.** — *Pelham v. The B. F. Woolsey*, 16 Fed. Rep. 418; *The*



diction, the character of the watercraft, and the use made of the wharf or dock, may be important.<sup>1</sup> The general principles of law governing the jurisdiction of admiralty have been discussed in a prior title of this work.<sup>2</sup>

**3. Improvements Necessary to Create Liability.** — Wharfage has been allowed, where a municipality has been given power to erect, repair, and regulate wharves and rates of wharfage, even when no artificial improvements were made.<sup>3</sup> But it has been decided in not a few cases that a municipality possessing the power to erect and maintain wharves and charge wharfage therefor must improve the shore with artificial structures so as to facilitate the receiving and discharging of cargoes, and to afford a secure mooring to vessels, before it can collect wharfage as such.<sup>4</sup>

**4. Termination of Right to Wharfage for Goods.** — If the owner of goods deposited at a wharf sells them, and gives notice to the wharfinger of such sale, on tendering the wharfage then due, he is discharged from liability for future wharfage.<sup>5</sup> Such notice may be given either verbally or by a delivery order.<sup>6</sup>

**5. Amount of Wharfage** — *a. IN GENERAL.* — It is a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A private wharf, that is, a wharf which the owner has constructed and reserved for his private use, is not subject to this rule; for if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain.<sup>7</sup> It has been held that if a wharfinger gives notice of his rates to a customer in advance, the latter, by making use of his wharf, impliedly contracts to pay such charges, and may not afterwards disaffirm his contract or refuse payment upon the ground that the charges are

Geo. E. Berry, 25 Fed. Rep. 780; *Barge No. 6*, 27 Fed. Rep. 472; *The Hercules*, 28 Fed. Rep. 475; *The Scow*, No. 15, (C. C. A.) 92 Fed. Rep. 1008, *affirming* 88 Fed. Rep. 305; *The Steamship Cornwall*, 10 Ben. (U. S.) 108; *Decker v. Jaques*, 1 E. D. Smith, (N. Y.) 80; *Camden, etc., R. Co. v. Finch*, 5 Sandf. (N. Y.) 48; *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 448; *Flandreau v. Elsworth*, 151 N. Y. 473, *affirming* (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 340. See also *Stephen v. Costor*, 3 Burr. 1408.

In London, under a statute, it has been held that a wharfinger cannot claim wharfage for freight landed into lighters from barges tied to a wharf. *Stephen v. Costor*, 3 Burr. 1408.

**1. Character of Vessel and Use of Wharf in Admiralty.** — *The Geo. E. Berry*, 25 Fed. Rep. 780; *Woodruff v. One Covered Scow*, 30 Fed. Rep. 269.

The nature of the service of providing wharf accommodation or the character of the contract is not changed by the circumstance that the watercraft which derives the benefit of the conveniences afforded is without masts or sails or other motive power of its own. *Ex p. Easton*, 95 U. S. 68.

**2. Jurisdiction of Admiralty.** — See the title ADMIRALTY JURISDICTION, vol. 1, p. 645.

**3. Wharfage for Unimproved Landings.** — *Sacramento v. The Steamer New World*, 4 Cal. 42. See also *Dubuque v. Stout*, 32 Iowa 80, 7 Am. Rep. 171; *Sacramento v. The Steamer Confidence*, 4 Cal. 45.

**4. Necessity of Improvements.** — See *supra*, this title, IV. 2. c. (4) (b) *Facilities Must Be Provided*.

**5. Termination of Right to Wharfage.** — *Barry*

*v. Longmore*, 12 Ad. & El. 639, 40 E. C. L. 144; *Wooster v. Blossom*, 5 Jones L. (50 N. Car.) 244, 72 Am. Dec. 549.

**6. Form of Notice.** — *Wooster v. Blossom*, 5 Jones L. (50 N. Car.) 244, 72 Am. Dec. 549.

**7. Reasonable Wharfage.** — *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Wharf Case*, 3 Bland (Md.) 362; *Barrington v. Commercial Dock Co.*, 15 Wash. 170.

**Remedy Where Excessive Wharfage Is Charged.** — The remedy in the case of excessive rates of wharfage is pointed out to be by an action at law to determine the excess; and, the excess being thus legally established, then, by an injunction from a court of equity, to restrain the excess. *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 565; *Silver v. Tobin*, 28 Fed. Rep. 545.

The courts of the United States have no authority to ignore the state laws and regulations on the subject of wharves and wharfage, and to declare them invalid by reason of any supposed repugnancy to the Constitution or laws of the United States. The courts cannot take the initiative in this matter. Congress must first legislate before the courts can proceed upon any ground of paramount jurisdiction. If the rates of wharfage exacted are deemed extortionate or unreasonable, the courts of the United States (in cases within their ordinary jurisdiction) as well as the courts of the states must apply and administer the state laws relating to the subject; and these laws will probably in most cases be found to be sufficient for the suppression of any glaring evils. At all events, there is not, at present, any federal law on the subject by which relief

unreasonable.<sup>1</sup>

*b. REGULATION OF WHARFAGE RATES — RIGHT TO REGULATE — (1) In General.* — When private property is affected with a public interest, it ceases to be *juris privati*. A public wharf or a private wharf affected with a public interest or which is in the nature of a monopoly affected with a public use, is subject to legislative regulation in regard to the rates of wharfage. Under the police power of the government it has been customary in *England* from time immemorial and in the *United States* from its first colonization, to regulate such employments as that of wharfinger, and in so doing to fix a maximum of charges to be made for services rendered and accommodations furnished. Statutes are to be found in many of the states upon these subjects and such legislation does not come within any of the constitutional prohibitions against interference with private property.<sup>2</sup> The power to construct, maintain, and lease wharves and to prescribe, regulate, and collect rates of wharfage is often found in the charters of municipalities bordering on navigable rivers. The right of the state, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, such as wharves, is conceded. Wharfage is governed by the local state laws, in the absence of an act of Congress to regulate it. By the state law it is generally required to be reasonable, and by those laws its reasonableness must be judged.<sup>3</sup>

can be obtained. *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691.

**1. Notice of Rates.** — *Southern Steamship Co. v. Sparks*, 22 Tex. 657, 75 Am. Dec. 793.

**Special Agreements for Storage of Goods.** — In *Woodruff v. Havemeyer*, 106 N. Y. 129, referring to a statute which made it lawful for the owners or lessees of wharves to charge and collect a certain sum per ton on all goods remaining on the same, for every day after the expiration of twenty-four hours from the time such goods were deposited thereon, *Andrews, J.*, said: "But however this may be, we think the statute cannot be construed to prohibit the owner of a private wharf from entering into a contract for the landing and deposit of goods upon his wharf upon such terms as may be agreed upon between himself and the owner of the goods, nor can it be construed as requiring him to store goods for any period of time without compensation."

**Customary Rates Controlling in Absence of Agreement.** — *The Minnie L. Gerow*, 48 Fed. Rep. 836.

**2. Regulation of Wharfage Rates.** — As bearing on the power of a state to regulate the rates of wharfage, see the following cases: *Munn v. Illinois*, 94 U. S. 113; *Murphy v. Montgomery*, 11 Ala. 586; *Lansing v. Smith*, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89.

**To Prevent Extortion**, it is within the powers of the state to regulate rates of wharfage. This power is often very properly delegated to the local municipal authority. *Cannon v. New Orleans*, 20 Wall. (U. S.) 577.

**Legislative Rates Control Courts.** — *Lesesne v. Young*, 33 S. Car. 543.

In the absence of a contract the rates mentioned in a statute are the just market rates. *The Antonio Lambrana*, 88 Fed. Rep. 546.

**Effect of Regulation.** — The right to wharfage is a matter which affects the public; the legislature may regulate its exercise, by declaring what tolls or wharfage an individual shall be

allowed to receive, but this does not make the right a franchise, but is merely a restraint upon the exercise of one of the rights of property. *Murphy v. Montgomery*, 11 Ala. 586.

**Penalties.** — An ordinance may define wharfage so that it may include the transportation of goods over a wharf, as well as the privilege of landing them upon it, and a penalty may be provided for violating the ordinance. *Ex p. Cass*, (Cal. 1887) 13 Pac. Rep. 169.

**A Full Discussion of the State's Police Power** in the regulation of employments and rates of charges, will be found under the title *POLICE POWER*, vol. 22, p. 914.

**3. Reasonableness of Charges Determined by Local Laws.** — *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *De Bary Baya Merchants' Line v. Jacksonville, etc., R. Co.*, 40 Fed. Rep. 392.

In *First Municipality v. Pease*, 2 La. Ann. 538, the court said: "The government of the municipality has determined that the rates of wharfage are due, as such; from this the state has not dissented. The responsibility of the act rests with the municipal government. The consequence of the interference of the judicial power in the details of its finances can be readily foreseen. \* \* \* If this wharfage is a tax on commerce, or on imports or exports, it is unconstitutional however small the amount. If it be not *per se* unconstitutional, the unconstitutionality depending, according to the argument, on the unreasonableness of the amount, the action of the judiciary is brought directly in conflict with the municipal administrative power on an administrative question, over which it must be conceded that the city government is called upon to exercise, to a certain extent, a discretionary power."

In *Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa 196, it was held that a city may prescribe, by ordinance, fees not unreasonable, which must be paid for the use of wharves, and such an ordinance is not unconstitutional, even though it exacts a payment from vessels moored



(2) *Private Wharves*. — Since the owner of a private wharf is entitled to its exclusive use and may prohibit others from making use of his structure, he may impose whatever conditions he pleases upon those wishing to make use of the wharf. The parties are at liberty to make whatever contract they please concerning the amount of wharfage to be paid.<sup>1</sup>

6. *Wharfinger's Lien* — *a. ON GOODS*. — A wharfinger has a lien, like similar bailees, on the goods intrusted to his keeping, to the amount of his lawful wharfage charges.<sup>2</sup> The lien has been held to extend to a general balance of accounts.<sup>3</sup> It has been held that the wharfinger has no lien for warehouse rents or for labor in landing and weighing goods in the absence of an express or implied agreement to that effect, though a continued and undisputed usage is evidence of such an agreement.<sup>4</sup>

*b. ON VESSEL*. — Since contracts for wharfage are recognized as maritime contracts for the benefit of the ship or vessel and are cognizable in admiralty, a maritime lien may arise in favor of the proprietor of a wharf against a foreign vessel or a vessel from another state using the wharf, for the payment of wharfage charges.<sup>5</sup> In order to establish a lien in admiralty the contract or transaction must be one over which the admiralty jurisdiction extends.<sup>6</sup>

at places where no wharves have been provided.

1. *Compensation for the Use of Private Wharves*. — See *Leverich v. Mobile*, 110 Fed. Rep. 170; *Woodruff v. Havemeyer*, 106 N. Y. 129.

"A Man for His Own Private Advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree for crannage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own." Hargrave's Tracts, p. 77.

2. *Lien on Goods*. — *Spears v. Hartley*, 3 Esp. 81; *Holderness v. Collinson*, 7 B. & C. 212, 14 E. C. L. 30; *Vaylor v. Mangles*, 1 Esp. 109; *Rex v. Humphery, M'Clel. & Y.* 173; *Wooster v. Blossom*, 5 Jones L. (50 N. Car.) 244, 72 Am. Dec. 549. See also *Buffalo Dock Co. v. Ladenburg*, 19 N. Y. App. Div. 35, affirmed 162 N. Y. 626.

*When Lien Does Not Exist*. — No lien exists under the following circumstances: A imported certain iron which upon its arrival was landed at B's wharf. On the day after its arrival it was sold to C. The greater part of it was delivered to C, when A became bankrupt. It was understood between A and B that wharfage charges should not be payable until some future date. B refused to deliver to C the remainder of the iron, unless he paid A's wharfage charges, which C refused to do. The court observed: "There was, \* \* \* in this case, no original right of lien in respect of these charges, and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist." *Crawshay v. Homfray*, 4 B. & Ald. 50, 6 E. C. L. 385.

In *Syeds v. Hay*, 4 T. R. 260, it was held that the captain of a vessel was liable in trover for landing goods at a wharf contrary to instructions, in the absence of a showing that under the circumstances the wharfinger had a right to retain the goods under a lien.

3. *General Lien*. — *Vaylor v. Mangles*, 1 Esp. 109; *Spears v. Hartley*, 3 Esp. 81; *Rex v.*

*Humphery, M'Clel. & Y.* 173; *Dresser v. Bosanquet*, 4 B. & S. 460, 116 E. C. L. 460.

"The Onus of Making Out a Right of General Lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed consulant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage." *Holderness v. Collinson*, 7 B. & C. 212, 14 E. C. L. 30.

4. *Warehouse Rents and Labor*. — *Holderness v. Collinson*, 7 B. & C. 212, 14 E. C. L. 30.

5. *Lien on Vessel*. — *The Dora Mathews*, 31 Fed. Rep. 619; *Johnson v. The Schooner M'Donough, Gilp.* (U. S.) 101; *Ex p. Lewis*, 2 Gall. (U. S.) 483; *The Phebe, Ware* (U. S.) 354; *The Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 60. See also *The Mary K. Campbell*, 31 Fed. Rep. 840.

*When Lien Does Not Exist*. — Where wharfage privileges were furnished under a contract which for a single price per day embraced other valuable considerations, the supply of which would give a lien upon the ship, and it was impossible to divide the price per day into different parts and the dealings appeared to have been a personal contract, it was held that there was no lien for wharfage. *The Advance*, 60 Fed. Rep. 766.

*Vessel in Custody of Law*. — When a vessel is in the custody of the law a lien cannot be enforced by a detention of the vessel; the wharfinger must apply to the court for its allowance, and it will be ordered to be paid in concurrence with other liens standing in the same rank of privilege. *The Phebe, Ware* (U. S.) 354.

6. *Character of Watercraft*. — *Woodruff v. One*



It has been held that there is no distinction between a foreign and a domestic vessel in reference to whether a lien exists.<sup>1</sup>

**Who Must Make Contract.** — The contract must be made by some person having authority to pledge the vessel to the performance of it, before a lien can be created.<sup>2</sup>

**The Jurisdiction of Admiralty** over maritime contracts and the principles of law determining what contracts are within the admiralty jurisdiction, also the general principles of law pertaining to common-law, statutory, and maritime liens, have been fully discussed in prior titles of this work.<sup>3</sup>

**c. PRIORITY OF LIEN.** — A maritime lien for dockage has been given priority over a bottomry bond upon a foreign vessel;<sup>4</sup> but a mortgage placed on a vessel prior to its arrival at the wharf under an attachment, may take precedence of the wharfinger's lien.<sup>5</sup>

**d. ENFORCEMENT OF LIEN.** — A wharfinger may enforce his claim either by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.<sup>6</sup>

**7. Right to Distrain for Wharfage.** — The common law gave the proprietor of a public wharf a remedy for his toll by distress.<sup>7</sup> The remedy of distress for wharfage has been made the subject of statutory regulation. Thus, at an early date in *New York* a statute was passed relating particularly to the city of New York, and providing for the remedy of distress for wharfage.<sup>8</sup> Under this statute it was held that the owner of a wharf could distrain for wharfage any goods or chattels on board a ship or vessel which had used his wharf, although the vessel had removed from the wharf. The distress could be made at a place within the jurisdiction of the process different from where

Covered Scow, 30 Fed. Rep. 269; *Ruddiman v. A Scow Platform*, 38 Fed. Rep. 158.

**Police Boat.** — In *The Police Boat Seneca*, 8 Ben. (U. S.) 509, 21 Fed. Cas. No. 12,668, it was held that a lien could not be enforced in admiralty against a police boat which landed a policeman at a wharf.

**1. Lien on Domestic Vessel.** — *The Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 60; *The Allianza*, 56 Fed. Rep. 609; *The Advance*, 60 Fed. Rep. 766, *affirmed* (C. C. A.) 71 Fed. Rep. 987; *The C. Vanderbilt*, 86 Fed. Rep. 785, *affirmed* (C. C. A.) 93 Fed. Rep. 986. But see *Russell v. The Asa R. Swift*, Newb. Adm. 553, 21 Fed. Cas. No. 12,144; *Ex p. Lewis*, 2 Gall. (U. S.) 483, 15 Fed. Cas. No. 8,310; *The Scow No. 15*, (C. C. A.) 92 Fed. Rep. 1008, *affirming* 88 Fed. Rep. 305.

**2. Authority to Pledge.** — *The Mary K. Campbell*, 31 Fed. Rep. 840.

**3.** See generally the titles ADMIRALTY JURISDICTION, vol. 1, p. 645; LIENS, vol. 19, p. 3; and MARITIME LIENS, vol. 19, p. 1079.

**4. Priority.** — *Ex p. Lewis*, 2 Gall. (U. S.) 483. See also *Johnson v. The Schooner McDonough*, Gilp. (U. S.) 101.

**5. Prior Mortgage.** — *The Mary K. Campbell*, 31 Fed. Rep. 840.

**6. Proceedings to Enforce Lien.** — *Ex p. Easton*, 95 U. S. 68. See also the title SHIPPING, 20 ENCYC. OF PL. AND PR. 260.

Where a city ordinance fixed wharfage rates, it was held that it was not necessary, in order to enforce a lien for delinquent wharfage, that the ordinance should provide for such enforcement, as the provisions of the general statute might be invoked. *A Coal-Float v. Jeffersonville*, 112 Ind. 15.

**7. Distress at Common Law.** — *Nicoll v. Gard*

*ner*, 13 Wend. (N. Y.) 289. See also generally the title DISTRESS, vol. 9, p. 617.

Wharfage and dockage are a rent for which the law allows the same concurrent remedies by action and distress as in the common case of landlord and tenant. *Buckbee v. Brown*, 21 Wend. (N. Y.) 110.

**8. The New York Statute** provided that when any vessel has lain twenty-four hours at any wharf, and the master or owner refuses or neglects to pay the wharfage, or give security therefor, being thereunto required by the owner or wharfinger, by notice in writing left on board with the mate or one of the hands belonging to the vessel, it shall and may be lawful for the owner or wharfinger to distrain for such wharfage on any goods or chattels found on board such vessel; and so from time to time as often as twenty-four hours' wharfage shall become due, and the goods and chattels so distrained, to sell and dispose of in the same manner as is provided in case of rent. See *Mangum v. Farrington*, 1 Daly (N. Y.) 236; *Nicoll v. Gardner*, 13 Wend. (N. Y.) 288.

It was held that the Act of 1846, p. 369, abolishing distress for rent, in no way affected the right given under the above statute to distrain for wharfage. Nor did the Act in relation to the rates of wharfage, passed April 10, 1860 (see Laws 1860, p. 416) take away or in any manner affect or abrogate the right to distrain for wharfage. *Mangum v. Farrington*, 1 Daly (N. Y.) 236.

Distress, and not an action, is the proper remedy for the collection of wharfage under the *New York Laws* of 1860, c. 416. *Warren v. McDiarmid*, (Supm. Ct. Spec. T.) 34 How. Pr. (N. Y.) 304.

the wharfage became due.<sup>1</sup> In order for the proprietor to be entitled to detain for wharfage the use of the wharf or pier must be of such a nature as to create a liability for wharfage within the terms of the statute.<sup>2</sup>

8. **Penalties for Evading Payment.** — The legislature may undoubtedly prescribe penalties for vessels leaving public wharves without first paying the wharfage or dockage due thereon, such, for instance, as the infliction of a certain sum of money or double wharfage rates where the vessel leaves the wharf or pier after the wharfage has been demanded.<sup>3</sup> While the additional amount imposed has been held to constitute wharfage,<sup>4</sup> the imposition may be, under the terms of the law imposing it, considered strictly as a penalty.<sup>5</sup>

9. **Right of Access** — *a.* **NATURE OF RIGHT.** — A wharfinger or the owner of a wharf, dock, or pier on a navigable river or body of water has, as against parties unreasonably and unlawfully obstructing his right of way, a right to use the navigable waters of a highway, which includes the right of access to his wharf, and also to the navigable waters beyond.<sup>6</sup> Unquestionably the owner of a wharf on the banks of a navigable body of water has, like every other citizen of the state, the right of navigating the water as one of the public. This, however, is not a right coming to him as owner or occupier of any land on the banks, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when the right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the water at the particular place; and it becomes a form of enjoyment of the land, and of the water in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by

1. **Place of Distress.** — *Nicoll v. Gardner*, 13 Wend. (N. Y.) 288.

2. **Nature of Use of Wharf or Pier.** — *Camden, etc., R. Co. v. Finch*, 5 Sandf. (N. Y.) 48.

3. **Penalties for Failure to Pay Wharfage.** — *The Virginia Rulon*, 13 Blatchf. (U. S.) 519, 28 Fed. Cas. No. 16,974; *The Shady Side*, 23 Fed. Rep. 731; *Braisted v. Denton*, 115 Fed. Rep. 428; *Beardstown v. Moody*, 36 Ill. 347.

**Necessity of Demand under New York Statute.** — *Barge No. 6*, 27 Fed. Rep. 472; *The Shady Side*, 23 Fed. Rep. 731.

**Sufficiency of Demand under New York Statute.** — *The Bark Francesca T.*, 9 Ben. (U. S.) 34; *The Steamboat City of Hartford*, 10 Ben. (U. S.) 150, 5 Fed. Cas. No. 2,751; *The Shady Side*, 23 Fed. Rep. 731.

4. **Additional Amount Considered as Wharfage.** — Under a New York statute that prescribed double wharfage rates as a penalty for a vessel leaving a wharf without paying wharfage, the additional amount was held to be wharfage. *The Virginia Rulon*, 13 Blatchf. (U. S.) 519, 28 Fed. Cas. No. 16,974.

5. **Penalty.** — Where a specific sum of money was prescribed as a penalty it was held that a suit for the penalty was not for wharfage, but for a penalty for violating the law. *Beardstown v. Moody*, 36 Ill. 347.

6. **Right of Access.** — *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662. See also *Martin v. Heckman*, 1 Alaska 165; *Juneau Ferry Co. v. Alaska Steamship Co.*, 1 Alaska 533; *Camden, etc., R. Co. v. Finch*, 5 Sandf. (N. Y.) 48; *Delaplaine v. Chicago, etc., R. Co.*, 42 Wis. 215, 24 Am. Rep. 386.

It is impossible to conceive of a wharf right

without an incidental right of access. *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644.

The defendant, owning a vessel and a wharf on a navigable stream, and finding a raft of lumber belonging to the plaintiff fastened in the stream so as to obstruct the approach of his vessel to his wharf, untied the raft, doing no unnecessary damage; and, not being in charge of any person, it floated away. It was held that he was not liable for the loss of the lumber, as raftsmen on navigable streams have no right to moor their rafts in such a manner as to deprive wharf owners of access to their wharves. *Harrington v. Edwards*, 17 Wis. 586, 84 Am. Dec. 768.

**The Riparian Proprietor**, as proprietor of the adjoining land and as connected with it, has the right of exclusive access to and from the waters of the lake at that particular point. *Delaplaine v. Chicago, etc., R. Co.*, 42 Wis. 215, 24 Am. Rep. 386.

**Right to Maintain Private Action.** — The owner of a wharf on public navigable waters cannot maintain a private action for illegally filling up such water and thereby obstructing his access to his wharf. *Harvard College v. Stearns*, 15 Gray (Mass.) 1.

**The Taking Away of River Frontage of a Wharf**, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury to the owner of the wharf, which, in the absence of legislative authority, would be compensated by damages, or altogether prevented. *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662.

an injunction.<sup>1</sup>

*b. EXTENT OF RIGHT.*—The owner or proprietor of a wharf, dock, or pier is not entitled at all times to the exclusive use of the navigable water adjacent to his wharf as against the parties temporarily occupying the same in the due course of navigation.<sup>2</sup>

*c. INTERFERENCE WITH RIGHT — OBSTRUCTIONS — NUISANCES TO NAVIGATION.*—An unauthorized obstruction which materially interferes with the right of navigation may constitute a nuisance. Such an obstruction may in a proper case be subject to an indictment, or an action for damages, or equitable relief may be afforded under certain circumstances.<sup>3</sup> The principles of law governing the right of private parties to maintain an action for a public nuisance have been discussed in a prior title of this work.<sup>4</sup>

**10. Right to Damages for Injuries to Wharf.**—Where a wharf, dock, or pier or an appliance thereon is injured as a result of negligence, the wharfinger or owner of the structure has a right to be made whole and he may maintain an action for damages.<sup>5</sup> But in order to hold the party inflicting the injury liable, a case of actionable negligence must be made out.<sup>6</sup>

**11. Right to Equitable Relief.**—The owner of a wharf not only has a right to recover damages in an action at law for injury done to his wharf, but he is entitled also in proper cases to the benefit of equitable remedies for the prevention of injuries to his rights by injunction to prevent the erection of obstructions.<sup>7</sup>

**12. Right to Make Rules and Regulations.**—A wharfinger who is required to permit the use of his wharf for the loading and unloading of vessels, with a view to the welfare of the public, may, like a common carrier, make reasonable rules and regulations looking to the control and management of the

**1. Nature of Right.**—*Lyon v. Fishmongers' Co.*, 1 App. Cas. 662. See also *Delaplaine v. Chicago, etc., R. Co.*, 42 Wis. 215, 24 Am. Rep. 386.

**2. Right Not Exclusive.**—*The Davidson*, 122 Fed. Rep. 1006; *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302, *modifying Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644.

A steamboat company owning a wharf adjacent to the slips of a ferry company, has the same right of navigation in front of the slips as in any other part of the river, but has no right wilfully to obstruct the ferry company in the use of its slips. *Delaware River Steamboat Co. v. Burlington, etc., Steam Ferry Co.*, 81 Pa. St. 103.

**3.** See the title *NAVIGABLE WATERS*, vol. 21, p. 444, and generally the title *NUISANCES*, vol. 21, p. 679.

**Injunction to Restrain Extension of Pier.**—In *Jenks v. Miller*, 14 N. Y. App. Div. 474, an injunction was refused which sought to restrain the extension of a pier in the Hudson river, where it did not appear that the pier would impair navigation or violate the River and Harbor Act.

**4.** See generally the title *NUISANCES*, vol. 21, p. 679.

**5. Damages for Injury to Wharf.**—*Alaska Steamship Co. v. Collins*, (C. C. A.) 127 Fed. Rep. 937; *Pittsburgh, etc., Dock Co. v. Detroit Transp. Co.*, 122 Mich. 445.

**Liability for Negligent Injury to Wharfinger.**—*Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, holding that where a wharfinger was injured by reason of a steamboat making a negligent landing, the question whether the place

where the plaintiff stood on the wharf was reasonably safe was a question for the jury, depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which, therefore, no opinions of witnesses were admissible. *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551.

**6. Negligence Must Be Shown.**—*U. S. v. Charles G. Dunn Co.*, 124 Fed. Rep. 705.

**For a General Discussion of the Law of Negligence**, see the title *NEGLIGENCE*, vol. 21, p. 455.

**7. Injunction.**—*Commercial Wharf Co. v. Winsor*, 146 Mass. 559; *Murray v. Sharp*, 1 Bosw. (N. Y.) 539; *Parker v. Taylor*, 7 Oregon 436; *Crocker v. New York*, 15 Fed. Rep. 405.

In *Penniman v. New York Balance Co.*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 40, a bill in equity was brought to prevent an injury to a private wharf by the erection of permanent obstructions which, if erected, would interfere with the ingress to and egress from a wharf. The court in this case said: "It is a familiar rule that an injunction will be granted to prevent and restrain a nuisance, and it will be allowed at the instance of any private individual who sustains a special injury from it. The plaintiffs' right to the wharfage and to the gains from the pier, and the gains which they made from vessels lying in the basin, were rights peculiar to them, the loss of which constitutes an injury special to them."

The owner of a private wharf is entitled to an injunction restraining the construction of another wharf in front of his, which would interfere with his ingress to and egress from the same, unless competent authority to erect the



business conducted upon the wharf. The rules and regulations, however, must be reasonable.<sup>1</sup>

**VIII. LIABILITIES, OBLIGATIONS, AND DUTIES OF WHARFINGERS — 1. Nature of Liability as Bailee** — *a. IN GENERAL.* — It is now well settled that the liability of a wharfinger as a bailee for goods deposited on his wharf does not differ materially from that of a warehouseman or other similar depositary for hire. He is responsible only for losses which happen through his neglect to exercise reasonable and ordinary care and diligence.<sup>2</sup> The broad and general expressions early made by Lord Mansfield<sup>3</sup> and Lord Ellenborough,<sup>4</sup> seemingly to the effect that wharfingers possess the same liabilities as common carriers, must be considered as having had reference to the particular facts, circumstances, and issues of the cases under consideration, in order to be consistent with reason and the law as subsequently developed.<sup>5</sup> The proposition that as bailees, wharfingers are under the same liabilities in reference to goods placed in their care, as common carriers, has been repudiated in both *England* and the *United States*.<sup>6</sup> But if a wharfinger undertakes to convey goods, he may assume thereby the responsibility of a common carrier, and will be held liable as such in case of loss or injury to the goods.<sup>7</sup>

**A Wharfinger Is Impliedly Bound by His Contract to Exercise Ordinary Care** for the preservation and safety of property intrusted to him, and this imposes upon him the duty to exercise ordinary care to ascertain the condition of his wharf, that he may know whether it is reasonably safe for the purposes for which he hires it; and, if merchandise is received by him upon a wharf which is unsafe, and is thereby lost so that he cannot deliver it according to his contract, the wharfinger is liable therefor if ordinary care would have enabled him to have known of the condition of his wharf, and such negligence on his part will be treated as a failure to exercise ordinary care for the safety of the property intrusted to him. This negligence and the consequent loss of the goods intrusted to him would be a breach of the terms of his contract, and his

proposed wharf be first shown. *Cowell v. Martin*, 43 Cal. 605.

**1. Rules and Regulations.** — *Lincoln v. Pennsylvania Warehousing Co.*, 8 Pa. Co. Ct. 195.

The owner of a wharf or landing on a navigable river has the right to prohibit its being used for unusual and unaccustomed purposes, such as the storage and keeping of timber to be rafted which may obstruct the free access to and from the vessels. *Compton v. Hankins*, 90 Ala. 411, 24 Am. St. Rep. 823.

**2. Liability Similar to That of Warehouseman.** — *Buckingham v. Fisher*, 70 Ill. 121; *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633; *Foot v. Storrs*, 2 Barb. (N. Y.) 326; *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175. See also *Sideways v. Todd*, 2 Stark. 400, 3 E. C. L. 462, and the title **WAREHOUSES AND WAREHOUSEMEN**, *ante*, p. 35.

**Liability for Acts of Agent.** — In *Coleman v. Riches*, 16 C. B. 104, 81 E. C. L. 104, 24 L. J. C. Pl. 125, 1 Jur. N. S. 596, 3 W. R. 453, it was held that a wharfinger was not liable for the acts of an agent who fraudulently signed a receipt that certain goods had been delivered at the wharf. See generally the title **AGENCY**, vol. 1, p. 939.

**3. Lord Mansfield said in *Ross v. Johnson***, 5 Burr. 2825: "It is impossible to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger."

**4. Lord Ellenborough** is reported to have been of the opinion that the liability of a wharfinger, whilst he has possession of the goods, is similar to that of carrier. *Maving v. Todd*, 1 Stark. 72, 2 E. C. L. 37. The language of the report of the above case should be read in view of the circumstance that the wharfinger undertook to carry the goods. See *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175, and note to *Platt v. Hibbard*, 7 Cow. (N. Y.) 497.

**5. Statements of Lords Mansfield and Ellenborough Explained.** — *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175. See also *Platt v. Hibbard*, 7 Cow. (N. Y.) 497, and note to case.

**6. Liability of Wharfingers Not Similar to Common Carriers.** — *Chattock v. Bellamy*, 64 L. J. Q. B. 250, 15 Reports 340; *Sideways v. Todd*, 2 Stark. 400, 3 E. C. L. 462; *Buckingham v. Fisher*, 70 Ill. 121; *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633; *Foot v. Storrs*, 2 Barb. (N. Y.) 326; *Platt v. Hibbard* 7 Cow. (N. Y.) 497; *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175.

A wharfinger may receive goods in the capacity of a wharfinger only and act as an agent in the carriage of the goods. In such a case the wharfinger is not liable for damage to the goods while en route. *Pontifex v. Hartley*, 62 L. J. Q. B. 196, 4 Reports 245.

**7. Wharfinger Liable as Carrier.** — *Maving v. Todd*, 1 Stark. 72, 2 E. C. L. 37, 4 Campb. 225, 16 Rev. Rep. 779.

In *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175,

liability therefor could have been enforced at common law by an action of *assumpsit*.<sup>1</sup>

**Burden of Proving Negligence.** — The burden of proving negligence on the part of the wharfinger is upon the owner of the goods. It is not sufficient to show a loss of the goods merely.<sup>2</sup>

**b. WHEN RESPONSIBILITY BEGINS.** — The responsibility of a wharfinger as a bailee begins when the goods are delivered at, or rather upon, the wharf, and he has expressly or impliedly received them into his care and custody.<sup>3</sup>

**c. EVIDENCE OF ACCEPTANCE OF GOODS.** — In order to charge a wharfinger with the acceptance of goods, some such circumstance as the booking of the goods, or a delivery to the wharfinger, or a delivery to some person who can be proved to be the wharfinger's agent for the purpose of receiving the goods, should be shown.<sup>4</sup> A mere delivery of goods at a wharf, however, is not necessarily a delivery to the wharfinger.<sup>5</sup>

**d. EFFECT OF USAGES AND CUSTOMS.** — The usages of business in the vicinity are of importance to show when a wharfinger acquires, and when he ceases to have, the custody of the goods in that capacity, as in the case of common carriers. Evidence of business usages concerning what constitutes a delivery to and a delivery from a wharfinger, is therefore admissible.<sup>6</sup>

**e. WHEN RESPONSIBILITY ENDS.** — The responsibility of a wharfinger ends when he, according to the terms of the contract, ceases to have control of the goods intrusted to him, and has fulfilled the contract of bailment. Where a delivery is to be made to a vessel, a wharfinger's control over the goods ceases when he has delivered the goods to the proper officer or officers of the vessel. Actual delivery on board of a vessel need not be proved where by usage certain officers are regarded as receiving goods when assuming control of them on the wharf. Where the established usage was that goods were delivered by wharfingers to the mates of the vessels which were to carry them, it was held that a delivery to the mate of a vessel ended the wharfinger's responsibility, even though the goods were lost on the wharf before they were put on board of the vessel.<sup>7</sup> The delivery should be made to the proper officer or person having authority to receive the goods. Under a generally established usage to deliver goods to the mate or officer of a ship, a wharfinger would not perform his duty by making a delivery to one of the crew.<sup>8</sup>

the court said, concerning the above case, "the defendants were lightermen as well as wharfingers, and in the former character they were common carriers and probably were liable as such in that case."

**1. Breach of Contract.** — *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158; *Oregon Imp. Co. v. Seattle Gas Light Co.*, 4 Wash. 634. See also *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633.

**Under the Practice in California** the owner or consignee may sue upon the contract for the damages sustained by reason of such negligence as stated in the text. *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158.

**2. Burden of Proof.** — *Foot v. Storrs*, 2 Barb. (N. Y.) 328. See also *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175.

**3. Commencement of Responsibility.** — *Rodgers v. Stophel*, 32 Pa. St. 111, 72 Am. Dec. 775. See also *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158.

Where a vendor of goods claimed a delivery to the purchaser by depositing the goods upon a wharf, but without taking any receipt from the wharfinger, or booking the goods, or delivering them to the wharfinger or his authorized

agent, it was held that the purchaser was not liable, as no delivery to the wharfinger was constituted which would furnish a remedy over in favor of the purchaser against the wharfinger. *Buckman v. Levi*, 3 Campb. 414.

**4. Evidence.** — As to what constitutes evidence of a delivery and acceptance of goods by the wharfinger, see *Buckman v. Levi*, 3 Campb. 414; *Quiggin v. Duff*, 1 M. & W. 174, 1 Gale 420, 5 L. J. Exch. 149; *Gillett v. Hill*, 2 Cramp. & M. 531, 4 Tyrw. 290, 3 L. J. Exch. 145, holding that the acceptance of an order for certain goods admitted that the wharfinger had the goods.

**5. Mere Delivery at Wharf.** — *Buckman v. Levi*, 3 Campb. 414; *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175.

**6. Usages and Customs.** — *Cobban v. Downe*, 5 Esp. 41; *Blin v. Mayo*, 10 Vt. 56, 33 Am. Dec. 175. See also generally the title *USAGES AND CUSTOMS*, vol. 29, p. 363.

**7. Termination of Responsibility.** — *Cobban v. Downe*, 5 Esp. 41, 8 Rev. Rep. 825.

**8. To Whom Delivery Should Be Made.** — *Leigh v. Smith*, 1 C. & P. 638, 11 E. C. L. 506, R. & M. 224, 28 Rev. Rep. 791. See also *Cobban v. Downe*, 5 Esp. 41.

**f. DUTY TO DELIVER GOODS TO OWNER.** — The wharfinger's duty is to deliver the goods according to the contract of bailment. Where goods have been deposited with a wharfinger and have been sold to a third party, it is undoubtedly the duty of the wharfinger to deliver the goods to the legal owner, at least upon the payment or tender of the lawful charges for the wharfinger's services.<sup>1</sup> Circumstances may arise, however, which will authorize a wharfinger to refuse to deliver goods to the holder or indorsee of the dock warrants. Thus, where certain goods which were fraudulent as bearing a spurious trademark were deposited with wharfingers who knew of the fraud and were informed that an injunction would be applied for by the injured party to enjoin the disposal of the goods, it was held that the wharfingers were justified in refusing to deliver the goods, and an injunction was granted restraining an action for damages for nondelivery, brought by the holders of the dock warrants.<sup>2</sup>

**g. LIABILITY FOR REFUSING TO DELIVER GOODS.** — In case the wharfinger unlawfully refuses to deliver the goods to a purchaser who has become the lawful owner, an action of trover may be maintained by the owner against the wharfinger for converting the goods.<sup>3</sup> But a wharfinger who has illegally detained goods from the owner, which the owner has afterwards agreed to accept and send for, is not liable for their value because of a destruction by fire without his fault, after the owner has had a reasonable time in which to recover the goods.<sup>4</sup>

**h. FAILURE TO UNLOAD GOODS.** — A wharfinger or proprietor of a wharf may be liable for a failure to unload a vessel within a reasonable time, where there is a contract providing for such a service. The mere fact that the vessel is allowed to be unloaded at a later time than that required by the contract does not necessarily waive a right to damages for the delay.<sup>5</sup>

**i. ESTOPPEL TO DENY BAILOR'S TITLE.** — Where a wharfinger acknowledged the ownership of goods which he held, to be in a certain party, by promising to hold the goods for him, making charges against him and protecting the goods as belonging to the party, it was held that the wharfinger, in an action of trover brought against him, could not set up as a defense that the title to the goods was in a third party.<sup>6</sup>

**1. Duty to Deliver to Owner.** — *Gosling v. Birnie*, 7 Bing. 339, 20 E. C. L. 153, 5 M. & P. 160, 9 L. J. C. Pl. O. S. 105; *Holl v. Griffin*, 3 Moo. & S. 732, 10 Bing. 246, 25 E. C. L. 118, 3 L. J. C. Pl. 17; *Harman v. Anderson*, 2 Campb. 243; *Hawes v. Watson*, 2 B. & C. 541, 9 E. C. L. 171.

**Failure to Account for Goods.** — Where a wharfinger received goods and failed to account for them to the owner, it was held that the wharfinger was liable in the absence of a showing that the goods passed out of his possession, or that they were lost or destroyed while the wharfinger was in the exercise of due care. *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633.

**2. Authority to Refuse Delivery.** — *Hunt v. Maniere*, 34 Beav. 157.

**3. Trover.** — *Gosling v. Birnie*, 7 Bing. 339, 20 E. C. L. 153, 5 M. & P. 160, 9 L. J. C. Pl. O. S. 105; *Holl v. Griffin*, 3 Moo. & S. 732, 10 Bing. 246, 25 E. C. L. 118, 3 L. J. C. Pl. 17; *Gillet v. Hill*, 2 Crompt. & M. 531, 4 Tyrw. 290, 3 L. J. Exch. 145; *Hawes v. Watson*, 2 B. & C. 541, 9 E. C. L. 171.

**Necessity for Appropriating Goods.** — Where the plaintiff ordered of B a certain number of slates out of a bulk lying upon a wharf, and he

took an order for the slates to the wharfinger for the delivery of the number ordered, which order the wharfinger accepted, but later declined to obey, it was ruled that there was no appropriation, and that the acceptance of the order did not supply the want of an appropriation, consequently trover would not lie. *Unwin v. Adams*, 1 F. & F. 312.

**4. Opportunity of Owner to Obtain Goods.** — *Carnes v. Nichols*, 10 Gray (Mass.) 369.

**5. Delay in Unloading.** — *Garfield, etc., Coal Co. v. Fitchburg R. Co.*, 166 Mass. 119.

**6. Estoppel.** — *Gosling v. Birnie*, 7 Bing. 339, 20 E. C. L. 153, 5 M. & P. 160, 9 L. J. C. Pl. O. S. 105. See also *Hawes v. Watson*, 2 B. & C. 541, 9 E. C. L. 171.

In *Holl v. Griffin*, 3 Moo. & S. 732, 10 Bing. 246, 25 E. C. L. 118, 3 L. J. C. Pl. 17, it was held that where a wharfinger recognized the plaintiff's title to certain goods, by promising to deliver the goods to him, he could not afterwards dispute it in an action of trover for nondelivery.

**Where a Third Person Abandoned His Claim** it was held that a wharfinger who had acknowledged the title of the plaintiff could not set up the *jus tertii* in that person. *Betteley v. Reed*, 3 Gale & D. 561.



**2. Liability for Safety of Wharf or Dock — a. IN GENERAL.** — It may be stated as a general rule that a wharfinger or proprietor of a wharf, dock, or pier is liable in damages to a person who, by the wharfinger's invitation expressed or implied, makes use of the wharf, for an injury caused by any defect or unsafe condition of the wharf which the wharfinger negligently causes or permits to exist if such person was himself in the exercise of due care.<sup>1</sup> Thus, the proprietor of a wharf may be liable for damages done to a vessel resulting from defective and insufficient fastenings,<sup>2</sup> or injuries to a person resulting from defects in the surface of the wharf,<sup>3</sup> or damages resulting from a failure to breast out a vessel when necessary to its safety,<sup>4</sup> or damages to goods because of a defective condition of the wharf.<sup>5</sup> The mere fact that another party is under the duty to remove obstructions from the river, or that the United States government has made appropriations for the improvement of the navigation of the river and has occasionally dredged it, or that no wharfage was actually received in the particular case, will not relieve a municipal corporation from liability for injuries caused to a vessel coming in

**1. General Liability.** — *Thompson v. North Eastern R. Co.*, 2 B. & S. 106, 110 E. C. L. 106; *Mersey Docks, etc., Board v. Gibbs*, L. R. 1 H. L. 93; *White v. Phillips*, 15 C. B. N. S. 245, 109 E. C. L. 245, 33 L. J. C. Pl. 33; *The John A. Berkman*, 6 Fed. Rep. 535; *Pennsylvania R. Co. v. Atha*, 22 Fed. Rep. 920; *The Calvin P. Harris*, 33 Fed. Rep. 295; *Cleary v. Oceanic Steam Nav. Co.*, 40 Fed. Rep. 908; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236; *Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60; *Clancy v. Byrne*, 58 Barb. (N. Y.) 449; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Vroman v. Rogers*, 132 N. Y. 167; *Pittsburgh v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65; *Willey v. Allegheny*, 118 Pa. St. 490, 4 Am. St. Rep. 608.

**Knowledge of Defects.** — In order to charge a wharfinger with responsibility it is not necessary to show that he was aware of a defect. If the wharfinger could have discovered the defect with the exercise of proper care to inform himself he will be liable. *The Nellie*, 130 Fed. Rep. 213.

**Storms.** — It is the duty of wharfingers to provide safe places for vessels in storms as well as in fair weather. *The Francisco R. v. The Waterloo*, 79 Fed. Rep. 113, *affirmed* 100 Fed. Rep. 332, 40 C. C. A. 386.

**Liability for Taking Vessel from Wharf.** — The wharfinger has no right without authority to take the vessel away to a place of danger, and if the wharfinger does so he will be liable for resulting injuries. *Roney v. New York, etc., R. Co.*, 132 Fed. Rep. 321. See also *Smith v. Yellow Pine Co.*, 114 Fed. Rep. 99, 52 C. C. A. 47.

**Damage to Vessel on Sunday.** — The fact that a vessel was forbidden by a state statute to enter a berth at a wharf on Sunday did not prevent the owner of the vessel, where the vessel was hauled in on that day, from recovering in the Admiralty Courts of the United States damages for injuries sustained afterwards by the vessel. *Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290. See also generally the title **SUNDAYS AND HOLIDAYS**, vol. 27, p. 386.

**Evidence** that vessels had lain at a dock before without injury, if admissible, to entitle

it to any weight it should appear that the other vessels were of the same length, breadth, and flatness as that of the plaintiff's vessel, and were as heavily loaded as she was. *Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60.

**Measure of Damages to Vessel.** — In *Union Ice Co. v. Crowell*, (C. C. A.) 55 Fed. Rep. 87, it was held that the measure of damages, where a vessel is injured, is the cost of repair.

In *Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290, 21 Fed. Cas. No. 12,402, the court declined to hold that fees for making surveys of an injured vessel were improperly allowed as damages, but held that damages for estimated depreciation in the vessel could not be allowed.

**2. Defective Fastenings.** — *The Francisco R. v. The Waterloo*, 79 Fed. Rep. 113, *affirmed* 100 Fed. Rep. 332, 40 C. C. A. 386; *Skinkle v. Covington*, 1 Bush (Ky.) 617.

**3. Surface Defects.** — *Knight v. Portland, etc., R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Low v. Grand Trunk R. Co.*, 72 Me. 313, 39 Am. Rep. 331; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Macauley v. New York*, 67 N. Y. 602; *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685; *Swords v. Edgar*, (Supm. Ct. Gen. T.) 44 How. Pr. (N. Y.) 139, 59 N. Y. 28, 17 Am. Rep. 295; *Delaney v. Pennsylvania R. Co.*, 78 Hun (N. Y.) 393, *affirmed* 144 N. Y. 718; *Reynolds v. Starin*, 50 N. Y. App. Div. 535. See also *De Boer v. Brooklyn Wharf, etc., Co.*, 51 N. Y. App. Div. 289.

**4. Failure to Breast Out.** — *Lewis v. Barber Asphalt Paving Co.*, 123 Fed. Rep. 161; *The Thomas Quigley*, (C. C. A.) 130 Fed. Rep. 336.

**5. Damage to Goods.** — *The City of Lincoln*, 25 Fed. Rep. 835; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158. See also *Oregon Imp. Co. v. Seattle Gas Light Co.*, 4 Wash. 64.

**Measure of Damages for Loss of Goods.** — In *Oregon Imp. Co. v. Seattle Gas Light Co.*, 4 Wash. 634, it was held that where by agreement a quantity of shale was deposited upon a wharf, and because of the decayed condition of the wharf the shale fell through into the sea, the wharfinger was liable for the value of the

contact with obstructions near the wharf.<sup>1</sup>

*b. APPLICABILITY OF RULES.* — The general rules of law which are applicable in cases of this character are the same in *England* and in the *United States*, and are the same at common law and in admiralty.<sup>2</sup>

*c. DEGREE OF CARE.* — A wharfinger is bound to exercise reasonable diligence in ascertaining the condition of the berths at the wharf, and if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths.<sup>3</sup> Where the wharfinger takes upon himself the responsibility of mooring the vessel and assigning a berth, he may be held liable for a higher degree of care than where this duty is not assumed.<sup>4</sup>

*d. WHARFINGER NOT INSURER.* — A wharfinger is not an insurer of the safety of his dock or wharf, but he is required only to use reasonable and ordinary care to keep his dock or wharf in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready.<sup>5</sup>

*e. FAILURE TO EXERCISE REASONABLE CARE.* — If the wharfinger fails to use reasonable care — if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him — he is guilty of negligence and liable to the person who, using due care, is injured thereby.<sup>6</sup> The duty to keep the wharf in a safe condition arises by implication of law, and is a natural and obvious duty under the circumstances, and so cannot be said to rest in or be founded on contract.<sup>7</sup>

*f. TO WHAT PERSONS DUTY EXTENDS.* — The wharfinger's duty is not limited to persons who come on the wharf to transact business for which it is adapted, but extends to all who come there for legitimate purposes, as a customhouse officer, who comes to prevent smuggling,<sup>8</sup> or to persons who for the transaction of lawful business go on board of a vessel.<sup>9</sup>

*g. CONCEALED OBSTRUCTIONS.* — A wharf owner is liable for injuries sustained by a vessel coming in contact with concealed obstructions in or about the wharf, the existence of which the wharfinger knew or might have known by the exercise of reasonable diligence.<sup>10</sup> Thus, a wharfinger has been held to be liable for injuries resulting from concealed projections under water,

1. *Petersburg v. Applegarth*, 28 Gratt. (Va.) 321, 26 Am. Rep. 357.

2. *Applicability of Rules.* — *Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60.

3. *Reasonable Care Required.* — *Smith v. Burnett*, 173 U. S. 430; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Hall v. Tillson*, 81 Me. 362; *Newell v. Bartlett*, 114 N. Y. 399; *Willey v. Allegheny*, 118 Pa. St. 490, 4 Am. St. Rep. 608.

4. *Assignment of Berth.* — *Curling v. Wood*, 16 M. & W. 628; *Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290; *Pennsylvania R. Co. v. Atha*, 22 Fed. Rep. 920.

5. *Not Insurer.* — *Smith v. Burnett*, 173 U. S. 430; *Girard Point Storage Co. v. Roy*, (C. C. A.) 93 Fed. Rep. 574; *The Calvin P. Harris*, 33 Fed. Rep. 295; *Hagan v. Brockie*, 11 Fed. Rep. 745; *The John A. Berkman* 6 Fed. Rep. 535; *Bacon v. Casco Bay Steamboat Co.*, 90 Me. 46; *Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60; *Nickerson v. Tirrell*, 127 Mass. 236; *McCaldin v. Parke*, 142 N. Y. 564; *Hagan v. Brockie*, 15 Phila. (Pa.) 432, 39 Leg. Int. (Pa.) 92.

6. *Failure to Exercise Reasonable Care.* — *The Stroma*, 50 Fed. Rep. 557, reversing 42 Fed. Rep. 922; *Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60; *Nickerson*

*v. Tirrell*, 127 Mass. 236; *Barber v. Abendroth*, 102 N. Y. 406, 55 Am. Rep. 821.

7. *Duty Not Founded on Contract.* — *Lyme Regis v. Henley*, 3 B. & Ad. 92, 23 E. C. L. 36; *Wendell v. Baxter*, 12 Gray (Mass.) 494.

8. *Customhouse Officers.* — In *Low v. Grand Trunk R. Co.*, 72 Me. 313, 39 Am. Rep. 331, the court, by Barrows, J., said: "The company owe a duty to all public officers whose attendance there is made necessary by the business carried on at their wharf. \* \* \* It avails nothing to say that the owners had not dedicated their wharf to smuggling and did not invite the plaintiff to come there to prevent it. They had dedicated their wharf to the use of vessels bringing merchandise from foreign ports, and without watchfulness on the part of the customs officers it was sure to be misused."

9. *Persons Transacting Business on Vessel.* — *Smith v. London, etc., Docks Co.*, L. R. 3 C. P. 326.

10. *Concealed Obstructions.* — *The Nellie*, 130 Fed. Rep. 213; *O'Rourke v. New York Dye-wood Extract, etc., Co.*, 55 Fed. Rep. 81; *Mamhattan Transp. Co. v. Mayor, etc.*, 37 Fed. Rep. 160; *Smith v. Havemeyer*, 36 Fed. Rep. 927; *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216; *Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133.

such as a projecting spike,<sup>1</sup> a projection from a pier,<sup>2</sup> pilings projecting from the bottom,<sup>3</sup> a projecting beam,<sup>4</sup> a projecting jetty,<sup>5</sup> rocks,<sup>6</sup> bar of earth,<sup>7</sup> deposits of matter,<sup>8</sup> inequalities in the bottom,<sup>9</sup> submerged portion of a jetty,<sup>10</sup> a defect in the bottom adjoining the dock,<sup>11</sup> and mud.<sup>12</sup> The wharfinger may be liable whether he owns the soil of the dock or not, and regardless of whether the wharf is public or private.<sup>13</sup>

**h. DEPTH OF WATER.** — A wharfinger is under no obligation to keep at any time a sufficient depth of water to accommodate vessels of all sizes at all tides.<sup>14</sup> But circumstances may exist under which a wharfinger may be liable for an insufficient depth of water, such as, for example, where a certain depth of water is guaranteed and a vessel is invited to enter a dock berth by the wharfinger under the circumstance of insufficient depth.<sup>15</sup> The mere fact of insufficient depth of water at the wharf does not show fault on the part of the wharfinger which renders him liable for a resulting delay to the vessel.<sup>16</sup> It has been held that a wharfinger is not required to dredge and keep even the bed of the stream in the vicinity of his wharf.<sup>17</sup> But a city operating a wharf may be liable for a failure to remove accumulations from drains deposited at public wharves where vessels are invited.<sup>18</sup>

**i. NOTICE OF DEFECTS.** — If wharves or their approaches are known to be in a dangerous condition, it is the duty of those having control of them either to close them or to give conspicuous notice to the public of the existence of the danger.<sup>19</sup>

**Ignorance of Obstruction.** — In all the cases in which wharfingers have been held liable for casualties resulting from concealed obstructions the vessel has approached the slip in ignorance of the real condition of the bottom, and the wharfinger has been held liable, upon the theory that it was his duty to furnish safe berths. *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280.

**Proof.** — The primary fact of the existence of the obstructions alleged and that the damage arose from that cause must be clearly proved. *Crossan v. Wood*, 44 Fed. Rep. 94.

**1. Projecting Spike.** — *Smith v. Havemeyer*, 36 Fed. Rep. 927.

**2. Projection from Pier.** — *Smith v. Havemeyer*, 32 Fed. Rep. 844.

**3. Projecting Pilings.** — *The Nellie*, 130 Fed. Rep. 213; *Pennsylvania R. Co. v. Atha*, 22 Fed. Rep. 920.

**4. Projecting Beam.** — *Maxwell v. Philadelphia*, 7 Phila. (Pa.) 137.

**5. Projecting Jetty.** — *Tracy v. Baltimore, etc.*, R. Co., 98 Fed. Rep. 633.

**6. Rocks.** — *The Stroma*, 50 Fed. Rep. 557, reversing 42 Fed. Rep. 922; *Hartford, etc., Transp. Co. v. Hughes*, 125 Fed. Rep. 981; *Daly v. Quinlan*, 131 Fed. Rep. 394; *Smith v. Burnett*, 10 App. Cas. (D. C.) 460; *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216; *Garfield, etc., Coal Co. v. Rockland-Rockport Line Co.*, 184 Mass. 60; *McCaldin v. Parke*, 66 Hun (N. Y.) 323.

**7. Bar of Earth.** — *Thompson v. North Eastern R. Co.*, 2 B. & S. 106, 110 E. C. L. 106, 31 L. J. Q. B. 194.

**8. Deposits.** — *Union Ice Co. v. Crowell*, (C. A.) 55 Fed. Rep. 87.

**9. Inequalities in Bottom.** — *The Ville de St. Nazaire*, 51 W. R. 590; *The Moorecock*, 14 P. D. 64, distinguished *Tredexar Iron, etc., Co. v. The Steamship Calliope*, (1891) A. C. 11, 60 L. J. P. 28, 63 L. T. N. S. 781, 39 W. R. 641;

*Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290, 21 Fed. Cas. No. 12,402.

Where a vessel was moved into a berth where the bottom was uneven, against the master's wishes and in his absence, the dock owner was held to be liable for resulting damages. *Smith v. Yellow Pine Co.*, 108 Fed. Rep. 881, affirmed (C. C. A.) 114 Fed. Rep. 99.

**10. Submerged Jetty.** — *Tracy v. Baltimore, etc.*, R. Co., 98 Fed. Rep. 633.

**11. Defect in Bottom.** — *Sawyer v. Oakman*, 1 Lowell (U. S.) 134, 21 Fed. Cas. No. 12,404; *Barber v. Abendroth*, 102 N. Y. 406, 55 Am. Rep. 821.

**12. Mud.** — *The Calliope*, 14 P. D. 138; *Mersey Docks, etc., Board v. Penhallow*, 7 H. & N. 329; *Mersey Docks, etc., Board v. Gibbs*, L. R. 1 H. L. 93.

**13. Liability Irrespective of Ownership of Soil.** — *The Annie R. Lewis*, 50 Fed. Rep. 556; *Carleton v. Franconia Iron, etc., Co.*, 99 Mass. 216.

**14. Obligation as to Depth of Water.** — *Nelson v. Phoenix Chemical Works*, 7 Ben. (U. S.) 37.

**15. Liability for Insufficient Depth.** — *The Annie R. Lewis*, 50 Fed. Rep. 556. See also *McCaldin v. Parke*, 66 Hun (N. Y.) 323, reversed 142 N. Y. 564.

**16. The Bark Francesca T.**, 9 Ben. (U. S.) 34.

**17. Dredging Bed of Stream.** — *Elting v. East Chester*, 50 Fed. Rep. 112.

**Right of Pier Owner to Dredge Adjoining Land.** — *White v. Nassau Trust Co.*, 168 N. Y. 149.

**18. Duty to Dredge.** — *The Dave & Mose*, 49 Fed. Rep. 389.

**19. Duty to Give Notice of Defects.** — *White v. Phillips*, 15 C. B. N. S. 245, 109 E. C. L. 245, 33 L. J. C. Pl. 33; *Heissenbuttel v. New York*, 30 Fed. Rep. 456; *Nelson v. Phoenix Chemical Works*, 7 Ben. (U. S.) 37; *Sawyer v. Oakman*, 7 Blatchf. (U. S.) 290; *The John A. Berkman*, 6 Fed. Rep. 535; *O'Rourke v. New York Dyewood Extract, etc., Co.*, 55 Fed. Rep. 81;



## J. WHEN RECOVERY MAY NOT BE HAD — CONTRIBUTORY NEGLIGENCE.

Where the injured party is damaged as a result of his own reckless imprudence there can be no recovery,<sup>1</sup> or where a vessel enters a dock in a manner contrary to the wharfinger's invitation and upon the captain's responsibility;<sup>2</sup> or where damage results to a party who has no authority to enter or remain upon a wharf or in a berth at a wharf, such, for example, as when a wharf is lawfully closed, the wharfinger may not be liable.<sup>3</sup> Notice that the invitation to use the wharf has been withdrawn must be given in order to relieve the wharfinger from liability,<sup>4</sup> but the notice need not be expressly given, as for instance, where a wharf or dock is impliedly withdrawn from public use by the making of extensive improvements.<sup>5</sup> Where the agent of a vessel assumes the responsibility of providing the vessel with a safe berth the wharfinger may not be liable.<sup>6</sup> The master of a vessel which is about to use a berth at a wharf is bound to use ordinary care. He cannot carelessly run into danger and then have the wharfinger charged with the damage resulting from his own negligence.<sup>7</sup> The wharfinger is not liable for an injury caused without his fault or negligence or the fault of those in privity with him. The wharfinger must be shown to have been negligent.<sup>8</sup>

Hartford, etc., Transp. Co., *v.* Hughes, 125 Fed. Rep. 981; Carleton *v.* Franconia Iron, etc., Co., 99 Mass. 216. See Christian *v.* Van Tassel, 12 Fed. Rep. 884. See also The Calvin P. Harris, 33 Fed. Rep. 295; Barber *v.* Abendroth, 102 N. Y. 406, 55 Am. Rep. 821.

**Sufficiency of Notice.**—A general notice of the depth of water given to the master and a warning to the effect that if anything happened he and not the wharfinger would be responsible, was held to be insufficient to relieve the wharfinger from liability for damages resulting from a projecting rock which was unknown to the master. Hartford, etc., Transp. Co. *v.* Hughes, 125 Fed. Rep. 981.

**1. Fault of Injured Party.**—The Schooner Niantic, 6 Fed. Rep. 632; The Dave & Mose, 49 Fed. Rep. 389; Elting *v.* East Chester, 50 Fed. Rep. 112; Peterson *v.* Great Neck Dock Co., 75 Fed. Rep. 683; Leo *v.* McCollum, 107 Fed. Rep. 742; Grand Tower Mfg., etc., Co. *v.* Hawkins, 72 Ill. 386; Hall *v.* Tillson, 81 Me. 362; Clancy *v.* Byrne, 58 Barb. (N. Y.) 449; Washington *v.* Staten Island Rapid Transit R. Co., 68 Hun (N. Y.) 87; Fitzpatrick *v.* Tweddie, 73 Hun (N. Y.) 105, *affirmed* 144 N. Y. 704.

**Collision with Pier.**—Even though a pier may be an obstruction to navigation, a vessel which negligently runs into it and is damaged cannot recover from the owner of the pier. The Henry Clark *v.* O'Brien, 65 Fed. Rep. 815.

**Contributory Negligence Question for Jury.**—Where a vessel broke away from a wharf in a high wind, in the night, and because of a defect in the wharf, the question of contributory negligence of the master was for the jury, where it appeared that the wharf indicated that it would give way, that it was dark, that all the lines were out, and that the master was unable to get at the lines. Michaud *v.* Grace Harbor Lumber Co., 122 Mich. 305.

**2.** The wharfinger is liable only for injuries occasioned in a use of the wharf or dock which the vessel was invited or induced to make. Phillips *v.* Schlesinger, 137 Mass. 338.

**3. Liability When Wharf Is Closed.**—Onderdonk *v.* Smith, 27 Fed. Rep. 874; Merritt, etc.,

Derrick, etc., Co. *v.* Schermerhorn, (C. C. A.) 98 Fed. Rep. 746.

When a vessel remains at a wharf longer than she has a right, the wharfinger is not liable for injury caused by reason of the vessel's delay in leaving. Onderdonk *v.* Smith, 23 Blatchf. (U. S.) 562.

**4. Necessity of Notice.**—New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. (U. S.) 649.

**5. Improvement of Wharf.**—Downes *v.* Elmira Bridge Co., 179 N. Y. 136.

**6. Assumption of Risk.**—Panama R. Co. *v.* Napier Shipping Co. 166 U. S. 280, *reversing* (C. C. A.) 50 Fed. Rep. 557.

**7. Master's Duty.**—Smith *v.* Burnett, 173 U. S. 430; The John A. Berkman, 6 Fed. Rep. 535; Phillips *v.* Schlesinger, 137 Mass. 338. See also Hustede *v.* Atlantic Refining Co., 68 Fed. Rep. 669.

**Duty to Take Soundings.**—It is the duty of the shipmaster before placing his vessel in the berth to ascertain whether the depth of water in the dock is sufficient for the draught of his vessel. Nelson *v.* Phoenix Chemical Works, 7 Ben. (U. S.) 37.

That the master of a vessel which is to lie in a regular berth at a wharf is not obliged to take soundings, see Garfield, etc., Coal Co. *v.* Rockland-Rockport Lime Co., 184 Mass. 60.

**Assumed Risk Question for Jury.**—Where a vessel broke away from a wharf in a high wind because of alleged defects in the wharf, and it was contended that the master knew of the wharf's condition because he had used the wharf many times before, but it appeared that the wharfinger represented that the wharf was safe, it was held that the question of assumption of risk was for the jury. Michaud *v.* Grace Harbor Lumber Co., 122 Mich. 305.

**8. Injury Caused Without Wharfinger's Fault.**—Tredegar Iron, etc., Co. *v.* The Steamship Calliope, (1891) A. C. 11, 60 L. J. P. 28, 63 L. T. N. S. 781, 39 W. R. 641; Fahy *v.* Society, etc., 114 Fed. Rep. 760; Jandreau *v.* Witherbee, (C. C. A.) 98 Fed. Rep. 629; Girard Point Storage Co. *v.* Roy, (C. C. A.) 93 Fed. Rep. 574; Hustede *v.* Atlantic Refining Co., 68 Fed. Rep. 669, *affirmed* (C. C. A.) 74 Fed. Rep. 876; Jack-

k. **INEVITABLE ACCIDENT.** — Where an injury occurs to a vessel resulting from inevitable accident, such as, for example, where an extraordinary storm produces damage to a vessel moored at a reasonably safe wharf, the wharfinger will not be liable.<sup>1</sup>

l. **NEGLIGENCE OF BOTH PARTIES.** — Frequently both the wharfinger and those in charge of the vessel have been adjudged in fault, the negligence of both parties having contributed to the result. In such cases the libellant has been given one-half damages.<sup>2</sup>

m. **LEASED WHARVES** — (1) *Liability of Lessor.* — The lessor of a wharf is not necessarily absolved from liability because the wharf has been leased, and this may be so notwithstanding the lessee has covenanted to repair. Thus, where the wharf is dangerous when leased the lessor may be held liable.<sup>3</sup> Under certain circumstances both the lessor and lessee may be held liable.<sup>4</sup> A mere grant by a municipal corporation of the right to collect wharfage certainly would not relieve the corporation of the duty to keep a pier in repair.<sup>5</sup> The lessor or owner has been held not to be liable for damages caused by defects in existence subsequent to the time the lease was made and which resulted from no fault of the lessor.<sup>6</sup>

(2) *Liability of Lessee.* — The lessee of a wharf, dock, or pier, like the owner, must keep it in repair, and the lessee is liable for damages notwithstanding that the lessor may be bound to repair.<sup>7</sup> Many of the cases concerning injuries received from leased wharves have been decided upon the principles of law relating to the subject of landlord and tenant. This subject has been fully discussed in another part of this work.<sup>8</sup>

**IX. FRANCHISES AND GRANTS.** — The rights, powers, duties, and liabilities of the grantor and grantee of franchises and grants to erect and maintain wharves are determined in the same manner as in the case of franchises and grants for other purposes.<sup>9</sup> As a general rule reference may be had to the

son *v. Allegheny*, 41 Fed. Rep. 886; *Morgan v. Morley*, 1 Wash. 464; *McCaldin v. Parke*, 142 N. Y. 564.

The mere fact that a party suffers damage because of a defect in a wharf will not warrant a recovery. The owner or person in control of the wharf must be shown to have been in fault. *Garrison v. New York*, 5 Bosw. (N. Y.) 497.

1. **Inevitable Accident.** — *Meyer v. Pennsylvania R. Co.*, 125 Fed. Rep. 428. See also generally the titles ACT OF GOD, vol. 1, p. 584; ACCIDENT, vol. 1, p. 272.

2. **Negligence of Both Parties.** — The *John A. Berkman*, 6 Fed. Rep. 535; *Sullivan v. Lake Superior Elevator Co.*, 56 Fed. Rep. 735; *Union Ice Co. v. Crowell*, (C. C. A.) 55 Fed. Rep. 87, 5 U. S. App. 270; *Christian v. Van Tassel*, 12 Fed. Rep. 884; *The Dave & Mose*, 49 Fed. Rep. 389.

3. **Liability of Lessor.** — *Mason v. Rhinelander*, 8 Ben. (U. S.) 163; *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159; *Wendell v. Baxter*, 12 Gray (Mass.) 494; *Moody v. New York*, 43 Barb. (N. Y.) 282; *Taylor v. New York*, 4 E. D. Smith (N. Y.) 559.

4. **Liability of Both Parties.** — *Cannavan v. Conklin*, 1 Daly (N. Y.) 509; *Joyce v. Martin*, 15 R. I. 558.

5. **Liability of Municipal Corporation.** — *Taylor v. New York*, 4 E. D. Smith (N. Y.) 559. See also *Clarey v. Oceanic Steam Nav. Co.*, 40 Fed. Rep. 908.

6. **When Owner Is Not Liable.** — *Moore v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 237;

*Carrollton Furniture Mfg. Co. v. Carrollton*, 104 Ky. 525; *State v. Boyce*, 73 Md. 469; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391, reversing 65 Barb. (N. Y.) 344; *Seaman v. New York*, 80 N. Y. 239, 36 Am. Rep. 612; *Ahern v. Steele*, 115 N. Y. 203, reversing 48 Hun (N. Y.) 517; *Towt v. Philadelphia*, 173 Pa. St. 314.

7. **Liability of Lessee.** — *Leonard v. Decker*, 22 Fed. Rep. 741; *Smith v. Havemeyer*, 32 Fed. Rep. 844; *O'Rourke v. Peck*, 40 Fed. Rep. 907; *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497; *Radway v. Briggs*, 37 N. Y. 256; *Gluck v. Ridgewood Ice Co.*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 254; *Cannavan v. Conklin*, 1 Daly (N. Y.) 509.

8. See generally the title LANDLORD AND TENANT, vol. 18, p. 149.

9. See generally the title FRANCHISES, vol. 14, p. 4 *et seq.*

**State Seal to Grant Not Essential.** — *Roberts v. Brooks*, (C. C. A.) 78 Fed. Rep. 411.

**Reservation in Grant of Right to Build Wharf Construed.** — *Bell v. New York*, 77 N. Y. App. Div. 437.

**Fee Conveyed by Grant.** — *Roberts v. Brooks*, (C. C. A.) 78 Fed. Rep. 411.

**Land under Water Not Included.** — *Matter of New York*, 167 N. Y. 627.

**Grant of Exclusive Privileges.** — "The first section of article 1 of the constitution of the state declares 'that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public services;' this does not



statute or instrument creating a grant or franchise, to fix the rights of the parties thereunder.<sup>1</sup>

**WHATEVER.** — See note 2.

**WHEAT.** — See the title CROPS, vol. 8, p. 301.

**WHEN.** (See also the titles HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318; TIME (COMPUTATION OF), vol. 28, p. 209; WILLS, *post.* And see IF, vol. 15, p. 824; THEN, vol. 28, p. 128.) — The ordinary meaning of the adverb "when" is, at that time.<sup>2</sup> But the word "when" does not necessarily refer to the instant of time spoken of; it frequently is used in a relative instead of an absolute sense, referring not to the present but to a different time, and means, according to the context, "whenever," "upon which," "in case," "if," etc.<sup>3</sup> Thus "when"

prohibit the legislature from granting to a single individual or association the exclusive right to erect and keep a public toll wharf, within certain prescribed limits, for such an improvement being beneficial to the public, in order to secure its erection, the exclusive profits thereof may be granted to the contractor, and moreover the grant is presumed to be in consideration of public services and for value." *Martin v. O'Brien*, 34 Miss. 21.

**Impairment of Grant by Later Grant.** — *Martin v. O'Brien*, 34 Miss. 21.

**Revocation.** — *Bradford v. McQuesten*, 182 Mass. 80; *Clifford v. O'Neill*, 12 N. Y. App. Div. 17; *Bedlow v. Bedlow*, 158 N. Y. 292, *affirming* 91 Hun (N. Y.) 384.

**Revocation by Failure to Construct.** — *Stockton v. American Lucol Co.*, (N. J. 1897) 36 Atl. Rep. 572.

**Changing Site of Wharf.** — *Lorton v. New York*, 33 N. Y. App. Div. 140, *affirmed* 162 N. Y. 616.

**Adverse Possession.** — *Roberts v. Brooks*, (C. C. A.) 78 Fed. Rep. 411; *Knickerbocker Ice Co. v. Forty Second St., etc.*, *Ferry R. Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 27, *affirmed* 176 N. Y. 408.

**Prescriptive Right to Wharf.** — *Bell v. New York*, 77 N. Y. App. Div. 437.

**Prescriptive Right a Question of Fact.** — *Thompson v. New York*, 3 Sandf. (N. Y.) 487, *affirmed* 11 N. Y. 115.

1. For Cases Construing Particular Grants, see the following: *Weber v. Harbor Com'rs*, 18 Wall. (U. S.) 57; *Roberts v. Brooks*, (C. C. A.) 78 Fed. Rep. 411; *Verplanck v. New York*, 2 Edw. (N. Y.) 220; *Marshall v. Guion*, 11 N. Y. 461; *Langdon v. New York*, 93 N. Y. 129; *Kingsland v. New York*, 110 N. Y. 569; *Knickerbocker Ice Co. v. Forty Second St., etc.*, *Ferry R. Co.*, 176 N. Y. 408; *Galveston v. Menard*, 23 Tex. 349.

2. **Whatever Remains.** (See also the title WILLS, *post.*) — A clause in a will stipulated: "Second. After the payment of such debts and funeral expenses I give and bequeath to my beloved wife, E. T., the farm on which we now reside, situate, etc.; also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or *whatever* remains, to descend to my daughter, M. T." It was held that the words "*whatever* remains" applied only to the personality which might be consumed or lost. *Green v. Hewitt*, 97 Ill. 113.

**Whatever Would Be Coming to Him.** — This

phrase has been used in the sense of the amount that would be due. See *Aultman v. Fletcher*, 110 Ala. 452.

**Whatever May Be Left — Will.** — See *Siegwald v. Siegwald*, 37 Ill. 435.

3. **When.** — *Webst. Dict.*; *Bell v. Hogan*, 1 Stew. (Ala.) 541; *Williams v. Washington L. Ins. Co.*, 31 Iowa 544. This definition was adopted in *St. Louis v. Withaus*, 90 Mo. 646, where it was held that, in the construction of a city ordinance, words are to be taken in their ordinary sense; hence, the word *when* cannot be converted into "while" where the effect would be to turn special sessions into general ones, as in the phrase "*when* assembled."

In *Strawick v. Munhall*, 139 Pa. St. 168, it was held that the word *when* in the first clause of the proviso of section 1, *Pennsylvania Act of June 17, 1887*, P. L. 409, relating to the liens of mechanics, was equivalent to the words "at the time," in the last proviso of section 1, *Act of May 18, 1887*, P. L. 118.

4. "**When**" in the Sense of If or in Case. — *Wilkinson v. Winne*, 15 Minn. 159; *Grimball v. Marshall*, 3 Smed. & M. (Miss.) 364; *Pulliam v. Aler*, 15 Gratt. (Va.) 59; *Goodwyn v. Myers*, 16 Gratt. (Va.) 351.

Thus, where a statute provides, "*when* a vacancy occurs it shall be filled," of course, *when* does not mean at the same instant of time; it is used in the sense of "if." *Pulliam v. Aler*, 15 Gratt. (Va.) 59.

In *State v. Haberle*, 72 Iowa 140, it was held to be no error in an instruction that *when* was used in the sense of "if." It is said: "The court further instructed the jury as follows: 'When it is successfully proven that the general reputation of a witness for general moral character is bad, the witness is impeached, and the jury will be warranted in disregarding the testimony of such witness as unworthy of belief. The defendants have been witnesses in their own behalf, and are subject to be impeached the same as any other witness.' This instruction is claimed to be erroneous because it assumes that the defendants were impeached. We do not think it is vulnerable to this objection. The use of the expression, '*when* it is successfully proven,' etc., is equivalent to saying, 'If it be successfully proven,' etc."

"**When**" in the Sense of If or Whenever. — An act contained the following passage: "And *when* an execution against the body of any defendant shall have been served, the party on whom the same shall have been served shall



in a testamentary gift usually has the sense of "if" and implies a condition.<sup>1</sup> But circumstances, even though slight, in the context, may be sufficient to show that a condition was not intended, and in such cases the gift will be held vested.<sup>2</sup>

be released, provided he, she, or they shall deliver to the officer serving the same the property which shall, in the opinion of such officer, be sufficient to discharge the debt and all costs." In construing this provision the court, in *Hening v. Nelson*, 20 Ga. 584, said: "The counsel for the plaintiff in error seemed to consider that the word *when* in this passage has the effect to restrict the exercise of the right given to the very point of time at which the arrest takes place. But we do not think so. The word is frequently used in the sense of 'if' or 'whenever,' and it is so used, we think, in this passage." See also *Elledge v. National City, etc.*, 100 Cal. 292; *Hening v. Nelson*, 20 Ga. 584; *Cooper's Estate*, 147 Pa. St. 325.

**Condition.**—In *Sam v. State*, 31 Miss. 485, it is said: "In providing that it 'should be the duty of the governor *when* notified of such vacancy,' to order the election, the term *when* was doubtless intended to refer to the condition upon which the election should be ordered, and not to prescribe the time *when* it should be ordered; and it should be understood as if the language was "upon being notified." This is frequently the sense of the word in technical language."

**Agreement to Discharge Defendant "When" a Certain Sum Shall Be Paid.**—In such an agreement *when* was held to be equivalent to "at a time after." *Kirtz v. Peck*, 113 N. Y. 222. The court said: "There is no language in the contract providing a specific time for the delivery of the release and discharge, but it may be required if not already executed at any time after payment. Its language is, *when* the money is paid, the said B. and her husband shall release and discharge the party of the first part from all claims, dues, and demands which they or either of them may have against him. *Morris v. Sliter*, 1 Den. (N. Y.) 59. The word *when* is used in the sense ascribed to it by lexicographers, as 'at a time after,' and as thus used the case of *Morris v. Sliter*, 1 Den. (N. Y.) 59, is in point."

**Note Payable When Property Is Sold.**—In *Crooker v. Holmes*, 65 Me. 195, it was held that where the maker of a note promises to pay a certain sum *when* he shall sell the place he lives on, the debt is absolute, and that it is the duty of the maker to sell within a reasonable time. See also *Noland v. Bull*, 24 Oregon 479; *De Wolfe v. French*, 51 Me. 420.

**When My Circumstances Allow.**—In *Trousseau v. Cartwright*, 10 Hawaii 352, it was held that the condition in a contract to pay money "*when* my circumstances allow and as soon as they allow," is fulfilled by evidence that the promisor was in receipt of money over and above his reasonable expenses with which he could pay.

**Imports a Condition.**—*Jolly v. Handcock*, 7 Exch. 820, 22 L. J. Exch. 38; *Hanson v. Graham*, 6 Ves. Jr. 239; *Bull v. Pritchard*, 5 Hare 567, 16 L. J. Ch. 185; *Stapleton v.*

*Cheales*, Prec. Ch. 317; *Cruse v. Barley*, 3 P. Wms. 20; *Smell v. Dee*, 2 Salk. 415; *Fonereau v. Fonereau*, 3 Atk. 645; *Goss v. Nelson*, 1 Burr. 227; *Lane v. Goudge*, 9 Ves. Jr. 229; *Roberts v. Brinker*, 4 Dana (Ky.) 570; *Gifford v. Thorn*, 9 N. J. Eq. 706.

The word *when*, in a testamentary gift, is a word of condition, denoting, unless qualified by the context, the time *when* the gift is to take effect in substance, so that if the legatee dies before the period specified the legacy is lapsed. Hence, while a legacy payable to the legatee at twenty-one, or any other age, is vested, a legacy to one *when* he attains the age of twenty-one is contingent. *Sellers v. Reed*, 88 Va. 377; *Major v. Major*, 32 Gratt. (Va.) 819.

**When** usually creates a condition precedent. *Jolly v. Handcock*, 7 Exch. 820, 22 L. J. Exch. 38.

A legacy to A *when* he shall attain the age of twenty-one does not vest before that time. *Giles v. Franks*, 2 Dev. Eq. (17 N. Car.) 521.

**When Recovered.**—Legacies were to be paid from money due on mortgage *when* recovered. It was held that the right to interest at four per cent., the mortgage producing five, did not depend upon the time *when* the money was recovered. *Wood v. Penoyre*, 13 Ves. Jr. 325.

**2. Condition Not Intended.**—*Fisher v. Johnson*, 38 N. J. Eq. 47; *Minnig v. Batdorff*, 5 Pa. St. 503; *Letchworth's Appeal*, 30 Pa. St. 175; *May v. Wood*, 3 Bro. C. C. 471; *Muskett v. Eaton*, 1 Ch. D. 435.

The word *when*, like the words "at" and "if," applied to a bequest of personalty, makes the gift contingent; but the addition of the words "equally to be divided," in a case where there are several legatees, shows that the words *when*, etc., were only used to designate the time *when* the enjoyment of the legacy was to commence, and would not prevent it from vesting. *Sims v. Smith*, 6 Jones Eq. (59 N. Car.) 347.

Where there is a testamentary gift to A, "if," or *when*, or "provided," or "in case," or "so soon as" (phrases which are synonymous, *Shrimpton v. Shrimpton*, 31 Beav. 425), a certain event happens—*e. g.*, attaining a stated age—such a gift, standing unaffected by the context, confers only a contingent interest, and requires the happening of the event to give it validity. But with the aid of a context such words may, without difficulty, not defer the vesting of the subject-matter of the gift, but merely refer to the futurity of its possession. 1 Jarm. on Wills (6th ed.), 805, 809, 816, 842, 854-960; *Boraston's Case*, 3 Coke 19; *Phipps v. Ackers*, 3 Cl. & F. 703; *nom.* *Phipps v. Williams*, 5 Sim. 44; *Scotney v. Lomer*, 29 Ch. D. 535, 31 Ch. D. 380, 54 L. J. Ch. 558, 55 L. J. Ch. 443; *In re Wrey*, 54 L. J. Ch. 1098, 30 Ch. D. 507. It has also been said that "*when*" cannot be considered as so strongly indicating contingency as 'provided' and 'if.'" *Watson Eq.* 1217.

**Devise.**—The word *when*, used in regard to

**WHENEVER.** (See also FORM, vol. 13, p. 1115; WHEN, *ante.*)—The word “whenever,” though often used as equivalent to “as soon as,” is sometimes used where the time intended by it is, and will be until its arrival, or for some uncertain period at least, indeterminate.<sup>1</sup>

**WHERE.** — “Where” signifies a place “at which” or “under circumstances in which.”<sup>2</sup>

**WHEREAS.** — The word “whereas” is defined to mean “the thing being so that,” “considering that things are so.”<sup>3</sup>

realty, relates to the time of enjoyment and not to the time of the vesting of the estate. Illinois Land, etc., Co. v. Bonner, 75 Ill. 325.

**When** in a devise or remainder, limited upon a particular estate, determinable upon an event which must necessarily happen, is construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting. Hersee v. Simpson, 154 N. Y. 496.

1. **Whenever.** — Robinson v. Greene, 14 R. I. 188.

A statute provided that “*whenever*, at the time and place appointed for the trial of any civil suit before a justice, such justice shall be unable to attend, any other justice may continue the cause.” In construing this provision the court said: “We, therefore, take the word *whenever* to mean in all cases which should need the intervention of another justice, as it was allowed under the preceding statute.” Whitcomb v. Rood, 20 Vt. 50.

**Whenever Notice Should Be Given.** — A statute provided that *whenever* notice should be given of a motion for an injunction, the court or judge might grant a temporary injunction until the motion could be heard. In construing this provision, the court said: “*Whenever* means at whatever time notice is given, and does not mean after whatever time. Simultaneously, therefore, with the time of giving the rule to show cause against the motion, the court may grant an order restraining the act threatened until the decision of the motion.” Yuengling v. Johnson, 1 Hughes (U. S.) 611.

**Whenever Service of Process Cannot Be Made.** — A statute provided that “*whenever* service of process cannot be made upon any person liable as sheriff, by reason of the removal of such person from the state, etc., an action of debt or scire facias may be brought by the party entitled thereto directly.” In construing this provision the court said: “*Whenever* such liability and inability to make service concur then the party is entitled to the action provided. *Whenever* is the word, and it covers all the time during which the liability of the sheriff should exist, and it looks directly to the act of making service of the process. If at any time during the existence of such liability process cannot be served, by reason of the removal of the sheriff, then the action against the sureties may be had.” Hine v. Pomeroy, 40 Vt. 106.

**Whenever Tendered.** — A statute provided that “railroads and other transportation companies, whose duty it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation ‘*whenever* tendered at a regular station,’ etc.” It was held that “*whenever* tendered” signified *whenever* tendered in the ordinary business

hours of such company. Alsop v. Southern Express Co., 104 N. Car. 294.

**Vested Remainder.** — The word *whenever* and its synonyms, referring to the time when property is to be enjoyed, are among the most ordinary words used in creating a vested remainder, and cannot be relied on as a test of a contingent one. Manderson v. Lukens, 23 Pa. St. 31.

2. **Where.** — State v. Hogreiver, 152 Ind. 652.

An indictment charged that the defendant “broke into and entered the store-house of R. D., with the intent to steal, *where* there was, at the time of such breaking and entering into said store-house, goods, merchandise, or other valuable things was kept for use.” In construing the indictment the court said: “It being charged that the defendant had broken into and entered the store-house specified, the word *where* must be understood, in that connection, as equivalent to the statutory words ‘in which.’ There was not error in overruling the demurrer.” Pond v. State, 55 Ala. 197.

**Bank Statement.** — A statute required banking corporations to publish semi-annually statements of their capital stock and of their assets and liabilities, and to show *where* the assets were situated. In construing this provision the court said: “The requirement of the statute that the statement shall show *where* the assets are situated, means that it shall not only point out and designate with approximate particularity the place in which they are situated, but also that if they are situated in more than one place the amount of the assets in each of the several places shall be given. A statement which does not show what proportion of the assets are situated within the state of California does not afford the information which it is intended to give, and the citizen of this state who deals with the bank is not informed whether he has any security in such dealing.” British North America Bank v. Madison, 99 Cal. 133.

3. **Whereas.** — Dean v. Clark, 80 Hun (N. Y.) 83.

**Pleading.** — In debt on bond with collateral condition, an assignment of a breach commencing “and *whereas*,” etc., and continuing by way of recital to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer. Syme v. Griffin, 4 Hen. & M. (Va.) 277. The court said: “That a sentence introduced by the word *whereas* has been always regarded as mere recital, unless in a subsequent part of it there is some positive allegation, has been too long settled both by pedagogues and rhetoricians, as well as by courts, to be doubted at this day.”

In People v. Ennis, 137 Cal. 263, it is said: “It is better, no doubt, to avoid the use of the

**WHERESOEVER.** — See note 1.

**WHEREUPON.** — See note 2.

**WHETHER.** — See note 3.

**WHICH.** — See note 4.

**WHILE.** — The definition of “while” as a conjunction, and also as an adverbial modifier, is “during the time that; as long as.”<sup>5</sup>

word *whereas* in a pleading; but it may be observed that whatever is in itself a positive averment is not turned into recital by the mere fact that somewhere preceding the averment the word *whereas* is used. The effect of that word depends upon how it is connected with the succeeding part of the sentence. ‘That *whereas*’ is the form generally held objectionable in the older decisions. But the word may be used in the sense given to it in the dictionaries as synonymous with ‘when in fact,’ ‘while the contrary,’ ‘the fact is,’ etc.; and when used in that sense, as shown by the context, what follows may be positive averment and not recital. In the case at bar the language objected to is, ‘*whereas*, in truth and in fact, \* \* \* he, the said Ennis, was down to Sargent’s corral,’ etc.; and this was clearly a positive averment, and not a mere recital, notwithstanding the use of the word *whereas*.’ See also *People v. Fitzgerald*, 92 Mich. 331.

**Indictment.** — See *Reg. v. Goddard*, 2 Ld. Raym. 920; *Rex v. Crowhurst*, 2 Ld. Raym. 1363; and see 10 ENCYC. OF PL. AND PR. 344, title INDICTMENTS.

1. **Wheresoever.** — A conviction had taken place under a Colonial Act which provided that “whosoever being married marries another person during the life of the former husband or wife, *wheresoever* such second marriage takes place, shall be liable to penal servitude for seven years.” *Wheresoever* was construed to mean *wherever* in the colony. *Macleod v. Atty.-Gen.*, (1891) A. C. 458. Compare *In re Bigamy Sections*, 1 Can. Crim. Cas. (Can.) 196.

2. **Whereupon.** — *Whereupon*, “upon which,” “after which,” are interchangeable terms. *Lee v. Cook*, 1 Wyo. 419.

**Whereupon in the Sense of After Which.** — *Mat- ter of Sandford*, 136 Cal. 97.

**Case Made.** — In *Morrison v. Wells*, 48 Kan. 494, it was held that when, in the record of a case made, the following recital appears immediately after the journal entry, “*Whereupon* the plaintiffs duly filed their motion to set aside their judgment and for a new trial,” such record sufficiently shows that the motion for new trial was filed in time. See also *Hill v. Wand*, 47 Kan. 340.

**Justice’s Docket.** — An entry in a justice’s docket was as follows: “The jury returned a verdict as follows: ‘We, the jury, find for the plaintiffs.’ *Whereupon* the court rendered judgment against the defendant; and it is hereby adjudged that the plaintiffs do recover from the defendant the sum of \$8.85,’ etc.” In construing this the court said: “True, the word *whereupon* is not definite as to time; but, taken in connection with the statement of the justice, the conclusive presumption is that judgment was rendered on

the verdict without an adjournment.” *State v. Van Ells*, 69 Wis. 22.

**Bill of Exceptions.** — A bill of exceptions detailed certain testimony, and without saying that this was all the testimony given on the point, proceeded thus: “*Whereupon* the court held that the deposition might be read.” The appellate court said: “*Whereupon* is a word relating to time, and is called an adverb of time. The meaning of it in the bill of exceptions is, that when the time arrived that the testimony was closed then the court decided so and so. No meaning which can be given to this word will or can make it a word of numbers or quantity.” *Foster v. Nowlin*, 4 Mo. 23.

**Whereupon and Thereupon Distinguished.** — The word *whereupon*, apart from its relative sense, appears to differ from “thereupon” in this respect, that it simply confers a right but involves no idea of time, whereas “thereupon” is virtually equivalent to “immediately.” See *Burslem v. Attenborough*, L. R. 8 C. P. 122, 42 L. J. C. Pl. 102, 12 Encyc. Laws Eng. 584.

3. **Whether.** — A statute made taxable “all ground rents, moneys at interest, and all debts due from solvent debtors, *whether* by promissory notes (except bank notes), penal or single bill, bond, judgment, mortgage, stocks, etc. In construing this provision the court said: “In fact, this section of the act is ungrammatical, and the proposition contained in the sentence is what is called by critics an anacolouthon — an incomplete proposition. The *whether*, as used here, requires some correlative — generally the word ‘or.’ But suppose the word ‘or’ to have been inserted between each of the classes enumerated, and thus the sentence made grammatical, yet it could not follow that the enumeration of some particulars would be an exclusion of all others, under the rule *expressio unius est exclusio alterius*, as if the ‘viz.’ had been used.” *Vægtly v. School Directors*, 1 Pa. St. 331. And see VIDELICET, vol. 29, p. 1058.

4. **Which and As.** — In the phrase “such sums of money *which* I have already advanced” the word *which* has been construed to mean “as.” *Wheatley v. Spooner*, 3 Kay & J. 547.

**Which and “and if That.”** — Where in a suit for the conversion of mining stock the court, in instructing the jury, used the language, “If the plaintiff consented to place his stock in the original pool, *which* pool was subsequently broken up,” etc., and it was objected that this was charging as a fact that the pool was broken up, it was held that the word *which* as there used was dependent on an “if,” to be supplied, and should be understood as if instead of *which* the words “and if that” had been employed. *Menzies v. Kennedy*, 9 Nev. 153.

5. **While.** — *Lawrence v. Leidigh*, 58 Kan. 591.



**WHILST.** — See note 1.

**WHIP.** — See *WEAPON, ante*.

**WHISKEY.** (See also the title *INTOXICATING LIQUORS*, vol. 17, p. 182.) — Whiskey is defined as a spirit distilled from corn.<sup>2</sup>

**WHISTLING.** — See note 3.

**WHITE.** — See note 4.

In *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 625, it is said: "The word *while* means 'during the time that,' and seems to necessarily imply some degree of continuance."

**While Means Time During Which.** — *State v. Causey*, 43 La. Ann. 898. And in that case it was held that an indictment charging the shooting with intent, under section 790, La. Rev. Stat. 1870, to have been done *while* lying in wait, was good.

**While in the Sense of "at the Same Time That."** — A finding contained the following clause:

"*While* it is found that the sale was made by said guardian under the order of the Court of Common Pleas." It was held that the word *while* as used in this finding meant simply "at the same time that." *Hammann v. Mink*, 99 Ind. 285.

**While in the Sense of When.** — See *Commercial Travelers' Mut. Acc. Assoc. v. Fulton*, (C. C. A.) 79 Fed. Rep. 425.

**While in Possession of the Property.** — In *New York Security, etc., Co. v. Saratoga Gas, etc., Co.*, 5 N. Y. App. Div. 538, it was held that an appellant out of possession of property could not secure a stay of execution pending appeal by giving the undertaking prescribed in the first clause of section 1331 of the New York Code of Civil Procedure. The court said: "But in order to secure to the respondent that protection the appellant must be in possession of the land ordered to be sold. He is not required to give security that no one will commit waste during the appeal, but the provision is that he will not commit any waste '*while* in possession of the property.' The phrase '*while* in possession of the property' evidently was intended to mean so long as he continues in the possession or until he is forced by the final judgment and sale to surrender it. The statute is framed upon the assumption that he is in possession, and that he is the one from whom waste may be apprehended."

**While in Use — Insurance.** — A policy of insurance was taken out upon a harvester "*while* in use." The harvester was destroyed by fire *while* stored in a shed upon the ranch of the plaintiff. In holding this loss not covered by the policy the court said: "We think the words '*while* in use' were intended to be employed, and have the effect, to limit the liability of defendant to loss by fire of the harvester while being used for harvesting purposes, and do not cover the loss as it occurred." *Slinkard v. Manchester F. Assur. Co.*, 122 Cal. 595.

1. **Whilst.** — The lessor, after the demise of certain premises with a portion of the adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself, *whilst* the same should remain there, paying half the expenses of repair." It was held that the words *whilst*, etc., reserved to

the lessor a power of removing the pump at his pleasure; and that it was no breach of the covenant though he removed it without reasonable cause, and in order to injure the lessee, but that without those words it would have been a breach of covenant to have removed the pump. *Rhodes v. Bullard*, 7 East 116.

2. **Whiskey.** — *Briffitt v. State*, 58 Wis. 43.

The court will take judicial notice that *whiskey* is a spirit distilled from corn. *State v. Williamson*, 21 Mo. 498.

It is common information that *whiskey* is a spirituous liquor distilled from corn and vegetables, and is highly intoxicating. *Aston v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 385; *Redding v. State*, 91 Ga. 231.

**Drugs.** — A large quantity of *whiskey* stored in a government warehouse was held not to pass under a bequest of "my stock of medicines, drugs, paints, and furniture belonging to or contained in my store." *Kloch v. Burger*, 58 Md. 578.

**Compound.** — The selling of a compound in which *whiskey* is the predominant ingredient is selling *whiskey*. Thus, in *Galloway v. State*, 23 Tex. App. 398, where an indictment charged the offense as selling *whiskey*, and the evidence showed that the article sold was "*whiskey* cocktail," it was held that there was no variation between the allegation and proof. The court said: "It is in proof that what is called '*whiskey* cocktail,' is only a mode of preparing *whiskey* as a beverage. *Whiskey* is the predominant ingredient. In selling the compound, the accused undoubtedly sold *whiskey*, which was a component part of the article sold, and the main ingredient designed and desired in the sale and purchase. If *whiskey* be present as the predominant element in the mixture, it is immaterial that bitters and tonics be used to qualify or render it more palatable as a beverage." (*Wall v. State*, (Ala. 1886) 8 Crim. L. Mag. 202.) Mr. Wharton says: "If pretexts such as these are sustained the worst vendors of the worst liquors would be the best protected by law." (2 Whart. Crim. L. (8th ed.), § 1507.) We have found no error in the conviction in this case, and the judgment is affirmed."

3. **Whistling.** — See the title *HORSES*, vol. 15, p. 756.

4. **White Paper Ballots.** — Ballots upon paper tinged with blue, which has ruled lines, not placed there as marks to distinguish the ballots, are upon *white* paper within the meaning of a statute providing "that no ballot shall be received, or counted, unless the same is written or printed upon *white* paper, without any marks or figures thereon intended to distinguish one ballot from another." *People v. Kilduff*, 15 Ill. 493.

**White Willow Saplings.** — See *Pike v. Fay*, 101 Mass. 134.

**WHITECAPPING.** — See note 1.

**WHITE PERSON.** (See also **BLACK**, vol. 4, p. 575; **COLORED PEOPLE**, vol. 6, p. 213; **MULATTO**, vol. 20, p. 1079; **NEGRO**, vol. 21, p. 527; and see the title **CITIZENSHIP**, vol. 6, p. 14.) — These words, as ordinarily used in the *United States* and in their well settled and popular meaning, include only persons of the Caucasian race; so the words used in the naturalization laws of the *United States* do not include individuals of the Mongolian race,<sup>2</sup> nor persons of half-white and half-Indian blood, who are therefore not entitled to be admitted to citizenship.<sup>3</sup> The distinction between white persons and persons not white does not depend upon the predomination of white blood over negro blood. The classes are to be understood as embracing those persons commonly understood to belong to the white or colored population respectively.<sup>4</sup>

1. **Whitecapping.** — See *Breeland v. State*, 79 Miss. 527. And see the titles **ASSAULT AND BATTERY**, vol. 2, p. 952; **CONSPIRACY**, vol. 6, p. 830; **MURDER AND MANSLAUGHTER**, vol. 21, p. 83; **RIOT**, vol. 24, p. 971; **THREATS AND THREATENING LETTERS**, vol. 28, p. 140.

2. **Chinese.** — *In re Ah Yup*, 5 Sawy. (U. S.) 155. In this case Sawyer, J., reviewing the history of the legislation, said: "Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words *white person* used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term *white person*, as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term *white person* any other than an individual of the Caucasian race, I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolians. At the time of the amendment, in 1870, extending the naturalization laws to the African race, Mr. Sumner made repeated and strenuous efforts to strike the word *white* from the naturalization laws, or to accomplish the same object by other language. It was opposed on the sole ground that the effect would be to authorize the admission of Chinese to citizenship. Every senator who spoke upon the subject assumed that they were then excluded by the term *white person*, and that the amendment would admit them, and the amendment was advocated on the one hand, and opposed on the other, upon that single idea."

The term *white person* does not include a Chinaman. *In re Gee Hop*, 71 Fed. Rep. 275.

Same — **Witness.** — A statute provided that "No black or mulatto person or Indian shall be allowed to give evidence in favor of or against a *white man*." It was held that the words, "Indian," "negro," "black," and *white* are generic terms, designating race; that, therefore, Chinese and all other people not *white* are included in the prohibition from being witnesses against *whites*. *People v. Hall*, 4 Cal. 399.

A Japanese is not a *white person* within

the naturalization law. *Matter of Takuji Yamashita*, 30 Wash. 234.

**Hawaiians.** — U. S. Rev. Stat. 1878, § 2169, allowing only persons of the *white* and African races to become citizens, is not modified by 22 U. S. Stat. at L., p. 61, § 14, which provides that "hereafter no state court, or court of the *United States*, shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed," as the purpose of the latter act was to remove all doubt as to the eligibility of Chinese to citizenship, and therefore a native of the Hawaiian Islands may not be naturalized, as he belongs to neither of the races mentioned. *In re Kanaka Nian*, 6 Utah 259. The court said: "There is a general rule of construction of statutes that if a portion of a number of classes are included by name, all others are excluded; such a rule of construction for this section would admit to citizenship the aliens of all other races, an effect that Congress unquestionably never intended. Some courts had admitted Chinese to citizenship, and this section was evidently made to prevent such naturalization and to remove all doubt. We are of opinion that the law authorizes the naturalization of aliens of the Caucasian or *white* races, and of the African races only, and all other races, among which are the Hawaiians, are excluded."

3. *In re Camille*, 6 Fed. Rep. 256.

4. **Predomination of White Blood.** — *Du Val v. Johnson*, 39 Ark. 182.

In *People v. Dean*, 14 Mich. 406, Campbell, J., said: "As the decisions now stand, so far as I have been able to follow them out, there is not a court in the *United States* which holds that a 'colored person,' in the popular acceptance, although lighter than a mulatto, can be called *white* without doing violence to language. In this state, both before and since the constitution now under consideration, the population of African descent has always been divided into black, mulatto, and 'other persons of color,' under statutes designed to protect them from illegal bondage; and every one must admit that statutes which protected none of a lighter shade than mulatto would have been of comparatively small service in that direction. (See Rev. Stat. 1838, p. 624; 2 Comp. L., § 5735; L. 1859, p. 526.) The term 'persons of color' was used in a very broad sense, and in conformity with popular usage, or it was senseless altogether."

But in *Gray v. State*, 4 Ohio 354, it was

So the words "white" and "colored," as used in statutes providing for the maintenance of schools, are held to be used in their ordinary acceptation.<sup>1</sup>

**WHITING.**—See note 2.

**WHOEVER.**—See note 3.

**WHOLE.**—See note 4.

**WHOLESALE.** (See also **RETAIL**, vol. 24, p. 875, and see the title **INTOXICATING LIQUORS**, vol. 17, p. 189.)—The primary and usual meaning of "wholesale" is the sale of goods in gross to retailers, who sell to consumers.<sup>5</sup>

held that a person who was nearer *white* than a mulatto was a *white person*. See also *Thacker v. Hawk*, 11 Ohio 380. Compare *Van Camp v. Board of Education*, 9 Ohio St. 407.

The division line is generally recognized to be that of one-quarter blood, as in *Virginia*, see *Dean v. Com.*, 4 Gratt. (Va.) 541; and in *Kentucky*, *Gentry v. McMinnis*, 3 Dana (Ky.) 382.

In *Louisiana*, if the proportion of African blood did not exceed one-eighth the person was deemed *white*; as was the rule in the colonial *code noir of France*. 2 Kent's Com. 72.

1. *Van Camp v. Board of Education*, 9 Ohio St. 407. "A person who has any perceptible admixture of African blood is generally called a colored person. In affixing the epithet 'colored' we do not ordinarily stop to estimate the precise shade, whether light or dark, though, where precision is desired, they are sometimes called 'light colored,' or 'dark colored,' as the case may be." See also the title **SCHOOLS**, vol. 25, p. 4.

**Liability of United States for Property of Friendly Indians Destroyed by a "White Person."**—U. S. Rev. Stat., § 2154, making the United States liable, under certain circumstances, for the property of friendly Indians, which is taken, injured, or destroyed by a *white person*, does not apply where the offender is a negro. *U. S. v. Perryman*, 100 U. S. 235.

2. **Whiting—Revenue Laws.**—See *U. S. v. Tiffany*, 117 Fed. Rep. 367.

3. **Whoever.**—In *Palmer v. Wakefield*, 102 Mass. 214, it was held that the provision of a statute subjecting to a penalty *whoever* brings a pauper into any town in the state where he is not lawfully settled, knowing him to be poor and indigent, etc., applies to public officers as well as to private persons.

4. **Whole.**—*Whole* in a grant was construed to mean the whole of the residue which had been previously granted. *Curtis v. Scales*, 14 M. & W. 447.

**Whole Case.**—In *Glassburn v. Deer*, 143 Ind. 179, it is said: "And it has been decided by this court again and again on appeal in such cases, not only that the case must be tried *de novo*, but that the *whole* case must be tried *de novo*. *Bowers v. Snyder*, 66 Ind. 340; *Scraper v. Pipes*, 59 Ind. 158, and authorities cited; *Hays v. Parrish*, 52 Ind. 132. What is meant by the *whole* case? Plainly it must be such case as was made by the issues presented before the board of commissioners. *Reynolds v. Shults*, 106 Ind. 291; *Schmied v. Keeney*, 72 Ind. 309." The case in question was appealed from the highway commissioners.

**Whole Year.**—A statute provided that any person being chosen, and actually serving one *whole* year in certain offices, should gain

thereby a settlement in the town. In construing this provision the court, in *Paris v. Hiram*, 12 Mass. 265, said: "We are of opinion that the term 'one *whole* year,' used in the statute, must be understood to be a political or rather a municipal year, namely, from the time the officer is chosen, until a new choice takes place, at the next annual meeting for the choice of town officers; which may sometimes exceed and sometimes fall short of a calendar year."

5. **Wholesale.**—*Kenyon v. Knights Templars*, etc., *Mut. Aid Assoc.*, 48 Hun (N. Y.) 292.

**Intoxicating Liquors.**—By *Wisconsin Session Laws* (1850), c. 139, § 5, all notes or accounts or evidences of debt given for retail liquor bills are absolutely void. The term *wholesale* implies the selling in or by unbroken parcels, as by the barrel, pipe, or cask, etc., while the term "retail" implies the cutting up or dividing such pieces, or parcels, or casks, into smaller quantities, and selling to customers in such manner. The purchase of liquors from time to time, in six or ten gallon kegs of different kinds, cannot, in any proper use of language, be called "selling by *wholesale*," if the casks are taken from a large bulk. *Gorsuth v. Butterfield*, 2 Wis. 237.

**Wholesale Dealer.**—In *State v. Lowenhaupt*, 11 Lea (Tenn.) 15, it is said: "One who sells by the nature of his business in gross, and not by the small quantity or parcel to consumers, is a *wholesale* dealer."

The mere fact that a liquor dealer sold by the quart, and in larger quantities not drunk or intended to be drunk on the premises, is not enough to constitute him a "*wholesale* dealer." *State v. Lowenhaupt*, 11 Lea (Tenn.) 14.

The board of aldermen of P. granted a license to H. to sell liquor at retail only, and H. gave bond to comply with the conditions of the license. Before it was granted the board passed a resolution that a sale of liquor in quantities over three gallons should be a sale at *wholesale*; but this resolution was not stated in the license, or recited or referred to in the bond, or stated or referred to in the grant of license, as recorded. In an action on H.'s bond for a breach thereof, in selling ten gallons of liquor, drawn from a cask containing a much larger quantity, it was held that the sale, being in the ordinary sense a sale at retail, was not affected by the resolution of the board, and was no breach of the condition of the bond. *Tripp v. Hennessy*, 10 R. I. 131. See also *Gorsuth v. Butterfield*, 2 Wis. 237.

A city charter gave the common council power "to license *wholesale* liquor dealers, and prohibit the keeping of the same." In construing this provision the court, in *Roberson v. Lambertville*, 38 N. J. L. 71, said: "It



**WHOLESALE PRICE.** — The words “wholesale price” have a certain, fixed, and well-defined meaning in the mercantile world. They mean the price fixed on merchandise by one who buys in large quantities of the producer or manufacturer, and who sells the same to jobbers or to retail dealers therein.<sup>1</sup>

**WHOLLY.** — See note 2.

**WHOLLY DESTROYED.** — See note 3.

**WHOLLY DISABLED.** — See the title ACCIDENT INSURANCE, vol. 1, p. 296.

**WHOM IT MAY CONCERN.** — See the titles FIRE INSURANCE, vol. 13, p. 213; MARINE INSURANCE, vol. 19, p. 956.

**WHORE.** (See also the title LIBEL AND SLANDER, vol. 18, p. 851.) — A

is argued on behalf of the prosecutor that a *wholesale* dealer is one who sells in large packages, and that, therefore, the city cannot exercise any restraint over those who sell by the quart. The word *wholesale* is used in contradistinction of the word ‘retail.’ The latter word has been used with a fixed and definite meaning in legislation upon this subject. In the 12th, 24th, and 39th sections of the Act concerning inns and taverns the retail of spirituous liquors is the sale by less quantity than one quart, and it is nowhere used in this Act in any other than this restricted sense. Giving it this meaning, it must be presumed that the legislature intended to include by the word *wholesale* all sales which are not retail — that is, by less quantity than one quart.” See also McPherson v. State, 54 Ala. 221; State v. Schweickardt, 109 Mo. 496.

**Wholesale Liquor Dealer.** — A manufacturer of liquor, selling in unbroken packages at his place of business to dealers, is not a *wholesale* liquor dealer, liable to taxation as other merchants. Taylor v. Vincent, 12 Lea (Tenn.) 282, 47 Am. Rep. 338; Pence v. Com., 6 Ky. L. Rep. 113; People v. Voorhis, 131 Mich. 398; Com. v. Rhodes, 1 Pittsb. Leg. J. (Pa.) 499.

But a manufacturer has been held a *wholesale* trader. Reg. v. Pearson, 1 Can. Crim. Cas. (British Columbia) 337.

**Wholesale Dealer — Revised Statutes United States, Section 3244.** — In U. S. v. Clare, 2 Fed. Rep. 57, it was held that if the quantity sold at one time exceeds five gallons the party selling is a *wholesale* dealer within the meaning of the statute.

**Commission Merchant.** — Under the seventeenth section of the Internal Revenue Act of 1864, as amended by the Act of July 13, 1866 (14 Stat. L. 98), persons who sell goods in their own name at their own store, on commission, and have possession of the goods as soon as the sales are made, and who deliver and send them off to their customers — such sales being to an extent exceeding twenty-five thousand dollars per annum — are to be taxed as “*wholesale* dealers,” not less than persons who sell to that amount on their own account. Slack v. Tucker, 23 Wall. (U. S.) 321.

**1. Wholesale Price.** — Fawcner v. Lew Smith Wall Paper Co., 88 Iowa 169.

**Wholesale Factory Price.** — Where a promissory note was made payable “in cotton yarn at the *wholesale* factory prices,” it was held that evidence of the usage of manufacturers and dealers in that article was admissible to show that by those terms was meant a certain scale of prices different from the actual

*wholesale* prices in the market. Avery v. Stewart, 2 Conn. 69.

**2. Wholly Engaged in Carrying on Manufacture.** — See People v. Campbell, 144 N. Y. 166.

**3. Fire Insurance.** (See also the title FIRE INSURANCE, vol. 13, p. 323.) — In Oshkosh Packing, etc., Co. v. Mercantile Ins. Co., 31 Fed. Rep. 204, the court, by Dyer, J., said: “In this state [*Wisconsin*] we have a statute which provides that ‘whenever any policy of insurance shall be written to insure any real property, and the property insured shall be *wholly destroyed* without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed.’ The expression *wholly destroyed* in this statute is equivalent to total loss; and total loss, as applicable to a building (for this statute relates only to real property), means, not that the materials of which it is composed were all utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot be properly any longer designated as a building. When that has occurred, then there is a total destruction or loss. May Ins., § 421a. Or, as it is said in one of the authorities which treats of this question, a total loss does not mean an absolute extinction. The question is not whether all the parts and material composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. 1 Wood Ins., § 107.” See also Barnard v. National F. Ins. Co., 38 Mo. App. 107.

The words *wholly destroyed*, as used in the statute, are equivalent to “total loss,” and mean that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and has become a disintegrated mass that cannot be properly designated as a building; and the court properly instructed the jury that, in order to aid the defendant, the standing wall must be believed to be of material value “as a building or a part of a building,” and also properly refused to instruct that, if such wall were of any material value, it would avail the defendant. Barnard v. National F. Ins. Co., 38 Mo. App. 107.

The words *wholly destroyed*, as used in the statute, have a technical meaning, different from their ordinary meaning in common usage,

whore is defined to be a woman who practices unlawful sexual intercourse with men, especially one who does it for hire.<sup>1</sup>

**WIDEN—WIDENING.**—See note 2.

**WIDOW.** (See also WIFE, *post*, and the titles DOWER, vol. 10, p. 122; HUSBAND AND WIFE, vol. 15, p. 785.)—In technical as well as ordinary use, the term “widow” has reference to a woman who has lost her husband by death,<sup>3</sup> the condition of widowhood being terminated by subsequent marriage.<sup>4</sup>

which would apply the words to any material change of form or substance. But, under the statute, a building is *wholly destroyed*, only when no part of it remains intact or substantially uninjured, so that it can be utilized in effectually restoring the structure to its entirety. The trial court erred in submitting to the jury, without proper definition, the meaning of the words, as well as their application to the facts in evidence. *Ampleman v. Citizens Ins. Co.*, 35 Mo. App. 308.

The term *wholly destroyed*, as used in Rev. Stat. of Missouri, 1879, § 6009, means that the building is totally destroyed as such, though there is not an absolute extinction of all its parts. *Havens v. Germania F. Ins. Co.*, 123 Mo. 403.

1. **Whore.**—*Wagner v. State*, 17 Tex. App. 559.

**Single Act.**—In *Peterson v. Murray*, 13 Ind. App. 420, it is said: “A *whore* is a woman who prostitutes her body for hire. The word is generally used as synonymous with ‘harlot,’ ‘courtesan,’ ‘prostitute,’ and ‘strumpet.’ Cent. Dict. The word in its most general meaning includes a woman who practices or holds unlawful sexual intercourse either for hire or to gratify a depraved passion; and possibly proof of such acts, under this definition, would constitute a justification of the charge. In any event we cannot say, as a matter of law, that one act of illicit sexual intercourse constitutes a woman a *whore*.” See also *Fahnestock v. State*, 102 Ind. 156. Compare *Alcorn v. Hooker*, 7 Blackf. (Ind.) 58; *Rodebaugh v. Hollingsworth*, 6 Ind. 339.

**Sexual Intercourse with Affianced.**—In *Sheehey v. Cokley*, 43 Iowa 185, it is said: “The common understanding recognizes a well-defined distinction between one who yields to the embraces of her affianced under promise and expectation of marriage, and one to whom the character of *whore* properly attaches. A *whore* is a woman who practices unlawful commerce with men, particularly one who does so for hire; a harlot; a concubine; a prostitute. It is true that a woman may acquire the character of a *whore* without being generally accessible to men. She may be the mistress of one and chaste towards all others. But in common parlance a vast difference is recognized between such a person and her who yields only to the solicitations of her affianced.”

**Charge of Adultery.**—To charge that a married woman is a *whore* is equivalent to charging her with adultery. *Burke v. Stewart*, 81 Ill. App. 510; *Schmisser v. Kreilich*, 92 Ill. 347.

**Whorish.**—In *Scott v. McKinnish*, 15 Ala. 664, it is said: “*Whore* is the synonym for a prostitute, or a lewd or incontinent woman;

*whorish* means lewd, unchaste, incontinent, etc.”

**Strumpet.**—A charge in a declaration that a woman was called a *whore* was not established by proving that she was called a strumpet. *Williams v. Bryant*, 4 Ala. 44.

2. **Widen—Widening.**—A statute gave the defendants power to condemn lands for the purpose of *widening* their road. In construing this grant the court said: “The plaintiff insists that the authority to take land exists only where a change of location is contemplated, which is not proposed by the company in this case; and that the proviso as to width applies to the entire grant of power. If this is the true reading of the act it is clear that further proceedings by the defendants must be arrested, and it is equally apparent that this construction gives no effect whatever to the word *widen*. In fact, it imputes to the law-maker the absurdity of declaring that the company may *widen* their road, provided they do not make it any wider, because it has already been laid out to the full width of the prior grant. *Widen* is a word of clear and definite meaning; it has been used by the legislature in this statute, and it is the duty of the court not to expunge it, but to give effect to it, if it can be done without violating settled rules of statutory construction.” The width authorized by statute before was sixty-six feet, which prior to the passage of the latter act had been appropriated by the company. *Beck v. United New Jersey R., etc., Co.*, 39 N. J. L. 47.

**Widening and Opening.**—For a construction of the term *widening* in reference to a street, used inadvertently for “opening,” see *Watson v. Maze*, 17 Quebec Super. Ct. 579. But see *Joseph v. Montreal*, 10 Quebec Super. Ct. 531, where it was held that the word *widening* in a statute could not be read to mean opening or extending in relation to street improvements; for even if the word *widening* was used by the legislature by inadvertence instead of “opening,” the court could not correct such error.

3. **Widow.**—Webst. Dict.; *Whitsell v. Mills*, 6 Ind. 229; *Wait v. Wait*, 4 Barb. (N. Y.) 205.

**Heirs.**—A *widow* is not one of the heirs of her husband. *Richardson v. Martin*, 55 N. H. 46. See also the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318; and see RELATIVE—RELATION—RELATIONSHIP, vol. 24, p. 278; WIFE, *post*.

**Widow Held Not to Include Widower.**—*Wellington v. Drummer*, 69 N. H. 295.

4. **Remarriage.**—*Farmers Bank v. Hoof*, 4 Cranch (C. C.) 323; *Cooper v. Pogue*, 92 Pa. St. 254. In *Com. v. Powell*, 51 Pa. St. 440, *Thompson, J.*, said: “In common parlance we know the term *widow* means an unmarried woman, and unless it be shown, which has not

A divorced woman is not a widow upon the death of her former husband, and can claim no rights as such.<sup>1</sup> The word "widow," as used in the insurance policy in a beneficial society, was held to mean only the legal widow, and not the putative wife of the deceased husband.<sup>2</sup> A devise or bequest to the widow of a certain person is held to have reference not necessarily to the wife

been attempted, that there is a technical sense to which it is to be referred for exposition, this is the sense in which we must regard it as used by the legislature. Our law dictionaries agree in their definitions of the usual acceptation of the meaning of the word *widow*. A woman whose husband is dead. Wharton. *Widow*, an unmarried woman whose husband is dead. Bouvier. Worcester defines the word thus, 'A woman whose husband is dead and who remains unmarried;' and Webster, in the unabridged edition of 1844, 'A woman who has lost her husband by death and has not taken another—one long bereaved of a husband.' The word is so entirely and exclusively descriptive of an unmarried condition, having once been married, that any other sense would be figurative."

A statute gave the *widow* the right to retain property of her deceased husband to the extent of three hundred dollars. It was held that this right did not vest on the death of the husband but only when she elected to exercise the right, and that if she remarried before making her election her right no longer existed, as she was no longer the *widow* of the decedent. Kerns's Appeal, 120 Pa. St. 527; Burk v. Gleason, 46 Pa. St. 297. See also Com. v. Powell, 51 Pa. St. 441; Shumate v. McGarity, 83 Pa. St. 38.

But in Georgia R., etc., Co. v. Garr, 57 Ga. 280, it was held that the right to sue for the homicide of her husband was not divested by the subsequent marriage of the *widow*. The court said: "The word *widow* indicates the person, not the state, and is used as synonymous with wife."

So in Miles v. Miles, 46 N. H. 264, it was held that notwithstanding the use of the word *widow* in the Homestead Act the *widow* did not lose her right of homestead by second marriage.

**Widowhood — During Widowhood.** (See also DURING — DURING WIDOWHOOD, vol. 10, p. 359.) — In Kratz v. Kratz, 189 Ill. 276, it is said: "The first question is, what effect is to be given to the words in the second clause of the will, 'during her *widowhood*'? We have held that they mean during life, unless sooner terminated by marriage; that is, a devise or bequest to a wife during her *widowhood*, or so long as she remains the *widow* of testator, is a gift for life only, which may be terminated by a second marriage of the *widow*." See also Mulberry v. Mulberry, 50 Ill. 67; Green v. Hewitt, 97 Ill. 113; Batterton v. Yoakum, 17 Ill. 288; Mansfield v. Mansfield, 75 Me. 512; Dole v. Johnson, 3 Allen (Mass.) 364; Loring v. Loring, 100 Mass. 341.

**So Long as She Remains a Widow.** — A testator gave all his property to his wife "so long as she remains my *widow*." In construing this will the court, in Fuller v. Wilbur, 170 Mass. 506, said: "The words 'so long as she remains my *widow*' imply a continuance of the

estate during *widowhood*, and no longer; and at most it could not extend beyond her life."

**1. Divorced Woman.** — Burr's Claim, 11 Op. Atty.-Gen. 1; Whittell v. Mills, 6 Ind. 229; Schonfield v. Turner, 75 Tex. 324. In Matter of Ensign, 103 N. Y. 284, Finch, J., said: "The divorced wife is not 'the *widow*.' She may be the lawful wife of another man, and the deceased may have lawfully remarried in another state, or by permission of the court in this, and it would follow, if the appellant is right, that a woman may be a *widow* although her lawful husband is living, and that an intestate may leave two *widows* with equal rights to administration and distribution. Suppose that, with unusual activity, he should leave four, how would each get one-third of the personality? And were the children of any account in the scheme of distribution? In one event 'the *widow*' is entitled to the whole surplus. The appellant's counsel solves the struggle for priority by applying to the later wives, with a sort of grim humor, the maxim *caveat emptor*, but the suggestion is not quite adequate to unsettle the law and unite at desired points a severed bond. When the court dissolves the marriage contract at the suit of the innocent wife, it is authorized to decree the payment to her of a suitable allowance. And why is that? If any marital right continues after the divorce, the wife remains entitled to her support and may enforce it in the ordinary way. On the contrary, the statute recognizes that when the marriage tie is broken, and the relation ended, no future rights will remain to the wife, and no future obligations bind the husband which have their root in the marriage relation."

**Contra.** — But the term has been interpreted as "husbandless." Rittenhouse v. Hicks, 10 Ohio Dec. (Reprint) 759, 23 Cinc. L. Bul. 269.

**Divorce a Mensa.** — A wife who has received a divorce *a mensa et thoro* has been held to be her husband's *widow* upon his death. Hokamp v. Hagaman, 36 Md. 511; Liddell's Succession, 22 La. Ann. 9; Clark v. Clark, 6 W. & S. (Pa.) 85.

**Widower — Divorce.** — In Kunkle v. Reeser, 5 Ohio Dec. 422, a divorced man was held to be a widower within the Homestead Act.

**Desertion.** — A wife who has deserted her husband has been held not to be included in the term *widow* as used in the Homestead Act. Prater v. Prater, 87 Tenn. 78, 10 Am. St. Rep. 623. See also Richard v. Lazard, 108 La. 540, where the same construction was given to a statute whereby a *widow* left in necessitous circumstances was entitled to recover one thousand dollars from her husband's succession to be paid by preference out of the estate.

**2. Legal Widow.** — Schnook v. Independent Order, etc., 53 N. Y. Super. Ct. 181.

In Bolton v. Bolton, 73 Me. 299, the husband insured his life, payable to his *widow*, while living with a woman who for years had passed



at the time of the making of the will, but to the wife who might survive the person designated.<sup>1</sup>

**WIDOW'S ALLOWANCE.** — See the title ALLOWANCES, vol. 2, p. 156.

**WIDOW'S QUARANTINE.** — See the title DOWER, vol. 10, p. 148.

**WIDTH.** — See note 2.

**WIFE.** (See also WIDOW, *ante*; and see the title HUSBAND AND WIFE, vol. 15, p. 785, and the references there given.) — “Wife” is the correlative of husband; a woman who is united to a man in the lawful bonds of wedlock.<sup>3</sup> The word “wife” has been held to include widow.<sup>4</sup> A divorced wife is not a wife within a general bequest or limitation,<sup>5</sup> nor is a woman who through

as his wife. Upon his death the money was passed to his supposed *widow*, but afterward, upon his lawful *widow* appearing and claiming the insurance, the court held that the latter was properly entitled thereto. And in *Grand Lodge, etc., v. Elsner*, 26 Mo. App. 108, it was held that the deceased having been lawfully married in a foreign country, his abandonment of his wife without a legal severance of the marital bond, his cohabitation in this state with another woman as his wife, and rearing a large family by her, do not entitle the latter woman, as against the former, to the benefits of the fund, and his intention in effecting the insurance, and her good faith in considering herself his wife, are immaterial.

1. **Widow Not Necessarily Wife at Time of Making Will.** (See also WIFE, *post.*) — Under a testamentary direction that if either of the testator's sons should die without leaving lawful issue, the *widow* of the decedent should receive one-third of the rents of the real estate devised to him by the will, it was held that the benefit of the provision not being restricted to a wife living at the time of the making of the will, or at the testator's death, the person who was the wife at the time of the son's death was entitled to the rents. *Swallow v. Swallow*, 27 N. J. Eq. 278. So in *Schettler v. Smith*, 41 N. Y. 328, the court held that the word *widow*, as used in the will, plainly included any wife who might survive the decedent. And to the same effect see *In re Lyne*, L. R. 8 Eq. 65.

But in *Van Brunt v. Van Brunt*, 111 N. Y. 178, affirming 48 Hun (N. Y.) 614, where the testatrix, at the time of the making of her will and at her death, had eight children, seven of whom were married and had issue, and she devised the residuum of her estate to her executors, in trust, to pay the income to her children in equal portions during their lives, and “after their deaths to their respective husbands or wives,” and provided that if a child should die without issue, “or without leaving a husband or wife,” his or her share was to go to the survivors “after the decease or remarriage of said husband or wife,” it was held that the husband or wife intended was one living at testatrix's death, and not one becoming such by a marriage thereafter, and that, therefore, the devise did not restrain alienation for more than two lives in being at the testatrix's death.

And for *widow* meaning the wife at the time of making the will, see *Firth v. Fielden*, 22 W. R. 622; *Davis v. Kerr*, 3 N. Y. App. Div. 322.

2. **Width Construed Depth to Avoid an Absurdity.** — See *Bird v. Kenton County*, 95 Ky. 195.

3. **Wife.** — Webst. Dict.

**Legal Wife.** — A *wife* of a man is a woman to whom he is legally married. *Miller v. Miller*, 79 Hun (N. Y.) 197. See also *Wilkinson v. Joughin*, L. R. 2 Eq. 319, 35 L. J. Ch. 684. But see *Pastene v. Bonini*, 166 Mass. 85, wherein it was held, where a married man went through the form of marriage with another woman than his wife, and lived with such woman for many years, down to the time of his death, holding her out to the world as his *wife*, that a reference to “my *wife*” in his will meant this second wife. See also *Dicke v. Wagner*, 95 Wis. 260; *Anderson v. Berkley*, (1902) 1 Ch. 936.

**Wife and Children — Insurance.** — A policy of insurance was payable to the *wife* and children of the insurer. In construing this the court said: “And as the contract provides that this fund shall ‘be paid to his *wife* and children,’ without designating in what proportions the same shall be paid, we think the same should be paid to his *wife* and children equally. Each should receive an equal share, or in other words, each should receive one-fourth of such fund. This is the natural construction of the language of the contract.” *Felix v. Grand Lodge, etc.*, 31 Kan. 81, 47 Am. Rep. 480.

**Wife Not a Relative of Her Husband.** — See RELATIVE — RELATION — RELATIONSHIP, vol. 24, p. 278.

4. **Widow.** — *Reigate Union v. Croyden Union*, 14 App. Cas. 465; *Medway v. Bedminster*, 53 J. P. 580. But see *Guardians of Poor v. Guardians of Poor*, 18 Q. B. D. 528; *Guardians of Poor v. Guardians of Poor*, 19 Q. B. D. 385. This was upon the construction of a settlement act.

5. **Divorce.** (See also WIDOW, *ante.*) — *In re Morrieson*, 40 Ch. D. 30, 58 L. J. Ch. 80.

In *People v. Hovey*, 5 Barb. (N. Y.) 118, the court said: “The terms ‘husband’ and *wife* have a very definite and precise meaning. They are descriptive of persons who are connected together by the marriage tie, and are significant of those mutual rights and obligations which flow from the marriage contract. Until those obligations are assumed there is no *wife*, and the term is then applied, not merely to describe a woman who has been married, but as expressive of the relations existing between her and her husband. So long as that relation continues, she is properly a *wife*; when that ceases, the term is no longer applicable. The decree dissolves the marriage, and declares that each party is freed from its obligations. The

bigamy becomes a supposed wife.<sup>1</sup> A devise or bequest to the wife of the testator, or the wife of some other person, is held *prima facie* to be confined to the wife at the date of the will, if there be one at that time.<sup>2</sup> But where it appears from the context that such was the testator's intention, a future wife may take.<sup>3</sup>

**WIFE'S EQUITY.**—See the titles HUSBAND AND WIFE, vol. 15, p. 785; MARRIAGE SETTLEMENTS, vol. 19, p. 1224; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 331.

marriage contract therefore is at an end; not only the complainant in the chancery suit but the defendant, also, is absolved from all the obligations arising out of that contract. The relation of the parties, consisting in their mutual rights and duties, no longer exists; and it would seem to follow that the words 'husband and wife,' used to describe that relation, have ceased to be applicable. Certainly the former, *wife*, as to whom the dissolution of the marriage is entirely unlimited, cannot be said after this decree to have had a husband living; for she might marry again, and thus, if that were so, have two lawful husbands at the same time. But 'husband' and *wife* are correlative terms, so defined by lexicographers, which implies that whenever one can be properly applied, there must be a person to whom the corresponding term is applicable. If, therefore, the defendant is no longer the husband of his former *wife*, then she is no longer his *wife*."

**Divorced Woman Included.**—Where the words of the statute were, "the *wife* may file her petition for alimony alone," it was held that the word *wife*, as used, included a divorced woman. *Woods v. Waddle*, 44 Ohio St. 449; *McGill v. Deming*, 44 Ohio St. 645.

A policy of insurance was issued to M., payable on his death to A., *wife* of M., if living. M. afterwards obtained a decree of divorce from A. for her adultery. It was held that the term *wife* was a word of description merely and not of condition. *Carter v. Mutual L. Ins. Co.*, 10 Hawaii 121.

When the word *wife* is used as a mere word of description, the rights of the claimant are not affected by divorce. *Bullock v. Zillee*, 1 N. J. Eq. 492.

**1. Bigamy.**—*Wilkinson v. Joughin*, L. R. 2 Eq. 319, 35 L. J. Ch. 684. See also *Miller v. Miller*, 79 Hun (N. Y.) 197. See *supra*, p. 522, note 3, *Legal Wife*.

**2. Wife at Date of Will.**—*Garratt v. Niblock*, 1 Russ. & M. 629; *Matter of Bryan*, 2 Sim. N. S. 103; *In re Drew*, (1899) 1 Ch. 336; *Radford v. Willis*, L. R. 7 Ch. 7; *Firth v. Fielden*, 22 W. R. 622; *In re Burrow*, 10 L. T. N. S. 184; *Boreham v. Bignall*, 8 Hare 131. See also *Bullock v. Zillee*, 1 N. J. Eq. 492.

In *Johnson v. Johnson*, 1 Tenn. Ch. 621, it was held that a devise by a husband to his "dear *wife*," not mentioning her name, applied exclusively to the individual who answers the description at the date of the will, and not to an after-taken *wife*. The chancellor said: "The original intent of the testator, every one will concede at once, was to give the property devised to his then existing *wife*. The words 'my dear *wife*' point to a person then existing, the qualifying adjective necessarily implying

affection for an individual. Such affection being, of course, inconceivable of a person not then occupying the designated relation. To substitute another object of the testator's bounty would be to violate his intent and to make a will for him. In the absence of all authority, I should consider it too plain for argument that the will does effectually designate the *wife* existing at the date of the will as the object of the testator's bounty as if she had been mentioned by her Christian name."

In *Boreham v. Bignall*, 8 Hare 131, a devise to the testator's *wife* and nephew and to the survivor was held to apply exclusively to the *wife* living at the date of the will and death of the testator, and not to a subsequently married *wife*.

**3. Second Wife.**—*In re Lyne*, L. R. 8 Eq. 65; *Longworth v. Bellamy*, 40 L. J. Ch. 513; *In re Burrow*, 10 L. T. N. S. 184; *Cogan v. McCabe*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 739.

A testator devised and bequeathed a share of his residuary estate upon trust to pay the income thereof to his son B. for life, and after his decease to B.'s *wife* for life, and after her decease upon trust as to both income and corpus for B.'s children living at B.'s decease; and the will provided for the cesser of B.'s interest upon alienation or bankruptcy, in which event the trustees were to apply the income of the share thereinbefore directed to be invested for B. "and his family" towards the maintenance of B., "his *wife* and children." B. had a *wife* living at the date of the will, but she afterwards died and he married a second *wife* who survived him. It was held that there was sufficient context in the will to rebut the presumption that the gift to B.'s *wife* for life was confined to the *wife* living at the date of the will, and that the widow was entitled. *In re Drew*, (1899) 1 Ch. 336.

"The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following: First, that a devise or bequest to the *wife* of A, who has a *wife* at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under all circumstances confined to her; but that, secondly, if A have no *wife* at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of *wife* at any subsequent period." *Jarm. on Wills* (6th ed.), vol. 1, p. 303.

**WILD.** — See note 1.

**WILD ANIMALS.** — See the title ANIMALS, vol. 2, p. 341.

**WILE.** (See also the title SEDUCTION, vol. 25, p. 183.) — To wile means to cheat cunningly; mislead or lead with guile; hoodwink; entice; lure; as, the Indian wiled him to his death.<sup>2</sup>

1. **Wild Engine.** — An engine running on telegraph orders, and not on schedule time, is said to be running *wild*. Simpson *v.* Central Vermont R. Co., 5 N. Y. App. Div. 615.

2. **Wile.** — Standard Dict., *quoted in State v.* Hamann, 109 Iowa 646.



# WILFUL; WILFULLY, ETC.

BY THOMAS JOHNSON MICHIE.

## I. GENERAL DEFINITION, 525.

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### CROSS-REFERENCES.

See *DELIBERATE — DELIBERATION*, vol. 9, p. 189; *MALICIOUS — MALICIOUSLY*, vol. 19, p. 627; *PREMEDITATE — PREMEDITATION, ETC.*, vol. 22, p. 1175.

**I. GENERAL DEFINITION.** — In common parlance the word "wilful" is used in the sense of intentional. So wilfully means intentionally,<sup>1</sup> as

**1. Intentional** — *England*. — Reg. v. Senior, (1899) 1 Q. B. 291; Reg. v. Badger, 6 El. & Bl. 137, 88 E. C. L. 137; *In re London*, (1894) 2 Ch. 524.

*Alabama*. — Williams v. State, 83 Ala. 70; Birmingham R., etc., Co. v. Bowers, 110 Ala. 328; Louisville, etc., R. Co. v. Anchors, 114 Ala. 492; Carl v. State, 125 Ala. 105.

*California*. — Benkert v. Benkert, 32 Cal. 471. *Georgia*. — King v. State, 103 Ga. 263.

*Indiana*. — Louisville, etc., R. Co. v. Bryan, 107 Ind. 51; Belt R., etc., Co. v. Mann, 107 Ind. 93; Chicago, etc., R. Co. v. Nash, 1 Ind. App. 300.

*Iowa*. — State v. Windahl, 95 Iowa 470; State v. Teeters, 97 Iowa 458.

*Massachusetts*. — Com. v. McLaughlin, 105 Mass. 463; Com. v. Brooks, 9 Gray (Mass.) 299.

*Missouri*. — State v. Lewis, 69 Mo. 93; State v. Ellis, 74 Mo. 214; Leslie v. Rich Hill Coal Min. Co., 110 Mo. 39; State v. Bradley, 31 Mo. App. 320; State v. Vollenwider, 94 Mo. App. 158; State v. Schaefer, 116 Mo. 96; State v. Williams, 141 Mo. 316; State v. Hyland, 144 Mo. 302; State v. Grant, 152 Mo. 57; State v. Wright, 134 Mo. 404.

*New Jersey*. — State v. Clark, 29 N. J. L. 98; Clifford v. State, 60 N. J. L. 287.

*New York*. — Anderson v. How, 116 N. Y. 336.

*Pennsylvania*. — Matthews v. Park, 146 Pa. St. 391; Com. v. Perrier, 3 Phila. (Pa.) 232, 15 Leg. Int. (Pa.) 333.

*Texas*. — Lane v. State, 16 Tex. App. 178; Bland v. State, (Tex. Civ. App. 1896) 38 S. W. Rep. 254; State v. Equitable Loan, etc., Assoc., 142 Mo. 325.

A person acts wilfully when he acts intentionally, as distinguished from accidentally or involuntarily. State v. Stein, 48 Minn. 466.

In State v. Bonofiglio, 67 N. J. L. 239, it is said: "The word 'wilful,' although broader in

its signification than 'intentional,' embraces the latter in its meaning."

A statute gave to the superintendent of public instruction power to remove any school officer who wilfully disobeyed his decision. It was held that wilful, as here used, was equivalent to intentional. People v. Draper, 63 Hun (N. Y.) 389.

**Wilful Refusal.** — Intentional failure to perform a statutory duty would be a wilful refusal. Leslie v. Rich Hill Coal Min. Co., 110 Mo. 39. See also Niantic Coal, etc., Co. v. Leonard, 126 Ill. 216; Beard v. Skeldon, 113 Ill. 584; Wesley City Coal Co. v. Healer, 84 Ill. 128.

**Wilful Delay.** — Wilful delay has been held to be intentional delay. Taylor v. Vergette, 7 H. & N. 143, 30 L. J. Exch. 400.

**Seduction.** — In *Re Maples*, 105 Fed. Rep. 921, it is said: "Wilful means intentional or deliberate. It may mean, when used in a statute, an intentional and deliberate doing of a wrongful act. How seduction can be other than a wilful act it is difficult to comprehend. Certainly it is done intentionally."

**Libel.** — A libel is wilful. McDonald v. Brown, 23 R. I. 546.

**Wilful Malfeasance.** — In State v. Columbia, etc., Turnpike Co., 2 Sneed (Tenn.) 254, it was held that an information against a corporation which failed to allege a wilful nonfeasance and misfeasance was fatally defective. But see State v. Equitable Loan, etc., Assoc., 142 Mo. 326.

**Wilful Trespass.** — A statute provided that wilful trespass on the property of another should constitute a nuisance. It was held that a complaint which did not charge the defendant with having wilfully committed the trespass was insufficient. The court held that the word 'wilful' is not a matter of form, but is a matter of substance, of the essence of the crime charged, and should be set forth in the complaint. Vandever v. State, 1 Marv. (Del.) 209.

distinguished from accidentally or involuntarily; designedly;<sup>1</sup> purposely;<sup>2</sup>

**Wilful Desertion — Military Law.** — In *Hanson v. South Scituate*, 115 Mass. 336, it was held that the word 'wilful' in the phrase 'wilful desertion' was intended to emphasize and distinguish between desertion with no intention to return and a mere absence without leave.

**Actual Intent.** — A statute provided for the punishment for the wilful and malicious obstruction of a railroad track. It was held that an actual purpose to obstruct was not necessary, but that if a wilful intent of the defendant to follow his own convenience, in violation of the equal rights of others, was shown, it was sufficient. *Com. v. Temple*, 14 Gray (Mass.) 69; *Com. v. Hicks*, 7 Allen (Mass.) 576.

And that actual intent is not always necessary, see *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250.

Reckless disregard of other people's rights may amount to wilfulness. *People v. O'Brien*, 96 Cal. 176; *Carter v. Louisville, etc., R. Co.*, 98 Ind. 552; *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250. And see *infra*, this section, *Negligence — Wilful Neglect — Wilful Injury, etc.*

**Wilful and Reckless Distinguished.** — See *Harrison v. State*, 37 Ala. 154; *Johnson v. State*, 92 Ala. 82; *Dull v. Cleveland, etc., R. Co.*, 21 Ind. App. 575.

**Estoppel.** (See also the title *ESTOPPEL*, vol. 11, p. 431.) — Lord Denman, in *Pickard v. Sears*, 6 Ad. & El. 469, 33 E. C. L. 115, laid down the rule that "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, \* \* \* the former is concluded." Of this rule the court, in *Freeman v. Cooke*, 2 Exch. 654, said: "By the term 'wilfully,' however, in that rule, we must understand, \* \* \* if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did so act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." See also *Cornish v. Abington*, 4 H. & N. 549; *Howard v. Hudson*, 2 El. & Bl. 1, 75 E. C. L. 1; *Clarke v. Hart*, 6 H. L. Cas. 633; *The Ottumwa Belle*, 78 Fed. Rep. 643; *Turner v. Coffin*, 12 Allen (Mass.) 401; *Kuhl v. Jersey City*, 23 N. J. Eq. 86; *Manufacturers', etc., Bank v. Hazard*, 30 N. Y. 226; *Waters's Appeal*, 35 Pa. St. 526.

In *Continental Nat. Bank v. National Bank*, 50 N. Y. 583, it is said: "The word 'wilful' does not mean *malo animo*, but so far wilfully that the party making the representation acted upon means that it shall be acted upon in that way."

In *Gillett v. Wiley*, 126 Ill. 322, it is said: "The cases and text writers seem to use interchangeably the words 'wilfully,' 'intentionally,' 'means,' and 'voluntarily' as synonymous terms in discussing the question of the making of declarations or performing acts from which it is alleged that an estoppel arises."

**Wilful Default — Vendor and Purchaser.** — The meaning of "wilful default" in contracts of sale requiring the purchaser to pay interest on the purchase money if for any cause whatever other than wilful default of the vendor the purchase is not completed by the appointed day, has been construed in the following cases: *Strafford v. Maples*, (1896) 1 Ch. 235; *Greenwood v. Churchill*, 8 Beav. 413; *North v. Percival*, (1898) 2 Ch. 129; *In re London*, (1894) 2 Ch. 535; *Williams v. Glenton*, L. R. 1 Ch. 200; *In re Young*, 31 Ch. D. 168; *In re Hetling*, (1893) 3 Ch. 269; *Elliott v. Turner*, 13 Sim. 477; *In re Wilson*, (1894) 3 Ch. 546; *In re Woods*, (1898) 1 Ch. 433. See also the title *VENDOR AND PURCHASER*, vol. 29, pp. 711, 712.

**Wilful Default — English Merchants' Shipping Act.** — See *Grill v. General Iron Screw Colliery Co., L. R. 3 C. P. 476*.

**1. Wilfully Means Designedly** — *Alabama*. — *Williams v. State*, 83 Ala. 70; *Birmingham R., etc., Co. v. Bowers*, 110 Ala. 328; *Louisville, etc., R. Co. v. Anchors*, 114 Ala. 492; *Carl v. State*, 125 Ala. 105.

*Indiana*. — *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 300; *Miller v. Miller*, 17 Ind. App. 607; *Dull v. Cleveland, etc., R. Co.*, 21 Ind. App. 571; *Huff v. Chicago, etc., R. Co.*, 24 Ind. App. 492.

*Iowa*. — *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 187; *State v. Williams*, 70 Iowa 54.

*Massachusetts*. — *Com. v. Bradford*, 9 Met. (Mass.) 270; *Com. v. Brooks*, 9 Gray (Mass.) 299.

*Missouri*. — *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 39; *State v. Schaefer*, 116 Mo. 96; *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 326.

*New Jersey*. — *State v. Clark*, 29 N. J. L. 98. *New York*. — *People v. Boas*, 29 Hun (N. Y.) 379, affirmed 92 N. Y. 560.

*Pennsylvania*. — *Com. v. Perrier*, 3 Phila. (Pa.) 232, 15 Leg. Int. (Pa.) 333.

*Texas*. — *Richardson v. State*, 5 Tex. App. 472.

To do a thing wilfully is to do it by design. *People v. Sheldon*, 68 Cal. 434; *People v. Von Tiedeman*, 120 Cal. 128.

A wilful act is one done designedly, intentionally, or purposely, as contradistinguished from accident, inadvertence, or the absence of design or intention. *Com. v. Perrier*, 3 Phila. (Pa.) 229, 15 Leg. Int. (Pa.) 333.

Wilful means intentional and by design, as distinguished from that which is thoughtless and accidental. *Com. v. Williams*, 110 Mass. 403.

**Consciously.** — An act consciously omitted is wilfully omitted. *Odin Coal Co. v. Denman*, 185 Ill. 413.

**2. Wilfully Held to Mean Purposely** — *England*. — *Fearnley v. Ormsby*, 4 C. P. D. 136.

*Alabama*. — *Birmingham R., etc., Co. v. Bowers*, 110 Ala. 328; *Louisville, etc., R. Co. v. Anchors*, 114 Ala. 492.

*Indiana*. — *Louisville, etc., R. Co. v. Bryan*, 107 Ind. 51; *Belt R., etc., Co. v. Mann*, 107 Ind. 93; *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 300.

*Iowa*. — *State v. Clark*, 102 Iowa 690.

obstinately;<sup>1</sup> stubbornly;<sup>2</sup> perversely;<sup>3</sup> voluntarily;<sup>4</sup> deliberately;<sup>5</sup> with set purpose;<sup>6</sup> being governed by the will, without regard to reason, or without yielding to reason.<sup>7</sup>

*Massachusetts*.—Com. v. Bradford, 9 Met. (Mass.) 270.

*Missouri*.—State v. Equitable Loan, etc., Assoc., 142 Mo. 325.

*New York*.—People v. Boas, 29 Hun (N. Y.) 379.

*Pennsylvania*.—Com. v. Perrier, 3 Phila. (Pa.) 232, 15 Leg. Int. (Pa.) 333.

*Texas*.—Richardson v. State, 5 Tex. App. 472.

*Vermont*.—Hill v. Cox, 54 Vt. 627.

Wilfully implies a purpose or willingness to commit the act. People v. Sheldon, 68 Cal. 434; People v. Von Tiedeman, 120 Cal. 128; People v. Boas, 29 Hun (N. Y.) 379, affirmed 92 N. Y. 560.

In Freeman v. Huron, 8 S. Dak. 435, it is said: "Wilful disobedience of this lawfully issued order was a crime, and a contempt of court. Comp. Laws, § 6402. The term 'wilful,' as here used, implies simply a purpose or willingness to commit the forbidden act."

**1. Wilfully Means Obstinately.**—Chicago, etc., R. Co. v. Nash, 1 Ind. App. 300; Miller v. Miller, 17 Ind. App. 607; Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571; Huff v. Chicago, etc., R. Co., 24 Ind. App. 492; Fuller v. Chicago, etc., R. Co., 31 Iowa 187; Whitman v. State, 17 Neb. 227; Richardson v. State, 5 Tex. App. 472.

**2. Wilfully Means Stubbornly.**—Miller v. Miller, 17 Ind. App. 607; Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571; Huff v. Chicago, etc., R. Co., 24 Ind. App. 492; Fuller v. Chicago, etc., R. Co., 31 Iowa 187; Whitman v. State, 17 Neb. 227; Richardson v. State, 5 Tex. App. 472.

**3. Wilfully Means Perversely.**—Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571.

**4. Wilfully Means Voluntarily.**—Felton v. U. S., 96 U. S. 699; Bridgewater v. State, 153 Ind. 560; Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571; State v. Williams, 70 Iowa 54; Com. v. Kneeland, 20 Pick. (Mass.) 206.

In State v. Dorsett, 21 Tex. 656, it is said: "Wilfully is a word of equivalent or a broader meaning than voluntarily. It certainly includes it."

**Voluntary Act Distinguished from Coercion.**—A statute provided that a corporation wilfully failing to make the report required by statute should be fined. It was contended that wilful in this connection meant a deliberate intention not to make the report for the purpose of defrauding the state, or evading or hindering it in the collection of taxes. The court, in Louisville, etc., Ferry Co. v. Com., 104 Ky. 726, said: "We are unable to concur in this view. The rule of law is universal which presumes all persons to know the law, and, if there be any exceptions to this rule, we are satisfied that the case at bar does not fall within the exceptions. The term 'wilful' as used in the statute, simply means the voluntary act of a party, as distinguished from coercion, or in other words, that he was free to report or not to report; and the term 'wilfully fail' can, as we think, have no other rational construction."

**Wilful and Voluntary Distinguished.**—In *McManus v. State*, 36 Ala. 285, it is said: "Wilful is not the synonym of voluntary. In truth, they express no distinct idea which is common to both. The former is a word of much greater strength than the latter. Wilful, in this connection, denotes 'governed by the will; without yielding to reason; obstinate, stubborn, perverse, inflexible.' Voluntary, in this connection, means 'willing; acting with willingness.' It is the antithesis of involuntary." See also Com. v. Kneeland, 20 Pick. (Mass.) 206.

Wilfully imports something more of determination to execute one's own will in spite and defiance of the law than voluntarily. State v. Alexander, 14 Rich. L. (S. Car.) 254.

**5. Wilfully Means Deliberately.**—Reg. v. Senior, (1899) 1 Q. B. 291; State v. Clark, 102 Iowa 690.

It is not error to instruct the jury that an act is wilful when done with deliberation, and not through surprise or confusion, or a *bona fide* mistake. People v. Sheldon, 68 Cal. 434.

"Wilful" was held to include "deliberate" and "premeditated" in People v. Pool, 27 Cal. 585.

But in Cannon v. State, 60 Ark. 571, the omission of the word "deliberate," although "wilful" was used, in an indictment for homicide, was held fatal.

**Omission in Indictment.**—The omission of the word "wilfully" has been held not to be fatal to an indictment. In *Aubrey v. State*, 62 Ark. 368, the court said: "Does the omission of the word 'wilfully' render the indictment defective as a charge for murder in the first degree? A wilful killing is an intended killing. Both the words 'deliberation' and 'premeditation' involve a prior purpose to do the act in question. And it is impossible to conceive of a murder committed with a 'felonious intent' that is not wilful. State v. Townsend, 66 Iowa 741; Leonard v. Territory, 2 Wash. Ter. 381, and authorities cited; State v. Shelton, 64 Iowa 333; State v. Stackhouse, 24 Kan. 445; 1 Whart. Cr. Law, § 380. We conclude, therefore, that the word 'wilful' finds its equivalent in the other terms employed."

**Wilful Oath.**—In Com. v. Cornish, 6 Binn. (Pa.) 251, it is said: "That the oath of Cornish was absolute and false is not denied. It was wilful, also, according to the legal import of that word, by which it is only understood that the oath is taken with some degree of deliberation, and 'not merely through surprise or inadvertency, or a mistake of the true state of the question.'"

**6. Wilful Means with Set Purpose.**—People v. Sheldon, 68 Cal. 434; People v. Von Tiedeman, 120 Cal. 128; Chicago, etc., R. Co. v. Nash, 1 Ind. App. 300; Fuller v. Chicago, etc., R. Co., 31 Iowa 187; State v. Williams, 70 Iowa 54; Whitman v. State, 17 Neb. 227.

**7. Governed by the Will.**—Mitchell v. State, 60 Ala. 28; Chicago, etc., R. Co. v. Nash, 1 Ind. App. 300.

Wilful means doing one's own will without



**Feloniously, Falsely, Wantonly, Unlawfully, etc.** — The word “feloniously” has been held to include wilfully.<sup>1</sup> It has been held that the term “wilful” is not equivalent to unlawful.<sup>2</sup>

**II. KNOWINGLY — BONA FIDE BELIEF.** — An allegation that a thing is done wilfully is equivalent to alleging that it is done knowingly.<sup>3</sup> So it has been

regard to the will of others. *Matthews v. Park*, 146 Pa. St. 391.

A wilful act is one done with free activity of the perpetrator's will. *Minkler v. State*, 14 Neb. 183.

Wilfully means that the mind of the person who does the act goes along with it. *Reg. v. Senior*, (1899) 1 Q. B. 291.

**Wilful Misconduct.** — Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence. *Lewis v. Great Western R. Co.*, 3 Q. B. D. 206.

**1. Wilfully and Feloniously.** (See also FELONIOUS—FELONIOUSLY, vol. 12, p. 1028.)—*Allen v. Hundred of Kirton*, 3 Wils. C. Pl. 318; *Williams v. People*, 26 Colo. 272.

In *State v. McDaniel*, 45 La. Ann. 686, it was held that where the word “wilful” is to be found only in the title of a statute, an indictment under the latter, which follows the exact words of the enacting clause, but uses the word “feloniously” in lieu of the word “wilfully,” complies with the law. The former term has a more extensive criminal meaning than the latter, and includes it. See also *State v. Bush*, 47 Kan. 201. Compare *State v. Williams*, 37 La. Ann. 776; *State v. Jackson*, 43 La. Ann. 183.

**Wilfully and Falsely.** — The words “wilfully,” “unlawfully,” and “feloniously” in an indictment for forgery, while not having the same import as “falsely,” have a broader and more extensive signification, and are more than its equivalent. *State v. McKiernan*, 17 Nev. 224.

**Wilfully and Wantonly.** — See *infra*, this title, *Evil Intent, Malice, etc.*

**Wilfully and Corruptly.** (See also CORRUPT—CORRUPTION, ETC., vol. 7, p. 869.)—In an information for perjury the omission of the word “wilfully” from the charging part of the information was held not to be cured by the use of the word “corruptly.” *Williams v. People*, 26 Colo. 272.

“The word ‘wilfully’ does not mean in the common acceptance of the term corruptly.” *Steinman v. McWilliams*, 6 Pa. St. 178.

**2. Wilful and Unlawful.** (See also UNLAWFUL—UNLAWFULLY, vol. 29, p. 339.)—The word “wilful” does not mean unlawful. *U. S. v. Britton*, 107 U. S. 655.

Many of the statutes provide that if any one “wilfully” beats or kills (or the like) a dumb animal, he may be punished. When the word “wilful” is thus used, it means more than its import in common parlance. It means with evil intent or legal malice, or without reasonable ground to believe the act to be lawful. Where such a statute is in force, it should be defined in instructions to the jury. *Thomas v. State*, 14 Tex. App. 200. But in such an instance it is error to say that the jury may convict if the killing or injury was “unlawful,” for many acts are unlawful in a civil that are not so in a criminal sense. The court said:

“The indictment sufficiently charges the offense of wilfully and wantonly killing a dumb animal, but an inspection of the charge of the court reveals a fundamental error. The jury were instructed that if they believed that the defendant unlawfully killed the animal as charged, they should convict. The killing might have been unlawful, and yet not wilful and wanton.” *Jones v. State*, 9 Tex. App. 178.

Wilfully and maliciously have been held equivalent to the term “unlawfully.” See *Hodgkins v. State*, 36 Neb. 160.

**3. Wilfully Includes Knowingly.** (See also KNOWINGLY, vol. 18, p. 67.)—*United States v. Felton v. U. S.*, 96 U. S. 699; *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196.

*Alabama.*—*Georgia Pac. R. Co. v. Lee*, 92 Ala. 262.

*Indiana.*—*Parker v. Pennsylvania Co.*, 134 Ind. 677; *Bridgewater v. State*, 153 Ind. 560; *Huff v. Chicago, etc., R. Co.*, 24 Ind. App. 492.

*Kentucky.*—*Board of Internal Imp. v. Searce*, 2 Duv. (Ky.) 576.

*Massachusetts.*—*Com. v. Kneeland*, 20 Pick. (Mass.) 206.

*Minnesota.*—*State v. Stein*, 48 Minn. 466.

*Nebraska.*—*Minkler v. State*, 14 Neb. 183.

*Texas.*—*State v. Alcorn*, 78 Tex. 387.

See also *infra*, this title, *Evil Intent, Malice, etc.*

Wilfully is equivalent to knowingly and is distinguished from a statement made through inadvertence, or mistake, or under agitation. *Garza v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 983.

In *Wong v. Astoria*, 13 Oregon 542, it is said: “To wilfully do an act implies that it was done by design—done for a set purpose; and I think that it would necessarily follow that it was ‘knowingly’ done.”

**Wilful Violation of Law.** — In *Catlett v. Young*, 143 Ill. 74, it was held that by a wilful violation of a law was meant the violation of its provisions knowingly and deliberately done.

In *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 274, it is said: “A wilful failure to comply with the provisions of the mine law, to our mind, must mean that there must have been some knowledge that they were violating it, some knowledge which should have induced them not to do what they did do, must have been some knowledge of the fact.”

**Wilful Discrimination in Freight Charges.** — The word wilful in this connection means that the act must be done knowingly and intentionally and without reasonable grounds for believing the act to be lawful, and without lawful justification. *Galveston, etc., R. Co. v. Bowman*, (Tex. Civ. App. 1894) 25 S. W. Rep. 140; *Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416.

**Knowingly and Wilfully Distinguished.** — In *Williams v. People*, 26 Colo. 272, it is said: “Neither knowingly nor corruptly is its equivalent, nor do both of them comprehend its full

held in a number of cases that where one *bona fide* believes that his act is right, it is not wilful.<sup>1</sup> But the mere assertion of a right, without any reasonable grounds of belief, though *bona fide*, will not prevent the act from being wilful.<sup>2</sup> And it has been held that an act though *bona fide* may be wilful.<sup>3</sup>

**III. EVIL INTENT, MALICE, ETC.** — Wilful is a word of familiar use in every branch of law, and, although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent.<sup>4</sup> And wilfully

meaning in the statute. Wilfully is a word of stronger meaning than either. Corruptly means viciously or wickedly. One may do a thing knowingly without any improper or evil purpose."

A statute provided for the punishment of one who knowingly and wilfully resisted an officer. The indictment under this statute was for unlawfully and wilfully resisting an officer. The court in *State v. Perry*, 109 Iowa 353, said: "But the state urges that knowingly and wilfully are synonymous, and that the omission of the former detracted nothing from the meaning of the indictment. To wilfully do an act implies that it be done by design or with set purpose. One might purposely do an act which would have the effect of impeding an officer in the performance of his duties, in entire ignorance of the capacity in which such officer was acting. The obstruction denounced is that, not only designedly or purposely interposed, but with knowledge that the person hindered was at that time an officer serving or attempting to serve some writ, rule, order or process."

But in *Wong v. Astoria*, 13 Oregon 538, it was held that to allege an act to have been done wilfully and unlawfully was equivalent to alleging that it was done knowingly.

**Wilful Ignorance.** — See **IGNORANCE**, vol. 15, p. 925.

**1. Bona Fide Belief that Act Is Right.** — *Reg. v. Stimpson*, 4 B. & S. 301, 116 E. C. L. 301; *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196; *Com. v. Bradford*, 9 Met. (Mass.) 268; *State v. Preston*, 34 Wis. 684. And see *infra*, this title, *Evil Intent, Malice, etc.*

In *State v. Nicholls*, 50 La. Ann. 699, it is said: "The word is often used in the sense of the commission of an unlawful act with knowledge it is unlawful. 'Without reasonable ground for believing the act to be lawful.' \* \* \* The trial judge stated that to do an act forbidden by law, without reasonable belief it was lawful, was to do it wilfully. Between doing an unlawful act knowing it to be unlawful, and doing it without reasonable belief it is lawful, is a difference of words."

**Wilfully Holding Over.** — The expression in a statute, "wilfully holding over," has been held to imply not only a holding over after the term has expired, but a holding over in the absence of a *bona fide* belief on the part of the tenant that he is justified by the circumstances in so doing. *Swinfen v. Bacon*, 6 H. & N. 846.

**Wilful Concealment of Property — Bankrupt Act.**

— In *Sanders v. Smallwood*, 8 Ired. L. (30 N. Car.) 131, it is said: "It is plain, therefore, that the terms 'wilful concealment' mean, in this act, a fraudulent and dishonest attempt to withdraw from the use of his creditors property which the bankrupt knew they were entitled to have, and that, to that end, he corruptly and knowingly omitted to disclose it."

**2. Reasonable Ground for Belief.** — *Foulger v. Steadman*, L. R. 8 Q. B. 65.

**3. Just Grounds for Believing It to Be Lawful.** — A statute provided that judges of election wilfully refusing the vote of a qualified person should be guilty of an offense. In construing this statute the court in *State v. Clark*, 102 Iowa 690, said: "Whether the act in question was done with or without 'just grounds for believing' it to be lawful, was wholly immaterial. If it was done purposely and deliberately, it was done wilfully, within the meaning of the statute." See also *State v. Teeters*, 97 Iowa 458; *Parker v. Parker*, 102 Iowa 500. And see *supra*, this title, *General Definition*.

In *Lewis v. Great Western R. Co.*, 3 Q. B. D. 206, it is said: "It has been said, and, I think, correctly, that, perhaps, one condition of 'wilful misconduct' must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other 'wilful misconduct.' I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, 'Now this may or may not be a right thing to do. He might say, 'Well, I do not know which is right, and I do not care; I will do this.' I am much inclined to think that that would be 'wilful misconduct,' because he acted under the supposition that it might be mischievous and with an indifference to his duty to ascertain whether it was mischievous or not."

**Wilful Trespass.** — In *Foulger v. Steadman*, L. R. 8 Q. B. 65, *Blackburn, J.*, said: "We think if a man does intentionally and purposely stay on the railway premises after being requested to leave, he commits a wilful trespass within section 16 of 3 & 4 Vict., c. 97, although he fancies that he is entitled to remain upon the premises because other drivers are allowed to put their cabs upon the stand pursuant to certain terms." Compare *Jones v. Taylor*, 1 El. & El. 20, 102 E. C. L. 20.

**4. Implies Nothing Blamable.** — In *re Young*, 31 Ch. D. 174; *Fulton v. Wilmington Star Min*



does not imply that an act done in that spirit was necessarily a malicious act.<sup>1</sup> But generally in penal statutes the words "wilful" and "wilfully" mean not merely voluntary or voluntarily, but import a bad motive or purpose,<sup>2</sup>

Co., (C. C. A.) 133 Fed. Rep. 196; Carterville Coal Co. v. Abbott, 181 Ill. 495; Odin Coal Co. v. Denman, 185 Ill. 413; Highway Com'rs v. Ely, 54 Mich. 181; State v. Clark, 29 N. J. L. 98; Hill v. Cox, 54 Vt. 627; Newell v. Whittingham, 58 Vt. 341.

**1. Wilfully Does Not Mean Maliciously** — *England*. — Freeman v. Cooke, 2 Exch. 654.

*Alabama*. — Carl v. State, 125 Ala. 105.

*California*. — Benkert v. Benkert, 32 Cal. 470; Parsons v. Smilie, 97 Cal. 655.

*Iowa*. — Fuller v. Chicago, etc., R. Co., 31 Iowa 187.

*Maryland*. — Washington, etc., Turnpike Road v. State, 19 Md. 295.

*Missouri*. — State v. Gardner, 2 Mo. 22; State v. Wells, 70 Mo. 635; State v. Bradley, 31 Mo. App. 320.

*New Hampshire*. — Horn v. Cole, 51 N. H. 295.

*North Carolina*. — State v. Massey, 97 N. Car. 465; Brown v. Brown, 124 N. Car. 19.

*South Carolina*. — State v. Doig, 2 Rich. L. (S. Car.) 179; State v. Alexander, 14 Rich. L. (S. Car.) 254.

And see *supra*, this title, *General Definition*.

In *Anderson v. How*, 116 N. Y. 336, the court said: "Bishop, in his work upon Criminal Law, says: 'A *Massachusetts* case decides that the word "maliciously" in the statute against malicious mischief, is not sufficiently defined as "the wilfully doing of any act prohibited by law, and for which the defendant had no lawful excuse," but it means more.' Com. v. Snelling, 15 Pick. (Mass.) 337. The same author says: 'The words "wilful" and "malicious" cover together a broader meaning than the word "wilful" alone. Section 429. "Wilfully" sometimes means little more than plain "intentionally" or "designedly." Section 428. Colt, J., in *Com. v. Williams*, 110 Mass. 401, in discussing the difference in the meaning of "wilful" and "malicious," says: 'The injury must not only be wilful—that is, intentional and by design, as distinguished from that which is thoughtless or accidental, but it must, in addition, be malicious in the sense above given, that is, an act or injury done, either out of a spirit of wanton cruelty, or black or diabolical revenge.' Wilfulness is implied in maliciousness, but maliciousness is not implied in wilfulness. 'To make "wilful" imply both a wrong and malice is to give to it a force and effect beyond what it will bear, or what can be maintained, either in common acceptance or its legal import.' Com. v. Kneeland, 20 Pick. (Mass.) 245."

**Illustrations.** — In a prosecution for obstructing a street, the court instructed the jury that it was not necessary that they should find that the defendant or its employees acted maliciously, in order to find the defendant guilty, but that it was sufficient if the street was "wilfully" obstructed; and that to act wilfully means to act "intentionally or knowingly." This was held to be not objectionable when considered in connection with another portion

of the charge, which expressly directed that to justify a conviction the jury must find that the obstruction complained of was "unreasonable." *State v. Chicago, etc., R. Co.*, 77 Iowa 442.

A statute provided that a railroad company should be subject to a penalty for wilfully neglecting to post rates. In construing this provision the court, in *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 204, said: "It is said by defendant's counsel that the word 'wilfully' implies the idea of malice of a mild kind, an evil intent without excuse. Such may be its meaning in indictments and criminal statutes. But it is not to be so understood here. The word means 'obstinately, stubbornly; with design; with a set purpose,' and this definition must be applied to it where it occurs in the statute under consideration. If defendant 'with design or with a set purpose,' and not through mistake or inadvertence, omitted to post the rates, liability thereupon attaches for the omission."

**Wilful Breach of Duty.** — A statute provided for relief against forfeiture except in cases of grossly negligent, wilful, or fraudulent breach of duty. It was held that wilful breach of duty applied to any spontaneous, voluntary, or intentional failure to comply with the conditions, but did not require that the breach should be malicious. *Parsons v. Smilie*, 97 Cal. 655.

**Wilful Desertion.** — Upon the meaning of the word "wilful" in the phrase "wilful desertion," the court, in *Benkert v. Benkert*, 32 Cal. 471, said: "Wilful ordinarily signifies intentional, and that, we think, is its signification here. It does not imply any malice or wrong towards the other party. The word does not seem to have limited the meaning of the term 'desertion' as construed in the cases and employed by text writers."

Wilful desertion was held to mean a desertion without a cause to justify it. *State v. Hopkins*, 130 N. Car. 647.

In *Reed v. Reed*, 62 Ark. 611, it is said: "When a wife separates from her husband and lives apart from him with his consent, this is not a 'wilful desertion' within the meaning of the statute." See also the title *DIVORCE*, vol. 9, p. 766.

**2. Bad Purpose or Motive** — *United States*. — *Felton v. U. S.*, 96 U. S. 699; *Potter v. U. S.*, 155 U. S. 438; *U. S. v. Smith*, 27 Fed. Rep. 859; *North Carolina v. Vanderford*, 35 Fed. Rep. 287; *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196.

*Alabama*. — *State v. Abram*, 10 Ala. 928; *McManus v. State*, 36 Ala. 285.

*California*. — *Galvin v. Gualala Mill Co.*, (Cal. 1893) 33 Pac. Rep. 94.

*Colorado*. — *Williams v. People*, 26 Colo. 274.

*Indiana*. — *Wales v. Miner*, 89 Ind. 118; *Bridgewater v. State*, 153 Ind. 560; *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 300, (Ind. 1890) 24 N. E. Rep. 884.

*Massachusetts*. — *Com. v. Kneeland*, 20 Pick. (Mass.) 206; *Com. v. Bradford*, 9 Met. (Mass.) 270.



malice,<sup>1</sup> an evil intent,<sup>2</sup> without justifiable excuse or reasonable ground for

*Missouri*.—State *v.* Equitable Loan, etc., Assoc., 142 Mo. 326.

*New Jersey*.—State *v.* Clark, 29 N. J. L. 98.

*New York*.—Cunningham *v.* Bucklin, 8 Cow. (N. Y.) 185.

*North Carolina*.—State *v.* Whitener, 93 N. Car. 592.

*Pennsylvania*.—Matthews *v.* Park, 146 Pa. St. 391.

*Texas*.—Thomas *v.* State, 14 Tex. App. 200; Yoakum *v.* State, 21 Tex. App. 260.

*Vermont*.—Savage *v.* Tullar, Brayt. (Vt.) 223.

*Wisconsin*.—State *v.* Preston, 34 Wis. 675.

**Wilful Misapplication.**—Rev. Stat. of the United States, § 5209, provides that every officer of any association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association with intent to injure or defraud the association, shall be guilty of a misdemeanor. It was held that a wilful misapplication was a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. *U. S. v. Britton*, 107 U. S. 655. See also *U. S. v. Northway*, 120 U. S. 327; *Claassen v. U. S.*, 142 U. S. 140; *Evans v. U. S.*, 153 U. S. 587. See generally the title EMBEZZLEMENT, vol. 10, p. 676.

**Suppression of Evidence.**—In *Hay v. Peterson*, 6 Wyo. 440, it is said: "But the destruction of the books must be a wilful act, as the presumption is that evidence wilfully suppressed would be adverse if produced. 1 Rice Ev., § 27, sub. c. While the word 'wilful' might in common parlance be held to be synonymous with intentional, yet there can be no doubt that the destruction must be designedly done with the purpose of suppressing evidence."

**Killing Cattle — Equivalent Expressions.**—In *State v. Lowe*, 56 Kan. 594, it was held that in an information charging the defendant with killing cattle it is not indispensable that the statutory word "wilful" be used. If all the averments of the information taken together show that the cattle were killed by the defendant for the purpose and with the intent to steal the carcasses, it is a sufficient statement of wilful killing.

**1. Wilful Imports Malice**—*United States*.—*Felton v. U. S.*, 96 U. S. 699; *U. S. v. Edwards*, 43 Fed. Rep. 67; *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196.

*California*.—*Galvin v. Gualala Mill Co.*, (Cal. 1893) 33 Pac. Rep. 94.

*Georgia*.—*King v. State*, 103 Ga. 263.

*Indiana*.—*Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 300.

*Kentucky*.—Board of Internal Imp. *v.* Scarce, 2 Duv. (Ky.) 576; *Lexington v. Lewis*, 10 Bush (Ky.) 680.

*New York*.—Cunningham *v.* Bucklin, 8 Cow. (N. Y.) 185.

*Texas*.—State *v.* Alcorn, 78 Tex. 387; *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 178; *Shubert v. State*, 16 Tex. App. 645; *Lloyd v. State*, 19 Tex. App. 321; *Baker v. State*, 21 Tex. App. 264; *Bowers v. State*, 24 Tex. App. 542; *High v. State*, 26 Tex. App. 572; *Moore v. State*, 27 Tex. App.

440; *Ferguson v. State*, 36 Tex. Crim. 60; *Bland v. State*, (Tex. Civ. App. 1896) 38 S. W. Rep. 252; *Dodson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 79; *Cornelison v. State*, 40 Tex. Crim. 159.

*Wisconsin*.—State *v.* Preston, 34 Wis. 675.

*Canada*.—*Johnson v. Allen*, 15 Can. L. T. 257.

**The Term "Malice" Implies Wilfulness.**—See *State v. Robbins*, 66 Me. 324.

The word "maliciously" in an indictment has been held to be an equivalent for wilfully. *Chapman v. Com.*, 5 Whart. (Pa.) 427, 34 Am. Dec. 565.

But in *State v. Massey*, 97 N. Car. 468, it is said: "The term 'wilfully' implies that the act is done knowingly and of stubborn purpose, but not of malice." And in that case it was held that a charge that an act was maliciously done was not equivalent to the statutory word "wilfully." See also MALICIOUS — MALICIOUSLY, vol. 19, p. 627; and see the title MALICE, vol. 19, p. 623.

**Wilful and Malice Aforethought.**—The adjectives "wilful," "deliberate," and "premeditated," as used in a statute against homicide, have been held to mean something over and above malice aforethought. *State v. Hing*, 16 Nev. 307; *State v. Wong Fun*, 22 Nev. 336.

**2. Evil Intent**—*England*.—*Smith v. Barnham*, 1 Ex. D. 419; *Taylor v. Newman*, 4 B. & S. 89, 116 E. C. L. 89.

*United States*.—*Felton v. U. S.*, 96 U. S. 699; *Potter v. U. S.*, 155 U. S. 446; *Spurr v. U. S.*, 174 U. S. 728; *U. S. v. Meagher*, 37 Fed. Rep. 881; *U. S. v. Edwards*, 43 Fed. Rep. 67; *U. S. v. Kirby*, 7 Wall. (U. S.) 482; *U. S. v. Three Railroad Cars*, 1 Abb. (U. S.) 196.

*California*.—*Galvin v. Gualala Mill Co.*, (Cal. 1893) 33 Pac. Rep. 94.

*Connecticut*.—*State v. Foote*, 71 Conn. 737.

*Georgia*.—*King v. State*, 103 Ga. 263.

*Indiana*.—*Bridgewater v. State*, 153 Ind. 560; *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 300; *Huff v. Chicago, etc., R. Co.*, 24 Ind. App. 492; *Indianapolis v. Consumer's Gas Trust Co.*, 140 Ind. 246.

*Massachusetts*.—*Com. v. Kneeland*, 20 Pick. (Mass.) 206.

*New York*.—*Anderson v. How*, 116 N. Y. 336; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 185.

*North Carolina*.—*State v. Norris*, 111 N. Car. 652.

*Texas*.—*State v. Alcorn*, 78 Tex. 387; *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 178; *Shubert v. State*, 16 Tex. App. 645; *Lloyd v. State*, 19 Tex. App. 321; *Baker v. State*, 21 Tex. App. 264; *Bowers v. State*, 24 Tex. App. 542; *High v. State*, 26 Tex. App. 572; *Moore v. State*, 27 Tex. App. 440; *Ferguson v. State*, 36 Tex. Crim. 60; *Bland v. State*, (Tex. Civ. App. 1896) 38 S. W. Rep. 252; *Dodson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 79; *Cornelison v. State*, 40 Tex. Crim. 159.

*Vermont*.—*Savage v. Tullar*, Brayt. (Vt.) 223.

*Wisconsin*.—*State v. Preston*, 34 Wis. 675.

Wilful denotes an evil intention and does

believing the act to be lawful.<sup>1</sup> Thus, as used in several of the provisions of the

not include an honest mistake. *Reg. v. Badger*, 6 El. & Bl. 137, 88 E. C. L. 137, 25 L. J. M. C. 90.

As used in criminal and penal statutes the word "wilful" has been frequently interpreted to mean not merely a voluntary act, but an act committed with evil intent. *Odin Coal Co. v. Denman*, 185 Ill. 413.

In *Highway Com'rs v. Ely*, 54 Mich. 180, it is said: "The word 'wilfully,' when used to denote the intent with which an act is done, is a word which is susceptible of different significations, depending upon the context in which it is used. It is employed in penal statutes more frequently to distinguish between those acts which are intentional and by design and those which are thoughtless or accidental. It may sometimes mean corruptly or unlawfully, or again designedly or purposely, with an intent to do some act in violation of the law."

In *State v. Whitener*, 93 N. Car. 592, it is said: "The word 'wilful,' used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." See also *State v. Roseman*, 66 N. Car. 634.

**1. Wilful Means Without Justifiable Excuse**—*United States*.—*Felton v. U. S.*, 96 U. S. 699; *Potter v. U. S.*, 155 U. S. 438; *U. S. v. Meagher*, 37 Fed. Rep. 881.

*Colorado*.—*Williams v. People*, 26 Colo. 274.

*Georgia*.—*King v. State*, 103 Ga. 263.

*Indiana*.—*Bridgewater v. State*, 153 Ind. 560; *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 560; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 246.

*Massachusetts*.—*Com. v. Kneeland*, 20 Pick. (Mass.) 206.

*New York*.—*Anderson v. How*, 116 N. Y. 336.

*Texas*.—*State v. Alcorn*, 78 Tex. 387; *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 178; *Shubert v. State*, 16 Tex. App. 645; *Lloyd v. State*, 19 Tex. App. 321; *Baker v. State*, 21 Tex. App. 264; *Bowers v. State*, 24 Tex. App. 542; *High v. State*, 26 Tex. App. 572; *Moore v. State*, 27 Tex. App. 440; *Ferguson v. State*, 36 Tex. Crim. 60; *Bland v. State*, (Tex. Civ. App. 1896) 38 S. W. Rep. 252; *Dodson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 79; *Cornelison v. State*, 40 Tex. Crim. 159.

The word "wilfully" "sometimes means little more than plain intentionally or designedly. Yet it is more frequently understood to extend a little further, and approximate the idea of the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse." 1 *Bishop's Crim. Law*, § 428. *Quoted* in *U. S. v. Meagher*, 37 Fed. Rep. 881; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 246; *Anderson v. How*, 116 N. Y. 336. And see *supra*, this title, *Knowingly*—*Bona Fide Belief*.

In *State v. Preston*, 34 Wis. 683, it is said: "The word 'wilfully,' as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity according to the context and evident purpose of the writer. It is sometimes so modified and reduced as to mean little more than plain intentionally or designedly. Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in greater or less degree, that is, as implying an evil intent without justifiable excuse."

**In a Prosecution for Malicious Mischief** the trial court charged that the term "wilful," as used in the statute, meant "voluntarily and knowingly." This was held to be error. The court said: "The word 'wilful,' when used in a penal statute, means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful." *Rose v. State*, 19 Tex. App. 471. See also *Thomas v. State*, 14 Tex. App. 200.

**Disturbing Meetings**.—In an indictment for wilfully disturbing a meeting, the court said of the word "wilful": "'Wilful,' in the sense as above used, means with evil intent, or without reasonable grounds for believing the act to be lawful.' As a ground for his motion for a new trial, appellant contends that the expression 'legal malice' should have been included in this definition; hence this omission is fatal. We do not think so. The definition of 'wilful,' as given by the court, is sufficient. See *Thomas v. State*, 14 Tex. App. 200; *Wood v. State*, 16 Tex. App. 574; *Finney v. State*, 29 Tex. App. 184." *Holmes v. State*, 39 Tex. Crim. 232. See also *Harrison v. State*, 37 Ala. 154; *Lancaster v. State*, 53 Ala. 398; *Goulding v. State*, 82 Ala. 48; *Richardson v. State*, 5 Tex. App. 470. See also the title **DISTURBING MEETINGS**, vol. 9, p. 673.

**Same—Wilful and Reckless Distinguished**.—On a prosecution for disturbing religious worship (*Alabama Code*, § 4033), the evidence showing that the defendant, while under the influence of liquor, went into a church after the services had begun, talked loud enough to attract attention, used profane language, and said that he could pray as well as the preacher and would do it, a charge instructing the jury that they must find him not guilty, if they believe from the evidence that what he said and did was said and done "heedlessly or recklessly—that is, carelessly, without thinking of the probable consequences," was properly refused. *Johnson v. State*, 92 Ala. 82. The court in this case said: "We suspect this charge was asked on the supposed authority of *Harrison v. State*, 37 Ala. 154, and the note appended to section 4033 of the code. This is a misapprehension of this court's ruling. The trial court, in that case, had instructed the jury that they could convict if the disturbance was either wilfully or recklessly done. This court ruled that the Circuit Court erred in giving that charge, because the statute punished only a wilful disturbance. We drew a distinction between the words 'wilful' and 'reckless,' and held that

*New York Penal Code*, the word "wilfully" has been defined as follows: "But the word 'wilfully' in the statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose or with a design to injure another, or one committed out of mere wantonness or lawlessness."<sup>1</sup> But the term has not always this meaning, even in criminal statutes.<sup>2</sup> So the

recklessness did not necessarily imply wilfulness. A grossly careless act may be characterized as reckless, and serious consequences may result from it. Yet such consequences would not necessarily be wilfully brought about. We, in *Harrison's case*, simply asserted that the word 'reckless' is not the synonym of the statutory word 'wilful,' and therefore the Circuit Court erred in asserting disjunctively that it was enough if the disturbance was wilfully or recklessly done. We decided that there might be recklessness without wilfulness. We are now asked to declare that, if there is recklessness, there cannot be wilfulness. We cannot assent to this. An act may be careless, heedless, rash, reckless, and still be wilful."

**Obstruction of Highway.** (See also the title *HIGHWAYS*, vol. 15, p. 502.) — Where a statute provided that the obstruction of highways should be indictable, it was held that the word "wilful" meant or implied legal malice or an evil intent, or the absence of reasonable ground for belief that the act charged was lawful, and not simply that the action was intentional or not accidental. *Savannah, etc., R. Co. v. State*, 23 Fla. 583; *Parsons v. State*, 26 Tex. App. 102.

The word "wilfully" does not mean solely intentionally or designedly, but implies a wicked purpose or perverse disposition. *State v. Preston*, 34 Wis. 675; *Hubbell v. Goodrich*, 37 Wis. 86; *State v. Castle*, 44 Wis. 684. See also *State v. Hayden*, 32 Wis. 663; *State v. Smith*, 52 Wis. 136.

A mill owner obstructed a public road by the erection of a milldam, backing the water from the milldam and rendering the road unsafe for crossing and practically impassable. Upon notification by the road overseer that he had obstructed the road, the mill owner replied that "if he wants the water removed, to warn out his men, and dip it out with buckets." In holding this to be a wilful obstruction, the court, in *State v. Raypholtz*, 32 Kan. 455, said: "If the term 'wilful' is construed only to mean designedly and purposely, then upon the agreed facts the appellants are guilty. If we give to it greater strength, and say that wilful in this connection denotes 'governed by a will; without yielding to reason; obstinate, stubborn, perverse, inflexible,' then the appellants are guilty. And if we go further, and say that in order to convict the appellants of wilful obstruction they must have committed an act 'which a man of reasonable knowledge and ability would know to be contrary to his duty,' then we must say that they are guilty, because with the knowledge that they had obstructed the road, they insolently answered the notice of the overseer, and in defiance of his order continued to obstruct the public road."

**Breaking Fences.** — In *State v. Clark*, 29 N. J. L. 96, the act under consideration made it

a misdemeanor "wilfully" to break down a fence in the possession of another person. The defendant was indicted under that statute. The defense was that the act of breaking down the fence, though wilful, was in the exercise of a legal right to go upon his own land. The trial court rejected the testimony offered to sustain the defense, and the Supreme Court held that this ruling was error. In its opinion the court used this language: "The Act of 1855 in terms makes the wilful opening, breaking down, or injuring of any fences belonging to or in the possession of any other person a misdemeanor. In what sense is the term 'wilful' used? In common parlance, 'wilful' is used in the sense of intentional, as distinguished from accidental or involuntary. Whatever one does intentionally he does wilfully. Is it used in that sense in this act? Did the legislature intend to make the intentional opening of a fence for the purpose of going upon the land of another indictable if done by permission or for a lawful purpose? \* \* \* We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed."

**1. New York Penal Code.** — *Wass v. Stephens*, 128 N. Y. 128; *Hewitt v. Newburger*, 141 N. Y. 543; *People v. Bates*, 79 Hun (N. Y.) 584; *Krauskopf v. Tallman*, 38 N. Y. App. Div. 277.

**2. Malice Not Implied.** — "In *Hill v. Cox*, 54 Vt. 627, it is said that a wrong that is purposely done is wilfully done, within the meaning of the statute. Sometimes in statutes the word 'wilful' or 'wilfully' approximates the idea of the milder kind of legal malice — that is, signifies an evil intent without justifiable excuse — and that is the meaning for which the defendant here contends. But that meaning is usually confined, we think, to penal statutes, though it does not always obtain there; for under the statutes of New York it is penal wilfully to sever from the freehold of another any produce or other thing attached thereto, and it is held that, to constitute the offense, it is requisite only that the act should have been done intentionally and with design. *Anderson v. How*, 116 N. Y. 336. See 29 AM. AND ENG. ENCYC. LAW 113." *Buchanan v. Cook*, 70 Vt. 168.

**Voting or Excluding a Vote.** — A statute provided for the punishment of a person for wilfully giving in a vote at an election, knowing himself not to be a qualified voter. In construing this provision, the court in *Com. v. Brad-*



terms "wilful" and "wilfully" in criminal statutes are often given the meaning of "wanton" and "wantonly."<sup>1</sup>

**Ability.** — The word "wilfully" when used in a penal statute in reference to a person who neglects or fails to discharge a duty or perform an act enjoined, implies that the party had the ability so to do.<sup>2</sup>

**IV. NEGLIGENCE — WILFUL NEGLECT — WILFUL INJURY.** — Wilfulness and negligence are, it has been said, the opposites of each other; the one signifying the presence of purpose, the other its absence.<sup>3</sup>

ford, 9 Met. (Mass.) 270, said: "Considering the manner in which the word 'wilfully' is used in the statute, the court are of opinion that this was right. It may sometimes mean corruptly or unlawfully; but in this section, where the gist of the offense consists in the other clause, 'knowing himself not to be a legal voter,' the term 'wilfully' means designedly, purposely, with an intent to claim and exercise the right of suffrage, on that occasion, in common with the legal voters of the city."

But in *People v. Boas*, 29 Hun (N. Y.) 379, affirmed 92 N. Y. 560, it is said: "To do an act wilfully is to do it willingly, by design — 'on purpose,' Worcester's Dictionary. Such was not this case. The inspectors assigned the reason. It was not sufficient in law, it is true, but they were evidently impressed and sought advice from the chief of the bureau of elections, who suggested what he considered to be the proper mode of disposing of the controversy. He was in error, it is true, but being persons uneducated in law and perhaps not sufficiently advised of their duties as to understand them perfectly, they placed reliance upon the advice thus given and by a person connected with the bureau of elections. This deprives the case of the essential element, under the statute, of malice or deliberate design and intent, and renders it necessary to reverse the judgment pronounced against the appellant."

**1. Wilfully Equivalent to Wantonly.** — *State v. Abram*, 10 Ala. 928; *State v. Preston*, 34 Wis. 675; *State v. Castle*, 44 Wis. 684.

Reckless and wanton as equivalent to wilful. See *Lexington v. Lewis*, 10 Bush (Ky.) 680. Compare *Board of Internal Imp. v. Scearce*, 2 Duv. (Ky.) 576.

In *Werner v. Flies*, 91 Iowa 146, it is said: "It is a mistake to suppose that a wilful act, which authorizes the recovery of treble damages, means simply 'willingly or purposely' as claimed by counsel for appellee. It means an act done wantonly, and without any reasonable excuse."

A statute provided that if any person should wilfully throw any soil or refuse into certain rivers, he should be guilty of an offense. It was held that wilfully in this connection meant wantonly or causelessly and did not include the discharge of refuse into the river by the defendant in the course of his business. *Smith v. Barnham*, 1 Ex. D. 419.

**Wanton Distinguished from Wilful.** — A complaint alleged that the defendant's conduct was "wanton." This was held defective in that, having admitted contributory negligence, wilfulness or gross negligence should have been alleged. In *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 290, 92 Am. Dec. 318, the court, by

Ray, J., said: "But children of tender years have no right to play about and upon railroad crossings, and engineers are not required to run their trains expecting to find them so engaged. To render the defendant liable in this case, therefore, the complaint must either charge knowledge of the fact that the child was so engaged, or such neglect in keeping a lookout as would have charged the company with negligence if a person of mature judgment had been upon the track. The complaint is fatally defective. After admitting facts which show negligence of the plaintiff contributing to the injury, it charges that the defendant in a wanton and careless manner ran said locomotive, etc. The word 'wanton' does not mean wilful. It is defined by Webster as follows: 'Wandering or roving in gayety or sport; licentious; lewd; extravagant,' etc. The word adds no force to the charge that the act was done in a careless manner. The demurrer should have been sustained to the complaint."

**2. Wilfully — Criminal Statutes — Ability.** — *Indianapolis v. Consumer's Gas Trust Co.*, 140 Ind. 246; *State v. Preston*, 34 Wis. 675; *Com. v. Kneeland*, 20 Pick. (Mass.) 220; *Felton v. U. S.*, 96 U. S. 699; *Washburn v. Washburn*, 9 Cal. 475.

**3. Wilfulness and Negligence Distinguished.** — (See also the title NEGLIGENCE, vol. 21, p. 477.) — See *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 251; *Chicago v. Martin*, 49 Ill. 246; *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 67; *Cincinnati, etc., R. Co. v. Eaton*, 53 Ind. 307; *Sherfey v. Evansville, etc., R. Co.*, 121 Ind. 427; *Huff v. Chicago, etc., R. Co.*, 24 Ind. App. 492; *Pickens v. South Carolina, etc., R. Co.*, 54 S. Car. 505; *Brasington v. South Bound R. Co.*, 62 S. Car. 325. See also *Belt R., etc., Co. v. Mann*, 107 Ind. 89.

In *Parker v. Pennsylvania Co.*, 134 Ind. 673, it is said: "Wilfulness does not consist in negligence. On the contrary, as illustrated by the cases of *Louisville, etc., R. Co. v. Bryand*, 107 Ind. 51; *Belt R., etc., Co. v. Mann*, 107 Ind. 89, heretofore cited, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while wilfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become wilfulness."

A charge of wilfulness is not maintained by proof of mere negligence. *Girard Coal Co. v. Wiggins*, 52 Ill. App. 74.

**Wilfulness Means More than Negligence.** — *Pittsburgh, etc., R. Co. v. Stuart*, 71 Ind. 500; *Carter v. Louisville, etc., R. Co.*, 98 Ind. 552.

**Wilful Misconduct.** — In *Lewis v. Great West-*

**Wilful Neglect** — Wilful neglect or negligence has been defined as that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest.<sup>1</sup>

ern R. Co., 3 Q. B. D. 206, it is said: "'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful."

**1. Wilful Neglect.** (See the title NEGLIGENCE, vol. 21, p. 477.) — Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119; Eskridge v. Cincinnati, etc., R. Co., 89 Ky. 367; Filbin v. Chesapeake, etc., R. Co., 91 Ky. 444; Cincinnati, etc., R. Co. v. Sampson, 97 Ky. 65; Louisville, etc., R. Co. v. Filbern, 6 Bush (Ky.) 574; Louisville, etc., Canal Co. v. Murphy, 9 Bush (Ky.) 522; Jacobs v. Louisville, etc., R. Co., 10 Bush (Ky.) 263; Lexington v. Lewis, 10 Bush (Ky.) 677; Claxton v. Lexington, etc., R. Co., 13 Bush (Ky.) 636; Louisville, etc., R. Co. v. Chism, (Ky. 1898) 47 S. W. Rep. 251.

Recklessness reaching in degree to an utter disregard of consequences may supply the place of a specific intent, and be sufficient to establish wilfulness. Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; Shumacher v. St. Louis, etc., R. Co., 39 Fed. Rep. 174.

Where an intent, either actual or constructive, to commit an injury exists at the time of its commission, such injury ceases to be a merely negligent act and becomes one of violence or aggression. Pennsylvania Co. v. Sinclair, 62 Ind. 301.

What degree of evidence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of a general statement. Illinois Cent. R. Co. v. Beard, 49 Ill. App. 232.

**Term Inapt.** — In Belt R., etc., Co. v. Mann, 107 Ind. 92, an action for personal injuries, the plaintiff alleged "that said accident occurred, and said injuries were inflicted by said defendant, her servants and employees, through their gross and wilful negligence." The court said: "The use of the phrase 'wilful negligence,' in the connection in which it is most frequently employed, is, to say the least, inapt. Whatever idea the word 'wilful' may express when so used, it is beyond question that to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct *quasi* criminal in character."

**Knowledge.** — In Huff v. Chicago, etc., R. Co., 24 Ind. App. 492, it is said: "Before wilfulness can be attributed to servants or employees in the operation of a train of cars facts should be averred and shown that would charge them with knowledge, actual or imputed, of im-

pending danger, before any duty of the company arises to require of it affirmative acts or efforts to avoid resulting injury. It is upon such knowledge that it is held to be the equivalent of wilfulness. Parker v. Pennsylvania Co., 134 Ind. 677." See also *supra*, this title, *Knowingly* — *Bona Fide Belief*.

**Same — Bridges.** — In Board of Internal Imp. v. Searce, 2 Duv. (Ky.) 576, it was held that it was the duty of a turnpike company to have bridges wherever the safety or convenience of travel required, and that wilful neglect of this duty meant a knowledge by the company of the insufficiency of its bridge and a voluntary failure to remedy the defect.

**Criminality.** — Upon the meaning of wilful neglect as applied to the failure of a turnpike company to keep its road in repair, the court in Washington, etc., Turnpike Road v. State, 19 Md. 295, said: "The objection made by the appellant to the charge of wilful neglect, in our opinion, is misconceived. The term does not, in this case, imply criminality, but must be construed to mean permissive, voluntary neglect."

**Opposed to Compulsory.** — Wilful neglect or misconduct conducing to adultery (§ 31, Matrimonial Causes Act, 1857) means marital neglect or misconduct, and not such compulsory absence as is occasioned by a term of imprisonment. It means also such neglect or misconduct as has led up to the respondent's fall from virtue — *i. e.*, the first lapse. St. Paul v. St. Paul, L. R. 1 P. & D. 739; Cummington v. Cummington, 1 Sw. & Tr. 475; Allen v. Allen, 28 L. J. P. & M. 81; Badcock v. Badcock, 31 L. T. 268; Proctor v. Proctor, 34 L. J. P. & M. 99; Dering v. Dering, L. R. 1 P. & D. 531; Davies v. Davies, 32 L. J. P. & M. 111; Hawkins v. Hawkins, 10 P. D. 177. See also Washburn v. Washburn, 9 Cal. 476; Holt v. Holt, 117 Mass. 202. And see the title DIVORCE, vol. 10, p. 831.

**Medical Aid.** — To "wilfully neglect" to do a thing is intentionally or purposely to omit to do it (*per* Mellor, J., Reg. v. Downes, 1 Q. B. D. 25); and therefore to pray, instead of sending for a doctor, is to "wilfully neglect" to provide medical aid within 31 & 32 Vict., c. 122, § 37. Reg. v. Downes, 1 Q. B. D. 25; Reg. v. Morby, 8 Q. B. D. 571.

**Wilful Neglect of Children.** — Wilful neglect of children, as used in the Pennsylvania Act making such neglect an offense, has been held to mean "a want of ordinary care, that is without justifiable excuse, and such as arises from an evil intent to injure such children, or a culpable indifference to their welfare." Com. v. Stewart, 12 Pa. Co. Ct. 154. See also the titles CRUELTY TO CHILDREN, vol. 8, p. 456; PARENT AND CHILD, vol. 21, p. 1034.

**Overseer of Road.** — In State v. Miller, 100 N. Car. 546, it is said: "An essential element of the offense thus prescribed and defined is, that the neglect shall be wilful, that is, not such



**Wilful Injury.** — To constitute wilful injury there must be design, purpose, intent to do wrong and inflict the injury.<sup>1</sup>

**WILL.** (See also SHALL, vol. 25, p. 633; WISH, *post.*) — The use of the auxiliary verb “will” always imports futurity, and denotes something not yet had or done, but still certainly to be had or done.<sup>2</sup> “Will” is sometimes used as the synonym of choice, wish, pleasure; but it is also used frequently in the sense of command, direction, determination, and resolution. It has, when found in testamentary papers, a universally received mandatory signification.<sup>3</sup>

**WILLINGLY.** (See also the title WILFUL, WILFULLY, ETC., *ante.*) — See note 4.

neglect as is simply unlawful, but such as is aggravated by an obstinate, a stubborn, perverse disposition of the offender not to discharge his duties as overseer, but to wilfully neglect to discharge the same; as, for example, such disposition not to repair the road when it is out of repair and in a ruinous condition, and he knows of this, or ought to know of it and make necessary repairs within his power.”

**Wilful Neglect and Negligence Distinguished.** — See Board of Internal Imp. *v.* Searce, 2 Duv. (Ky.) 576.

**Wilful Neglect and Gross Negligence Distinguished.** — Gross negligence is not necessarily the same as wilful neglect. Hansford *v.* Payne, 11 Bush (Ky.) 382. But see Chesapeake, etc., R. Co. *v.* Yost, (Ky. 1895) 29 S. W. Rep. 327.

**Actions for Death.** (See also the title DEATH BY WRONGFUL ACT, vol. 8, p. 863.) — In Chesapeake, etc., R. Co. *v.* Yost, (Ky. 1895) 29 S. W. Rep. 326, it is said: “Wilful neglect is a degree of neglect that applies alone to actions brought for loss of life.”

As to what constitutes wilful negligence resulting in death, see Alabama G. S. R. Co. *v.* Burgess, 116 Ala. 509; Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 433; Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160; Alabama G. S. R. Co. *v.* Hall, 105 Ala. 599; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492; Alabama G. S. R. Co. *v.* Burgess, 114 Ala. 587.

1. Birmingham R., etc., Co. *v.* Bowers, 110 Ala. 328; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492. 62 Am. St. Rep. 116; Citizens St. R. Co. *v.* Willooby, 134 Ind. 563.

To constitute a wilful injury, the act or omission which produced it must have been of purpose or intentional, or it must have been committed under such circumstances as to evince a reckless disregard for the safety of others. Belt R., etc., R. Co. *v.* Mann, 107 Ind. 93; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51.

2. **Futurity.** — Hodge *v.* Wilson, 12 Smed. & M. (Miss.) 504.

**Will Sell.** — In Weed *v.* Boston, etc., Ice Co., 12 Allen (Mass.) 379, it is said: “The agreement is that the defendant ‘will sell’ for a sum to be paid in the manner stipulated. This imports an executory contract, though the expression used would not be of great importance if it appeared from other parts of the instrument that the property was to pass.”

3. **Mandatory.** — McRee *v.* Means, 34 Ala. 365.

**Precatory Trusts.** — See McRee *v.* Means, 34

Ala. 364; Edgar *v.* Edgar, 26 Oregon 69. And see the title PRECATORY TRUSTS, vol. 22, p. 1162.

**Will and Shall.** — But in State *v.* Hilsabeck, 132 Mo. 348, it is said: “And it is to be further noted that the word *will* has not an imperative force like the word ‘shall.’ See Webst. Internat. Dict. under those words.”

**Will and Desire.** — In Thompson *v.* Davitte, 59 Ga. 482, it is said: “Using the word *will* in the sense of desire a man may make a valid testament against his *will*. He might heartily wish that every provision in it could be altered consistently with his sense of duty; and yet it might be, legally and morally, as much and as exclusively his own testamentary act as if he had no desire not in complete accord with it. *Will* in the sense of choice or consent, not in the sense of desire, is the *will* that is requisite to testamentary freedom. If a man is free to choose, and free to give effect to his choice, he is the master of his own testament, and may yield to his desires, or oppose them, at his own election.” See also the title TESTAMENTARY CAPACITY, vol. 28, p. 68.

**Good Will.** — See the title GOOD WILL, vol. 14, p. 1085.

**Estates at Will.** — See the title ESTATES, vol. 11, p. 364.

4. **Willingly.** — A statute provided that if a wife *willingly* leave her husband and go away and continue with her adulterer her claim for dower should be barred. It was held that if the wife was driven away by her husband she did not forfeit her dower. Walters *v.* Jordan, 13 Ired. L. (35 N. Car.) 361.

**Willingly and Wittingly.** (See also the title ALTERATION OF RECORDS, vol. 2, p. 284.) — An indictment charged that a record was altered *willingly*, whereas to constitute the crime the statute states that it shall be done *wittingly*. In holding the indictment defective the court, in Harrington *v.* State, 54 Miss. 493, said: “The alteration of the record was charged to have been *willingly* done. The language of the statute is ‘wittingly.’ While it is not always necessary to follow the literal language of the act in framing indictments for statutory offenses, it is essential that either the same words, or words of equivalent meaning, and substantially synonymous, should be used. Section 2884, Code 1871; Kline *v.* State, 44 Miss. 317. *Willingly* and ‘wittingly’ are not synonymous words, and do not convey the same idea. The one relates to the will and means ‘freely,’ or ‘voluntarily,’ while the other relates to the wit or understanding and means ‘knowingly,’ or ‘designedly.’”



# WILLS.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 22, p. 1190, and the cross-references there given.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the titles *ABATEMENT OF LEGACIES*, vol. 1, p. 42; *ADEMPMENT OF LEGACIES*, vol. 1, p. 610; *ANNUITIES*, vol. 2, p. 386; *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 894; *CODICILS*, vol. 6, p. 175; *CONVERSION AND RECONVERSION*, vol. 7, p. 464; *DEBTS OF DECEDENTS*, vol. 8, p. 1007; *EQUITABLE ELECTION*, vol. 11, p. 59; *ESTATES*, vol. 11, p. 365; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 741; *LEGACIES AND DEVISES*, vol. 18, p. 709; *MARSHALING DECEDENTS' ESTATES*, vol. 19, p. 1292; *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 703; *PROBATE AND LETTERS OF ADMINISTRATION*, vol. 23, p. 111; *REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS*, vol. 24, p. 377; *RESTRAINTS ON ALIENATION*, vol. 24, p. 863; *SHELLEY'S CASE (RULE IN)*, vol. 25, p. 655; *SUCCESSION*, vol. 27, p. 293; *SURROGATE AND PROBATE COURTS*, vol. 27, p. 552; *TESTAMENTARY CAPACITY*, vol. 28, p. 68; *TRUSTS AND TRUSTEES*, vol. 28, p. 848; *UNDUE INFLUENCE*, vol. 29, p. 101; and the cross-references throughout the body of this article.

**I. SCOPE OF TITLE.** — The scope of this title will be confined, generally speaking, to the form and construction of testamentary dispositions. Particular discussion will be found elsewhere in this work of the probate of wills; of codicils to wills; of the capacity to devise or bequeath; of the various classes of legacies, and the validity, abatement, ademption, lapse, and satis-

faction thereof; of the rights of heirs or legatees; of the powers and duties of executors and administrators; of the administration of decedents' estates; and of other kindred subjects pertinent to the law of wills.<sup>1</sup>

**What Law Governs.** — The law which must govern, in case of a conflict of the laws of different jurisdictions as to the execution or construction of a will, has been given separate and independent treatment elsewhere.<sup>2</sup> But it remains to be noted whether, within any single jurisdiction, the validity or construction of a will is to be determined by the law in force at the time of the testator's death, or by that in force at the time the will was executed. The views of the courts on this point are not harmonious, the difference in opinion, however, being in some measure attributable to the difference in the language and theory of the local statutes. On the one hand, it is said that a will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction and validity must depend upon the law as it then stands.<sup>3</sup> On the other hand, it is declared that when a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, it would unjustly disappoint his lawful right of disposition to apply to such will a rule subsequently enacted though before his death.<sup>4</sup>

1. See the table of cross-references at the beginning of this title.

**As to What Passes under a General or Residuary Bequest or Devise,** see the title **LEGACIES AND DEVISES**, vol. 18, p. 723.

**As to the Creation by Will of Estates in Cotenancy,** see the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 17, p. 653.

**Devise or Bequest as Execution of Power.** — As to circumstances under which a general devise or bequest operates as a good execution of a power, see the title **POWERS**, vol. 22, p. 1091. And see *infra*, this title, *Definition and Classification* — *Written Wills* — *Wills Intended to Take Effect in Execution of a Power*.

2. See the title **PRIVATE INTERNATIONAL LAW**, vol. 22, p. 1362 *et seq.*

3. **Law at Time of Testator's Death Governs.** — 1 Jarman on Wills, p. 337; 1 Redfield on Wills (3d ed.), \*p. 406; Matter of Learned, 70 Cal. 140; Condict v. King, 13 N. J. Eq. 375. Compare Tevis v. Pitcher, 10 Cal. 465.

**The Rule Stated in the Text Held Applicable.** — As to the capacity of the testator to devise or bequeath, *Wakefield v. Phelps*, 37 N. H. 295; *Pierce v. Richardson*, 37 N. H. 306. As to the sufficiency of the attestation, *Sutton v. Chenault*, 18 Ga. 1; *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252; *Langley v. Langley*, 18 R. I. 618. As to the validity of provisions of the will and of trusts created thereby, *Coleman v. O'Leary*, (Ky. 1902) 70 S. W. Rep. 1068; *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295; *Dodge v. Williams*, 46 Wis. 70. As to the power to suspend alienation, *In re Kopmeier*, 113 Wis. 233. As to the nature of the estate passing by a devise, *Doty v. Teller*, 54 N. J. L. 163; *Holme v. Shinn*, 62 N. J. Eq. 1. As to the interest of the husband in a legacy to the wife, *Meserve v. Meserve*, 63 Me. 518; *Perkins v. George*, 45 N. H. 453. As to the husband's right of tenancy by the curtesy, *Johnson v. Williams*, 152 Mass. 474. As to the capacity of a legatee, *Hamilton v. Flinn*, 21 Tex. 713. And as to the lapse of legacies by the death of the legatee, *Bishop v. Bishop*, 4 Hill (N. Y.) 138.

**In South Carolina,** the rule stated in the text is held to be applicable to wills of personal property. It is said that a distinction has always been made between a will of real and personal estate; that a will of real estate carries only the land which the deviser has at the time of making the will, but that a testament of personal estate carries all the goods which he has at the time of his death, although he may have acquired them after making the will. *Houston v. Houston*, 3 McCord L. (S. Car.) 491, followed in *Matter of Elcock*, 4 McCord L. (S. Car.) 39.

**Statute Does Not Become Retrospective in Operation.** — In *Wakefield v. Phelps*, 37 N. H. 295, it was held that a statute changing the law as to the power of a wife to devise real estate to her husband, passed after the making of a will but before the death of the testator, takes effect upon the will. To give the statute such a construction is not to make it retrospective in its operation, since it affects no rights vested before its passage. See also the title, **CONSTITUTIONAL LAW**, vol. 6, pp. 943-4.

**Where the Testator Specifically Directs** that his wife shall receive such share of his estate as she would be entitled to under the statutes in force at the time of his death, such direction in the will will be upheld, although the effect thereof is to give the wife the entire estate. *In re Johnson*, (Minn. 1904) 99 N. W. Rep. 212.

**Distribution of Remainder "According to Law,"** — Where a testator devises realty for life and provides that at the death of the life tenant the property is to be distributed to the latter's surviving children "according to law," a contingent estate is created in the children, and the property is to be divided according to the law as it exists at the death of the devisee for life and not at the death of the testator. *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32.

4. **Contra — Law at Time of Execution of Will Governs.** — *Schouler on Wills* (2d ed.), § 11; *Downing v. Townsend*, Amb. 280; *Gillmore v. Shooter*, 2 Mod. 310; *Mullen v. McKelvy*, 5 Watts (Pa.) 399.



**II. ORIGIN AND HISTORY.** — The right of testamentary disposition in some form or other, as an incident of the right of property, is said to be "coeval with civilization itself and so close, in fact, upon the origin of property and property rights as not to be essentially separated in point of antiquity."<sup>1</sup> Blackstone says that testaments were in use among the ancient Hebrews, there being instances of testamentary dispositions recorded in the book of Genesis.<sup>2</sup> In Greece wills were introduced by Solon;<sup>3</sup> and among the Romans the mode of conveying property by testament was known even before the art of letters.<sup>4</sup> In *England* the power of bequeathing personal property has always existed, abridged, it is true, in early times, by the doctrine of "reasonable parts."<sup>5</sup> But this doctrine was gradually altered, and finally abolished by legislative enactment, until eventually all restraints upon the testamentary disposition of personalty were removed.<sup>6</sup> The power to devise realty existed in England before the conquest.<sup>7</sup> But, as a consequence of the introduction of the feudal system, real estate was not devisable at common law,<sup>8</sup> save through the medium of a devise to uses enforced in chancery. When the statute of uses was adopted,<sup>9</sup> which converted all uses into legal estates, real estate became again incapable of being devised. The original statute of wills<sup>10</sup> was the first authority to dispose of real property by will. But this statute was restrictive in its character, and it was not until the restoration of Charles II. that the feudal tenures were abolished and the right of devising freehold lands became complete and universal.<sup>11</sup> By the more recent statute of wills, adopted in 1837, the right to dispose of property by will is made absolute, whether the same be realty or personalty.<sup>12</sup> In the

**This Contrary Rule Has Been Held Applicable.**

— As to the capacity of the testator to devise or bequeath, *Kurtz v. Saylor*, 20 Pa. St. 205; *Gable v. Daub*, 40 Pa. St. 217. As to the sufficiency of the attestation, *Lane's Appeal*, 57 Conn. 182; *Gaylor's Appeal*, 43 Conn. 82; *Packer v. Packer*, 179 Pa. St. 580; *Taylor v. Mitchell*, 57 Pa. St. 209. As to the competency of witnesses, *Camp v. Stark*, 81\* Pa. St. 235; *Giddings v. Turgeon*, 58 Vt. 106. And as to the revocation of the will by marriage, *Goodsell's Appeal*, 55 Conn. 171.

**As to the Passing of After-acquired Property** under a will, where the law is changed between the execution of the will and the death of the testator, see *infra*, this title, *What May Be Devised or Bequeathed — After-acquired Property — Realty*.

**But the Rule Does Not Apply** where a testator commits the distribution of his estate to the law upon the happening of an event necessarily future, as in such case he must be presumed to have contemplated the possibility of a change in the law in the meantime. *Kohler's Estate*, 199 Pa. St. 455.

**An Act Passed Subsequent to the Death** of the testator can have no operation with respect to the validity of his will. *Shinkle v. Crock*, 17 Pa. St. 159.

1. Schouler on Wills (2d ed.), § 13.
2. 2 Bl. Com. 490.
3. 2 Bl. Com. 491.
4. *Castro v. Castro*, 6 Cal. 158.
5. 1 Williams on Executors (9th ed.) 2; 2 Bl. Com. 492; Schouler on Wills (2d ed.), § 14.

**Of the Doctrine of Reasonable Parts**, Blackstone says: "By the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, an-

other to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ de rationabili parte bonorum was given to recover them." 2 Bl. Com. 492.

In 1 Williams on Executors (7th Am. ed.), p. 3, it is said that there exists among early writers a difference of opinion as to whether the doctrine of reasonable parts was the general law of the land or only obtained by custom in particular places. Fitzherbert and Blackstone are cited as expressing the former view, while Lord Coke is said to have declared that there must be a custom in order to entitle the wife and children to the writ de rationabili parte bonorum.

6. 1 Vict., c. 26 (statute of wills); 2 Bl. Com. 493.

7. 2 Bl. Com. 373; Schouler on Wills (2d ed.), § 15.

8. 2 Bl. Com. 374; *Jenner v. Harper*, 1 P. Wms. 247.

9. 27 Hen. VIII., c. 10.

10. 32 Hen. VIII., c. 1, explained by 34 Hen. VIII., c. 5.

11. 2 Bl. Com. 375; Schouler on Wills (2d ed.), § 15; *Lewis v. Aylott*, 45 Tex. 190; *Gillis v. Weller*, 10 Ohio 462.

12. The Statute of Wills (1 Vict., c. 26) contains the following provision: "And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will, executed in manner hereinafter required,

*United States* the power to make testamentary disposition of one's property will be found to exist generally, and without restriction as to the nature of such property.<sup>1</sup>

**III. DEFINITION AND CLASSIFICATION — 1. Definition.** — A "will," "last will," or "last will and testament,"<sup>2</sup> may be defined as the legal declaration of a man's intentions which he wills to be performed after his death.<sup>3</sup> This definition, it will be observed, does not confine wills to instruments disposing of property, as do the definitions of many authorities.<sup>4</sup> The better opinion is that an instrument may be a will though it is framed exclusively with a view to appointing executors or guardians,<sup>5</sup> or for the purpose of merely revoking a former testamentary disposition.<sup>6</sup> The term "will" is generally understood to include codicils, and in some jurisdictions it is expressly so provided by statute.<sup>7</sup>

all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator."

1. See the various state statutes, many of which are substantially similar to the English statute of wills.

**The Power to Devise Real Estate** exists in the *United States* only as the result of legislation. *Gillis v. Weller*, 10 Ohio 462.

**2. Terms Synonymous.** — The common usage is to employ the terms "will," "last will," and "last will and testament" as exactly synonymous. *Schouler on Wills* (2d ed.), § 2; *Hill v. Hill*, 7 Wash. 410.

In *Compton v. McMahan*, 19 Mo. App. 494, it is said that originally the word "will," when used alone, was understood to refer to a devise of realty only, and that a "testament" operated only upon personal property; but now the words are held to be synonymous and are used interchangeably. See also 4 Kent's Com. 501; *Redf. on Wills* (4th ed.), p. 6.

**3.** This is Blackstone's definition (2 Bl. Com. 499), and its significant feature is the use of the adjective "legal," from which it follows that the declaration must be made in accordance with all the requirements of the governing statute. Blackstone's definition has been cited with approval in the following cases: *Smith v. Bell*, 6 Pet. (U. S.) 68; *Colton v. Colton*, 127 U. S. 309; *Hardenbergh v. Ray*, 151 U. S. 112; *Jackson v. Culpepper*, 3 Ga. 569; *Robinson v. King*, 6 Ga. 547; *Ward v. Ward*, 104 Ky. 857; *Langdon v. Astor*, 16 N. Y. 49; *Clayton v. Liverman*, 2 Dev. & B. L. (21 N. Car.) 558; *Price v. Johnson*, 90 N. Car. 592; *Frew v. Clarke*, 80 Pa. St. 178.

**Toller's** definition is very similar to that of Blackstone. *Sykes v. Sykes*, 2 Stew. (Ala.) 364.

**Swinburne** says: "A last will is a lawful disposing of that which any one would have done after death." *Swin.*, pt. 1, §§ 3, 4. This definition is approved in the following cases: *Hastilow v. Stobie*, L. R. 1 P. & D. 64; *Morrow v. Morrow*, 2 Tenn. Ch. 563; *Reagan v. Stanley*, 11 Lea (Tenn.) 316; *Liffie v. Fanning*, 10 Rich. L. (S. Car.) 186.

**4. "Will" Confined to Disposition of Property.**

— *Bouv. L. Dict.*; 1 *Jarm. on Wills* 18; 1 *Redf. on Wills* (4th ed.) 5.

*Alabama.* — *Rice v. Rice*, 68 Ala. 216.

*Arizona.* — *Eldred v. Warner*, 1 Ariz. 207.

*California.* — *Matter of Wood*, 36 Cal. 75.

*Georgia.* — *Hester v. Young*, 2 Ga. 50.

*Illinois.* — *Robinson v. Brewster*, 140 Ill. 649.

*Maine.* — *Leathers v. Greenacre*, 53 Me. 561.

*Maryland.* — *Randall v. Hodges*, 3 Bland (Md.) 477; *Carey v. Dennis*, 13 Md. 1; *Cover v. Stem*, 67 Md. 449.

*Mississippi.* — See *Wall v. Wall*, 30 Miss. 91.

*Montana.* — *Barney v. Hayes*, 11 Mont. 575.

*South Carolina.* — See *Babb v. Harrison*, 9 Rich. Eq. (S. Car.) 111.

*Tennessee.* — *Reagan v. Stanley*, 11 Lea (Tenn.) 316.

*Texas.* — *Williams v. Noland*, 10 Tex. Civ. App. 629; *Grigsby v. Willis*, 25 Tex. Civ. App. 1.

*Virginia.* — *Carr v. Effinger*, 78 Va. 197.

*Wisconsin.* — *Ogle's Estate*, 97 Wis. 58.

**Chancellor Kent's** definition is "a disposition of real and personal property, to take effect after the death of the testator." 4 Kent's Com. 501.

**Bacon** defines a will as "a declaration of the mind, either by word or writing, in disposing of an estate; and to take place after the death of the testator. It is in Latin called *testamentum*, i. e., *testatio mentis*, the witness of a man's mind; and to devise by testament is to speak by a man's will, what his mind is, to have done after his death." 10 Bac. Abr. 479.

**Instrument Merely Disinheriting Son.** — An instrument which appoints no executor, and merely excludes one of testator's sons from participation in the estate, without making any other disposition of the property, has been held not entitled to probate. *Coffman v. Coffman*, 85 Va. 459.

**5. See *infra***, this title, *Form — What Constitutes a Will — Distinguishing Characteristics.*

**Naming of Executor Unnecessary.** — The idea that the naming of an executor is indispensable to the validity of a will has long been abandoned in *England* and never was received on this side of the Atlantic. *Leathers v. Greenacre*, 53 Me. 561.

**6.** *Goods of Hicks*, L. R. 1 P. & D. 683; *Goods of Durance*, L. R. 2 P. & D. 406. *Compare Goods of Fraser*, L. R. 2 P. & D. 40; *Laughton v. Atkins*, 1 Pick. (Mass.) 535.

**7. "Will" Includes "Codicil."** — *Schouler on*

**2. Classification — a. IN GENERAL.** — Wills may be broadly classified as being of two kinds, viz., written wills, and oral or nuncupative wills.<sup>1</sup> Such a classification, however, results in the inclusion of practically all wills in the former class. For it is a general statutory provision, originating with the English statute of frauds, re-enacted in the statute of wills, and now incorporated in the statute law of all American jurisdictions, that wills must be in writing.<sup>2</sup> Oral wills are not permitted at all in some jurisdictions; in others, the privilege of nuncupation is extended, merely as an exception to the general rule, to certain testators peculiarly situated.<sup>3</sup>

By the Civil Law, wills are divided into solemn and privileged wills. The solemn will is of two kinds, the nuncupative or open will, and the sealed or written will. The privileged will corresponds with what is known to the common law as a nuncupative will.<sup>4</sup> In *Louisiana*, where the civil law exists in somewhat modified form, the kinds of wills recognized and provided for by statute do not fall readily under a general classification, particularly on account of the confusing use of the term "nuncupative." Separate treatment is therefore accorded to Louisiana testaments as a distinct class of written wills.<sup>5</sup>

**b. WRITTEN WILLS — (1) Generally.** — Written wills, as has been pointed out, embrace the great majority of all wills, including the ordinary will, as the term is commonly understood. Therefore, there remains for specific consideration in this connection merely those kinds of written wills possessing peculiar and unusual features, such as olographic wills, contingent wills, alternative wills, wills operative at the election of a third person, wills intended to take effect in execution of a power, joint and mutual wills, and the wills recognized by the civil law of *Louisiana*.

**(2) Olographic Wills.** — An olographic, or holographic, will is one that is written by the testator himself. In order to be valid, it must be entirely written, dated, and signed by the hand of the testator.<sup>6</sup> The statutes generally provide that such a will need assume no particular form, may be made either within or without the jurisdiction, and need not be attested by witnesses; as to the manner of probate, including the number of witnesses requisite to prove the testator's handwriting, there is some slight difference in statutory provisions.<sup>7</sup> The utmost strictness prevails in requiring olographic wills to

Wills (2d ed), § 8; *Fry v. Morrison*, 159 Ill. 244; *Bayley v. Bailey*, 5 Cush. (Mass.) 245.

1. 10 Bac. Abr. 487; *Leathers v. Greenacre*, 53 Me. 561; *Hubbard v. Hubbard*, 12 Barb. (N. Y.) 153.

2. See the various statutes.

As to What Is a Sufficient Writing within the statute, see *infra*, this title, *Form*.

3. For a more particular discussion of this subject, see *infra*, this section, *Oral or Nuncupative Wills*.

4. *Castro v. Castro*, 6 Cal. 158; *Dockum v. Robinson*, 26 N. H. 372.

5. See *infra*, this subsection, *Written Wills — Louisiana Testaments*.

6. Definition. — 2 Bouv. L. Dict. (15th ed.) 722; 2 Kent's Com. (13th ed.) 519; Rev. Civ. Code La. (1899), art. 1588; Civ. Code Cal., § 1277.

A Married Woman cannot make an olographic will in *Idaho*. *Scott v. Harkness*, 6 Idaho 736.

A Blind Person may make a valid olographic testament in *Louisiana*. *State v. Martin*, 2 La. Ann. 667.

A Paper Preserved with the Will, and evidently intended as a codicil, will be given such effect,

though it contains no reference to the will. *Perkins v. Jones*, 84 Va. 358.

"Answer at Once" in a testamentary letter is not presumptively an indication of an intent to alter the letter if not answered. *Buffington v. Thomas*, (Miss. 1904) 36 So. Rep. 1039.

**Revocation of Former Will.** — As to the revocation of an ordinary written will by an olographic will, see *infra*, this title, *Revocation*.

**7. Statutory Provisions.** — See the statutes of the various states. See also the following cases, declaratory or explanatory of statutory provisions:

*Arkansas*. — *Ex p. Horner*, 27 Ark. 443.

*California*. — *Martin's Estate*, 58 Cal. 530; *Matter of Rand*, 61 Cal. 475; *Matter of Billings*, 64 Cal. 427; *Matter of Soher*, 78 Cal. 477; *Mitchell v. Donohue*, 100 Cal. 202.

*District of Columbia*. — *McIntire v. McIntire*, 8 Mackey (D. C.) 482.

*Idaho*. — *Scott v. Harkness*, 6 Idaho 736.

*Kentucky*. — *Baker v. Dobyns*, 4 Dana (Ky.) 220; *Toebbe v. Williams*, 80 Ky. 664; *Webster v. Lowe*, 107 Ky. 293; *Morris v. Morton*, (Ky. 1892) 20 S. W. Rep. 287.

*Louisiana*. — *Williams v. Hardy*, 15 La. Ann. 286.



comply with the statute;<sup>1</sup> but an olographic will is not invalid because it exceeds the statutory requirements, in being attested by witnesses,<sup>2</sup> or in containing an unsigned attestation clause.<sup>3</sup>

In *North Carolina* and *Tennessee*, an olographic will is not valid unless found among valuable papers or effects of the deceased, or lodged with some person for safe keeping.<sup>4</sup> In *New York* the statute makes no exception with respect to an olographic will, in its requirements as to execution. But it is unnecessary to criticise as closely as in the case of an ordinary will the terms and manner of publication. A substantial compliance with the statute will be sufficient.<sup>5</sup> In some other states, it seems that olographic wills must be executed with all the formalities attending wills in general.<sup>6</sup>

**Writing.** — It is absolutely essential that an olographic will be wholly in the handwriting of the testator. Therefore, an instrument partly written and partly printed will be refused probate,<sup>7</sup> unless the printed words are of no

*Mississippi.* — *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363.

*Montana.* — *Barney v. Hayes*, 11 Mont. 571.  
*North Carolina.* — *Outlaw v. Hurdle*, 1 Jones L. (46 N. Car.) 150.

*Virginia.* — *Perkins v. Jones*, 84 Va. 358.

And see the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 153.

**Will in Form of Note.** — The following document, written, signed, and dated, in the hand of J. M., was held to be valid as his holographic will, or as a codicil thereto: "\$100,000. New Orleans, Jan. 25, 1848. Four years from and after my death, I hereby authorize and direct (and will) my executors to pay unto F. one hundred thousand dollars. John McDonogh." *Pena v. New Orleans*, 13 La. Ann. 86, 71 Am. Dec. 506.

**Will of Illiterate Testator.** — A written document providing that "this is to serify that ie levet to mey wife Real and persnal and she to dispose for them as she wis" is properly construed as if it read: This is to certify that I leave to my wife real and personal property, and she to dispose of them as she wishes; and as thus read shows a testamentary intent, and such document, if wholly written, dated, and signed by the testator, is entitled to probate as an olographic will. *Mitchell v. Donohue*, 100 Cal. 202.

**1. Necessity for Statutory Compliance.** — *Matter of Rand*, 61 Cal. 468; *Armant's Succession*, 43 La. Ann. 310; *Baker v. Brown*, 83 Miss. 793; *Warwick v. Warwick*, 86 Va. 602.

**Unless the Requirements of the Statute Are Satisfied**, the presumption is that a written paper was not intended to be and to operate as the writer's last will. Such presumption, however, may be removed by satisfactory proof. *Crutcher v. Crutcher*, 11 Humph. (Tenn.) 377.

**2. Attestation Will Not Invalidate.** — 4 Kent's Com. (13th ed.) 519, 520; *Matter of Soher*, 78 Cal. 479; *Knight v. Smith*, 3 Mart. (La.) 163; *Andrews v. Andrews*, 12 Mart. (La.) 713; *Langley v. Langley*, 12 La. 114; *Roth's Succession*, 31 La. Ann. 315; *Brown v. Beaver*, 3 Jones L. (48 N. Car.) 516, 67 Am. Dec. 255; *Harrison v. Burgess*, 1 Hawks (8 N. Car.) 384.

**3.** *Hill v. Bell*, Phil. L. (61 N. Car.) 122, 93 Am. Dec. 583; *Guthrie v. Owen*, 2 Humph. (Tenn.) 202, 36 Am. Dec. 318, note; *Perkins v. Jones*, 84 Va. 358.

**The Word "Attest,"** written at the end of the

paper, has no effect upon the validity of the will. *Allen v. Jeter*, 6 Lea (Tenn.) 672.

**4. Rule in North Carolina and Tennessee.** — *Sawyer v. Sawyer*, 7 Jones L. (52 N. Car.) 134; *Hill v. Bell*, Phil. L. (61 N. Car.) 122, 93 Am. Dec. 583; *Hughes v. Smith*, 64 N. Car. 493; *Winstead v. Bowman*, 68 N. Car. 170; *Marr v. Marr*, 2 Head (Tenn.) 303; *Hooper v. McQuary*, 5 Coldw. (Tenn.) 136; *Tate v. Tate*, 11 Humph. (Tenn.) 465.

**"Among Valuable Papers."** — Where a decedent had two drawers, in one of which he kept his notes, deeds, and other valuable papers, carefully arranged, together with his money and other valuable effects; and in the other he kept some papers of little value, carelessly deposited with some effects of very small value, it was held that a holographic script, found in the latter place, could not be proved as a will, under the statute. *Little v. Lockman*, 4 Jones L. (49 N. Car.) 494.

**"Lodged in the Hands of Any Person for Safe Keeping."** — Where a statute provides that an olographic will must be either found among the valuable papers of the testator or lodged in the hands of any person for safe keeping a letter written by a testator to one whom he intended to be his legatee, declaring that certain of his property was to go to her in case of his death, and directing her to collect moneys due to him and retain them until his return, is valid as an olographic will. It is not the intention of the statute that the testator should particularly say that he is intrusting the paper for safe keeping to the person in whose possession it is found. His intention in this respect must govern. *Alston v. Davis*, 118 N. Car. 202.

**5. Rule in New York.** — *Matter of Beckett*, 103 N. Y. 167; *Matter of Turell*, 166 N. Y. 330, affirming 47 N. Y. App. Div. 560; *Matter of Akers*, 74 N. Y. App. Div. 461; *Matter of Eakins*, (Surrogate Ct.) 13 Misc. (N. Y.) 557; *Matter of Palmer*, (Surrogate Ct.) 42 Misc. (N. Y.) 469. See also *Matter of Dale*, 56 Hun (N. Y.) 169; *Matter of Hunt*, 110 N. Y. 281.

**6.** See *Western Maryland College v. McKinstry*, 75 Md. 188; *Neer v. Cowhidge*, 4 Wyo. 49.

**7. Partly Printed Instrument Invalid.** — *Matter of Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Matter of Billings*, 64 Cal. 427, wherein the year of the date was printed; *Robertson's Suc-*

material effect upon the meaning of the will and so may be regarded as mere surplusage.<sup>1</sup> Figures may be used to denote the amount of a legacy,<sup>2</sup> and the instrument may be written with lead pencil as well as with pen and ink.<sup>3</sup>

**Date.** — The date is an important part of every holographic will and consists of the year, month, and day, the omission of any of which is fatal.<sup>4</sup> The date may be placed at the head, foot, or in the body of the instrument.<sup>5</sup>

**Signature.** — According to some authorities, the name of the testator at the commencement of the paper is an equivocal act, and insufficient as a signature, unless it appears affirmatively from something on the face of the paper that it was so meant.<sup>6</sup> Other authorities declare that the name need not be subscribed, but that it may appear anywhere in the instrument.<sup>7</sup> But the indorsement of the paper in the testator's handwriting as his will is not sufficient.<sup>8</sup>

(3) *Contingent Wills.* — A contingent or conditional will is one so drawn as to become operative only upon the happening or not happening, or upon the existence or nonexistence, of a certain set of circumstances during a certain period of time, so that if the contingency fails or occurs the will is or is not entitled to probate, as the case may be.<sup>9</sup> But the intention of a testator to

cession, 49 La. Ann. 868, wherein two figures of the year of the date were printed.

**The Testimony of Witnesses** that the will was written will not overcome the absolute proof furnished by the will itself that it was partly printed. Robertson's Succession, 49 La. Ann. 868.

**To Establish the Forgery** of an olographic will, the weight of the testimony should make it appear with some certainty that the will is a forged paper. Barlaw v. Harrison, 51 La. Ann. 875.

1. McMichael v. Bankston, 24 La. Ann. 451. "My Will" printed at the head of the instrument is to be disregarded as mere surplusage. Baker v. Brown, 83 Miss. 793.

**A Word Denoting the Place** where the will was dated may be printed without invalidating the will, as the statute does not require the place to be stated. Robertson's Succession, 49 La. Ann. 868.

2. Vanhille's Succession, 49 La. Ann. 107.

3. Philbrick v. Spangler, 15 La. Ann. 46.

4. **Necessity of Date.** — Martin's Estate, 58 Cal. 530; Fuentes v. Gaines, 25 La. Ann. 85.

**The Day** must be stated. Heffner v. Heffner, 48 La. Ann. 1088. But compare Gaines v. Lizardi, 3 Woods (U. S.) 77.

**The Year** must be stated. Matter of Billings, 64 Cal. 427; Robertson's Succession, 49 La. Ann. 868.

**Well-understood Abbreviations** used in writing the date, such as Nov. 22/97, will not invalidate the will. Matter of Lakemeyer, 135 Cal. 28.

5. Zerega v. Percival, 46 La. Ann. 590.

**Date Below Signature Sufficient.** — Fuqua's Succession, 27 La. Ann. 273.

**Presumption as to Date Where Will Contains Separate Clauses.** — Where an olographic will was dated at the commencement, and, after making various dispositions, was signed by the testator, and he subsequently added another clause and again signed it, the instrument appearing to be congruous and continuous, it will be presumed, in the absence of proof to the contrary, that it was finished at one time, and

is clothed with the forms required for its validity. Lagrave v. Merle, 5 La. Ann. 278, 52 Am. Dec. 589.

6. **Name of Testator at Beginning of Paper Insufficient.** — Armant's Succession, 43 La. Ann. 310; Ramsey v. Ramsey, 13 Gratt. (Va.) 664, 70 Am. Dec. 438; Roy v. Roy, 16 Gratt. (Va.) 418, 84 Am. Dec. 696. See also Matter of Booth, 127 N. Y. 109.

7. **Name May Appear in Any Part of Will.** — Johnson's Estate, Myr. Prob. (Cal.) 5; Stratton's Estate, 112 Cal. 513; Matter of Camp, 134 Cal. 233; Tate v. Tate, 11 Humph. (Tenn.) 465; Lawson v. Dawson, 21 Tex. Civ. App. 361.

**Name Occurring in Final Words.** — A will concluding, "I, W. D., say this is my last will and testament," is sufficiently signed. Dinning v. Dinning, (Va. 1904) 46 S. E. Rep. 473.

8. **Plumstead's Appeal**, 4 S. & R. (Pa.) 545; Roy v. Roy, 16 Gratt. (Va.) 418, 84 Am. Dec. 696.

**Indorsement on Envelope.** — The name of the testator indorsed on the envelope containing the will does not constitute a signing of the will. Warwick v. Warwick, 86 Va. 602.

9. **Contingent Wills.** — 1 Jarman on Wills (6th ed.) \*25, 26; Theobald on Wills (2d ed.) 11; Redf. on Wills (4th ed.) 177; Schouler on Wills (2d ed.), § 285.

*England.* — Lugg v. Lugg, 2 Salk. 592, 1 Ld. Raym. 441; Parsons v. Lanoe, 1 Ves. 190; Sinclair v. Hone, 6 Ves. Jr. 607; Roberts v. Roberts, 1 Sw. & Tr. 337; Goods of Porter, L. R. 2 P. & D. 22; Goods of Robinson, L. R. 2 P. & D. 171; Lindsay v. Lindsay, L. R. 2 P. & D. 459; In re Thorne, 4 Sw. & Tr. 36.

*United States.* — Tarver v. Tarver, 9 Pet. (U. S.) 174.

*Indiana.* — Lindsey v. Lindsey, 45 Ind. 552; Gibson v. Seymour, 102 Ind. 485, 52 Am. Rep. 688; Murphy v. Brown, 159 Ind. 106.

*Kentucky.* — Maxwell v. Maxwell, 3 Met. (Ky.) 101; Dougherty v. Dougherty, 4 Met. (Ky.) 25.

*Maryland.* — Wagner v. M'Donald, 2 Har. & J. (Md.) 346.

make a conditional will must appear very clearly on the face thereof; and before any will can be defeated upon the ground that it is conditional, and that the condition has failed, it must be determined: first, whether the contingency is referred to as the occasion of making the will or as the condition upon which the instrument is to become operative, or, in other words, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which led him to make a testamentary provision;<sup>1</sup> and secondly, if the language clearly imports a condition, whether it applies to and affects the whole will or only some of its provisions.<sup>2</sup> Thus, if the testator makes his will conditional upon his death during a particular period, which he survives, the will does not take effect.<sup>3</sup> But if the possibility of death within such period is merely the motive for making a will prior thereto, the survival of the testator after the expiration of the period mentioned will not render the will invalid.<sup>4</sup>

*Massachusetts.*—*Damon v. Damon*, 8 Allen (Mass.) 192.

*New York.*—*Ex p. Lindsay*, 2 Bradf. (N. Y.) 204; *Thompson v. Connor*, 3 Bradf. (N. Y.) 366.

*Pennsylvania.*—*Todd's Case*, 2 W. & S. (Pa.) 145; *Turner v. Scott*, 51 Pa. St. 126; *Frederick's Appeal*, 52 Pa. St. 338, 91 Am. Dec. 159.

*South Carolina.*—*Jacks v. Henderson*, 1 Desaus. (S. Car.) 543.

*Virginia.*—*Cody v. Conly*, 27 Gratt. (Va.) 313.

*West Virginia.*—*French v. French*, 14 W. Va. 458.

**1. Intention to Make Will Contingent Must Clearly Appear.**—*Redfield on Wills* (4th ed.) 177; *Tarver v. Tarver*, 9 Pet. (U. S.) 174; *Matter of Barton*, 52 Cal. 538; *Murphy v. Brown*, 159 Ind. 106; *Likefield v. Likefield*, 82 Ky. 591, 56 Am. Rep. 908; *Kelleher v. Kernan*, 60 Md. 440; *Damon v. Damon*, 8 Allen (Mass.) 192; *French v. French*, 14 W. Va. 458. See also *Broadus v. Rosson*, 3 Leigh (Va.) 12.

**Extrinsic Evidence** of alleged parol declarations of the testator at the time of executing the will are inadmissible to prove its contingent character. *Sewell v. Slingluff*, 57 Md. 538.

**2. Intention to Make Whole Instrument Conditional Must Clearly Appear.**—*Damon v. Damon*, 8 Allen (Mass.) 194; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204.

**3. Will Conditional upon Death.**—*Goods of Spratt*, 75 L. T. N. S. 518, (1897) P. 28; *Halford v. Halford*, 75 L. T. N. S. 520, (1897) P. 36; *Goods of Porter*, L. R. 2 P. & D. 22; *Goods of Robinson*, L. R. 2 P. & D. 171; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459. See also *In re Thorne*, 4 Sw. & Tr. 36, 34 L. J. P. 131.

**Language Importing a Condition.**—The following expressions have been held to create a condition upon the failure of which the will is not entitled to probate: "Instructions to be followed if I die at sea or abroad," *Lindsay v. Lindsay*, L. R. 2 P. & D. 459. "If I die before my return from Ireland," *Parsons v. Lanoe*, 1 Ves. 189. "In case of the death of both of us," *Jeffries's Estate*, 24 Pa. Ct. 492, affirmed 18 Pa. Super. Ct. 439. "In case I should not get back," *Morrow's Appeal*,

116 Pa. St. 440; *Magee v. McNeil*, 41 Miss. 17. "If I never get back home," *Maxwell v. Maxwell*, 3 Met. (Ky.) 101. "I may never get back. If it should be my misfortune, I give my property, etc.," *Robnett v. Ashlock*, 49 Mo. 171. "Should anything happen that I should not return alive," *Dougherty v. Dougherty*, 4 Met. (Ky.) 25. "If I should not return (which I will, no preventing Providence)," *Todd's Case*, 2 W. & S. (Pa.) 145. "If I should not come to you again," *Wagner v. McDonald*, 2 Har. & J. (Md.) 346.

**4. Mere Possibility of Death the Occasion for Will.**—*Theobald on Wills* (2d ed.) 11, 12; *Goods of Dobson*, L. R. 1 P. & D. 88; *Goods of Martin*, L. R. 1 P. & D. 380; *Goods of Mayd*, 6 P. D. 17, 29 W. R. 214.

**Language Merely Expressive of Circumstances under Which Will Was Made.**—The following expressions have been held merely expressive of the circumstances under which the will was made, and not conditional:

"In the event of my death whilst serving in this horrid climate, or any accident happening to me." *In re Thorne*, 4 Sw. & Tr. 36.

"In case of any fatal accident happening to me, being about to travel by railway, I hereby leave." *Goods of Dobson*, L. R. 1 P. & D. 88.

"In case of my death on the way." *Goods of Mayd*, 6 P. D. 17.

"Being about to travel a considerable distance, and knowing the uncertainty of life." *Tarver v. Tarver*, 9 Pet. (U. S.) 174.

"To provide for possible contingencies." *Kelleher v. Kernan*, 60 Md. 440.

"Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath," etc. *French v. French*, 14 W. Va. 458.

"According to my present intention, should anything happen to me before I reach my friends in St. Louis." *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204.

"Being physically weak in health, have obtained permission to cease from all duty for a few days, \* \* \* and in the event of my death occurring during such time, I do hereby will and bequeath." *Goods of Martin*, L. R. 1 P. & D. 380.

"I am going on a journey and may not ever return. And if I do not, this is my last request." *Eaton v. Brown*, 193 U. S. 411.

"Realizing the uncertainty of life at all times, and the dangers incident to travel, I leave



**Rule of Construction.** — The language of a will will be construed, if possible, as merely setting forth the circumstances which induced the testator to make a testamentary provision, rather than as creating a condition upon which alone it is to become operative;<sup>1</sup> and even where the language clearly imports a condition, the tendency is to restrain its operation to particular provisions, rather than to allow it to affect the entire instrument.<sup>2</sup> If, however, the testator has married since the will was made, or has had children born thereafter, for whom the will makes no provision, the rule of construction is reversed in equity, and any words are laid hold of which will make the instrument contingent and conditional.<sup>3</sup>

**Republication After Failure of Condition.** — Due republication in accordance with statutory requirements is necessary in order that a will may remain valid and subsisting after the condition upon which it was to be operative has failed. Mere parol recognition of the instrument is insufficient.<sup>4</sup>

If the Event Is Still in Suspense upon the death of the testator, general probate will at once be granted.<sup>5</sup>

(4) *Alternative Wills.* — Alternative wills are instruments so expressed that the contingency upon which each is to become operative is the alternative of that upon which the other is to become operative. As if a testator, after executing two wills of different dates, should declare by a codicil to the second will, that if he died before a certain date the earlier instrument should be taken as his last will and testament; otherwise, the later.<sup>6</sup>

(5) *Wills Operative at the Election of a Third Person.* — Although a testator cannot delegate to another power either to make or to revoke his will after his death, yet he may provide that a paper in form testamentary shall become operative or not, at the election of a third person. In such case the testamentary character of the paper is dependent upon the election of the third person, and it is not entitled to probate without his assent.<sup>7</sup>

(6) *Wills Intended to Take Effect in Execution of a Power.* — A will which

this as a memoranda of my wishes should anything happen to me during my intended trip." *Redhead v. Redhead*, 83 Miss. 141.

**1. Construction Against Conditions.** — *Strauss v. Schmidt*, 3 Phill. Ecc. 209; *Eaton v. Brown*, 193 U. S. 411; *Matter of Barton*, 52 Cal. 538; *Kelleher v. Kernan*, 60 Md. 440; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 206; *French v. French*, 14 W. Va. 458.

**If There Be Room for Reasonable Doubt** as to the contingent character of the instrument, the probate judge is justified in admitting the will to probate on the formal proof, leaving the determination of its conditional nature for subsequent construction. *Ex p. Lindsay*, 2 Bradf. (N. Y.) 209.

**2. Construction in Favor of Partial Condition.** — *Schouler on Wills* (2d ed.), §§ 285, 286; *Messie v. Griffin*, 2 Met. (Ky.) 364; *Damon v. Damon*, 8 Allen (Mass.) 192; *Ex p. Lindsay*, 2 Bradf. (N. Y.) 204.

**3. Parsons v. Lanoe.** *Ambl.* 562, 1 Ves. 192; *Jacks v. Henderson*, 1 Desaus. (S. Car.) 156. But see *Damon v. Damon*, 8 Allen (Mass.) 196.

**4. Republication After Failure of Condition.** — *Schouler on Wills* (2d ed.), § 287; *Goods of Cawthron*, 3 Sw. & Tr. 417; *Parsons v. Lanoe*, *Ambl.* 560; *Goods of Winn*, 2 Sw. & Tr. 147; *Roberts v. Roberts*, 1 Sw. & Tr. 337; *Dougherty v. Dougherty*, 4 Met. (Ky.) 25; *French v. French*, 14 W. Va. 458. See also *Kelleher v. Kernan*, 60 Md. 440. And see *infra*, this title, *Revival or Republication*.

**In England**, before the modern Wills Act of

1837, parol republication of bequests of personality was not prohibited, and hence evidence of subsequent recognition and adherence was admissible. *Strauss v. Schmidt*, 3 Phill. Ecc. 218; *Burton v. Collingwood*, 4 Hag. Ecc. 176.

**The Due Execution of a New and Inconsistent Will** supersedes a prior contingent will. *Goods of Ward*, 4 Hag. Ecc. 179.

**5. In re Cooper**, 1 Deane Ecc. 9. See also *Goods of Bangham*, 1 P. D. 429.

**6. In Hamilton's Estate**, 74 Pa. St. 69, a testator made a will dated November 20, 1871; he made another dated January 13, 1873; he made a "codicil to my last will and testament," dated "this — day of January, 1873." By the codicil, after referring to the law forbidding gifts to charities within one month of the testator's decease, he provided: "Now I declare said will of 20th November, 1871, to be my last will should I die before the 1st of March, 1873, otherwise, the will of 13th January, 1873, shall be my last will." He died on the 23d of January, 1873. It was held that the paper of November, 1871, was his will.

**7. In Goods of Smith**, L. R. 1 P. & D. 717, the testator wrote a codicil with his own hand, which concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." It was held that the validity of this paper was conditional on the assent of the wife, and that as she elected not to avail herself of its provisions, it ought not to be included in the probate.

is intended to take effect as an exercise of a power may nevertheless be operative though such power does not exist. The will is valid if the testator has sufficient power over the subject-matter to dispose of the same by testament, no matter from what source such power may be derived.<sup>1</sup>

(7) *Joint and Mutual Wills.* — Although it is true, as said by one authority, that the law of joint and mutual wills, regarded as a doctrine of general jurisprudence, is still in a somewhat confused state,<sup>2</sup> yet it may be remarked that the current of opinion is in favor of the validity of both joint and mutual wills. A joint will, or in other words, a single instrument containing the wills of two or more persons, may be probated upon the death of one of the testators as his will, and, unless revoked subsequently, may again be probated upon the death of another of the testators, as the will of the latter.<sup>3</sup> But a will cannot be probated as the joint will of both parties so long as one of them is living;<sup>4</sup> nor, if intended to take effect only after the death of both parties, can it be admitted to probate before that time.<sup>5</sup> A mutual will, or, strictly speaking, a reciprocal will, is one by which each testator makes a testamentary disposition in favor of the other. Such a will is unquestionably valid and is entitled to probate upon the death of either party.<sup>6</sup> The principles underlying the power of revocation of joint and mutual wills are considered in a subsequent section of this title.<sup>7</sup>

(8) *Louisiana Testaments* — (a) *In General.* — Especial mention seems necessary of the forms of testamentary disposition recognized in the state of Louisiana. In that jurisdiction verbal testaments are prohibited,<sup>8</sup> and all testaments must be drawn up in writing, either by the testator himself, or by some other person under his dictation.<sup>9</sup> Of these written testaments there are three classes, viz., nuncupative or open testaments, mystic or sealed

**1. Will Intended as Exercise of Power.** — 1 Jarman on Wills \*26 (citing *Jones v. Southall*, 30 Beav. 187; *Sing v. Leslie*, 2 Hem. & M. 68; *In re Wilmot*, 29 Beav. 644; *Bruce v. Bruce*, L. R. 11 Eq. 371). See also *Waldron v. Chasteney*, 2 Blatchf. (U. S.) 62; *In re Brooksbank*, 34 Ch. D. 160; *Heyer v. Burger*, Hoffm. (N. Y.) 1; *Price v. Parker*, 16 Sim. 198. And see the title POWERS, vol. 22, p. 1115.

**2. Schouler on Wills** (2d ed.), § 457.

**3. Joint Wills Valid.** — 1 Jarman on Wills \*27; Schouler on Wills (2d ed.), §§ 456-460.

*England.* — *In re Stracey*, 1 Deane Ecc. 6; *Dufour v. Pereira*, 1 Dick. 419; *Goods of Miskelly, Jr.* R. 4 Eq. 62; *Denysen v. Mostert*, L. R. 4 P. C. 236. Compare *Hobson v. Blackburn*, 1 Add. Ecc. 274; *Darlington v. Pulteney*, 1 Cowp. 260.

*Alabama.* — *Mosser v. Mosser*, 32 Ala. 551.

*Georgia.* — *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751.

*Indiana.* — *Black v. Richards*, 95 Ind. 184.

*Kentucky.* — *Breathitt v. Whittaker*, 8 B. Mon. (Ky.) 530; *Hill v. Harding*, 92 Ky. 76.

*Louisiana.* — See *Wood v. Roane*, 35 La. Ann. 865.

*Massachusetts.* — *Gould v. Mansfield*, 103 Mass. 408.

*New York.* — *Matter of Diez*, 50 N. Y. 88; *Ex p. Day*, 1 Bradf. (N. Y.) 476; *Matter of Raupp*, (Surrogate Ct.) 10 Misc. (N. Y.) 300.

*North Carolina.* — *In re Davis*, 120 N. Car. 9, overruling *Clayton v. Liverman*, 2 Dev. & B. L. (19 N. Car.) 558.

*Ohio.* — *Betts v. Harper*, 39 Ohio St. 641, 48 Am. Rep. 477, superseding *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474.

*Texas.* — *Wyche v. Clapp*, 43 Tex. 544; *March v. Huyter*, 50 Tex. 243.

**Wills Partly Joint and Partly Mutual.** — *In State Bank v. Bliss*, 67 Conn. 317, it was held, following *Walker v. Walker*, 14 Ohio St. 157, that a joint will making specific legacies to third persons with a residuary clause in favor of the surviving testator, and providing that the will was not to be proved until after the death of both testators, was invalid as a will and could not be proved as such upon the death of either party.

**As to Property Owned by One Testator Alone,** a joint will is valid, as the execution by the other testator is mere surplusage. *Allen v. Allen*, 28 Kan. 18; *Rogers, Appellant*, 11 Me. 303.

**4. In re Davis**, 120 N. Car. 9.

**5. In re Raine**, 1 Sw. & Tr. 144. See also *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477.

**In Arkansas**, a joint will, to take effect upon the death of both testators, is invalid. *Hershy v. Clark*, 35 Ark. 17, 37 Am. Rep. 1.

**6. Mutual Wills Valid.** — *Dufour v. Pereira*, 1 Dick. 419; *Walpole v. Orford*, 3 Ves. Jr. 402; *Denysen v. Mostert*, L. R. 4 P. C. 236; *Dias v. De Livera*, 5 App. Cas. 123; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Lewis v. Scofield*, 26 Conn. 452, 68 Am. Dec. 404; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *Matter of Diez*, 50 N. Y. 88; *Cawley's Estate*, 136 Pa. St. 628. See also *Alter's Appeal*, 67 Pa. St. 341.

**7. See infra**, this title, *Revocation*.

**8. Verbal Testaments Prohibited in Louisiana.** — Rev. Civ. Code La. (1899), art. 1576.

**9. Rev. Civ. Code La.** (1899), art. 1575.

testaments, and olographic testaments.<sup>1</sup>

(b) **Nuncupative Wills** — *aa. GENERALLY.* — The term “nuncupative” does not have its usual significance of “oral”<sup>2</sup> when applied to wills in Louisiana. In that state nuncupative wills are written wills, and are of two kinds: those made by public act and those made by act under private signature.<sup>3</sup>

*bb. PUBLIC NUNCUPATIVE WILLS* — **Dictation.** — The distinguishing characteristic of a nuncupative testament by public act is the dictation thereof by the testator. Dictation is essential and must be made to a notary before witnesses.<sup>4</sup> The notary may ask questions of the testator during the dictation or suggest words to be used by him, provided no attempt is made to influence the testamentary disposition,<sup>5</sup> and the testator may avail himself of the services of counsel in framing the will, if he immediately dictates the same to the notary.<sup>6</sup>

**Reduction to Writing.** — The testament must be written out by the notary as dictated, and read to the testator in the presence of the witnesses.<sup>7</sup> The exact language used by the testator need not be employed by the notary. The use of other words or expressions will not invalidate the will when it appears that the notary fully understood the language of the testator and faithfully expressed the same in the writing.<sup>8</sup> A will couched in ungrammatical language is nevertheless good if no ambiguity exists.<sup>9</sup> The placing by the notary of a word omitted from the will upon the margin thereof is immaterial when the word can be ignored and the will stand.<sup>10</sup>

**Witnesses.** — The witnesses must be three in number if they reside in the place where the will is executed; otherwise, five are required.<sup>11</sup> “Place,” as used in the statute, has been held to mean “parish.”<sup>12</sup> If one of the witnesses does not understand the language in which the will is dictated, the will is of no effect for lack of the requisite number of witnesses, notwithstanding the fact that the testamentary dispositions were translated to such witness as soon as dictated.<sup>13</sup> The witnesses must be present throughout the dictation and execution of the instrument as a whole, or the will cannot be sustained.<sup>14</sup>

**Interruption.** — All the foregoing formalities prescribed by the statute must be fulfilled at one time, without interruption, and without turning aside to other acts.<sup>15</sup> But such a temporary cessation of the proceeding as is induced occasionally by the weakness of the testator does not constitute a legal interruption;<sup>16</sup> nor do pauses made by the testator after dictating each clause of the will to permit the notary to take down the same, though the testator may converse with persons present during such pauses, come within the statutory prohibition.<sup>17</sup> An interlineation of words cannot be considered as an

1. **Classes of Louisiana Testaments.** — Rev. Civ. Code La. (1899), art. 1574.

2. See *infra*, this section, *Oral or Nuncupative Wills*.

3. **Nuncupative Wills.** — Rev. Civ. Code La. (1899), art. 1577.

4. **Public Nuncupative Wills.** — Rev. Civ. Code La. (1899), art. 1578.

5. **Notary May Ask Questions.** — Saux's Succession, 46 La. Ann. 1423; *Hennessey v. Woulfe*, 49 La. Ann. 1376.

6. *Landry v. Tomatis*, 32 La. Ann. 118.

7. **Reduction to Writing.** — Rev. Civ. Code La. (1899), art. 1578.

8. *Starrs v. Mason*, 32 La. Ann. 8; *Cauvien's Succession*, 46 La. Ann. 1412.

If the Testator Be Uneducated, and dictate his will in peculiar terms and language, the notary may write the same in proper language provided he preserves the exact meaning of the testator. Saux's Succession, 46 La. Ann. 1423.

9. *Acosta v. Marrero*, 16 La. Ann. 136, wherein it was held that the revocation of other

wills might be expressed in ungrammatical terms, provided it appeared that such was the intention of the testator and not a mere inference of the notary.

10. *Dupuy v. Esnard*, 51 La. Ann. 797.

11. **Witnesses.** — Rev. Civ. Code La. (1899), art. 1578; *Vollmer's Succession*, 40 La. Ann. 593; *Escobal's Succession*, 42 La. Ann. 1086.

12. *Weick v. Henne*, 41 La. Ann. 1153.

13. *Breaux v. Gallusseaux*, 14 La. Ann. 229.

14. **Presence of Witnesses Necessary.** — *Langley v. Langley*, 12 La. 114; *Devall v. Palms*, 20 La. Ann. 202; *Wilkin's Succession*, 21 La. Ann. 115.

**The Temporary Absence** of one witness for the purpose of getting a drink of water in a passage open upon the room where the act is received by the notary will not invalidate the will. *Lawson v. Lawson*, 12 La. Ann. 603.

15. **Interruption.** — Rev. Civ. Code La. (1899), art. 1578.

16. *Lawson v. Lawson*, 12 La. Ann. 603.

17. *Starrs v. Mason*, 32 La. Ann. 8.



interruption or turning aside to other acts.<sup>1</sup>

**Signing.** — The testament must be signed by the testator; or, if he be unable to sign, he must declare that fact, and express mention must be made in the will of such declaration and of the cause of the inability.<sup>2</sup> This declaration takes the place of the signature; hence, a person who does not know how to sign his name need not,<sup>3</sup> though he may,<sup>4</sup> make his mark. The testament must also be signed by the witnesses, or at least by one of them for all, if the others cannot write.<sup>5</sup>

**Necessary Recitals.** — Express mention must be made, in a nuncupative testament by public act, of a strict compliance in the execution thereof with each and every formality required by the statute. A public testament must be full proof of itself. Nothing can be supplied by evidence *dehors* the instrument.<sup>6</sup> Thus, the notary must expressly mention that the will was dictated by the testator;<sup>7</sup> that it was written out by himself as dictated;<sup>8</sup> that it was read to the testator;<sup>9</sup> that the witnesses were present when the will was dictated, written down, and read aloud;<sup>10</sup> and that the witnesses, if but three in number, were residents of the place where the will was executed.<sup>11</sup> It is not imperative, however, that the notary declare that the formalities were done at one time and without interruption;<sup>12</sup> nor need he expressly negative the existence of incapacity on the part of the witnesses.<sup>13</sup> And no mention need be made of the signature except in the contingency, provided for by statute, that the testator is unable to sign.<sup>14</sup> It is not necessary that the notary should use the exact language of the statute in declaring that the prescribed formalities have been complied with. Other language which conveys the same idea is sufficient. Thus, he need not state that the will was written out by him "as dictated;"<sup>15</sup> and, if he describes himself as being a notary of a certain city, it is sufficient for him to state that the witnesses are all of "this city."<sup>16</sup>

The **Presumption of Law** is in favor of the truthfulness of the recitals of the notary, and strong proof is required to overcome this presumption and invalidate the will.<sup>17</sup>

**cc. PRIVATE NUNCUPATIVE WILLS.** — A nuncupative testament under private signature in Louisiana seems to correspond most nearly with the ordinary written will in other jurisdictions.<sup>18</sup> The statute provides that such a testa-

1. Carter v. McManus, 15 La. Ann. 627.

2. **Signature by Testator.** — Rev. Civ. Code La. (1899), art. 1579; Shannon v. Shannon, 16 La. Ann. 8.

3. Hennessey v. Woulfe, 49 La. Ann. 1376.

4. Shannon v. Shannon, 16 La. Ann. 8.

5. **Signature by Witnesses.** — Rev. Civ. Code La. (1899), art. 1580.

6. **Express Mention of Formalities Essential.** — Rev. Civ. Code La. (1899), art. 1578; Graves v. Graves, 10 La. Ann. 212; Wilkin's Succession, 21 La. Ann. 115; Dorries's Succession, 37 La. Ann. 833; Vollmer's Succession, 40 La. Ann. 593; Weick v. Henne, 41 La. Ann. 1153; Vidal's Succession, 44 La. Ann. 41; Saux's Succession, 46 La. Ann. 1423; Monroe v. Liebman, 47 La. Ann. 155.

7. Saux's Succession, 46 La. Ann. 1423.

8. **Will Must Recite that It Was Written by Notary.** — Dorries's Succession, 37 La. Ann. 833; Miller v. Shumaker, 42 La. Ann. 398; Saux's Succession, 46 La. Ann. 1423.

9. Saux's Succession, 46 La. Ann. 1423.

10. **Will Must Recite Presence of Witnesses.** — Devall v. Palms, 20 La. Ann. 202; Wilkin's Succession, 21 La. Ann. 115; Vidal's Succession, 44 La. Ann. 41. Compare Lawson v. Lawson, 12 La. Ann. 603.

11. Murray's Succession, 41 La. Ann. 1109.

**It Is Sufficient** for the will to state that the witnesses are domiciled in the place where the will is made. Escobal's Succession, 42 La. Ann. 1086.

**A Recital that the Witnesses Are Competent** does not satisfy the statute. The notary cannot judge of the competency of the witnesses and omit to state the facts constituting that competency. Vollmer's Succession, 40 La. Ann. 593.

12. **Will Need Not Recite Lack of Interruption.** — Murray's Succession, 41 La. Ann. 1109; Saux's Succession, 46 La. Ann. 1423.

13. **Will Need Not Negative Incapacity of Witnesses.** — Escobal's Succession, 42 La. Ann. 1086; Marqueze's Succession, 50 La. Ann. 66.

14. Saux's Succession, 46 La. Ann. 1423.

15. Hoover v. York, 24 La. Ann. 375.

16. Marqueze's Succession, 50 La. Ann. 66.

**Designation of Notarial Capacity.** — The statement by a notary that he is a notary is sufficient without using the words "duly commissioned or sworn." Marqueze's Succession, 50 La. Ann. 66.

17. **Presumption in Favor of Recitals.** — Landry v. Tomatis, 32 La. Ann. 118; Cauvien's Succession, 46 La. Ann. 1412.

18. See *infra*, this title, *Form — Formal Requisites*.

ment must be written by the testator himself, or by any other person from his dictation; or even by one of the witnesses, in the presence of five witnesses residing in the place where the will is received, or of seven witnesses residing elsewhere.<sup>1</sup> In the country three resident witnesses, or five witnesses residing elsewhere, are sufficient, provided a greater number cannot be had.<sup>2</sup> A will executed before the required number of witnesses, one of whom does not understand the language employed, is invalid, though such language was translated to the witness during dictation.<sup>3</sup>

**Presentation and Declaration.** — By another clause of the statute, however, it will suffice if, in the presence of the same number of witnesses, and of all of them,<sup>4</sup> the testator present the paper on which he has written his testament, or caused it to be written out of their presence, declaring to them that that paper contains his last will.<sup>5</sup> This presentation and declaration is intended to supply the want of dictation, and it is not necessary, therefore, under this clause of the statute, that the testator should dictate his will.<sup>6</sup> It may be written as well in the presence as out of the presence of the witnesses,<sup>7</sup> and even by one of them.<sup>8</sup> It is a sufficient presentation for the testator to answer a question put to him as to whether the paper contains his last will.<sup>9</sup>

**Reading.** — The testament, whether dictated or merely presented and declared, is required, under pain of nullity, to be read by the testator to the witnesses, or by one of the witnesses to the rest, in the presence of the testator.<sup>10</sup>

**Signing.** — Having been read aloud, the testament must be signed by the testator, if he knows how or is able to sign, and by the witnesses, or at least by two of them, in case the others know not how to sign; and those of the witnesses who do not know how to sign must affix their mark.<sup>11</sup> When the testator is unable to sign on account of physical disability, a recital in the will to that effect will satisfy the statute.<sup>12</sup>

**Other Formalities.** — A nuncupative will under private signature is to be tested solely by the foregoing requirements and is subject to no other formality.<sup>13</sup>

**Express Mention** of the fulfillment of the requisites of the statute is not demanded of a will by private act. Proof *aliunde* of compliance therewith may be received.<sup>14</sup>

**Invalid Public Will Good as Private Will.** — An instrument which is held to be invalid as a nuncupative will by public act on account of failure to observe the required formalities in its execution may nevertheless be good as a nuncupative will under private signature.<sup>15</sup> And in such case, the notary who receives the act, and the person who signs the testator's name on account of the physical disability of the latter, are competent witnesses.<sup>16</sup>

(c) **Mystic Wills.** — A mystic or secret will is a kind of testament borrowed

**Conflict of Laws.** — In the absence of evidence as to the law of another state, the *Louisiana* statute must govern, and where the requisite number of witnesses under that statute do not attest, the will is invalid. *Abston v. Abston*, 15 La. Ann. 137.

1. **Private Nuncupative Wills.** — Rev. Civ. Code La. (1899), art. 1581.

2. Rev. Civ. Code La. (1899), art. 1583.

3. **Witnesses Must Understand Language of Testator.** — *Pardo's Succession*, 22 La. Ann. 139; *Dauterive's Succession*, 39 La. Ann. 1092.

4. *Babineau v. Le Blanc*, 14 La. Ann. 739.

5. **Presentation and Declaration.** — Rev. Civ. Code La. (1899), art. 1581; *Wood v. Roane*, 35 La. Ann. 865.

6. **Testator Need Not Dictate Will.** — *Prendergast v. Prendergast*, 16 La. Ann. 219, *affirming* *De Bardelabon v. Averret*, 11 La. Ann. 636, and *overruling* *Bordelon v. Baron*, 11 La. Ann. 676;

*Morales' Succession*, 16 La. Ann. 267; *Wood v. Roane*, 35 La. Ann. 865; *Pfarr v. Belmont*, 39 La. Ann. 294.

7. *Prendergast v. Prendergast*, 16 La. Ann. 219; *Morales' Succession*, 16 La. Ann. 267.

8. *Wood v. Roane*, 35 La. Ann. 865.

9. *Pfarr v. Belmont*, 39 La. Ann. 294.

10. **Reading of Will.** — Rev. Civ. Code La. (1899), art. 1582; *Hollingshead v. Sturgis*, 21 La. Ann. 450.

11. **Signing Will.** — Rev. Civ. Code La. (1899), art. 1582.

12. *Frith v. Pearce*, 105 La. 186.

13. Rev. Civ. Code La. (1899), art. 1582; *Prendergast v. Prendergast*, 16 La. Ann. 219.

14. *Graves v. Graves*, 10 La. Ann. 212.

15. **Invalid Public Will Good as Private Will.** — *Graves v. Graves*, 10 La. Ann. 212; *Morales' Succession*, 16 La. Ann. 267; *Devall v. Palms*, 20 La. Ann. 202.

16. *Frith v. Pearce*, 105 La. 186.

by the Code of Louisiana from the Napoleon Code. It consists of a written disposition of property, signed by the testator, closed and sealed, declared by the testator to be his will in the presence of a notary and several witnesses, and superscribed by the testator, notary, and witnesses.<sup>1</sup>

(d) **Olographic Wills.** — Olographic wills in Louisiana present no especially peculiar characteristics or features unusual to similar wills in other jurisdictions. This kind of will has been considered generally elsewhere in this title.<sup>2</sup>

c. **ORAL OR NUNCUPATIVE WILLS** — (1) *Generally.* — Oral wills are confined, in modern times, to what are known as nuncupative wills. The term "nuncupative," being derived from *nuncupare*, to call by name, had original application to the naming of an executor by word of mouth. Later it became, and has remained, in the law of wills, practically synonymous with "oral;" and a nuncupative will may therefore be defined as an oral will declared by a testator before witnesses, and subsequently by statutory admonition reduced to writing.<sup>3</sup>

(2) *History and Present Status* — (a) **In England.** — This form of testament was borrowed by the common law of England from the civil law of the Romans, and is of very ancient date.<sup>4</sup> In early times, a verbal will was as valid as a written will, and could be made by any person, at any time, and under any circumstances.<sup>5</sup> But with the growth of learning and the progress of letters, the necessity for allowing testamentary dispositions *ore tenus* ceased to exist. And inasmuch as fraudulent practices in setting up such wills became more and more common, nuncupations gradually fell into disfavor,<sup>6</sup> and ultimately were considered invalid unless made in the last sickness.<sup>7</sup> In

1. **Mystic Wills.** — Rev. Civ. Code La. (1899), art. 1584.

"Sealing" means merely firmly closing the paper. There is no necessity for any impress of a seal. *Saint v. Charity Hospital*, 48 La. Ann. 236.

**Closing with Wafers** is a sufficient sealing. *Hart v. Thompson*, 15 La. 88.

**Closing with Wax** is not essential. The use of mutilage or any other adhesive substance will satisfy the statute. *Saint v. Charity Hospital*, 48 La. Ann. 236.

2. See *supra*, this section, *Written Wills* — *Olographic Wills*.

3. **Definition.** — Schouler on Wills (2d ed.), §§ 359, 360; *Stamper v. Hooks*, 22 Ga. 603, citing *Swinburne* 87; *Leathers v. Greenacre*, 53 Me. 561; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Porter's Appeal*, 10 Pa. St. 254.

**Executor Need Not Be Named.** — It is no more essential to a nuncupative will than to a written will that an executor be named. *Hubbard v. Hubbard*, 8 N. Y. 196.

**Where No Bequests Are Made** in an alleged nuncupative will, an executor being appointed merely, it is not subject to the operation of the statute of frauds. *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192.

**A Nuncupative Will Cannot Appoint a Guardian** of a child, as writing is necessary to such purpose by the statute of frauds and the *Maryland Act of 1810*. *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192.

**Agreement Intended to Take Effect After Death.** — An agreement entered into by a decedent before his death with a third person and intended to take effect after death cannot be given testamentary force unless reduced to writing. *Crispin v. Winkleman*, 57 Iowa 523.

**A Nuncupative Will Cannot Be Questioned Col-**

**laterally.** — *Wells v. Harris*, 5 J. J. Marsh. (Ky.) 4.

4. **Origin of Nuncupative Wills.** — Schouler on Wills (2d ed.), § 361; *Hubbard v. Hubbard*, 8 N. Y. 196; *Winn v. Bob*, 3 Leigh (Va.) 140.

**The Practice or Custom** of making nuncupative wills grew up and was allowed from the necessity of the case, and had its origin among seamen, soldiers, and persons usually possessed of small fortunes. *Lewis v. Aylott*, 45 Tex. 190.

5. *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Gould v. Safford*, 39 Vt. 498.

6. **Nuncupations Regarded Unfavorably.** — *Leathers v. Greenacre*, 53 Me. 561; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154.

7. See *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, the leading American case on nuncupative wills, wherein Chancellor Kent says: "A nuncupative will is defined by Perkins (§ 476) in his book, which was published under Henry VIII., to be properly when the testator 'lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate, and others, his neighbors, to bear witness of his last will, and declareth by word what his last will is.' So, again, in *Swinburne* (p. 32), whose treatise was published in the time of King James I., it is said that this kind of testament is commonly made when the testator is now very sick, weak, and past all hope of recovery. I do not infer from these passages that unwritten wills were always bad at common law unless made in a case of extremity, when death was just overtaking the testator. \* \* \* But these ancient writers mean to be understood that in the ages of Henry VIII., Elizabeth, and James, letters had become so generally cultivated, and reading and writing so widely diffused, that nuncupative wills were



the twenty-eighth year of Charles II., an attempt was made, by means of gross fraud and perjury, to set up a nuncupative will revoking a former written one.<sup>1</sup> This case, it is generally believed,<sup>2</sup> led to the adoption, in the following year, of the statute of frauds,<sup>3</sup> which, while not forbidding nuncupative wills, placed them under such restrictions as practically to abolish them.<sup>4</sup> And still later, in the year 1837, the statute of wills was passed, requiring all wills to be in writing, with the exception of wills made by soldiers in actual military service and by mariners or seamen at sea.<sup>5</sup>

(b) *In the United States.* — At the present time, statutes are in force in most of the United States, either similar to the statute of frauds, extending the privileges of nuncupative wills to all persons, under certain restrictions, or similar to the statute of wills, confining such privilege to soldiers in actual service and to mariners at sea.<sup>6</sup> In *Connecticut* all wills are required to be

properly, according to Perkins, and commonly, according to Swinburne, confined to extreme cases, and to be justified only upon the plea of necessity. And this has been the uniform language of the English law writers from that time down to this day, so that it has become the acknowledged doctrine that a nuncupative will is only to be tolerated when made in *extremis*." See also *infra*, this section, *Statutory Restrictions — Time of Making*.

1. *Cole v. Mordaunt*, 4 Ves. Jr. 196, note.

2. *Leathers v. Greenacre*, 53 Me. 561; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Winn v. Bob*, 3 Leigh (Va.) 140.

3. *Statute of Frauds.* — The sections of 29 Car. II., c. 3, pertinent to nuncupative wills are as follows:

"§ 19. And for prevention of fraudulent practices in setting up nuncupative wills which have been the occasion of much perjury, be it enacted by the authority aforesaid that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will or to that effect, nor unless such nuncupative will were made in the time of the last sickness of the deceased and in the house of his or her habitation or dwelling or where he or she hath been resident for the space of ten days or more next before the making of such will except where such person was surprised or taken sick being from his own home and died before he returned to the place of his or her dwelling.

"§ 20. And be it further enacted that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative except the said testimony or the substance thereof were committed to writing within six days after the making of the said will.

"§ 21. And be it further enacted that no letters testamentary or probate of any nuncupative will shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved unless process have first issued to call in the

widow or next of kindred to the deceased to the end they may contest the same if they please.

"§ 22. And be it further enacted that no will in writing concerning any goods or chattels or personal estate shall be repealed nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only except the same be in the life of the testator committed to writing and after the writing thereof read unto the testator and allowed by him and proved to be so done by three witnesses at the least.

"§ 23. Provided always that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea may dispose of his movables, wages, and personal estate as he or they might have done before the making of this act."

4. *Gould v. Safford*, 39 Vt. 498.

5. *Statute of Wills.* — 1 Vict., c. 26; *Morgan v. Stevens*, 78 Ill. 287; *Leathers v. Greenacre*, 53 Me. 561; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154.

6. *Statutes in United States.* — See the statutes of the various states. See also the following cases, declaratory of statutory provisions:

*District of Columbia.* — *In re Askins*, 20 D. C. 12.

*Florida.* — *McLeod v. Dell*, 9 Fla. 451.

*Georgia.* — *Ellington v. Dillard*, 42 Ga. 361.

*Illinois.* — *Arnett v. Arnett*, 27 Ill. 247; *Morgan v. Stevens*, 78 Ill. 287; *In re Grossman*, 175 Ill. 425.

*Indiana.* — *Pierce v. Pierce*, 46 Ind. 86.

*Iowa.* — *Stricker v. Oldenburgh*, 39 Iowa 653; *Mulligan v. Leonard*, 46 Iowa 692.

*Kentucky.* — *Portwood v. Hunter*, 6 B. Mon. (Ky.) 538.

*Maine.* — *Parsons v. Parsons*, 2 Me. 298; *Leathers v. Greenacre*, 53 Me. 561.

*Maryland.* — *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192; *Welling v. Owings*, 9 Gill (Md.) 467; *Biddle v. Biddle*, 36 Md. 630.

*Massachusetts.* — *Slocomb v. Slocomb*, 13 Allen (Mass.) 38.

*Mississippi.* — *Gibson v. Gibson*, Walk. (Miss.) 364; *Andrews v. Andrews*, 48 Miss. 220; *George v. Greer*, 53 Miss. 495; *Donald v. Unger*, 75 Miss. 294. See also *Woods v. Ridley*, 27 Miss. 119.

*New Hampshire.* — *Dockum v. Robinson*, 26 N. H. 372.

*New Jersey.* — *Matter of Hebden*, 20 N. J. Eq. 473.

in writing, and a nuncupative will is of no validity.<sup>1</sup> In *Louisiana* a so-called nuncupative will is provided for by statute, such will, however, being actually a written will.<sup>2</sup>

(c) **Conflict of Laws.** — A nuncupative will must be executed according to the law of the testator's domicile at the time of his death.<sup>3</sup> However, it has been held that a provision of a state statute allowing the probate of a will made out of the state, when such will might be proved or allowed by the laws of the state or country where made, applies to nuncupative wills.<sup>4</sup>

(d) **Property Affected.** — The operation of nuncupative wills is confined to personal property only. Real estate cannot be so devised.<sup>5</sup> Such has ever been the policy and rule of the law. At common law, lands were not devisable at all. They became so only by virtue of the statute of 32 Hen. VIII., and by the same statute it was required that a will of lands should be in writing.<sup>6</sup> The courts have been uniformly reluctant to depart from this rule, and consequently have held that the use, in a statute relating to nuncupative wills, of the term "estate,"<sup>7</sup> or the term "estate bequeathed,"<sup>8</sup> or the term "property,"<sup>9</sup> cannot be said to indicate an intention to include land in the property affected thereby. A nuncupative will attempting to dispose of both realty and personalty will be held effectual nevertheless as to the

*New York.* — *Prince v. Hazleton*, 20 Johns. (N. Y.) 502; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Hubbard v. Hubbard*, 8 N. Y. 196.

*North Carolina.* — *Wester v. Wester*, 5 Jones L. (50 N. Car.) 95; *Matter of Haygood*, 101 N. Car. 574; *Smith v. Smith*, 63 N. Car. 637; *Bundrick v. Haygood*, 106 N. Car. 468; *Long v. Foust*, 109 N. Car. 114.

*Ohio.* — *Gillis v. Weller*, 10 Ohio 462; *Bolles v. Harris*, 34 Ohio St. 38.

*Oklahoma.* — *Ray v. Wiley*, 11 Okla. 720.

*Pennsylvania.* — *Porter's Appeal*, 10 Pa. St. 254; *Matter of Yarnall*, 4 Rawle (Pa.) 46.

*Rhode Island.* — *Warren v. Harding*, 2 R. I. 133.

*Tennessee.* — *Tally v. Butterworth*, 10 Yerg. (Tenn.) 501; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215; *Smith v. Thurman*, 2 Heisk. (Tenn.) 110; *Ridley v. Coleman*, 1 Sneed (Tenn.) 616; *Gwin v. Wright*, 8 Humph. (Tenn.) 639.

*Texas.* — *Jones v. Norton*, 10 Tex. 120; *Mitchell v. Vickers*, 20 Tex. 377.

*Vermont.* — *Van Deuzer v. Gordon*, 39 Vt. 111; *Gould v. Safford*, 39 Vt. 498.

*Virginia.* — *Nowlin v. Scott*, 10 Gratt. (Va.) 64; *Marks v. Bryant*, 4 Hen. & M. (Va.) 91; *Reese v. Hawthorn*, 10 Gratt. (Va.) 548; *Winn v. Bob*, 3 Leigh (Va.) 140.

*Wisconsin.* — *Bronson v. Burnett*, 1 Chand. (Wis.) 136; *Dawson's Appeal*, 23 Wis. 69.

1. *Stone's Appeal*, 74 Conn. 301.

2. See *supra*, this section, *Written Wills* — *Louisiana Testaments*.

3. *Barnes v. Brashear*, 2 B. Mon. (Ky.) 380, holding that where a resident of Kentucky died in another state, his nuncupative will, made at the place of death, was not valid in Kentucky unless capable of proof and actually proved there. See also the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1365.

4. *Slocomb v. Slocomb*, 13 Allen (Mass.) 38.

5. **Real Estate Not Devisable by Nuncupative Will.** — *McLeod v. Dell*, 9 Fla. 451; *Palmer v. Palmer*, 2 Dana (Ky.) 390; *Wells v. Harris*, 5 J. J. Marsh. (Ky.) 4; *Williams v. Pope*,

*Wright (Ohio)* 406; *Bolles v. Harris*, 34 Ohio St. 38; *Lewis v. Aylott*, 45 Tex. 190; *Watts v. Holland*, 56 Tex. 54; *Furrrh v. Winston*, 66 Tex. 521. See also *Campbell v. Campbell*, 21 Mich. 438.

In Ohio the Act of 1824 was construed to authorize the devise of realty by nuncupative will. *Gillis v. Weller*, 10 Ohio 462; *Ashworth v. Carleton*, 12 Ohio St. 381. But the Act of 1831 specifically restricted the operation of nuncupative wills to personalty. *Gillis v. Weller*, 10 Ohio 462.

**Nuncupative Will as Evidence of Title to Land.** — A nuncupative will is not effectual to pass title to land, but it is nevertheless admissible in evidence so far as it may tend to show that the testator had previously made a parol sale or gift of the land. *Wooldridge v. Hancock*, 70 Tex. 18.

**Devise of Rent Out of Land.** — A devise in a nuncupative will by a tenant in tail of rent out of land to a charity is void, though the will was made before the statute of frauds. *Jenner v. Harper*, 1 P. Wms. 247.

**Ratification by Will of Division of Estate.** — While a testator cannot pass his real estate by a verbal will, yet where he in his lifetime has divided with his brothers real estate coming from the father, and has ratified such division by acting upon it, he may confirm and ratify the same in his nuncupative will. Page v. Page, 2 Rob. (Va.) 424.

**Subsequently Accruing Income of Real Estate.** — The language of a will must be construed with reference to the time of the testator's death, and a nuncupative will will be ineffectual to pass any part of the income of the real estate accruing subsequent to the death of the testator. *In re Davis*, 103 Wis. 455.

6. *Jenner v. Harper*, 1 P. Wms. 247.

7. "Estate." — *Smithdeal v. Smith*, 64 N. Car. 52.

8. "Estate Bequeathed." — *In re Davis*, 103 Wis. 455.

9. "Property." — *Moffett v. Moffett*, 67 Tex. 642.

personalty.<sup>1</sup> But an instrument purporting to devise land and nothing else cannot be established as a nuncupative will.<sup>2</sup>

**Slaves.** — In some states the title to slaves has been held to pass by virtue of a nuncupative will;<sup>3</sup> in other jurisdictions decisions are found to the contrary.<sup>4</sup>

(3) *Statutory Restrictions* — (a) *Degree of Proof Required.* — As has been seen, the original statute of frauds hedged nuncupative wills about with numerous restrictions as to form, execution, and proof. These restrictions will be found to have been copied, more or less faithfully, into the statutes of those jurisdictions where nuncupations are now or have been at any time permitted, and will be discussed here *seriatim* so far as they may have received judicial interpretation. But, first, it should be observed that nuncupative wills are not favorites of the law. And though, if duly proved, they are equally entitled to be established with written wills, yet much greater strictness is required in their proof than in the proof of written wills, and statutes imposing restrictions upon them must be strictly complied with.<sup>5</sup> But added to this, and independent of the statute of frauds or any other statute, the *factum*, or making, of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one in every single particular.<sup>6</sup> Hence it must appear, by the clearest and most indisputable testimony, that the testator was possessed not only of testamentary capacity,<sup>7</sup> but also of a testamentary mind, an *animus testandi*, or intent that the words uttered by him

**1. Nuncupative Will of Both Realty and Personality.** —

Mulligan v. Leonard, 46 Iowa 692; Offutt v. Offutt, 3 B. Mon. (Ky.) 162; Sadler v. Sadler, 60 Miss. 251; *In re Davis*, 103 Wis. 455.

2. Smith v. Thurman, 2 Heisk. (Tenn.) 110.

**3. Slaves May Pass by Nuncupative Will.** —

Burch v. Stovall, 27 Miss. 725; Gwin v. Wright, 8 Humph. (Tenn.) 639; Page v. Page, 2 Rob. (Va.) 424.

In Virginia slaves may be emancipated by a nuncupative will. Phoebe v. Boggess, 1 Gratt. (Va.) 129. See also Winn v. Bob, 3 Leigh (Va.) 140.

**4. Slaves May Not Pass by Nuncupative Will.**

— McLeod v. Dell, 9 Fla. 451; Offutt v. Offutt, 3 B. Mon. (Ky.) 162; Wells v. Harris, 5 J. J. Marsh. (Ky.) 4; Cooke v. Cooke, 3 Litt. (Ky.) 238. See also Miles' Will, 4 Dana (Ky.) 1.

**Where a Will Directs the Conversion of Money into a Slave**, the property passes as personal estate, and the bequest, in a nuncupative will, is valid. Sledd v. Carey, 11 B. Mon. (Ky.) 181.

**5. Strict Proof Required** — *England.* — Lemann v. Bonsall, 1 Add. Ecc. 389; Parsons v. Miller, 2 Phill. Ecc. 194.

*Alabama.* — Johnston v. Glasscock, 2 Ala. 218.

*Georgia.* — Scaife v. Emmons, 84 Ga. 619; Sales v. Thornton, 118 Ga. 93.

*Illinois.* — Morgan v. Stevens, 78 Ill. 287; Matter of Grossman, 75 Ill. App. 224.

*Indiana.* — Pierce v. Pierce, 46 Ind. 86.

*Maine.* — Parsons v. Parsons, 2 Me. 298.

*Maryland.* — Dorsey v. Sheppard, 12 Gill & J. (Md.) 192.

*Mississippi.* — Woods v. Ridley, 27 Miss. 119; Lucas v. Goff, 33 Miss. 629; Andrews v. Andrews, 48 Miss. 220; Sadler v. Sadler, 60 Miss. 251.

*North Carolina.* — Rankin v. Rankin, 9 Ired.

L. (31 N. Car.) 156; Haden v. Bradshaw. Winst. L. (60 N. Car.) 263; Smith v. Smith, 63 N. Car. 637; Bundrick v. Haygood, 106 N. Car. 468.

*Pennsylvania.* — Matter of Yarnall, 4 Rawle (Pa.) 46; Conaughton's Will, 1 Pa. Dist. 309; Matter of Meisenhelter, 15 Phila. (Pa.) 651, 38 Leg. Int. (Pa.) 294; Haus v. Palmer, 21 Pa. St. 296; Taylor's Appeal, 47 Pa. St. 31; Wiley's Estate, 187 Pa. St. 82, *affirming* 6 Pa. Dist. 691; Rutt's Estate, 200 Pa. St. 549.

*Tennessee.* — Smith v. Thurman, 2 Heisk. (Tenn.) 110.

*Texas.* — Jones v. Norton, 10 Tex. 120; Mitchell v. Vickers, 20 Tex. 377; Hunt v. White, 24 Tex. 643; Martinez v. Martinez, 19 Tex. Civ. App. 661.

*Vermont.* — Gould v. Safford, 39 Vt. 498.

*Wisconsin.* — Bronson v. Burnett, 1 Chand. (Wis.) 136.

See also the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 154.

**A Literal Compliance** with the statute in regard to nuncupative wills will not be required in every instance; but the law, in no case, will dispense with a substantial compliance in order to the validity of such wills. Weir v. Chidester, 63 Ill. 453.

**6. "Factum" Must Be Clearly Proved.** — Lemann v. Bonsall, 1 Add. Ecc. 389; Johnston v. Glasscock, 2 Ala. 218; Dorsey v. Sheppard, 12 Gill & J. (Md.) 192; Andrews v. Andrews, 48 Miss. 220; Smith v. Thurman, 2 Heisk. (Tenn.) 110.

**7. Testamentary Capacity Must Be Shown.** — Lemann v. Bonsall, 1 Add. Ecc. 389; Green v. Skipworth, 1 Phill. Ecc. 53; Johnston v. Glasscock, 2 Ala. 218; Morgan v. Stevens, 78 Ill. 287; Dorsey v. Sheppard, 12 Gill & J. (Md.) 192; Biddle v. Biddle, 36 Md. 630; Lucas v. Goff, 33 Miss. 629; Andrews v. Andrews, 48 Miss. 220; Matter of Yarnall, 4 Rawle (Pa.) 46; Smith v. Thurman, 2 Heisk. (Tenn.) 110.



should constitute his last will and testament.<sup>1</sup> Above all, it must plainly result from the evidence that the instrument propounded contains the true substance and import of the alleged nuncupation, and consequently that it embodies the deceased's real testamentary intentions, though not so reduced to writing during his or her life as to be capable of being propounded as a written will.<sup>2</sup>

**Verbal Instructions and Informal Writings.** — It is said by some authorities to be against reason to hold that where a testator intended to make a written will, which for any cause was left incomplete or unfinished, such unfinished will should operate as a nuncupative will. There must be not only the *animus testandi*, but the mind and intent to nuncupate.<sup>3</sup> Therefore, mere verbal declarations or instructions by the testator as to the drawing up of a written will,<sup>4</sup> or a writing drawn up in pursuance of verbal instructions and left unsigned by the testator,<sup>5</sup> or a will reduced to writing and signed by the testator but not further attested as required by law,<sup>6</sup> cannot be admitted to probate as a nuncupative will, although all the elements of such a will, other than the intent to nuncupate, be present. This doctrine, however, has not met with unqualified approval, and the courts in some jurisdictions prefer the rule that a paper not perfected as a written will may be established as a nuncupative disposition, if its noncompletion in the form contemplated resulted from the act of God or any other cause than an intention to abandon or postpone the consummation of it according to law, provided there shall be proof of the testamentary declarations by the requisite number of competent

**1. Animus Testandi Must Be Shown** — *England.*

*Lemann v. Bonsall*, 1 Add. Ecc. 389; *Green v. Skipworth*, 1 Phill. Ecc. 53.

*Alabama.* — *Sykes v. Sykes*, 2 Stew. (Ala.) 364; *Johnston v. Glascock*, 2 Ala. 218.

*Georgia.* — *Scales v. Thornton*, 118 Ga. 93.

*Illinois.* — *Morgan v. Stevens*, 78 Ill. 287.

*Kentucky.* — *Kelly v. Kelly*, 9 B. Mon. (Ky.) 553.

*Maryland.* — *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192; *Biddle v. Biddle*, 36 Md. 630.

*Mississippi.* — *Gibson v. Gibson*, Walk. (Miss.) 364; *Anderson v. Pryor*, 10 Smed. & M. (Miss.) 620; *Woods v. Ridley*, 27 Miss. 119; *Burch v. Stovall*, 27 Miss. 725; *Lucas v. Goff*, 33 Miss. 629; *Andrews v. Andrews*, 48 Miss. 220; *George v. Greer*, 53 Miss. 495; *Broach v. Sing*, 57 Miss. 115.

*New Hampshire.* — *Dockum v. Robinson*, 26 N. H. 372.

*New Jersey.* — *Matter of Male*, 49 N. J. Eq. 266.

*North Carolina.* — *Bundrick v. Haygood*, 106 N. Car. 468.

*Pennsylvania.* — *Matter of Yarnall*, 4 Rawle (Pa.) 46; *Wiley's Estate*, 187 Pa. St. 82; *Rutt's Estate*, 200 Pa. St. 549.

*Tennessee.* — *Ridley v. Coleman*, 1 Sneed (Tenn.) 616; *Smith v. Thurman*, 2 Heisk. (Tenn.) 110.

*Wisconsin.* — *Bronson v. Burnett*, 1 Chand. (Wis.) 136.

See also *infra*, this subsection, *Rogatio Testamentum*.

**The Animus Testandi Will Be Inferred** where the testator on his deathbed expresses a wish as to the disposition of his property. *Mulligan v. Leonard*, 46 Iowa 692.

**Mere Declarations of an Intent to Leave Property** to a certain person do not constitute a verbal

act of disposition. *McGee v. McCants*, 1 McCord L. (S. Car.) 517.

**Words Not of a Testamentary Character** cannot, upon any principle, be regarded as a part of the will, although spoken at the time when it was made. *Woods v. Ridley*, 27 Miss. 119.

**What Words Necessary to Establish Animus Testandi.** — To establish the *animus testandi* or testamentary purposes of the deceased, something more must be shown than the words of the will, and that the attention of the witnesses was called to them. The declaration of the testator that such was his will, or some other unequivocal act or fact of equal import, showing an actual testamentary disposition of the property was intended, must be proved. *Dawson's Appeal*, 23 Wis. 69.

**2. Will Must Embody Actual Intentions of Testator.** — *Lemann v. Bonsall*, 1 Add. Ecc. 389; *Green v. Skipworth*, 1 Phill. Ecc. 53; *Johnston v. Glascock*, 2 Ala. 218; *Andrews v. Andrews*, 48 Miss. 220; *Matter of Yarnall*, 4 Rawle (Pa.) 46.

**3. Intent to Nuncupate Necessary.** — *Porter's Appeal*, 10 Pa. St. 254.

**4. Verbal Instructions for Drawing Written Will.** — *Knox v. Richards*, 110 Ga. 5; *In re Grossman*, 175 Ill. 425; *Donald v. Unger*, 75 Miss. 294; *Dockum v. Robinson*, 26 N. H. 372.

**5. Unsigned Written Will.** — *Knox v. Richards*, 110 Ga. 5; *Matter of Hebden*, 20 N. J. Eq. 473; *Matter of Male*, 49 N. J. Eq. 266.

**6. Unattested Written Will.** — *Stamper v. Hooks*, 22 Ga. 603; *Ellington v. Dillard*, 42 Ga. 361; *Knox v. Richards*, 110 Ga. 5.

**Entry of Testamentary Wishes in Account Book.** — Where the decedent on his deathbed, in the presence of two witnesses and his children, determined how much of his estate was due to each child, and entered the same on his book in the form of an account, such entry

witnesses, who were present when such declarations were made.<sup>1</sup> But under no circumstances can the same testamentary disposition be established both as a written and as a nuncupative will, and omissions in a written will cannot be supplied by proving the omitted matter as a nuncupative will.<sup>2</sup> On account of the statutory exception in favor of such testators,<sup>3</sup> a writing not complying with the provisions of the law as to wills may nevertheless be admitted to probate if made by a seaman at sea or a soldier in actual service.<sup>4</sup>

(b) **Amount of Property.** — In most instances the statutes limit the amount of personalty which can be bequeathed by nuncupative will to a fixed sum or value.<sup>5</sup> A will attempting to bequeath more than such amount is invalid as to the excess merely.<sup>6</sup>

(c) **Witnesses — Number.** — The statutes vary considerably as to the number of witnesses necessary to the probate of a nuncupative will. The statute of frauds required at least three witnesses to be present at the making of the will, but in many jurisdictions no more than two are necessary.<sup>7</sup> A will attested by less than the required number of witnesses will not be admitted to probate.<sup>8</sup> A statute which makes no provision as to the number of witnesses, but refers to them in the plural number, evidently requires the presence of at least two;<sup>9</sup> but it seems that, in such case, resort must be had to the previously existing law, to determine the exact number necessary.<sup>10</sup> One witness is sufficient to prove the nuncupative will of a soldier or sailor, as the common law in regard to such testators has never been restricted or limited.<sup>11</sup>

**Presence.** — The statute is not complied with unless all of the required number of witnesses were present when the nuncupative words were spoken. It is not sufficient that one witness heard the declaration of the testator at one time, and another witness heard the same declaration at another time.<sup>12</sup>

could not be upheld as a nuncupative will. *Williams v. Pope, Wright (Ohio)* 406.

**1. Incomplete Written Will Valid as Nuncupative Will — England.** — *Lamkin v. Babb*, 1 Lee Ecc. 1; *L'Huille v. Wood*, 2 Lee Ecc. 22; *Goodman v. Goodman*, 2 Lee Ecc. 109; *Green v. Skipworth*, 1 Phill. Ecc. 53; *Huntington v. Huntington*, 2 Phill. Ecc. 213; *Lewis v. Lewis*, 3 Phill. Ecc. 109; *Strish v. Pelham*, 2 Vern. 647. See also *Goods of Bathgate*, 1 Hag. Ecc. 67; *Sikes v. Snaith*, 2 Phill. Ecc. 351.

*District of Columbia.* — See *Cruit v. Owen*, 21 App. Cas. (D. C.) 378.

*Kentucky.* — *Offutt v. Offutt*, 3 B. Mon. (Ky.) 162.

*Virginia.* — *Mason v. Dunman*, 1 Munf. (Va.) 456; *Phœbe v. Boggess*, 1 Gratt. (Va.) 129; *Reese v. Hawthorn*, 10 Gratt. (Va.) 548.

**This Principle Does Not Apply** where the imperfection or fault of the paper left by the testator is to be imputed to no visitation of extreme illness or incapacity, but to a mistaken belief on the part of the testator and witnesses that the paper constituted a perfect will. *Reese v. Hawthorn*, 10 Gratt. (Va.) 548.

**2. Omissions in Written Will.** — *Hunt v. White*, 24 Tex. 643.

**3. See *infra*, this section, *Statutory Exceptions*.**

**4. Informal Writing by Soldier or Seaman.** — *Warren v. Harding*, 2 R. I. 133.

See also the following illustrative cases: *Goods of Parker*, 5 Jur. N. S. 553; *Goods of Thorne*, 11 Jur. N. S. 569; *Goods of Patterson*, 79 L. T. N. S. 123; *Anderson v. Pryor*, 10 Smed. & M. (Miss.) 620; *Botsford v. Krake*, (Surrogate Ct.) 1 Abb. Pr. N. S. (N. Y.) 112; *Van Deuzer v. Gordon*, 39 Vt. 111.

**5. See the various statutes.**

**By the Original Statute of Frauds**, the amount was thirty pounds. 29 Car. II., § 19.

**Alabama — Ignorance of Law by Testator.** — By the code which took effect in 1853, an unwritten will of personal property is invalid if the amount of property bequeathed by it exceeds in value the sum of five hundred dollars. A will violating this provision of the code will not be admitted to probate on the ground that the testator was ignorant of, or mistaken as to, the change in the law made by the code. *Erwin v. Hamner*, 27 Ala. 296.

**6. Will Invalid Only as to Excess of Bequest.** — *Mulligan v. Leonard*, 46 Iowa 692. But see *Strickler v. Oldenburgh*, 39 Iowa 653, holding that a will bequeathing a note which, on its face, is in excess of the statutory limit, is invalid unless it affirmatively appear that the actual value is within the limit.

**7. Number of Witnesses.** — See the various statutes.

**8. Wiley's Estate**, 187 Pa. St. 82.

**9. O'Neill v. Smith**, 33 Md. 569.

**10. Johnston v. Glascock**, 2 Ala. 218, wherein it was said that the number must be determined by reference to the civil and canon law, which governed proceedings in the English ecclesiastical courts and which required two witnesses, in general, to establish a will. The common law never contained any rules with respect to wills of personalty.

**11. *Ex p. Thompson***, 4 Bradf. (N. Y.) 154; *Gould v. Safford*, 39 Vt. 498. See also *infra*, this section, *Statutory Exceptions*.

**12. Presence of Witnesses.** — *Wester v. Wester*, 5 Jones L. (50 N. Car.) 95; *Matter of Yarnall*, 4 Rawle (Pa.) 46; *Tally v. Butterworth*, 10

**Witnesses Must Be Disinterested.** — The witnesses present must be disinterested persons. If one of them is disqualified by reason of being named as a legatee,<sup>1</sup> or executor,<sup>2</sup> his testimony cannot be received. As to whether a subsequent renunciation and release of all the right and interest of the witness under the will will remove his disqualification, the few authorities on the subject are in conflict. On the one hand, it is said that the disqualification may be so removed;<sup>3</sup> on the other, it is declared that the witness must be actually disinterested and competent at the time the will is made,<sup>4</sup> or at least when it is reduced to writing and subscribed.<sup>5</sup>

**Witnesses Must Agree.** — The testimony of the witnesses must agree, at least substantially, as to the words spoken, or the dispositions made by the deceased; and where some of the material legacies or directions are not sustained by all the witnesses, the intention of the deceased cannot be gathered and probate will be refused.<sup>6</sup>

**Exclusion of Witnesses.** — It is proper for the court to exclude other witnesses from the room while one witness to a nuncupative will is testifying.<sup>7</sup>

(d) **Rogatio Testium.** — One of the most important restrictions which the statute of frauds placed upon the making of nuncupative wills was the requirement that the testator, at the time of pronouncing the same, should bid the persons present, or some of them, to "bear witness that such was his will or to that effect."<sup>8</sup> This calling upon persons present to bear witness, or, as it is technically known, the *rogatio testium*, is a practically uniform requirement of the various statutes relating to nuncupative wills;<sup>9</sup> and the statutes are, in this regard, strictly construed,<sup>10</sup> to the end that the *animus testandi*, of

Yerg. (Tenn.) 501; Weeden v. Bartlett, 6 Munf. (Va.) 123. Compare Portwood v. Hunter, 6 B. Mon. (Ky.) 538. And see Burch v. Stovall, 27 Miss. 725, holding that the statute does not require the witnesses to prove the presence of each other at the time the words were uttered.

1. **Legatee Not Competent Witness.** — Vrooman v. Powers, 47 Ohio St. 191; Lewis v. Aylott, 45 Tex. 190.

In Ohio that section of the Revised Statutes which provides that a bequest to a witness shall be void and that such witness may be competent to give testimony, does not apply to nuncupative wills. Vrooman v. Powers, 47 Ohio St. 191.

2. **Executor Not Competent Witness.** — Watts v. Holland, 56 Tex. 54.

3. **Disqualification May Be Removed** — Brayfield v. Brayfield, 3 Har. & J. (Md.) 208; Lewis v. Aylott, 45 Tex. 190; Watts v. Holland, 56 Tex. 54.

4. Haus v. Palmer, 21 Pa. St. 296.

5. Vrooman v. Powers, 47 Ohio St. 191.

6. Mitchell v. Vickers, 20 Tex. 377. Compare Portwood v. Hunter, 6 B. Mon. (Ky.) 538, holding that if the witnesses do not agree as to the disposition of any part of the estate, the will will be upheld as to those parts concerning which they do agree.

**Although the Testimony of a Witness Is Negative** in character, and therefore not entitled to the same weight as that of another witness, yet its legitimate effect is sufficient to detract from the certainty of the testator's declarations and to raise a doubt as to whether there was any *animus testandi*. Lucas v. Goff, 33 Miss. 629.

7. Watts v. Holland, 56 Tex. 54.

8. 29 Car. II., § 19.

9. See the various statutes.

In Iowa a nuncupative will may be proved by witnesses who are not called upon expressly by the decedent to attest his act. There is no provision in the statute as to bidding persons present to bear witness. Mulligan v. Leonard, 46 Iowa 692.

10. **Statutes Strictly Construed as to Rogatio Testium** — England. — Bennett v. Jackson, 2 Phill. Ecc. 190; Parsons v. Miller, 2 Phill. Ecc. 194.

Alabama. — Sykes v. Sykes, 2 Stew. (Ala.) 364.

Georgia. — Sampson v. Browning, 22 Ga. 293.

Illinois. — Arnett v. Arnett, 27 Ill. 247; Morgan v. Stevens, 78 Ill. 287.

Maine. — Parsons v. Parsons, 2 Me. 298.

Mississippi. — Garner v. Lansford, 12 Smed. & M. (Miss.) 558; Parkison v. Parkison, 12 Smed. & M. (Miss.) 672; Woods v. Ridley, 27 Miss. 119; Andrews v. Andrews, 48 Miss. 220.

New Hampshire. — Dockum v. Robinson, 26 N. H. 372.

New Jersey. — Matter of Hebden, 20 N. J. Eq. 473; Matter of Male, 49 N. J. Eq. 266.

North Carolina. — Bundrick v. Haygood, 106 N. Car. 468.

Pennsylvania. — Matter of Yarnall, 4 Rawle (Pa.) 46.

Tennessee. — Gwin v. Wright, 8 Humph. (Tenn.) 639; Tally v. Butterworth, 10 Yerg. (Tenn.) 501.

Virginia. — Winn v. Bob, 3 Leigh (Va.) 140.

**The Rogatio Testium Cannot Be Supplied by Inference** from the nuncupation itself. Biddle v. Biddle, 36 Md. 630.

**The Will as Reduced to Writing** must show the *rogatio testium*. In re Askins, 20 D. C. 12.

**The Probate of a Will May Be Revoked at a**

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which the *rogatio testium* is, in truth, the evidence,<sup>1</sup> may clearly and affirmatively appear.<sup>2</sup> The *rogatio testium* need not be in the exact words of the statute. Words of like import are sufficient, provided they amount to a distinct and explicit request by the testator to persons present to take notice that he intends thus to make his will.<sup>3</sup> But the mere fact that the words of the will are spoken in the presence and hearing of the witnesses is not enough.<sup>4</sup> The testator need not call upon persons present by name to become witnesses to his will,<sup>5</sup> nor is it essential that a request to bear witness should be addressed to each and every one of the witnesses. It is sufficient if some of the witnesses are expressly called upon.<sup>6</sup>

A Will Made by Interrogatories is valid, but the court must be more strict in requiring proof of spontaneity and volition than it would be in an ordinary case.<sup>7</sup> Thus, mere declarations of a testator drawn from him by questions, he not requesting any one to bear witness that such statements are his will, are not sufficient to constitute a valid nuncupative will.<sup>8</sup>

(e) **Time of Making.** — The statutes generally provide, as did the statute of frauds, that a nuncupative will is valid only when made in the last sickness of the testator. As to the meaning of the term "last sickness," there is some conflict of opinion. In a leading American case,<sup>9</sup> the doctrine is laid down that the privilege of making nuncupative wills is meant to be extended only in cases of necessity or emergency, and that the phrase "last sickness" must consequently be taken to mean *in extremis*, or when the testator is overtaken by sudden and violent sickness and has not time or opportunity to make a written will. This doctrine is supported by a great preponderance of authority.<sup>10</sup> On the other hand, it is held that the words "last sickness"

subsequent term on the ground that the proof falls short of showing satisfactorily the *rogatio testium*. *Garner v. Lansford*, 12 Smed. & M. (Miss.) 558.

1. *Woods v. Ridley*, 7 Miss. 119.

2. See *supra*, this subsection, *Degree of Proof Required*.

3. **Formal Rogatio Testium Unnecessary** — *Georgia*. — *Scales v. Thornton*, 118 Ga. 93.

*Illinois*. — *Weir v. Chidester*, 63 Ill. 453; *Harrington v. Stees*, 82 Ill. 50; *In re Grossman*, 175 Ill. 425, *affirming* 75 Ill. App. 224; *Bradford v. Clower*, 60 Ill. App. 55.

*Kentucky*. — *Kelly v. Kelly*, 9 B. Mon. (Ky.) 553; *Hare v. Bryant, Sneed* (Ky.) 270.

*Mississippi*. — *Burch v. Stovall*, 27 Miss. 725; *George v. Greer*, 53 Miss. 495.

*North Carolina*. — *Haden v. Bradshaw, Winst. L.* (60 N. Car.) 263; *Smith v. Smith*, 63 N. Car. 637.

*Pennsylvania*. — *Matter of Yarnall*, 4 Rawle (Pa.) 46; *Wiley's Estate*, 187 Pa. St. 82, *affirming* 6 Pa. Dist. 601.

*Tennessee*. — *Hatcher v. Millard*, 2 Coldw. (Tenn.) 30; *Smith v. Thurman*, 2 Heisk. (Tenn.) 110; *Baker v. Dodson*, 4 Humph. (Tenn.) 342; *Ridley v. Coleman*, 1 Sneed (Tenn.) 616.

**Request to Inform Others.** — Where a testator requested persons present to inform his friends as to a certain disposition of his property, this was held to be a sufficient request to bear witness. *Gwin v. Wright*, 8 Humph. (Tenn.) 639.

4. **Speaking Words of Will Insufficient.** — *In re Grossman*, 175 Ill. 425; *Broach v. Sing*, 57 Miss. 115; *Matter of Hebden*, 20 N. J. Eq. 473. *Compare Portwood v. Hunter*, 6 B. Mon. (Ky.) 538.

**Looking Towards a Person** when speaking the words of bequest is not equivalent to directing

him to bear witness that such is the testator's will. A bare look is not to the "same effect" as words spoken. *Matter of Meisenhelter*, 15 Phila. (Pa.) 651, 38 Leg. Int. (Pa.) 294.

5. *Weir v. Chidester*, 63 Ill. 453. See also *Long v. Foust*, 109 N. Car. 114, holding that the testator need not specify by name the particular persons he requires to witness his will, but if there are several present, at least two of whom are competent witnesses, and he expressly requires all present to be witnesses, that is sufficient.

6. **Request to All Witnesses Unnecessary.** — *Johnston v. Glasscock*, 2 Ala. 218; *Smith v. Salter*, 115 Ga. 286; *Parkison v. Parkison*, 12 Smed. & M. (Miss.) 672; *Burch v. Stovall*, 27 Miss. 725; *Tally v. Butterworth*, 10 Yerg. (Tenn.) 501.

7. **Will by Interrogatories.** — *Green v. Skipworth*, 1 Phill. Ecc. 53; *Harrington v. Stees*, 82 Ill. 50; *Bradford v. Clower*, 60 Ill. App. 55; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192; *Andrews v. Andrews*, 48 Miss. 220.

8. *Parsons v. Miller*, 2 Phill. Ecc. 194; *Rutt's Estate*, 200 Pa. St. 549; *Brown v. Brown*, 2 Murph. (6 N. Car.) 350.

**Where the Testator Was Unable to Speak**, it was held that his signs in response to questions put to him did not sufficiently indicate his intentions to constitute a valid will. *Kelly v. Kelly*, 9 B. Mon. (Ky.) 553.

9. *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, wherein Chancellor Kent declared that long before the adoption of the statute of frauds, nuncupative wills were recognized as being permissible only when the testator was *in extremis*. See also *supra*, this section, *History and Present Status*. — *In re Land*.

10. **Nuncupative Wills Must Be Made in Extremis**

must be taken in their ordinary significance; and the rule is stated to be that if a person deliberately makes a will in conformity to the statute, during the sickness of which he subsequently dies, and while impressed with the probability of approaching death, such will will not be declared invalid because in point of fact the testator had time and opportunity to reduce it to writing.<sup>1</sup>

**The Will of a Soldier or Mariner** need not be made during the last sickness.<sup>2</sup>

(f) **Place of Making.** — Where a statute provides that the will must be made at the habitation of the testator, the term "habitation" is to be understood as dwelling house or home;<sup>3</sup> and a provision that such a will may be made at other than the habitation of the testator when the latter is "taken sick from home," is complied with where the testator was sick when he left home, but became suddenly and more dangerously ill, and died while away from home.<sup>4</sup>

(g) **Reduction to Writing and Probate.** — Under the statute of frauds, no testimony could be received to prove a nuncupative will after the expiration of six months from the making thereof unless the will was reduced to writing within six days after the words constituting the same were spoken.<sup>5</sup> Similar provisions in other statutes<sup>6</sup> have been variously construed, some decisions

— *Georgia.* — *Ellington v. Dillard*, 42 Ga. 361; *Scaife v. Emmons*, 84 Ga. 619; *Bellamy v. Peeler*, 96 Ga. 467; *Smith v. Salter*, 115 Ga. 286. *Compare* *Sampson v. Browning*, 22 Ga. 293.

*Maryland.* — *O'Neill v. Smith*, 33 Md. 569; *Biddle v. Biddle*, 36 Md. 630.

*Mississippi.* — *Donald v. Unger*, 75 Miss. 294. See also *Sadler v. Sadler*, 60 Miss. 251.

*New Jersey.* — *Carroll v. Bonham*, 42 N. J. Eq. 625.

*New York.* — *Ex p. Thompson*, 4 Bradf. (N. Y.) 154.

*Pennsylvania.* — *Matter of Yarnall*, 4 Rawle (Pa.) 46; *Boyer v. Frick*, 4 W. & S. (Pa.) 357; *Werkheiser v. Werkheiser*, 6 W. & S. (Pa.) 184; *Conaughton's Will*, 1 Pa. Dist. 309; *Wiley's Estate*, 6 Pa. Dist. 691; *Matter of Meisenhelter*, 15 Phila. (Pa.) 651, 38 Leg. Int. (Pa.) 294; *Porter's Appeal*, 10 Pa. St. 254; *Haus v. Palmer*, 21 Pa. St. 296; *Taylor's Appeal*, 47 Pa. St. 31.

*Texas.* — *Jones v. Norton*, 10 Tex. 120.

*Virginia.* — *Reese v. Hawthorn*, 10 Gratt. (Va.) 548, *explaining* Page v. Page, 2 Rob. (Va.) 424, by the statement that it does not appear directly in the latter case that the testator after declaring his will orally had any opportunity to make a written will.

**The Necessity Contemplated** is not that which arises from ignorance of the law, or mere carelessness in attending to the execution of a will. *Haus v. Palmer*, 21 Pa. St. 296.

**Delay of Testator Through Hope of Recovery.** — Although there might be sufficient time after the testator's physician had warned him to settle his affairs, to make a will in writing, yet if he, through misplaced confidence in his ability to pull through, postpones making his will, it would not necessarily follow that he might not yet make a valid nuncupative will. *Wiley's Estate*, 187 Pa. St. 82.

**On an Application for Probate** of a nuncupative will it must be alleged that the words of the will were spoken in the last sickness of the testator. *Martinez v. Martinez*, 19 Tex. Civ. App. 661.

**It Must Appear in the Writing** subsequently made that the will was made in the time of the

last sickness of the deceased. *In re Askins*, 20 D. C. 12.

**1. Contrary Rule.** — *Johnston v. Glasscock*, 2 Ala. 218, *criticising* *Sykes v. Sykes*, 2 Stew. (Ala.) 364, as *obiter dicta*; *Harrington v. Stees*, 82 Ill. 50; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215. *Compare* *Morgan v. Stevens*, 78 Ill. 289; *Ridley v. Coleman*, 1 Sneed (Tenn.) 616.

**2. Wills of Soldiers and Mariners.** — *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Van Deuzer v. Gordon*, 39 Vt. 111. *Compare* *Hubbard v. Hubbard*, 12 Barb. (N. Y.) 148, wherein it was held that it was necessary for a mariner or soldier to be *in extremis* in order that he might make a nuncupative will. This case was *affirmed* in 8 N. Y. 196, but the court refused to pass upon this point, as the will in question was undoubtedly made *in extremis*. And see *Botsford v. Krake*, (Surrogate Ct.) 1 Abb. Pr. N. S. (N. Y.) 112, declaring that in neither *Ex p. Thompson* nor *Hubbard v. Hubbard* was the question material to the issue involved. See also *infra*, this section, *Statutory Exceptions*.

**3.** *Nowlin v. Scott*, 10 Gratt. (Va.) 64, holding that a will made in a building other than the home of the testator, though owned by him, is not valid.

**4.** *Marks v. Bryant*, 4 Hen. & M. (Va.) 91.

**5.** 29 Car. II., c. 3, § 20.

**6.** See the various state statutes.

**The Georgia Act of 1805** authorizing an appeal from the decision of the Court of Ordinary did not repeal, as to Georgia, the twentieth section of the statute of frauds limiting the time within which a nuncupative will may be proved when not reduced to writing within six days. *Newman v. Colbert*, 13 Ga. 38.

**In North Carolina** the statute provides that no nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making, nor shall it be proved till citation has been first issued or publication been made to call in the widow and next of kin to contest such will if they think proper. This statute must be taken to mean that, while the testimony of the witnesses must be given within six months, the probate of the will as to

being to the effect that the reduction of the will to writing is essential to its validity,<sup>1</sup> and others holding that reduction to writing is necessary only when probate is deferred for a longer period than six months after nuncupation.<sup>2</sup> It has also been held that if the testimony of the witnesses has once been taken within the prescribed time, their evidence may again be given after the expiration of the six months, upon an issue of *devisavit vel non*.<sup>3</sup> The writing made must contain substantially the words uttered by the testator,<sup>4</sup> but a failure to include in the writing all of the dispositions will not make void the whole will.<sup>5</sup> The failure to take proper steps to secure probate of a will within the statutory six months cannot be excused on the ground of fraud.<sup>6</sup>

(h) **Repeal or Alteration of Written Will.**—It is a general statutory rule that nuncupative wills cannot effect the revocation or alteration of previously written wills.<sup>7</sup>

(4) **Statutory Exceptions**—(a) **Generally.**—The origin of the statutory exception in favor of soldiers and sailors may be found, it is said, in the testamentary privileges of the Roman army under Julius Cæsar. That celebrated commander authorized the making of the military testament, in any mode, and without prescribed ceremonials. In succeeding years the usage became thoroughly established, and was extended to the naval service; officers, rowers, and sailors being, in this respect, deemed soldiers. Subsequently, the military testament was limited by Justinian to soldiers engaged in an expedition.<sup>8</sup> The general doctrine of nuncupation was borrowed by the common

issuance of citation or publication need not be completed within such period. *Matter of Haygood*, 101 N. Car. 574.

**Virginia.**—The statute authorizing wills admitted to probate to be contested by a bill in chancery at any time within seven years thereafter applies only to written and not to nuncupative wills; when such a will has been proven and all formalities complied with the probate can be impeached only by an appeal therefrom. *Page v. Page*, 2 Rob. (Va.) 424.

1. **Reduction to Writing Necessary.**—In *Wellington v. Owings*, 9 Gill (Md.) 467, it was held that the true construction of the Act of 1810 requires that the testamentary words, or the substance thereof, should be reduced to writing within six days after they were uttered, and shown to and proved as correct by each of the attesting witnesses. Hence, where the testamentary words were reduced to writing by one of the witnesses and shown by him to another within the time prescribed by the Act, yet were never reduced to writing by the third witness, nor signed by him until more than a year after the testator's death, the statute was not complied with. See also *Nab v. Nab*, 10 Mod. 404, holding that where one devised all of her personal estate and then added by parol a direction to give a certain sum to another person, and such direction was not put in writing within the six days required by the Act, such gift could not be looked upon as a legacy.

2. **Reduction to Writing Necessary Only When Probate Deferred.**—*Johnston v. Glasscock*, 2 Ala. 218; *Matter of Haygood*, 101 N. Car. 574.

3. *George v. Greer*, 53 Miss. 495; *Matter of Haygood*, 101 N. Car. 574.

4. *Bolles v. Harris*, 34 Ohio St. 38. See also *supra*, this subsection, *Degree of Proof Required*.

A **More Letter** written by one of the witnesses, containing nothing of what the statute requires, as to *animus testandi*, the words of the

testator, the request to bear witness, etc., is not a sufficient reduction to writing. *Taylor's Appeal*, 47 Pa. St. 31.

5. *Marks v. Bryant*, 4 Hen. & M. (Va.) 91.

6. *Martinez v. Martinez*, 19 Tex. Civ. App. 661.

7. See *infra*, this title, *Revocation*.

**Alteration by Nuncupative Codicil.**—In *Stonywell's Will*, T. Raym. 334, the testator had made his will giving the residuary estate to his wife, but the wife having died before himself he made a nuncupative codicil leaving the same property to another person. It was held that such codicil was good because it did not alter the written will, the devise of the residuum having become totally void.

8. *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Gould v. Safford*, 39 Vt. 498.

**History of Exception in Favor of Soldiers.**—“It is very clear that this exception to the general provisions in relation to wills was copied from the civil law by the framers of the statute of frauds and perjuries. It was the law of ancient Rome, first promulgated by Julius Cæsar, and embraced every Roman soldier generally, wherever situated. This was subsequently modified so as to exclude those who were at their own homes; they being required to execute their testaments in the ordinary form. Afterwards, the power was still further limited and confined to soldiers engaged in an expedition, in military quarters, or in the camp. The Code of Justinian ultimately limited the exception to soldiers on an expedition or engaged in a battle or siege, and the various commentators on this part of the code appear to have settled down to the position that the soldier must be in an expedition or engaged in active service in quarters or in the camp. The laws of nearly all of modern Continental Europe, either by express codes or judicial construction, seem to have adopted the same rule. Such appears to be the law of Russia, West-



law from the Roman civil law, and obtained in England for a considerable period of time.<sup>1</sup> When it was finally sought to curtail this privilege by the enactment of the statute of frauds, a special exception was made in behalf of soldiers and sailors, the statute providing that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate as he or they might have done before the making of this act."<sup>2</sup> The same exception was preserved in the statute of wills,<sup>3</sup> and is in force at the present time in most jurisdictions, so that as to any one belonging to either of these privileged classes, the right to dispose of his personal estate and wages still remains substantially as under the civil law in the days of Justinian.<sup>4</sup> In fact, in many jurisdictions, including England, the only exception allowed to the rule that all wills of both realty and personalty must be in writing is the exception granted to soldiers in actual military service and seamen at sea.<sup>5</sup>

The Formalities required to be observed in the execution of wills by soldiers and mariners are the same as those of the common law, but the rules are not very clearly defined;<sup>6</sup> and any informal writing, such as a letter, written by the testator while situated as prescribed by the statute, will be upheld as a valid will.<sup>7</sup> The restrictions placed upon nuncupative wills generally by the statute of frauds are not applicable to this class of wills, and, hence, the wills of soldiers and sailors need not be made *in extremis*,<sup>8</sup> nor need they be attested by any certain number of witnesses.<sup>9</sup> It is clearly necessary, however, that the testamentary capacity and *animus testandi* should be present.<sup>10</sup>

Personal Property only can pass by a soldier's or sailor's nuncupative will.<sup>11</sup>

(b) **Soldiers in Actual Service.** — The privilege in regard to wills extended to soldiers does not depend upon the education or position of the testator.<sup>12</sup> The term "soldier" embraces every grade, from the private to the highest officer, and includes the gunner, the surgeon, or the general.<sup>13</sup>

"Actual Military Service" is equivalent to the ancient *in expeditione*. There

phalia, Bavaria, Spain, and, I think, Holland.  
\* \* \* Such is also the rule laid down by Swinburn, and which governed the English ecclesiastical courts at an early period." *Per* Pearson, J., in *Matter of Smith*, 6 Phila. (Pa.) 104, 22 Leg. Int. (Pa.) 68.

1. See *supra*, this section, *History and Present Status*.

2. **Statute of Frauds.** — 29 Car. II., c. 3, § 23; *Leathers v. Greenacre*, 53 Me. 561.

3. **Statute of Wills.** — 1 Vict., c. 26, § 11; *Hubbard v. Hubbard*, 8 N. Y. 196.

4. *Leathers v. Greenacre*, 53 Me. 561; *Gould v. Safford*, 39 Vt. 498.

5. See the various statutes.

**It Is Not Enough** merely to be a soldier or a sailor. The courts have invariably adhered to the principle that the soldier must be engaged in actual military service, and that the mariner must be at sea. *Ex p. Thompson*, 4 Bradf. (N. Y.) 154; *Key v. Jordan*, 3 Curt. Ecc. 522.

6. **Formalities to Be Observed.** — *Hubbard v. Hubbard*, 8 N. Y. 196; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154.

7. See *supra*, this section, *Statutory Restrictions — Degree of Proof Required*.

8. See *supra*, this section, *Statutory Restrictions — Time of Making*.

**In Oklahoma** no one can make a nuncupative will, except those in actual military service in the field, or those doing duty on shipboard at sea; and even those can only make a nuncupative will when they are at the time in actual

contemplation, fear, or peril of death, or at the time are in expectation of immediate death from an injury received the same day. *Ray v. Wiley*, 11 Okla. 720.

9. See *supra*, this section, *Statutory Restrictions — Witnesses*.

10. **Testamentary Capacity and Animus Testandi Necessary.** — *Anderson v. Pryor*, 10 Smed. & M. (Miss.) 620; *Botsford v. Krake*, (Surrogate Ct.) 1 Abb. Pr. N. S. (N. Y.) 112; *Hubbard v. Hubbard*, 8 N. Y. 196. See also *supra*, this section, *Statutory Restrictions — Degree of Proof Required*.

**Animus Testandi Shown by Answer to Question.** — Where a sailor, who was extremely sick and apprehending death, was asked what disposition he wished to make of his property, and said he wished his wife to have all of it, and at the same time requested one of the persons present to settle his affairs and see to his business, the *animus testandi* was satisfactorily established. *Hubbard v. Hubbard*, 8 N. Y. 196, *affirming* 12 Barb. (N. Y.) 148.

**A Mere Promise to Aid Another**, made in a letter written by a soldier in actual service, is not a testamentary disposition. *Anderson v. Pryor*, 10 Smed. & M. (Miss.) 620.

11. *Pierce v. Pierce*, 46 Ind. 86. See also *supra*, this section, *History and Present Status — Property Affected*.

12. *Goods of May*, 86 L. T. N. S. 120.

13. *Goods of Donaldson*, 2 Curt. Ecc. 386; *Shearman v. Pyke*, 3 Curt. Ecc. 539; *Ex p. Thompson*, 4 Bradf. (N. Y.) 154.

must be actual warfare, in the prosecution of which the soldier is at the time engaged. But the term "expedition" is not to be confined to that movement of the troops which immediately precedes the conflict. Actual military service is more properly taken to mean being engaged in the active duties of the field, whether it be on the march, in the temporary camp, or in the shock of battle.<sup>1</sup> It can never apply to the soldier who is in regular quarters or barracks, either at home<sup>2</sup> or in a peaceful colony,<sup>3</sup> or to the soldier at his customary home on leave of absence.<sup>4</sup> Still less can it apply to a soldier who has enlisted but has not yet been sworn into service.<sup>5</sup>

(c) **Sailors at Sea.** — The term "sailor," or "mariner," applies to every person in the naval or mercantile service, from the common seaman to the captain or admiral. It is not limited or restricted to any special occupation on shipboard.<sup>6</sup> Thus, the purser of a man of war,<sup>7</sup> or a surgeon in the royal navy,<sup>8</sup> or a cook on a steamship,<sup>9</sup> is a mariner within the statute. But a passenger on board a vessel, though he be in fact a master mariner by profession, is not a mariner at sea.<sup>10</sup>

"At Sea" means upon waters within the ebb and flow of the tide.<sup>11</sup> Thus, a sailor is at sea when he is the master of a schooner lying at anchor in the mouth of a bay where the tide ebbs and flows;<sup>12</sup> but an officer on a United States gunboat on the Mississippi river is not at sea.<sup>13</sup> A vessel may be in port, and yet, constructively, at sea,<sup>14</sup> provided the voyage has actually commenced.<sup>15</sup>

**IV. FORM — 1. What Constitutes a Will — a. DISTINGUISHING CHARACTERISTICS.** — There are no instruments more frequently written by unpracticed

**1. Actual Military Service.** — *Botsford v. Krake*, (Surrogate Ct.) 1 Abb. Pr. N. S. (N. Y.) 112; *Matter of Smith*, 6 Phila. (Pa.) 104, 22 Leg. Int. (Pa.) 68.

**Being Encamped Among a Hostile Population** and acting in conjunction with soldiers who are confronted by the enemy is actual military service. *Leathers v. Greenacre*, 53 Me. 561; *Van Deuzer v. Gordon*, 39 Vt. 111.

**A United States Volunteer** in service in Mexico is in actual military service. *Anderson v. Pryor*, 10 Smed. & M. (Miss.) 620.

**An Officer About to Start on an Expedition** into the interior of Africa with his regiment is in actual military service. *Goods of Thorne*, 11 Jur. N. S. 569.

**A Soldier in Hospital** under orders, while the army is on an expedition, is in actual military service. *Gould v. Safford*, 39 Vt. 498.

**Mobilization** may be taken as a fair test as to whether a soldier is or is not what is called in Roman law in *expeditione*. Mere warning for service is not enough. *Goods of Knee*, 86 L. T. N. S. 119.

**2. In Barracks at Home.** — *Drummond v. Parish*, 3 Curt. Ecc. 522; *Matter of Smith*, 6 Phila. (Pa.) 104, 22 Leg. Int. (Pa.) 68.

In *Goods of Hiscock*, 84 L. T. N. S. 61, (1901) P. 78, the will of a soldier in barracks was held a valid nuncupative will, and the court laid down the rule that for a man to be in actual military service it is necessary first that there should be a state of war in existence; and, secondly, that the man should be for that purpose in some place where otherwise he would not have been. It would be going too far to say that he was in actual military service as soon as he had received his orders. But as soon as he had done anything under these orders actual military service might be

said to have commenced. As soon as the first step has been taken, although the step may be a small one, a man is in actual military service.

**3. In Barracks in Peaceful Colony.** — *Goods of Johnson*, 2 Curt. Ecc. 341; *In re Phipps*, 2 Curt. Ecc. 368; *White v. Repton*, 3 Curt. Ecc. 818; *Goods of Hill*, 1 Rob. Ecc. 276.

**4. On Leave of Absence.** — *Matter of Smith*, 6 Phila. (Pa.) 104, 22 Leg. Int. (Pa.) 68.

**5. Pierce v. Pierce**, 46 Ind. 86.

**6. Ex p. Thompson**, 4 Bradf. (N. Y.) 154; *Gwin's Will*, Tuck. (N. Y.) 44.

**Term Applicable to Merchant Seamen.** — *Morrell v. Morrell*, 1 Hag. Ecc. 51.

**7. Re Hayes**, 2 Curt. Ecc. 338.

**8. Goods of Saunders**, 11 Jur. N. S. 1027.

**9. Ex p. Thompson**, 4 Bradf. (N. Y.) 154.

**10. Passenger.** — *Warren v. Harding*, 2 R. I. 133. *Compare Goods of Saunders*, 11 Jur. N. S. 1027, holding that where a surgeon in the royal navy is invalidated in service, and on his way home by sea makes a will before overtaken by death, such will is properly executed at sea.

**11. "At Sea."** — *Gwin's Will*, Tuck. (N. Y.) 44; *Hubbard v. Hubbard*, 8 N. Y. 196.

**12. Hubbard v. Hubbard**, 8 N. Y. 196, *affirming* 12 Barb. (N. Y.) 148.

**13. Gwin's Will**, Tuck. (N. Y.) 44.

**14. Vessel in Port.** — *Goods of Parker*, 5 Jur. N. S. 553; *Goods of M'Murdo*, L. R. 1 P. & D. 540.

**Will Made on Shore.** — A mariner belonging to a vessel lying in a harbor, who meets with an accident when on shore by leave, is at sea. *Goods of Lay*, 2 Curt. Ecc. 375.

But an admiral who makes a will while staying at the house on shore appropriated to the admiral of the station is not at sea. *Euston v. Seymour*, 2 Curt. Ecc. 339.

**15. Goods of Corby**, 29 Eng. L. & Eq. 604.

hands, or in which less formality or precision is required, than wills. In whatever language they may be couched or however incorrectly and bunglingly drawn, if they are duly executed and the intention of the testator can be ascertained, they are valid and effectual to pass property of any kind or amount. Great allowance should be made for the ignorance of testators and the incorrectness of the language used by them. Uneducated men may make wills as well as others, and if upon the inspection of the whole instrument, duly regarding the situation and intelligence of the testator, his intentions can be satisfactorily ascertained, they must be carried into execution.<sup>1</sup>

**The Distinguishing Features** of all genuine testamentary instruments, whatever their form, are, first, that they are written *animo testandi*, and second, that they are of their own nature ambulatory or revocable during the testator's life. In order that the instrument be written *animo testandi*, it is not necessary that the testator should have meant to write his will when he sat down to write it, but it is necessary that he should have intended the instrument to be operative, as distinguished from a paper written in jest or from a mere memorandum of instructions, and to effect by it such a disposition of his property as would be in its legal effect testamentary.<sup>2</sup> In some cases it has been laid down that an instrument cannot be admitted to probate as a will unless the testator knew the instrument to be his will, and intended it as such.<sup>3</sup>

**No Particular Form of Words Is Necessary** to make a valid will. The form of the instrument is immaterial if its substance is testamentary. Accordingly the property being adequately described, a definite donee being expressly named, the donor being named both in the body of the paper and in his signature,

*Compare* Goods of Patterson, 79 L. T. N. S. 123, holding that the master of a vessel lying in a river preparatory to sailing is at sea within the meaning of the statute.

**1. Form in General.**—Baddeley v. Leppingwell, 3 Burr. 1541; Frogmorton v. Holyday, 3 Burr. 1625; Stewart's Succession, 51 La. Ann. 1553; Richardson v. Noyes, 2 Mass. 58; Loring v. Sumner, 23 Pick. (Mass.) 98; Matter of Lautenschlager, 80 Mich. 292; Ferris v. Neville, 127 Mich. 444; Keith v. Scales, 124 N. Car. 497.

**The Elements of a Testamentary Instrument** are included in a writing which declares the present will of the maker as to the disposal of property after his death, without attempting to declare or create any rights therein prior to such event. Templeton v. Butler, 117 Wis. 455.

**2. Distinguishing Characteristics**—*Alabama*.—Dunn v. Mobile Bank, 2 Ala. 152; Walker v. Jones, 23 Ala. 448; Mosser v. Mosser, 32 Ala. 551.

*California*.—Matter of Meade, 118 Cal. 428; Matter of Scott, 128 Cal. 57.

*Georgia*.—Hester v. Young, 2 Ga. 31; Jackson v. Culpepper, 3 Ga. 569; Symmes v. Arnold, 10 Ga. 506; Johnson v. Yancey, 20 Ga. 707, 65 Am. Dec. 646; Hall v. Bragg, 28 Ga. 330.

*Maryland*.—Plater v. Groome, 3 Md. 134; Boofter v. Rogers, 9 Gill (Md.) 44, 52 Am. Dec. 680; Clagett v. Hawkins, 11 Md. 381; Carey v. Dennis, 13 Md. 1; Morsell v. Ogden, 24 Md. 377.

*Massachusetts*.—Swett v. Boardman, 1 Mass. 258, 2 Am. Dec. 16.

*Mississippi*.—Young v. Wark, 76 Miss. 829.

*New Jersey*.—Combs v. Jolly, 3 N. J. Eq. 625; Smith v. Baxter, 62 N. J. Eq. 209.

*New York*.—Matter of Barber, 92 Hun (N. Y.) 489.

*North Carolina*.—Allison v. Allison, 4 Hawks (11 N. Car.) 141. See also Fort v. Fort, 3 Dev. L. (14 N. Car.) 19.

*Pennsylvania*.—Plumstead's Appeal, 4 S. & R. (Pa.) 545; Baer's Estate, 11 Pa. Dist. 471, quoting 29 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 138; Houser v. Moore, 31 Pa. St. 346; Frederick's Appeal, 52 Pa. St. 338; Patterson v. English, 71 Pa. St. 458; Frew v. Clarke, 80 Pa. St. 170. See also Blocher v. Hostetter, 2 Grant Cas. (Pa.) 288; Murry v. Murry, 6 Watts (Pa.) 353.

*South Carolina*.—Lyles v. Lyles, 2 Nott & M. (S. Car.) 531; Ragsdale v. Booker, 2 Strobb. Eq. (S. Car.) 348 note; Ingram v. Porter, 4 McCord L. (S. Car.) 198; Babb v. Harrison, 9 Rich. Eq. (S. Car.) 111.

*Tennessee*.—Watkins v. Dean, 10 Yerg. (Tenn.) 321; Crutcher v. Crutcher, 11 Humph. (Tenn.) 377.

*Texas*.—Millican v. Millican, 24 Tex. 426. See also Blackman v. Schierman, 21 Tex. Civ. App. 517.

*Virginia*.—See Hocker v. Hocker, 4 Gratt. (Va.) 277.

**Testamentary Intent** is the very breath of life of a will. Sunday's Estate, 167 Pa. St. 30.

**3. Scienter.**—Swett v. Boardman, 1 Mass. 262, 2 Am. Dec. 16; Combs v. Jolly, 3 N. J. Eq. 625. See Matter of Wood, 36 Cal. 75; Toebe v. Williams, 80 Ky. 661; Tabler v. Tabler, 62 Md. 601; Waite v. Frisbie, 48 Minn. 420; Lyles v. Lyles, 2 Nott & M. (S. Car.) 531; Means v. Means, 5 Strobb. L. (S. Car.) 167. But in the absence of statutes requiring publication, it may be doubted whether this means more than that the testator must be shown to have intended to make such an effective disposition of his property as would be, in its legal effect, testamentary.



and the words employed being absolutely and with conclusive force apt words of gift of the entire title by the donor to the donee, the instrument will be construed as a will.<sup>1</sup>

**A Will Partly Written and Partly Printed** will not be denied probate merely because there are blank spaces between the provisions of the instrument.<sup>2</sup>

**A Will Being of Itself Ambulatory or Revocable** differs from other instruments, and while disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the grantor or settlor, yet the postponement in such case is produced by express terms, and does not result from the nature of the instrument.<sup>3</sup>

**Instruments Appointing Executors or Guardians.** — An instrument in the form of a will, executed with the prescribed formalities, which intrusts to a certain person, as executor, the settlement of an estate, may be probated as a will even though it does not further effect the disposition of the property.<sup>4</sup> And this is equally true as to a testamentary instrument appointing a guardian,<sup>5</sup> though it has been held that the mere declaration of a wish by a parent, as to the person or persons who shall rear her children, has no legal characteristics of a will.<sup>6</sup>

**b. INFORMAL INSTRUMENTS** — (1) *English Cases.* — Before the English Wills Act of 1837, 1 Vict., c. 26, which prescribes a particular mode of attestation and execution, the rule adopted by the English ecclesiastical courts, in construing informal instruments disposing of the personal property of the deceased, was that any dispositive instrument designed not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos*, more especially if incapable of operation in the intended form, was to be regarded as testamentary.<sup>7</sup> Hence, marriage articles,<sup>8</sup> letters,<sup>9</sup> notes payable by executors to avoid the legacy duty,<sup>10</sup> the assignment of a note or bond by indorsement,<sup>11</sup> receipts for stock, indorsed bills,<sup>12</sup> and checks on a banker,<sup>13</sup> have been admitted to probate. In some cases the court refused to apply the principle unless the instrument was in its nature revocable.<sup>14</sup> But where the instrument contains nothing that refers to death or to

**1. No Particular Form of Words Is Necessary.** — *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *Matter of Longer*, 108 Iowa 34; *Matter of Stumpenhousen*, 108 Iowa 555; *Rose v. Quick*, 30 Pa. St. 225; *Patterson v. English*, 71 Pa. St. 458; *Frew v. Clarke*, 80 Pa. St. 170; *Tozer v. Jackson*, 164 Pa. St. 373; *Megary's Estate*, 206 Pa. St. 260.

**2. Blank Spaces in Instrument.** — *Matter of Murphy*, 48 N. Y. App. Div. 211; *Roush v. Wensel*, 8 Ohio Cir. Dec. 141, 15 Ohio Cir. Ct. 133. See also *Matter of Blake Estate*, 136 Cal. 306.

**3. Wills Are of Themselves Ambulatory or Revocable.** — *Goods of Robinson*, L. R. 1 P. & D. 384; *Thompson v. Johnson*, 19 Ala. 59; *Nichols v. Chandler*, 55 Ga. 369; *Comer v. Comer*, 120 Ill. 425; *Miller v. Holt*, 68 Mo. 584; *Meck's Appeal*, 97 Pa. St. 313; *Armstrong v. Armstrong*, 4 Baxt. (Tenn.) 357.

**Will Rendered Irrevocable by Execution of a Trust Deed.** — A will may be rendered irrevocable by the execution of a deed of trust for the uses of the will, as to the disposition then made and fixed, but as to after-acquired property, its effect as a will, with the attribute of revocability, is not altered or impaired. *Dawson v. Dawson*, Cheves Eq. (S. Car.) 148.

**4. Instrument Appointing Executor.** — *Goods of Jordan*, L. R. 1 P. & D. 555; *Brownigg v. Pike*, 7 P. D. 61; *Goods of Cubbon*, 11 P. D.

169; *Miller v. Miller*, 32 La. Ann. 439; *Barber v. Barber*, 17 Hun (N. Y.) 72.

**5. Instrument Appointing Guardian.** — *Ex p. Ilchester*, 7 Ves. Jr. 367; *Wardwell v. Wardwell*, 9 Allen (Mass.) 518.

**6. Mere Declaration of Wish.** — *In re Williamson*, 6 Ohio Dec. 505; *Williams v. Noland*, 10 Tex. Civ. App. 629.

**7. Informal Instruments.** — 1 Jarm. on Wills (5th ed.) \*24.

**8. Marriage Articles.** — *Marnell v. Walton*, cited in *Masterman v. Maberly*, 2 Hag. Ecc. 247.

**9. Letters.** — *Drybutter v. Hodges*, cited in *Masterman v. Maberly*, 2 Hag. Ecc. 247. See *Passmore v. Passmore*, 1 Phill. Ecc. 218; *Goods of Mundy*, 7 Jur. N. S. 52.

**10. Notes Payable by Executors to Avoid Duty.** — *Maxee v. Shute*, cited in *Masterman v. Maberly*, 2 Hag. Ecc. 247. See *In re Marsden*, 1 Sw. & Tr. 542; *Jones v. Nicolay*, 2 Rob. Ecc. 288, 14 Jur. 675.

**11. Assignment of Note or Bond by Indorsement.** — *Musgrave v. Down*, cited in *Masterman v. Maberly*, 2 Hag. Ecc. 247.

**12. Receipts for Stocks and Indorsed Bills.** — *Sabine v. Goate*, cited in *Masterman v. Maberly*, 2 Hag. Ecc. 247.

**13. Checks on a Banker.** — *Bartholomew v. Henley*, 3 Phill. Ecc. 317.

**14. Instrument Must Be in Its Nature Revocable,**

a testamentary disposition, it cannot be given the effect of a will unless there is clear evidence that the deceased intended that it should operate as such. It might even require evidence that it was the intention of the deceased to do that which the instrument, as a testamentary act, might possibly effect from supervening circumstances.<sup>1</sup>

Under the Statute of Frauds devises of realty had to be signed by the testator and attested by three credible witnesses, and an informal instrument could not be construed as a will unless it was signed and attested as required by the act.<sup>2</sup>

And as by the English Wills Act of 1837, 1 Vict., c. 26, signature and attestation were made essential to a valid bequest of personalty, a similar restriction was placed upon the application of the above principles in regard to that species of property.<sup>3</sup>

(2) *American Cases.* — In those states in which no particular form of execution, attestation, or acknowledgment is required by the local statute, the principle adopted by the English ecclesiastical courts is substantially recognized, so that it may be laid down as a general rule that in such states any instrument which makes a disposition of property, to take effect after the death of the maker, and which is in its nature revocable, conferring no rights *in præsentia*, but to take effect *in futuro*, will be entitled to probate.<sup>4</sup>

If the Local Statute Prescribes Certain Formalities of Execution, the instrument will not be entitled to probate unless the requirements of the statute have been complied with, although its dispositions be testamentary in character; or, in other words, the test as to whether or not the dispositions of the instrument are testamentary is the same in both classes of jurisdictions; but even if testamentary, it cannot be admitted to probate unless the formalities of execution, attestation, and acknowledgment prescribed by the local statute have been complied with.<sup>5</sup> Thus, the existing requirements of the local statute not being

— Patch *v.* Shore, 2 Drew. & Sm. 589; Goods of Robinson, L. R. 1 P. & D. 384.

1. Instrument Not Referring to Testamentary Disposition. — Griffin *v.* Ferard, 1 Curt. Ecc. 97; Glynn *v.* Oglander, 2 Hag. Ecc. 428; Nichols *v.* Nichols, 2 Phill. Ecc. 180; King's Proctor *v.* Daines, 3 Hag. Ecc. 231; Langley *v.* Thomas, 26 L. J. Ch. 609.

2. Under the Statute of Frauds. — Powell on Devises (3d. ed.) 27.

3. Under the English Wills Act of 1837. — Jarm. on Wills (5th ed.) 31; Goods of Peve-rett, (1902) P. 205.

4. American Cases — Where No Particular Form Is Required — United States. — Grattan *v.* Appleton, 3 Story (U. S.) 755.

California. — Matter of Wood, 36 Cal. 75.

Illinois. — Boatman *v.* Boatman, 105 Ill. App. 40.

Maryland. — Cover *v.* Stem, 67 Md. 449.

Mississippi. — Anderson *v.* Pryor, 10 Smed. & M. (Miss.) 620.

New Hampshire. — Hunt *v.* Hunt, 4 N. H. 434, 17 Am. Dec. 438.

New York. — Morrell *v.* Dickey, 1 Johns. Ch. (N. Y.) 153; Watts *v.* Public Administrator, 4 Wend. (N. Y.) 168, 1 Paige (N. Y.) 347.

North Carolina. — Jones *v.* Kea, 4 Dev. L. (15 N. Car.) 301.

Pennsylvania. — Turner *v.* Scott, 51 Pa. St. 126; Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159; Frew *v.* Clarke, 80 Pa. St. 170; Book *v.* Book, 104 Pa. St. 240; Gaston's Estate, 188 Pa. St. 374; Harrison's Estate, 196 Pa.

St. 576. See also Porter *v.* Turner, 3 S. & R. (Pa.) 108.

South Carolina. — Witherspoon *v.* Witherspoon, 2 McCord L. (S. Car.) 520.

Tennessee. — Reagan *v.* Stanley, 11 Lea (Tenn.) 316.

Virginia. — Swann *v.* Housman, 90 Va. 816.

If an Instrument Be Equivocal the presumption is against its operating as testamentary, unless it is made clearly to appear that it was executed *animo testandi*, to operate as a posthumous disposition of property. Abney *v.* Moore, 106 Ala. 131; Gomez *v.* Higgins, 130 Ala. 493; Harper *v.* Reaves, 132 Ala. 625.

Instruments Made to Carry Out or Perform Obligations made and entered into by the makers thereof are not, in their essence, wills, but are in the nature of contracts. Beatty *v.* Western College, 177 Ill. 280.

A Note, Bond, or Other Instrument Payable After the Death of the Obligor is not necessarily to be given effect only as a will. Fitzgerald *v.* English, 73 Minn. 266.

A Lease which is not to become operative upon or after the death of the lessor, but is to take effect, in substance, immediately upon and from its date, cannot be established as a will. Ogle's Estate, 97 Wis. 56.

5. Where Certain Formalities Are Prescribed — Connecticut. — Main's Appeal, 73 Conn. 638.

Illinois. — Jennings *v.* Neville, 180 Ill. 270.

Indiana. — McCarty *v.* Waterman, 84 Ind. 550; Orth *v.* Orth, 145 Ind. 184; Oldenburg *v.* Baird, 26 Ind. App. 379.

violated thereby, bonds, bills of exchange, contracts, diaries, letters, indorsements on certificates of membership in beneficial orders, and other informal instruments have been held testamentary.<sup>1</sup> On the other hand, a mere memorandum of advancements, not executed with the formalities prescribed by the statute, is not entitled to probate;<sup>2</sup> nor is an antenuptial agreement giving the wife power to dispose of certain real and personal property by will, although under seal and duly attested, entitled to probate as a testamentary paper.<sup>3</sup>

**A Will May Be Void as to Realty and Valid as to Personalty**, as in the case of an instrument disposing of both real and personal estate which is invalid for not complying with the statutory requisites for the testamentary disposition of realty.<sup>4</sup> In such a case the provisions as to the real estate will be disregarded, the testator, so far as legal effect is concerned, dying intestate as to the realty.<sup>5</sup>

**An Instrument in the Form of a Due Bill**, the provisions of which leave no doubt as to the intention of the maker to become a debtor to another with the understanding that the debt is not to be paid until after his death, cannot be considered as a will.<sup>6</sup>

**Mere Brevity and Informality of Expression** will not exclude the instrument from probate, provided it be executed with the formalities prescribed by the local statute.<sup>7</sup> In *Pennsylvania*, subscribing witnesses are not required, and various informal papers have been sustained as in effect testamentary.<sup>8</sup>

**c. DEEDS DISTINGUISHED FROM WILLS.** — A deed differs from a will in that a deed must pass a present interest in the property, although the right to possession and enjoyment may not accrue until some future time. An instrument which does not pass any interest until after the death of the maker

*Kansas.* — *Poore v. Poore*, 55 Kan. 687.

*Maine.* — *Norway Sav. Bank v. Merriam*, 88 Me. 146.

*Maryland.* — *Cover v. Stem*, 67 Md. 449;

*Metropolitan Sav. Bank v. Murphy*, 82 Md. 314.

*Michigan.* — *Gibson v. Van Syckle*, 47 Mich. 439.

*Minnesota.* — *Fitzgerald v. English*, 73 Minn. 266.

*New Jersey.* — *Stevenson v. Earl*, (N. J. 1903) 55 Atl. Rep. 1091.

*New York.* — *Hosea v. Skinner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653; *Priester v. Hohloch*, 70 N. Y. App. Div. 256.

*Rhode Island.* — *Johnson v. Johnson*, 24 R. I. 571.

*Tennessee.* — *Orgain v. Irvine*, 100 Tenn. 193.

**An Instrument Invalid as a Will**, which is evidently of a testamentary character, and intended to operate as a will, cannot be turned into a declaration of trust, so as to operate as a will, and defeat the statute prescribing how the will of a married woman shall be executed. *Long's Appeal*, 86 Pa. St. 204.

**1. Informal Instruments Held Testamentary.** — *California.* — *Matter of Wood*, 36 Cal. 75; *Matter of Skerrett*, 67 Cal. 585.

*Georgia.* — *Johnson v. Yancey*, 20 Ga. 707.

*Kentucky.* — *Jackson v. Jackson*, 6 Dana (Ky.) 257.

*Maine.* — *Leathers v. Greenacre*, 53 Me. 561.

*Maryland.* — *Carey v. Dennis*, 13 Md. 1; *Kelleher v. Kernan*, 60 Md. 440; *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89.

*Montana.* — *Barney v. Hayes*, 11 Mont. 571.

*New Hampshire.* — *Hunt v. Hunt*, 4 N. H. 434, 17 Am. Dec. 438.

*New Jersey.* — *Cowley v. Knapp*, 42 N. J. L. 297.

*New York.* — *Matter of Beebe*, 6 Dem. (N. Y.) 43.

*North Carolina.* — *Matter of Belcher*, 66 N. Car. 51; *Brown v. Eaton*, 91 N. Car. 26.

*Pennsylvania.* — *Rose v. Quick*, 30 Pa. St. 225; *Schad's Appeal*, 88 Pa. St. 111; *Fosselman v. Elder*, 98 Pa. St. 159; *Knox's Estate*, 131 Pa. St. 220; *Scott's Estate*, 147 Pa. St. 89; *Fouche's Estate*, 147 Pa. St. 395. *Compare* *Shields v. Irwin*, 3 Yeates (Pa.) 389.

*Virginia.* — *Grand Fountain, etc. v. Wilson*, 96 Va. 594.

See further upon the subject, a note appended to *Burlington University v. Barrett*, 22 Iowa 60, 92 Am. Dec. 383.

**Valid Codicil in Form of Power of Attorney.** — *Stewart v. Stewart*, 177 Mass. 493.

**2. Memorandum of Advancements.** — *Sims v. Sims*, 39 Ga. 117, 99 Am. Dec. 450.

**3. Antenuptial Agreement.** — *Michael v. Baker*, 12 Md. 158, 71 Am. Dec. 593.

**4. Void as to Realty, Valid as to Personalty.** — *Hilliard v. Binford*, 10 Ala. 977; *Devecmon v. Devecmon*, 43 Md. 335; *Orgain v. Irvine*, 100 Tenn. 193.

**5. Effect of Invalid Disposition of Real Estate.** — *Hilliard v. Binford*, 10 Ala. 977; *Lake v. Warner*, 34 Conn. 483; *Guthrie v. Owen*, 2 Humph. (Tenn.) 202, 36 Am. Dec. 311.

**6. Instrument in Form of Due Bill.** — *Feeser v. Feeser*, 93 Md. 716.

**7. Brevity or Informality of Expression.** — *Matter of Wood*, 36 Cal. 75; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Barber v. Barber*, 17 Hun (N. Y.) 72. See *Matter of Barton*, 52 Cal. 538.

**8. Subscribing Witnesses Not Required in Pennsylvania.** — *Havard v. Davis*, 2 Binn. (Pa.) 418; *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Carson's*



is a will.<sup>1</sup> But the line of separation between what constitutes a deed and a will is sometimes so shadowy as to make it extremely doubtful whether an instrument is the one or the other.<sup>2</sup>

An Instrument in the Form of a Deed Is Testamentary if it confers no interest *in presenti*, is revocable at pleasure, and is not to take effect till the death of the maker;<sup>3</sup> and if executed, acknowledged, and attested with the formalities

Appeal, 59 Pa. St. 496. See also *Hight v. Wilson*, 1 Dall. (Pa.) 94; *Rohrer v. Stehman*, 1 Watts (Pa.) 463; *Rose v. Quick*, 30 Pa. St. 225; *Frew v. Clarke*, 80 Pa. St. 170; *Schad's Appeal*, 88 Pa. St. 111.

**1. Deed Distinguished from Will** — *United States*. — *Bowdoin College v. Merritt*, 75 Fed. Rep. 480.

*Alabama*. — *Morser v. Morser*, 32 Ala. 551; *McGuire v. Mobile Bank*, 42 Ala. 591; *Gillham v. Mustin*, 42 Ala. 365; *Hall v. Burkham*, 59 Ala. 349; *Abney v. Moore*, 106 Ala. 131; *Whitten v. McFall*, 122 Ala. 619; *Gomez v. Higgins*, 130 Ala. 493; *Harper v. Reaves*, 132 Ala. 625; *Adair v. Craig*, 135 Ala. 332.

*Arkansas*. — *Bunch v. Nicks*, 50 Ark. 367.

*California*. — *Kenney v. Parks*, (Cal. 1898) 54 Pac. Rep. 251; *Mowry v. Heney*, 86 Cal. 471; *Kopp v. Gunther*, 95 Cal. 64; *McCloskey v. Tierney*, 141 Cal. 101.

*Georgia*. — *Cumming v. Cumming*, 3 Ga. 460; *Jackson v. Culpepper*, 3 Ga. 569; *Griffith v. Douglas*, 120 Ga. 582; *Jones v. Lingo*, 120 Ga. 693; *Seals v. Pierce*, 83 Ga. 787; *Owen v. Smith*, 91 Ga. 564; *Goff v. Davenport*, 96 Ga. 423; *Guthrie v. Guthrie*, 105 Ga. 86; *West v. Wright*, 115 Ga. 277; *Watkins v. Nugen*, 118 Ga. 375; *Brice v. Sheffield*, 118 Ga. 128; *Brewer v. Baxter*, 41 Ga. 212, 5 Am. Rep. 530.

*Illinois*. — *Massey v. Huntington*, 118 Ill. 80; *Latimer v. Latimer*, 174 Ill. 418; *Bogan v. Swearingen*, 199 Ill. 454.

*Indiana*. — *St. Clair v. Marquell*, (Ind. 1903) 67 N. E. Rep. 693; *Spencer v. Robbins*, 106 Ind. 580; *Stroup v. Stroup*, 140 Ind. 179; *Kelley v. Shimer*, 152 Ind. 290.

*Iowa*. — *Burlington University v. Barrett*, 22 Iowa 72; *Craven v. Winter*, 38 Iowa 478; *Leaver v. Gauss*, 62 Iowa 314; *Saunders v. Saunders*, 115 Iowa 275; *Tuttle v. Raish*, 116 Iowa 331; *Cone v. Cone*, 118 Iowa 458.

*Kansas*. — *Hazelton v. Reed*, 46 Kan. 73; *Love v. Blauw*, 61 Kan. 406, 78 Am. St. Rep. 334; *Cross v. Benson*, (Kan. 1904) 75 Pac. Rep. 558; *Powers v. Scharling*, 64 Kan. 339; *Bevins v. Phillips*, 6 Kan. App. 324.

*Kentucky*. — *Pennington v. Lawson*, (Ky. 1901) 65 S. W. Rep. 120; *Pelley v. Earles*, 107 Ky. 640; *Goad v. Lawrence*, (Ky. 1902) 68 S. W. Rep. 411; *Ward v. Ward*, 104 Ky. 857.

*Maryland*. — *Carey v. Dennis*, 13 Md. 1.

*Massachusetts*. — *Kelley v. Snow*, 185 Mass. 288; *Bromley v. Mitchell*, 155 Mass. 509.

*Michigan*. — *Culy v. Upham*, (Mich. 1903) 97 N. W. Rep. 405; *Jenkinson v. Brooks*, 119 Mich. 108.

*Mississippi*. — *Wall v. Wall*, 30 Miss. 91; *Sartor v. Sartor*, 39 Miss. 760.

*Missouri*. — *Christ v. Kuehne*, 172 Mo. 118; *Griffin v. McIntosh*, 176 Mo. 392.

*Nebraska*. — *Pinkham v. Pinkham*, 55 Neb. 720.

*New Jersey*. — *Sibley v. Somers*, 62 N. J. Eq. 595; *Smith v. Baxter*, (N. J. 1902) 53 Atl. Rep. 1125.

*New York*. — *Matter of Diez*, 50 N. Y. 88; *Diefendorf v. Diefendorf*, 132 N. Y. 100.

*North Carolina*. — *Robinson v. Ingram*, 126 N. Car. 327.

*Ohio*. — *Brodt v. Rannells*, 9 Ohio Dec. 503, 7 Ohio N. P. 79; *Wright v. Werden*, 8 Ohio Dec. 1.

*Pennsylvania*. — *Turner v. Scott*, 51 Pa. St. 126; *Book v. Book*, 104 Pa. St. 240; *Coulter v. Shelmadine*, 204 Pa. St. 120.

*South Carolina*. — *Babb v. Harrison*, 9 Rich. Eq. (S. Car.) 111, 70 Am. Dec. 203.

*Tennessee*. — *Horn v. Broyles*, (Tenn. Ch. 1900) 62 S. W. Rep. 297; *Johnson v. Johnson*, 103 Tenn. 32; *Watkins v. Dean*, 10 Yerg. (Tenn.) 321, 31 Am. Dec. 583.

*Texas*. — *Carpenter v. Hannig*, (Tex. Civ. App. 1896) 34 S. W. Rep. 774; *Griffis v. Payne*, 92 Tex. 293; *Jenkins v. Adcock*, 5 Tex. Civ. App. 466; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40; *Parker v. Stephens*, (Tex. Civ. App. 1897) 39 S. W. Rep. 164; *Martin v. Faries*, 22 Tex. Civ. App. 539; *De Bajligethy v. Johnson*, 23 Tex. Civ. App. 272; *Grigsby v. Willis*, 25 Tex. Civ. App. 1.

*Virginia*. — *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; *McBride v. McBride*, 26 Gratt. (Va.) 476.

*West Virginia*. — *Lauck v. Logan*, 45 W. Va. 251.

**2. Line of Separation Ill Defined.** — *Williams v. Tolbert*, 66 Ga. 127.

**3. Testamentary Instrument in the Form of a Deed** — *Canada*. — *Cock v. Cooke*, L. R. 1 P. & D. 241; *Robertson v. Smith*, L. R. 2 P. & D. 43; *Goods of Coles*, L. R. 2 P. & D. 362; *Hixon v. Wytham*, 1 Ch. Cas. 248, *Finch* 195; *Henderson v. Farbridge*, 1 Russ. 479; *In re Marsden*, 1 Sw. & Tr. 542; *Peacock v. Monk*, 1 Ves. 127; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Green v. Froud*, 3 Keb. 310, 1 Mod. 117; *Doe v. Cross*, 8 Q. B. 714, 55 E. C. L. 714; *Milnes v. Foden*, 15 P. D. 105.

*Alabama*. — *Golding v. Golding*, 24 Ala. 122; *Gillham v. Mustin*, 42 Ala. 365; *Daniel v. Hill*, 52 Ala. 430; *Hall v. Burkham*, 59 Ala. 349; *Jordan v. Jordan*, 65 Ala. 301; *Sharp v. Hall*, 86 Ala. 110; *Crocker v. Smith*, 94 Ala. 295.

*Arkansas*. — *Refeld v. Bellette*, 14 Ark. 148.

*Connecticut*. — *Stewart v. Stewart*, 5 Conn. 317.

*Georgia*. — *Jones v. Morgan*, 13 Ga. 515; *Johnson v. Yancey*, 20 Ga. 707, 65 Am. Dec. 646; *Hall v. Bragg*, 28 Ga. 330; *Daniel v. Veal*, 32 Ga. 589; *Nichols v. Chandler*, 55 Ga. 369; *Sperber v. Balster*, 66 Ga. 317; *Williams v. Tolbert*, 66 Ga. 127; *Seals v. Pierce*, 83 Ga. 787; *Barnes v. Stephens*, 107 Ga. 436; *Dye v. Dye*, 108 Ga. 741; *Wynn v. Wynn*, 112 Ga. 214.

*Illinois*. — *Massey v. Huntington*, 118 Ill. 80; *Wilenou v. Handlon*, 207 Ill. 104.

*Indiana*. — *Castor v. Jones*, 86 Ind. 289.

*Iowa*. — *Matter of Longer*, 108 Iowa 34.

prescribed by the local wills act, the instrument is operative as a will.<sup>1</sup>

**The Mere Fact that an Instrument Cannot Take Effect as a Deed** does not show that it is testamentary,<sup>2</sup> although if the requirements of the local wills act have been complied with, that fact is to be taken into consideration in determining the intent of the maker.<sup>3</sup> Conversely, it has been held that a paper that cannot operate as a will is to be given effect as a deed, if it can be fairly done.<sup>4</sup>

**Alteration of Deed by Subsequent Will.** — A deed, valid and operative, cannot be subsequently explained or altered by a will. Thus, where a testator by deed conveys property in trust for his daughter and her issue in such manner as to divest himself of all power and control over the property carried by it, his subsequent will, though duly executed, cannot operate upon the property.<sup>5</sup>

**d. INSTRUMENT OPERATIVE PARTLY AS A DEED AND PARTLY AS A WILL.** — A conveyance is not necessarily homogeneous. It can be a deed in part and a will as to another part. In the same instrument a person may sell or give a piece of property to one and will another piece to the same individual.<sup>6</sup>

**e. WILLS DISTINGUISHED FROM GIFTS MORTIS CAUSA.** — A will differs from a gift *mortis causa* in that the latter, instead of purporting to be an intended disposition of property to take effect after death, purports to be an immediate transfer and must be accompanied by delivery;<sup>7</sup> hence, a docu-

*Kansas.* — *Reed v. Hazleton*, 37 Kan. 321.

*Maryland.* — *Wagner v. McDonald*, 2 Har. & J. (Md.) 346; *Carey v. Dennis*, 13 Md. 1.

*Michigan.* — *Matter of Lautenschlager*, 80 Mich. 285.

*Mississippi.* — *Herrington v. Bradford*, Walk. (Miss.) 520; *Sartor v. Sartor*, 39 Miss. 760; *Cunningham v. Davis*, 62 Miss. 366.

*Missouri.* — *Miller v. Holt*, 68 Mo. 584; *Murphy v. Gabbert*, 166 Mo. 596.

*Nebraska.* — *Pinkham v. Pinkham*, 55 Neb. 729.

*New Hampshire.* — *Gage v. Gage*, 12 N. H. 371.

*North Carolina.* — *Allison v. Allison*, 4 Hawks (11 N. Car.) 141.

*Pennsylvania.* — *Rose v. Quick*, 30 Pa. St. 225; *Turner v. Scott*, 51 Pa. St. 126; *Frederick's Appeal*, 52 Pa. St. 338, 91 Am. Dec. 159; *Ritter's Appeal*, 59 Pa. St. 9; *Frew v. Clarke*, 80 Pa. St. 170; *Meck's Appeal*, 97 Pa. St. 313. *Compare Hinkle v. Landis*, 131 Pa. St. 573.

*South Carolina.* — *Jacks v. Henderson*, 1 Desaus. (S. Car.) 543; *Milledge v. Lamar*, 4 Desaus. (S. Car.) 617; *Wheeler v. Durant*, 3 Rich. Eq. (S. Car.) 452; *Ingram v. Porter*, 4 McCord L. (S. Car.) 198; *Singleton v. Bremar*, 4 McCord L. (S. Car.) 12, 17 Am. Dec. 699.

*Tennessee.* — *Armstrong v. Armstrong*, 4 Baxt. (Tenn.) 357; *Evans v. Lauderdale*, 10 Lea (Tenn.) 73; *Ellis v. Pearson*, 104 Tenn. 591; *Watkins v. Dean*, 10 Yerg. (Tenn.) 321, 31 Am. Dec. 583.

*Texas.* — *Crain v. Crain*, 21 Tex. 790; *Millican v. Millican*, 24 Tex. 426; *Hart v. Rust*, 46 Tex. 556.

**Instruments in the Form of Deeds Inter Partes**, purporting to convey property to trustees, but providing that the trusts should not take effect till after the death of the donor, have been held testamentary. *Goods of Morgan*, L. R. 1 P. & D. 214. See also *Goods of Knight*, 2 Hag. Ecc. 554; *Shingler v. Pemberton*, 4 Hag. Ecc. 356.

**A Conveyance of an Undivided Interest of What the Grantor Dies Seized of** may be a will although the instrument is in the form of a deed. *Brewer v. Baxter*, 41 Ga. 212, 5 Am. Rep. 530; *Stevenson v. Huddleson*, 13 B. Mon. (Ky.) 299; *Gage v. Gage*, 12 N. H. 371; *Watkins v. Dean*, 10 Yerg. (Tenn.) 321, 31 Am. Dec. 583. *Compare Robey v. Hannon*, 6 Gill (Md.) 463.

**The Reservation of the Use and Control of land** during the natural lives of the grantor and his wife does not make the instrument testamentary. *Bass v. Bass*, 52 Ga. 531.

**1. Instrument Executed, Acknowledged, and Attested.** — *Boling v. Boling*, 22 Ala. 826; *Kelly v. Richardson*, 100 Ala. 584; *Moye v. Kittrell*, 29 Ga. 677; *Cover v. Stem*, 67 Md. 449; *Cunningham v. Davis*, 62 Miss. 366.

**2. Instrument Not Effective as a Deed.** — *Matter of Skerrett*, 67 Cal. 585; *Bromley v. Mitchell*, 155 Mass. 509; *Edwards v. Smith*, 35 Miss. 197; *Dawson v. Dawson*, 2 Strobb. Eq. (S. Car.) 34; *Blackman v. Schierman*, 21 Tex. Civ. App. 517; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42.

**3. Compliance with Local Wills Act.** — *Thompson v. Johnson*, 19 Ala. 59; *Crain v. Crain*, 21 Tex. 790.

**4. Instrument Inoperative as Will.** — *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734.

**5. Alteration of Deed by Subsequent Will.** — *Purcell v. Purcell*, *Riley Eq.* (S. Car.) 282.

**6. Instrument Operating Partly as Deed and Partly as Will.** — *Doe v. Cross*, 8 Q. B. 714, 55 E. C. L. 714. See *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Mallery v. Dudley*, 4 Ga. 52; *Robinson v. Schly*, 6 Ga. 515; *Burlington University v. Barrett*, 22 Iowa 61, 92 Am. Dec. 376; *Reed v. Hazleton*, 37 Kan. 321; *Powers v. Scharling*, 64 Kan. 339; *Dawson v. Dawson*, 2 Strobb. Eq. (S. Car.) 34. *Compare Thompson v. Johnson*, 19 Ala. 59.

**7. Wills Distinguished from Gifts Mortis Causa.** — See *GIFTS*, vol. 14, p. 1053; *Driscoll v. Driscoll*, 143 Cal. 528; *Knight v. Tripp*, 121 Cal. 674.

ment intended to take effect as a will, which is void for want of attestation, cannot be sustained as a gift *mortis causa*; <sup>1</sup> nor can a void gift *mortis causa* be sustained as a valid will of personalty. <sup>2</sup>

*f.* MEMORANDUM OF INSTRUCTIONS. — A duly executed instrument described as instructions for a will may have effect as a will, if it appears that it was intended to take effect in the absence of a more formal instrument; <sup>3</sup> otherwise, however, if it be merely a preliminary draft or minute not designed to take effect as a will, <sup>4</sup> even though duly executed, <sup>5</sup> or if it be wanting in the formalities of execution and attestation prescribed by the local statute. <sup>6</sup>

**Discrepancy Between Will and Instructions.** — Where there is a discrepancy between a will and the instructions upon which it is founded and such discrepancy is not made known to the testator, either by reading the will over to him or by otherwise explaining to him its contents and variations from the instructions, the instrument is not a valid will. But if the testator knows of the alterations he will be held to have adopted them by the execution of the will. <sup>7</sup>

*g.* EXTRANEOUS PAPERS — INCORPORATION BY REFERENCE. — If a will executed and witnessed as required by the local statute, incorporates into itself, by reference, any document or paper not so executed or witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such. <sup>8</sup>

1. *In re Hughes*, W. N. (1888) 163.

2. **Void Gift Mortis Causa Not Sustainable as Will.** — *Basket v. Hassell*, 108 U. S. 267.

3. **Memorandum of Instructions.** — *Theobald on Wills* (2d ed.) 11, citing *Bone v. Spear*, 1 Phill. Ecc. 345; *Torre v. Castle*, 1 Curt. Ecc. 303, 2 Moo. P. C. 133; *Barwick v. Mullings*, 2 Hag. Ecc. 225; *Hattatt v. Hattatt*, 4 Hag. Ecc. 211; *Arndt v. Arndt*, 1 S. & R. (Pa.) 263. As to unsigned testamentary instruments in the absence of statutory regulation, see *Public Administrator v. Watts*, 1 Paige (N. Y.) 347, 4 Wend. (N. Y.) 168; *McLean v. McLean*, 6 Humph. (Tenn.) 452. And see *supra*, this title, **Definition and Classification** — **Classification** — **Oral or Nuncupative Wills**.

4. **Preliminary Draft Not Designed as Will.** — *Lungren v. Swartzwelder*, 44 Md. 482; *Covenstry v. Williams*, 3 Curt. Ecc. 787; *Aurand v. Wilt*, 9 Pa. St. 54; *Wall v. Wall*, 123 Pa. St. 545. See *Sharp v. Sharp*, 2 Leigh (Va.) 249; *Hocker v. Hocker*, 4 Gratt. (Va.) 277.

But see *Boofter v. Rogers*, 9 Gill (Md.) 44, 52 Am. Dec. 680, wherein it was held that a paper, though not a last will and testament at the time it is written, may be made such afterwards by adoption; that a paper, though intended merely as an instrument of instructions or a memorandum, to enable the scrivener to prepare the will, will be admitted to probate, if the more formal will be left unfinished by reason of any act which the law pronounces to be the act of God. There must, however, be a continuance of the intention of the deceased down to the time when the act of God intervened and prevented the execution of the formal instrument. An immediate or sudden death is not required, if according to the proof, the jury are satisfied that there was no change of intention in regard to the provisions of the will.

5. **Due Execution Insufficient.** — *Ferguson-*

*Davie v. Ferguson-Davie*, 15 P. D. 109. See also *Hocker v. Hocker*, 4 Gratt. (Va.) 277. Compare *Toebbe v. Williams*, 80 Ky. 661.

6. **Instrument Lacking in Formalities of Execution and Attestation.** — *Vernam v. Spencer*, 3 Bradf. (N. Y.) 16; *Ruoff's Appeal*, 26 Pa. St. 219; *Wall v. Wall*, 123 Pa. St. 545.

**Failure to Comply with Statutory Requirements.** — If the record shows that the requirements of the statute were not observed, the decree of probate is an absolute nullity. *Wall v. Wall*, 123 Pa. St. 545.

7. **Discrepancy Between Will and Instructions.** — *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Munikhuyzen v. Magraw*, 35 Md. 280.

**Variance of Subsequent Will from Memorandum.** — It has been held that in so far as the will varies from the instructions, it is inoperative if executed upon the assurance that it complied with them. *Waite v. Frisbie*, 45 Minn. 361.

**Where No Fraud Is Practiced upon the Testator,** by which he is misled into signing what he does not wish to sign, it does not matter what variation there may be between the instructions and the executed instrument. *In re Livingston*, (N. J. 1897) 37 Atl. Rep. 770.

8. **Extraneous Papers Incorporated by Reference** — *England.* — *Goods of Balme*, (1897) P. 261; *Goods of Pascall*, L. R. 1 P. & D. 606; *Goods of Sunderland*, L. R. 1 P. & D. 198; *Goods of Sibthorp*, L. R. 1 P. & D. 106; *Singleton v. Tomlinson*, 3 App. Cas. 404; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Bizzey v. Flight*, 3 Ch. D. 269; *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6, 32 L. J. Prob. 21.

*United States.* — *Lucas v. Brooks*, 18 Wall. (U. S.) 436.

*California.* — *Matter of Shillaber*, 74 Cal. 144; *Matter of Soher*, 78 Cal. 477; *Matter of Willey*, 128 Cal. 1. Compare *Myer's Estate*, Myr. Prob. (Cal.) 205.



**The Instrument Referred to Must Be in Existence when the reference is made, and referring to a document as "made or to be made" affords ground for the presumption that the document had not yet been made.**<sup>1</sup>

Where the Description of the Document Referred to Is Not Distinct, yet is in terms sufficiently definite to render it capable of identification extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the necessary proof.<sup>2</sup>

The Absence of a Paper to Which Reference Is Made raises a presumption that such

*Connecticut.*—*Compare* Crosby v. Mason, 32 Conn. 482; Phelps v. Robbins, 40 Conn. 250.

*Indiana.*—Fesler v. Simpson, 58 Ind. 83; Fickle v. Snapp, 97 Ind. 289, 49 Am. Rep. 449.

*Kentucky.*—Beall v. Cunningham, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469.

*Louisiana.*—Hall v. Hill, 6 La. Ann. 745.

*Massachusetts.*—Newton v. Seaman's Friend Soc., 130 Mass. 91, 39 Am. Rep. 433; Dexter v. Harvard College, 176 Mass. 192.

*Missouri.*—Harvy v. Chonteau, 14 Mo. 587, 55 Am. Dec. 120.

*New York.*—Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 488; Tonnele v. Hall, 4 N. Y. 140; Brown v. Clark, 77 N. Y. 369. *Compare* Thompson v. Quimby, 2 Bradf. (N. Y.) 449; Matter of Andrews, 162 N. Y. 1. See also Matter of Hardenburg, 85 Hun (N. Y.) 580.

*North Carolina.*—Bullock v. Bullock, 2 Dev. Eq. (17 N. Car.) 307; Chambers v. McDaniel, 6 Ired. L. (28 N. Car.) 226.

*Pennsylvania.*—Zimmerman v. Zimmerman, 23 Pa. St. 375; Baker's Appeal, 107 Pa. St. 381, 52 Am. Rep. 478.

*South Carolina.*—Johnson v. Clarkson, 3 Rich. Eq. (S. Car.) 305; Milledge v. Lamar, 4 Desaus. (S. Car.) 617.

*Virginia.*—Pollock v. Glassell, 2 Gratt. (Va.) 439.

*Wisconsin.*—*Compare* Ford v. Ford, 70 Wis. 19.

**Extraneous Papers Must Be Clearly Identified.**—Shaffer's Succession, 50 La. Ann. 601; Matter of Sanderson, (Surrogate Ct.) 9 Misc. (N. Y.) 574.

**An Indorsement on an Envelope and the Contents Thereof** have been held to constitute a valid testamentary disposition operating as a codicil to a will. Fosselman v. Elder, 98 Pa. St. 159.

**Description of Instrument Referred to.**—It has been held that a clause which "ratifies and confirms a deed, dated, etc., and made between, etc.," is sufficient to incorporate the instrument referred to. Sheldon v. Sheldon, 1 Rob. Ecc. 81, 3 Notes Cas. (Eng.) 254, 8 Jur. 877; Bizzey v. Flight, 3 Ch. D. 269. But see Goods of Hubbard, L. R. 1 P. & D. 53.

**An Expression in the Donor's Will, viz., "I give and bequeath to my son P. in addition to what I had given him by deed of gift,"** certain notes, etc., is not a sufficiently definite reference to the deed, which was invalid for want of delivery, to incorporate it into the will and thereby pass the land. Bailey v. Bailey, 7 Jones L. (52 N. Car.) 44.

**An Invalid Instrument May Be Made Effective** by a reference thereto in a will. Loring v. Sumner, 23 Pick. (Mass.) 98.

**If a Paper Referred to Is Blank** and the will is complete in itself the paper thus referred to is

to be disregarded. Handley v. Palmer, 91 Fed. Rep. 948.

**1. Instrument in Existence at Time of Reference.**—*In re* Skair, 5 Notes Cas. (Eng.) 57; *In re* Astell, 5 Notes Cas. (Eng.) 489, note. See also Durham v. Northen, (1895) P. 66; Goods of Smart, (1902) P. 238; Goods of Hakewill, 1 Deane 14, 2 Jur. N. S. 168; Goods of Pembroke, 1 Sw. & Tr. 250, 1 Deane 182, 2 Jur. N. S. 526; Croker v. Hertford, 4 Moo. P. C. 339; Johnson v. Ball, 5 De G. & Sm. 89; Bryan's Appeal, 77 Conn. 240; St. Johns v. Bostwick, 8 App. Cas. (D. C.) 452; Thayer v. Wellington, 9 Allen (Mass.) 283; 85 Am. Dec. 753; Langdon v. Astor, 3 Duer (N. Y.) 477, 16 N. Y. 9; Grabill v. Barr, 5 Pa. St. 441, 47 Am. Dec. 418; Magoohan's Appeal, 117 Pa. St. 238.

**A Reference to Persons or Things "Hereinafter Named"** is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the witnesses, although it be proved that in fact such writings were in existence before the will was executed. Goods of Watkins, L. R. 1 P. & D. 19; Goods of Dallow, L. R. 1 P. & D. 189; *Re* Brewis, 33 L. J. Prob. 124.

**A Reference to "The Annexed Schedule"** is not sufficiently specific to incorporate the same, as such words might well be satisfied by a schedule written after the will was executed. Singleton v. Tomlinson, 3 App. Cas. 414. See also Goods of Ash, 1 Deane Ecc. 14, 2 Jur. N. S. 526.

**By the Execution of a Valid Codicil, a document** may be incorporated which was made between the time of the execution of the will, and that of the codicil, as a codicil may republish the will, and make it speak as at the date of the codicil. *In re* Hunt, 2 Rob. Ecc. 622; Goods of Truro, L. R. 1 P. & D. 201. But if a will refers to a paper as afterwards to be executed, a later codicil making no reference back cannot suffice to incorporate such paper. Goods of Mathias, 3 Sw. & Tr. 100.

**A Will Does Not Incorporate a Previous Will** by virtue of a clause that it is not in any manner to invalidate or interfere with any testamentary disposition theretofore or thereafter made by the testator of property belonging to him in another country or elsewhere in the same country. Goods of Murray, (1806) P. 65.

**2. Evidence to Establish Identity of Document to Which Reference Is Made.**—Goods of Mercer, L. R. 2 P. & D. 91; Goods of Greves, 1 Sw. & Tr. 250, 28 L. J. P. 18; Goods of Almosnino, 1 Sw. & Tr. 508, 29 L. J. P. 46; *In re* Willesford, 3 Curt. Ecc. 77, 1 Notes Cas. (Eng.) 404; *In re* Dickens, 3 Curt. Ecc. 60, 1 Notes Cas. (Eng.) 398; *In re* Durham, 3 Curt. Ecc. 57, 1 Notes Cas. (Eng.) 365, 6 Jur. 176; Jorden v. Jorden, 2 Notes Cas. (Eng.) 388; *In re* Pewt-

paper has been destroyed by the testator *animo revocandi*; and in such a case the controlling principle is that the apparent testamentary intentions of a testator are not to be disappointed merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming.<sup>1</sup>

**Two or More Wills May Be Construed Together** where there is nothing in the scope or scheme of the latter or last will to indicate that it is intended to stand alone and be in complete substitution for all others, and where there are no extraneous circumstances pointing to such a conclusion.<sup>2</sup>

**The Execution of a Codicil** may give force and effect to a previous codicil or an original will which has not been attested and proven as required by law.<sup>3</sup>

**h. WILLS WRITTEN ON SEVERAL SHEETS OF PAPER.**—It is a rudimentary principle that a will may be made on distinct papers. It is sufficient that they are connected by their internal sense, by coherence or adaptation.<sup>4</sup>

**i. EVIDENCE OF TESTAMENTARY INTENTION.**—Evidence is admissible to show that a deed or other instrument of gift which on the face of it is not testamentary, was not intended to operate until the death of the person exe-

ner, 4 Notes Cas. (Eng.) 479; *In re Darby*, 4 Notes Cas. (Eng.) 427, 10 Jur. 164. But see *Collier v. Langebear*, 1 Notes Cas. (Eng.) 369; *In re Edwards*, 6 Notes Cas. (Eng.) 306; *In re Southern*, 2 Curt. Ecc. 831, 1 Notes Cas. (Eng.) 73.

**1. Absence of Paper to Which Reference Is Made.**—*Goods of Greig*, L. R. 1 P. & D. 72; *Dickinson v. Stidolph*, 11 C. B. N. S. 341, 103 E. C. L. 341; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449; *Wood v. Sawyer*, Phil. L. (61 N. Car.) 251.

**Diagram Annexed to Will.**—A testator caused his real estate to be surveyed and divided into as many portions as it would admit of, and valued each part proportionately. By his will he devised to several of his children each a part, charged with the payment to the other children of such owelty as would establish equality among them all. As there was not real estate enough to give each child a part when divided, the sum of \$2,184.87, the ascertained value of each purpart, was to be paid by those who took land to each of those for whom there was no land. To his will he added a diagram of the partition he had made of his real estate, and declared in writing that he published that diagram as part of his will. To his daughter A he devised no land, but gave her a pecuniary legacy to the full amount of the value assigned to each purpart. In the diagram was laid out a lot marked A's, which was not included in the lines of any of the purparts devised to the other children. It was held that this was not a devise of the lot in question to A, but that the testator died intestate in respect thereof. *Houser v. Moore*, 31 Pa. St. 346.

**2. Two or More Wills Construed Together.**—*Gordon v. Whitlock*, 92 Va. 723.

**3. Will Made Effective by Codicil**—*England*.—*Goods of Tamplin*, (1894) P. 39.

*California*.—*Payne v. Payne*, 18 Cal. 291.

*Illinois*.—*Camp v. Shaw*, 52 Ill. App. 241.

*Iowa*.—*In re Murfield*, 74 Iowa 479.

*Kentucky*.—*Beall v. Cunningham*, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; *Sharp v. Wallace*, 83 Ky. 584.

*Missouri*.—*Harvy v. Chouteau*, 14 Mo. 587.

*New York*.—*Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590, 7 Hill (N. Y.) 346; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Matter of Douglass*, (Surrogate Ct.) 38 Misc. (N. Y.) 609. *Compare Matter of Carll*, (Surrogate Ct.) 38 Misc. (N. Y.) 471.

*North Carolina*.—*Murray v. Oliver*, 6 Ired. Eq. (41 N. Car.) 55.

*South Carolina*.—*Rose v. Drayton*, 4 Rich. Eq. (S. Car.) 260, 7 Rich. Eq. (S. Car.) 328.

*Tennessee*.—*Stover v. Kendall*, 1 Coldw. (Tenn.) 557.

*Wisconsin*.—*Skinner v. American Bible Soc.*, 92 Wis. 209.

**4. Wills Written on Several Sheets of Paper.**—*Matter of Snell*, (Surrogate Ct.) 32 Misc. (N. Y.) 611; *Matter of Dayger*, 47 Hun (N. Y.) 127; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597; *Martin v. Hamlin*, 4 Strobb. L. (S. Car.) 188, 53 Am. Dec. 673. See also *Barnewall v. Murrell*, 108 Ala. 366; *Murphy's Estate*, 104 Cal. 554; *Matter of Willey*, 128 Cal. 1; *Jones v. Habersham*, 63 Ga. 146; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114; *Matter of Whitney*, 90 Hun (N. Y.) 138; *Porter v. Turner*, 3 S. & R. (Pa.) 108; *Ginder v. Farnum*, 10 Pa. St. 98; *Grubb's Estate*, 174 Pa. St. 187; *Fletcher v. Gates*, (Tex. Civ. App. 1901) 63 S. W. Rep. 937.

**Failure to Annex the Separate Sheets at the Time of Execution** does not impair the validity of the will. *Matter of Fitzgerald*, (Surrogate Ct.) 33 Misc. (N. Y.) 325.

**Papers Bound or Fastened Together**, coherent in sense, and constituting the will as found after the testator's death, are presumed to have been so bound or fastened and to have constituted the will when it was attested. *Marsh v. Marsh*, 1 Sw. & Tr. 528.

**Two Instruments Will Not Be Construed as One Will** where such a construction cannot be adopted without perverting and disregarding the language of both. *Jeffries's Estate*, 9 Pa. Dist. 709.

**A Substituted Page Is Noneffective** where the will, as changed, is not re-executed or witnessed in any way known to the law. *Varnon v. Varnon*, 67 Mo. App. 534.

cutting it;<sup>1</sup> to show that an instrument, on the face of it testamentary, was not written *animo testandi*;<sup>2</sup> but not to show that the operation of a will, absolute in its terms, depends upon a condition.<sup>3</sup>

The *Animus Testandi* Is Indicated by a writing which in form and substance is testamentary.<sup>4</sup>

**2. Formal Requisites — a. WRITING.** Typewriting or Printing satisfies the requirement of the statute of frauds that a will shall be in writing, and it is not uncommon for a will to be in part written and in part printed or engraved.<sup>5</sup>

A Will Written in Lead Pencil is *prima facie* deliberative only, but is entitled to probate, if shown to be final;<sup>6</sup> and lead-pencil alterations upon a will written in ink are subject to the same rule.<sup>7</sup>

Writing upon a Slate has been held not to be such writing as is contemplated by the statute.<sup>8</sup>

**b. SIGNATURE — (1) Signature Distinguished from Execution.** — The word "execution" is sometimes used to indicate the act of signing, as distinguished from attestation;<sup>9</sup> strictly speaking, however, execution includes all formal requisites essential to the validity of the instrument.<sup>10</sup>

**(2) Necessity of Signature — (a) In England.** — In England, before the statute of 1 Vict., c. 26, the signature was not essential to the validity of wills of personalty, although the presumption was against testamentary papers not actually executed by the testator;<sup>11</sup> yet such presumption was feeble, and easily repelled by satisfactory evidence that the nonexecution might be ascribed to some other cause than an abandonment of the intention therein expressed,<sup>12</sup> as by showing that the execution was prevented by act of God,<sup>13</sup> or that the deceased intended the will to operate in its present state and without doing any further act in order to give it testamentary effect.<sup>14</sup> The

**1. Evidence of Testamentary Intention.** — Cock v. Cooke, L. R. 1 P. & D. 241; Robertson v. Smith, L. R. 2 P. & D. 43; Goods of Coles, L. R. 2 P. & D. 362; Goods of Webb, 10 Jur. N. S. 709; Lincoln v. Felt, 132 Mich. 49; Herrington v. Bradford, Walk. (Miss.) 520; Robertson v. Dunn, 2 Murph. (6 N. Car.) 133, 5 Am. Dec. 525; Kisecker's Estate, 190 Pa. St. 476; Diehl's Estate, 11 Pa. Super. Ct. 293. See also Phillips v. Phillips, 30 Colo. 516; Wilenou v. Handlon, 207 Ill. 104. Compare Clay v. Layton, (Mich. 1903) 96 N. W. Rep. 458.

Two Witnesses have been held necessary to establish testamentary intent. Hock v. Hock, 6 S. & R. (Pa.) 47; Sunday's Estate, 167 Pa. St. 30.

**2. Evidence to Show Lack of Testamentary Intention.** — Whyte v. Pollok, 7 App. Cas. 400; Goods of Nosworthy, 11 Jur. N. S. 570; Nichols v. Nichols, 2 Phill. Ecc. 180; Spence v. Huckins, 208 Ill. 304.

**3. Evidence Inadmissible to Show Condition in Will.** — Sewell v. Slingluff, 57 Md. 537.

**4. Indication of Animus Testandi.** — Barnewall v. Murrell, 108 Ala. 366.

**5. Writing Within Statute of Frauds.** — Goods of Adams, L. R. 2 P. & D. 367; Dench v. Dench, 2 P. D. 60. See Henshaw v. Foster, 9 Pick. (Mass.) 312; Temple v. Mead, 4 Vt. 536.

**6. Will Written in Lead Pencil.** — Goods of Dyer, 1 Hag. Ecc. 219; Bateman v. Pennington, 3 Moo. P. C. 223; Mence v. Mence, 18 Ves. Jr. 348; Harris v. Pue, 39 Md. 535.

In Pennsylvania it has been held that there is no distinction between pencil and ink. Myers v. Vanderbelt, 84 Pa. St. 510; Tomlinson's Estate, 133 Pa. St. 245. See Knox's Estate, 131 Pa. St. 220.

**7. Lead-pencil Alterations.** — Dickenson v. Dickenson, 2 Phill. Ecc. 173; Goods of Hall, L. R. 2 P. & D. 256; Goods of Adams, L. R. 2 P. & D. 367.

**8. Writing upon a Slate.** — Reed v. Woodward, 11 Phila. (Pa.) 541, 32 Leg. Int. (Pa.) 337.

**9. Everhart v. Everhart,** 34 Fed. Rep. 82; Matter of Booth, 127 N. Y. 109.

**10. Execution Includes All Requisites.** — Schouler on Wills (2d ed.), § 302, note 1.

**11. Presumption Against Unsigned Will.** — Salmon v. Hays, 4 Hag. Ecc. 382; Scott v. Rhodes, 1 Phill. Ecc. 12; Abbott v. Peters, 4 Hag. Ecc. 380; Montefiore v. Montefiore, 2 Add. Ecc. 358; Bragge v. Dyer, 3 Hag. Ecc. 208. See also Forbes v. Gordon, 3 Phill. Ecc. 628; Coles v. Trecothick, 9 Ves. Jr. 249; Gaskins v. Gaskins, 3 Ired. L. (25 N. Car.) 158; Public Administrator v. Watts, 1 Paige (N. Y.) 347, 4 Wend. (N. Y.) 168; McLean v. McLean, 6 Humph. (Tenn.) 452.

**12. Presumption Against Will Easily Rebutted.** — Montefiore v. Montefiore, 2 Add. Ecc. 357. See also Gaskins v. Gaskins, 3 Ired. L. (25 N. Car.) 158; Public Administrator v. Watts, 1 Paige (N. Y.) 347; McLean v. McLean, 6 Humph. (Tenn.) 452.

**13. Signature Prevented by Act of God.** — Scott v. Rhodes, 1 Phill. Ecc. 12; Masterman v. Maberly, 2 Hag. Ecc. 235. See also Plater v. Groome, 3 Md. 134; Gaskins v. Gaskins, 3 Ired. L. (25 N. Car.) 158.

Supervening Insanity has been held sufficient to account for nonexecution. Hoby v. Hoby, 1 Hag. Ecc. 146; Fulleek v. Allinson, 3 Hag. Ecc. 527.

**14. Intention to Have Will Operate Without Signature.** — Roose v. Mouldsdaile, 1 Add. Ecc. 131.



principle only applied, however, to unexecuted as distinguished from imperfect papers, and hence was inapplicable if the body of the instrument was unfinished and incomplete, unless it was clearly proved by the party setting up the instrument that the deceased had come to a final resolution respecting it as far as it went.<sup>1</sup>

The Statute of Frauds required all devises of realty to be in writing and signed by the testator or some other person in his presence and by his express direction.<sup>2</sup>

The Statute of Wills, which applies to all wills made, re-executed, or republished after January 1, 1838, provides that no will of either real or personal estate shall be valid unless in writing and signed by the testator or by some other person in his presence and by his direction.<sup>3</sup>

(b) *In the United States.* — In nearly all of the United States statutes exist similar in provision to the English statute of wills.<sup>4</sup>

Under the Pennsylvania Statute, in order to sustain, as a will, a paper to which the decedent did not sign his name, it must be proved by two witnesses, not only that he was prevented by the extremity of his last sickness from signing his name himself, but also that he was prevented by the same cause from requesting some one to sign for him and in his presence.<sup>5</sup> And the testator's continued inability to sign the will, with his repeated application to others to sign for him, and their refusal, is not a compliance with the act.<sup>6</sup>

(c) *Mutual Wills.* — Where mutual wills are executed it is essential that each testator sign his own will; and if, by mistake, each testator signs the will of the other, both wills will be held invalid.<sup>7</sup>

(3) *Sufficiency of Signature* — (a) *Place of Signature.* — Under the English statute of frauds, a will was held to be sufficiently "signed" if the testator wrote his name at the beginning or in the body of the will with intent thus to sign the instrument;<sup>8</sup> and this rule has been followed in those jurisdictions wherein the statute is silent as to the place of signature,<sup>9</sup> with the modifica-

For Instances in which testamentary effect has been given to finished papers remaining unexecuted, see Warburton v. Burrows, 1 Add. Ecc. 383; Masterman v. Maberly, 2 Hag. Ecc. 235; Scott v. Rhodes, 1 Phill. Ecc. 12; Thomas v. Wall, 3 Phill. Ecc. 23; Friswell v. Moore, 3 Phill. Ecc. 135; Read v. Phillips, 2 Phill. Ecc. 122.

1. *Principle Not Applicable to Unfinished Instrument.* — Montefiore v. Montefiore, 2 Add. Ecc. 358. See also Plater v. Groome, 3 Md. 134; Jones v. Kea, 4 Dev. L. (15 N. Car.) 301. And compare Frierson v. Beall, 7 Ga. 438.

2. *Statute of Frauds.* — 29 Car. II., c. 3, § 5.

3. *Statute of Wills.* — 1 Vict., c. 26, § 9. See also Wms. on Exrs. (9th ed.) 107; Goods of Gee, 78 L. T. N. S. 843; Lawson v. Dawson, 21 Tex. Civ. App. 361; Royle v. Harris, (1895) P. 163.

4. *Rule in the United States.* — See the statutes of the various states. See also Albany Fertilizer Co. v. James, 112 Ga. 450; Matter of Beneficent, (Surrogate Ct.) 38 Mont. (N. Y.) 272; Murry v. Hennessey, 48 Neb. 608; Wall v. Wall, 123 Pa. St. 545; Smith v. Smith, 67 Vt. 443. And see *infra*, this subsection, *Sufficiency of Signature* — *Signature by Party Other than Testator.*

5. *Requisites to Sustain Unsigned Paper in Pennsylvania.* — Prickett's Estate, 1 Phila. (Pa.) 306; Asay v. Hoover, 5 Pa. St. 21, 14 Am. Dec. 713; Grabill v. Barr, 5 Pa. St. 441, 47 Am. Dec. 418; Dunlop v. Dunlop, 10 Watts (Pa.) 153; Ruoff's Appeal, 26 Pa. St. 219. And see

*supra*, this title, *Definition and Classification* — *Classification* — *Oral or Nuncupative Wills.*

6. *Striker v. Groves*, 5 Whart. (Pa.) 386.

7. *Mutual Wills Must Be Signed by Respective Makers.* — Goods of Hunt, L. R. 3 P. & D. 250; Anonymous, 14 Jur. 402; *In re Alter*, 7 Phila. (Pa.) 529.

8. *Place of Signature under Statute of Frauds.* — Cook v. Parsons, Prec. Ch. 184; Coles v. Trecothick, 9 Ves. Jr. 249. See also the title VERBAL AGREEMENTS (STATUTE OF FRAUDS), vol. 29, p. 856.

9. *Place of Signature Immaterial* — *Alabama.* — Armstrong v. Armstrong, 29 Ala. 538. *Illinois.* — Kolowski v. Fausz, 103 Ill. App. 528.

*Kentucky.* — Miles' Will, 4 Dana (Ky.) 1; Allen v. Everett, 12 B. Mon. (Ky.) 371; Upchurch v. Upchurch, 16 B. Mon. (Ky.) 102.

*New Jersey.* — Matter of Kirkpatrick, 22 N. J. Eq. 463.

*New York.* — People v. Murray, 5 Hill (N. Y.) 468; Merritt v. Clason, 12 Johns. (N. Y.) 102, *sub nom.* Clason v. Bailey, 14 Johns. (N. Y.) 484; Matter of Booth, 127 N. Y. 109.

*Vermont.* — Adams v. Field, 21 Vt. 256.

*Virginia.* — Ramsey v. Ramsey, 13 Gratt. (Va.) 664, 70 Am. Dec. 438.

In Alabama it has been held, under a statute similar to the statute of frauds, that the testator's name at the beginning of a will dictated by himself is to be regarded as a sufficient signing by another at his request. *Armstrong v. Armstrong*, 29 Ala. 538.

tion, in some instances, that the intent to sign must appear upon the face of the will.<sup>1</sup> By the wills acts of *England*,<sup>2</sup> and of many of the *United States*,<sup>3</sup> however, it is required that the testator's signature be at the end of the will or subscribed thereto.

**Signature at End of Will.** — Where the statute requires the will to be signed at the end thereof, the signature must be sufficiently near the end of the written matter to prevent interpolations in the intervening space;<sup>4</sup> and, generally, if any testamentary provision is placed after the signature, the whole instrument will be excluded from probate.<sup>5</sup> Thus, where a testator, after signing his will, added a bequest, and then had the witnesses sign without signing again himself, the whole will was held invalid.<sup>6</sup> In *England* and *Pennsylvania* the rule is that a will signed at the end of the obviously inherent sense, though not at the end in point of space, is "signed at the end thereof" within the meaning of the statute, and hence portions below the signature, connected by asterisks or reference with portions preceding it, do not invalidate the instrument;<sup>7</sup> in *New York* it has been held that the principles deduced from the English decisions are inapplicable, and that the signature must be at the physical end.<sup>8</sup> The effect of a clause appointing executors, inserted after the signature, may be either to invalidate the whole instrument<sup>9</sup> or merely to render such clause inoperative.<sup>10</sup> A subscription after the attestation clause is a signing at the "end of the will" within the meaning of the statute, as the testator by so signing is considered as making the attestation

**1. Intent Must Appear on Face of Will.** — See *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Matter of Jolly*, 5 N. J. Eq. 456; *Graham v. Graham*, 10 Ired. L. (32 N. Car.) 219; *Ray v. Hill*, 3 Strobb. L. (S. Car.) 297, 49 Am. Dec. 647; *Waller v. Waller*, 1 Gratt. (Va.) 454, 42 Am. Dec. 564; *Rosser v. Franklin*, 6 Gratt. (Va.) 1, 52 Am. Dec. 97; *Warwick v. Warwick*, 86 Va. 596.

**2.** 1 Vict., c. 26, § 9.

**3.** See the various state statutes.

**4. Signature Must Closely Follow Written Matter.** — *Smee v. Bryer*, 6 Moo. P. C. 404; *Soward v. Soward*, 1 Duv. (Ky.) 126. *Compare* *Morrow's Estate*, 204 Pa. St. 479.

**5. Signature Must Follow All Testamentary Provisions** — *England*. — See *Royle v. Harris*, (1895) P. 163.

*California*. — See *Matter of Blake*, 136 Cal. 306.

*Missouri*. — *Catlett v. Catlett*, 55 Mo. 330.

*New York*. — *Public Administrator v. Watts*, 1 Paige (N. Y.) 347, 4 Wend. (N. Y.) 168; *Matter of Sanderson*, (Surrogate Ct.) 9 Misc. (N. Y.) 574; *Matter of Donner*, (Surrogate Ct.) 37 Misc. (N. Y.) 57; *Matter of Hewitt*, 91 N. Y. 261; *Matter of O'Neil*, 91 N. Y. 516; *Matter of Conway*, 124 N. Y. 455; *Matter of Whitney*, 153 N. Y. 259; *Matter of Andrews*, 162 N. Y. 1; *Matter of Fults*, 42 N. Y. App. Div. 593; *Matter of Brand*, 68 N. Y. App. Div. 225.

*Ohio*. — See *Baker v. Baker*, 51 Ohio St. 217.

*Pennsylvania*. — *Frazier's Estate*, 8 Pa. Co. Ct. 306; *Hays v. Harden*, 6 Pa. St. 409; *Wikoff's Appeal*, 15 Pa. St. 291, 53 Am. Dec. 597; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478. See also *Wineland's Appeal*, 118 Pa. St. 37; *Fouche's Estate*, 147 Pa. St. 395.

**Position of Date.** — The will is not invali-

dated by the fact that the signature precedes the date. *Flood v. Pragoff*, 79 Ky. 607.

**6.** *Glancy v. Glancy*, 17 Ohio St. 134.

**7. Signature at End of Obviously Inherent Sense Sufficient.** — *Goods of Gee*, 78 L. T. N. S. 843; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478; *Goods of Greenwood*, (1892) P. 7. See also *Goods of Anstee*, (1893) P. 283; *Fouche's Estate*, 147 Pa. St. 395.

**Portions of a Will May Physically Follow the Signature** and yet be construed to be anterior to it. *Goods of Gilbert*, 78 L. T. N. S. 762.

**8. Signature Must Be at Physical End.** — *Butler v. Benson*, 1 Barb. (N. Y.) 526; *M'Guire v. Kerr*, 2 Bradf. (N. Y.) 244; *Dennett v. Taylor*, 5 Redf. (N. Y.) 561; *Lewis v. Lewis*, 13 Barb. (N. Y.) 17; *Robins v. Coryell*, 27 Barb. (N. Y.) 556; *Matter of Conway*, 124 N. Y. 455. See also *Sisters of Charity v. Kelly*, 67 N. Y. 409, reversing 7 Hun (N. Y.) 290. And compare *Matter of Noon*, (Surrogate Ct.) 31 Misc. (N. Y.) 420.

But see *Tonnele v. Hall*, 4 N. Y. 140, holding that a map referred to in the body of a will, and attached thereto below the signatures of the testator and witnesses, is deemed to be constructively inserted in the will where such references are made, and the will is, therefore, signed at the end thereof, in conformity with the statute.

**9. Will Invalidated by Clause Appointing Executors.** — *Baird's Estate*, 3 Pa. Dist. 514; *Wineland's Appeal*, 118 Pa. St. 37. *Compare* *Saunders v. Samarreg Co.*, 205 Pa. St. 632.

In *New York*, it has been held that such a clause does not invalidate the instrument, unless it was inserted before signing. *Matter of Jacobson*, 6 Dem. (N. Y.) 298; *Brady v. M'Crosson*, 5 Redf. (N. Y.) 431. See also *Matter of Gedney*, (Surrogate Ct.) 17 Misc. (N. Y.) 500.

**10.** *McCullough's Estate*, Myr. Prob. (Cal.) 76.

clause a part of the will.<sup>1</sup>

**Signature on Attached Paper.** — The signature may be on a piece of paper stuck or tied on at the end of the will and containing nothing but the signature and attestation;<sup>2</sup> but in such case the fact that the piece of paper was so attached before execution must be proved.<sup>3</sup>

**Where the Will Is Written on Several Sheets of Paper,** one signature is sufficient. In such case, the order in which the sheets are found at the testator's death is presumed to be the same as when the will was executed.<sup>4</sup>

**Clauses Written at Different Times** require but one signature and attestation.<sup>5</sup>

**Where an Instrument Is Signed in Several Places** it is the last signature which consummates the instrument and makes it a will, and the erasure of such last signature works a repeal of the instrument.<sup>6</sup>

(b) **Manner of Signature.** — The first essential of a valid signature is that the name or mark be put upon the paper, or subsequently adopted, with the intent of finally authenticating the instrument, so that no further signature on the maker's part is contemplated.<sup>7</sup> Thus, the making of a mark with intent to authenticate the instrument is a sufficient signing within the meaning of the statute, even though the testator's inability to write is not proven,<sup>8</sup> and

**1. Subscription at End of Attestation Clause.** — Matter of Acker, 5 Dem. (N. Y.) 19; Matter of Laudy, 78 Hun (N. Y.) 479; Younger v. Duffie, 94 N. Y. 535; Cohen's Will, Tuck. (N. Y.) 286. But compare *Sisters of Charity v. Kelly*, 67 N. Y. 409. So, also, where the statute merely requires that the will be signed by the testator. *Hallowell v. Hallowell*, 88 Ind. 251.

**2. Signature on Attached Paper.** — Goods of Horsford, L. R. 3 P. & D. 211; *Cooke v. Lambert*, 32 L. J. P. 93.

**3. Goods of West**, 32 L. J. P. 182.

**4. One Signature to Several Sheets of Paper.** — Marsh v. Marsh, 1 Sw. & Tr. 528; *Rees v. Rees*, L. R. 3 P. & D. 84; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Ginder v. Farnum*, 10 Pa. St. 98; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597; *Martin v. Hamlin*, 4 Strobb. L. (S. Car.) 188, 53 Am. Dec. 673.

**The Signature May Be Written on a Subsequent Page** to that on which the rest of the will is written. Goods of Moore, (1901) P. 44.

**5. Clauses Written at Different Times.** — Goods of Catrall, 3 Sw. & Tr. 419.

**6. Signature in Several Places in Instrument.** — *Evan's Appeal*, 58 Pa. St. 238.

**7. Intent to Authenticate Instrument Essential.** — *Right v. Price*, 1 Dougl. 241; *Dunlop v. Dunlop*, 10 Watts (Pa.) 153; *Ramsey v. Ramsey*, 13 Gratt. (Va.) 664, 70 Am. Dec. 438. See also *Armstrong v. Armstrong*, 29 Ala. 538; *Matter of Booth*, 127 N. Y. 109; *Warwick v. Warwick*, 86 Va. 596.

**8. Making of Mark Sufficient Signature** — *England*. — *Baker v. Dening*, 8 Ad. & El. 94, 35 E. C. L. 335.

*Alabama*. — *Schieffelin v. Schieffelin*, 127 Ala. 14.

*Arkansas*. — *Guthrie v. Price*, 23 Ark. 396.

*California*. — *Matter of Guilfoyle*, 96 Cal. 598; *Matter of Mullin*, 110 Cal. 252.

*Delaware*. — *Smith v. Dolby*, 4 Harr. (Del.) 350.

*Illinois*. — *Bevelot v. Lestrade*, 153 Ill. 625.

*Indiana*. — *Rook v. Wilson*, 142 Ind. 24.

*Iowa*. — *Scott v. Hawk*, 107 Iowa 723.

*Kentucky*. — *Savage v. Bulger*, (Ky. 1903) 77 S. W. Rep. 717.

*Louisiana*. — See *Crouzeilles's Succession*, 106 La. 442.

*Maryland*. — *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666.

*Massachusetts*. — *Chase v. Kittredge*, 11 Allen (Mass.) 53, 87 Am. Dec. 687; *Nickerson v. Buck*, 12 Cush. (Mass.) 332.

*Mississippi*. — *Sheehan v. Kearney*, (Miss. 1896) 21 So. Rep. 41, 35 L. R. A. 102.

*Missouri*. — *St. Louis Hospital Assoc. v. Williams*, 19 Mo. 609; *Stephens v. Stephens*, 129 Mo. 422.

*Nebraska*. — *Thompson v. Thompson*, 49 Neb. 157.

*New York*. — *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Watts v. Public Administrator*, 4 Wend. (N. Y.) 168; *Matter of Beneventano*, (Surrogate Ct.) 38 Misc. (N. Y.) 272.

*Oregon*. — *Pool v. Buffum*, 3 Oregon 438.

*Pennsylvania*. — *Flannery's Will*, 24 Pa. St. 502; *Burford v. Burford*, 29 Pa. St. 221; *Main v. Ryder*, 84 Pa. St. 217. See also *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *McCarty v. Hoffman*, 23 Pa. St. 507.

*South Carolina*. — See *Ray v. Hill*, 3 Strobb. L. (S. Car.) 297, 49 Am. Dec. 647.

**In Pennsylvania**, signature by mark was expressly authorized by Act of Jan. 27, 1848, P. L. 16. *Knox's Estate*, 131 Pa. St. 229.

**Intent to Substitute Mark for Signature** must appear. *Everhart v. Everhart*, 34 Fed. Rep. 85.

**If in Addition to the Mark** made by the testator his name is signed to the will by another, at his request, it has been held that the will is void unless the person subscribing the testator's name signs his own name as a witness and states that he wrote the testator's name at his request, as required by the statute. *St. Louis Hospital Assoc. v. Williams*, 19 Mo. 609. See also *Scott v. Hawk*, 107 Iowa 723; *McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129; *Northcutt v. Northcutt*, 20 Mo. 266; *Asay v. Hoover*, 5 Pa. St. 21, 14 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 444, 47 Am. Dec. 418; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.



although his name does not appear on the face of the will.<sup>1</sup> Likewise, it is a sufficient signature if the testator merely affixes his initials<sup>2</sup> or his Christian name,<sup>3</sup> or even an assumed name, since such name will be taken as a mark;<sup>4</sup> or if he stamps his name,<sup>5</sup> or affixes a seal stamped with his initials and pronounces it his "hand and seal."<sup>6</sup> An imperfect or indistinct subscription of the testator's name will be regarded as his mark.<sup>7</sup> It is immaterial that a wrong name is written against the mark,<sup>8</sup> or that the testator is wrongly named in the body of the will,<sup>9</sup> or that the testator's hand is guided by another in signing<sup>10</sup> or making his mark.<sup>11</sup>

Sealing is not signing.<sup>12</sup>

(c) **Signature by Party Other than Testator.** — In numerous jurisdictions the statutes provide that a will may be signed by some person other than the testator, in his presence and by his express direction.<sup>13</sup> In *Pennsylvania*, a testator must sign himself, unless prevented by the extremity of his last sickness.<sup>14</sup> In *New Jersey*, where the statute requires that "the signature shall be made

1. *In re Bryce*, 2 Curt. Ecc. 325.

2. **Initials Sufficient Signature.** — Goods of Savory, 15 Jur. 1042. See also *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Knox's Estate*, 131 Pa. St. 220.

3. **Christian Name Sufficient Signature.** — *Knox's Estate*, 131 Pa. St. 220.

4. **Assumed Name Sufficient Signature.** — *In re Redding*, 2 Rob. Ecc. 339, 14 Jur. 1052; Goods of Glover, 11 Jur. 1022.

5. **Stamped Name Sufficient Signature.** — *Jenkyns v. Gaisford*, 3 Sw. & Tr. 93.

6. **Seal with Initials Sufficient Signature.** — Goods of Emerson, L. R. 9 Ir. 443.

7. **Imperfect Subscription Regarded as Mark.** — *Hartwell v. M'Master*, 4 Redf. (N. Y.) 389. See also *Plate's Estate*, 9 Pa. Co. Ct. 644.

8. **Wrong Name Written Against Mark.** — *In re Clark*, 1 Sw. & Tr. 22; *Bailey v. Bailey*, 35 Ala. 687; *Long v. Zook*, 13 Pa. St. 400; *Knox's Estate*, 131 Pa. St. 220.

9. **Misnomer of Testator in Body of Will.** — *In re Dowse*, 31 L. J. P. 172.

10. **Testator's Hand Guided in Signing.** — *Stevens v. Vancleve*, 4 Wash. (U. S.) 262; *Vines v. Clingfost*, 21 Ark. 309; *Fritz v. Turner*, 46 N. J. Eq. 515; *Van Hanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *Vandruuff v. Rinchart*, 29 Pa. St. 232; *Shotwell's Estate*, 11 Pa. Co. Ct. 444; *Trezevant v. Rains*, (Tex. 1802) 19 S. W. Rep. 567; *McMechen v. McMechen*, 17 W. Va. 684, 41 Am. Rep. 682. See also *Matter of Van Houten*, (Surrogate Ct.) 15 Misc. (N. Y.) 196.

11. **Testator's Hand Guided in Making Mark.** — *Wilson v. Beddard*, 12 Sim. 28; *Stevens v. Vancleve*, 4 Wash. (U. S.) 269; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 393; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Van Hanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *Vandruuff v. Rinchart*, 29 Pa. St. 232; *Cozen's Will*, 61 Pa. St. 196.

**Request of Assistance.** — It is not necessary to prove an express request for such assistance. The act is his own with the assistance of another, and not that of another under authority from him. *Cozen's Will*, 61 Pa. St. 201.

12. See *infra*, this section, 2. (c) *Sealing*.

13. **Signature by Party Other than Testator.** — The English statute is 1 Vict., c. 26, § 9. See

also the statutes of the various states, and see the following cases:

*Alabama.* — *Armstrong v. Armstrong*, 29 Ala. 538; *Riley v. Riley*, 36 Ala. 496.

*Arkansas.* — *Matter of Cornelius*, 14 Ark. 675; *Abraham v. Wilkins*, 17 Ark. 292.

*Delaware.* — *Sutton v. Sutton*, 5 Harr. (Del.) 454.

*Illinois.* — *Rigg v. Wilton*, 13 Ill. 15.

*Louisiana.* — *Matter of Carroll*, 28 La. Ann. 388.

*Maryland.* — *Compare Higgins v. Carlton*, 28 Md. 117, 92 Am. Dec. 666.

*Missouri.* — *McGee v. Porter*, 14 Mo. 611; *St. Louis Hospital Assoc. v. Williams*, 19 Mo. 609, 21 Mo. 17; *Simpson v. Simpson*, 27 Mo. 288; *Northcutt v. Northcutt*, 20 Mo. 266.

*Nebraska.* — *Elliott v. Elliott*, (Neb. 1902) 92 N. W. Rep. 1006.

*New York.* — *Butler v. Benson*, 1 Barb. (N. Y.) 527; *Robins v. Coryell*, 27 Barb. (N. Y.) 559; *Stevens v. Stevens*, 6 Dem. (N. Y.) 262; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 91, 40 Am. Dec. 225.

*Oregon.* — *Pool v. Buffum*, 3 Oregon 438.

*South Carolina.* — *Ex p. Leonard*, 39 S. Car. 548.

*Washington.* — *Higgins v. Nethery*, 30 Wash. 204.

*Wisconsin.* — *Jenkins's Will*, 43 Wis. 610.

**The Direction to Sign** must precede the act of signing. *Waite v. Frishie*, 45 Minn. 361; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.

**A Testator May Indicate by Signs** that he is too weak to sign the instrument. *Gordon v. Gordon*, 12 Quebec Super. Ct. 433.

**Mere Assent or Acquiescence** to another's signing, or knowledge of the testator that his name is being signed, does not meet the requirements of the statute. *Murry v. Hennessey*, 48 Neb. 608.

**"This Will Was Read and Approved by C. F. B., by E. C., in Presence of, etc.,"** written at the foot of a will by the person requested to sign for the testator and followed by the signature of the witnesses, is sufficient. *Jenkyns v. Gaisford*, 32 L. J. P. 122.

**14. Pennsylvania Rule.** — *Vernon v. Kirk*, 30 Pa. St. 223. But see *Barr v. Graybill*, 13 Pa. St. 396; *Vosburg's Will*, 9 Pa. Co. Ct. 243.

by the testator or the making thereof acknowledged by him in the presence of two witnesses," signature by another is insufficient.<sup>1</sup> In jurisdictions in which signature by another is allowed, the other person may be one of the subscribing witnesses,<sup>2</sup> and it is immaterial that he signs his own name instead of the name of the testator.<sup>3</sup> Where the statute requires the will to be signed by the other person in the testator's presence, a signature or mark affixed while he was unconscious is incapable of subsequent ratification without re-execution.<sup>4</sup>

**The Signature of Another to Be Valid Must Be Intended as Final**, and hence it has been held that if the name of the testator be subscribed by another at his request and in his presence, but with the intention that it shall be afterwards executed by the testator himself by mark, the execution will not be valid if he fails to affix his mark.<sup>5</sup>

(4) *Knowledge of Contents Before Signature.* — It is, of course, essential that the testator should have knowledge of the contents of his will before he signs the same, and, as a general rule, this knowledge is presumed.<sup>6</sup> But the presumption does not arise where the testator is blind, or illiterate, or for any cause is unable to read, and in such case it must be shown affirmatively that he was made acquainted with the contents of the will by reading it over or explaining it to him before he signed it.<sup>7</sup> When the legal terms and practical effect of a will are fully explained to the testator, and he states unequivocally

1. *New Jersey Rule.* — *Matter of McElwaine*, 18 N. J. Eq. 449.

**A Mark Made by Another with the Testator's Hand upon the Pen** has been held sufficient. *Campbell v. McGuigan*, (N. J. 1896) 34 Atl. Rep. 383.

2. **Person Signing for Testator May Be a Witness.** — *Goods of Bailey*, 1 Curt. Ecc. 914; *Smith v. Harris*, 1 Rob. Ecc. 262; *Riley v. Riley*, 36 Ala. 496; *Herbert v. Berrier*, 81 Ind. 1; *Robins v. Coryell*, 27 Barb. (N. Y.) 556. See also *Pool v. Buffum*, 3 Oregon 438.

3. It was so held at least under 1 Vict., c. 26, in a case where the other person signed his own name after the words, "Signed on behalf of the testator, in his presence and by his direction, by me." *Re Clark*, 2 Curt. Ecc. 329. And a like ruling would probably be sustained under corresponding statutes in the United States.

**A Subscription, "A B for C D at His Request,"** has been held sufficient. *Abraham v. Wilkins*, 17 Ark. 292; *Vernon v. Kirk*, 30 Pa. St. 218.

4. **Signature by Another While Testator Is Unconscious.** — *Dunlop v. Dunlop*, 10 Watts (Pa.) 153.

5. **Signature of Another Must Be Intended as Final.** — *Main v. Ryder*, 84 Pa. St. 217.

6. **Testator's Knowledge of Contents of Will Presumed.** — *Smith v. Dolby*, 4 Harr. (Del.) 350; *Sheer v. Sheer*, 159 Ill. 591; *Pettes v. Bingham*, 10 N. H. 514; *Carr v. McComm*, 1 Dev. & B. L. (20 N. Car.) 276; *Downey v. Murphy*, 1 Dev. & B. L. (20 N. Car.) 82; *Vernon v. Kirk*, 30 Pa. St. 218; *McNinch v. Charles*, 2 Rich. L. (S. Car.) 229. See also *Perera v. Perera*, (1901) A. C. 354; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393; *Matter of Seargrist*, (Surrogate Ct.) 11 Misc. (N. Y.) 188; *Matter of Richardson*, 51 N. Y. App. Div. 637. But see *Gerrish v. Nason*, 22 Me. 438.

7. **When Testator Must Be Informed of Contents of Will — England.** — *In re Axford*, 1 Sw. & Tr. 540; *Barton v. Robins*, 3 Phill. Ecc. 455, note b.

*United States.* — *Harrison v. Rowan*, 3 Wash. (U. S.) 580.

*Georgia.* — *Martin v. Mitchell*, 28 Ga. 382.

*Iowa.* — See *Scott v. Hawk*, 107 Iowa 723.

*Maryland.* — *Wampler v. Wampler*, 9 Md. 540.

*Massachusetts.* — *Worthington v. Klemm*, 144 Mass. 167.

*New Jersey.* — *Day v. Day*, 3 N. J. Eq. 549.

*New York.* — *Van Pelt v. Van Pelt*, 30 Barb. (N. Y.) 134. See also *Matter of Bull*, 111 N. Y. 624.

*Pennsylvania.* — *Harding v. Harding*, 18 Pa. St. 340. But see *Hoshauer v. Hoshauer*, 26 Pa. St. 404.

*Compare Guthrie v. Price*, 23 Ark. 396.

**In England** while the general rule of law is that a competent testator to whom a will is read over is to be held to have approved its contents, the door is still open to the tribunal before whom the consideration of the document may come to find as a fact that the will was not read over in the proper way. *Garnett-Botfield v. Garnett-Botfield*, (1901) P. 335.

**In New York** it has been held that reading the will to the testator before execution, in the presence of subscribing witnesses, fulfils the requirements of the local statute. *Moore v. Moore*, 2 Bradf. (N. Y.) 261.

**In Georgia and Maryland** the will need not be read in the presence of the witnesses. *Martin v. Mitchell*, 28 Ga. 382; *Wampler v. Wampler*, 9 Md. 540.

**Where a Testator Is of Doubtful Capacity** his knowledge of the contents of his will will not be presumed from the fact of execution. Additional and more direct proof is necessary. *McNinch v. Charles*, 2 Rich. L. (S. Car.) 229.

**A First Draft of a Will Being Read to the testator** it is immaterial that the copy thereof which she signs is not so read. *Beyer v. Hermann*, 173 Mo. 295.

that he understands the provisions thereof, and that they are in accordance with his wishes, it sufficiently appears that he has knowledge of the contents of the will.<sup>1</sup>

c. PUBLICATION. — Publication is the formal declaration or acknowledgment by the testator, in the presence of the subscribing witnesses, at the time of subscription, that the instrument they are called upon to attest is his last will and testament, and is only necessary when expressly required by statute.<sup>2</sup> Publication differs from acknowledgment in that it is not merely a substitute for signing in the presence of attesting witnesses, but accompanies the final execution of the will under all circumstances.<sup>3</sup>

**Manner of Publication.** — Where the statute requires publication, the testator must in some way communicate, by words, signs, or conduct, to the attesting witnesses, at the time they are called upon to subscribe as witnesses, that the instrument they are to attest is his last will and testament and is so recognized by him.<sup>4</sup> If publication is made by word of mouth, no particular form of

**1. Sufficient Proof of Testator's Knowledge.** — *Idwards v. Fincham*, 4 Moo. P. C. 198; *O'Brien v. Spalding*, 102 Ga. 490; *Hess's Appeal*, 43 Pa. St. 73; *Boyd v. Cook*, 3 Leigh (Va.) 32. See also *Crumb's Will*, 6 Dem. (N. Y.) 478; *King v. Kingsey*, 74 N. Car. 261.

**2. Publication Unnecessary in Absence of Statute** — *England*. — *Bond v. Seawell*, 3 Burr. 1775; *Moodie v. Reid*, 7 Taunt. 355, 2 E. C. L. 355. *Connecticut*. — *Canada's Appeal*, 47 Conn. 450.

*District of Columbia*. — See *In re Porter*, 20 D. C. 493.

*Georgia*. — *Huff v. Huff*, 41 Ga. 696.

*Indiana*. — *Brown v. McAlister*, 34 Ind. 375. See also *Turner v. Cook*, 36 Ind. 129.

*Iowa*. — *Matter of Hulse*, 52 Iowa 662; *Scott v. Hawk*, 107 Iowa 723.

*Kentucky*. — *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 71.

*Louisiana*. — As to the statutory requirements in Louisiana in regard to publication, see *supra*, this title, *Definition and Classification* — *Classification* — *Written Wills* — *Louisiana Testaments*.

*Maine*. — *Cilley v. Cilley*, 34 Me. 162.

*Massachusetts*. — *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155.

*Mississippi*. — *Watson v. Pipes*, 32 Miss. 451.

*Pennsylvania*. — *Kisecker's Estate*, 190 Pa. St. 476.

*South Carolina*. — *Black v. Ellis*, 3 Hill L. (S. Car.) 68; *Verdier v. Verdier*, 8 Rich. L. (S. Car.) 135.

*Vermont*. — *Adams v. Field*, 21 Vt. 256; *Dean v. Dean*, 27 Vt. 746.

*Virginia*. — See *Beane v. Yerby*, 12 Gratt. (Va.) 239.

*Wisconsin*. — *Allen v. Griffin*, 69 Wis. 529. See also *Meurer's Will*, 44 Wis. 392.

**3. Publication Distinguished from Acknowledgment.** — *Fusilier's Estate*, Myr. Prob. (Cal.) 40; *Den v. Mitton*, 12 N. J. L. 70; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Heyer v. Burger, Hoffm.* (N. Y.) 1; *In re Simmons*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 352.

**4. What Constitutes Publication under the Statute** — *Arkansas*. — *Rogers v. Diamond*, 13 Ark. 474.

*Illinois*. — *Harrington v. Stees*, 82 Ill. 50.

*Kentucky*. — *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102.

*Massachusetts*. — *Hogan v. Grosvenor*, 10 Met. (Mass.) 54, 43 Am. Dec. 414.

*New Jersey*. — *Matter of Maxwell*, 8 N. J. Eq. 251; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Turnure v. Turnure*, 35 N. J. Eq. 439; *Ludlow v. Ludlow*, 35 N. J. Eq. 480, 36 N. J. Eq. 597; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Darnell v. Buzby*, 50 N. J. Eq. 725; *Robbins v. Robbins*, 50 N. J. Eq. 742; *Hildreth v. Marshall*, 51 N. J. Eq. 241; *Clark v. Clark*, 64 N. J. Eq. 361; *Den v. Mitton*, 12 N. J. L. 70.

*New York*. — *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251, 8 Paige (N. Y.) 488; *Seymour v. Van Wyck*, 6 N. Y. 120; *Lewis v. Lewis*, 11 N. Y. 220; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125; *Thompson v. Stevens*, 62 N. Y. 634; *Lane v. Lane*, 95 N. Y. 494; *Matter of Beckett*, 103 N. Y. 167; *Matter of Hunt*, 110 N. Y. 278; *Doe v. Roe*, 2 Barb. (N. Y.) 200; *Seguine v. Seguine*, 2 Barb. (N. Y.) 385; *Whitbeck v. Patterson*, 10 Barb. (N. Y.) 608; *Torry v. Bowen*, 15 Barb. (N. Y.) 304; *Burritt v. Silliman*, 16 Barb. (N. Y.) 198; *Nipper v. Groesbeck*, 22 Barb. (N. Y.) 670; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Abbey v. Christy*, 49 Barb. (N. Y.) 276; *Auburn Theological Seminary v. Calhoun*, 62 Barb. (N. Y.) 381; *Belding v. Leichardt*, 2 Thomp. & C. (N. Y.) 52; *Bagley v. Blackman*, 2 Lans. (N. Y.) 41; *Thompson v. Leastedt*, 3 Hun (N. Y.) 395; *Darling v. Arthur*, 22 Hun (N. Y.) 84; *Matter of Dale*, 56 Hun (N. Y.) 169; *Matter of Barber*, 92 Hun (N. Y.) 489; *Heyer v. Burger, Hoffm.* (N. Y.) 1; *Brown v. De Selding*, 4 Sandf. (N. Y.) 10; *Ex p. Beers*, 2 Bradf. (N. Y.) 163; *Carle v. Underhill*, 3 Bradf. (N. Y.) 101; *Rieben v. Hicks*, 3 Bradf. (N. Y.) 353; *Tunison v. Tunison*, 4 Bradf. (N. Y.) 138; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226; *Harris's Will*, Tuck. (N. Y.) 293; *Rutherford v. Rutherford*, 1 Den. (N. Y.) 33, 43 Am. Dec. 644; *Porteus v. Holm*, 4 Dem. (N. Y.) 14; *Hunn v. Case*, 1 Redf. (N. Y.) 307; *Van Hooser v. Van Hooser*, 1 Redf. (N. Y.) 365; *Von Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Hollenbeck v. Van Valkenburgh*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 281; *In re McKenna*, (Surrogate Ct.) 4 N. Y. Supp. 458.

*North Carolina*. — *Eelbeck v. Granberry*, 2 Hayw. (3 N. Car.) 232, 2 Am. Dec. 624.



words is necessary.<sup>1</sup> Thus, the testator may merely be asked if the instrument is his will, and if he answers in the affirmative it is a sufficient declaration.<sup>2</sup>

**Time of Publication.** — Whether the will was published before or after the subscribing witnesses signed it, is immaterial, provided publication and subscription occur upon the same occasion.<sup>3</sup>

**Proof of Publication.** — Publication may be established by the testimony of one attesting witness in opposition to the other, the presumption being in its favor;<sup>4</sup> and the failure of the witnesses to remember whether publication was made or not will not defeat the will when the attestation clause recites the fact.<sup>5</sup>

**Pleading.** — In *New Jersey* it has been held essential to good pleading to aver that the will was duly published by the testator in the presence of the required number of witnesses, although the contrary appears to have been the practice in *England*.<sup>6</sup>

**d. ACKNOWLEDGMENT.** — In *England*, before the passage of 1 Vict., c. 26, § 9, subscribing witnesses were unnecessary to the validity of wills of personality.<sup>7</sup> In regard to devises of realty, the statute of frauds required that a will of lands should be signed by the devisor, or by some other person in his presence and by his express direction, and attested and subscribed in his presence by three or four credible witnesses.<sup>8</sup> Under this provision it was

*Pennsylvania.* — *Loy v. Kennedy*, 1 W. & S. (Pa.) 399.

*Vermont.* — *Denny v. Pinney*, 60 Vt. 524.

**Olographic Wills.** — As to the measure of statutory compliance necessary to the due publication of olographic wills, see *supra*, this title, *Definition and Classification* — *Classification* — *Written Wills* — *Olographic Wills*.

**The Declaration May Be Made to the Attesting Witnesses Separately.** — *Barry v. Brown*, 2 Dem. (N. Y.) 309; *Hoysradt v. Kingman*, 22 N. Y. 372.

**Declaration by Scrivener.** — The statement, "This is the will of A B and he desires you to witness it," made by the scrivener in the presence of the testator, to a witness, has been held sufficient. *Mundy v. Mundy*, 15 N. J. Eq. 290. See also *Harp v. Parr*, 168 Ill. 459; *Elkinton v. Brick*, 44 N. J. Eq. 154.

**1. No Particular Form of Words Necessary** — *California.* — *Matter of Mullin*, 110 Cal. 252.

*New Jersey.* — *Lacey v. Dobbs*, 61 N. J. Eq. 575.

*New York.* — *Matter of Kane*, 2 Connoly (N. Y.) 249; *Matter of Lang*, (Surrogate Ct.) 9 Misc. (N. Y.) 521; *Matter of Menge*, (Surrogate Ct.) 13 Misc. (N. Y.) 553; *Matter of Carey*, (Surrogate Ct.) 14 Misc. (N. Y.) 486; *Matter of Murphy*, (Surrogate Ct.) 15 Misc. (N. Y.) 208; *Matter of Woolsey*, (Surrogate Ct.) 17 Misc. (N. Y.) 547; *Matter of Carll*, (Surrogate Ct.) 38 Misc. (N. Y.) 471; *In re Jones*, (Surrogate Ct.) 85 N. Y. Supp. 294.

*South Carolina.* — *Gable v. Rauch*, 50 S. Car. 95.

**The Words, "Will You Witness My Will?" or, "I Want You to Witness My Will,"** addressed by the decedent to and heard by both the subscribing witnesses, constitute a sufficient acknowledgment, declaration, and rogation. *Harder's Will*, Tuck. (N. Y.) 426.

**"That Is All Right, John, that Is My Will,"** was held a sufficient publication when made in reply to one of the witnesses who asked if the will was all right. *Ayres v. Ayres*, 43 N. J. Eq. 566. See also *Schierbaum v. Schemme*,

157 Mo. 1; *Matter of Murphy*, (Surrogate Ct.) 15 Misc. (N. Y.) 208; *Matter of Buel*, 44 N. Y. App. Div. 4.

**2. Answer to Question.** — *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *Coffin v. Coffin*, 23 N. Y. 15, 80 Am. Dec. 235; *Matter of Voorhis*, 125 N. Y. 765. *Compare* *Larabee v. Ballard*, 1 Dem. (N. Y.) 496; *Matter of Look*, 1 Connoly (N. Y.) 403.

**3. Time of Publication.** — *Doe v. Roe*, 2 Barb. (N. Y.) 200; *Matter of Collins*, 5 Redf. (N. Y.) 20; *Jackson v. Jackson*, 39 N. Y. 153. See also *Walsh v. Laffan*, 2 Dem. (N. Y.) 498; *Vaughan v. Burford*, 3 Bradf. (N. Y.) 78; *Matter of Dale*, 56 Hun (N. Y.) 169; *Gamble v. Gamble*, 39 Barb. (N. Y.) 373.

**4. Publication Established by One Attesting Witness.** — *Matter of Menge*, (Surrogate Ct.) 13 Misc. (N. Y.) 553; *Orser v. Orser*, 24 N. Y. 51; *Auburn Theological Seminary v. Calhoun*, 25 N. Y. 422; *Matter of Cottrell*, 95 N. Y. 329.

**5. Failure of Witnesses to Remember Publication.** — *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251.

**But Where the Attestation Clause Was Not Read to or by the Witnesses**, one of whom did not remember that the character of the instrument was stated, while the other testified positively that the word "will" was not mentioned at the interview, probate was refused for want of due publication, although a third person swore that he asked the decedent, in the witnesses' presence, whether he wished them to witness his "last will and testament," and received an affirmative answer, which conversation, however, was not shown to have been heard by the witnesses. *McCord v. Lounsbury*, 5 Dem. (N. Y.) 68.

**6. Averment of Publication.** — Anonymous, 2 Salk. 519; *Birch v. Bellamy*, 12 Mod. 540; 1 Saund. 276, note; *Morehouse v. Cotheal*, 21 N. J. L. 488.

**7. Wms. on Exrs.** (8th Eng. ed.), pt. 1, bk. 2, c. 2, § 2; *Brett v. Brett*, 3 Add. Ecc. 224.

**8.** 29 Car. II., c. 3, § 5.

held unnecessary for the testator actually to sign the will in the presence of the subscribing witnesses, but that any acknowledgment before them, either of the will<sup>1</sup> or the signature, made their attestation and subscription complete; and furthermore, that a due acknowledgment in fact did not require the use of the words "This is my will," or "This is my signature," or other equivalent expressions, provided the testator's conduct was such as to amount, in common understanding and reasonable construction, to an acknowledgment that the instrument was his will or that the signature was his, although the witnesses did not see the signature and were not aware of the nature of the instrument.<sup>2</sup> The fact that the attestation clause distinctly sets forth that the instrument is the testator's will has been held in itself a sufficient acknowledgment, although the witnesses did not see the signature, and were not otherwise informed as to the nature of the instrument.<sup>3</sup> Under the statute of 1 Vict., c. 26, § 9, which provides that "the signature shall be made or acknowledged by the testator," it has been held that there is no sufficient acknowledgment unless the witnesses either see or are able to see the signature,<sup>4</sup> although the testator expressly declares that the paper to be attested by them is his will.<sup>5</sup> Whether the witnesses either actually saw the signature or had the opportunity of seeing it, is to be determined by the court from the circumstances of the particular case, in the absence of positive evidence one way or the other.<sup>6</sup> But where the testator produces the will with his signature on the face of it visibly apparent to the witnesses, and requests them to subscribe it, an express acknowledgment of the signature itself is unnecessary.<sup>7</sup>

In the United States, acknowledgment is the generally recognized substitute for signing in the presence of the witnesses;<sup>8</sup> and where the will is signed by

**1. Acknowledgment of Will Sufficient.** — *Ellis v. Smith*, 1 Ves. Jr. 11; *Addy v. Grix*, 8 Ves. Jr. 504; *Morison v. Tournour*, 18 Ves. Jr. 175.

**2. Sufficiency of Acknowledgment.** — *White v. British Museum*, 6 Bing. 310, 19 E. C. L. 91. See also *Johnson v. Johnson*, 1 Crompt. & M. 140; *Wright v. Wright*, 7 Bing. 457, 20 E. C. L. 197; *In re Porter*, 20 D. C. 493; *Hall v. Hall*, 17 Pick. (Mass.) 373; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Buckhout v. Fisher*, 4 Dem. (N. Y.) 277; *Raudebough v. Shelley*, 6 Ohio St. 307; *Dudley v. Dudley*, 3 Leigh (Va.) 436.

**3. Attestation Clause a Sufficient Acknowledgment.** — *Eelbeck v. Granberry*, 2 Hayw. (3 N. Car.) 232, 2 Am. Dec. 624. But see *Matter of Van Geison*, 47 Hun (N. Y.) 5, criticised in *Matter of Graham*, (Supm. Ct. Gen. T.) 30 N. Y. St. Rep. 292.

**4. Witnesses Must See Signature.** — *In re Harrison*, 2 Curt. Ecc. 863; *Ilott v. Genge*, 3 Curt. Ecc. 160, 4 Moo. P. C. C. 265; *Goods of Swinford*, L. R. 1 P. & D. 631; *Pearson v. Pearson*, L. R. 2 P. & D. 451; *Morrill v. Douglas*, L. R. 3 P. & D. 1.

**5. Declaration of Testator Insufficient.** — *Jarm. on Wills* (5th ed.) 108; *Hudson v. Parker*, 1 Rob. Ecc. 14, 8 Jur. 786; *Shaw v. Neville*, 1 Jur. N. S. 408; *Goods of Gunstan*, 7 P. D. 102. But see *Beckett v. Howe*, L. R. 2 P. & D. 1.

**6. Whether Witnesses Saw Signature a Question for the Court.** — *Goods of Huckvale*, L. R. 1 P. & D. 375; *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Goods of Gunstan*, 7 P. D. 102; *Cooper v. Bockett*, 4 Moo. P. C. 419. Compare *Goods of Archer*, L. R. 2 P. & D. 252; *Goods of Hammond*, 3 Sw. & Tr. 90.

**7. Express Acknowledgment of Visibly Apparent**

**Signature Unnecessary.** — *Goods of Huckvale*, L. R. 1 P. & D. 378; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172; *Goods of Jones*, 1 Jur. N. S. 1096; *In re Dinmore*, 2 Rob. Ecc. 641; *In re Bosanquet*, 2 Rob. Ecc. 577; *Gaze v. Gaze*, 3 Curt. Ecc. 451; *Blake v. Knight*, 3 Curt. Ecc. 547; *Keigwin v. Keigwin*, 3 Curt. Ecc. 607, 7 Jur. 840; *In re Davis*, 3 Curt. Ecc. 748; *In re Ashmore*, 3 Curt. Ecc. 756, 7 Jur. 1045; *Gwillim v. Gwillim*, 3 Sw. & Tr. 200, 29 L. J. P. 31; *In re Philpot*, 3 Notes Cas. (Eng.) 2; *Faulds v. Jackson*, 6 Notes Cas. Sup. (Eng.) 1; *Daintree v. Fasulo*, 13 P. 102. But see *Morrill v. Douglas*, L. R. 3 P. & D. 1.

**8. Acknowledgment as Substitute for Signing Before Witnesses.** — See the statutes of the various states. See also the following cases: *Arkansas*. — *Abraham v. Wilkins*, 17 Ark. 292.

*California*. — *Crittenden's Estate*, Myr. Prob. (Cal.) 50; *Taney's Estate*, Myr. Prob. (Cal.) 210.

*Connecticut*. — *Canada's Appeal*, 47 Conn. 450.

*Delaware*. — *Sutton v. Sutton*, 5 Harr. (Del.) 459.

*Georgia*. — *Beall v. Mann*, 5 Ga. 456; *Gaither v. Gaither*, 20 Ga. 709; *Webb v. Fleming*, 30 Ga. 80, 76 Am. Dec. 675.

*Illinois*. — *Rigg v. Wilton*, 13 Ill. 15; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Holloway v. Galloway*, 51 Ill. 159; *Yoe v. McCord*, 74 Ill. 33; *Crowley v. Crowley*, 80 Ill. 469.

*Indiana*. — *Reed v. Watson*, 27 Ind. 443.

*Iowa*. — *Matter of Convey*, 52 Iowa 197.

*Kentucky*. — *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Sechrest v. Edwards*, 4 Met. (Ky.) 163.

another than the testator, it has been held unnecessary that the testator should state in his acknowledgment that the other person signed the instrument at his request.<sup>1</sup> In some states, in which the local statute is framed upon the statute of frauds, the English decisions under that act are of authority, and it has been held that the validity of the acknowledgment will depend upon the conduct of the testator rather than his language, and that anything which amounts in common understanding and reasonable construction to an acknowledgment that the instrument is his will or the signature is his is sufficient, although the witnesses did not know what the paper was and did not see the signature.<sup>2</sup> Thus, where the testator produces his will for attestation with his name upon it, and requests the witnesses to sign, there is a sufficient acknowledgment.<sup>3</sup> In *New York*, where the statute requires subscription in the presence of the attesting witnesses "or an acknowledgment of the making of the same to them," it has been held, in analogy to the English decisions, under the statute of Victoria, that the witness must either see or have the opportunity of seeing the signature,<sup>4</sup> but that when a testator produces a paper to which he has personally affixed his

*Maryland*.—*Stirling v. Stirling*, 64 Md. 144.  
*Massachusetts*.—*Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Ela v. Edwards*, 16 Gray (Mass.) 91.

*Missouri*.—*Cravens v. Faulconer*, 28 Mo. 19.  
*New Hampshire*.—*Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521.

*New Jersey*.—*Combs v. Jolly*, 3 N. J. Eq. 625; *Matter of McElwaine*, 18 N. J. Eq. 449; *Matter of Alpaugh*, 23 N. J. Eq. 507; *Ludlow v. Ludlow*, 35 N. J. Eq. 480; *Den v. Mitton*, 12 N. J. L. 70; *Mickle v. Matlack*, 17 N. J. L. 86; *In re Coles*, (N. J. 1900) 47 Atl. Rep. 385.

*New York*.—*Butler v. Benson*, 1 Barb. (N. Y.) 526; *Robins v. Coryell*, 27 Barb. (N. Y.) 556; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Baker v. Woodbridge*, 66 Barb. (N. Y.) 261; *Matter of Abercrombie*, 24 N. Y. App. Div. 407; *Merchant's Will, Tuck*, (N. Y.) 151; *Van Hooser v. Van Hooser*, 1 Redf. (N. Y.) 365; *Matter of Simon*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 352.

*North Carolina*.—*Eelbeck v. Granberry*, 2 Hayw. (N. Car.) 232, 2 Am. Dec. 624.

*Ohio*.—*Keyl v. Feuchter*, 56 Ohio St. 424.  
*Pennsylvania*.—*Vernon v. Kirk*, 30 Pa. St. 218.

*Vermont*.—*Adams v. Field*, 21 Vt. 256; *Roberts v. Welch*, 46 Vt. 164.

*Virginia*.—*Beane v. Yerby*, 12 Gratt. (Va.) 239; *Parramore v. Taylor*, 11 Gratt. (Va.) 220, 52 Am. Dec. 97.

*Wisconsin*.—*Allen v. Griffin*, 69 Wis. 529.

**1. Acknowledgment Where Signature Is by Other than Testator.**—*Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579. See also *Matter of Merchant, Tuck*, (N. Y.) 151; *Rosser v. Franklin*, 6 Gratt. (Va.) 1, 52 Am. Dec. 97.

**2. Rule under Statute of Frauds Followed—Alabama.**—See *Leverett v. Carlisle*, 19 Ala. 80.

*Connecticut*.—*Canada's Appeal*, 47 Conn. 450.

*Illinois*.—*Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

*Indiana*.—*Turner v. Cook*, 36 Ind. 129.

*Kentucky*.—*Flood v. Pragoff*, 79 Ky. 607.

*Massachusetts*.—*Hogan v. Grosvernor*, 10

Met. (Mass.) 56, 43 Am. Dec. 414; *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Ela v. Edwards*, 16 Gray (Mass.) 92. See *Nickerson v. Buck*, 12 Cush. (Mass.) 332.

*Missouri*.—See *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Grimm v. Tittman*, 113 Mo. 56.

*Ohio*.—*Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579. See *Raudebaugh v. Shelley*, 6 Ohio St. 307.

*Wisconsin*.—*Allen v. Griffin*, 69 Wis. 529.

**3. Request to Sign Sufficient.**—*Ray v. Walton*, 2 A. K. Marsh. (Ky.) 74; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Small v. Small*, 4 Me. 220, 16 Am. Dec. 253; *Higgins v. Carlton*, 28 Md. 117, 92 Am. Dec. 666; *Nickerson v. Buck*, 12 Cush. (Mass.) 342; *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230; *Eelbeck v. Granberry*, 2 Hayw. (3 N. Car.) 232; *Green v. Crain*, 12 Gratt. (Va.) 252. And see *Luper v. Werts*, 19 Oregon 122.

In *South Carolina* it has been held that where the will was attested by the three subscribing witnesses at different times, one of whom attested in the presence but not very near the testatrix, and did not see her sign the will, nor hear her acknowledge her signature, the will was not proved. *Tucker v. Oxner*, 12 Rich. L. (S. Car.) 141.

**4. Rule in New York.**—*Lewis v. Lewis*, 11 N. Y. 220; *Matter of MacKay*, 110 N. Y. 611; *Matter of Eakins*, (Surrogate Ct.) 13 Misc. (N. Y.) 557; *Mitchell v. Mitchell*, 16 Hun (N. Y.) 97, affirmed 77 N. Y. 596; *Baskin v. Baskin*, 36 N. Y. 416; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

It is sufficient that the witnesses could have seen the signature. *Matter of Carll*, (Surrogate Ct.) 38 Misc. (N. Y.) 471.

There is not a sufficient acknowledgment where the testator studiously and persistently prevents the witnesses from seeing what is written. The irresistible conclusion in such a case is that neither witness sees the signature so as to read it, or be able to identify it, or to say it was or purported to be a signature at all. *Matter of Laudy*, 14 N. Y. App. Div. 160.

**When the Witnesses Forget the Fact of Ac-**



signature, plainly apparent, requests the witnesses to attest it, and declares it to be his last will and testament, this is a substantial compliance with the requirements of the statute.<sup>1</sup> In *New Jersey*, where there is a statutory provision similar to that of New York, the rule of construction adopted in the latter state has been approved.<sup>2</sup>

*e. SEALING.* — Sealing, except where a statute expressly so provides,<sup>3</sup> is unnecessary to the validity of a will,<sup>4</sup> unless the will is executed by virtue of a power requiring such paper to be under hand and seal, in which case it is essential to a valid execution of the power.<sup>5</sup> The presence of a seal does not cure the want of a signature by the testator,<sup>6</sup> or of subscription by the witnesses.<sup>7</sup>

*f. DATE.* — Where the statute does not require wills to be dated, an undated will is valid.<sup>8</sup>

*g. COMPLETION.* — In order to be valid a will must be completed during the life of the testator.<sup>9</sup>

The Presumption Against a Will Arising from Its Incompleteness is not removed by showing that it could not have been easily or conveniently made complete.<sup>10</sup>

*Evidence of Completion.* — Where it is conclusively shown that a will was signed and executed by the testatrix, and attested by witnesses, in the mode prescribed by law, this is, in law, conclusive evidence of the fact that it was completed to the satisfaction of such testator.<sup>11</sup>

*h. ATTESTATION AND SUBSCRIPTION* — (1) *Distinguished.* — Attestation consists in the act of witnessing the performance of the statutory requirements to valid execution. Subscription is the signing of the witnesses' names upon the same paper, for the sole purpose of identification, and implies that attestation has been performed. The one is mental, the other mechanical; there may be perfect attestation without subscription.<sup>12</sup>

(2) *In the Absence of Legislation.* — In the absence of legislation, attestation and subscription are unnecessary.<sup>13</sup>

**knowledge** such acknowledgment may be proven by the draftsman. *Matter of Langtry*, 1 Silv. Sup. (N. Y.) 524.

**1. Substantial Compliance with Statute.** — *Baskin v. Baskin*, 36 N. Y. 416; *Matter of Austin*, 45 Hun (N. Y.) 1; *Gilbert v. Knox*, 52 N. Y. 125; *Matter of Look*, 4 Silv. Sup. (N. Y.) 233. Compare *Matter of Van Geison*, 47 Hun (N. Y.) 5; *In re Trenor*, (Surrogate Ct.) 4 N. Y. Supp. 466; *In re Simmons*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 352.

**2. Rule in New Jersey.** — *Ludlow v. Ludlow*, 35 N. J. Eq. 489; *Stewart v. Stewart*, 56 N. J. Eq. 761. See also *Booth v. Timoney*, 3 Dem. (N. Y.) 416, 2 Silv. Sup. (N. Y.) 213, construing the New Jersey statute.

**3.** See the various statutes.

**4. Sealing Unnecessary.** — *Doe v. Pattison*, 2 Blackf. (Ind.) 355; *Ketchum v. Stearns*, 8 Mo. App. 66; *Pollock v. Glassell*, 2 Gratt. (Va.) 452. See also *Smith v. Evans*, 1 Wils. C. Pl. 313; *Wright v. Wakeford*, 17 Ves. Jr. 454; *Platt v. McCullough*, 1 McLean (U. S.) 69; *Avery v. Pixley*, 4 Mass. 460; *Williams v. Burnet*, *Wright (Ohio)* 53; *Hight v. Wilson*, 1 Dall. (Pa.) 94; *Rohrer v. Stehman*, 1 Watts (Pa.) 442; *Grubbs v. McDonald*, 91 Pa. St. 236.

**5. Sealing of Will Executed by Virtue of Power.** — *Dormer v. Thurland*, 2 P. Wms. 506. See also *Hight v. Wilson*, 1 Dall. (Pa.) 94; *Arndt v. Arndt*, 1 S. & R. (Pa.) 256; *Pollock v. Glassell*, 2 Gratt. (Va.) 439. And see the title POWERS, vol. 22, p. 1110.

**6. Sealing Is Not Signing.** — *Smith v. Evans*,

1 Wils. C. Pl. 313; *Wright v. Wakeford*, 17 Ves. Jr. 454; *Pollock v. Glassell*, 2 Gratt. (Va.) 452.

**7.** Goods of Byrd, 3 Curt. Ecc. 117.

**Revocation by Tearing Off Seal.** — As to the revocation of a will by the act of tearing off the seal, see *infra*, this title, *Revocation*.

**8. Necessity of Date.** — *Matter of Haviland*, (Surrogate Ct.) 17 Misc. (N. Y.) 193.

**Date May Be Inserted by Beneficiary.** — *Lange v. Wiegand*, 125 Mich. 647.

**9. Completion.** — *Ferris v. Neville*, 127 Mich. 444; *Matter of Fish*, 88 Hun (N. Y.) 56.

**10. Presumption Arising from Incompleteness.** — *Boling v. Boling*, 22 Ala. 826.

**11. Evidence of Completion.** — *Taylor v. Cox*, 153 Ill. 220.

**12. Attestation and Subscription Distinguished.** — *Ricketts v. Loftus*, 4 Y. & C. Exch. 519; *Swift v. Wiley*, 1 B. Mon. (Ky. 117; *Tobin v. Haack*, 79 Minn. 101. See also *Hudson v. Parker*, 1 Rob. Ecc. 14, 8 Jur. 788; *Burdett v. Spilsbury*, 10 Cl. & F. 340; *Freshfield v. Reed*, 9 M. & W. 404; *Gerrish v. Nason*, 22 Me. 441, 39 Am. Dec. 589; *Reed v. Watson*, 27 Ind. 448.

**13. Attestation and Subscription Unnecessary in Absence of Legislation** — *England.* — *Allen v. Hill*, Gilb. Eq. 260; *Limbery v. Mason*, 2 Comyns 452; *Brett v. Brett*, 3 Add. Ecc. 224.

*Alabama.* — *McGrews v. McGrews* 1 Stew. & P. (Ala.) 30; *Hilliard v. Binford*, 10 Ala. 977; *Ex p. Henry*, 24 Ala. 638.

*Connecticut.* — See *Lake v. Warner*, 34 Conn. 487.

(3) *Effect of Legislation.* — Under the statute of frauds, a will of lands was required to be "attested and subscribed" in the presence of the deviser by "three or four credible witnesses."<sup>1</sup> The statute of Victoria extended the same rule to wills of personalty by providing that no will made on or after January 1, 1838, should be valid unless the signature be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time," who are to attest and subscribe the will "in the presence of the testator."<sup>2</sup> In nearly all of the United States, statutes exist requiring wills of either real or personal property to be attested and subscribed by witnesses. These statutes differ slightly from each other as to the number of witnesses required and as to other matters of detail, but, in general, the majority of the acts may be said to be framed upon the model of the statute of frauds rather than the statute of Victoria.<sup>3</sup>

The Number of Witnesses Necessary to Prove the Will may, in the absence of special statutory requirement, be less than the number required to subscribe the instrument.<sup>4</sup>

*District of Columbia.* — McIntire v. McIntire, 19 D. C. 482.

*Georgia.* — Mealing v. Pace, 14 Ga. 596.

*Maine.* — Leathers v. Greenacre, 53 Me. 561.

*Maryland.* — See Plater v. Groome, 3 Md. 142.

*Michigan.* — High, Appellant, 2 Dougl. (Mich.) 515.

*New Hampshire.* — Marston v. Marston, 17 N. H. 503.

*Pennsylvania.* — Rohrer v. Stehman, 1 Watts (Pa.) 463; Frew v. Clarke, 80 Pa. St. 170.

*South Carolina.* — Brown v. Shand, 1 McCord L. (S. Car.) 409; McGee v. McCants, 1 McCord L. (S. Car.) 517.

*Tennessee.* — Guthrie v. Owen 2 Humph. (Tenn.) 207, 36 Am. Dec. 311.

*Virginia.* — Parker v. Brown, 6 Gratt. (Va.) 554.

The Witnesses Who Prove the Will need not be those who signed it. Rohrer v. Stehman, 1 Watts (Pa.) 463; Hight v. Wilson, 1 Dall. (Pa.) 94; Arndt v. Arndt, 1 S. & R. (Pa.) 256.

In Kentucky no attesting witnesses are necessary to make a paper in the handwriting of the testator a valid will of both real estate and personalty. Morris v. Morton, (Ky. 1892) 20 S. W. Rep. 287. See also, as to olographic wills generally, *supra*, this title, *Definition and Classification* — *Classification* — *Written Wills* — *Olographic Wills*.

1. 29 Car. II., c. 3, § 5.

2. 1 Vict., c. 26, § 9.

3. *Attestation and Subscription Required Generally in United States.* — See the various statutes. See also the following cases:

*Alabama.* — Woodruff v. Hundley, 127 Ala. 640.

*California.* — Castro v. Castro, 6 Cal. 158.

*Delaware.* — Sutton v. Sutton, 5 Harr. (Del.) 459; Owens v. Bennett, 5 Harr. (Del.) 367.

*Georgia.* — Hooks v. Stamper, 18 Ga. 471.

*Illinois.* — Rigg v. Wilton, 13 Ill. 15; Kelly v. Parker, 181 Ill. 49; Sloan v. Sloan, 184 Ill. 579.

*Indiana.* — Doe v. Pattison, 2 Blackf. (Ind.) 355.

*Iowa.* — Matter of Boyeus, 23 Iowa 354.

*Kansas.* — Clark v. Miller, 65 Kan. 726.

*Maine.* — Murdock v. Bridges, 91 Me. 124.

*Maryland.* — Clayland v. Pearce, 1 Har. & M. (Md.) 29.

*Minnesota.* — Tobin v. Haack, 79 Minn. 101.

*Mississippi.* — Johnson v. Delome Land, etc., Co., 77 Miss. 15.

*Tennessee.* — Rose v. Allen, 1 Coldw. (Tenn.) 23; Davis v. Davis, 6 Lea (Tenn.) 546.

The Mere Presence of the required number is not enough. McCarn v. Rundall, 111 Iowa 406.

In New York it was held that a will executed previously to the revised statutes, although attested by only two witnesses, if the testator died after the statute went into effect, is sufficiently attested as a will of real estate. Lawrence v. Hebbard, 1 Bradf. (N. Y.) 252.

*Pennsylvania.* — In Rossetter v. Simmons, 6 S. & R. (Pa.) 452, it was said: "To institute a valid disposition of real estate by will it is necessary that it should be in writing; put into writing in the testator's lifetime. Signing by the testator, formal publication, attestation by subscribing witnesses, are solemnities not required by our laws, but it must be proved by two witnesses."

In South Carolina it has been held that a will executed in the presence of two subscribing witnesses is not such an execution under the statute as will pass real estate, although the penner of the will was present at the execution; and a codicil executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to the will as to the real estate. Dunlap v. Dunlap, 4 Desaus. (S. Car.) 305.

4. *All Subscribing Witnesses Need Not Be Called at Probate* — *United States.* — Davis v. Mason, 1 Pet. (U. S.) 503. Compare Lewis v. Maris, 1 Dall. (Pa.) 278; Hylton v. Brown, 1 Wash. (U. S.) 298.

*Alabama.* — Woodruff v. Hundley, 127 Ala. 640.

*Connecticut.* — Field's Appeal, 36 Conn. 279.

*Georgia.* — Walker v. Hunter, 17 Ga. 364.

*Iowa.* — Barney v. Chittenden, 2 Greene (Iowa) 165.

*Kentucky.* — Turner v. Turner, 1 Litt. (Ky.) 101; Harper v. Wilson, 2 A. K. Marsh. (Ky.) 465; Lindsay v. McCormack, 2 A. K. Marsh. (Ky.) 229, 12 Am. Dec. 387; Hall v. Sims, 2 J. J. Marsh. (Ky.) 509; Welch v. Welch, 2 T.

Where More than the Required Number Subscribe, one of whom is incompetent, the will is nevertheless valid.<sup>1</sup>

(4) *Effect of Unsigned Attestation Clause Where Subscription Unnecessary.* — The natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed. Even in those jurisdictions wherein subscription is unnecessary the presumption of law is against a testamentary paper with an attestation clause not subscribed by witnesses.<sup>2</sup> The presumption against an instrument so circumstanced is but a slight one, where the instrument is perfect in all other respects, and is overcome by evidence showing an intention that the instrument should operate in its subsisting state or that the testator was prevented by act of God from completing the same.<sup>3</sup>

(5) *Essentiality of Attestation Clause.* — A formal attestation clause, though desirable for many reasons, is nevertheless no part of the will and is not

B. Mon. (Ky.) 83, 15 Am. Dec. 126; Griffith v. Griffith, 5 B. Mon. (Ky.) 511; Overall v. Overall, Litt. Sel. Cas. (Ky.) 501.

Maine. — McKee v. Frost, 46 Me. 239.

Maryland. — Deakins v. Hollis, 7 Gill & J. (Md.) 311.

Mississippi. — Kirk v. State, 13 Smed. & M. (Miss.) 406; Crusoe v. Butler, 36 Miss. 150. Compare Evans v. Evans, 10 Smed. & M. (Miss.) 402.

Missouri. — Graham v. O'Fallon, 3 Mo. 507.

New Jersey. — Jackson v. Vandyke, 1 N. J. L. 32; Whitenack v. Stryker, 2 N. J. Eq. 8; Bailey v. Stiles, 2 N. J. Eq. 220; Compton v. Mitton, 12 N. J. L. 70; Wyckoff v. Wyckoff, 16 N. J. Eq. 401; Den v. Matlack, 17 N. J. L. 86.

New York. — Jackson v. Thompson, 6 Cow. (N. Y.) 178. Compare Jackson v. Vickory, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522.

North Carolina. — Harrison v. Burgess, 1 Hawks (8 N. Car.) 384; Brown v. Beaver, 3 Jones L. (48 N. Car.) 516, 67 Am. Dec. 255; Harven v. Springs, 10 Ired. L. (32 N. Car.) 180.

Pennsylvania. — Hight v. Wilson, 1 Dall. (Pa.) 94.

South Carolina. — Watkins v. Watkins, 13 Rich. L. (S. Car.) 66.

Virginia. — Lambert v. Cooper, 29 Gratt. (Va.) 61.

The Practice of the Ecclesiastical Court was to require at least two witnesses to prove a will of personalty. Wms. on Exrs. (8th ed.), pt. 1, bk. 2, c. 2, § 2.

In Massachusetts the testimony of one of the subscribing witnesses is sufficient to justify probate, if it appears to the satisfaction of the court that no one interested in the estate objects. But in the case of a contest, all those required by the statute to subscribe must be produced. Chase v. Lincoln, 3 Mass. 236.

In New York two credible witnesses are required to prove the provisions of a will. Matter of Purdy, (Surrogate Ct.) 25 Misc. (N. Y.) 458.

In Pennsylvania the will must be proved by two witnesses, under the Act of April 8, 1833. Rossetter v. Simmons, 6 S. & R. (Pa.) 452. See also Weigel v. Weigel, 5 Watts (Pa.) 486; Hock v. Hock, 6 S. & R. (Pa.) 47.

In Tennessee, if there be no contest, one subscribing witness is sufficient to prove a will. Rogers v. Winton, 2 Humph. (Tenn.) 178.

In Virginia, before the statute of 1834-35, a testament of personal estate might be well proved by a single witness. Worsham v. Worsham, 5 Leigh (Va.) 589.

1. *Subscription by More than Required Number.* — Ackless v. Seekright, 1 Ill. 76. See also Carroll v. Norton, 3 Bradf. (N. Y.) 291; Scattergood v. Kirk, 192 Pa. St. 263.

2. *Effect of Unsigned Attestation Clause.* — Beaty v. Beaty, 1 Add. Ecc. 154; Walker v. Walker, 1 Meriv. 503; Scott v. Rhodes, 1 Phill. Ecc. 19; Harris v. Bedford, 2 Phill. Ecc. 177; Matthews v. Warner, 4 Ves. Jr. 186; Plater v. Groome, 3 Md. 134; Brown v. Tilden, 5 Har. & J. (Md.) 371; Barnes v. Syester, 14 Md. 509; Devecmon v. Devecmon, 43 Md. 335; Watts v. Public Administrator, 4 Wend. (N. Y.) 168. See also Jekyll v. Jekyll, 1 Lee Ecc. 419.

*Olographic Wills.* — The principle in the text has been held not to apply to olographic wills. Hill v. Eell, Phil. L. (61 N. Car.) 122; Harrison v. Burgess, 1 Hawks (8 N. Car.) 384; Brown v. Beaver, 3 Jones L. (48 N. Car.) 516, 67 Am. Dec. 255; Perkins v. Jones, 84 Va. 361. *Contra*, Power v. Davis, 3 MacArthur (D. C.) 162. And see *supra*, this title, *Definition and Classification* — *Classification* — *Written Wills* — *Olographic Wills*.

If the Attestation Clause Is Signed by One Witness, the presumption does not arise. Matter of Soher, 78 Cal. 477.

3. *Presumption Easily Overcome.* — Beaty v. Beaty, 1 Add. Ecc. 154; Goods of Jerram, 1 Hag. Ecc. 550; Goods of Thomas, 1 Hag. Ecc. 695; Goods of Edmonds, 1 Hag. Ecc. 698; Stewart v. Stewart, 2 Moo. P. C. 193; Buckle v. Buckle, 3 Phill. Ecc. 323; Bragge v. Dyer, 3 Hag. Ecc. 207; Bateman v. Pennington, 3 Moo. P. C. 223; Harris v. Bedford, 2 Phill. Ecc. 178; Barnes v. Syester, 14 Md. 507; Watts v. Public Administrator, 4 Wend. (N. Y.) 168.

Any Recognition by the testator will suffice to overcome the presumption. Goods of Jerram, 1 Hag. Ecc. 550; Goods of Vanhagen, 1 Hag. Ecc. 478; Goods of Sparrow, 1 Hag. Ecc. 479.



required as a part of its due execution.<sup>1</sup> The witnesses may write their names opposite or after the word "attest" or "witness," or other words of similar meaning; or, in fact, it will suffice if they merely write their names without any accompanying expression whatever.<sup>2</sup>

(6) *Attestation Clause Following or Preceding Signature.* — When the attestation clause follows the signature, it cannot be taken as a part of the will; but if inserted before the signature, it becomes a part of the instrument.<sup>3</sup>

(7) *Value of Attestation Clause as Evidence.* — In case of the death of the subscribing witnesses, the attestation clause becomes *prima facie* evidence that the will was executed with the formalities therein recited;<sup>4</sup> while in case of a contest it is very persuasive evidence that whoever directed the execution understood what formalities were needful and saw them observed.<sup>5</sup> The clause also serves as a useful memorandum to aid the subscribing witnesses in recalling what occurred at the time of execution.<sup>6</sup> A regular clause shown to have been signed by the witnesses, and corroborated by the circumstances surrounding the execution or other competent evidence, has been held sufficient to establish the execution of a will duly signed by the testator, even against the positive testimony of the subscribing witnesses.<sup>7</sup> But the formal

**The Fact that the Testamentary Paper Was Found Sealed up** at the death of the testator, in such a way as to indicate that he did not intend to open it again, has been held sufficient to overcome the presumption against the instrument. *Buckle v. Buckle*, 3 Phill. Ecc. 323.

1. **Attestation Clause Not Essential.** — *Roberts v. Phillips*, 4 El. & Bl. 450, 82 E. C. L. 450; *Bryan v. White*, 5 Eng. L. & Eq. 579; *Matter of Hull*, 117 Iowa 738; *Ela v. Edwards*, 16 Gray (Mass.) 97; *Fatheree v. Lawrence*, 33 Miss. 585; *Leaycraft v. Simmons*, 3 Bradf. (N. Y.) 35; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; *Baskin v. Baskin*, 36 N. Y. 416; *Jackson v. Jackson*, 39 N. Y. 153; *Matter of Crane*, 68 N. Y. App. Div. 355; *Matter of Cornell*, 89 N. Y. App. Div. 412; *Matter of Palmer*, (Surrogate Ct.) 42 Misc. (N. Y.) 469.

2. **Subscription Sufficient Without Attestation Clause** — *England.* — *Croft v. Pawlet*, 2 Stra. 1109; *Roberts v. Phillips*, 4 El. & Bl. 450, 82 E. C. L. 450; *Bryan v. White*, 5 Eng. L. & Eq. 579; *Brice v. Smith*, Willes 1; *Hands v. James*, Comyns 531.

*Illinois.* — *Robinson v. Brewster*, 140 Ill. 649.

*Indiana.* — *Potts v. Felton*, 70 Ind. 166; *Herbert v. Berrier*, 81 Ind. 1; *Olerick v. Ross*, 146 Ind. 282.

*Massachusetts.* — *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Ela v. Edwards*, 16 Gray (Mass.) 91.

*Mississippi.* — *Fatheree v. Lawrence*, 33 Miss. 585.

*Missouri.* — *Berberet v. Berberet*, 131 Mo. 399.

*Nebraska.* — *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705, 96 N. W. Rep. 151.

*New Jersey.* — *Allaire v. Allaire*, 37 N. J. L. 312; *Waddington v. Buzby*, 45 N. J. Eq. 173.

*New York.* — *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Jackson v. Jackson*, 39 N. Y. 153; *Matter of Akers*, 74 N. Y. App. Div. 461, affirmed 173 N. Y. 620. See also *Taylor v. Brodhead*, 5 Redf. (N. Y.) 624.

*Rhode Island.* — *In re Fry*, 2 R. I. 88.

3. *Jackson v. Jackson*, 39 N. Y. 153; *Younger v. Duffie*, 94 N. Y. 540, 46 Am. Rep. 156.

4. **Attestation Clause Prima Facie Evidence** — *United States.* — *Blake v. Knight*, 3 Curt. Ecc. 547.

*Georgia.* — *Deupree v. Deupree*, 45 Ga. 415; *Underwood v. Thurman*, 111 Ga. 325.

*Illinois.* — *Thompson v. Owen*, 174 Ill. 229.

*Maine.* — *Barnes v. Barnes*, 66 Me. 286.

*Massachusetts.* — *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Ela v. Edwards*, 16 Gray (Mass.) 97.

*New Jersey.* — *Matter of Alpaugh*, 23 N. J. Eq. 507; *Farley v. Farley*, 50 N. J. Eq. 434.

*New York.* — *Walsh v. Walsh*, 4 Redf. (N. Y.) 165; *Taylor v. Brodhead*, 5 Redf. (N. Y.) 624; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 89, 40 Am. Dec. 225; *Orser v. Orser*, 24 N. Y. 55; *Jackson v. Jackson*, 39 N. Y. 153; *Matter of Hunt*, 42 Hun (N. Y.) 434; *Matter of Kellum*, 52 N. Y. 517; *Rugg v. Rugg*, 83 N. Y. 592; *Matter of Cottrell*, 95 N. Y. 329.

*South Carolina.* — *Welch v. Welch*, 9 Rich. L. (S. Car.) 133.

*Virginia.* — *Clarke v. Dunnavant*, 10 Leigh (Va.) 14.

*Canada.* — *Hill's Estate*, 34 Nova Scotia 494.

**The Presumption of Due Execution May Be Rebutted.** — *Rumsey v. Goldsmith*, 3 Dem. (N. Y.) 494.

In England a well-drawn attestation clause reciting proper formalities enables the executor to obtain probate on his own oath. Wms. on Exrs. 93.

5. **Strong Evidence in Case of Contest.** — *In re Lantry*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 501; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; *Matter of Pepon*, 91 N. Y. 255. See also *Goods of Huckvale*, L. R. 1 P. & D. 375; *Gwillim v. Gwillim*, 3 Sw. & Tr. 200.

6. **Memorandum for Witnesses.** — *Roberts v. Phillips*, 4 El. & Bl. 457, 82 E. C. L. 457; *Chambers v. Queen's Proctor*, 2 Curt. Ecc. 415; *Gove v. Gaven*, 3 Curt. Ecc. 151; *Taylor v. Brodhead*, 5 Redf. (N. Y.) 624; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Matter of Kellum*, 52 N. Y. 519.

7. **Where Attestation Clause Prevails Against**

execution of a will cannot be presumed, in opposition to positive testimony, merely upon the ground that the attestation clause is in due form, and states that all things were done which are required to be done to make the instrument valid as a will.<sup>1</sup> Where the attestation clause is clear and regular, the fact that subscribing witnesses, when called upon to prove the execution of the will, have forgotten the facts recited, is not alone sufficient to overcome the presumption of their truth.<sup>2</sup> So where one of the subscribing witnesses testifies in corroboration of the accuracy of the recitals in the attestation clause, the testimony of the other in suggestion of doubt or of his own want of recollection is not enough to justify the denial of probate.<sup>3</sup>

(8) *Value of Testimony of Subscribing Witnesses.* — The testimony of a subscribing witness in favor of the validity of the will he attested is entitled to peculiar consideration; but his testimony against its validity should be viewed with suspicion.<sup>4</sup> While subscribing witnesses are the most proper to establish the execution of the will, and the failure to call one within reach is a circumstance worthy of consideration, yet, in case of their death, non-residence, failure to remember the circumstances of the execution, or unfavorable testimony, the will may be established by other evidence.<sup>5</sup>

**Testimony of Witnesses.** — Goods of Moore, (1901) P. 44; Leach v. Bates, 6 Notes Cas. (Eng.) 699; Chambers v. Queen's Proctor, 2 Curt. Ecc. 415; Gove v. Gawen, 3 Curt. Ecc. 151; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Matter of Kellum, 52 N. Y. 519; Matter of Cottrell, 95 N. Y. 330.

1. Croft v. Croft, 4 Sw. & Tr. 10; Lewis v. Lewis, 11 N. Y. 220; Woolley v. Woolley, 95 N. Y. 231.

2. **Attestation Clause Prevails as Against Memory of Witnesses** — Georgia. — Underwood v. Thurman, 111 Ga. 325.

Illinois. — Thompson v. Owen, 174 Ill. 229. New Jersey. — Tappen v. Davidson, 27 N. J. Eq. 459; McCurdy v. Neall, 42 N. J. Eq. 333.

New York. — Rolla v. Wright, 2 Dem. (N. Y.) 482; Walsh v. Walsh, 4 Redf. (N. Y.) 165; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Matter of Wright, (Surrogate Ct.) 67 How. Pr. (N. Y.) 117; Brown v. Clark, 77 N. Y. 369; Rugg v. Rugg, 83 N. Y. 592; Matter of Pepono, 91 N. Y. 255.

Wisconsin. — Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591; O'Hagan's Will, 73 Wis. 78.

Compare Webb v. Dye, 18 W. Va. 376.

3. **Conflict in Testimony of Witnesses.** — McCurdy v. Neall, 42 N. J. Eq. 333. See also Wright v. Rogers, L. R. 1 P. & D. 678; Matter of Bedell, 2 Connolly (N. Y.) 328; Matter of Bernsee, 71 Hun (N. Y.) 27.

4. **Value of Testimony of Subscribing Witnesses** — England. — Wright v. Rogers, L. R. 1 P. & D. 678.

Alabama. — Hughes v. Hughes, 31 Ala. 519.

Iowa. — Stephenson v. Stephenson, 62 Iowa 163.

Maryland. — Colvin v. Warford, 20 Md. 357.

Massachusetts. — Needham v. Ide, 5 Pick. (Mass.) 510; Tilden v. Tilden, 13 Gray (Mass.) 110.

Michigan. — Abbott v. Abbott, 41 Mich. 540; Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460.

New York. — Weir v. Fitzgerald, 2 Bradf. (N. Y.) 42; Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; Crispell v. Dubois, 4 Barb. (N. Y.) 393; *In re* Nelson, (Supm. Ct.

Gen. T.) 16 N. Y. Supp. 690; Jackson v. Le-Grange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; *In re* Boardman, (Surrogate Ct.) 20 N. Y. Supp. 60; Orser v. Orser, 24 N. Y. 51; Auburn Theological Seminary v. Calhoun, 38 Barb. (N. Y.) 148; Brown v. Clark, 77 N. Y. 369; Marx v. McGlynn, 88 N. Y. 357; Matter of Higgins, 94 N. Y. 554. See also Matter of Buchan, (Surrogate Ct.) 16 Misc. (N. Y.) 204.

Virginia. — Cheatham v. Hatcher, 30 Gratt. (Va.) 56, 32 Am. Rep. 650.

West Virginia. — Webb v. Dye, 18 W. Va. 376.

**A Subscribing Witness Ought Not to Be Allowed to Testify** that the instrument was executed merely to amuse the testator. Stephenson v. Stephenson, 62 Iowa 163.

5. **Will Established by Evidence Other than That of Witnesses** — United States. — See Hight v. Wilson, 1 Dall. (Pa.) 94.

Indiana. — Stevens v. Leonard, 154 Ind. 67.

Iowa. — Matter of Allison, 104 Iowa 130.

Kentucky. — Howard's Will, 5 T. B. Mon. (Ky.) 199, 17 Am. Dec. 60.

Massachusetts. — Eliot v. Eliot, 10 Allen (Mass.) 357.

Michigan. — Abbott v. Abbott, 41 Mich. 540.

New York. — Cadmus v. Oakley, 2 Dem. (N. Y.) 298; Peebles v. Case, 2 Bradf. (N. Y.) 226; Matter of Kane, 2 Connolly (N. Y.) 249; Reeve v. Crosby, 3 Redf. (N. Y.) 74; Matter of Sanderson, (Surrogate Ct.) 9 Misc. (N. Y.) 574; Lewis v. Lewis, 11 N. Y. 220; Auburn Theological Seminary v. Calhoun, 25 N. Y. 422; Matter of McDougall, 87 Hun (N. Y.) 349. Compare Butler v. Benson, 1 Barb. (N. Y.) 526; Wilson v. Hetterick, 2 Bradf. (N. Y.) 427; Newhouse v. Godwin, 17 Barb. (N. Y.) 236; Graber v. Haaz, 2 Dem. (N. Y.) 216.

Pennsylvania. — Givin v. Green, 10 Phila. (Pa.) 99, 30 Leg. Int. (Pa.) 424.

Tennessee. — Beadles v. Alexander, 9 Baxt. (Tenn.) 604.

Virginia. — Spencer v. Moore, 4 Call (Va.) 423; Cheatham v. Hatcher, 30 Gratt. (Va.) 56, 32 Am. Rep. 650.

**When the Witnesses Do Not Recollect** that the testator signed the will in their presence, it is

(9) *Knowledge of Witnesses as to Contents or Nature of Paper.* — The subscribing witnesses need not know the contents of the paper they attest,<sup>1</sup> nor, in the absence of statutes requiring publication, need they be informed that it is a will.<sup>2</sup>

(10) *Attestation as to Sanity.* — Since, from the mere fact of attestation and subscription, an inference arises that the subscribing witnesses were of opinion that the testator possessed testamentary capacity at the time of execution,<sup>3</sup> a formal recital to that effect in the attestation clause may be dispensed with, in the absence of statutory requirements to the contrary.<sup>4</sup>

(11) *Request to Witnesses to Sign.* — The request to the witnesses to sign may be by words or signs. No particular form of request is necessary and it may be implied from acts. Anything which conveys to the witnesses the idea that they are desired to be witnesses is a good request. Even a knowing acquiescence may be equivalent to an actual request in words.<sup>5</sup> Thus, the testator need not make the request himself, but it may be made by the draftsman, professional adviser, or other person present, provided the testator's intelligent acquiescence distinctly appears.<sup>6</sup> However, when the

sufficient for them to show that they signed the will in the testator's presence and at his request, and that he declared it to be his will. *Leckey v. Cunningham*, 56 Pa. St. 370.

#### 1. Witnesses Need Not Know Contents of Paper.

— *Leverett v. Carlisle*, 19 Ala. 80; *Dickie v. Carter*, 42 Ill. 376; *Turner v. Cook*, 36 Ind. 136; *Higdon's Will*, 6 J. J. Marsh. (Ky.) 444, 22 Am. Dec. 84; *Flood v. Pragoff*, 79 Ky. 607; *Bott v. Wood*, 56 Miss. 137; *Ortt v. Leonhardt*, 102 Mo. App. 38; *Skinner's Will*, 40 Oregon 571; *Linton's Appeal*, 104 Pa. St. 228; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478. See also *Allen v. Griffin*, 69 Wis. 529. But see *Matter of Hitchler*, (Surrogate Ct.) 25 Misc. (N. Y.) 365.

**Where a Deed of Trust Is Referred to in a Will**, it is not necessary for a proper attestation of the will that the deed be present and exhibited to the witnesses. *Matter of Willey*, 128 Cal. 1.

**2. Witnesses Need Not Be Informed that Paper Is a Will.** — *Gould v. Chicago Theological Seminary*, 189 Ill. 282; *Turner v. Cook*, 36 Ind. 136; *Flood v. Pragoff*, 79 Ky. 607; *Savage v. Bulge*, (Ky. 1903) 76 S. W. Rep. 361, rehearing denied (Ky. 1903) 77 S. W. Rep. 717; *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *In re Claflin*, 75 Vt. 19; *Skinner v. American Bible Soc.*, 92 Wis. 209. See also *In re Porter*, 20 D. C. 493. Compare *White v. British Museum*, 6 Bing. 310, 19 E. C. L. 91; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Matter of Delprat*, (Surrogate Ct.) 27 Misc. (N. Y.) 355; *Luper v. Werts*, 19 Oregon 122; *Skinner's Will*, 40 Oregon 571; *Richardson v. Orth*, 40 Oregon 252. See also *infra*, this subsection, *Publication; Acknowledgment*.

**3. Inference of Sanity Arising from Attestation.** — *Withinton v. Withinton*, 7 Mo. 592; *Heyward v. Hazard*, 1 Bay (S. Car.) 349. See also *Field's Appeal*, 36 Conn. 279; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Stephenson v. Stephenson*, 62 Iowa 163; *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 230. And compare *Whitenack v. Stryker*, 2 N. J. Eq. 8.

**4. Recital of Sanity Dispensed With.** — *Murphy v. Murphy*, 24 Mo. 526. But see *Withinton v. Withinton*, 7 Mo. 589.

**Where Such Recital Is Required** an affidavit

that the testator was of sound mind when he signed the "will" must be held to include a codicil which was attached to the will at the time of attestation. *Fry v. Morrison*, 159 Ill. 244.

#### 5. Informality of Request to Sign — Arkansas.

— *Rogers v. Diamond*, 13 Ark. 474; *Payne v. Payne*, 54 Ark. 415.

*California.* — *Crittenden's Estate*, Myr. Prob. (Cal.) 54; *Matter of Mullin*, 110 Cal. 252.

*Illinois.* — *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

*Iowa.* — *Matter of Hull*, 117 Iowa 738.

*Maryland.* — *Higgins v. Carlton*, 28 Md. 117, 92 Am. Dec. 666; *Gross v. Burneston*, 91 Md. 383.

*Minnesota.* — *Matter of Allen*, 25 Minn. 39.

*Missouri.* — *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Schierbaum v. Schemme*, 157 Mo. 1; *Martin v. Bowdern*, 158 Mo. 379.

*New Jersey.* — *Whitenack v. Stryker*, 2 N. J. Eq. 9.

*New York.* — *Moore v. Moore*, 2 Bradf. (N. Y.) 261; *Doe v. Roe*, 2 Barb. (N. Y.) 201; *Hutchings v. Cochrane*, 2 Bradf. (N. Y.) 295; *Sequine v. Sequine*, 2 Barb. (N. Y.) 385; *Brown v. De Selding*, 4 Sandf. (N. Y.) 10; *Brady v. McCrosson*, 5 Redf. (N. Y.) 431; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Gamble v. Gamble*, 39 Barb. (N. Y.) 373; *Matter of Woolsey*, (Surrogate Ct.) 17 Misc. (N. Y.) 547; *Gilbert v. Knox*, 52 N. Y. 125.

*North Carolina.* — *Burney v. Allen*, 125 N. Car. 314.

*Wisconsin.* — *Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591.

*Canada.* — *Hannah v. Brereton*, 23 Quebec Super. Ct. 98.

**The Request to Sign Must Be Shown** either by the attestation clause or by other evidence. *Matter of McMulkin*, 6 Dem. (N. Y.) 347; *Lockwood v. Lockwood*, 51 Hun (N. Y.) 337.

**6. Request Made by Other than Testator — England.** — *Inglesant v. Inglesant*, L. R. 3 P. & D. 172.

*Georgia.* — *Huff v. Huff*, 41 Ga. 696.

*Indiana.* — *Bundy v. McKnight*, 48 Ind. 502; *Dyer v. Dyer*, 87 Ind. 13.



testator is feeble and able to speak but faintly, at the very last of a long sickness, it is necessary to examine carefully what takes place before him. It will not answer to assume, without some clear proof, that he adopts the acts of those about him who pretend to speak for him. In his feeble condition he may be unable to express his dissent, and it is unsafe to take his silence as acquiescence.<sup>1</sup>

(12) *Time of Subscription.* — In *England*, under the statute of Victoria, signature or acknowledgment by the testator must precede, in point of time, subscription by the witnesses.<sup>2</sup> It is not sufficient for the testator to sign the will in the presence of the witnesses immediately after they have subscribed,<sup>3</sup> nor for the witnesses to place seals opposite their names,<sup>4</sup> or formally acknowledge their signatures,<sup>5</sup> after the testator has signed.

In the *United States* the general rule is the same, irrespective of whether the local statute is framed upon the statute of frauds or the statute of Victoria.<sup>6</sup> Many American cases, however, hold that where the signature by the testator and the subscriptions by the witnesses form substantially one transaction, it is not material which precedes the other.<sup>7</sup>

The Presumption is, in the absence of proof to the contrary, that the testator signed before the witnesses subscribed.<sup>8</sup>

(13) *Subscription in Presence of Testator.* — Under the statute of frauds and the statute of Victoria in *England*, and most of the corresponding stat-

*Maryland.* — *Etchison v. Etchison*, 53 Md. 348.

*Missouri.* — *Martin v. Bowdern*, 158 Mo. 379.

*Nebraska.* — *Thompson v. Thompson*, 49 Neb. 157.

*New Jersey.* — *Whitenack v. Stryker*, 2 N. J. Eq. 9; *Elkinton v. Brick*, 44 N. J. Eq. 154. Compare *Ludlow v. Ludlow*, 35 N. J. Eq. 480.

*New York.* — *Smith v. Smith*, 2 Lans. (N. Y.) 266; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Matter of Gilman*, 38 Barb. (N. Y.) 364; *Gilbert v. Knox*, 52 N. Y. 125; *In re Nelson*, 141 N. Y. 152.

*North Carolina.* — *Burney v. Allen*, 125 N. Car. 314.

*Oregon.* — *Skinner's Will*, 40 Oregon 571; *Ames's Will*, 40 Oregon 495.

*Virginia.* — *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, 32 Am. Rep. 650.

*Wisconsin.* — *Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591.

1. *Matter of Lyman*, (Surrogate Ct.) 14 Misc. (N. Y.) 352; *Heath v. Cole*, 15 Hun (N. Y.) 103.

2. *Signature or Acknowledgment to Precede Subscription.* — *Hindmarsh v. Carlton*, 8 H. L. Cas. 160; *Goods of Summers*, 7 Notes Cas. (Eng.) 562, 14 Jur. 791, 2 Rob. Ecc. 295; *Goods of Olding*, 2 Curt. Ecc. 865; *Goods of Byrd*, 3 Curt. Ecc. 117.

3. *Goods of Olding*, 2 Curt. Ecc. 865.

4. *In re Byrd*, 3 Curt. Ecc. 117.

5. *Hindmarsh v. Carlton*, 8 H. L. Cas. 160; *Moore v. King*, 3 Curt. Ecc. 243.

*Passing Over the Signature with a Dry Pen* amounts to no more than an acknowledgment, and does not serve as a subscription. *Playne v. Scriven*, 1 Rob. Ecc. 772.

6. *General Rule in United States* — *Georgia.* — *Duffie v. Corridon*, 40 Ga. 122; *Brooks v. Woodson*, 87 Ga. 379.

*Indiana.* — *Reed v. Watson*, 27 Ind. 443.

*Kentucky.* — *Chisholm v. Ben*, 7 B. Mon. (Ky.) 409.

*Massachusetts.* — *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Mendell v. Dunbar*, 169 Mass. 74; *Marshall v. Mason*, 176 Mass. 216.

*Michigan.* — *Schermerhorn v. Merritt*, 123 Mich. 310.

*Minnesota.* — *Tobin v. Haack*, 79 Minn. 101.

*New Jersey.* — *Lacey v. Dobbs*, 63 N. J. Eq. 325.

*New York.* — *Matter of McMulkin*, 6 Dem. (N. Y.) 347; *Mitchell v. Mitchell*, 16 Hun (N. Y.) 97; *Rugg v. Rugg*, 21 Hun (N. Y.) 383; *Jackson v. Jackson*, 39 N. Y. 153; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

*North Carolina.* — *Eelbeck v. Granberry*, 2 Hayw. (3 N. Car.) 232, 2 Am. Dec. 624.

*Pennsylvania.* — *Irvine's Estate*, 206 Pa. St. 1.

*Texas.* — *Fowler v. Stagner*, 55 Tex. 393.

*Subsequent Acknowledgment* is insufficient to validate a subscription made before the testator signed. *Duffie v. Corridon*, 40 Go. 122.

*Where a Witness Commences to Sign* as a witness to the instrument without knowing it is a will, and before he completes his signature the testator makes the necessary declaration and acknowledgment, and thereupon the witness completes his signature as an attesting witness, it is a sufficient compliance with the statute. *Matter of Phillips*, 98 N. Y. 267.

7. *When Signature and Subscription One Transaction.* — *O'Brien v. Gallagher*, 25 Conn. 229; *Gibson v. Nelson*, 181 Ill. 122; *Swift v. Wiley*, 1 B. Mon. (Ky.) 114; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 113; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Cutler v. Cutler*, 130 N. Car. 1; *Kaufman v. Caughman*, 49 S. Car. 159; *Miller v. McNeill*, 35 Pa. St. 217, 78 Am. Dec. 333; *Rosser v. Franklin*, 6 Gratt. (Va.) 1, 52 Am. Dec. 97. See also *Moale v. Cutting*, 59 Md. 519; *Sturdivant v. Birchett*, 10 Gratt. (Va.) 67.

8. *Presumption that Testator Signed First.* —

utes in the *United States*, the witnesses must subscribe in the presence of the testator; <sup>1</sup> a subsequent acknowledgment in his presence of a subscription made in his absence is insufficient. <sup>2</sup> And it is immaterial that the failure of the witnesses to subscribe in the testator's presence may have been due to his own solicitation or other good cause. <sup>3</sup> The purpose of the statutory requirement is said to be that the testator may have ocular evidence of the identity of the instrument subscribed by the witnesses, and hence the generally accepted tests of presence are vision and mental apprehension. <sup>4</sup>

**Mental Apprehension.** — In the first place it is essential that the testator be mentally capable of recognizing the act which is being performed before him. <sup>5</sup> When, therefore, the testator, after signing and publishing his will, fell into a state of insensibility before the witnesses subscribed, the attestation was held insufficient. <sup>6</sup> The witnesses must also subscribe with the testator's knowledge and consent, and not in a clandestine or fraudulent way, for such subscription is bad, even though in the same room. <sup>7</sup>

**Vision.** — The true test of vision is not whether the testator actually saw

Allen *v.* Griffin, 69 Wis. 529. See also Matter of Austin, 45 Hun (N. Y.) 1. And compare Simmons *v.* Leonard, 91 Tenn. 183.

**1. Subscription Must Be in Presence of Testator.** — See the various statutes. See also Snider *v.* Burks, 84 Ala. 53; Stirling *v.* Stirling, 64 Md. 138; Chase *v.* Kittredge, 11 Allen (Mass.) 51, 87 Am. Rep. 687; Rucker *v.* Lambdin, 12 Smed. & M. (Miss.) 230; Watson *v.* Pipes, 32 Miss. 451; Fatheree *v.* Lawrence, 33 Miss. 586; Mays *v.* Mays, 114 Mo. 536; Ragland *v.* Huntingdon, 1 Ired. L. (23 N. Car.) 561; *In re* Cox, 1 Jones L. (46 N. Car.) 321; Rose *v.* Allen, 1 Coldw. (Tenn.) 23.

In New York, where the statute merely provides that there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator, it has been held that the subscription need not be in the testator's presence. Lyon *v.* Smith, 11 Barb. (N. Y.) 124; Ruddon *v.* McDonald, 1 Bradf. (N. Y.) 352; Herrick *v.* Snyder, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 462; Matter of Phillips, (Surrogate Ct.) 34 Misc. (N. Y.) 442; *In re* Jones, (Surrogate Ct.) 85 N. Y. Supp. 294. See also Butler *v.* Benson, 1 Barb. (N. Y.) 526; Neugent *v.* Neugent, 2 Redf. (N. Y.) 376.

**Arkansas.** — The Arkansas statute is a transcript of that of New York, and under it witnesses need not subscribe in the presence of testator. Matter of Cornelius, 14 Ark. 675. See also Abraham *v.* Wilkins, 17 Ark. 325.

In Michigan it has been held that in the definition of the phrase "in the presence of" due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If the witnesses sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence. Cook *v.* Winchester, 81 Mich. 581.

**2. Subsequent Acknowledgment Insufficient.** — *England.* — *In re* Chamney, 1 Rob. Ecc. 757; Hindmarsh *v.* Carlton, 8 H. L. Cas. 160; Payne *v.* Scriven, 1 Rob. Ecc. 772, 7 Notes Cas. (Eng.) 122; *In re* Cunningham, 1 Searle & S. 132, 29

L. J. P. 71; Moore *v.* King, 3 Curt. Ecc. 243; *In re* Davis, 3 Curt. Ecc. 748.

*Delaware.* — See Rash *v.* Purnell, 2 Harr. (Del.) 448; Pennell *v.* Weyant, 2 Harr. (Del.) 506. *Georgia.* — Lamb *v.* Girtman, 33 Ga. 289; Duffie *v.* Corridon, 40 Ga. 122.

*Indiana.* — Reed *v.* Watson, 27 Ind. 443.

*Maryland.* — See Moale *v.* Cutting, 59 Md. 510.

*Massachusetts.* — Chase *v.* Kittredge, 11 Allen (Mass.) 49, 87 Am. Rep. 687; Mendell *v.* Dunbar, 169 Mass. 74.

*Michigan.* — Maynard *v.* Vinton, 59 Mich. 139, 60 Am. Rep. 276.

*New Jersey.* — Combs *v.* Jolly, 3 N. J. Eq. 625; Compton *v.* Mitton, 12 N. J. L. 70. See also Den *v.* Matlack, 17 N. J. L. 96.

*Rhode Island.* — Pawtucket *v.* Ballou, 15 R. I. 58.

*Wisconsin.* — Matter of Downie, 42 Wis. 66.

In Connecticut and Kentucky a witness may subscribe his name in the presence of the testator, before the testator himself has signed, and acknowledge his subscription afterward. O'Brien *v.* Gallagher, 25 Conn. 229; Swift *v.* Wiley, 1 B. Mon. (Ky.) 117; Upchurch *v.* Upchurch, 16 B. Mon. (Ky.) 113.

In Virginia an acknowledgment by a witness, in the testator's presence, of a signature affixed in his absence, has been sustained. Sturdivant *v.* Birchett, 10 Gratt. (Va.) 67; Parramore *v.* Taylor, 11 Gratt. (Va.) 220.

**3. Occasion of Witnesses' Absence Immaterial.** — Broderick *v.* Broderick, 1 P. Wms. 239; Machell *v.* Temple, 2 Show 288. Compare Edelen *v.* Hardey, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292; Reynolds *v.* Reynolds, 1 Spears L. (S. Car.) 253, 40 Am. Dec. 599.

4. 1 Jarm. on Wills (5th ed.) \*87.

**5. Testator Must Be Mentally Capable of Recognizing Acts of Witnesses.** — Hill *v.* Barge, 12 Ala. 687; Hall *v.* Hall, 18 Ga. 40; Jackson *v.* Moore, 14 La. Ann. 209; Etchison *v.* Etchison, 53 Md. 348; Watson *v.* Pipes, 32 Miss. 451; Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591.

6. Right *v.* Price, Dougl. 241. See also Sanders *v.* Stiles, 2 Redf. (N. Y.) 1; Vernam *v.* Spencer, 3 Bradf. (N. Y.) 16.

7. Longford *v.* Eyre, 1 P. Wms. 741.

the witnesses sign, but whether he might have seen them sign, considering his mental and physical condition, and his position at the time of subscription.<sup>1</sup> Thus, mere contiguity is not enough, if the testator, by reason of his position or intervening obstacles, could not see the witnesses subscribe.<sup>2</sup> A subscription made in the same room with the testator is treated as *prima facie* made in his presence, while a subscription made in another room is treated as *prima facie* not made in his presence.<sup>3</sup> However, where the testator is in one room and the witnesses subscribe their names in another room, the door of which is open so that the testator may see the acts of the witnesses if he will, there is a sufficient subscription;<sup>4</sup> but it is not sufficient if the place in the

**1. True Test of Vision** — *England*. — Norton *v.* Bazet, 3 Jur. N. S. 1084, 1 Deane Ecc. 259; Doe *v.* Manifold, 1 M. & S. 294; *In re* Killick, 3 Sw. & Tr. 578; Goods of Trimmell, 11 Jur. N. S. 248; Newton *v.* Clarke, 2 Curt. Ecc. 320.

*Alabama*. — Hill *v.* Barge, 12 Ala. 687.

*Georgia*. — Robinson *v.* King, 6 Ga. 539; Lamb *v.* Girtman, 26 Ga. 625; Reed *v.* Roberts, 26 Ga. 294, 71 Am. Dec. 210; Hamlin *v.* Fletcher, 64 Ga. 549.

*Illinois*. — Matter of Storey, 20 Ill. App. 183; Ambre *v.* Weishaar, 74 Ill. 109; Drury *v.* Connell, 177 Ill. 43.

*Indiana*. — McElfresh *v.* Guard, 32 Ind. 408; Turner *v.* Cook, 36 Ind. 136.

*Kentucky*. — Howard's Will, 5 T. B. Mon. (Ky.) 199, 17 Am. Dec. 60.

*Maryland*. — Edelen *v.* Hardey, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292.

*Massachusetts*. — Dewey *v.* Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Boldry *v.* Par-  
ris, 2 Cush. (Mass.) 433.

*Michigan*. — Maynard *v.* Vinton, 59 Mich. 139, 60 Am. Rep. 276.

*Minnesota*. — Matter of Allen, 25 Minn. 39; Cunningham *v.* Cunningham, 80 Minn. 180.

*Mississippi*. — Watson *v.* Pipes, 32 Miss. 451; Walker *v.* Walker, 67 Miss. 529.

*New Hampshire*. — Healey *v.* Bartlett, (N. H. 1904) 59 Atl. Rep. 617.

*New Jersey*. — Campbell *v.* McGuiggan, (N. J. 1896) 34 Atl. Rep. 383; Ayres *v.* Ayres, 43 N. J. Eq. 565.

*New York*. — See Ruddon *v.* McDonald, 1 Bradf. (N. Y.) 352.

*North Carolina*. — Jones *v.* Tuck, 3 Jones L. (48 N. Car.) 202.

*South Carolina*. — Ray *v.* Hill, 3 Strobb. L. (S. Car.) 297, 49 Am. Dec. 647; Wright *v.* Lewis, 5 Rich. L. (S. Car.) 212, 55 Am. Dec. 714.

*Virginia*. — Neil *v.* Neil, 1 Leigh (Va.) 6; Nock *v.* Nock, 10 Gratt. (Va.) 106; Baldwin *v.* Baldwin, 81 Va. 405, 59 Am. Rep. 669.

**Where a Mere Act of Volition** will permit the testator to witness the attestation, the will is sufficiently attested in his presence. Spoonemore *v.* Cables, 66 Mo. 579. Otherwise, if he is not so placed. Matter of Downie, 42 Wis. 66.

**The Witnesses Must Be in a Position to Let the Testator See Them Subscribe**, which means that they must not withdraw themselves from the continued observance of his senses, although the testator may himself refrain from using such senses. Reynolds *v.* Reynolds, 1 Spears L. (S. Car.) 253, 40 Am. Dec. 599.

**In Michigan**, vision, as the exclusive test of

presence, has been abandoned, in cases in which, though the witnesses sign out of the line of vision, the testator is within hearing distance, understands what is done, and expressly approves the whole transaction. Cook *v.* Winchester, 81 Mich. 581.

**2. Mere Contiguity Not Sufficient.** — Doe *v.* Manifold, 1 M. & S. 294; Edlestone *v.* Speake, 1 Show. 89, Carth. 79; *In re* Ellis, 2 Curt. Ecc. 395; *Re* Colman, 3 Curt. Ecc. 118; Hamlin *v.* Fletcher, 64 Ga. 549; Walker *v.* Walker, 67 Miss. 529; Neil *v.* Neil, 1 Leigh (Va.) 22.

**That the Testator Saw the Bodies of the Witnesses** as they wrote, is not enough if the will itself was out of sight. Graham *v.* Graham, 10 Ired. L. (32 N. Car.) 219; Burney *v.* Allen, 125 N. Car. 314. But see Bynum *v.* Bynum, 11 Ired. L. (33 N. Car.) 632; Matter of Tobin, 196 Ill. 484; Ayres *v.* Ayres, 43 N. J. Eq. 565.

**3. Subscription in Same and Different Rooms as Prima Facie Evidence.** — Norton *v.* Bazet, 1 Deane Ecc. 259; Doe *v.* Pickett, 51 Ala. 584; Lamb *v.* Girtman, 33 Ga. 289; Mason *v.* Harrison, 5 Har. & J. (Md.) 480; Edelen *v.* Hardey, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292; Mandeville *v.* Parker, 31 N. J. Eq. 242; Ayres *v.* Ayres, 43 N. J. Eq. 565; Stewart *v.* Stewart, 56 N. J. Eq. 761.

**4. When Subscription in Another Room Sufficient** — *England*. — *In re* Piercy, 1 Rob. Ecc. 278; Shires *v.* Glascock, 2 Salk. 688; Tod *v.* Winchelsea, 2 C. & P. 488, 12 E. C. L. 227; Davy *v.* Smith, 3 Salk. 395; Goods of Trimmell, 11 Jur. N. S. 248.

*Alabama*. — See Hill *v.* Barge, 12 Ala. 687.

*Illinois*. — Gallagher *v.* Kilkeary, 29 Ill. App. 415; Ambre *v.* Weishaar, 74 Ill. 110.

*Indiana*. — McElfresh *v.* Guard, 32 Ind. 408; Turner *v.* Cook, 36 Ind. 129.

*Massachusetts*. — Raymond *v.* Wagner, 178 Mass. 315.

*North Carolina*. — Bynum *v.* Bynum, 11 Ired. L. (33 N. Car.) 636. See Cornelius *v.* Cornelius, 7 Jones L. (52 N. Car.) 593.

*Rhode Island*. — Hopkins *v.* Wheeler, 21 R. I. 533.

*South Carolina*. — See Ray *v.* Hill, 3 Strobb. L. (S. Car.) 297, 49 Am. Dec. 647; Wright *v.* Lewis, 5 Rich. L. (S. Car.) 212, 55 Am. Dec. 714; Tucker *v.* Tucker, 12 Rich. L. (S. Car.) 141.

*Virginia*. — Nock *v.* Nock, 10 Gratt. (Va.) 106. See Moore *v.* Moore, 8 Gratt. (Va.) 307.

*Wisconsin*. — Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591.

**Where the Testatrix Could See Through the Windows of her carriage and of the attorney's**



adjoining room where the witnesses subscribe is so situated that the testator cannot see it through the open door.<sup>1</sup> And where a testatrix is physically capable of rising from her bed and walking to the door of an adjacent room, but is able to do so only with great difficulty, and perhaps with peril to her life, it will not be said that an attestation which can be seen by her in that manner only takes place in her presence.<sup>2</sup> Nor is it enough to subscribe in the same room with the testator, if the relative position or intervening obstacles prevent his perceiving the act, and his condition is such that of his own volition he can neither change his position nor remove the obstacle.<sup>3</sup> Where the testator is blind, it has been held that the position of the witnesses must be such that the testator could see them if he had his eyesight;<sup>4</sup> but the better opinion would seem to be that the subscription should be made where he may take cognizance of the act by his other senses.<sup>5</sup>

(14) *Simultaneous Presence of Witnesses.* — Under the statute of frauds, which provided merely that the will should be "attested and subscribed in the presence of the deviser, by three or four credible witnesses," it was held that the witnesses need not subscribe in the presence of each other, and that the testator might either sign before one and acknowledge before the others, or acknowledge before each separately without signing before any of them.<sup>6</sup> Under the statute of Victoria, which provides that the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary," it has been held that the signature must be made or acknowledged in the presence of the witnesses simultaneously and not at different times,<sup>7</sup> and that they must subscribe in the presence of the testator, though not necessarily in the presence of each other.<sup>8</sup> In some of the *United States*, statutes exist which require the witnesses to attest and subscribe in the presence of the testator and of each other;<sup>9</sup> but in the absence of such

office, the will was held well attested. *Casson v. Dade*, 1 Bro. C. C. 99.

**1. When Subscription in Another Room Insufficient —** *England.* — *Norton v. Bazet*, 1 Deane Ecc. 259; *Doe v. Manifold*, 1 M. & S. 294; *Tod v. Winchelsea*, 2 C. & P. 488, 12 E. C. L. 227; *Carter v. Seaton*, 85 L. T. N. S. 76; *Re Colman*, 3 Curt. Ecc. 118.

*Georgia.* — See *Lamb v. Girtman*, 33 Ga. 289. *Maryland.* — *Edelen v. Hardey*, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292; *Russell v. Falls*, 3 Har. & M. (Md.) 472.

*Massachusetts.* — *Mendell v. Dunbar*, 169 Mass. 74. See also *Boldry v. Parris*, 2 Cush. (Mass.) 433.

*New Jersey.* — *Mandeville v. Parker*, 31 N. J. Eq. 242.

*North Carolina.* — See *Jones v. Tuck*, 3 Jones L. (48 N. Car.) 202; *Graham v. Graham*, 10 Ired. L. (32 N. Car.) 219.

*South Carolina.* — See *Reynolds v. Reynolds*, 1 Spears L. (S. Car.) 253, 40 Am. Dec. 599.

*Wisconsin.* — *Matter of Downie*, 42 Wis. 66.

**2. Ability to See Attestation Only with Peril to Life.** — *Witt v. Gardiner*, 158 Ill. 176.

**3. Insufficient Subscription in Same Room.** — *Tribe v. Tribe*, 1 Rob. Ecc. 775; *Doe v. Therriau*, 17 N. Bruns. 395; *Neil v. Neil*, 1 Leigh (Va.) 6. See also *Brooks v. Duffell*, 23 Ga. 441; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210. And compare *Orndorff v. Hummer*, 12 B. Mon. (Ky.) 619; *Aikin v. Weckerly*, 19 Mich. 482; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276.

**4. In re Piercy**, 1 Rob. Ecc. 278, 4 Notes Cas. (Eng.) 250.

**5. Rule Where Testator Blind.** — *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464; *Reynolds v. Reynolds*, 1 Spears L. (S. Car.) 253, 40 Am. Dec. 599; *Ray v. Hill*, 3 Strobb. L. (S. Car.) 297, 40 Am. Dec. 647.

In *England*, where the tendency of the courts has been to construe the statutes with great strictness, it has always been held that a blind man can make a valid will, if he is sensible of the presence of the witnesses. *In re Piercy*, 1 Robb. Ecc. 278; *Edwards v. Fincham*, 3 Curt. Ecc. 63.

**6. Simultaneous Presence of Witnesses — Rule under Statute of Frauds.** — *Ellis v. Smith*, 1 Ves. Jr. 11; *Grayson v. Atkinson*, 2 Ves. 454; *Smith v. Codron*, cited in *Grayson v. Atkinson*, 2 Ves. 455; *Wright v. Wright*, 7 Bing. 459, 20 E. C. L. 198.

**7. Rule under Statute of Victoria.** — *Brown v. Skirrow*, 85 L. T. N. S. 645; *In re Allen*, 2 Curt. Ecc. 331; *In re Simmonds*, 3 Curt. Ecc. 79; *Moore v. King*, 3 Curt. Ecc. 243.

**8. In re Webb**, 1 Deane Ecc. 1, 1 Jur. N. S. 1096; *Faulds v. Jackson*, 6 Notes Cas. Sup. (Eng.) 1.

**9.** See the various state statutes. See also *Roberts v. Welch*, 46 Vt. 164; *Blanchard v. Blanchard*, 32 Vt. 62.

**It Is Not Necessary for the Testator to Sign** his name in presence of the attesting witnesses. It is sufficient that the will is signed by him without their presence and he afterwards re-

statutory requirement, it is sufficient if each witness attests and subscribes in the presence of the testator.<sup>1</sup>

(15) *Sufficiency of Subscription.* — Provided the witness puts his name to the paper *animo attestandi*,<sup>2</sup> he may subscribe by making his mark,<sup>3</sup> or by affixing his initials to the paper,<sup>4</sup> and perhaps by a stamp or device, if illiteracy

quests them to witness his signature. *In re* Claflin, 75 Vt. 19.

**1. Simultaneous Presence of Witnesses Unnecessary** — *Alabama.* — Hoffman v. Hoffman, 26 Ala. 535; Woodcock v. McDonald, 30 Ala. 411; Moore v. Spier, 80 Ala. 130.

*Arkansas.* — Rogers v. Diamond, 13 Ark. 474. *Connecticut.* — Gaylor's Appeal, 43 Conn. 82; Lane's Appeal, 57 Conn. 182.

*District of Columbia.* — *In re* Porter, 20 D. C. 493.

*Georgia.* — Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675. See also Thompson v. Davitte, 59 Ga. 472.

*Illinois.* — Flinn v. Owen, 58 Ill. 111.

*Indiana.* — Johnson v. Johnson, 106 Ind. 475, 55 Am. Rep. 762.

*Iowa.* — Matter of Hull, 117 Iowa 738.

*Kentucky.* — Grubbs v. Marshall, (Ky. 1890) 13 S. W. Rep. 447.

*Maryland.* — Moale v. Cutting, 59 Md. 510.

*Massachusetts.* — Dewey v. Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Hogan v. Grosvenor, 10 Met. (Mass.) 54; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Rep. 687; Ela v. Edwards, 16 Gray (Mass.) 91.

*Missouri.* — Cravens v. Faulconer, 28 Mo. 19; Grimm v. Tittman, 113 Mo. 56.

*New Hampshire.* — Welch v. Adams, 63 N. H. 344, 56 Am. Rep. 521.

*New Jersey.* — *In re* Clark, (N. J. 1900) 52 Atl. Rep. 222.

*New York.* — Conselyea v. Walker, 2 Dem. (N. Y.) 117; *In re* Potter, (Surrogate Ct.) 12 N. Y. Supp. 105; Barry v. Brown, 2 Dem. (N. Y.) 309; Hoysradt v. Kingman, 22 N. Y. 372; Willis v. Mott, 36 N. Y. 486; Matter of Diefenthaler, (Surrogate Ct.) 39 Misc. (N. Y.) 765; Matter of Bogart, (Surrogate Ct.) 67 How. Pr. (N. Y.) 313.

*North Carolina.* — Eelbeck v. Granberry, 2 Hayw. (3 N. Car.) 232, 2 Am. Dec. 624.

*Tennessee.* — Simmons v. Leonard, 91 Tenn. 183.

*Virginia.* — Parramore v. Taylor, 11 Gratt. (Va.) 220; Beane v. Yerby, 12 Gratt. (Va.) 239; Green v. Crain, 12 Gratt. (Va.) 252.

*Wisconsin.* — Smith's Will, 52 Wis. 543.

**In Kentucky** it is not indispensable for subscribing witnesses to be present at the same time and place when the will is acknowledged if it be in fact done in the presence of each of them. Grubbs v. Marshall, (Ky. 1890) 13 S. W. Rep. 447.

**In Minnesota**, to constitute a legal and valid attestation, the testator must either sign the will in the presence of the witnesses, or acknowledge his signature to them, or in some other way clearly and unequivocally indicate to them that he has signed and executed the same. Tobin v. Haack, 79 Minn. 101.

**In New York** the statute requires that the subscription shall either be made in the presence of the witnesses or be acknowledged by the testator to have been made to each of them.

Matter of Purdy, 46 N. Y. App. Div. 33; Matter of Turell, 47 N. Y. App. Div. 560, affirmed 166 N. Y. 330. See also Matter of de Haas, 9 N. Y. App. Div. 561.

It is sufficient if the witnesses are together for the purpose of witnessing the execution of the will and are in a position actually to see the testator write if they choose to do so. *In* Matter of Bedell, 2 Connolly (N. Y.) 328. See also Gilman v. Gilman, 1 Redf. (N. Y.) 354.

A will subscribed by the testator in the presence of one attesting witness, declared in the presence of both witnesses to be the testator's last will and testament, and signed by both witnesses as such, is sufficiently executed and attested. Matter of Look, (Supm. Ct. Gen. T.) 4 Silv. Sup. (N. Y.) 233.

**Either Signing or Acknowledging** a will in the presence of the witnesses is sufficient. Woodruff v. Hundley, 127 Ala. 640; Webster v. Yorty, 194 Ill. 408.

**2. Witness Must Sign Animo Attestandi.** — Goods of Sharman, L. R. 1 P. & D. 661; Goods of Wilson, L. R. 1 P. & D. 269. Dunn v. Dunn, L. R. 1 P. & D. 277; Goods of Maddock, L. R. 3 P. & D. 169; Hindmarsh v. Carlton, 8 H. L. Cas. 160; Pryor v. Pryor, 29 L. J. P. 114; Goods of Duggins, 39 L. J. P. 24; Moale v. Cutting, 59 Md. 510; Boone v. Lewis, 103 N. Car. 40; Fowler v. Stagner, 55 Tex. 393; Peake v. Jenkins, 80 Va. 293.

**The Coexistence of Another Purpose** does not destroy the *animus attestandi*. Griffiths v. Griffiths, L. R. 2 P. & D. 300.

**A Person Who Signs Only as an Amanuensis** cannot be considered a subscribing witness. Burton v. Brown, (Miss. 1898) 25 So. Rep. 61.

**3. Witness May Subscribe by Mark** — *England.* — Addy v. Grix, 8 Ves. Jr. 504; Harrison v. Harrison, 8 Ves. Jr. 185; *In re* Ashmore, 3 Curt. Ecc. 756.

*Alabama.* — Garrett v. Heflin, 98 Ala. 615.

*Arkansas.* — Davis v. Semmes, 51 Ark. 48.

*Georgia.* — Thompson v. Davitte, 59 Ga. 472.

*Maryland.* — Reaver's Appeal, 96 Md. 735.

*New Jersey.* — Compton v. Mitton, 12 N. J. L. 70.

*New York.* — Campbell v. Logan, 2 Bradf. (N. Y.) 90; Meehan v. Rourke, 2 Bradf. (N. Y.) 385; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; Morris v. Kniffin, 37 Barb. (N. Y.) 336.

*North Carolina.* — Pridgen v. Pridgen, 13 Ired. L. (35 N. Car.) 259.

*South Carolina.* — Adams v. Chaplin, 1 Hill Eq. (S. Car.) 266. Compare Ford v. Ford, 7 Humph. (Tenn.) 92.

**There Need Be No Peculiarity in the Mark** of an attesting witness to a will. It is only necessary that he be able to recognize it and swear to it when called upon to testify. Thompson v. Davitte, 59 Ga. 472.

**4. Subscription by Initials.** — *In re* Christian, 2 Rob. Ecc. 110; Jackson v. Van Dusen, 5

or some other good reason can be given for it.<sup>1</sup> And if necessary, his hand may even be guided by another person.<sup>2</sup> A witness may subscribe by a descriptive title, as "servant to A,"<sup>3</sup> or by a fictitious name,<sup>4</sup> unless used with intent to personate another.<sup>5</sup> But where a witness intended to write his full name, and wrote only his Christian name, being too feeble to complete it, the subscription was held insufficient.<sup>6</sup> A marksman's signature is not avoided by the fact that a wrong surname is written against it by mistake.<sup>7</sup> The better opinion is that subscription requires some manual act on the part of the witness, apparent on the paper, and hence, unlike the testator, he cannot allow another to write his name;<sup>8</sup> in some jurisdictions, however, it has been held that the name of the witness may be written by another at his request, in his presence, and in the presence of the testator.<sup>9</sup> A witness cannot subscribe by merely affixing his seal, any more than the testator can sign by so doing.<sup>10</sup>

(16) *Place of Subscription* — (a) *In General*. — In several jurisdictions it is expressly provided by statute that the witnesses shall subscribe at the end of the will.<sup>11</sup> In *Kentucky* the same result is attained through judicial construction of a statute which merely requires the witnesses to attest and subscribe the will, and any unreasonable gap between the signature of the testator

*Johns. (N. Y.)* 144, 4 Am. Dec. 330; *Adams v. Chaplin*, 1 Hill Eq. (S. Car.) 266.

**If Merely Placed in the Margin to Identify Alterations**, the initials are not a good subscription. *In re Cunningham*, 1 Searle & S. 132; *In re Martin*, 6 Notes Cas. (Eng.) 694.

**1. Subscription by Stamp or Device**. — *Schouler on Wills* (2d ed.), § 331.

**2. Hand Guided by Another Person**. — *Harrison v. Elvin*, 3 Q. B. 117, 43 E. C. L. 658, 2 Gale & D. 769; *Goods of Frith*, 4 Jur. N. S. 288.

**A Witness Who Signs by a Guided Hand**, or mark, signs by his own act, and one witness may help another in this way. *Lewis v. Lewis*, 2 Sw. & Tr. 153; *Harrison v. Elvin*, 3 Q. B. 117, 43 E. C. L. 658; *Campbell v. Logan*, 2 Bradf. (N. Y.) 96; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 393.

**Where the Witness Can Write**, it has been doubted whether it is sufficient for him to touch the top of the pen while another writes his name. *In re Kilcher*, 6 Notes Cas. (Eng.) 15.

**3. Subscription by Descriptive Title**. — *Goods of Sperling*, 3 Sw. & Tr. 272.

**4. Subscription by Fictitious Name**. — *In re Olliver*, 2 Spinks 57.

**5. Subscription with Intent to Personate Another**. — *Pryor v. Pryor*, 29 L. J. P. 114.

**6. Mere Christian Name Insufficient**. — *Goods of Maddock*, L. R. 3 P. & D. 169. See *Winslow's Estate*, Myr. Prob. (Cal.) 124.

**7. Wrong Surname Written by Mistake**. — *In re Ashmore*, 3 Curt. Ecc. 756.

**Where a Witness Writes the Testator's Surname** after his own initials, such subscription is invalid. *Walker's Estate*, 110 Cal. 387.

**8. Name May Not Be Written by Another**. — *Playne v. Scriven*, 1 Rob. Ecc. 772; *In re White*, 2 Notes Cas. (Eng.) 461; *Goods of Leverington*, 11 P. D. 80; *Goods of Duggins*, 39 L. J. P. 24; *Riley v. Riley*, 36 Ala. 496; *Horton v. Johnson*, 18 Ga. 396; *Matter of Losee*, (Surrogate Ct.) 13 Misc. (N. Y.) 298. See also *Matter of Strong*, 2 Connolly (N. Y.) 574; *Ex p. Leroy*, 3 Bradf. (N. Y.) 227.

**In Tennessee** the name of a witness signed by another person is incomplete unless accom-

panied by some mark or sign indicating that the witness has adopted the other person's act. *Simmons v. Leonard*, 91 Tenn. 183. See also *McFarland v. Bush*, 94 Tenn. 538.

**9. Name May Be Written by Another**. — *Derry's Estate*, Myr. Prob. (Cal.) 202; *Schnee v. Schnee*, 61 Kan. 643; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *In re Crawford*, 46 S. Car. 299; *Jesse v. Parker*, 6 Gratt. (Va.) 57, 52 Am. Dec. 102. See also *Pollock v. Glassell*, 2 Gratt. (Va.) 439.

**10. Subscription Cannot Be by Seal**. — *In re Byrd*, 3 Curt. Ecc. 117.

**11. Subscription Must Be at End of Will**. — See the various statutes. See also the following cases: *Matter of Conway*, 124 N. Y. 455; *Matter of Beck*, 6 N. Y. App. Div. 211; *Hitchcock v. Thompson*, 6 Hun (N. Y.) 279; *Matter of Dayger*, 47 Hun (N. Y.) 127; *Matter of Blair*, 84 Hun (N. Y.) 581; *Matter of Singer*, (Surrogate Ct.) 19 Misc. (N. Y.) 679; *Matter of Albert*, (Surrogate Ct.) 38 Misc. (N. Y.) 61; *Matter of Case*, 4 Dem. (N. Y.) 124; *Gilman v. Gilman*, 1 Redf. (N. Y.) 354; *Matter of Collins*, 5 Redf. (N. Y.) 20; *Heady's Will*, (Surrogate Ct.) 15 Abb. Pr. N. S. (N. Y.) 211.

**Where the Witnesses Subscribe After a Memorandum of Erasures and Interlineations**, which is immediately below the attestation clause, this is a sufficient subscription. The memorandum is merely a part of the certificate, which, taken together, states that the paper as altered was executed by the testator and attested by the witnesses. *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238.

**Effect of Blank Space Before Subscription**. — An instrument is signed at the end thereof when nothing intervenes between the instrument and the subscription. Accordingly, where there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause, it was held that the instrument was nevertheless subscribed at the end thereof. *Matter of Gilman*, 38 Barb. (N. Y.) 364.



and those of the witnesses may avoid the subscription.<sup>1</sup> In the absence of an express statutory provision, however, the general rule is that the witnesses need not sign in any particular place, provided it can be shown that they signed *animo attestandi*;<sup>2</sup> but in considering whether persons have subscribed a will as attesting witnesses, the position of the signatures may be most material.<sup>3</sup>

(b) **Subscription on Separate Paper.** — An attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet, although no particular mode of fastening the papers together is required.<sup>4</sup>

(c) **Where Will Consists of Several Sheets.** — As a general rule the witnesses need not attest every sheet of a will, nor is it necessary that every sheet should be shown to them. It is sufficient that all the sheets were in the room at the time of execution and attestation,<sup>5</sup> and, in the absence of proof to the contrary, such is the presumption.<sup>6</sup> Sheets which are bound together and constitute the will at the testator's death are presumed to have been so bound together at the time of attestation.<sup>7</sup>

(d) **Additions Subsequent to Attestation.** — Unattested provisions inserted by the testator after the witnesses have subscribed are not entitled to probate.<sup>8</sup>

(17) **Interlineations to Be Noted.** — To avoid question, interlineations made before execution should be noted in the attestation clause, although the failure to do so does not prevent probate.<sup>9</sup>

(18) **Certificate of Acknowledgment.** — A certificate of acknowledgment is superfluous and useless, but may have the effect of converting the magistrate or notary public who takes the acknowledgment into a subscribing witness.<sup>10</sup>

(19) **Re-execution.** — Where a first attempt at execution fails, through some formality, care must be taken to perform the solemnity *de novo*, and not merely to piece out the imperfections of the first attempt. Thus, a witness who has served before should resubscribe, for his acknowledgment of his signature is insufficient.<sup>11</sup>

(20) **Qualifications of Attesting Witnesses** — (a) "Credible" Equivalent to "Compe-

1. **Rule in Kentucky.** — *Soward v. Soward*, 1 Duv. (Ky.) 126.

2. **Rule in Absence of Statute.** — *Goods of Streatley*, (1891) P. 172; *Goods of Braddock*, 1 P. D. 433; *Roberts v. Phillips*, 4 El. & Bl. 450, 82 E. C. L. 450; *In re Davis*, 3 Curt. Ecc. 748; *Kolowski v. Fausz*, 103 Ill. App. 528; *Potts v. Felton*, 70 Ind. 166; *Jones v. Habersham*, 63 Ga. 146; *Moale v. Cutting*, 59 Md. 510; *Murray v. Murphy*, 39 Miss. 214.

A Subscription to an Indorsement on the Back of the Will cannot be shown by parol evidence to have been intended as a subscription to the will. *Patterson v. Ransom*, 55 Ind. 402.

A Subscription Above or Within Instead of Below the Attestation Clause is valid if signed *animo attestandi*. *Moale v. Cutting*, 59 Md. 510; *Franks v. Chapman*, 64 Tex. 159.

3. **Position of Signatures Showing Intention of Witness.** — *Goods of Wilson*, L. R. 1 P. & D. 269; *Patterson v. Ransom*, 55 Ind. 402.

4. **Subscription on Separate Paper.** — *Goods of Braddock*, 1 P. D. 433; *Matter of Collins*, 5 Redf. (N. Y.) 20.

5. **Attestation of Will Consisting of Several Sheets.** — *Bond v. Seawell*, 3 Burr. 1773; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597; *Jones v. Habersham*, 63 Ga. 146; *Ela v. Edwards*, 16 Gray (Mass.) 99; *Gass v. Gass*, 3 Humph. (Tenn.) 278. See also *Tonnele v. Hall*, 4 N. Y. 141.

6. *Bond v. Seawell*, 3 Burr. 1773.

7. **Presumption as to Sheets Bound Together at Testator's Death.** — *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Rees v. Rees*, L. R. 3 P. & D. 86; *Gregory v. Queen's Proctor*, 4 Notes Cas. (Eng.) 620. See also *Jones v. Habersham*, 63 Ga. 146; *Ela v. Edwards*, 16 Gray (Mass.) 91.

8. **Unattested Provisions Inserted After Subscription.** — *Treloar v. Lean*, 14 P. D. 49; *Stevens v. Stevens*, 6 Dem. (N. Y.) 262. See also *Dyer v. Erving*, 2 Dem. (N. Y.) 160; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544.

9. **Noting Interlineations.** — *Wright v. Wright*, 5 Ind. 389; *Matter of Vorhees*, 6 Dem. (N. Y.) 162.

Where the Original Language of an Altered Will Can Be Ascertained it has been held that the will may be admitted to probate and its provisions carried out in disregard of the alteration. *In re Wilcox*, (Surrogate Ct.) 20 N. Y. Supp. 131.

10. **Certificate of Acknowledgment Unnecessary.** — *Murray v. Murphy*, 39 Miss. 214. See also *Payne v. Payne*, 54 Ark. 415; *Franks v. Chapman*, 64 Tex. 159.

11. **Going Over the Signature with a Dry Pen, or adding the date to the subscription, merely amounts to an acknowledgment.** *Goods of Maddock*, L. R. 3 P. & D. 169; *Casement v. Fulton*, 5 Moo. P. C. 130; *Hindmarsh v. Carlton*, 8 H. L. Cas. 160.

tent." — The term "credible" as used in the statute of frauds in relation to attesting witnesses is equivalent to "competent" as used in other wills acts.<sup>1</sup>

(b) **Time When Competency Must Exist.** — At common law there was some conflict of authority as to whether the requisite competency in the attesting witness must exist at the time of attestation, or when the will was offered for proof.<sup>2</sup> It seems to be well settled now, both in *England* and in the *United States*, that the witness must be competent at the time of attestation;<sup>3</sup> and it has never been doubted that subsequent incompetency will not impair the validity of the attestation.<sup>4</sup> A release of interest subsequent to the attestation will not remove the incompetency of the attesting witness.<sup>5</sup>

(c) **Who Are Competent Attesting Witnesses** — *aa. IN GENERAL.* — An attesting witness to a will, in order to possess the requisite competency, should be of such character and have such qualifications as would render his testimony admissible on occasions when the testimony of witnesses is ordinarily received.<sup>6</sup>

*bb. CHILDREN.* — The age of the attesting witness is only to be considered with reference to the requisite degree of intelligence necessary to competence in the witness. As regards children, no arbitrary and conclusive standard of years can be established, as the degree of understanding, which is the test of competency, is not developed in all at the same age. It has been held, however, that proof that an attesting witness was only fourteen years of age at

1. "Credible" Construed to Mean "Competent" — *Georgia.* — Hall v. Hall, 18 Ga. 40; Smith v. Crotty, 112 Ga. 905.

*Illinois.* — Sloan v. Sloan, 184 Ill. 579; Johnson v. Johnson, 187 Ill. 86; Boyd v. McConnell, 209 Ill. 396. See also *In re Noble*, 22 Ill. App. 535, 124 Ill. 266.

*Kentucky.* — Savage v. Bulger, (Ky. 1903) 77 S. W. Rep. 717. See also Fuller v. Fuller, 83 Ky. 345.

*Maine.* — Warren v. Baxter, 48 Me. 193. See also Smalley v. Smalley, 70 Me. 548; Marston, Petitioner, 79 Me. 26.

*Massachusetts.* — Sparhawk v. Sparhawk, 10 Allen (Mass.) 155; Haven v. Hilliard, 23 Pick. (Mass.) 10; Sullivan v. Sullivan, 106 Mass. 474. See also Amory v. Fellowes, 5 Mass. 219; Hawes v. Humphrey, 9 Pick. (Mass.) 350; Sears v. Dillingham, 12 Mass. 358; Bacon v. Bacon, 17 Pick. (Mass.) 134.

*Mississippi.* — Rucker v. Lambdin, 12 Smed. & M. (Miss.) 230.

*New Hampshire.* — Eustis v. Parker, 1 N. H. 273; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565.

*Ohio.* — See Vrooman v. Powers, 47 Ohio St. 191.

*Pennsylvania.* — See Combs's Appeal, 105 Pa. St. 158.

*Tennessee.* — See Simmons v. Leonard, 91 Tenn. 183.

*Texas.* — See Nixon v. Armstrong, 38 Tex. 296; Brown v. Pridgen, 56 Tex. 124.

2. **Time When Competency Must Exist — At Common Law.** — Bac. Abr., Wills (D) 111; Goodtitle v. Welford, Dougl. 141; Lowe v. Jolliffe, 1 W. Bl. 366 Windham v. Chetwynd, 1 Burr. 414; Hindson v. Hersey, 4 Burns Ecc. 27.

3. **Present Rule — Witness Must Be Competent at Time of Attestation** — *England.* — Holdfast v. Dowsing, 2 Stra. 1254; Hatfield v. Thorp, 5 B. & Ald. 589, 7 E. C. L. 199.

*Georgia.* — Gillis v. Gillis, 96 Ga. 1.

*Illinois.* — Fisher v. Spence, 150 Ill. 253; Johnson v. Johnson, 187 Ill. 86.

*Maine.* — Patten v. Tallman, 27 Me. 17. See also Warren v. Baxter, 48 Me. 193.

*Massachusetts.* — Sparhawk v. Sparhawk, 10 Allen (Mass.) 157; Amory v. Fellowes, 5 Mass. 219; Sullivan v. Sullivan, 106 Mass. 474. See also Hawes v. Humphrey, 9 Pick. (Mass.) 350; Haven v. Hilliard, 23 Pick. (Mass.) 10.

*Minnesota.* — *In re Holt*, 56 Minn. 33.

*New Hampshire.* — Carlton v. Carlton, 40 N. H. 18.

*North Carolina.* — Morton v. Ingram, 11 Ired. L. (33 N. Car.) 368. See also Allison v. Allison, 4 Hawks (11 N. Car.) 141.

*South Carolina.* — Taylor v. Taylor, 1 Rich. L. (S. Car.) 531; Workman v. Dominick, 3 Strobb. L. (S. Car.) 589.

*Vermont.* — Smith v. Jones, 68 Vt. 132.

4. **Subsequent Incompetency.** — Brograve v. Winder, 2 Ves. Jr. 636; Sears v. Dillingham, 12 Mass. 359; Holmes v. Holloman, 12 Mo. 535; *In re Holt*, 56 Minn. 33. See also Gill's Will, 2 Dana (Ky.) 447.

5. Fisher v. Spence, 150 Ill. 253; Allison v. Allison, 4 Hawks (11 N. Car.) 141. Compare Nixon v. Armstrong, 38 Tex. 296.

Where a Statute Provides that a Release of Interest Renders a Witness Competent, it may be construed as determining that in this respect a witness need not have been competent at the time of attestation. Miltenberger v. Miltenberger, 78 Mo. 27. See also Grimm v. Tittman, 113 Mo. 56.

6. **Competent Attesting Witnesses Generally.** — Matter of Mobile, 124 Ill. 266; Carlton v. Carlton, 40 N. H. 17. See also *In re Holt*, 56 Minn. 33.

The Rule of the Common Law has been held to be the standard by which the competency of attesting witnesses is to be determined. Hitchcock v. Shaw, 160 Mass. 140.

Interest as a disqualification in the case of wills has been distinguished in *England* from interest in other cases. Windham v. Chetwynd, 1 Burr. 421.

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the date of the attestation would make a *prima facie* case against the due execution of the will, overcoming the presumption of competency which exists with respect to witnesses, until proof is adduced to the contrary.<sup>1</sup> Some statutes prescribe the age below which a person may not be a valid attesting witness.<sup>2</sup>

*cc. HUSBAND AND WIFE.* — The common-law rule that husbands and wives could not in any case be admitted as witnesses for or against each other, independently of the question of interest, applies to the attestation of wills. Hence, in the absence of statutes changing the rule in this respect, a husband cannot be a competent attesting witness to his wife's will, and *vice versa*.<sup>3</sup>

Where the Husband or Wife of the Witness Is Interested, as by being a legatee or devisee, the witness is incompetent, in the absence of a statute either expressly removing such incompetency or making the witness competent by virtue of avoiding the legacy or devise.<sup>4</sup>

*dd. LEGATEES AND DEVISEES.* — The competency of legatees and devisees as attesting witnesses has been fully discussed elsewhere in this work.<sup>5</sup>

**Subscription by Legatee or Devisee for Another Person.** — The policy of the rule excluding devisees and legatees as attesting witnesses to wills, on the ground of interest, has been held to warrant the position that a devisee or legatee may not be allowed to subscribe the name of some other person at such person's request, on account of the illiteracy or physical disability of the latter, though the person who desires to attest by mark may be a valid attesting witness, whose name, written by some disinterested person, would be sufficient.<sup>6</sup> It has been held, however, that a devisee may, by his own attestation, authenticate the mark of an attesting witness who thus attested the instrument.<sup>7</sup>

*ee. EXECUTORS.* — Under the *English* statute of Victoria, it is expressly provided that an executor shall be a competent witness to a will.<sup>8</sup> And this rule has been adopted in most of the *United States*, an executor's right to commissions being held not to be such an interest as to disqualify him as an attesting witness.<sup>9</sup>

*ff. HEIRS.* — An heir is a competent subscribing witness when testifying

does not of itself render a person an incompetent attesting witness. *Matter of Noble*, 124 Ill. 266.

**Louisiana.** — *Women* have been held absolutely incapable of acting as attesting witnesses to testaments; but they may be competent witnesses to prove the handwriting of the testator upon the probate of a will when that fact has to be established. *Roth's Succession*, 31 La. Ann. 315.

*Persons Who Are Deaf, Dumb, or Blind* have been held absolutely incompetent to act as attesting witnesses. However, the law does not exclude those whose senses of sight or hearing are merely impaired; though such an infirmity may be taken into consideration respecting the credibility and effect of the testimony of such witnesses. *Major v. Esneault*, 7 La. Ann. 51.

1. *Carlton v. Carlton*, 40 N. H. 19.

**An Attesting Witness Twenty Years of Age** has been held to be a competent witness to the execution of the will. *Jones v. Tebbetts*, 57 Me. 574.

2. See the various statutes.

**In Louisiana** women of what age soever and male children who have not attained the age of sixteen years, complete, are absolutely incapable of being witnesses to testaments. *Civ. Code La.* (1899), art. 1501.

**In Texas** the witnesses must be above the age

of fourteen years. *Rev. Stat. Tex.* (1895), art. 5335.

3. *Pease v. Allis*, 110 Mass. 157. See also *Dickinson v. Dickinson*, 61 Pa. St. 401.

4. See the title **LEGACIES AND DEVISES**, vol. 18, p. 739, where this subject is fully discussed.

**The Husband of a Contestant**, where the latter takes nothing under the will, is a competent subscribing witness. *Slingloff v. Bruner*, 174 Ill. 561.

5. See the title **LEGACIES AND DEVISES**, vol. 18, p. 737.

6. **Devisee or Legatee Cannot Subscribe for Another.** — *Simmons v. Leonard*, 91 Tenn. 183.

7. *Boone v. Lewis*, 103 N. Car. 40.

8. 1 Vict., c. 26, § 17.

9. **Executor Competent as Witness** — *Florida*. — *Meyer v. Fogg*, 7 Fla. 292.

*Georgia.* — *Baker v. Bancroft*, 79 Ga. 672.

*Massachusetts.* — *Wyman v. Symmes*, 10 Allen (Mass.) 153; *Sears v. Dillingham*, 12 Mass. 358.

*Missouri.* — *Murphy v. Murphy*, 24 Mo. 526.

*New Hampshire.* — *Stewart v. Harriman*, 56 N. H. 25.

*New Jersey.* — *Lippincott v. Wikoff*, 54 N. J. Eq. 107.

*New York.* — *Children's Aid Soc. v. Love-ridge*, 70 N. Y. 387; *Reeve v. Crosby*, 3 Redf.



against his own interest. Thus, he may testify in support of a will by which he is disinherited, either wholly,<sup>1</sup> or even in part.<sup>2</sup> In many jurisdictions there are statutes providing that where a devise or bequest is made to a person who would inherit under the laws of descent or distribution, the will is not invalidated by virtue of such person being a witness thereto, nor is such witness rendered incompetent thereby; but the legatee or devisee is entitled only to such share in the estate as he would have inherited if there had been no will.<sup>3</sup>

*gg. DRAFTSMAN.* — The person who draws the will may attest it.<sup>4</sup>

*hh. JUDGE OF PROBATE.* — The judge of probate may be a valid attesting witness to a will, notwithstanding the fact that the will is to be proved before him.<sup>5</sup>

**V. WHO MAY MAKE A WILL — 1. In General.** — It may be stated generally that any person of sound mind and not under some special legal disability may make a will.<sup>6</sup> The question as to what constitutes a sound mind has already been fully considered in this work,<sup>7</sup> as has the extent of the power to devise or bequeath existing in the case of certain particular classes, such as aliens, infants, felons, etc.<sup>8</sup>

**2. Married Women — a. CAPACITY AT COMMON LAW — (1) In General.** — At common law, a married woman had no power to dispose by will of either her real<sup>9</sup>

(N. Y.) 74; *In re Gagan*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 350.

*North Carolina.* — *Overton v. Overton*, 4 Dev. & B. L. (20 N. Car.) 197. *Compare Tucker v. Tucker*, 5 Ired. L. (27 N. Car.) 161; *Gunter v. Gunter*, 3 Jones L. (48 N. Car.) 441.

*Pennsylvania.* — *Jordan's Estate*, 161 Pa. St. 393.

*South Carolina.* — *Henderson v. Kenner*, 1 Rich. L. (S. Car.) 474; *Noble v. Burnett*, 10 Rich. L. (S. Car.) 505. *Compare Taylor v. Taylor*, 1 Rich. L. (S. Car.) 531; *Workman v. Dominick*, 3 Strobb. L. (S. Car.) 589.

*Vermont.* — *Richardson v. Richardson*, 35 Vt. 238.

**Where the Executor Declines the Trust**, he is a competent witness. *Jones v. Larrabee*, 47 Me. 474. See also *Snyder v. Bull*, 17 Pa. St. 54; and compare *Morton v. Ingram*, 11 Ired. L. (33 N. Car.) 368.

**Distinction Between Wills of Personalty and Realty.** — While an executor may be a witness to a will devising real property, he is not a competent witness to a will of personalty. *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291. See also *Morton v. Ingram*, 11 Ired. L. (33 N. Car.) 368; *Mathis v. Guffin*, 8 Rich. Eq. (S. Car.) 79.

**The Wife of an Executor**, not beneficially interested under the will, has been held to be a credible attesting witness thereto. *Piper v. Moulton*, 72 Me. 155; *Stewart v. Harriman*, 56 N. H. 25; *In re Lyon*, 96 Wis. 339.

**Compensation in Addition to Commissions.** — It has been held that a gift to an executor of a sum of money as compensation for services in addition to commissions, or the appointment of an executor as legatee in trust for the purposes of the will, is not a beneficial provision which is forfeited by his acting as a witness. *Pruyn v. Brinkerhoff*, (Supm. Ct. Gen. T.) 7 Abb. Pr. N. S. (N. Y.) 400.

**1. Heir May Witness Will if Disinherited.** — *Smalley v. Smalley*, 70 Me. 545; *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155; *Allen v. Al-*

*len*, 2 Overt. (Tenn.) 172; *In re Hoppe*, 102 Wis. 54. See also *Old v. Old*, 4 Dev. L. (15 N. Car.) 500.

**2.** *Smalley v. Smalley*, 70 Me. 545; *In re Hoppe*, 102 Wis. 54.

**3.** See the various statutes. See also *Grimm v. Tittman*, 113 Mo. 56; *Maxwell v. Hill*, 89 Tenn. 594; *Clark v. Clark*, 54 Vt. 489.

**4.** *Schieffelin v. Schieffelin*, 127 Ala. 14.

**5. Judge of Probate.** — *M'Lean v. Barnard*, 1 Root (Conn.) 462; *Ford's Case*, 2 Root (Conn.) 232; *Patten v. Tallman*, 27 Me. 17.

**Alcalde — Mexican Law.** — Where an alcalde was appointed executor in a will, and also signed as an attesting witness, it was held that he was competent to authenticate in his judicial capacity, as he derived no benefit from the testamentary disposition, nor did the law allow any compensation for his services. *Panaud v. Jones*, 1 Cal. 488.

**6.** See the title LEGACIES AND DEVISES, vol. 18, p. 734.

**As to Blind Persons**, see the title TESTAMENTARY CAPACITY, vol. 28, p. 88.

**As to Deaf and Dumb Persons**, see the title DEAF AND DUMB PERSONS, vol. 8, p. 843.

**As to Persons Unable to Read**, see *supra*, this title, *Form — Formal Requisites — Signature*.

**7.** See the title TESTAMENTARY CAPACITY, vol. 28, p. 68.

**8.** See the following titles: ALIENS, vol. 2, p. 83; CIVIL DEATH, vol. 6, p. 65; INFANTS, vol. 16, p. 265.

**9. Power at Common Law to Devise Realty — Connecticut.** — *Adams v. Kellogg*, Kirby (Conn.) 195, 1 Am. Dec. 18; *Fitch v. Brainerd*, 2 Day (Conn.) 163.

*Kentucky.* — *Perkins v. Towery*, (Ky. 1887) 3 S. W. Rep. 604; *Harris v. Harbeson*, 9 Bush (Ky.) 403; *Anderson v. Miller*, 6 J. J. Marsh. (Ky.) 568; *George v. Bussing*, 15 B. Mon. (Ky.) 558; *Ford v. Ford*, 2 Duv. (Ky.) 418; *Hickman v. Brown*, 88 Ky. 377; *Craine v. Edwards*, 92 Ky. 109.

*Massachusetts.* — *Beach v. Manchester*, 2

or her personal estate.<sup>1</sup>

(2) *Exceptions* — (a) **When Acting in Representative Capacity.** — As an exception to the rule, a married woman acting in a representative capacity, as, for instance, in the capacity of executrix, could make a will of the property held by her in *autre droit*.<sup>2</sup>

(b) **When Consent of Husband Given.** — Likewise, a wife could bequeath her personal property if her husband consented thereto, for the latter was alone interested to question her authority so to do, and the gift was rendered effectual, by his consent, as his own gift.<sup>3</sup> But a husband could not by his consent confer upon his wife the power to devise her realty.<sup>4</sup>

**Revocation of Consent.** — The consent of the husband was not obligatory, but was revocable at the pleasure of the husband at any time before

Cush. (Mass.) 72; Morse v. Thompson, 4 Cush. (Mass.) 562; Osgood v. Breed, 12 Mass. 525.

Mississippi. — Lee v. Bennett, 31 Miss. 119.

New Hampshire. — Marston v. Norton, 5 N. H. 205; Cutter v. Butler, 25 N. H. 343; Wakefield v. Phelps, 37 N. H. 295.

New Jersey. — Van Winkle v. Schoonmaker, 15 N. J. Eq. 384.

New York. — Wadhams v. American Home Missionary Soc., 12 N. Y. 415.

North Carolina. — Newlin v. Freeman, 1 Ired. L. (23 N. Car.) 514.

Pennsylvania. — Thomas v. Folwell, 2 Whart. (Pa.) 11; West v. West, 10 S. & R. (Pa.) 445.

South Carolina. — Hood v. Archer, 1 McCord L. (S. Car.) 225; Graham v. Graham, 3 Hill L. (S. Car.) 145.

Tennessee. — Johnson v. Sharp, 4 Coldw. (Tenn.) 45.

Virginia. — West v. West, 3 Rand. (Va.) 373; Stroud v. Connelly, 33 Gratt. (Va.) 217.

1. **Power at Common Law to Bequeath Personality.** — Willock v. Noble, L. R. 7 H. L. 580; Hines v. Gordon, 2 Hayw. & H. (D. C.) 222, 30 Fed. Cas. No. 18,302; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384; Vreeland v. Ryno, 26 N. J. Eq. 160; Hood v. Archer, 1 McCord L. (S. Car.) 225.

2. **Acting in Representative Capacity.** — Hodsdon v. Lloyd, 2 Bro. C. C. 534; Scammell v. Wilkinson, 2 East 556; Willock v. Noble, L. R. 7 H. L. 580; Cutter v. Butler, 25 N. H. 343. See also Lee v. Bennett, 31 Miss. 119; West v. West, 3 Rand. (Va.) 373.

3. **Consent of Husband to Bequest** — *England.* — Willock v. Noble, L. R. 7 H. L. 580.

Alabama. — Burton v. Holly, 18 Ala. 408.

Connecticut. — Adams v. Kellogg, Kirby (Conn.) 195.

Kentucky. — George v. Bussing, 15 B. Mon. (Ky.) 558.

Massachusetts. — Osgood v. Breed, 12 Mass. 525; Newburyport Bank v. Stone, 13 Pick. (Mass.) 420.

Mississippi. — Lee v. Bennett, 31 Miss. 119.

New Hampshire. — Marston v. Norton, 5 N. H. 210; Reed v. Blaisdell, 16 N. H. 194, 41 Am. Dec. 722; Cutter v. Butler, 25 N. H. 393; Sanborn v. Batchelder, 51 N. H. 426.

New Jersey. — Van Winkle v. Schoonmaker, 15 N. J. Eq. 384.

North Carolina. — Newlin v. Freeman, 1 Ired. L. (23 N. Car.) 514.

Pennsylvania. — Matter of Wagner, 2 Ashm. (Pa.) 448; Wagner v. Ellis, 7 Pa. St. 411, 47

Am. Dec. 515; Osmond's Estate, 161 Pa. St. 543, 34 W. N. C. (Pa.) 425.

South Carolina. — Grimke v. Grimke, 1 Desaus. (S. Car.) 366; Smelie v. Reynolds, 2 Desaus. (S. Car.) 66; Hood v. Archer, 1 McCord L. (S. Car.) 225.

Tennessee. — Perry v. Gill, 2 Humph. (Tenn.) 218.

Vermont. — Fisher v. Kimball, 17 Vt. 328.

Virginia. — West v. West, 3 Rand. (Va.) 373.

Compare Moehring v. Mitchell, 1 Barb. Ch. (N. Y.) 264.

**Proof of Consent of Husband.** — Cutter v. Butler, 25 N. H. 343.

**Oral Consent.** — See Reed v. Blaisdell, 16 N. H. 194; McGowan v. Jones, R. M. Charl. (Ga.) 184.

**An Assent in the Husband's Handwriting** was considered sufficient to support a will by the wife of her personal estate. Grimke v. Grimke, 1 Desaus. (S. Car.) 366.

**Time of Giving Consent.** — The consent of the husband could be given at the time the will was executed. Reed v. Blaisdell, 16 N. H. 194; Fisher v. Kimball, 17 Vt. 323.

**Continuance of Consent.** — In George v. Bussing, 15 B. Mon. (Ky.) 558, it was held that when a will was made with the consent of the husband, very little proof would be required to show the continuance of the consent.

**Husband's Knowledge of Contents of Will.** — It was necessary that the husband should know the contents of the will, or it could not be said to be made with his consent. Thus, the mere fact that the husband knew that his wife had made a will, and assented thereto, would not give validity to it. Willock v. Noble, L. R. 7 H. L. 580. See also Rex v. Bettesworth, 2 Stra. 891; George v. Bussing, 15 B. Mon. (Ky.) 558; Kurtz v. Saylor, 20 Pa. St. 205.

**What Property Passed.** — A will of the wife made with the assent of the husband only operated to pass such things as did not belong to the husband, but which he would have had the right to after the death of the wife as her administrator. Personal property which belonged to her and was reduced to possession by the husband during coverture and thereby became his property would not pass by her will. George v. Bussing, 15 B. Mon. (Ky.) 558.

4. **Consent of Husband to Devise Realty.** — Scammell v. Wilkinson, 2 East 552; Morse v. Thompson, 4 Cush. (Mass.) 562; Osgood v. Breed, 12 Mass. 525; Lee v. Bennett, 31 Miss. 119; Marston v. Norton, 5 N. H. 205.

probate.<sup>1</sup> unless given for a valuable consideration.<sup>2</sup>

(c) **Testamentary Execution of Power.** — At common law, there was no question as to the right of a married woman to make a will in execution of a power;<sup>3</sup> and in a marriage settlement the wife might reserve a power to dispose of her property by will, and the execution of such a power would be upheld in equity, though the property was not vested in trustees.<sup>4</sup> In executing a power by testamentary disposition, compliance with the provisions of the instrument or agreement creating the power was, of course, necessary.<sup>5</sup>

(3) **Removal of Disability** — (a) **By Death of Husband.** — By the death of the husband, the disability of the wife to make a will was removed.<sup>6</sup> But the death of the husband did not of itself give validity to a will executed by the wife in his lifetime. In order to render such a will valid, republication thereof was necessary.<sup>7</sup>

**Adultery or Desertion of Husband.** — The adultery or desertion of the husband did not enable the wife to make a will.<sup>8</sup>

(b) **By Civil Death of Husband.** — Where the husband of a married woman was civilly dead, being, for example, banished from the realm for life, her disability to make a will no longer existed.<sup>9</sup>

1. **Revocation of Consent.** — *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384. See also *George v. Bussing*, 15 B. Mon. (Ky.) 558; *Matter of Wagner*, 2 Ashm. (Pa.) 448; *West v. West*, 3 Rand. (Va.) 373. And compare *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 330.

**Husband Estopped to Revoke Consent.** — In *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, it was said: "If, for instance, the executor, in advance of the probate, with the assent of the husband, dispose of the property bequeathed to third persons, or if rights are otherwise acquired under the will, it may well be that the husband would not be permitted to retract his assent and oppose the probate."

2. *Osmond's Estate*, 161 Pa. St. 543.

3. **Testamentary Execution of Power** — *England.* — *Hawksley v. Barrow*, L. R. 1 P. & D. 147; *Stone v. Forsyth*, 2 Dougl. 707; *Scammell v. Wilkinson*, 2 East 552; *Ross v. Ewer*, 3 Atk. 156; *Douglas v. Cooper*, 3 Myl. & K. 378; *Cooper v. Macdonald*, 7 Ch. D. 288; *Noble v. Willock*, L. R. 8 Ch. 778.

*United States.* — *Barnes v. Irwin*, 2 Dall. (U. S.) 199; *Picquet v. Swan*, 4 Mason (U. S.) 443.

*Georgia.* — *Chapman v. Gray*, 8 Ga. 341.

*Illinois.* — *Pool v. Blakie*, 53 Ill. 495.

*Kentucky.* — *George v. Bussing*, 15 B. Mon. (Ky.) 558; *Ford v. Ford*, 2 Duv. (Ky.) 418; *Kennedy v. Ten Broeck*, 11 Bush (Ky.) 241; *Parrott v. Kelly*, 79 Ky. 490, 3 Ky. L. Rep. 269. *Maryland.* — *Mory v. Michael*, 18 Md. 227; *Schley v. McConney*, 36 Md. 267.

*Massachusetts.* — *Osgood v. Breed*, 12 Mass. 525; *Heath v. Withington*, 6 Cush. (Mass.) 497. See also *Osgood v. Bliss*, 141 Mass. 474, 55 Am. Rep. 488.

*New Hampshire.* — *Cutter v. Butler*, 25 N. H. 343.

*New York.* — *Strong v. Wilkin*, 1 Barb. Ch. (N. Y.) 9; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 111; *Hicks v. Cochran*, 4 Edw. Ch. (N. Y.) 107; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523; *Albrecht v. Pell*, 11 Hun (N. Y.) 127; *Wadhams v. American Home Missionary Soc.*, 12 N. Y. 415.

*North Carolina.* — *Merritt v. Windley*, 3 Dev. L. (14 N. Car.) 399; *Newlin v. Freeman*, 1 Ired. L. (23 N. Car.) 514.

*Ohio.* — *Jones v. Shields*, 14 Ohio 359.

*South Carolina.* — *Porcher v. Daniel*, 12 Rich. Eq. (S. Car.) 349.

*Virginia.* — *Thorndike v. Reynolds*, 22 Gratt. (Va.) 21.

See also the title **POWERS**, vol. 22, p. 1088.

In *Schley v. McConney*, 36 Md. 266, it was said: "There can be no question made of the right of a *feme covert* to execute a power, whether collateral, appendant, or in gross, and in no case is the concurrence of the husband necessary, unless made so by the power itself. The law prescribes no particular ceremonies to be observed in the execution of a power; but the terms of the power may direct it to be executed by a note in writing, or by will or deed, or may prescribe any ceremonies which the will or caprice of the party creating it may think proper, all of which must be complied with, however unessential or unimportant they may appear to be in themselves."

In *Thorndike v. Reynolds*, 22 Gratt. (Va.) 21, it was held that a husband who by his will gave property, real and personal, to his wife, absolutely, if she survived him, might also authorize her to make a will in his lifetime disposing of said property. And the wife having made a will in the lifetime of her husband, disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same was valid to pass the property to her devisees and legatees.

4. *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523.

5. *Hodsden v. Lloyd*, 2 Bro. C. C. 534.

6. *Osgood v. Breed*, 12 Mass. 525.

7. See *infra*, this title, *Revival or Republication* — *Of Will of Married Woman*.

8. **Adultery or Desertion of Husband.** — *Cain v. Bunkley*, 35 Miss. 119; *Vreeland v. Ryno*, 26 N. J. Eq. 163.

9. **Husband Civilly Dead.** — *Portland v. Producers*, 2 Vern. 104.



*b. CAPACITY IN EQUITY.*—Courts of equity have long recognized the right of a wife to dispose by will of her equitable separate property, whether the same be personally<sup>1</sup> or realty.<sup>2</sup> It has been held, however, that the power to dispose of her equitable separate real estate does not exist unless such power is expressly reserved by antenuptial agreement, or is conferred by the instrument creating the estate.<sup>3</sup> Where the instrument creating a married woman's equitable separate estate contains no restriction on her power of alienation, except that the trustee shall join in her deed, she may devise such estate by will without the trustee joining therein or consenting thereto.<sup>4</sup> A statutory provision prohibiting or restricting a married woman from disposing of her equitable separate estate is, of course, valid and will be given effect.<sup>5</sup>

*c. CAPACITY UNDER STATUTE*—(1) *In General.*—The want of capacity on the part of a married woman to make a will, being legal only, may be removed by statute.<sup>6</sup> The early statutes authorizing in general terms any person to dispose of his lands by will, were held not to confer such power upon married women;<sup>7</sup> but at the present time, in practically all jurisdictions, the common-law disability of a married woman to make a will has been by statute either wholly or partially removed.<sup>8</sup> Such statutes, since they are

1. *Right to Dispose of Equitable Separate Personality.*—*Willock v. Noble*, L. R. 7 H. L. 580; *Wells v. Bransford*, 28 Ala. 200; *Buchanan v. Turner*, 26 Md. 1; *Lee v. Bennett*, 31 Miss. 119; *Wadhams v. American Home Missionary Soc.*, 12 N. Y. 415; *West v. West*, 3 Rand. (Va.) 373. See also *Beach v. Manchester*, 2 Cush. (Mass.) 72; *Porcher v. Daniel*, 12 Rich. Eq. (S. Car.) 349.

2. *Smith v. Thompson*, 2 MacArthur (D. C.) 291, 29 Am. Rep. 621; *Buchanan v. Turner*, 26 Md. 1. See also the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 380.

3. *Thomas v. Folwell*, 2 Whart. (Pa.) 11, 30 Am. Dec. 230; *West v. West*, 3 Rand. (Va.) 373; *Dillard v. Dillard*, (Va. 1895) 21 S. E. Rep. 669.

4. *Smith v. Thompson*, 2 MacArthur (D. C.) 291.

5. *Harris v. Harbeson*, 9 Bush (Ky.) 397; *Heyer v. Burger*, Hoff. (N. Y.) 1.

In *Wadhams v. American Home Missionary Soc.*, 12 N. Y. 415, *reversing* 10 Barb. (N. Y.) 597, it was held that under a statute providing that every male person of the age of eighteen years or upwards, and every female "not being a married woman," of the age of sixteen years or upwards, of sound mind and memory, and "no others," might give and bequeath his or her personal estate by will, a married woman could not make a valid will of her separate personal estate reserved by marriage contract, though she was expressly authorized to do so by the contract.

*Effect of Statute upon Will Theretofore Executed.*—*Strong v. Wilkin*, 1 Barb. Ch. (N. Y.) 9.

6. *Marston v. Norton*, 5 N. H. 205; *Wakefield v. Phelps*, 37 N. H. 295; *Allen v. Little*, 5 Ohio 65.

7. *Early Statutes of Wills*—*Alabama*.—*Baker v. Chastang*, 18 Ala. 417.

*Connecticut*.—*Adams v. Kellogg*, Kirby (Conn.) 195; *Fitch v. Brainerd*, 2 Day (Conn.) 183.

*Indiana*.—*Reese v. Cochran*, 10 Ind. 195. But see *Noble v. Enos*, 19 Ind. 72.

*Kentucky*.—*George v. Bussing*, 15 B. Mon. (Ky.) 558.

*Massachusetts*.—*Morse v. Thompson*, 4 Cush. (Mass.) 562; *Osgood v. Breed*, 12 Mass. 525.

*New Hampshire*.—*Marston v. Norton*, 5 N. H. 205; *Cutter v. Butler*, 25 N. H. 352; *Wakefield v. Phelps*, 37 N. H. 295.

*Compare Bennett v. Hutchinson*, 11 Kan. 398; *Allen v. Little*, 5 Ohio 65; *Fisher v. Kimball*, 17 Vt. 323.

In *Morse v. Thompson*, 4 Cush. (Mass.) 562, the court, in speaking of the English statute, said: "The English statute of wills, 32 Hen. VIII., c. 1, authorized any person having lands, etc., to devise them, and it seems to have been the better opinion, on the construction of that statute, that a married woman could not make a valid will of lands. But as 'divers doubts, questions, and ambiguities' had arisen or were apprehended on that and other points, the Statute of 34 & 35 Hen. VIII., c. 5, was made to remove them; and this last statute (§ 14) expressly prohibits such devises by married women."

8. *Statutory Removal of Incapacity*—*Alabama*.—*Mosser v. Mosser*, 32 Ala. 551.

*District of Columbia*.—*Emmons v. Garnett*, 18 D. C. 52.

*Georgia*.—*Urquhart v. Oliver*, 56 Ga. 344.

*Illinois*.—*Matter of Tuller*, 79 Ill. 99, 22 Am. Rep. 164; *Emmert v. Hays*, 89 Ill. 11.

*Indiana*.—*Noble v. Enos*, 19 Ind. 72.

*Kansas*.—*Bennett v. Hutchinson*, 11 Kan. 398; *Noecker v. Noecker*, 66 Kan. 347.

*Kentucky*.—*Ford v. Ford*, 2 Duv. (Ky.) 418; *Hiram v. Griffin*, 8 Bush (Ky.) 262; *Harris v. Harbeson*, 9 Bush (Ky.) 397; *Perkins v. Towery*, (Ky. 1887) 3 S. W. Rep. 604; *Johnson v. Johnson*, (Ky. 1894) 24 S. W. Rep. 628. See also *Porter v. Ford*, 82 Ky. 191.

*Maryland*.—*Schull v. Murray*, 32 Md. 9.

*Massachusetts*.—*Burroughs v. Nutting*, 105 Mass. 228; *Smith v. Wells*, 134 Mass. 11.

*Mississippi*.—*Kelly v. Alred*, 65 Miss. 495.

*Missouri*.—*Waters v. Herboth*, 178 Mo. 166.

in derogation of the common law, should be strictly construed.<sup>1</sup>

**Operation of Statutes.** — A statute conferring testamentary capacity upon married women generally includes women married prior to the passage thereof,<sup>2</sup> and includes the power to dispose of property acquired before as well as after its enactment.<sup>3</sup>

**Conflict of Laws.** — Questions relative to the law which must govern, as between different jurisdictions, in determining the validity of the will of a married woman, are considered elsewhere in this work.<sup>4</sup> As to what law should govern within any one jurisdiction, the authorities are in conflict. According to one view, the statute in force at the time of her death governs,<sup>5</sup> according to other authorities, the law prevailing at the time of the execution of the will is determinative.<sup>6</sup>

(2) *Woman's Property Acts.* — Woman's property acts enlarging the power of married women to hold and dispose of property are regarded strictly in the character of enabling statutes, and therefore not as restricting their power otherwise conferred to make wills.<sup>7</sup> Similarly, acts merely empowering

*New Hampshire.* — *Hayes v. Seavey*, 69 N. H. 308.

*New Jersey.* — *Vreeland v. Ryno*, 26 N. J. Eq. 160.

*New York.* — *Waters v. Cullen*, 2 Bradf. (N. Y.) 354; *Wallace v. Bassett*, 41 Barb. (N. Y.) 92. See also *Wadhams v. American Home Missionary Soc.*, 12 N. Y. 415.

*Ohio.* — *Allen v. Little*, 5 Ohio 65; *Huston v. Cone*, 24 Ohio St. 11.

*Texas.* — *Brown v. Pridgen*, 56 Tex. 124.

*Virginia.* — *Dillard v. Dillard*, (Va. 1895) 21 S. E. Rep. 669.

*California.* — In *Matter of Matheny*, 121 Cal. 267, it was held that Code Civ. Pro., § 1468, which provides that the separate property of the wife selected and set apart as a homestead by the court after her death vests in her heirs subject to the homestead, constituted a limitation on the general power of the wife to dispose of her estate by will, and therefore a devise by her of property so set apart as a homestead was ineffectual. See also *Matter of Walkerly*, 108 Cal. 627.

*Massachusetts.* — In *Beach v. Manchester*, 2 Cush. (Mass.) 72, it was held that Stat. 1845, c. 208, § 7, providing that if a married woman holding property to her separate use should die intestate, the property thus held should vest in her husband, unless other provision was made in relation thereto by the terms of the contract or conveyance conveying the separate estate, did not impliedly authorize the wife to dispose of such property by will, and in order for the wife to dispose thereof she must comply with the provisions of Stat. 1842, c. 74.

*New Hampshire.* — In *Wakefield v. Phelps*, 37 N. H. 295, it was held that Rev. Stat., c. 149, § 3, related merely to married women deserted by their husbands and living separate from them, and to the wives of aliens living in the state apart from their husbands, and did not, therefore, authorize a married woman living with her husband to make a will.

*New York.* — The Acts of April 7, 1848, and April 10, 1849, conferring upon married women testamentary capacity, were not repealed by the Act of March 20, 1860, relating to the rights and liabilities of husband and wife. *Wallace v. Bassett*, 41 Barb. (N. Y.) 92.

**Power Confined to Separate Estate.** — Where the statute merely authorizes a married woman to devise her separate estate, she cannot devise property constituting her general estate. *Perkins v. Towery*, (Ky. 1887) 3 S. W. Rep. 604; *Craine v. Edwards*, 92 Ky. 109; *Wehle v. Umpfenbach*, (Ky. 1893) 23 S. W. Rep. 360.

**1. Strict Construction of Statutes.** — *Harker v. Elliott*, 3 Harr. (Del.) 51; *Compton v. Pierson*, 28 N. J. Eq. 229.

**2.** *Waters v. Cullen*, 2 Bradf. (N. Y.) 354.

**3.** *Smith v. Thompson*, 2 MacArthur (D. C.) 291; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114.

**4.** See the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1362.

**5.** *Wakefield v. Phelps*, 37 N. H. 295, wherein the court said: "A will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction and validity depend upon the law as it then stands. A statute passed after the making of a will, but before the death of the testator, by which the law is changed, takes effect upon the will. To give the statute such a construction is not to make it retrospective in its operation, since it affects no rights vested before its passage." Compare *Burroughs v. Nutting*, 105 Mass. 228.

**6.** In *Kurtz v. Saylor*, 20 Pa. St. 205, the court said: "But a will made in 1833, if invalid for such want of authority, was not validated by the Act of 1848, passed during her lifetime. Her right to make a will was to be determined by the law as it existed when the will was made, and not as it was at the time of her death." See also *Mullen v. McKelvy*, 5 Watts (Pa.) 399. And see *supra*, this title, *Scope of Title*.

**7. Testamentary Power Not Restricted by Woman's Property Acts.** — *Buchanan v. Turner*, 26 Md. 1; *Beach v. Manchester*, 2 Cush. (Mass.) 72 (construing Stat. 1845, c. 208, §§ 5, 7); *Lee v. Bennett*, 31 Miss. 119; *Wakefield v. Phelps*, 37 N. H. 295.

In *Buchanan v. Turner*, 26 Md. 1, the court said: "The power of the testatrix to dispose of her property by such an instrument as the will before us was not derived alone from any provision of the code; under the decisions of

women to hold property during marriage free from the control of their husbands, do not impliedly empower them to dispose of such property by will.<sup>1</sup> But, as a general rule, the present statutes in relation to the separate property of married women expressly empower them to make testamentary disposition of such property.<sup>2</sup>

(3) *Married Infant*. — A general statute conferring testamentary power upon a married woman is to be construed in connection with other statutes regulating testamentary capacity. Thus, a general power conferred upon a married woman to make a will does not include an infant married woman where other states prohibit infants from making wills.<sup>3</sup>

(4) *Manner of Exercise of Power*. — A married woman in exercising her statutory power to dispose of her property by will must, of course, comply with all the statutory requirements.<sup>4</sup> Thus, where the consent of the husband is required, such consent must be given.<sup>5</sup>

(5) *Rights of Husband*. — A general statutory power conferred upon a married woman to dispose of her property by will does not by implication empower her to bequeath such property in derogation of the rights of the husband to the share in her estate which the law gives to him.<sup>6</sup> And in some instances the statutes conferring testamentary power upon married women have expressly so provided.<sup>7</sup> Thus, a general testamentary capacity conferred

this court before cited it would have been a good will to pass the property in question if executed by a married woman before the code was adopted, and notwithstanding the provisions of the sixth section of the Act of 1842. The property being held by her to her sole and separate use, that act did not apply to it, and when re-enacted in the code it must have the same operation and effect, and cannot be construed as abridging or taking away the power of the testatrix to dispose of her property by will executed as if she were a *feme sole*."

1. *Testamentary Power Not Implied*. — Harker v. Elliott, 3 Harr. (Del.) 51; Cain v. Bunkley, 35 Miss. 119; Vreeland v. Ryno, 26 N. J. Eq. 160; Compton v. Pierson, 28 N. J. Eq. 229; Ransom v. Nichols, 22 N. Y. 110; Ryder v. Hulse, 24 N. Y. 372; Barnes v. Underwood, 47 N. Y. 353. Compare Erquhart v. Oliver, 56 Ga. 344; Noble v. Enos, 19 Ind. 72.

In Delaware an act empowering a married woman "to hold, bargain, sell, and convey her lands," and providing that "her deed conveying said lands shall be good," has been held to refer merely to contracts *inter vivos*, and not to testamentary dispositions. Harker v. Elliott, 3 Harr. (Del.) 51.

2. *Present Statutes*. — Matter of Tuller, 79 Ill. 99; Emmert v. Hays, 89 Ill. 11; Stewart v. Ross, 50 Miss. 776; Dickinson v. Dickinson, 61 Pa. St. 401.

3. *Married Infant*. — Campbell v. Browder, 7 Lea (Tenn.) 240.

The New York Act of 1849, conferring testamentary power upon "any married female," was held not to confer such power upon an infant married female. Zimmerman v. Schoenfeldt, 3 Hun (N. Y.) 692.

4. Gregory v. Oates, 92 Ky. 532.

*Presence of Husband at Execution of Will*. — A statute prohibiting a husband from witnessing his wife's will does not render it unlawful for him to be present when she executes her will. Dickinson v. Dickinson, 61 Pa. St. 401.

5. *Consent of Husband*. — Smith v. Sweet, 1

Cush. (Mass.) 470; Beach v. Manchester, 2 Cush. (Mass.) 72; Sanborn v. Batchelder, 51 N. H. 426; Kurtz v. Saylor, 20 Pa. St. 205.

*Sufficiency of Consent*. — Where the statute requires the consent of the husband to a will by the wife, the fact that the husband stated to his wife that she could do what she pleased with her property provided he got a certain amount, is not a sufficient consent to render a bequest by her valid. Kurtz v. Saylor, 20 Pa. St. 208.

6. *Rights of Husband in Property of Wife*. — Hayes v. Seavey, 69 N. H. 308; Bertolet's Estate, 2 Woodw. (Pa.) 439.

In Missouri, where a wife dies without children or other descendants in being, the husband is given by statute (Rev. Stat. 1899, § 2938) one-half of the real and personal estate belonging to her at the time of her death; and the wife under the general statutory power to dispose of her property by will (Rev. Stat. 1899, § 4603) cannot defeat his right thereto. Waters v. Herboth, 178 Mo. 166.

7. Dickinson v. Dickinson, 61 Pa. St. 401.

The New Jersey Act of 1864 provided that any will or testament, by any married female above the age of twenty-one years, thereafter made, of any real or personal property, should be held and taken to be as valid and effectual in law as if she were, at the time of the making of such will or testament, a *feme sole* and unmarried; provided always that nothing in the act contained should be so construed as to authorize any married woman to dispose of by will or testament any interest to which her husband then or at her death was entitled by law, in her real or personal property; but such interest should remain in and survive to the husband in the same manner as if such will had not been made. The Act of 1852 protected the property of the married woman during her life from the control of her husband, but did not affect the right of succession by the husband to her personal property. It was held under these statutes that a married woman could not bequeath personal property as against the rights



upon a wife does not empower her to dispose of the realty so as to cut off the husband's estate by the curtesy.<sup>1</sup> Questions as to the power of the wife to dispose of the homestead and of community property, as against the rights of the husband therein, have been discussed elsewhere in this work.<sup>2</sup>

*d. EFFECT OF MARRIAGE SUBSEQUENT TO EXECUTION OF WILL.* — A discussion of the effect of marriage upon a will executed by a woman while *feme sole* will be found elsewhere in this title.<sup>3</sup>

*e. DEVISES AND BEQUESTS TO HUSBAND.* — The right of a married woman to devise or bequeath her property to her husband is considered hereafter.<sup>4</sup>

**VI. RESTRAINTS ON TESTAMENTARY POWER** — 1. In General — *a. PERSONAL INCAPACITY OF LEGATEE OR DEVISEE.* — The general rule is that any person may be a legatee or devisee.<sup>5</sup> But, as an exception to this rule, the law has seen fit to declare, for reasons of public policy and good morals, that certain persons or classes of persons shall be incapable of receiving a legacy or devise. Such special disabilities, either entire or partial, have been already very generally considered in this work, and no more than a reference to other titles is necessary here.<sup>6</sup>

*b. INVALID TESTAMENTARY DISPOSITIONS.* — Upon the same grounds of public policy and good morals, a testamentary disposition designed to carry into effect some purpose which the law regards as illegal, impossible, impolitic, or immoral, will be held void.<sup>7</sup> Questions concerning the validity of testa-

of the husband thereto. *Vreeland v. Ryno*, 26 N. J. Eq. 160. See also *Compton v. Pierson*, 28 N. J. Eq. 229.

1. **Husband's Right of Curtesy.** — *Cooper v. Macdonald*, 7 Ch. D. 288; *Clarke's Appeal*, 79 Pa. St. 376. See also *Stewart v. Ross*, 50 Miss. 776. And see the title *CURTESY*, vol. 8, p. 525.

In *Clarke's Appeal*, 79 Pa. St. 376, it was said: "A husband is entitled to his curtesy in the real estate of inheritance of his deceased wife when he elects to take it against her last will. In considering the legislation upon the power of a married woman to devise her real estate, the fact must not be overlooked that his curtesy estate was one arising at common law in the lifetime of his wife, and becoming fixed in him at the instant of her death. It was, therefore, not a subject upon which her devise could operate."

**When Wife Has Power of Disposition.** — A husband cannot be tenant by curtesy of real estate conveyed to the wife for her sole and separate use, and with power of disposal, where she has disposed of it by will duly executed and attested. *Pool v. Blakie*, 53 Ill. 495.

**Effect of Joinder of Husband in Will.** — "The joinder of the husband in a will of lands executed by the wife in *Pennsylvania*, when her power of disposition is unqualified (Act of April 11, 1848, § 8, pamph. L. 537), can mean nothing else but that he consents and agrees to the disposition therein made, and if it is an immediate disposition, it must mean a release of his curtesy or it means nothing." *McBride's Estate*, 81 Pa. St. 303.

2. See the titles *COMMUNITY PROPERTY*, vol. 6, p. 346; *HOMESTEAD*, vol. 15, p. 692.

3. See *infra*, this title, *Revocation*.

4. See *infra*, this title, *Restraints on Testamentary Power—Wills Between Husband and Wife*.

5. See the title *LEGACIES AND DEVISES*, vol. 18, p. 735.

6. **Aliens.** — See the titles *ALIENS*, vol. 2, pp. 64, 87; *LEGACIES AND DEVISES*, vol. 18, p. 735.

**Attesting Witnesses.** — See the title *LEGACIES AND DEVISES*, vol. 18, p. 737. See also *supra*, this title, *Form—Formal Requisites—Attestation and Subscription—Qualifications of Attesting Witnesses*.

**Bankrupts.** — See the title *LEGACIES AND DEVISES*, vol. 18, p. 735.

**Corporations.** — See the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 721; *LEGACIES AND DEVISES*, vol. 18, p. 741.

**Felons.** — See the titles *CIVIL DEATH*, vol. 6, p. 64; *LEGACIES AND DEVISES*, vol. 18, p. 736.

**Infants en Ventre Sa Mere.** — See the title *INFANTS*, vol. 16, p. 259.

**Murderer of Testator.** — See the title *MURDER AND MANSLAUGHTER*, vol. 21, p. 238.

**Scrivener of Will.** — See the title *UNDUE INFLUENCE*, vol. 29, pp. 114, 124; and also *Rusling v. Rusling*, 36 N. J. Eq. 603; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 69; *Riddell v. Johnson*, 26 Gratt. (Va.) 152.

**Slaves.** — See the titles *SLAVES AND SLAVERY*, vol. 25, p. 1097; *LEGACIES AND DEVISES*, vol. 18, p. 735.

**Unincorporated Associations.** — See the title *LEGACIES AND DEVISES*, vol. 18, p. 741.

7. **Conception of Public Policy Liable to Variations.** — "Doubtless the local conception of public policy on such points is liable, in different jurisdictions and at different times and different epochs, to great variations. Decisions must greatly vary in consequence." *Per Hall, J.*, in *Smith v. Du Bose*, 78 Ga. 413, citing *Schouler on Wills* (2d ed.), § 22.

**It Is the Testator's Intention,** and not that of the legatee, which will vitiate the will if its objects are illegal. Thus, if the testator gives his property to a friend with no injunction as to the disposition of the same, the mere fact that such legatee intends to devote the same to

mentary dispositions between husband and wife,<sup>1</sup> and the power of a parent to disinherit his children,<sup>2</sup> will be considered hereafter. As to the validity of various other legacies and devises, references will be found in the notes to the specific titles wherein such matters are discussed.<sup>3</sup>

**2. Wills Between Husband and Wife — Will of Husband.** — A husband could always will his property to his wife as to a stranger, for his will takes effect only upon his death and after the marriage unity has been destroyed.<sup>4</sup>

**Will of Wife.** — At common law, a testamentary disposition by a wife to her husband, though made with his consent, was void, being considered as nothing more or less than a gift of a husband to himself;<sup>5</sup> but it was held that the same principle which allowed a married woman to bequeath to a stranger with the consent of her husband, would uphold a bequest by the wife to her husband, with his consent, of her choses in action not reduced to possession by the husband.<sup>6</sup> And under a general power conferred upon a married woman to dispose of her property by will she might make her husband the beneficiary.<sup>7</sup> Under modern statutes, the right of a wife to devise or bequeath to her husband is generally well settled;<sup>8</sup> but where a statute expressly provides that a married woman cannot devise to her husband, such a devise is invalid.<sup>9</sup> A statute which gives a married woman general power to devise her lands, merely providing that her will shall not injuriously affect her husband's rights, has been held to empower a wife to devise her lands to her husband.<sup>10</sup>

an illegal purpose, because of his knowledge of the testator's desires in that respect, will not render the will void. *Carrie v. Cumming*, 26 Ga. 690.

In Louisiana the testamentary power must be exerted in subordination to the titles of ownership prescribed by the code, and a will which seeks to introduce an impossible and illegal tenure is invalid. *Kernan's Succession*, 52 La. Ann. 48.

*Substitutions and Fidei Commissa* are prohibited in Louisiana. Civ. Code La. (1900), art. 1520; *Provost v. Provost*, 13 La. Ann. 574; *Weber v. Ory*, 14 La. Ann. 543; *Wailles v. Daniell*, 14 La. Ann. 585. See also the title TRUSTS AND TRUSTEES, vol. 28, p. 863.

A Legacy Designed to Create a Revolution in the dominions of an ally of England was held invalid in *Habershon v. Vardon*, 7 Eng. L. & Eq. 228, 15 Jur. 961.

**Legacy Designed to Oppose Secret Societies.** — A testamentary disposition is not illegal because made for the purpose of opposing secret societies generally and Freemasonry in particular. *Matter of Bissell*, 63 Neb. 585.

**Testamentary Restrictions upon Previous Gift.** — A will cannot by its terms place restrictions upon a gift made by the testator before the will became operative. *Tolley v. Wilson*, (Tenn. Ch. 1897) 47 S. W. Rep. 156.

1. See *infra*, this section, *Wills Between Husband and Wife*.

2. See *infra*, this section, *Disinheritance of Children*.

3. **Gifts to Charitable or Superstitious Uses.** — See the titles CHARITIES AND TRUSTS FOR CHARITABLE PURPOSES, vol. 5, p. 893; RELIGIOUS SOCIETIES, vol. 24, p. 363; LEGACIES AND DEVISES, vol. 18, p. 743.

**Gifts in Perpetuity and for Accumulation.** — See the title PERPETUITIES AND TRUSTS FOR ACCUMULATION, vol. 22, p. 701.

**Gifts to Mistress or Paramour.** — See the title LEGACIES AND DEVISES, vol. 18, p. 736.

**Gifts to Illegitimate Children.** — See the titles BASTARDY, vol. 3, p. 893; LEGACIES AND DEVISES, vol. 18, p. 736.

**Devise to Heirs of Testator.** — See the title LEGACIES AND DEVISES, vol. 18, p. 740.

**Emancipation of Slaves by Will.** — See the title SLAVES AND SLAVERY, vol. 25, p. 1103.

**As to Illegal or Immoral Conditions** in a will, see *infra*, this title, XI. 18. *Conditional Devises or Bequests*.

**4. Husband May Will Property to Wife.** — *Morse v. Thompson*, 4 Cush. (Mass.) 562; *Burdeno v. Amperse*, 14 Mich. 90; *Wakefield v. Phelps*, 37 N. H. 295.

5. *Hood v. Archer*, 1 McCord L. (S. Car.) 225. See also *supra*, this title, *Who May Make a Will — Married Women*.

6. *Burton v. Holly*, 18 Ala. 408.

7. **Under Power.** — *Rich v. Beaumont*, 3 Bro. P. C. 308; *Parrott v. Kelly*, 3 Ky. L. Rep. 269; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523.

8. See the various statutes.

9. *Wakefield v. Phelps*, 37 N. H. 295.

10. *Wakefield v. Phelps*, 37 N. H. 295, construing N. H. Comp. Stat., c. 158, § 11, but holding that this statute in so far as it empowers a wife to devise lands to her husband was impliedly repealed by the Act of July 8, 1854. But see *Morse v. Thompson*, 4 Cush. (Mass.) 562, wherein Fletcher, J., said: "The terms in this provision in the act are perfectly clear and unambiguous, and have one, and but one, distinct, intelligible meaning. The terms are: 'Provided, that the rights and interests of the husband to and in any such property shall in no way be affected thereby;' that is, the rights and interests of the husband in the property of his wife shall be in no way affected by her will. The wife, therefore, has no power by the statute to make a will, by which the rights and

**3. Disinheritance of Children.**—In many jurisdictions it is provided by statute that pretermitted children, or the pretermitted issue of deceased children, living at the date of the will, shall take the same interest in the testator's estate as they would have taken had he died intestate.<sup>1</sup> It does not seem to be necessary, however, that actual or bountiful provision be made for the children, or descendants of the children, of the testator. It is sufficient if it affirmatively appear that such children were not unintentionally forgotten or overlooked by the testator at the time he made his will.<sup>2</sup> Under some statutes, the intention of the testator must appear from the will itself, it being necessary that the children be actually named, or distinctly referred to personally;<sup>3</sup> under others, parol evidence is admissible to show that the children were intentionally omitted from the will.<sup>4</sup> The circumstances under which the birth of a child subsequent to the date of the will works a revocation thereof are discussed elsewhere.<sup>5</sup>

**VII. WHAT MAY BE DEVISED OR BEQUEATHED — 1. In General.**—The power of testamentary disposition extends to all interests, legal or equitable, in real and personal property, which would, unless otherwise disposed of, descend or devolve on the death of the testator to his heirs or personal representatives.<sup>6</sup>

interests of her husband to and in her property will be in any way affected. The statute does not say that the rights and interests of the husband to and in her property shall be in no way prejudiced or impaired or unfavorably affected by the will of the wife; but shall be in no way affected, favorably or unfavorably, diminished or increased."

1. See the various statutes.

**An Illegitimate Child** is not within the purview of the statute. *Kent v. Barker*, 2 Gray (Mass.) 535. See also *McCulloch's Appeal*, 113 Pa. St. 247.

**A Will Merely Executing a Power of Appointment** is not contemplated by the provisions of the statute. *Sewall v. Wilmer*, 132 Mass. 131.

**2. Actual Provision Unnecessary if Children Not Forgotten.**—*Boman v. Boman*, 49 Fed. Rep. 329; *Hockensmith v. Slusher*, 26 Mo. 237; *Wetherall v. Harris*, 51 Mo. 68; *Gerrish v. Gerrish*, 8 Oregon 351.

**What Is a Sufficient Provision.**—In *Boman v. Boman*, 47 Fed. Rep. 849, it was held that the statute was satisfied if the children were merely mentioned in the will in some manner, so that the intention of the testator to provide for them might be apparent, and that a legacy of one dollar to each of them was a sufficient provision. This decision was reversed in 49 Fed. Rep. 329, but upon the ground that the term "heirs at law," which was used by the testator in making the dollar legacies, did not include the children of the testator.

**In Arkansas** the statute inhibits the exclusion of a child by will unless the child is mentioned in the will by name; and a general designation of children as a class, without even specifying the number, is not a compliance with either the letter or the spirit of the statute. *Arnold v. Arnold*, 62 Ga. 627.

"**Relatives**" does not embrace children. *Hargadine v. Pulte*, 27 Mo. 423.

**3. Intentional Omission Must Appear from Will.**—*Matter of Garraud*, 35 Cal. 336; *Matter of Stevens*, 83 Cal. 322; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Gage v. Gage*, 29 N. H. 533; *Chace v. Chace*, 6 R. I. 407.

**4. Parol Evidence Admissible to Show Intention.**

—*Coulam v. Doull*, 133 U. S. 216; *Lorieux v. Keller*, 5 Iowa 196; *Whittemore v. Russell*, 80 Me. 297; *Wilson v. Fosket*, 6 Met. (Mass.) 400; *Bancroft v. Ives*, 3 Gray (Mass.) 367; *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8. See also *Peters v. Siders*, 126 Mass. 135.

5. See *infra*, this title, *Revocation*.

6. 1 Jarman on Wills (6th ed.) \*48; Schouler on Wills (2d ed.), § 28; Wills Act, 1 Vict. c. 26, § 3. See also the various American statutes. And see the titles LEGACIES AND DEVISES, vol. 18, p. 734; ESTATES, vol. 11, p. 364.

**As to What Are Assets of an Estate**, see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 828.

**The Word "Seized,"** in a statute conferring the right of devising real estate only upon persons who are seized thereof, should be understood in the broad sense of "having." *Bailey v. Hoppin*, 12 R. I. 569.

**Executory or Contingent Interests** are subject to testamentary disposition. *Inglby v. Amcotts*, 21 Beav. 585; *Collins v. Smith*, 105 Ga. 525. See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 456.

**Custody of Children.**—A wife cannot by testamentary disposition deprive her husband of the custody of the children, to which he has the natural and legal right, unless he is so completely unfit for such duties that the welfare of the children themselves imperatively demands another disposition of their custody. *Matter of Neff*, 20 Wash. 652.

**Claim Against Estate.**—An equitable claim of an heir at law against the estate of his ancestor, based upon an error in partitioning the property, is devisable. *Smith v. Sweringen*, 26 Mo. 551.

**Claim Against Government.**—Where a testator, previous to his death, had filed a claim against the government, which claim was subsequent to his death paid to his administrator, the funds were held to form part of the residuary estate of the deceased and not to be a mere gratuity passing to the heirs at law of the testator. *Camp v. Vaughan*, 110 Ga. 131.

**Right to Dispose of Dead Body.**—In the absence



**The Test,** then, of a devisable interest is that it is descendible.<sup>1</sup> Accordingly, a testator cannot devise property in which he has only a life estate,<sup>2</sup> or in which his interest is strictly that of a joint tenant;<sup>3</sup> and an interest coupled with a trust cannot be devised, as it must cease with the trust, and the trust is extinguished by the death of the trustee.<sup>4</sup>

**Insurance Moneys.** — The proceeds of an insurance policy upon the life of the testator, payable to his executor, administrator, or assigns may be disposed of by will.<sup>5</sup> But where a policy is made payable to the "legal heirs," to be designated by will, a testator cannot bequeath the insurance to his executors for the payment of debts with remainder to his children.<sup>6</sup>

**Disposal by Testator of Devise or Legacy to Himself.** — Where a legatee or devisee dies before his testator, his right to dispose of the devise or legacy depends upon the statute in force relative to the lapsing of legacies. If it is therein provided that the legacy shall vest in the children or descendants of the devisee or legatee, he has no power of disposition over such property by will; but if the law is that the devise or bequest vests in the deceased legatee and becomes subject to all the incidents of property belonging to him, in the same manner as if he had survived the testator, then he may dispose of the property by will.<sup>7</sup>

**2. Rights of Entry and Action.** — At common law, a mere right of action as a reversion in fee expectant on an estate tail, which had been discontinued by the tenant in tail, could not be devised;<sup>8</sup> and the same doctrine applied to a mere right of entry created by actual disseizin, as distinguished from a right to recover land held by adverse possession or by a tenant at sufferance.<sup>9</sup>

of statutory provisions there is no property in a dead body, and a man cannot by will dispose of that which after his death will be his corpse. *Williams v. Williams*, 20 Ch. D. 659; *Enos v. Snyder*, 131 Cal. 68. See also the title *DEAD BODY*, vol. 8, p. 834.

**As to Wills of Homestead Property,** see *Matter of Fath*, 132 Cal. 609; *Matter of Matheney*, 121 Cal. 267; *Caro v. Caro*, (Fla. 1903) 34 So. Rep. 309, and the title *HOMESTEAD*, vol. 15, p. 692.

**As to Wills of Community Property,** see the title *COMMUNITY PROPERTY*, vol. 6, p. 346.

**As to Restrictions on the Right to Devise or Bequeath** certain property arising from an agreement made by the testator before his death, see the title *DEBTS OF DECEDENTS*, vol. 8, p. 1017.

**As to the Devisable Portion of the Property of a Married Person,** see *supra*, this title, *Restraints on Testamentary Power—Wills Between Husband and Wife*.

1. *Ingilby v. Amcotts*, 21 Beav. 585; *Smith v. Sweringen*, 26 Mo. 568.

2. *Beeton v. Stoops*, 91 N. Y. App. Div. 185.

**Equitable Lien Not Devised by Attempt to Devise Fee.** — A will by a tenant for life only, which purports to devise the fee of the lands which are the subject of the tenancy, does not operate as a bequest of an equitable lien upon the reversion in behalf of the testator because of his having paid off an incumbrance upon the premises existing at or prior to the creation of the life estate. *Schimpf v. Rhodewald*, 62 Neb. 105.

3. 1 *Jarman on Wills* (6th ed.) \*48; *Schouler on Wills* (2d ed.), § 28; *Co. Litt.* 185v.

4. *Land v. Otley*, 4 Rand. (Va.) 213.

5. **Insurance Moneys.** — *Stoecker v. Thornton*, 88 Ala. 241; *Hamilton v. McQuillan*, 82 Me. 204; *Fox v. Senter*, 83 Me. 295; *Williams v.*

*Carson*, 9 Baxt. (Tenn.) 516; *Fletcher v. Williams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 860. See also *Laughlin v. Norcross*, 97 Me. 33.

**The Legatee** may be a person with no insurable interest in the life of the testator. *Fletcher v. Williams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 860.

**In Maine** the statute makes special provision for the distribution of life-insurance money, and if the insured wishes to change such distribution by will, he must make specific expression of such intention. But this statute does not apply to the beneficiary under a policy, whose interest therein will pass by his will without any specific mention thereof. *Small v. Jose*, 86 Me. 120.

6. *Griffith v. Howes*, 5 Ont. L. Rep. 439.

7. *Pate v. Pate*, 40 Miss. 750, wherein the court said that by the English rule the legacy vests in the deceased legatee. See also *Newbold v. Prichett*, 2 Whart. (Pa.) 46.

**In Maryland** it has been held that where a devisee dies before his testator the devise will not pass by the former's will, but will descend to the devisee's representatives, being distributed as if he had died intestate. *Glenn v. Belt*, 7 Gill & J. (Md.) 362. See also *Hall, Appellant*, 26 Md. 107.

8. 1 *Jarman on Wills* (6th ed.) \*50; *Baker v. Hacking*, Cro. Car. 387; *Doe v. Finch*, 1 N. & M. 130.

9. *Goodright v. Forester*, 8 East 564; *Cave v. Holford*, 3 Ves. Jr. 669; *Atty-Gen. v. Vigor*, 8 Ves. Jr. 282; *Doe v. Hull*, 2 Dowl. & R. 38, 16 E. C. L. 69; *Culley v. Doe*, 11 Ad. & El. 1020, 30 E. C. L. 303.

**Reason for Rule.** — Rights of entry and action were not devisable at common law, because a devise was regarded as a species of conveyance, and such rights could not be conveyed by deed

In *England*, the question of the devisability of rights of action has been rendered unimportant by the passage of a statute abolishing real actions; <sup>1</sup> and as to rights of entry, a later statute expressly includes among devisable interests "all rights of entry for conditions broken and other rights of entry."<sup>2</sup> In the *United States*, under the broad and comprehensive provisions of the local statutes as to what property is devisable, and in the absence of any express statutory provision forbidding the devise of land held adversely to the testator, there would seem to be no reason why one may not devise lands of which he is disseized or to which he has only a right of entry.<sup>3</sup>

**3. Lands Occupied Without Title.** — A devise of land which the testator holds merely by possession, without title, confers upon the devisee a good title against all but the true owner.<sup>4</sup>

**4. Equitable Rights to Reconveyance.** — One who has executed a conveyance under circumstances which would entitle him in equity to have it set aside and reconveyance decreed, has an interest distinct from a right of entry, which may be devised without regard to the devisability of rights of entry under the local law.<sup>5</sup>

without champerty. *Goodright v. Forester*, 8 East 566.

1. Stat. 3 & 4 Will. IV., c. 27, § 36; 1 Jarman on Wills (6th ed.) \*50.

2. Wills Act 1837 (1 Vict., c. 26).

**The Possibility of Reverter** upon the determination of a conditional fee is devisable within this act. *Pemberton v. Barnes*, 80 L. T. N. S. 181.

**3. Power to Devise Lands Out of Possession.** — 4 Kent's Com. (13th ed.) 512; *Waring v. Jackson*, 1 Pet. (U. S.) 570; *Willis v. Watson*, 5 Ill. 64; *Whittemore v. Beane*, 6 N. H. 47; *Varick v. Jackson*, 2 Wend. (N. Y.) 166, 7 Cow. (N. Y.) 238; *Smith v. Jones*, 4 Ohio 115; *Hyer v. Shobe*, 2 Munf. (Va.) 200; *Watts v. Cole*, 2 Leigh (Va.) 664. Compare *Atwood v. Weems*, 99 U. S. 183; *Carter v. Thomas*, 4 Me. 341.

See also the statutes of the various states expressly authorizing in some instances a devise of lands held adversely to the testator.

**Land in Adverse Possession of Another.** — Under a statute authorizing the devise of estates in possession, reversion, or remainder, it cannot affect the power of the testator to devise that the land in question is shown to have been in the adverse possession of another at the death of the testator as well as at the making of the will. The words "possession, reversion, or remainder" are used as descriptive of the nature of the estate to be devised, or of its tenure, and not as describing the peculiar situation in which the land itself might be with regard to improvements upon it by strangers. *May v. Slaughter*, 3 A. K. Marsh. (Ky.) 505.

**A Right to Enter Land under a Government Grant** is devisable, as it is not necessary that a testator should have a complete legal title to land to enable him to dispose of it by will. *Gist v. Robinet*, 3 Bibb (Ky.) 2.

In *Pennsylvania* it is well settled that one may convey or devise lands out of possession. *Stoever v. Whitman*, 6 Binn. (Pa.) 421; *Humes v. McFarlane*, 4 S. & R. (Pa.) 435.

**Disseizee Can Devise Only to Disseizor.** — In *Poor v. Robinson*, 10 Mass. 131, it was held that a disseizee, dying disseized, could not devise such

estate to any but the disseizor, and that in such case the devise would, strictly speaking, operate as a release and not as a devise.

**The Mere Possibility of Reverter** for condition broken is not such an interest as may be devised. *Upington v. Corrigan*, 151 N. Y. 143; *Methodist Protestant Church v. Young*, 130 N. Car. 8.

4. 1 Jarman on Wills (6th ed.) \*50; *Asher v. Whitlock*, L. R. 1 Q. B. 1. See also *Atwood v. Weems*, 99 U. S. 183; *Smith v. Bryan*, 12 Ired. L. (34 N. Car.) 11.

In *Asher v. Whitlock*, L. R. 1 Q. B. 1, Cockburn, C. J., said: "I take it as clearly established, that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine."

5. 1 Jarman on Wills (6th ed.) \*50; *Gresley v. Mousley*, 4 De G. & J. 92; *Uppington v. Bullen*, 2 Dr. & War. 184; *Stump v. Gaby*, 2 De G. M. & G. 623.

In *Gresley v. Mousley*, 4 De G. & J. 92, the devisee of lands sold by the testator to his solicitor was allowed to recover. *Turner, L. J.*, said: "The will under which the plaintiff claims title was executed after the conveyance had been made to the solicitor, the purchaser, upon the occasion of the purchase in question, and it is therefore insisted, on the part of the appellants, the devisees of the purchaser, that the testator had not, at the time of the execution of his will or at any time afterwards, any estate or interest in the property; that he had merely a right of suit to recover it, which right, it was said, was analogous to the right of entry, and could not pass by devise. \* \* \* I think the analogy contended for does not exist. A right of entry is the foundation of proceedings to recover an estate. The exercise of it is of course prescribed by law for restoring the seizin which has been displaced, and without which the estate cannot be recovered. A devise of a right of entry, therefore, is no more than a devise of the right to institute proceedings for recovering an estate; but where a purchase is voidable in equity there is no question of restoring the seizin before instituting proceedings to avoid it. The interest in

**5. Lands Contracted for by Testator.** — An interest in lands arising from a contract for the purchase thereof is an interest subject to testamentary disposition.<sup>1</sup> In case of such a contract, the respective rights of those claiming the realty, and of those claiming the personality, of the testator, are to be governed by the state of the testator's liability under the contract at the time of his death. Where the contract is such, as could have been enforced against the purchaser at the time of his decease, the heir or devisee will be entitled to have the contract performed by payment of the contract price from the personality, or, in default of performance, will be entitled to a sum out of the personal estate, equivalent to the purchase money. But if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, the heir or devisee will not be entitled to take the estate with its defects, or to claim the amount agreed to be paid therefor, or to have another estate bought for him out of the personal funds of the testator.<sup>2</sup>

**6. After-acquired Property** — *a. PERSONALTY.* — The rule, both at common law and as in force at the present time, is that personal property acquired by the testator after the date of the execution of his will, will pass thereby;<sup>3</sup> and

the estate which gives the right to avoid it exists independently of any act to be done by the party seeking the avoidance. The decree of the court avoiding the purchase does not, as was suggested in argument, create a wholly new right; it proceeds upon a pre-existing right. The mere circumstance of an estate not being recoverable otherwise than by action or suit, clearly does not prevent it from being devisable."

**Rescinded Contract of Sale.** — Where, at the date of the execution of a will, the testator had sold a large portion of his estate, real and personal, and taken a mortgage thereon for the purchase money, and then the contract of sale was rescinded, followed by the death of the testator, without a republication of the will, it was held that the property included in the contract of sale did not pass under a residuary clause in the will; the then existing law being that no real or personal property acquired after the making of a will shall pass thereby, without republication of the will. *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346.

**1. Lands Contracted for by Testator.** — 1 Jarman on Wills (6th ed.) \*51; Schouler on Wills (2d ed.), § 28.

*England.* — *Marston v. Roe*, 8 Ad. & El. 14, 35 E. C. L. 303; *Broome v. Monck*, 10 Ves. Jr. 597; *Hudson v. Cook*, L. R. 13 Eq. 417; *Haynes v. Haynes*, 1 Drew. & Sm. 451; *Curre v. Bowyer*, 5 Beav. 6; *Ingle v. Richards*, 28 Beav. 366; *O'Shea v. Howley*, 1 J. & La T. 391. See also *Lysaght v. Edwards*, 2 Ch. D. 516.

*Maine.* — *Sergeant v. Simpson*, 8 Me. 149. *New York.* — *Malin v. Malin*, 1 Wend. (N. Y.) 625; *M'Kinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307.

*North Carolina.* — *Matter of Champion*, Busb. Eq. (45 N. Car.) 246.

*Ohio.* — *Smith v. Jones*, 4 Ohio 115.

*Rhode Island.* — *Bailey v. Hoppin*, 12 R. I. 560.

See also the cases cited in the following note. And see *infra*, this section, *After-acquired Property* — *Realty*.

"It is Also Requisite that the agreement to purchase should exist prior to the devise." *Per*

Chancellor Kent in *M'Kinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307.

**2. Liability of Testator under Contract Determinative of Subsequent Rights.** — 3 Williams on Executors (9th ed.) 265; *Milner v. Mills*, Mosely 123; *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Lacon v. Mertins*, 3 Atk. 1; *Atty.-Gen. v. Day*, 1 Ves. 218; *Buckmaster v. Harrop*, 7 Ves. Jr. 341; *Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. Jr. 597. See also *Lord v. Lord*, 1 Sim. 505.

**3. After-acquired Personality.** — Schouler on Wills (2d ed.), § 29; *Smith v. Edrington*, 8 Cranch (U. S.) 66; *Warner v. Swearingen*, 6 Dana (Ky.) 199; *Walton v. Walton*, 7 J. J. Marsh. (Ky.) 58; *Marshall v. Porter*, 10 B. Mon. (Ky.) 1; *Haven v. Foster*, 14 Pick. (Mass.) 539; *Winchester v. Forster*, 3 Cush. (Mass.) 369; *Wait v. Belding*, 24 Pick. (Mass.) 129; *Loveren v. Lamprey*, 22 N. H. 434; *McNaughton v. McNaughton*, 34 N. Y. 201; *Nichols v. Allen*, 87 Tenn. 131; *Henderson v. Ryan*, 27 Tex. 674; *Allen v. Harrison*, 3 Call (Va.) 289. See also *Kenaday v. Sinnott*, 179 U. S. 606. And see *infra*, this title, *Construction* — *Period Referred To* — *Words Descriptive of Property*.

**Effect of Repeal of Statute.** — During the operation of a statute providing that personal property acquired after the making of a will should not pass thereby, a certain testator executed his last will and testament. Then the existing act was repealed, and the law changed so as to make a will speak in its disposition of personality as if executed at the death of the testator. Later the testator, who had made his will disposing of his personal estate when such affairs were regulated by the pre-existing statute, died, leaving the repealing statute in force. It was held that this latter statute should be regarded, and consequently personal property acquired after the making of the will was held to pass thereby. *Means v. Evans*, 4 Desaus. (S. Car.) 242.

**The Proceeds of an Insurance Policy** which is taken out and made payable to the beneficiary after the making of a will by the latter, will nevertheless pass by such will. *Laughlin v. Norcross*, 97 Me. 33.



the principle has been extended to cover personal property limited by settlement to one's executors and administrators.<sup>1</sup>

*b. REALTY.* — By the settled rule of the common law, as well as by the uniform construction put upon the statute of wills of 34 and 35 Hen. VIII., no one could devise lands that he did not own and had no interest in at the time of the execution of his will; and lands acquired subsequently thereto did not pass by the will.<sup>2</sup> The rule held even where after-acquired lands were expressly and in terms disposed of by the testator.<sup>3</sup> The right, however, to call for a conveyance, pursuant to a binding contract entered into before the will was made, was held a sufficient interest to sustain a devise of

1. *Morris v. Howes*, 4 Hare 599.

In *Mackenzie v. Mackenzie*, 3 Macn. & G. 559, by a postnuptial settlement certain moneys, to become payable on three policies of insurance on the life of R. M., were vested in trust for B. M. for life, and after her death, upon trust for the appointees of R. M. The latter appointed the moneys so to become payable to his executors and administrators. It was held that the effect of the appointment was to make the property part of the personal estate of R. M., the court saying: "The fact is that the effect of the appointment is to add the money to the husband's personal estate in the first instance in the hands of his executors or administrators, and when in the hands of his executors or administrators, it then becomes subject to the operation of any testamentary disposition of it, or in default of that, to the operation of the statute of distributions. The persons who take it beneficially do not take as purchasers under the instrument by which the property becomes added to his personal estate. They are not like the objects of a limitation particularly designated by that instrument; they have only the hope or chance, whatever it may amount to, of becoming entitled to the property, or some part of it, not under that instrument, but under the will or intestacy, as the case may be."

2. **Common-law Rule as to After-acquired Realty.** — 1 Jarman on Wills (6th ed.) \*50.

*England.* — *Harwood v. Goodright*, Cowp. 90; *Bunter v. Coke*, 1 Salk. 237; *Langford v. Pitt*, 2 P. Wms. 629; *Perry v. Phelps*, 1 Ves. Jr. 251; *Brydges v. Chandos*, 2 Ves. Jr. 417; *Milnes v. Slater*, 8 Ves. Jr. 295. See also *Delacherois v. Delacherois*, 11 H. L. Cas. 62.

*United States.* — *Smith v. Edrington*, 8 Cranch (U. S.) 66.

*Alabama.* — *Meador v. Sorsby*, 2 Ala. 712; *Atwood v. Beck*, 21 Ala. 625.

*Connecticut.* — *Brewster v. McCall*, 15 Conn. 274; *Canfield v. Bostwick*, 21 Conn. 554.

*Florida.* — *Frazier v. Boggs*, 37 Fla. 307.

*Georgia.* — *Jones v. Shewmake*, 35 Ga. 151.

*Indiana.* — *Bowen v. Johnson*, 6 Ind. 110.

*Kentucky.* — *Halloway v. Doe*, 4 Litt. (Ky.) 294; *Skeene v. Fishback*, 1 A. K. Marsh. (Ky.) 356; *Parker v. Cole*, 2 J. J. Marsh. (Ky.) 503; *Roberts v. Elliott*, 3 T. B. Mon. (Ky.) 396; *Ross v. Ross*, 12 B. Mon. (Ky.) 437. See also *Bowman v. Violet*, 4 T. B. Mon. (Ky.) 350.

*Maine.* — See *Carter v. Thomas*, 4 Me. 341.

*Maryland.* — *Kemp v. M'Pherson*, 7 Har. & J. (Md.) 320; *Beall v. Schley*, 2 Gill (Md.) 108.

*Massachusetts.* — *Blaney v. Blaney*, 1 Cush. (Mass.) 107; *Ballard v. Carter*, 5 Pick. (Mass.) 112; *Wait v. Belding*, 24 Pick. (Mass.) 129; *Hays v. Jackson*, 6 Mass. 149.

*New Hampshire.* — *George v. Green*, 13 N. H. 521.

*New Jersey.* — *Bruen v. Bragaw*, 4 N. J. Eq. 261; *Lanning v. Cole*, 6 N. J. Eq. 102; *Gardner v. Gardner*, 37 N. J. Eq. 487; *Van Wagenen v. Brown*, 26 N. J. L. 196.

*New York.* — *Green v. Dikeman*, 18 Barb. (N. Y.) 537; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *M'Kinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Parker v. Bogardus*, 5 N. Y. 309; *McNaughton v. McNaughton*, 34 N. Y. 201; *Youngs v. Youngs*, 45 N. Y. 254; *Quinn v. Hardenbrook*, 54 N. Y. 83. See also *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441.

*North Carolina.* — *Foster v. Craige*, 2 Ired. Eq. (37 N. Car.) 533; *Battle v. Speight*, 9 Ired. L. (31 N. Car.) 288; *Den v. Maney*, 1 Murph. (5 N. Car.) 264.

*Pennsylvania.* — *Girard v. Philadelphia*, 4 Rawle (Pa.) 323; *Philadelphia v. Davis*, 1 Whart. (Pa.) 509; *Donaugher's Estate*, 2 Pars. Eq. Cas. (Pa.) 164.

*Rhode Island.* — *Borden v. Borden*, 2 R. I. 94.

*South Carolina.* — *Grimke v. Grimke*, 1 Desaus. (S. Car.) 366; *Thompson v. Scott*, 1 McCord Eq. (S. Car.) 32; *Drayton v. Rose*, 7 Rich. Eq. (S. Car.) 328.

*Tennessee.* — *McGavock v. Pugsley*, 12 Heisk. (Tenn.) 689.

*Virginia.* — *Allen v. Harrison*, 3 Call (Va.) 289; *Raines v. Barker*, 13 Gratt. (Va.) 128; *Gibson v. Carrell*, 13 Gratt. (Va.) 136; *Clements v. Kyles*, 13 Gratt. (Va.) 468.

**The Reason for the Rule** was the ancient regard for wills as a species of conveyance. *George v. Green*, 13 N. H. 521; *Battle v. Speight*, 9 Ired. L. (31 N. Car.) 288; *Watson v. Child*, 9 Rich. Eq. (S. Car.) 129.

**A Republication of the Will** after purchase of the lands will suffice to pass them. *Luce v. Dimock*, 1 Root (Conn.) 82; *Jackson v. Potter*, 9 Johns. (N. Y.) 312.

In *Florida*, while the statute of 1828 was in force, the common-law rule prevailed, and after-acquired lands would not pass by will. *Frazier v. Boggs*, 37 Fla. 307.

3. *Bunter v. Coke*, 1 Salk. 237. Compare *Ross v. Ross*, 12 B. Mon. (Ky.) 437; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

the land contracted for.<sup>1</sup> At the present time, statutes exist in *England*, and in nearly all of the *United States*, enabling a testator to dispose by will of the real estate to which he may be entitled at the time of his death.<sup>2</sup> Under such statutes, the question whether after-acquired realty passes by a will becomes one of testamentary intention purely, and in fact, in some jurisdictions it is expressly provided that a will is to be construed as if made immediately before the death of the testator, unless a contrary intention appears.<sup>3</sup>

**Contrary Intent of Testator.**—Where a contrary intent is expressed, after-

**1. Right to Conveyance under Contract.**—1 Jarman on Wills (6th ed.) \*51, 52; Marston v. Roe, 8 Ad. & El. 14, 35 E. C. L. 303; Langford v. Pitt, 2 P. Wms. 631; Greenhill v. Greenhill, Prec. Ch. 320; Morgan v. Holford, 1 Smale & G. 101; Dearing v. Selvey, 50 W. Va. 4.

**If the Will Was Made Before the Articles of Purchase** were entered into, the testator had not a devisable interest. Langford v. Pitt, 2 P. Wms. 631.

**Presumption as to Date of Contract.**—In Cathrow v. Eade, 4 De G. & Sm. 527, it was held that there was no presumption that the contract antedated the will.

**2.** See the various statutes and the cases cited in the following note.

**The English Statute** is that of 1 Vict., c. 26, which applies to all wills made since January 1, 1838; 1 Jarman on Wills (6th ed.) \*51. Schouler on Wills (2d ed.) 29.

**3. Intention of Testator Governs under Present Statutes**—*England*.—Langdale v. Briggs, 3 Smale & G. 246, 2 Jur. N. S. 982; Goodlad v. Burnett, 1 Kay & J. 341.

*Canada*.—Ayer v. Estabrooks, 2 N. Bruns. Eq. 392.

*Colorado*.—Clayton v. Hallett, 30 Colo. 231.

*Connecticut*.—Brewster v. McCall, 15 Conn. 274; Dickerson's Appeal, 55 Conn. 223; Wheeler v. Brewster, 68 Conn. 177.

*District of Columbia*.—McAleer v. Schneider, 2 App. Cas. (D. C.) 461; Bradford v. Matthews, 9 App. Cas. (D. C.) 438; Crenshaw v. McCormick, 19 App. Cas. (D. C.) 494.

*Georgia*.—Jones v. Shewmake, 35 Ga. 151; Gibbon v. Gibbon, 40 Ga. 562.

*Illinois*.—Willis v. Watson, 5 Ill. 64; Peters v. Spillman, 18 Ill. 370; Decker v. Decker, 121 Ill. 341.

*Iowa*.—Briggs v. Briggs, 69 Iowa 617.

*Kentucky*.—Warner v. Swearingen, 6 Dana (Ky.) 195; Roberts v. Elliott, 3 T. B. Mon. (Ky.) 395; Alexander v. Waller, 6 Bush (Ky.) 330; Pepper v. Pepper, (Ky. 1903) 74 S. W. Rep. 253; Flournoy v. Flournoy, 1 Bush (Ky.) 515.

*Maine*.—Laughlin v. Norcross, 97 Me. 33.

*Maryland*.—Beall v. Schley, 2 Gill (Md.) 181; Magruder v. Carroll, 4 Md. 335; Wilson v. Wilson, 6 Md. 487; Bourke v. Boone, 94 Md. 472.

*Massachusetts*.—Winchester v. Forster, 3 Cush. (Mass.) 366; Cushing v. Aylwin, 12 Met. (Mass.) 169; Pray v. Waterston, 12 Met. (Mass.) 262; Kimball v. Ellison, 128 Mass. 41.

*Minnesota*.—Bedell v. Fradenburgh, 65 Minn. 361.

*Mississippi*.—Doe v. Wynne, 23 Miss. 251;

Watson v. Butler, 26 Miss. 178; Macrae v. Lowrey, 80 Miss. 47.

*Missouri*.—Applegate v. Smith, 31 Mo. 166; Webb v. Archibald, 128 Mo. 299.

*New Hampshire*.—Loveren v. Lamprey, 22 N. H. 434.

*New Jersey*.—Flummerfelt v. Flummerfelt, 51 N. J. Eq. 432.

*New York*.—O'Brien v. Heeney, 2 Edw. (N. Y.) 242; Ellison v. Miller, 11 Barb. (N. Y.) 332; Green v. Dikeman, 18 Barb. (N. Y.) 535; Lent v. Lent, 24 Hun (N. Y.) 436; Havens v. Havens, 1 Sandf. (N. Y.) 329.

*North Carolina*.—Matter of Champion, Busb. Eq. (45 N. Car.) 246; Turnage v. Turnage, 7 Ired. Eq. (42 N. Car.) 127; Battle v. Speight, 9 Ired. L. (31 N. Car.) 288; Rogers v. Brickhouse, 5 Jones Eq. (58 N. Car.) 301; Edwards v. Warren, 90 N. Car. 604; Hines v. Mercer, 125 N. Car. 71; Brown v. Hamilton, 135 N. Car. 10.

*Ohio*.—Carrel v. Carrel, 24 Ohio Cir. Ct. 416; James v. Pruden, 14 Ohio St. 251.

*Oregon*.—Hardenbergh v. Ray, 151 U. S. 112, construing Oregon statute.

*Pennsylvania*.—Mullock v. Souder, 5 W. & S. (Pa.) 198; Roney v. Stiltz, 5 Whart. (Pa.) 381; Gable v. Daub, 40 Pa. St. 217; Price's Appeal, 169 Pa. St. 294; Williams v. Brice, 201 Pa. St. 595.

*Rhode Island*.—Church v. Warren Mfg. Co., 14 R. I. 539.

*South Carolina*.—Dennis v. Dennis, 5 Rich. L. (S. Car.) 468.

*Tennessee*.—Wynne v. Wynne, 2 Swan (Tenn.) 405.

*Texas*.—Henderson v. Ryan, 27 Tex. 670.

*Virginia*.—Turpin v. Turpin, 1 Wash. (Va.) 75; Raines v. Barker, 13 Gratt. (Va.) 128; Overton v. Mabon, 10 Leigh (Va.) 639.

*West Virginia*.—Dearing v. Selvey, 50 W. Va. 4.

**Liberal Construction of Statutes.**—The construction given this class of statutes has been of a very liberal nature. All the authorities agree that the intention need not be declared in express words, and that it will be sufficient if it can be reasonably made out in the will taken as a whole. McAleer v. Schneider, 2 App. Cas. (D. C.) 461.

**The Words "Balance of My Property"** have been held sufficient with their context to express an intent to make a full residuary disposition of all property of the testator, including after-acquired realty. Webb v. Archibald, (Mo. 1894) 28 S. W. Rep. 80.

**Intention of Testator as to Property Left Him by Another's Will.**—Where a testator was aware of a provision in a will of another in his favor

acquired property will not pass;<sup>1</sup> but a contrary intent is not necessarily manifested by the use of words in the present tense,<sup>2</sup> or by the use of the word "now,"<sup>3</sup> or by the use of the word "my."<sup>4</sup>

**Generic and Specific Description.** — There may be sufficient particularity in the description of the specific subject of gift to show that an object in existence at the date of the will was intended;<sup>5</sup> but where generic terms in the description of land are used, they are construed to mean the land answering that description at the death of the testator, even where additions are made to it by him after the will.<sup>6</sup>

**Prospective Operation of Statutes.** — Statutes permitting testamentary disposition of after-acquired realty have generally been held to be prospective merely and not applicable to wills executed before their passage;<sup>7</sup> though in some states this application has been extended to all cases where the testator died after the passage of the act.<sup>8</sup>

**VIII. ALTERATION.** — The effect of the alteration of a will by the act of erasing or interlining words and clauses for the purpose of amending one or more of its provisions, as distinguished from alteration by codicil, and from mutilation or obliteration intended to effect a revocation of the instrument, has been fully considered elsewhere in this work.<sup>9</sup>

**IX. REVOCATION — 1. Definition.** — By the revocation of a will is generally understood an act by which the will ceases to have any effect or efficacy. And this is the meaning of the term strictly and accurately speaking.<sup>10</sup>

and in his will used such language as would indicate his intention to dispose of the property thus to be acquired by him, it was held that such property would pass by his will although he had not heard of the other person's death either at the time of making the will or at the time of his death. *Perry v. Hunter*, 2 R. I. 80.

**Property Bought at Foreclosure Sale**, subsequent to the execution of the will, is after-acquired property though the debt which was secured by the mortgage existed in favor of the testator before he made his will; but property bought in at foreclosure by the testator before making his will, and transferred to a trustee to hold for the testator's benefit or convenience, is not after-acquired property. *Webster v. Wiggin*, 19 R. I. 73.

**Where a Will Is Not Dated** it will not be inferred that it was executed subsequent to the date of the conveyance to the testator of a certain piece of property, on account of the ordinary presumption that the maker of the will intended to die testate as to all his estate, and on account of the fact that the heirs of the testator have never questioned the right of the devisee to take such property under the will. *Reeves v. Low*, 8 App. Cas. (D. C.) 105.

**As to After-acquired Property Passing by Residuary Bequest**, see the title LEGACIES AND DEVISES, vol. 18, p. 725.

1. *Bourke v. Boone*, 94 Md. 472.

2. *Lilford v. Keck*, 30 Beav. 300.

3. "Now." — *Theobald on Wills* (2d ed.) 162; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Hepburn v. Skirving*, 4 Jur. N. S. 651; *In re Ord*, 12 Ch. D. 22. See also *Cole v. Scott*, 1 Macn. & G. 518; *Hutchinson v. Barrow*, 6 H. & N. 583; *Jepson v. Key*, 10 Jur. N. S. 392; *Everett v. Everett*, 7 Ch. D. 428.

4. "My." — *Goodlad v. Burnett*, 1 Kay & J. 347; *Webb v. Byng*, 1 Kay & J. 580.

5. **Specific Description.** — *Hawkins on Wills* \*20; *Emuss v. Smith*, 2 De G. & Sm. 722;

*Flynn v. Holman*, 119 Iowa 731; *Teel v. Hilton*, 21 R. I. 227.

**Intent of Particular Description.** — Where a particular description is intended merely as an exhibition of the present location and extent of the deviser's landed estate, and not as a limitation of a preceding grant of all real property of every description and wheresoever situate, subsequently acquired real estate will pass by the will. *Durboraw v. Durboraw*, 67 Kan. 139.

6. **Generic Description.** — *Macrae v. Lowrey*, 80 Miss. 47.

**Where There Are No Express Terms in the Will** referring to after-acquired property, such property will not pass thereby, although the description of the property devised is as general as possible, and although it may be inferred from the whole scheme of the will that the testator designed to dispose of all the estate which the law gave him power to affect by his will. *Webster v. Wiggin*, 19 R. I. 73.

7. **Prospective Operation.** — *Brewster v. McCall*, 15 Conn. 274; *Gibbon v. Gibbon*, 40 Ga. 562; *Ellison v. Miller*, 11 Barb. (N. Y.) 332; *Green v. Dikeman*, 18 Barb. (N. Y.) 535; *Parker v. Bogardus*, 5 N. Y. 309; *Battle v. Speight*, 9 Ired. L. (31 N. Car.) 288; *Mullock v. Souder*, 5 W. & S. (Pa.) 198; *Gable v. Daub*, 40 Pa. St. 217; *Raines v. Barker*, 13 Gratt. (Va.) 128.

**A Will Republished** after the passage of the statute, is governed by its provisions. *Battle v. Speight*, 9 Ired. L. (31 N. Car.) 288; *Jones v. Shewmake*, 35 Ga. 151.

8. **Retrospective Operation.** — *Wilson v. Wilson*, 6 Md. 487; *Cushing v. Aylwin*, 12 Met. (Mass.) 169; *Pray v. Waterston*, 12 Met. (Mass.) 262; *Loveren v. Lamprey*, 22 N. H. 434. Compare *Carroll v. Carroll*, 16 How. (U. S.) 275, construing the Maryland statute.

9. See the title ALTERATION OF INSTRUMENTS, vol. 2, pp. 264, 280.

10. **Definition.** — *Carter v. Thomas*, 4 Me. 341.



**Alteration Distinguished.** — The difference between revocation and alteration has been thus defined: "If what is done simply takes away what was given before or a part of what was given before, then it is revocation; but if it gives something in addition, or gives something else, then it is more than revocation," or, in fact, it is alteration.<sup>1</sup>

**2. By Act of Party — a. RIGHT OF REVOCATION — (1) In General.** — Owing to the ambulatory nature of wills, a testator may revoke his will at any time before his death.<sup>2</sup>

The Delivery of a Testamentary Paper to the Person Beneficially Interested, when no present interest passes, does not destroy the testator's power of revocation. It is still ambulatory, to take effect only after death in case it is not revoked.<sup>3</sup>

**(2) Mutual Wills — (a) In General.** — A mutual will is revocable by the testator at any time prior to his death. And this is so though he survives the other testator, provided he takes no advantage under the other will.<sup>4</sup>

**(b) Execution Pursuant to Contract.** — While no legal obligation not to revoke is created by the mere execution of mutual wills, yet, if the wills are executed pursuant to a contract, and either testator revokes without notice, the other may compel a specific performance of the contract, or, in case a specific performance is impossible, may recover damages for the breach of the contract.<sup>5</sup>

**b. MENTAL CAPACITY NECESSARY.** — No person who is without testamentary capacity can revoke a will in any manner whatever.<sup>6</sup> Thus, it requires the same mental capacity to revoke a will by burning, tearing, canceling, or obliterating the same, as it does to execute the will in the first instance;<sup>7</sup> and an attempt to revoke a will in such manner by a testator who is at the time insane is of no effect, though the will be utterly destroyed.<sup>8</sup>

**c. PAROL AND WRITTEN REVOCATION — (1) At Common Law.** — At

In *Eschbach v. Collins*, 61 Md. 499, the court said: "To revoke a testamentary disposition plainly means to annul it; and the revocation of a clause implies the destruction of that clause. In legal contemplation it ceases to exist, and is as inoperative as if it had never been written."

**1. Alteration Distinguished.** — *Swinton v. Bailey*, 45 L. J. Exch. 427; *Miles's Appeal*, 68 Conn. 245.

**Revocation Not a Synonym of Alteration.** — *Eschbach v. Collins*, 61 Md. 499.

**2. Right of Testator to Revoke.** — *Verdier v. Verdier*, 8 Rich. L. (S. Car.) 135.

**3. Delivery of Testamentary Paper to Person Beneficially Interested.** — *Wilson v. Van Leer*, 103 Pa. St. 600; *Megary's Estate*, 206 Pa. St. 260.

**4. Revocation of Mutual Wills in General — England.** — *Hobson v. Blackburn*, 1 Add. Ecc. 274; *In re Stacy*, Deane Ecc. 6; *In re Lovegrove*, 2 Sw. & Tr. 453; *Dufour v. Pereira*, 1 Dick. 419; *Walpole v. Orford*, 3 Ves. Jr. 402; *Denysen v. Mostert*, L. R. 4 P. C. 236; *Dias v. De Livera*, 5 App. Cas. 123.

*Alabama.* — *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

*Kentucky.* — *Hill v. Harding*, 92 Ky. 76; *Brethitt v. Whittaker*, 8 B. Mon. (Ky.) 534.

*Massachusetts.* — *Coulb. v. Mumfeld*, 103 Mass. 408, 4 Am. Rep. 573.

*Pennsylvania.* — *Cawley's Estate*, 136 Pa. St. 628.

*South Carolina.* — *Izard v. Middleton*, 1 Desaus. (S. Car.) 116.

*Texas.* — *Wyche v. Clapp*, 43 Tex. 543.

**5. Execution Pursuant to Contract.** — *Edson v.*

*Parsons*, 85 Hun (N. Y.) 263, affirmed 155 N. Y. 555.

**6. Necessity of Testamentary Capacity.** — *Olmsted's Estate*, 122 Cal. 224; *Rich v. Gilkey*, 73 Me. 595; *Dudley v. Gates*, 124 Mich. 443.

**7. Mental Capacity Necessary to Destroy Will.** — *Allison v. Allison*, 7 Dana (Ky.) 94; *Laughton v. Atkins*, 1 Pick. (Mass.) 547; *McIntire v. Worthington*, 68 Md. 203. See also *infra*, this section, *Revocation by Cancellation or Destruction of Will*.

**8. Destruction While Testator Insane — England.** — *Scruby v. Fordham*, 1 Add. Ecc. 74; *Brunt v. Brunt*, L. R. 3 P. & D. 37; *Goods of Shaw*, 1 Curt. Ecc. 905.

*California.* — *Lang's Estate*, 65 Cal. 19.

*Connecticut.* — *Matter of Johnson*, 40 Conn. 587.

*Indiana.* — *Forbing v. Weber*, 99 Ind. 588.

*Maine.* — *Rich v. Gilkey*, 73 Me. 595.

*Maryland.* — *Rhodes v. Vinson*, 9 Gill (Md.) 169.

*New York.* — *Smith v. Wait*, 4 Barb. (N. Y.) 28; *Matter of Forman*, 54 Barb. (N. Y.) 274.

*Tennessee.* — *Ford v. Ford*, 7 Humph. (Tenn.) 92.

**Delirium Tremens.** — A testator having duly executed his will, subsequently, when suffering from an attack of delirium tremens, tore it in pieces. The pieces were preserved, and when on his recovery he was informed of what he had done, he answered that he must have been mad at the time and that he would make a fresh will, which intention he did not carry out. It was held that the will was not revoked. *Brunt v. Brunt*, L. R. 3 P. & D. 37.

common law a will could be revoked by parol even though required to be executed in writing.<sup>1</sup>

(2) *Under Statutes* — (a) **In England** — *aa. STATUTE OF FRAUDS.* — In England the common-law rule permitting parol revocation of wills was abrogated by the following provisions of the statute of frauds.

**Realty.** — As to wills of realty, this statute provided that no devise in writing, of lands, tenements, or hereditaments, nor any clause thereof, should be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same (or by burning, tearing, canceling, and obliterating); but all devises and bequests of lands and tenements should remain and continue in force (until the same should be burnt, torn, canceled, or obliterated, or) unless the same should be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same.<sup>2</sup>

**Personalty.** — As to wills of personalty, the statute provided that no will in writing, concerning any goods or chattels or personal estate, should be repealed, nor should any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same should be in the life of the testator committed to writing, and after the writing thereof, should be read unto the testator and allowed by him, and be proved to be so done by three witnesses at least.<sup>3</sup>

*bb. STATUTE OF VICTORIA.* — The statute in England which regulates the revocation of wills at the present time was passed in the time of Victoria. This statute provides that a will or codicil may be revoked by another will or codicil duly executed, or by some writing declaring an intention to revoke the same and executed in like manner as a will.<sup>4</sup>

(b) **In United States.** — Statutes exist generally in the United States at the present time prohibiting the revocation of wills by parol.<sup>5</sup> In most of the

**1. Parol Revocation at Common Law.** — *Cranvell v. Sanders*, Cro. Jac. 497; *Ex p. Ilchester*, 7 Ves. Jr. 348; *Richardson v. Barry*, 3 Hag. Ecc. 249; *Brook v. Warde*, 3 Dyer 310b; *Collagan v. Burns*, 57 Me. 454; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31; *Clark v. Eborn*, 2 Murph. (6 N. Car.) 234; *Boudinot v. Bradford*, 2 Yeates (Pa.) 170.

**In Connecticut**, previous to the revision of the statute of 1821, wills were revocable by parol. *Witter v. Mott*, 2 Conn. 67; *James v. Marvin*, 3 Conn. 576; *Card v. Grinman*, 5 Conn. 164; *Peck's Appeal*, 50 Conn. 562; *Goodsell's Appeal*, 55 Conn. 171.

**2. Wills of Realty.** — 29 Car. II., c. 3, § 6.

**As to Revocation by Burning, Tearing, Canceling, or Obliterating**, see *infra*, this section, *Revocation by Cancellation or Destruction of Will*.

**3. Wills of Personalty.** — 29 Car. II., c. 3, § 22.

**4. Statute of Victoria.** — 1 Vict., c. 26, § 20; *Goods of Fraser*, L. R. 2 P. & D. 40.

**5. Parol Revocation Prohibited by Statute in United States — Alabama.** — *Slaughter v. Stephens*, 81 Ala. 418; *Law v. Law*, 83 Ala. 434; *Woodruff v. Hundley*, 127 Ala. 640.

*California.* — *Olmsted's Estate*, 122 Cal. 224.

*Connecticut.* — *Peck's Appeal*, 50 Conn. 562; *Goodsell's Appeal*, 55 Conn. 171.

*Georgia.* — *Hargroves v. Redd*, 43 Ga. 143;

*Coffee v. Coffee*, 119 Ga. 533.

*Illinois.* — *Taylor v. Pegram*, 151 Ill. 106.

*Iowa.* — *Perjue v. Perjue*, 4 Iowa 520.

*Kansas.* — *Caeman v. Van Harke*, 33 Kan. 336.

*Kentucky.* — *Herbert v. Long*, 23 S. W. Rep. 658, 15 Ky. L. Rep. 427.

*Louisiana.* — *Hollingshead v. Sturgis*, 21 La. Ann. 450.

*Maryland.* — *Wittman v. Goodhand*, 26 Md. 95.

*Massachusetts.* — *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Brown v. Thorndike*, 15 Pick. (Mass.) 393; *Reid v. Borland*, 14 Mass. 208; *Stickney v. Hammond*, 138 Mass. 116.

*Michigan.* — *Lansing v. Haynes*, 95 Mich. 16.

*Mississippi.* — *Jones v. Moseley*, 40 Miss. 261.

*New Jersey.* — *Mundy v. Mundy*, 15 N. J. Eq. 290.

*New York.* — *Delafield v. Parish*, 1 Redf. (N. Y.) 1; *Sherry v. Lozier*, 1 Bradf. (N. Y.) 437; *Nelson v. Public Administrator*, 2 Bradf. (N. Y.) 210; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31.

*Ohio.* — *Kent v. Mahaffey*, 10 Ohio St. 204.

*Pennsylvania.* — *Lewis v. Lewis*, 2 W. & S. (Pa.) 455; *Wikoff's Appeal*, 15 Pa. St. 281; *Heise v. Heise*, 31 Pa. St. 249.

*Texas.* — *Tynan v. Paschal*, 27 Tex. 302; *Kennedy v. Upshaw*, 64 Tex. 412.

*Vermont.* — *Blanchard v. Blanchard*, 32 Vt. 62; *In re Noyes*, 61 Vt. 14.

*Virginia.* — *Hylton v. Hylton*, 1 Gratt. (Va.) 161; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535.

*Wisconsin.* — *Ladd's Will*, 60 Wis. 187.

**In Tennessee** the only statute on the subject of written revocation is one providing that no written will shall be revoked by a nuncupative

states the revocation must be in writing, and executed with the same formalities as the will itself.<sup>1</sup>

**A Distinction Between Wills of Realty and Wills of Personalty** is made in some states by statutes similar to the English statute of frauds. Such statutes require wills of realty to be revoked by a writing executed with the same formalities as the will itself, but allow wills of personalty to be revoked by word of mouth, provided such words are subsequently committed to writing and are read to, and allowed by, the testator, and such acts are proved by a certain number of witnesses.<sup>2</sup>

**A Nuncupative Will** is, of course, not allowed to revoke a prior written will in those jurisdictions which require a revoking will to be in writing and executed with all the formalities of the prior will.<sup>3</sup>

**Olographic Will.** — In *Arkansas* it is provided by statute that an olographic will shall not be pleaded in bar to an ordinary will.<sup>4</sup>

**d. REVOCATION BY WRITTEN INSTRUMENT** — (1) *In General.* — Many statutes provide expressly that a will may be revoked by a subsequent will or codicil, or by some other writing executed with the formalities requisite to the due execution of a will.<sup>5</sup>

**A Literal Compliance** with the statutory provision that the writing shall be executed with the same formalities as a will is not necessary. What is meant by the statutes is that the formalities required in the making of a will shall be applied to a paper of revocation so far as the latter, from its nature and character, is susceptible of having the same formalities observed. Where, for example, one of the formalities required in a will is that the testator shall declare the instrument to be his last will and testament, a writing which contains a revocation only and no disposition of property, need not contain this declaration.<sup>6</sup>

**Necessity for Probate.** — A writing containing only words of revocation, there being no new disposition of property, need not be probated; in fact, it will

one, unless such nuncupative will is subsequently reduced to writing. *Smiley v. Gambill*, 2 Head (Tenn.) 166.

But the courts have uniformly refused to follow the old common-law rule and have held that a written will of either personalty or realty cannot be revoked by mere parol. *Kirkpatrick v. Jenkins*, 96 Tenn. 85; *Billington v. Jones*, 108 Tenn. 234; *Allen v. Huff*, 1 Yerg. (Tenn.) 404; *Marr v. Marr*, 2 Head (Tenn.) 307; *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 496; *Allen v. Jeter*, 6 Lea (Tenn.) 674.

1. See the various state statutes. And see the cases cited in the preceding note.

2. **Distinction Between Wills of Realty and Wills of Personalty.** — Fla. Rev. Stat. (1892), § 1798; Md. Pub. Gen. Laws, art. 93, § 312; *Morey v. Sohler*, 63 N. H. 509.

In *Virginia* a statute formerly existed which made this distinction between wills of realty and wills of personalty. *Glasscock v. Smither*, 1 Call (Va.) 479.

3. **Revocation by Nuncupative Will.** — *McCune v. House*, 8 Ohio 144; *Brook v. Chap-pell*, 34 Wis. 405.

In *Louisiana* a nuncupative will by private act, not having been read by the testatrix to the witnesses, nor by one of them to the rest in her presence, is invalid as a testament, and will not operate as a revocation of a valid will. *Hollingshead v. Sturgis*, 21 La. Ann. 450. And see *supra*, this title, *Definition and Classification* — *Classification* — *Written Wills* — *Louisiana Testaments*.

4. **Revocation by Olographic Will.** — Sand. & H. Dig. (Ark. 1894), § 7392.

5. **Statutory Provisions.** — See the various statutes. See also the following cases:

*California.* — *Matter of Lones*, 108 Cal. 688.

*Kentucky.* — *Thruston v. Prather*, 77 S. W. Rep. 354, 25 Ky. L. Rep. 1137.

*Minnesota.* — *Graham v. Burch*, 47 Minn. 171.

*Missouri.* — *Odenwaelder v. Schorr*, 8 Mo. App. 463.

*New Hampshire.* — *Fellows v. Allen*, 60 N. H. 439; *Hoitt v. Hoitt*, 63 N. H. 494; *Morey v. Sohler*, 63 N. H. 509.

*New York.* — *Matter of Barnes*, 70 N. Y. App. Div. 523.

*Pennsylvania.* — *Heise v. Heise*, 31 Pa. St. 246; *Saunders v. Samarreg Co.*, 205 Pa. St. 632.

*Virginia.* — *Barksdale v. Barksdale*, 12 Leigh (Va.) 540.

*West Virginia.* — *Dower v. Seeds*, 28 W. Va. 113.

**Writing Must Be Testamentary.** — *Stetson v. Stetson*, 200 Ill. 601.

In *Louisiana*, under the civil code, the act of revocation need not itself be a testament. But it must be in one of the forms prescribed for testaments and clothed with the same formalities. *Hill's Succession*, 47 La. Ann. 329; *Seymour's Succession*, 48 La. Ann. 993.

6. **Literal Compliance Unnecessary.** — *Matter of Backus*, 49 N. Y. App. Div. 410.



not be allowed probate.<sup>1</sup>

(2) *Particular Writings* — (a) *By Subsequent Will* — *aa. EXPRESS OR IMPLIED REVOCATION.* — A duly executed will may operate as a revocation of a prior testamentary instrument, by reason either of an express clause of revocation, or of an inconsistent disposition of the previously devised property.<sup>2</sup>

*bb. EFFECT OF EXPRESS REVOCATORY CLAUSE* — (*aa*) *When Will Wholly or Partially Inoperative* — *aaa. By Reason of Improper Execution.* — Though the subsequent will contains a clause expressly revoking the earlier will, yet if such subsequent will is defectively executed the revocatory clause will not take effect.<sup>3</sup> And it makes no difference that the earlier will has been destroyed in the belief that it was no longer valid.<sup>4</sup>

*bbb. By Reason of Failure of Provisions.* — An express revocatory clause will operate as such notwithstanding certain devises or legacies in the subsequent will fail to take effect on account of the incapacity of the devisee or legatee to take,<sup>5</sup>

1. *Necessity for Probate.* — *Goods of Fraser*, L. R. 2 P. & D. 40. *Compare Goods of Hicks*, L. R. 1 P. & D. 683; *Laughton v. Atkins*, 1 Pick. (Mass.) 535.

2. *Revocation Either Express or Implied* — *England.* — *Lemage v. Goodban*, 13 L. T. N. S. 508, L. R. 1 P. & D. 57; *Cadell v. Wilcocks*, 67 L. J. P. 81, 78 L. T. N. S. 83, 46 W. R. 394; *Kent v. Kent*, (1902) P. 108, 86 L. T. N. S. 536; *Chifferiel v. Watson*, 73 L. T. N. S. 53.

*United States.* — *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Ennis v. Smith*, 14 How. (U. S.) 400; *Homer v. Brown*, 16 How. (U. S.) 354.

*Alabama.* — *Gelbke v. Gelbke*, 88 Ala. 427; *Kelly v. Richardson*, 100 Ala. 584.

*California.* — *Clarke v. Ransom*, 50 Cal. 595. *Illinois.* — *Stetson v. Stetson*, 200 Ill. 601.

*Indiana.* — *Burns v. Travis*, 117 Ind. 47; *Sturgis v. Work*, 122 Ind. 134; *Kern v. Kern*, 154 Ind. 29.

*Kentucky.* — *Young v. Sadler*, 24 S. W. Rep. 877, 15 Ky. L. Rep. 531.

*Louisiana.* — *Fisk's Succession*, 3 La. Ann. 705; *Hollingshead v. Sturgis*, 21 La. Ann. 450; *Mercer's Succession*, 28 La. Ann. 564; *Bobb's Succession*, 42 La. Ann. 40.

*Maryland.* — *Colvin v. Warford*, 20 Md. 357; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Belt v. Belt*, 1 Har. & McH. (Md.) 409; *Deakins v. Hollis*, 7 Gill & J. (Md.) 311.

*Massachusetts.* — *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Reid v. Borland*, 14 Mass. 208.

*Missouri.* — *Kelly v. Johnson*, 34 Mo. 400.

*New Hampshire.* — *Lane v. Hill*, 68 N. H. 275; *Marston v. Marston*, 17 N. H. 503.

*New Jersey.* — *Den v. Snowhill*, 23 N. J. L. 447; *Boylan v. Meeker*, 28 N. J. L. 274; *Smith v. McChesney*, 15 N. J. Eq. 359.

*New York.* — *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Simmons v. Simmons*, 26 Barb. (N. Y.) 68; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Ludlum v. Otis*, 15 Hun (N. Y.) 410; *Howland v. Union Theological Seminary*, 5 N. Y. 193; *Coster v. Coster*, 3 Sandf. Ch. (N. Y.) 111; *Matter of Myers*, (Surrogate Ct.) 28 Misc. (N. Y.) 359; *Matter of Williams*, (Surrogate Ct.) 34 Misc. (N. Y.) 748.

*North Carolina.* — *Jones v. Jones*, 2 Dev. Eq. (17 N. Car.) 387; *Green v. Lane*, Busb. Eq. (45 N. Car.) 102; *Hallyburton v. Carson*, 86 N. Car. 290.

*Pennsylvania.* — *Price v. Maxwell*, 28 Pa. St.

23; *Heise v. Heise*, 31 Pa. St. 246; *Neff's Appeal*, 48 Pa. St. 501; *Rudy v. Ulrich*, 69 Pa. St. 177; *Hamilton's Estate*, 74 Pa. St. 69; *Burden's Estate*, 111 Phila. (Pa.) 130, 33 Leg. Int. (Pa.) 149; *Boudinot v. Bradford*, 2 Dall. (Pa.) 266.

*Rhode Island.* — *Derby v. Derby*, 4 R. I. 414; *Reese v. Probate Ct.*, 9 R. I. 434.

*South Carolina.* — *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482.

*Vermont.* — *Holley v. Larrabee*, 28 Vt. 274; *Warner v. Warner*, 37 Vt. 356.

*Wisconsin.* — *Fisher's Will*, 4 Wis. 254.

3. *Will Defectively Executed* — *England.* — *Onions v. Tyrer*, 1 P. Wms. 345; *Thynne v. Stanhope*, 1 Add. Ecc. 52; *Ex p. Ilchester*, 7 Ves. Jr. 373; *Winsor v. Pratt*, 5 Moo. 484, 2 Brod. & B. 650, 6 E. C. L. 314; *Scott v. Scott*, 1 Sw. & Tr. 258; *Clarkson v. Clarkson*, 3 Sw. & Tr. 497; *Dancer v. Crabb*, L. R. 3 P. & D. 98; *Clarke v. Scripps*, 2 Rob. Ecc. 563.

*Kentucky.* — *Youse v. Forman*, 5 Bush (Ky.) 338.

*Maryland.* — *Semmes v. Semmes*, 7 Har. & J. (Md.) 390.

*Massachusetts.* — *Laughton v. Atkins*, 1 Pick. (Mass.) 543; *Stickney v. Hammond*, 138 Mass. 116.

*Michigan.* — *Dudley v. Gates*, 124 Mich. 440. *Mississippi.* — *Wilbourn v. Shell*, 59 Miss. 205.

*New York.* — *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

*North Carolina.* — *Bethell v. Moore*, 2 Dev. & B. L. (19 N. Car.) 311.

*South Carolina.* — *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 279; *Means v. Moore*, 3 McCord L. (S. Car.) 282.

*Tennessee.* — *McClure v. McClure*, 86 Tenn. 179; *Stover v. Kendall*, 1 Coldw. (Tenn.) 557.

*Virginia.* — *Barksdale v. Barksdale*, 12 Leigh (Va.) 535.

4. *Earlier Will Destroyed.* — *Wilbourn v. Shell*, 59 Miss. 205.

5. *Incapacity of Devisee or Legatee to Take* — *England.* — *Tupper v. Tupper*, 1 Kay & J. 665; *Eggleston v. Speke*, 3 Mod. 258; *Roper v. Radcliffe*, 10 Mod. 230; *Ex p. Ilchester*, 7 Ves. Jr. 378; *Onions v. Tyrer*, 1 P. Wms. 345; *Ellis v. Smith*, 1 Ves. Jr. 17; *French's Case*, 8 Vin. Abr. 133; *Goods of Gentry*, L. R. 3 P. & D. 80; *Quinn v. Butler*, L. R. 6 Eq. 225.

*Georgia.* — *Barksdale v. Hopkins*, 23 Ga. 342.

or on account of the illegality of the bequest,<sup>1</sup> or on account of indefiniteness.<sup>2</sup>

*ccc. By Reason of Failure to Prove Will.* — A subsequent will containing a clause revoking an earlier will must, as a general rule, be admitted to probate before the clause of revocation can have any effect,<sup>3</sup> and the same kind, quality, and method of proof is required for the establishment of the subsequent will as was required for the establishment of the former will.<sup>4</sup>

*Lost or Destroyed Will.* — An exception exists, however, where the subsequent will has been lost or unintentionally destroyed. In such a case, proof of the due execution of the will and of the clause of revocation is sufficient to effect a revocation of the original will, although evidence of the rest of the contents cannot be obtained.<sup>5</sup> The burden of showing that the lost or destroyed will contained a revocatory clause rests, of course, upon the party asserting that to be the fact.<sup>6</sup>

*(bb) When Will Contingent.* — Where a subsequent will containing a clause of revocation is to take effect only upon the happening of a certain contingency, the prior will is held not to be revoked if the contingency does not happen.<sup>7</sup>

*(cc) When Unrestrained Construction Results in Absurdity.* — Words expressing a total revocation may be controlled by a natural implication arising from the circumstances under which the will was made, or the absurdities resulting from giving them an unrestrained construction.<sup>8</sup>

*(dd) When Earlier Will Executes Power of Appointment.* — A will executing a power of appointment is revoked by a subsequent will containing a clause revoking all former wills.<sup>9</sup>

*Maryland.* — Colvin *v.* Warford, 20 Md. 394.  
*Massachusetts.* — Laughton *v.* Atkins, 1 Pick. (Mass.) 535.

*Mississippi.* — Hairston *v.* Hairston, 30 Miss. 276; Read *v.* Manning, 30 Miss. 308; Vining *v.* Hall, 40 Miss. 83.

*North Carolina.* — Gossett *v.* Weatherly, 5 Jones Eq. (58 N. Car.) 46.

*Pennsylvania.* — Price *v.* Maxwell, 28 Pa. St. 39.

**1. Illegality of Bequest.** — Vining *v.* Hall, 40 Miss. 83.

**2. Indefiniteness.** — Dudley *v.* Gates, 124 Mich. 440. And see Tupper *v.* Tupper, 1 Kay & J. 665; Smith *v.* McChesney, 15 N. J. Eq. 359.

**3. Necessity of Probating Subsequent Will.** — Brencley *v.* Still, 2 Rob. Ecc. 162; Goods of Durance, L. R. 2 P. & D. 406; Laughton *v.* Atkins, 1 Pick. (Mass.) 535; Reid *v.* Borland, 14 Mass. 208; Wallis *v.* Wallis, 114 Mass. 510; Stickney *v.* Hammond, 138 Mass. 116; Sewall *v.* Robbins, 139 Mass. 167. But see Barksdale *v.* Hopkins, 23 Ga. 332.

**4. In re Noyes**, 61 Vt. 14.

**5. Will Lost or Destroyed** — *Kentucky.* — Muller *v.* Muller, 108 Ky. 511.

*Massachusetts.* — Wallis *v.* Wallis, 114 Mass. 510.

*Michigan.* — Stevens *v.* Hope, 52 Mich. 65; Cheever *v.* North, 106 Mich. 390; Dudley *v.* Gates, 124 Mich. 443.

*Minnesota.* — Matter of Cunningham, 38 Minn. 169.

*Nebraska.* — Williams *v.* Miles, (Neb. 1903) 94 N. W. Rep. 705.

*New Hampshire.* — Lane *v.* Hill, 68 N. H. 275.

*New Jersey.* — Day *v.* Day, 3 N. J. Eq. 549.

*New York.* — Nelson *v.* McGiffert, 3 Barb. Ch. (N. Y.) 158; Matter of Barnes, 70 N. Y. App. Div. 523; *In re Forbes*, (Surrogate Ct.)

24 N. Y. Supp. 841; Matter of Myers, (Surrogate Ct.) 28 Misc. (N. Y.) 359.

*Pennsylvania.* — McKenna *v.* McMichael, 189 Pa. St. 440.

**Existence of Revocatory Clause Must Be Clearly Established.** — Seymour *v.* Nothworthy, Hardres 374, Shaw C. P. 146; Goodright *v.* Harwood, 2 W. Bl. 937, 1 Cowp. 87; Hitchins *v.* Basset, 3 Mod. 203, Shaw C. P. 146; Peck's Appeal, 50 Conn. 562; Nelson *v.* McGiffert, 3 Barb. Ch. (N. Y.) 158.

**6. Burden of Proof.** — Cheever *v.* North, 106 Mich. 390.

**7. Subsequent Will Contingent.** — Goods of Hugo, 2 P. D. 73. In this case the deceased made a will leaving all his property to his wife. Subsequently he and his wife made a joint will to take effect only in case they should be called out of the world at one and the same time and by one and the same accident. This will revoked all former wills. The deceased dying in the lifetime of his wife, it was held that the last will was dependent upon a contingency which did not happen and was therefore inoperative, even for the purpose of revoking the previous will.

**8. Jones v. Jones**, 2 Dev. Eq. (17 N. Car.) 387. In this case a testator disposed of all his estate, giving the larger portion to his wife, and a smaller to his daughter, then his only child. Upon the birth of a son, he executed a codicil containing the following declaration: "I revoke and make void the said legacy to my wife," then gave one moiety of the said legacy to his son, and made no disposition of the other. It was held that his intention was to revoke the legacy to his wife only for one-half, so as to make her a joint tenant with the son.

**9. Earlier Will Executing Power of Appointment.** — Cadell *v.* Wilcocks, 78 L. T. N. S. 83; Sotheran *v.* Dening, 20 Ch. D. 99; *In re King-*

cc. EFFECT OF INCONSISTENT DISPOSITION OF PROPERTY — (aa) *In General* — **Total Revocation.**

— A subsequent will which makes a full disposition of all the testator's property is inconsistent with the existence of any prior will, and therefore amounts to a revocation of all wills previously executed.<sup>1</sup>

**Partial Revocation.** — And so a second will containing certain provisions inconsistent with the provisions of a former will revokes the former will to the extent of the inconsistent portion.<sup>2</sup> In such a case both wills will be admitted to probate.<sup>3</sup>

(bb) *Rules of Construction* — aaa. **In General.** — The form of the subsequent will is of little consequence in determining whether it was intended to effect a partial or total revocation of the original will by implication. It is the disposition of property that is material.<sup>4</sup> Courts strive to reconcile the dispositions of property in the two wills, and they will sustain both unless there is such a plain inconsistency as makes it impossible for the wills to stand together.<sup>5</sup>

don, 32 Ch. D. 604. But see *In Goods of Merritt*, 1 Sw. & Tr. 112.

**1. Total Revocation.** — *Cadell v. Wilcocks*, 78 L. T. N. S. 83; *Kern v. Kern*, 154 Ind. 29; *Simmons v. Simmons*, 26 Barb. (N. Y.) 68; *Rochester Sav. Bank v. Bailey*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 247; *Swann v. Housman*, 90 Va. 816.

In *Henfrey v. Henfrey*, 4 Moo. P. C. 29, a testator left two substantive wills, each disposing of his entire property. By the first, dated in 1838, he appointed executors, to one of whom he gave the residue of his estate. By the second will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of five pounds, but appointed no executors. It was held, affirming the decree of the court below, that the second will operated as a revocation of the first will, and was alone entitled to probate. Dr. Lushington said: "Can two wills, both disposing of the whole property, be included in one probate? Can the will of 1838 be joined in probate with the will of 1839? Such a course would be against the whole practice of the court, and productive of utter confusion and litigation."

In *Ludlum v. Otis*, 15 Hun (N. Y.) 410, a testator, in 1869, executed in the city of New York, a will whereby he devised his interest in a house and lot in said city to two cousins. On April 30, 1875, at Nyon, in Switzerland, he executed, in accordance with the laws of this state, a second will whereby, after giving certain legacies to his servant, he devised the remainder of his property, all situated or invested in America, to his natural heirs. The second will did not in express terms revoke the first. It was held that the first will, being inconsistent therewith, was revoked by the second.

**2. Partial Revocation.** — *Cadell v. Wilcocks*, 78 L. T. N. S. 83; *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705; *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Ludlum v. Otis*, 15 Hun (N. Y.) 410; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Burhans v. Haswell*, 43 Barb. (N. Y.) 424; *Newcomb v. Webster*, 113 N. Y. 191; *Arndt v. Arndt*, 1 S. & R. (Pa.) 256.

In *Lemage v. Goodban*, L. R. 1 P. & D. 57, the testator by his first will made his sister general and residuary legatee. By a subsequent will, purported to be his "last will and testament," he bequeathed to her substantially

the same property that he had bequeathed by the general legacy in the first will, but inserted a defective residuary clause. It was held that the residuary bequest was not revoked. Sir J. P. Wilde said: "Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says: 'The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revokes the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only where they are inconsistent.' This passage truly represents the result of the authorities."

**3. Both Wills Admitted to Probate** — *England*. — *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Stoddart v. Grant*, 1 Macq. H. L. 171; *Hellier v. Hellier*, 9 P. D. 237; *Richards v. Queen's Proctor*, 18 Jur. 540.

*Maryland*. — *Johns Hopkins University v. Pinckney*, 55 Md. 365.

*New Hampshire*. — *Marston v. Marston*, 17 N. H. 503.

*New Jersey*. — *Den v. Snowhill*, 23 N. J. L. 447.

*New York*. — *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Robinson v. Smith*, (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 359; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158.

*North Carolina*. — *Jones v. Jones*, 2 Dev. Eq. (17 N. Car.) 387; *Fleming v. Fleming*, 63 N. Car. 209.

*Pennsylvania*. — *Arndt v. Arndt*, 1 S. & R. (Pa.) 256; *Price v. Maxwell*, 28 Pa. St. 23.

*Vermont*. — *Holley v. Larrabee*, 28 Vt. 274.

**4. Form of Little Consequence.** — *Lemage v. Goodban*, L. R. 1 P. & D. 57.

**5. Dispositions Reconciled if Possible** — *Eng-*



bbb. When Subsequent Will Described as Last Will. — The fact that the subsequent will is described as the testator's last will and testament is entitled to very little weight in determining whether it shall supersede the original will.<sup>1</sup>

ccc. Effect of Appointment or Nonappointment of Executors. — The fact that the subsequent will appoints or does not appoint executors is by no means conclusive evidence, where the question is whether such subsequent will supersedes the original will by implication.<sup>2</sup> And if both wills name executors, and there is no inconsistency in the disposition of property, probate may be granted to both sets of executors.<sup>3</sup>

ddd. When Inconsistent Wills Bear Same Date. — Where two wills containing inconsistent dispositions bear the same date, extrinsic evidence is admissible to show which was executed last. But if there is no extrinsic evidence to be had, neither instrument will be admitted to probate.<sup>4</sup>

Duplicate Wills. — But where two wills are merely duplicates of each other, being identical in form and language as well as date, neither revokes the other and either may be admitted to probate.<sup>5</sup>

eee. Parol Evidence of Intent to Revoke. — Parol evidence is admissible to show an intent to revoke one instrument by another by implication only where there is a latent ambiguity.<sup>6</sup>

*land.* — *Henfrey v. Henfrey*, 2 Curt. Ecc. 468, 4 Moo. P. C. 29; *Cottrell v. Cottrell*, L. R. 2 P. & D. 397; *Goods of Howard*, L. R. 1 P. & D. 636; *Robertson v. Powell*, 2 H. & C. 762; *Freeman v. Freeman*, Kay 479, 5 De G. M. & G. 704; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Cookson v. Hancock*, 1 Keen 817; *Birks v. Birks*, 4 Sw. & Tr. 23; *Richards v. Queen's Proctor*, 18 Jur. 540; *Leslie v. Leslie*, Ir. R. 6 Eq. 332; *Stoddart v. Grant*, 1 Macq. H. L. 171; *Hellier v. Hellier*, 9 P. D. 239.

*Alabama.* — *Grimball v. Patton*, 70 Ala. 626.

*Louisiana.* — *Lyon v. Fisk*, 1 La. Ann. 444; *New Orleans v. Fisk*, 2 La. Ann. 78.

*Maryland.* — *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Buchanan v. Lloyd*, 64 Md. 306; *Boyle v. Parker*, 3 Md. Ch. 42.

*Massachusetts.* — *Quincy v. Rogers*, 9 Cush. (Mass.) 291; *Lamb v. Lamb*, 11 Pick. (Mass.) 371.

*Mississippi.* — *Vaughan v. Bunch*, 53 Miss. 513.

*Nebraska.* — *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705.

*New Jersey.* — *Den v. Vancleve*, 5 N. J. L. 680; *Smith v. McChesney*, 15 N. J. Eq. 359.

*New York.* — *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Newcomb v. Webster*, 113 N. Y. 191; *Austin v. Oakes*, 117 N. Y. 577; *Hard v. Ashley*, 117 N. Y. 606; *Crozier v. Bray*, 120 N. Y. 366; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Barlow v. Coffin*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 54.

*North Carolina.* — *Dalton v. Houston*, 5 Jones Eq. (58 N. Car.) 401; *Hallyburton v. Carson*, 86 N. Car. 290; *In re Venable*, 127 N. Car. 346.

*Pennsylvania.* — *Boudinot v. Bradford*, 2 Dall. (Pa.) 266; *Price v. Maxwell*, 28 Pa. St. 23; *Reichard's Appeal*, 116 Pa. St. 232.

*Tennessee.* — *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 490; *Brown v. Cannon*, 3 Head (Tenn.) 354.

*Vermont.* — *Holley v. Larrabee*, 28 Vt. 274.

*Virginia.* — *Dawson v. Dawson*, 10 Leigh (Va.) 631.

1. Subsequent Will Described as Last Will. —

*Lemage v. Goodban*, L. R. 1 P. & D. 57; *Hellier v. Hellier*, 9 P. D. 237; *Leslie v. Leslie*, Ir. R. 6 Eq. 332; *Cutto v. Gilbert*, 9 Moo. P. C. 131.

*Illustration.* — In *Cutto v. Gilbert*, 9 Moo. P. C. 131, a testator executed a will in 1825, which was found uncanceled at his death, which took place in 1853. In 1852 he executed another testamentary paper, the contents of which were wholly unknown except the circumstance of the paper commencing with the words "This is the last will and testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction. The prerogative court held that the instrument executed in 1852 was not to be considered as a codicil, but as a substantive will, which operated as a revocation of the prior will of 1825. In reversing this judgment the appellate court said: "The very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words 'This is my last will and testament.' We are of opinion that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument. We think that the interpretation put upon these words by Lord Truro, in his judgment in the case of *Stoddart v. Grant*, 1 Macq. H. L. 171, is the true meaning to be attributed to them."

2. Effect of Appointment or Nonappointment of Executors. — *Richards v. Queen's Proctor*, 18 Jur. 540; *Stoddart v. Grant*, 1 Macq. H. L. 171. But see *Plenty v. West*, 1 Rob. Ecc. 264.

3. Probate Granted to Both Sets of Executors. — *Greaves v. Price*, 3 Sw. & Tr. 71; *In re Leese*, 2 Sw. & Tr. 442.

4. Inconsistent Wills Bearing Same Date. — *Phipps v. Anglesey*, 7 Bro. P. C. (Toml. ed.) 443.

5. Duplicate Wills. — *Odenwaelder v. Schorr*, 8 Mo. App. 464; *Crossman v. Crossman*, 95 N. Y. 145.

6. Parol Evidence of Intent to Revoke. — *In re Venable*, 127 N. Car. 346.

(cc) *When Earlier Will Executes Power of Appointment.* — A will devising property by virtue of a power of appointment may be impliedly revoked by a subsequent will containing an inconsistent disposition.<sup>1</sup>

(b) *By Codicil.* — Revocation by codicil is treated elsewhere in this work.<sup>2</sup>

(c) *By Memorandum on Will.* — A memorandum on the will may be a sufficient writing to satisfy the statutory requirement of written revocation.<sup>3</sup>

(d) *By Letter.* — A letter written by the testator showing a present intention to revoke his will is a sufficient writing to effect a revocation if properly signed and attested.<sup>4</sup>

(e) *By Deed of Trust.* — The writing revoking a will may be in the form of a deed of trust.<sup>5</sup>

(3) *Necessity that Present Intention to Revoke Appear.* — The writing, whatever it may be, that contains the words of revocation, must show a present intention to revoke, or it cannot effect a revocation.<sup>6</sup>

A Mere Intimation of an Intent to make a new disposition, as where the testator writes on a second will, devising after-acquired property, that he intends to dispose of the general residuary estate bequeathed by the first will by codicil, "hereafter to be made," does not work an actual present revocation.<sup>7</sup> So words which might otherwise amount to a revocation of an entire will have been held to fail of that effect because accompanied by other words showing that there was no present intention to revoke; as where the testator wrote upon the will the word "canceled," but further wrote that he intended

**1. Will Executing Power of Appointment Revoked.** — *Cadell v. Wilcocks*, 78 L. T. N. S. 83.

**Illustration.** — In *Kent v. Kent*, 71 L. J. P. 50, (1902) P. 108, 86 L. T. N. S. 536, the subsequent will contained the words "give, devise, bequeath, and appoint." It was held that the testator did not make use of the word "appoint" as a mere conventional term, but that he actually intended to exercise his power of appointment.

**2. Revocation by Codicil.** — See the title *Codicils*, vol. 6, p. 174.

**3. Memorandum on Will.** — *Goods of Fraser*, L. R. 2 P. & D. 40.

**4. Letter.** — *Goods of Durance*, L. R. 2 P. & D. 406; *Tynan v. Paschal*, 27 Tex. 303.

**5. Deed of Trust.** — *Matter of Backus*, 49 N. Y. App. Div. 410. In this case the deed contained the following clause: "And, I, Charles C. Backus aforesaid, hereby revoke, annul, and cancel any last will and testament by me here tofore made, sealed, subscribed, published, and declared as and for my last will and testament." The deed was subscribed by Charles C. Backus in the presence of three subscribing witnesses, who stated that he declared to them that it was "his act and deed."

**6. Present Intention to Revoke Must Appear.** — *Burton v. Gowell*, Cro. Eliz. 306; *Cleoburey v. Beckett*, 14 Beav. 583; *Doe v. Hicks*, 8 Bing. 475, 21 E. C. L. 349; *Grimball v. Patton*, 70 Ala. 626; *Gelbke v. Gelbke*, 88 Ala. 427; *Tynan v. Paschal*, 27 Tex. 303.

**Present Intent Sufficiently Shown.** — A memorandum on the will, "This will was canceled this day," duly attested, has been held sufficient to show a present intent to revoke. *Goods of Fraser*, L. R. 2 P. & D. 40; *Goods of Hicks*, L. R. 1 P. & D. 683.

In *Goods of Durance*, L. R. 2 P. & D. 406, the testator, in a letter addressed to his brother, which was signed by him in the pres-

ence of two witnesses, directed his brother to obtain his will and burn it without reading it. It was held that the letter was a writing duly executed, declaring an intention to revoke the will, and administration, with the letter only annexed, was granted to the next of kin to the deceased.

In *Brown v. Thorndike*, 15 Pick. (Mass.) 388, a testator wrote on his will, "It is my intention at some future time to alter the tenor of the above will, or rather to make another will; therefore, be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect." It was held that this was a present revocation and not the declaration of an intent to revoke by some future act. The court, by Shaw, C. J., said: "It was contended by the counsel for the appellant, that supposing the instrument of revocation to be well executed, still it did not separate as a revocation, because it manifested a future intent to revoke and not an actual revocation. The rule is well settled that the declaration of an intent to revoke by some future act is no actual revocation. *Cranvell v. Sanders*, Cro. Jac. 497; *Thomas v. Evans*, 2 East 488. But we think the present case not affected by that rule, because, taken together, the instrument is one of present revocation. \* \* \* It does not declare an intent to revoke; it looks to no future act to be done, to effect such revocation, and in this respect it differs from the cases cited. The instrument written on the will, therefore, must be considered, not as a declaration of an intent to revoke by some future act, but as an actual instrument of present revocation, by which the will in question was legally revoked."

**7. Mere Intimation of Intention Shown.** — *Thomas v. Evans*, 2 East 488. See also *Griffin v. Griffin*, 4 Ves. Jr. 197, note a; *Ray v. Walton*, 2 A. K. Marsh. (Ky.) 74; *Rife's Appeal*, 110 Pa. St. 232.

making another will, "whereupon I shall destroy this."<sup>1</sup>

(4) *Fraud, Undue Influence, or Mistake in Execution of Instrument*—

(a) *Fraud and Undue Influence.*—The subsequent will, codicil, or other writing executed for the purpose of revoking a will, must not be the result of fraud or undue influence, or it will effect no revocation.<sup>2</sup>

(b) *Mistake*—*aa. IN GENERAL.*—An express clause of revocation inserted in a writing by mistake is inoperative.<sup>3</sup>

*bb. MISTAKEN BELIEF AS TO FACTS*—*Reason for Revocation Set Forth.*—Where a testator revokes a devise or bequest in a former will or codicil, and, as his reason for so doing, expressly sets forth in the revoking instrument the existence of a state of facts which turns out to be false, the condition upon which the revocation was to take effect is held to have failed, and the devise or bequest remains unrevoked.<sup>4</sup> It has been held, however, that revocation results where the testator founds his revocation upon advice or belief, though he may have been misinformed or under a misapprehension.<sup>5</sup> Revocation is also held to result where it appears that the facts are peculiarly within the knowledge of the testator.<sup>6</sup>

*Reason for Revocation Not Set Forth.*—Where the testator has not set forth in the revoking instrument the grounds upon which the intent to revoke is founded, the instrument will operate to revoke the will,<sup>7</sup> as evidence *dehors* the revoking instrument will not be admitted to show, as a reason for the revocation, a mistaken belief as to facts on the part of the testator.<sup>8</sup>

*c. REVOCATION BY CANCELLATION OR DESTRUCTION OF WILL*—

(1) *Statutory Provisions*—(a) *In England*—*Statute of Frauds.*—By the sixth section of the statute of frauds it was provided that revocation of a written devise of lands, tenements, or hereditaments, or any clause thereof, might be effected by burning, canceling, tearing, or obliterating the same, either by the testator himself or by another in his presence and by his direction and consent.<sup>9</sup>

*Statute of Victoria.*—A later statute, passed in the time of Victoria, provides that any will or codicil may be revoked by burning, tearing, or otherwise destroying the same, either by the testator, or by some person in his presence and by his direction, with the intention of revoking the same, but that

1. *Absolute Words Qualified by Other Words.*—*Goods of Brewster*, 6 Jur. N. S. 56; *In re Knapen*, 75 Vt. 146.

2. *Effect of Fraud or Undue Influence.*—*McCartney v. Bone*, 33 Ala. 601; *Laughton v. Atkins*, 1 Pick. (Mass.) 246; *Dudley v. Gates*, 124 Mich. 443; *Lyon v. Dada*, 127 Mich. 395; *Rudy v. Ulrich*, 69 Pa. St. 177; *O'Neill v. Farr*, 1 Rich. L. (S. Car.) 80.

3. *Clause Inserted by Mistake Inoperative.*—*Powell v. Mouchett*, 6 Madd. 216.

4. *Reason for Revocation Set Forth*—*England.*—*Goods of Oswald*, L. R. 3 P. & D. 162; *Campbell v. French*, 3 Ves. Jr. 321; *Doe v. Evans*, 10 Ad. & El. 228, 37 E. C. L. 102; *Barclay v. Maskelyne*, Johns. Ch. (Eng.) 124; *Goods of Moresby*, 1 Hag. Ecc. 378; *Atty.-Gen. v. Lloyd*, 1 Ves. 32; *Atty.-Gen. v. Ward*, 3 Ves. Jr. 327; *Parker v. Nickson*, 1 De G. J. & S. 177; *Thomas v. Howell*, L. R. 18 Eq. 198; *In re Taylor*, 22 Ch. D. 495.

*Connecticut.*—*Dunham v. Averill*, 45 Conn. 61.

*New Jersey.*—*Hayes v. Hayes*, 21 N. J. Eq. 265.

*North Carolina.*—*Mordecai v. Boylan*, 6 Jones Eq. (59 N. Car.) 365.

*Pennsylvania.*—*Mendinhall's Appeal*, 124 Pa. St. 387.

*Rhode Island.*—*Gifford v. Dyer*, 2 R. I. 102.  
*Virginia.*—*Skipwith v. Cabell*, 19 Gratt. (Va.) 784.

5. *Acting on Advice or Belief.*—*Atty.-Gen. v. Lloyd*, 1 Ves. 35; *Atty.-Gen. v. Ward*, 3 Ves. Jr. 327; *Dunham v. Averill*, 45 Conn. 81; *Skipwith v. Cabell*, 19 Gratt. (Va.) 785. But see *Thomas v. Howell*, L. R. 18 Eq. 211; *Mendinhall's Appeal*, 124 Pa. St. 387.

6. *Facts Peculiarly Within Knowledge of Testator.*—*Mendinhall's Appeal*, 124 Pa. St. 387. See, however, *In re Taylor*, 22 Ch. D. 495.

In *Hayes v. Hayes*, 21 N. J. Eq. 265, it was held that a codicil revoking in express terms a legacy in the will, because the testator had provided the legatees with a permanent home, when in fact he had not so provided, would not be declared inoperative upon the ground of mistake, since the testator must have known whether or not he had provided such a home.

7. *Reason for Revocation Not Set Forth.*—*Dunham v. Averill*, 45 Conn. 62; *Gifford v. Dyer*, 2 R. I. 102; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758.

8. *Evidence Dehors Instrument Inadmissible.*—*Gifford v. Dyer*, 2 R. I. 102; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758. But see *Goods of Moresby*, 1 Hag. Ecc. 378.

9. *Statute of Frauds.*—29 Car. II., c. 3, § 6.



no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as is required for the execution of the will itself.<sup>1</sup>

**Statutes Contrasted.** — It should be noted that under the statute of Victoria, revocation by tearing or burning is authorized as under the statute of frauds, but that revocation by cancellation is not recognized, nor is revocation by obliteration, unless the obliteration is so complete that the words of the will are not apparent on an inspection of the instrument.<sup>2</sup>

(b) **In United States.** — In the United States, statutes permitting the revocation of wills by tearing, burning, canceling, obliterating, or destroying the same, exist in most of the states. Some of these statutes follow the English statute of frauds, while others are more similar in provisions to the statute of Victoria.<sup>3</sup> In *Iowa* cancellation, to effect a revocation, must be witnessed in the same manner as a will is witnessed.<sup>4</sup>

(2) *By Whom Act May Be Committed* — (a) **By Testator.** — As has been noted, the various statutes provide as a matter of course that the act of burning, tearing, canceling, obliterating, or destroying may be committed by the testator.<sup>5</sup>

(b) **By Third Person.** — But a further common provision of the statutes is that such act of revocation may be performed by a third person, if done by the direction or with the consent of the testator,<sup>6</sup> and, in some jurisdictions, in the testator's presence.<sup>7</sup>

**Revocation After Death of Testator.** — Since the destruction of a will by a third person will not operate to revoke the same in the lifetime of the testator, unless the latter has consented thereto, a similar act performed after his

1. **Statute of Victoria.** — 1 Vict., c. 26, §§ 20, 21.

2. **Statutes Contrasted.** — *Goods of Horsford*, L. R. 3 P. & D. 211; *Hobbs v. Knight*, 1 Curt. Ecc. 779; *In re Ibbetson*, 2 Curt. Ecc. 337; *Stephens v. Taprell*, 2 Curt. Ecc. 458; *Townley v. Watson*, 3 Curt. Ecc. 761; *In re Brewster*, 29 L. J. P. 69; *Goods of Fary*, 15 Jur. 1114; *Lushington v. Onslow*, 6 Notes Cas. (Eng.) 187; *Cheese v. Lovejoy*, 2 P. D. 251; *Twining v. Powell*, 2 Coll. Ch. Cas. 262; *Goods of McCabe*, L. R. 3 P. & D. 94.

3. **Statutes in United States** — *Alabama*. — *Barber v. Bell*, 46 Ala. 216; *Slaughter v. Stephens*, 81 Ala. 418.

*California*. — *Olmsted's Estate*, 122 Cal. 224.

*Connecticut*. — *Miles's Appeal*, 68 Conn. 237.

*Delaware*. — *Smith v. Dolby*, 4 Harr. (Del.) 350.

*Georgia*. — *Patterson v. Hickey*, 32 Ga. 156.

*Illinois*. — *Wolf v. Bollinger*, 62 Ill. 368; *Stetson v. Stetson*, 200 Ill. 601; *Hubbard v. Hubbard*, 99 Ill. App. 558.

*Kansas*. — *Caeman v. Van Harke*, 33 Kan. 336.

*Kentucky*. — *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190; *Steele v. Price*, 5 B. Mon. (Ky.) 58; *Thruston v. Prather*, 77 S. W. Rep. 354, 25 Ky. L. Rep. 1137.

*Maryland*. — *Semmes v. Semmes*, 7 Har. & J. (Md.) 388.

*Massachusetts*. — *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

*Michigan*. — *Lawyer v. Smith*, 8 Mich. 411.

*Minnesota*. — *Graham v. Burch*, 47 Minn. 171.

*Missouri*. — *Spoonemore v. Cables*, 66 Mo. 579.

*New Hampshire*. — *Fellows v. Allen*, 60 N. H. 439; *Hoitt v. Hoitt*, 63 N. H. 494; *Morey v. Sohler*, 63 N. H. 509.

*New Jersey*. — *Boylan v. Meeker*, 28 N. J. L. 274; *Smock v. Smock*, 11 N. J. Eq. 156; *Mundy v. Mundy*, 15 N. J. Eq. 291.

*New York*. — *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Timon v. Claffy*, 45 Barb. (N. Y.) 438; *Matter of Ackels*, (Surrogate Ct.) 23 Misc. (N. Y.) 321.

*North Carolina*. — *White v. Casten*, 1 Jones L. (46 N. Car.) 197.

*Pennsylvania*. — *Burns v. Burns*, 4 S. & R. (Pa.) 295; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

*South Carolina*. — *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272; *Means v. Moore*, 3 McCord L. (S. Car.) 282.

*Tennessee*. — *Marr v. Marr*, 2 Head (Tenn.) 303.

*West Virginia*. — *Dower v. Seeds*, 28 W. Va. 113.

4. *Gay v. Gay*, 60 Iowa 415.

5. See *supra*, this subsection, (1) *Statutory Provisions*.

6. See the various statutes. See also *Howard v. Hunter*, 115 Ga. 357; *Means v. Moore*, 3 McCord L. (S. Car.) 282.

7. **Act to Be Performed in Testator's Presence.** — *Miles's Appeal*, 68 Conn. 242; *Morey v. Sohler*, 63 N. H. 509; *Mundy v. Mundy*, 15 N. J. Eq. 291; *Heise v. Heise*, 31 Pa. St. 246; *Verdier v. Verdier*, 8 Rich. L. (S. Car.) 135; *Gavitt v. Moulton*, 119 Wis. 35.

death will not affect the validity of the will; <sup>1</sup> and where the statute provides that the act of destruction must be performed in the testator's presence, the testator's consent, given in his lifetime, will not make effective an act of destruction performed after his death. <sup>2</sup> If the act is performed, nevertheless, and the will is destroyed, its contents may be proved *aliunde*. <sup>3</sup>

**Ratification by Testator.** — The act of a third person who destroys a will without the consent of the testator cannot be ratified by the latter so as to effect a revocation of the will. <sup>4</sup>

**Proof of Authority to Destroy.** — It is provided by some statutes that where the will is canceled or destroyed by any person other than the testator, the authority so to act, together with the fact of such cancellation or destruction, must be proved by two witnesses. <sup>5</sup>

(3) **Partial Revocation** — (a) **Whether Permissible.** — Under the English statute of frauds, which, as has been seen, authorized the revocation of a devise "or any clause thereof" by burning, tearing, canceling, or obliterating, partial revocation was considered permissible. <sup>6</sup> And where other statutes have contained the same words, or words of like import, a similar construction has been accorded them. <sup>7</sup> In some jurisdictions, however, the statutes provide merely that no will shall be revoked in the absence of certain formalities, unless it be burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking the same. In the construction of such statutes, the authorities are not uniform. Some courts hold that the statutes were not intended to authorize partial revocation, <sup>8</sup> while others take a contrary view. <sup>9</sup>

(b) **By Reducing Interest of Beneficiary.** — In those jurisdictions where partial revocation is permitted, a testator may, it seems, by striking out words, reduce the interest of a beneficiary. <sup>10</sup>

(c) **By Increasing Interest of Beneficiary.** — But it is generally held that the testator may not, by striking out words, increase the share of a beneficiary either directly or indirectly. <sup>11</sup>

**Increasing Residuary Clause.** — Thus, if there is a residuary clause in the will

**1. Revocation After Death of Testator.** — *Haines v. Haines*, 2 Vern. 441; *Mills v. Millward*, 15 P. D. 20; *Kidder's Estate*, 66 Cal. 488; *Allison v. Allison*, 7 Dana (Ky.) 94; *Tucker v. Whitehead*, 59 Miss. 594; *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Bennet v. Sherrod*, 3 Ired. L. (25 N. Car.) 303.

**2. Stockwell v. Ritherdon**, 12 Jur. 779.

**3. Contents Proved Aliunde.** — *Goods of North*, 6 Jur. 564.

**4. Ratification by Testator.** — *Steele v. Price*, 5 B. Mon. (Ky.) 61; *Clingan v. Mitcheltree*, 31 Pa. St. 25. But see *Mills v. Millward*, 15 P. D. 20.

**5. Proof of Authority to Destroy.** — *Matter of Barnes*, 70 N. Y. App. Div. 523; *Matter of Hopkins*, (Surrogate Ct.) 35 Misc. (N. Y.) 702. And see the various statutes.

**6. Partial Revocation Permitted under Statute of Frauds.** — *Mence v. Mence*, 18 Ves. Jr. 350; *Martins v. Gardiner*, 8 Sim. 73; *Francis v. Grover*, 5 Hare 39; *Larkins v. Larkins*, 3 B. & P. 16; *Short v. Smith*, 4 East 418; *Goods of Woodward*, L. R. 2 P. & D. 206; *Rogers Ecc. Law* 1018; *Roberts v. Round*, 3 Hag. Ecc. 548; *Burkitt v. Burkitt*, 2 Vern. 498; *Sutton v. Sutton*, 2 Cowp. 812; *Limbery v. Mason*, 2 Comyns 451; *Swinton v. Bailey*, 1 Ex. D. 110.

**7. Under Statutes Similar to Statute of Frauds.** — *Wolf v. Bollinger*, 62 Ill. 372; *Hubbard v. Hubbard*, 198 Ill. 621, affirming 99 Ill. App.

555; *Brown's Will*, 1 B. Mon. (Ky.) 57; *Eschbach v. Collins*, 61 Md. 478; *Dammann v. Dammann*, (Md. 1894) 28 Atl. Rep. 408; *Varnon v. Varnon*, 67 Mo. App. 537.

**8. Partial Revocation Not Authorized** — *Alabama*. — *Law v. Law*, 83 Ala. 432.

*New York*. — *Lovell v. Quitman*, 88 N. Y. 377, affirming 25 Hun (N. Y.) 537, and overruling *McPherson v. Clark*, 3 Bradf. (N. Y.) 92. See also *Quinn v. Quinn*, 1 Thomp. & C. (N. Y.) 437; *Matter of Prescott*, 4 Redf. (N. Y.) 178; *Gugel v. Vollmer*, 1 Dem. (N. Y.) 484; *Matter of Alger*, (Surrogate Ct.) 38 Misc. (N. Y.) 143.

**9. Contrary View.** — *Miles's Appeal*, 68 Conn. 237; *Townshend v. Howard*, 86 Me. 285; *Bigelow v. Gillott*, 123 Mass. 102.

**10. Fee Reduced to Life Estate.** — In *Swinton v. Bailey*, 45 L. J. Exch. 427, the testator, by his will, devised his realty to a certain person, her heirs and assigns forever. He subsequently, with intent to revoke, obliterated the words "her heirs and assigns forever." It was held that the effect of his act was to change the estate in fee, formerly devised, to an estate for life.

**11. Share of Beneficiary May Not Be Increased.** — *Larkins v. Larkins*, 3 B. & P. 21; *Miles's Appeal*, 68 Conn. 237; *Wolf v. Bollinger*, 62 Ill. 368. Compare *Swinton v. Bailey*, 4 App. Cas. 70.

the testator will not be allowed to revoke specific devises or bequests, for to do so would be to increase the share of the residuary legatee or devisee.<sup>1</sup>

(4) *Intention to Revoke* — (a) *Necessity of Intent to Revoke* — *aa. IN GENERAL.* — The act of burning, tearing, canceling, obliterating, or destroying, in order to effect a revocation, must be done with that intention.<sup>2</sup>

*Abandonment of Intention.* — Where the testator abandons his intention of revoking the will before the act of destruction is complete, the will remains unrevoked.<sup>3</sup>

*Attempt to Change Life Estate to Fee by Erasures.* — *Eschbach v. Collins*, 61 Md. 478.

1. *Residuary Clause May Not Be Increased.* — *Miles's Appeal*, 68 Conn. 237. And see *In re Knapen*, 75 Vt. 146. But compare *Bigelow v. Gillott*, 123 Mass. 102.

2. *Intent to Revoke Necessary* — *England.* — *Elms v. Elms*, 4 Jur. N. S. 765; *Bigge v. Bigge*, 9 Jur. 192; *Clarke v. Scripps*, 16 Jur. 783, 2 Rob. Ecc. 563; *Beardsley v. Lacey*, 67 L. J. P. 35, 78 L. T. N. S. 25; *Price v. Powell*, 3 H. & N. 341; *Cheese v. Lovejoy*, 2 P. D. 251; *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Mills v. Millward*, 15 P. D. 20; *Francis v. Grover*, 5 Hare 39; *Giles v. Warren*, L. R. 2 P. & D. 401, 3 Moak 478; *Swinton v. Bailey*, 4 App. Cas. 70.

*Alabama.* — *Woodruff v. Hundley*, 127 Ala. 640.

*California.* — *Lang's Estate*, 65 Cal. 19; *Olmsted's Estate*, 122 Cal. 224.

*Connecticut.* — *Matter of Johnson*, 40 Conn. 587.

*Georgia.* — *Howard v. Hunter*, 115 Ga. 357; *McIntyre v. McIntyre*, 120 Ga. 67.

*Illinois.* — *Wolf v. Bollinger*, 62 Ill. 368; *Hesterberg v. Clark*, 166 Ill. 241.

*Indiana.* — *Wright v. Wright*, 5 Ind. 389; *Runkle v. Gates*, 11 Ind. 95; *Woodfill v. Patton*, 76 Ind. 575; *Forbing v. Weber*, 99 Ind. 588.

*Iowa.* — *Gay v. Gay*, 60 Iowa 415; *McCarn v. Rundall*, 111 Iowa 406.

*Kentucky.* — *Gains v. Gains*, 2 A. K. Marsh. (Ky.) 190; *Beauchamp's Will*, 4 T. B. Mon. (Ky.) 363; *Sanders v. Babbitt*, 106 Ky. 646; *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 501.

*Louisiana.* — *Muh's Succession*, 35 La. Ann. 394.

*Maine.* — *Collagan v. Burns*, 57 Me. 454; *Rich v. Gilkey*, 73 Me. 595.

*Minnesota.* — *Graham v. Burch*, 47 Minn. 171.

*Missouri.* — *Dickey v. Malechi*, 6 Mo. 177.

*New Hampshire.* — *Fellows v. Allen*, 60 N. H. 439.

*New Jersey.* — *Smock v. Smock*, 11 N. J. Eq. 156.

*New York.* — *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Sweet v. Sweet*, 1 Redf. (N. Y.) 451; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Delafield v. Parish*, 25 N. Y. 9; *Matter of Akers*, 74 N. Y. App. Div. 467.

*North Carolina.* — *White v. Casten*, 1 Jones L. (46 N. Car.) 197; *Marsh v. Marsh*, 3 Jones L. (48 N. Car.) 77; *Bethell v. Moore*, 2 Dev. & B. L. (19 N. Car.) 311; *Cutler v. Cutler*, 130 N. Car. 1.

*Pennsylvania.* — *Heise v. Heise*, 31 Pa. St.

246; *Evans's Appeal*, 58 Pa. St. 238; *Lewis v. Lewis*, 2 W. & S. (Pa.) 455; *Burns v. Burns*, 4 S. & R. (Pa.) 295; *Boudinot v. Bradford*, 2 Yeates (Pa.) 170.

*South Carolina.* — *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482; *Means v. Moore*, 3 McCord L. (S. Car.) 282.

*Tennessee.* — *Billington v. Jones*, 108 Tenn. 239; *Frear v. Williams*, 7 Baxt. (Tenn.) 550.

*Wisconsin.* — *Ladd's Will*, 60 Wis. 187; *Gavitt v. Moulton*, 119 Wis. 35.

In *Clarke v. Scripps*, 2 Rob. Ecc. 563, the court said: "It is to be observed that the burning, tearing, or otherwise destroying the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law; the act must be accompanied with the intention of revoking; there must be the *animus* as well as the act; both must concur in order to constitute a legal revocation."

*Olographic Will.* — *Marr v. Marr*, 2 Head (Tenn.) 303.

3. *Abandonment of Intention.* — *Elms v. Elms*, 1 Sw. & Tr. 155; *In re Cockayne*, Deane Ecc. 177; *Winsor v. Pratt*, 2 Brod. & B. 655, 6 E. C. L. 316; *Giles v. Giles*, Conf. Rep. (1 N. Car.) 174; *Burns v. Burns*, 4 S. & R. (Pa.) 295.

In *Doe v. Perkes*, 3 B. & Ald. 489, 5 E. C. L. 353, a testator, being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm; and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse. Bayley, J., said: "If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped *in medio*, then the act, not having been completed, will not be sufficient to destroy the validity of the will. Suppose a person, having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here there was evidence from which a change of purpose, before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict."



*bb. ACCIDENTAL DESTRUCTION.*—A will is not revoked by an act of burning, tearing, canceling, obliterating, or destroying which is accidental.<sup>1</sup> Thus, where ink is thrown on the will, instead of sand as was intended, there is no revocation, though a material part of the will is obliterated or destroyed.<sup>2</sup>

*cc. DEPENDENT RELATIVE REVOCATION.*—The intention to revoke must have something more than a conditional existence. It must be an intention to revoke at all events. And if the act of burning, tearing, canceling, obliterating, or destroying be done with the deliberate and sole intention of setting up and establishing some other testamentary paper for which the destruction of the paper in question is designed only to make way, the act does not operate as a revocation, unless the other testamentary paper is set up or established.<sup>3</sup>

**1. Will Destroyed by Accident.**—*Powell v. Powell*, L. R. 1 P. & D. 209; *Collagan v. Burns*, 57 Me. 455; *Matter of Cook*, 5 Pa. L. J. Rep. 1, 3 Am. L. J. 353.

**2. Ink Instead of Sand Used.**—*Burtenshaw v. Gilbert*, 1 Cowp. 52.

**3. Intention Must Be to Revoke at All Events**—*England.*—*In re James*, 1 Sw. & Tr. 238; *Kirke v. Kirke*, 4 Russ. 435; *Locke v. James*, 11 M. & W. 901; *Brooke v. Kent*, 3 Moo. P. C. 334; *Soar v. Dolman*, 3 Curt. Ecc. 121; *Winsor v. Pratt*, 2 Brod. & B. 650, 6 E. C. L. 314; *Goods of Horsford*, L. R. 3 P. & D. 211; *R<sup>2</sup> Parr*, 1 Sw. & Tr. 56; *In re Harris*, 1 Sw. & Tr. 536; *Short v. Smith*, 4 East 418; *Eccleston v. Petty*, Carth. 79; *Limbery v. Mason*, 2 Comyns 451; *Ex p. Ilchester*, 7 Ves. Jr. 348; *Hyde v. Hyde*, 3 L. J. Ch. 130; *Cossey v. Cossey*, 69 L. J. P. 17, 82 L. T. N. S. 203, 64 J. P. 89; *In re Mitcheson*, 32 L. J. P. 202; *Goods of Weston*, L. R. 1 P. & D. 633; *Goods of Gentry*, L. R. 3 P. & D. 80; *Powell v. Powell*, L. R. 1 P. & D. 209; *Eckersley v. Platt*, L. R. 1 P. & D. 281; *Beardsley v. Lacey*, 67 L. J. P. 35, 78 L. T. N. S. 25; *Goods of Applebee*, 1 Hag. Ecc. 143; *Scott v. Scott*, 1 Sw. & Tr. 258; *Clarkson v. Clarkson*, 2 Sw. & Tr. 497; *In re Middleton*, 3 Sw. & Tr. 583; *James v. Shrimpton*, 1 P. D. 431; *In re Kennett*, 2 N. R. 461; *Onions v. Tyrer*, 1 P. Wms. 343; *In re Tozer*, 2 Notes Cas. (Eng.) 11; *In re Ibbetson*, 2 Curt. Ecc. 337; *Goods of Nelson*, 1 Ir. R. 6 Eq. 569; *Goods of Parr*, 29 L. J. P. 70, 6 Jur. N. S. 56; *Goods of McCabe*, L. R. 3 P. & D. 94; *Dancer v. Crabb*, L. R. 3 P. & D. 98; *Townley v. Watson*, 3 Curt. Ecc. 761, 8 Jur. 111, 3 Notes Cas. (Eng.) 17; *Goods of Reeve*, 13 Jur. 370.

*Canada.*—*Miller v. Miller*, 34 Can. L. J. 743.

*California.*—*Olmsted's Estate*, 122 Cal. 224.

*Georgia.*—*McIntyre v. McIntyre*, 120 Ga. 67.

*Illinois.*—*Wolf v. Bollinger*, 62 Ill. 374.

*Kentucky.*—*Youse v. Forman*, 5 Bush (Ky.) 337.

*Maryland.*—*Semmes v. Semmes*, 7 Har. & J. (Md.) 388.

*Massachusetts.*—*Laughton v. Atkins*, 1 Pick. (Mass.) 543; *Pickens v. Davis*, 134 Mass. 252; *Stickney v. Hammond*, 138 Mass. 116; *Sewall v. Robbins*, 139 Mass. 164.

*Michigan.*—*Dudley v. Gates*, 124 Mich. 442.

*Minnesota.*—*Thomas v. Thomas*, 76 Minn. 237.

*Mississippi.*—*Bohanon v. Walcott*, 1 How. (Miss.) 336; *Hairston v. Hairston*, 30 Miss. 276; *Wilbourn v. Shell*, 59 Miss. 205.

*Missouri.*—*Varnon v. Varnon*, 67 Mo. App. 534.

*New York.*—*McPherson v. Clark*, 3 Bradf. (N. Y.) 92; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

*North Carolina.*—*Bethell v. Moore*, 2 Dev. & B. L. (19 N. Car.) 311.

*Pennsylvania.*—*Rudy v. Ulrich*, 69 Pa. St. 183.

*South Carolina.*—*Pringle v. M'Pherson*, 2 Brev. (S. Car.) 290; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 278.

*Tennessee.*—*Stover v. Kendall*, 1 Coldw. (Tenn.) 557.

*Vermont.*—*In re Knapen*, 75 Vt. 146.

*Virginia.*—*Barksdale v. Barksdale*, 12 Leigh (Va.) 535.

*West Virginia.*—*Carpenter v. Miller*, 3 W. Va. 174.

**Will Intended to Be Substituted Not Made.**—*Goods of Applebee*, 1 Hag. Ecc. 143; *Goods of Eccles*, 2 Sw. & Tr. 600; *Goods of De Bode*, 5 Notes Cas. (Eng.) 189; *Youse v. Forman*, 5 Bush (Ky.) 338.

**Illustrations.**—*In Dancer v. Crabb*, L. R. 3 P. & D. 98, the testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it, to a friend, who wrote them down. The testatrix, feeling unwell, desired her friend to stop there, and then tore off and burned so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will. It was held that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed.

*In Clarkson v. Clarkson*, 2 Sw. & Tr. 497, B duly executed a will in August, 1857; in July, 1859, he executed another will, purporting to revoke the will of 1857; it was proved that, after the execution of the will of 1859, B had called for the will of 1857, and after appearing to read it had torn it up, saying, "It is of no use now, I have another." The court held that there was no proof of the destruction of the will of 1857, with intention to revoke, so as to satisfy 1 Vict., c. 26, § 20, and decreed probate of the draft thereof. Sir C. Creswell said: "The act done without the intention is

This doctrine is known as that of dependent relative revocation.<sup>1</sup> But the doctrine does not apply and revocation will nevertheless result where the testator at the time of the destruction of his will merely intends at some indefinite future time to make a new will.<sup>2</sup>

**Where Clause of Express Revocation Contained in Subsequent Will.** — The fact that the later will contains a clause expressly revoking former wills does not prevent the application of the doctrine, since it must be inferred that the testator intended to revoke former wills for the purpose of giving effect to the new disposition, and if, for want of proper execution of the subsequent will, its defective construction, or other sufficient cause, proper effect cannot be given to it, it is not to be supposed that the testator designed to die intestate.<sup>3</sup>

**A Will Canceled in Order to Set Up a Prior Will** which cannot be so revived is not revoked.<sup>4</sup>

(b) **Evidence of Intent to Revoke** — *aa. QUESTION FOR JURY.* — Usually it is for the jury to determine whether the act of tearing, burning, canceling, obliterating, or destroying was done with intent to revoke the will, especially if the act be of an equivocal nature. But the facts in evidence may be so plain and free

ineffectual. Here the intention was wanting, for, according to the evidence, he imagined that the revocation had been already accomplished; and because it had been accomplished, and not for the purpose of accomplishing it, the act of destruction was done."

**1. Known as Doctrine of Dependent Relative Revocation.** — *Cossey v. Cossey*, 69 L. J. P. 17, 82 L. T. N. S. 203, 64 J. P. 89; *McIntyre v. McIntyre*, 120 Ga. 67.

**2. When Doctrine Does Not Apply** — *England.* — *Williams v. Tyley*, 5 Jur. N. S. 35; *In re Mitcheson*, 32 L. J. P. 202; *Goods of Weston*, L. R. 1 P. & D. 633; *Goods of Gentry*, L. R. 3 P. & D. 80.

*California.* — *Olmsted's Estate*, 122 Cal. 224. *Georgia.* — *McIntyre v. McIntyre*, 120 Ga. 67. *Kentucky.* — *Sanders v. Babbitt*, 106 Ky. 646; *Youse v. Forman*, 5 Bush (Ky.) 338.

*Maine.* — *Townshend v. Howard*, 86 Me. 285. *Maryland.* — *Semmes v. Semmes*, 7 Har. & J. (Md.) 388.

*Massachusetts.* — *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

*Missouri.* — *Banks v. Banks*, 65 Mo. 435. *South Carolina.* — *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

In *Banks v. Banks*, 65 Mo. 432, a testator, intending to revoke a will, caused it to be burned. He had already prepared and signed a second will making materially different dispositions of the property. At the time of the burning, the second will was not attested, and the testator understood that until attested it would not be complete. It was subsequently attested, and after the death of the testator was offered for probate, but was rejected by the probate court. In an action to establish the first will, it was held that the burning operated as a complete revocation, and this result was not changed by the fact that the second will never took effect. The court, by Henry, J., said: "In the English cases which we have cited, the alterations in the original wills were in immaterial particulars, and did not indicate any dissatisfaction of the testator with the disposition of the property made by the original wills. Here the disposition which he proposed to make of his property by the will of 1866,

was substantially and materially different from that made by the will of 1865, clearly indicating that he was not satisfied with the original will. Here the testator had no impression or opinion that the last will was complete, but had a purpose subsequently to perfect it, and did so. He burned the will expressly to revoke it. We cannot say that he would not have done so if he had known that the second will would never be completed or probated."

**3. Where Clause of Express Revocation Contained in Subsequent Will.** — *Powell v. Powell*, L. R. 1 P. & D. 209; *Onions v. Tyrer*, 1 P. Wms. 345; *Peck's Appeal*, 50 Conn. 566; *Stickney v. Hammond*, 138 Mass. 120; *Rudy v. Ulrich*, 69 Pa. St. 183; *Pringle v. M'Pherson*, 2 Brev. (S. Car.) 290; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535. But see *Barksdale v. Hopkins*, 23 Ga. 339; *Burns v. Travis*, 117 Ind. 45; *Hairston v. Hairston*, 30 Miss. 276.

**4. Will Canceled in Order to Set Up Prior Will.** — *Dickinson v. Swatman*, 4 Sw. & Tr. 205; *Eckersley v. Platt*, L. R. 1 P. & D. 281; *Goods of Weston*, L. R. 1 P. & D. 633.

In *Powell v. Powell*, L. R. 1 P. & D. 209, a testator executed a will in 1864, revoking all former wills. In 1865 he destroyed this will, saying at the time that he wished to substitute for it a will of 1862, which he held in his hand. It was held that there was no revocation. Sir J. P. Wilde said: "It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done '*animo revocandi*' it is no revocation. What, then, if the act of destruction be done

from conflict and the inference to be drawn so clear in some cases as to justify the court in treating the question as one of law.<sup>1</sup>

*bb. BURDEN OF PROOF.* — The burden of showing that the act of tearing, burning, canceling, obliterating, or destroying was done with the intention to revoke the will either wholly or partially is upon the person alleging such intention.<sup>2</sup>

*cc. PRESUMPTIONS* — (*aa*) *In General.* — Intention is often inferred in the first instance from the character of the act done, though extrinsic evidence is usually admissible to rebut such presumption.<sup>3</sup> The particular acts which are sufficient to give rise to a presumption of revocation are considered hereafter.<sup>4</sup>

(*bb*) *As to Revocation of Codicil.* — A codicil is *prima facie* dependent on the will, and the cancellation of the will is an implied revocation of the codicil. But there have been instances where the codicil has appeared to be so independent of, and so unconnected with, the will, that, under the circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of intention, and, consequently, the legal presumption may be repelled by showing that the testator intended the codicil to operate notwithstanding the revocation of the will.<sup>5</sup>

(*cc*) *Where Canceled Will Found Among Testator's Effects.* — Where a will is found among the testator's effects, and the will is canceled or obliterated, the *prima facie* presumption is that the testator made the cancellation or obliteration, and that it was done *animo revocandi*.<sup>6</sup>

(*dd*) *Where Will Cannot Be Found.* — It seems to be well settled that where a will which was last heard of in testator's custody cannot be found after his death, the *prima facie* presumption is that it was destroyed by the testator *animo revocandi*.<sup>7</sup> But if the will is not shown to have been in the testator's

with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the '*animo revocandi*' had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument."

1. *Question of Intention for Jury Ordinarily.* — *Law v. Law*, 83 Ala. 432; *Patterson v. Hickey*, 32 Ga. 156; *Cutler v. Cutler*, 130 N. Car. 1.

2. *Burden of Proof.* — *Means v. Moore*, 3 McCord L. (S. Car.) 282.

3. *Intention Inferred from Character of Act.* — *Pemberton v. Pemberton*, 13 Ves. Jr. 310; *Re Hains*, 5 Notes Cas. (Eng.) 621; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272. But see *Asinari v. Bangs*, 3 Dem. (N. Y.) 385.

In *Clarke v. Scripps*, 2 Rob. Ecc. 563, the court said: "The intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator; *i. e.*, it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself, it may be inferred either he did intend to destroy it altogether, or did not."

In *Georgia*, by express statutory provision, where a will has been canceled or obliterated in a material part, a presumption of revocation arises, and the burden is on the propounder to show that no revocation was intended. *McIntyre v. McIntyre*, 120 Ga. 67.

4. See *infra*, this subsection, (6) *The Act of Cancellation or Destruction* — *Particular Acts*.

5. *Presumption as to Revocation of Codicil.* —

*Coppin v. Dillon*, 4 Hag. Ecc. 361; *Medlycott v. Assheton*, 2 Add. Ecc. 229; *Tagart v. Hooper*, 1 Curt. Ecc. 289. And see *Matter of Brookman*, (Surrogate Ct.) 11 Misc. (N. Y.) 677.

6. *Canceled Will Found Among Testator's Effects.* — *Olmsted's Estate*, 122 Cal. 224; *McIntyre v. McIntyre*, 120 Ga. 67.

*Will Found in Testator's Desk.* — *McDonald v. McDonald*, 142 Ind. 55; *Matter of Hopkins*, 172 N. Y. 360, reversing 73 N. Y. App. Div. 559.

7. *Where Will Cannot Be Found* — *England.* — *Brown v. Brown*, 8 El. & Bl. 876, 92 E. C. L. 876; *Rickards v. Mumford*, 2 Phill. Ecc. 24; *Goods of Debac*, 77 L. T. N. S. 374; *Patten v. Poulton*, 1 Sw. & Tr. 55.

*Georgia.* — *Scott v. Maddox*, 113 Ga. 795.

*Illinois.* — *Boyle v. Boyle*, 158 Ill. 228; *Stetson v. Stetson*, 200 Ill. 601.

*Indiana.* — *McDonald v. McDonald*, 142 Ind. 55.

*Mississippi.* — *Wilbourn v. Shell*, 59 Miss. 205.

*Missouri.* — *Hamilton v. Crowe*, 175 Mo. 634. *Nebraska.* — *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705.

*New Hampshire.* — *Lane v. Hill*, 68 N. H. 275.

*New Jersey.* — *In re Willitt*, (N. J. 1900) 46 Atl. Rep. 519.

*New York.* — *Hard v. Ashley*, 88 Hun (N. Y.) 103; *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Collyer v. Collyer*, 110 N. Y. 486; *Matter of Kennedy*, 167 N. Y. 163, affirming 53 N. Y. App. Div. 105; *Matter of Barnes*, 70 N. Y. App. Div. 525.



possession, the failure to find it after his death furnishes no ground for a presumption of revocation.<sup>1</sup>

(cc) *Where One of Two Duplicate Wills Is Destroyed.* — If a testator who has executed a will in duplicate cancels or destroys one part, the presumption is that he meant thereby to revoke the will,<sup>2</sup> whether the other part is deposited with some other person<sup>3</sup> or is in the testator's possession.<sup>4</sup> In the latter case, however, the presumption is weaker.<sup>5</sup> It has even been held that if a testator having both parts in his possession alters one and then destroys that which he has altered, a presumption of revocation, though slight, arises.<sup>6</sup>

dd. ADMISSIBILITY OF EXTRINSIC EVIDENCE.—(aa) *To Show Nonexistence of Intent to Revoke.* — Extrinsic evidence is admissible to show that an act, which on its face appears to have been intended for a revocation, either total or partial, was as a matter of fact done without any intention to revoke.<sup>7</sup>

(bb) *To Show Existence of Intent to Revoke.* — Extrinsic evidence is also admissible to show that certain equivocal acts which would be sufficient to constitute a burning, tearing, canceling, obliterating, or destroying within the meaning of the statute, if performed with that intent, were in fact so performed.<sup>8</sup>

**Evidence of Intent to Effect Total Revocation.** — It may be shown by extrinsic evidence that an act which on its face appears to have been intended for a partial revocation only was as a matter of fact intended to effect a total revocation.<sup>9</sup>

**Evidence of Intent to Effect Partial Revocation.** — But extrinsic evidence is not admissible to show that an act which on its face clearly appears to have been intended for a total revocation was as a matter of fact only intended for a partial revocation. If, however, the act is equivocal, extrinsic evidence is admissible to show that a partial revocation was intended.<sup>10</sup>

*Pennsylvania.* — *Foster's Appeal*, 87 Pa. St. 67; *Stewart's Estate*, 149 Pa. St. 111; *Gardner v. Gardner*, 177 Pa. St. 218; *Gfeller v. Lappe*, 208 Pa. St. 48.

*Texas.* — *McElroy v. Phink*, (Tex. 1903) 76 S. W. Rep. 753, reversing (Tex. Civ. App. 1903) 74 S. W. Rep. 61; *Tynan v. Paschal*, 27 Tex. 296.

*Wisconsin.* — *Gavitt v. Moulton*, 119 Wis. 35.

See also the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 148.

**Where Two Wills Were Made** at different times, each of which contained a clause revoking all former wills, and only one of them could be found at the testator's death, it was held that a *prima facie* presumption arose that the other will had been destroyed for the purpose of revocation. *Starkweather v. Bell*, 13 S. Dak. 475.

**1. Will Not Shown to Have Been in Testator's Possession.** — *Throckmorton v. Holt*, 180 U. S. 552; *Lane v. Hill*, 68 N. H. 275; *Stevens v. Stevens*, 72 N. H. 360; *McElroy v. Phink*, (Tex. 1903) 76 S. W. Rep. 753, reversing (Tex. Civ. App. 1903) 74 S. W. Rep. 61.

**2. Where One of Two Duplicate Wills Is Destroyed** — *England.* — *Pemberton v. Pemberton*, 13 Ves. Jr. 310; *Seymore's Case*, cited in *Onions v. Tyrer*, 1 P. Wms. 346; *Colvin v. Fraser*, 2 Hag. Ecc. 266; *Hubbard v. Alexander*, 3 Ch. D. 738; *Doe v. Strickland*, 8 C. B. 724, 65 E. C. L. 724; *Atkinson v. Morris*, 75 L. T. N. S. 440.

*New York.* — *Biggs v. Angus*, 3 Dem. (N. Y.) 93; *Crossman v. Crossman*, 95 N. Y. 150.

*South Carolina.* — *O'Neill v. Farr*, 1 Rich. L. (S. Car.) 80.

**3. One Part Deposited with Other Person.** — In *Rickards v. Mumford*, 2 Phill. Ecc. 24, Sir J. Nicholl said: "If a testator executes a duplicate and keeps one part himself and deposits the other part with some other person, and the testator voluntarily cancels or destroys the part in his own custody, it is a revocation of both."

**4. Both Parts in Testator's Possession.** — *Pemberton v. Pemberton*, 13 Ves. Jr. 310; *Re Hains*, 5 Notes Cas. (Eng.) 621. But see *Roberts v. Round*, 3 Hag. Ecc. 548; *Asinari v. Bangs*, 3 Dem. (N. Y.) 385.

**5. Pemberton v. Pemberton**, 13 Ves. Jr. 310.

**6. Alteration and Destruction of One Part.** — *Pemberton v. Pemberton*, 13 Ves. Jr. 310.

**7. Extrinsic Evidence to Show Nonexistence of Intent to Revoke.** — *Powell v. Powell*, L. R. 1 P. & D. 209; *Patterson v. Hickey*, 32 Ga. 156, *Brown's Will*, 1 B. Mon. (Ky.) 56; *Bethell v. Moore*, 2 Dev. & B. L. (19 N. Car.) 311; *Cutler v. Cutler*, 130 N. Car. 4; *Matter of Cook*, 5 Pa. L. J. Rep. 1, 3 Am. L. J. 353; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

**8. Extrinsic Evidence to Explain Equivocal Acts.** — *Smith v. Fenner*, 1 Gall. (U. S.) 170; *Hargroves v. Redd*, 43 Ga. 143; *Gay v. Gay*, 60 Iowa 415; *Wittman v. Goodhand*, 26 Md. 95; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Davis v. King*, 89 N. Car. 441.

**9. Extrinsic Evidence to Show Total Revocation.** — *Law v. Law*, 83 Ala. 432; *Matter of Cook*, 5 Pa. L. J. Rep. 1, 3 Am. L. J. 353.

**Name of One of Legatees Canceled.** — *Law v. Law*, 83 Ala. 432.

**10. Extrinsic Evidence to Show Partial Revocation.** — *Brown's Will*, 1 B. Mon. (Ky.) 56.

*ee. DECLARATIONS* — (aa) *Of Testator*. — Declarations of the testator, contemporaneous with the act of tearing, burning, canceling, obliterating, or destroying, are admissible in evidence for the purpose of showing the intention with which the act was done,<sup>1</sup> whether such declarations be verbal or written.<sup>2</sup> As to subsequent declarations of the testator, some authorities hold them to be admissible to show intent,<sup>3</sup> while other authorities hold to the contrary.<sup>4</sup>

**To Rebut Presumption Arising from Failure to Find Will.** — Parol declarations made by the testator have been held admissible to rebut the legal presumption of revocation arising from the failure to find a will which was in the possession or under the control of the testator before his death.<sup>5</sup> Thus, declarations of a testator which show that up to a time shortly before his death he believed that he had the will in his possession are admissible as tending to show that the will was lost by accident, or destroyed by the design of others.<sup>6</sup>

(bb) *Of Spouse of Testator*. — Declarations of the husband of a testator are not admissible upon the question whether she intended to revoke her will.<sup>7</sup>

(5) *Effect of Fraud, Undue Influence, or Mistake* — (a) **Fraud or Undue Influence.** — A will which has been burned, torn, canceled, obliterated, or destroyed by the testator on account of fraud or undue influence exerted upon him is not revoked.<sup>8</sup>

(b) **Mistake.** — Likewise, a will which is destroyed by reason of a misapprehension as to the effect of such act, as where it is erroneously believed that the will is invalid,<sup>9</sup> or is unnecessary because another instrument will effect

**1. Contemporaneous Declarations Admissible.** — *Clarke v. Scripps*, 2 Rob. Ecc. 563; *Law v. Law*, 83 Ala. 432; *Glass v. Scott*, 14 Colo. App. 377; *Patterson v. Hickey*, 32 Ga. 156; *Kimsey v. Allison*, 120 Ga. 413; *Gay v. Gay*, 60 Iowa 415; *Tucker v. Whitehead*, 59 Miss. 594; *Hamilton v. Crowe*, 175 Mo. 634; *Matter of Kennedy*, 53 N. Y. App. Div. 105, *affirmed* 167 N. Y. 163.

**2. Verbal or Written Declarations Admissible.** — *Evans's Appeal*, 58 Pa. St. 238.

**3. Subsequent Declarations Admissible.** — *Law v. Law*, 83 Ala. 432; *Patterson v. Hickey*, 32 Ga. 156; *Collagan v. Burns*, 57 Me. 449; *McElroy v. Phink*, (Tex. 1903) 76 S. W. Rep. 753. See also *Olmsted's Estate*, 122 Cal. 224.

**4. Subsequent Declarations Inadmissible.** — *Throckmorton v. Holt*, 180 U. S. 552; *Glass v. Scott*, 14 Colo. App. 377; *Caeman v. Van Harke*, 33 Kan. 333; *Matter of Kennedy*, 167 N. Y. 163, *affirming* 53 N. Y. App. Div. 105.

In *Lawyer v. Smith*, 8 Mich. 412, it appeared in evidence that after the death of the testatrix a will twenty-five years old was discovered in a barrel among waste papers, and either torn or worn into several pieces, which were scattered loose among the papers in the barrel. It was held that whether the injury to the instrument was done by the testatrix or by some other person, and, if by her, whether accidentally, or intentionally, and for the purpose of revoking the will, were questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, were competent evidence.

**5. Rebuttal of Presumption Arising from Failure to Find Will** — *England*. — In *Goods of Barber*, L. R. 1 P. & D. 267; *Battyll v. Lyles*, 4 Jur. N. S. 718; *Welch v. Phillips*, 1 Moo. P. C. 299;

*Usticke v. Bawden*, 2 Add. Ecc. 116; *Patten v. Poulton*, 1 Sw. & Tr. 55.

*Alabama*. — *McBeth v. McBeth*, 11 Ala. 596; *Conoly v. Gayle*, 61 Ala. 116.

*Massachusetts*. — *Pickens v. Davis*, 134 Mass. 252.

*Michigan*. — *Lawyer v. Smith*, 8 Mich. 411; *Matter of Hope*, 48 Mich. 518.

*Nebraska*. — *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705.

*Tennessee*. — *Morris v. Swaney*, 7 Heisk. (Tenn.) 591.

But see *Kimsey v. Allison*, 120 Ga. 413.

See also the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 149.

**6.** *Gavitt v. Moulton*, 119 Wis. 35.

**7. Declarations of Husband of Testator.** — *McElroy v. Phink*, (Tex. 1903) 76 S. W. Rep. 753.

**8. Fraud or Undue Influence.** — *Batton v. Watson*, 13 Ga. 63; *Rich v. Gilkey*, 73 Me. 595; *McIntire v. Worthington*, 68 Md. 203; *Laughton v. Atkins*, 1 Pick. (Mass.) 546; *Voorhees v. Voorhees*, 39 N. Y. 463.

**9. Belief that Will Destroyed Is Invalid.** — In *Giles v. Warren*, L. R. 2 P. & D. 401, a testator, under the false impression that his will was invalid, tore it up. Immediately afterward, on reconsideration, he collected the pieces and placed them together among his papers of importance, and preserved them until his death. It was held that as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, and the will was admitted to probate. Lord Penzance said: "The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed. That is to say, the bare fact. If, for instance, he tears it, imagining it to be some other document, there would be no revocation, for there would be no *animus revocandi*. He must intend by the act to revoke something that he had previously done. There can be no in-

the same purpose,<sup>1</sup> is not revoked.

**The Destruction of a Codicil Which Has Revived a Revoked Will** does not revoke the will if it appears that the codicil was destroyed on the supposition that the will would still stand.<sup>2</sup>

(6) *The Act of Cancellation or Destruction* — (a) **Necessity of Performance** — *aa. IN GENERAL.* — A mere expression of intention by the testator to destroy his will, without anything more, is not sufficient to effect a revocation. The intention must be carried out in one of the ways enumerated by the statutes.<sup>3</sup>

**Declarations of Testator** that he has revoked his will are inadmissible where the act done does not constitute a burning, tearing, canceling, obliterating, or destroying.<sup>4</sup>

*bb. WHERE DIRECTION TO THIRD PERSON NOT CARRIED OUT.* — If the testator directs a third person to destroy his will, unless the third person so acts there is no revocation. It is not enough that the testator believes the will to have been destroyed as directed, even though such belief is due to deceit practiced by the third person.<sup>5</sup>

(b) **Particular Acts** — *aa. IN GENERAL.* — What acts of tearing, burning, cancel-

tion to revoke a will if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will." See also *Beardsley v. Lacey*, 67 L. J. P. 35, 78 L. T. N. S. 25; *Miller v. Miller*, 34 Can. L. J. 743; *Sanders v. Babbitt*, 106 Ky. 646.

1. **Belief that Will Destroyed Is Unnecessary.** — Where the testator in his will appointed certain funds comprised in a marriage settlement, executed several years earlier, and subsequently caused the will to be canceled under the erroneous impression that the appointment contained therein was useless and that the settlement would of itself effect the purpose he had in mind when the will was executed, it was held that there was no revocation of the will. *Stamford v. White*, 84 L. T. N. S. 269, 70 L. J. P. 9, (1901) P. 46.

2. **Destruction of Codicil.** — In *James v. Shrimpton*, 1 P. D. 431, the testator, having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life. It was held that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution.

3. **Unexecuted Intention Insufficient** — *England.* — *Doe v. Harris*, 8 Ad. & El. 1, 35 E. C. L. 299; *Cheese v. Lovejoy*, 2 P. D. 251; *Clarke v. Scripps*, 22 Eng. L. & Eq. 627.

*Alabama.* — *Woodruff v. Hundley*, 127 Ala. 655.

*Georgia.* — *Pryor v. Coggin*, 17 Ga. 445; *McIntyre v. McIntyre*, 120 Ga. 67.

*Indiana.* — *Runkle v. Gates*, 11 Ind. 95; *Belshaw v. Chitwood*, 141 Ind. 377.

*Iowa.* — *Perjue v. Perjue*, 4 Iowa 520; *Gay v. Gay*, 60 Iowa 415.

*Kentucky.* — *Gains v. Gains*, 2 A. K. Marsh.

(Ky.) 190; *Beauchamp's Will*, 4 T. B. Mon. (Ky.) 361.

*Minnesota.* — *Graham v. Burch*, 47 Minn. 171.

*New Hampshire.* — *Fellows v. Allen*, 60 N. H. 439; *Stevens v. Stevens*, 72 N. H. 360.

*New Jersey.* — *Mundy v. Mundy*, 15 N. J. Eq. 290.

*New York.* — *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Delafield v. Parish*, 25 N. Y. 9.

*North Carolina.* — *Hise v. Fincher*, 10 Ired. L. (32 N. Car.) 139; *Cutler v. Cutler*, 130 N. Car. 1; *Giles v. Giles*, Conf. Rep. (1 N. Car.) 174.

*Ohio.* — *Kent v. Mahaffey*, 10 Ohio St. 204.

*Pennsylvania.* — *Clingan v. Mitcheltree*, 31 Pa. St. 25.

*South Carolina.* — *Means v. Moore*, 3 McCord L. (S. Car.) 282.

*Tennessee.* — *Billington v. Jones*, 108 Tenn. 239; *Allen v. Huff*, 1 Yerg. (Tenn.) 409.

*Vermont.* — *Blanchard v. Blanchard*, 32 Vt. 62.

*Virginia.* — *Boyd v. Cook*, 3 Leigh (Va.) 32; *Malone v. Hobbs*, 1 Rob. (Va.) 366; *McBride v. McBride*, 26 Gratt. (Va.) 476.

In *Bibb v. Thomas*, 2 W. Bl. 1043, the court said: "Revocation is an act of the mind which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has a specified form of these (burning, tearing, canceling, or obliterating), and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation." This quotation is cited with approval in *Kent v. Mahaffey*, 10 Ohio St. 204.

4. *Stevens v. Stevens*, 72 N. H. 360.

5. **Where Direction to Third Person Not Carried Out.** — *Doe v. Harris*, 6 Ad. & El. 209, 33 E. C. L. 57; *Trice v. Shipton*, 113 Ky. 102; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Hise v. Fincher*, 10 Ired. L. (32 N. Car.) 139; *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Tynan v. Paschal*, 27 Tex. 302; *Boyd v. Cook*, 3 Leigh (Va.) 32; *Malone v. Hobbs*, 1 Rob. (Va.) 366. But see *Card v. Grinman*, 5 Conn. 164.

**Destruction of Another Paper.** — Where a tes-



ing, obliterating, or destroying are sufficient to constitute a total or partial revocation must depend, to a considerable extent, upon the circumstances of each case.<sup>1</sup> There are, however, a few general rules which have been evolved from the cases and which are considered below.

*bb. TEARING — (aa) In General.* — By tearing, as used in the statutes, is not meant, necessarily, a literal tearing to pieces. The slightest act of tearing with intent to revoke the whole will is sufficient for the purpose.<sup>2</sup> In the absence of evidence *aliunde*, however, an intent to revoke the whole will cannot be inferred from a partial mutilation which does not affect the instrument as an entirety, or destroy that part which gives effect to the whole.<sup>3</sup> Thus, tearing the will in such a way as to indicate that the signature and attestation clause are designedly left untouched only revokes that part of the will which is torn.<sup>4</sup>

**Tearing Includes Cutting.** — The word "tearing" as used in the statutes includes cutting.<sup>5</sup>

*(bb) Cutting Off First Part of Will.* — Cutting off the first part of the will, including the formal statement that the instrument is the last will and testament of the testator, has been held not to effect a total revocation, where it appears probable that the part cut off contained something besides such statement.<sup>6</sup>

tator being sick in bed called for his will and directed his son to burn it, and the son instead of doing so retained the will and burned another paper, it was held that there was no revocation, though the testator believed that his will had been destroyed. *Hise v. Fincher*, 10 Ired. L. (32 N. Car.) 139. But see *Billington v. Jones*, 108 Tenn. 238; *Smiley v. Gambill*, 2 Head (Tenn.) 164.

**1. Circumstances of Each Case Must Determine.** — *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

**2. Slightest Act of Tearing Sufficient — England.** — *Bibb v. Thomas*, 2 W. Bl. 1043; *Clarke v. Scripps*, 2 Rob. Ecc. 563.

*Alabama.* — *Slaughter v. Stephens*, 81 Ala. 418; *Woodruff v. Hundley*, 127 Ala. 640.

*Kentucky.* — *Brown's Will*, 1 B. Mon. (Ky.) 56.

*Massachusetts.* — *Avery v. Pixley*, 4 Mass. 460.

*Mississippi.* — *Bohanon v. Walcott*, 1 How. (Miss.) 336.

*New York.* — *Sweet v. Sweet*, 1 Redf. (N. Y.) 451; *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Lovell v. Quitman*, 88 N. Y. 377.

*North Carolina.* — *White v. Casten*, 1 Jones L. (46 N. Car.) 197.

*Pennsylvania.* — *Evans's Appeal*, 58 Pa. St. 238.

*South Carolina.* — *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

**Will Torn into Several Fragments.** — In *Sweet v. Sweet*, 1 Redf. (N. Y.) 451, the testator tore his will into ten or twelve fragments, which were carefully collected by his wife and sewed together in such a manner that the instrument was perfectly legible when propounded for probate. The testator was of sound mind, though in infirm health, at the time of the tearing and expressed satisfaction at its destruction. It was held that there was a valid revocation of the will.

**3. Effect of Partial Mutilation Only — England.** — *Hobbs v. Knight*, 1 Curt. Ecc. 768; *Clarke v. Scripps*, 2 Rob. Ecc. 563; *Bell v. Fothergill*, L. R. 2 P. & D. 148; *Goods of*

*Woodward*, L. R. 2 P. & D. 206; *In re Gullan*, 1 Sw. & Tr. 23; *Williams v. Jones*, 7 Notes Cas. (Eng.) 106; *In re Lewis*, 1 Sw. & Tr. 31; *Goods of Simpson*, 5 Jur. N. S. 1366; *Abraham v. Joseph*, 5 Jur. N. S. 179; *Evans v. Dallow*, 31 L. J. Prob. 128; *Price v. Powell*, 3 H. & N. 341; *Williams v. Tyley, Johns*, (Eng.) 530; *Giles v. Warren*, L. R. 2 P. & D. 401; *Doe v. Harris*, 6 Ad. & El. 209, 33 E. C. L. 57.

*Kentucky.* — *Brown's Will*, 1 B. Mon. (Ky.) 56.

*Massachusetts.* — *Avery v. Pixley*, 4 Mass. 460.

*New York.* — *Lovell v. Quitman*, 88 N. Y. 377.

*South Carolina.* — *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

**4. Signature and Attestation Clause Designedly Left Untouched.** — *Clarke v. Scripps*, 2 Rob. Ecc. 563. And see *Brown's Will*, 1 B. Mon. (Ky.) 57.

**5. Tearing Includes Cutting.** — *Clarke v. Scripps*, 2 Rob. Ecc. 563; *In re Cooke*, 5 Notes Cas. (Eng.) 390.

In *Hobbs v. Knight*, 1 Curt. Ecc. 779, Sir H. Jenner said: "Cutting is a mode of destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it. What would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife that would be no revocation; and if the pieces could be collected and pasted together, the will must be pronounced for by the court. I cannot conceive it possible that it was the intention of the legislature to leave the law in that state."

**6. Goods of Woodward, L. R. 2 P. & D. 207. In this case Lord Penzance said: "The mere cutting off eight lines at the beginning of the document does not show an intention to revoke the whole will. It may be said that the object of tearing off the first part was to destroy the statement that it was the last will and testa-**

(cc) *Cutting Out Specific Provisions.* — Cutting out certain devises in a will, and leaving the testator's signature at the conclusion of the will, or in the body, when no other signing had been intended, accompanied by a declaration that the intention was to revoke only that part of the will which was cut out, does not effect a revocation of the rest of the will.<sup>1</sup>

(dd) *Tearing Off Executor Clause.* — Tearing off the clause appointing executors revokes the will as to that clause, but does not, in the absence of evidence of an intention to the contrary, revoke the whole will.<sup>2</sup>

(ee) *Tearing Off or Cutting Out Signatures.* — Tearing off or cutting out the signature of the testator revokes the whole will, at least where no contrary intention appears;<sup>3</sup> and tearing off or cutting out the signatures of witnesses produces the same effect.<sup>4</sup> Where a will is written on several sheets, each of which is signed by the testator and subscribed by witnesses, tearing off the signature and subscription on the last sheet revokes the whole will, although the prior signatures and subscriptions remain, at least in those jurisdictions where wills are required to be signed at the end thereof.<sup>5</sup>

(ff) *Tearing Off Seal.* — Although sealing is not essential to the validity of a will, tearing off the seal works a total revocation, if the will professes to be executed and attested as a sealed instrument, or the *animus revocandi* be shown by evidence *aliunde*.<sup>6</sup>

(gg) *Tearing Off Part of Codicil.* — In the case of a will and codicil, where the concluding words of the codicil, and the name of the testator attached thereto, are torn off, the name and seal to the will remaining entire, it will be presumed in the absence of evidence *aliunde* to the contrary that the testator only intended to revoke the codicil.<sup>7</sup>

cc. BURNING. — By burning, as used in the statute, is not meant a literal consuming of the will. A very little burning, if accompanied by satisfactory evidence drawn *aliunde* of an intention to revoke, will satisfy the statute and revoke the will.<sup>8</sup> It has been held that even a slight singeing is sufficient,<sup>9</sup> though this has been doubted, and the rule laid down that there should be at least a partial burning.<sup>10</sup> The throwing of a will on the fire with the purpose of destroying and revoking it, the effect being that it is burned in three places,

ment of the deceased, which is a material averment, but the force of that observation depends very much, if not entirely, upon the consideration whether there was anything else of moment or importance in that part of the will destroyed, which the testator might have wished to revoke. It is probable in this case that there was. It seems probable that the part torn off did contain something besides the mere statement that the document was the last will and testament of the deceased, and it might very well have been that the deceased tore it off in order to get rid of that. I consider, under these circumstances, that the will is not revoked, and must be admitted to probate."

1. *Brown's Will*, 1 B. Mon. (Ky.) 56.

2. *Tearing Off Executor Clause.* — *Goods of Maley*, 12 P. D. 134; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152.

3. *Signature of Testator Cut or Torn Off.* — *In re Gullan*, 1 Sw. & Tr. 23; *In re Lewis*, 1 Sw. & Tr. 31; *In re Harris*, 3 Sw. & Tr. 485; *Williams v. Tyley*, Johns. Ch. (Eng.) 530; *Goods of Simpson*, 5 Jur. N. S. 1366; *Gay v. Gay*, 60 Iowa 418; *Matter of Jones*, 2 Ohio Dec. 409, 2 Ohio N. P. 190.

In *Hobbs v. Knight*, 1 Curt. Ecc. 779, Sir H. Jenner said: "I consider the name of the testator to be essential to the existence of a will, and that if that name be removed the

essential part of the will is removed and the will is destroyed."

4. *Signatures of Witnesses Torn or Cut Out.* — *Abraham v. Joseph*, 5 Jur. N. S. 179; *Evans v. Dallow*, 31 L. J. Prob. 128; *Hobbs v. Knight*, 1 Curt. Ecc. 781; *Birkhead v. Bowdoin*, 2 Notes Cas. (Eng.) 66; *Matter of White*, 25 N. J. Eq. 501.

5. *Will Written on Several Sheets.* — *In re Gullan*, 1 Sw. & Tr. 23; *Gullan v. Grove*, 26 Beav. 64; *Christmas v. Whinyates*, 32 L. J. P. 73.

6. *Seal Torn Off.* — *Lambell v. Lambell*, 3 Hag. Ecc. 568; *Davies v. Davies*, 1 Lee Ecc. 444; *Price v. Powell*, 3 H. & N. 341; *Avery v. Pixley*, 4 Mass. 462; *Bohanon v. Walcott*, 1 How. (Miss.) 336; *Matter of White*, 25 N. J. Eq. 501; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 277. See *Stevens v. Stevens*, 72 N. H. 360.

7. *Concluding Words of Codicil Torn.* — *Matter of Cook*, 5 Pa. L. J. Rep. 1, 3 Am. L. J. 353.

8. *Amount of Burning Necessary.* — *Doe v. Harris*, 6 Ad. & El. 209, 33 E. C. L. 57; *Bohanon v. Walcott*, 1 How. (Miss.) 336; *White v. Casten*, 1 Jones L. (46 N. Car.) 197; *Evans's Appeal*, 58 Pa. St. 238; *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

9. *Bibb v. Thomas*, 2 W. Bl. 1043.

10. *Partial Burning Necessary.* — *Doe v. Harris*,

without, however, interfering with the writing, constitutes a sufficient revocation, though without the testator's knowledge it is rescued and preserved by a third person.<sup>1</sup>

*dd. CANCELING OR OBLITERATING* — (*aa*) *Necessity of Effacement.* — In England, as has already been seen, the present statute on the subject of revocation does not authorize revocation by cancellation. And revocation by obliteration can only be effected by a complete effacement of what is sought to be revoked, so that the words are illegible<sup>2</sup> even with the aid of a magnifying glass.<sup>3</sup> In the *United States*, however, the statutes do not require that the cancellation or obliteration shall efface the words of the will. Any act done with intent to revoke is effectual, though the words canceled or obliterated can be read notwithstanding such act.<sup>4</sup>

(*bb*) *Canceling Distinguished from Destroying.* — As distinguished from destruction, cancellation implies a preservation of the will, but with something upon it indicative that it has ceased to be operative.<sup>5</sup>

(*cc*) *How Effected* — *aaa. Use of Pencil or Pen.* — Cancellations or obliterations are as effectual when made with a pencil as when made with a pen.<sup>6</sup>

*bbb. Manner of Canceling.* — Revocation by canceling is usually effected by drawing lines through the part of the will sought to be revoked.<sup>7</sup>

*Writing Words on Will.* — But it is sometimes done by writing on the will words which indicate an intention to cancel. These words must, by some of the authorities, be written on some material part of the will, otherwise they will effect no cancellation.<sup>8</sup> But there is contrary authority to the effect that

6 Ad. & El. 209, 33 E. C. L. 57, 8 Ad. & El. 1, 35 E. C. L. 299, *criticising* Bibb v. Thomas, 2 W. Bl. 1043. In this case the testator, intending to revoke his will, threw it on the fire, but it was snatched off, without the testator's consent, by a devisee under the will, not, however, before a corner of the envelope in which the will was contained had been singed. Patterson, J., said: "A mere singeing of the corner of an envelope is not sufficient. To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself. I do not say that a quantity of words must be burnt, but there must be a burning of the paper on which the will is."

1. White v. Casten, 1 Jones L. (46 N. Car.) 107.

2. *Effacement Necessary under Statute of Victoria.* — Goods of Gosling, 11 P. D. 79. See also Mence v. Mence, 18 Ves. Jr. 350.

3. *Words Not Effaced if Made Out with Aid of Glass.* — *In re* Ibbetson, 2 Curt. Ecc. 337; Lushington v. Onslow, 6 Notes Cas. (Eng.) 187; Goods of Horsford, L. R. 3 P. & D. 211.

4. *No Effacement Necessary.* — Mence v. Mence, 18 Ves. Jr. 350; Woodfill v. Patton, 76 Ind. 575; Matter of Kirpatrick, 22 N. J. Eq. 463; Dan v. Brown, 4 Cow. (N. Y.) 483; Matter of Clark, Tuck. (N. Y.) 445; Bethell v. Moore, 2 Dev. & B. L. (19 N. Car.) 316; Evans's Appeal, 58 Pa. St. 238; Means v. Moore, 3 McCord L. (S. Car.) 282.

5. *Cancellation Distinguished from Destroying.* — Evans's Appeal, 58 Pa. St. 246.

6. *Pencil or Pen.* — McIntyre v. McIntyre, 120 Ga. 70; Woodfill v. Patton, 76 Ind. 575; Townshend v. Howard, 86 Me. 288; Tomlinson's Estate, 133 Pa. St. 245. But see Mence v. Mence, 18 Ves. Jr. 348.

7. *Drawing Lines.* — Chinmark's Estate, Myr.

Prob. (Cal.) 128; Glass v. Scott, 14 Colo. App. 377; Hubbard v. Hubbard, 198 Ill. 621, *affirming* 99 Ill. App. 555; Townshend v. Howard, 86 Me. 285; Matter of Kirpatrick, 22 N. J. Eq. 463. And see CANCEL — CANCELLATION, vol. 5, p. 128.

8. *Back of Will.* — In Howard v. Hunter, 115 Ga. 357, the will was written on three of the pages of a double sheet of legal cap paper, and signed on the third page. The attesting clause signed by the witnesses was near the close of the last page, the name of the last witness being on the last fold of the paper when the same was folded up. Across the back of the paper on the last page and over this last fold were these words: "This will is made void by one of more recent date. J. W. Howard." It was held that there was no revocation by cancellation, because the writing was not on a material part of the will.

In Ladd's Will, 60 Wis. 187, a will was written on the first page of a double sheet of paper, and the testatrix wrote upon the fourth page of the sheet the words: "I revoke this will." This writing was signed and dated. It was held that this will was not canceled.

*Left-hand Corner of Last Sheet.* — In Oetjen v. Oetjen, 115 Ga. 1004, the testator wrote in the left-hand corner of the last sheet of the will the words: "This my will and testament is of no avail and null and void." One word of this entry was written across one word in the last sentence of the will, which stated merely that a word in the will had been changed before signing. It was held that the writing did not constitute a cancellation.

*Margin of Will.* — In Matter of Akers, 74 N. Y. App. Div. 461, the testator wrote on the margin of the will the following words: "This will and codicil is revoked." This was held



it is immaterial where the writing appears, so long as the words clearly indicate an intention to cancel.<sup>1</sup>

ccc. *Manner of Obliterating.* — Revocation by obliterating may be effected by scratching out,<sup>2</sup> erasing,<sup>3</sup> or blotting out<sup>4</sup> the words of the will.

(dd) *Effect of Canceling Particular Clause.* — The canceling or obliterating of a particular devise or bequest affects that provision of the will only and not the whole will. In those jurisdictions where partial revocation is permissible, the result is the revocation of the clause canceled; in other jurisdictions the act is of no effect whatever.<sup>5</sup>

(ee) *Effect of Canceling Signatures.* — The cancellation or obliteration of the signature of either testator or witness effects the total revocation of the will in the absence of evidence *aliunde* that the testator's act was not intended to produce that effect.<sup>6</sup>

to be no revocation by cancellation. But see *Matter of Alger*, (Surrogate Ct.) 38 Misc. (N. Y.) 143.

**Ground of Decision.** — The authorities holding that the writing, to effect a cancellation, must be on a material part of the will, so decide because of the existence of statutes providing that a written revocation must be attested by witnesses, and hence a writing which is on the margin or on the back of the will is a written revocation within the meaning of the statute, and must, to be of any effect, be attested by witnesses. It should be noticed here, however, that with the exception of *Connecticut*, similar statutes prevail in the jurisdictions where a writing, though not on a material part of the will, may effect a cancellation.

**1. Writing Below Signatures.** — In *Warner v. Warner*, 37 Vt. 356, it was held that where a testator wrote his will mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterwards wrote below all the writing and near the middle of the sheet, "This will is hereby canceled and annulled in full this 15th day of March, 1859," there was a revocation of the will by canceling.

In *Semmes v. Semmes*, 7 Har. & J. (Md.) 388, there was a memorandum at the foot of the will and just below the signatures as follows: "In consequence of the death of my wife it is become necessary to make another will." This memorandum was signed. The signature of the testator and subscribing witnesses had lines drawn through them. It was held that the memorandum, together with the drawing of the lines through the signatures, effected a cancellation of the will.

In *Evans's Appeal*, 58 Pa. St. 238, the word "canceled" was written upon the back of the will, the signature of the testator to a codicil was crossed out, and the word "canceled" written under it. The signature of the testator appeared in two places in the original will, and one of these was crossed out by a line drawn through it and the date written under it. The will was also torn in two places. It was held that the will was canceled, and that a will could be canceled by writing upon the will itself a word that manifested an intention to annul it. This case *distinguished* that of *Lewis v. Lewis*, 2 W. & S. (Pa.) 455, wherein it was held that the word "obsolete" written

on the margin of a will did not amount to a cancellation.

**2. Scratching Out.** — *Goods of Morton*, 12 P. D. 141; *Evans's Appeal*, 58 Pa. St. 238.

**3. Erasing.** — *Muh's Succession*, 35 La. Ann. 394.

**4. Blotting Out.** — *Townshend v. Howard*, 86 Me. 285; *Evans's Appeal*, 58 Pa. St. 244.

**5. Effect of Canceling Particular Clause** — *England.* — *Sutton v. Sutton*, 2 Cowp. 812.

*Illinois.* — *Hubbard v. Hubbard*, 99 Ill. App. 555, *affirmed* 198 Ill. 621.

*Kentucky.* — *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152; *Brown's Will*, 1 B. Mon. (Ky.) 57; *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

*Louisiana.* — *Muh's Succession*, 35 La. Ann. 394; *Batchelor's Succession*, 48 La. Ann. 278.

*Maine.* — *Doane v. Hadlock*, 42 Me. 72; *Townshend v. Howard*, 86 Me. 285.

*Massachusetts.* — *Bigelow v. Gillott*, 123 Mass. 102.

*New Jersey.* — *Matter of Kirpatrick*, 22 N. J. Eq. 463.

*New York.* — *McPherson v. Clark*, 3 Bradf. (N. Y.) 92; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Jackson v. Holloway*, 7 Johns. (N. Y.) 395; *Gugel v. Vollmer*, 1 Dem. (N. Y.) 484.

*Pennsylvania.* — *Dixon's Appeal*, 55 Pa. St. 424; *Tomlinson's Estate*, 133 Pa. St. 245.

*South Carolina.* — *Means v. Moore*, 3 McCord L. (S. Car.) 282.

*Virginia.* — *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

**Canceling a Legatee's Name in Some Places and Not in Others** does not show a sufficient intention to revoke his legacy. *Martins v. Gardiner*, 8 Sim. 73.

**6. Effect of Canceling Signatures** — *England.* — *Goods of James*, 7 Jur. N. S. 52; *Goods of Morton*, 12 P. D. 141.

*Colorado.* — *Glass v. Scott*, 14 Colo. App. 377.

*Georgia.* — *McIntyre v. McIntyre*, 120 Ga. 67.

*Indiana.* — *Woodfill v. Patton*, 76 Ind. 575.

*Maine.* — *Townshend v. Howard*, 86 Me. 285.

*New Jersey.* — *Matter of White*, 25 N. J. Eq. 501.

*New York.* — *Matter of Clark, Tuck*, (N. Y.) 445; *Matter of Hopkins*, 172 N. Y. 360; *Matter of Brookman*, (Surrogate Ct.) 11 Misc. (N. Y.) 676; *In re Philp*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 13; *Matter of Alger*, (Surrogate Ct.) 38 Misc. (N. Y.) 143.

*Pennsylvania.* — *Baptist Church v. Robbarts*, 2 Pa. St. 110; *Evans's Appeal*, 58 Pa. St. 238.

**Several Signatures in Will.** — Where there are several signatures of the testator in the will, as where it is written on several sheets of paper and every sheet is signed, a cancellation or obliteration of the last signature effects a revocation of the whole will.<sup>1</sup>

**Cancellation of Signature to Codicil.** — The cancellation of the signature of the testator to a codicil of the will has been held to revoke the will itself, where the codicil began on the same sheet of paper upon which the will ended, there being only a short blank space between the end of the will and the beginning of the codicil, and both instruments were securely tied together in one cover.<sup>2</sup>

(ff) *Effect of Canceling Words on Wrapper of Will.* — The cancellation or obliteration of words on the envelope containing the will, such as "the last will and testament and codicil," effects no revocation of the will.<sup>3</sup>

ee. DESTROYING — (aa) *In General.* — Destroying, as used in the statutes, does not mean necessarily annihilation or a change into other forms of matter.<sup>4</sup>

**Will Found Among Worthless Papers.** — The finding of a will among worthless papers in an insecure place, while the valuable papers of the testatrix were kept by her in a place of greater security, has been held to be evidence of inattention and carelessness about the instrument and perhaps of abandonment, but not evidence of destruction of the will within the meaning of the statute.<sup>5</sup>

(bb) *Includes Burning, Tearing, and Canceling.* — The word "destroying" in a statute has been held to include burning, canceling, and tearing,<sup>6</sup> or canceling and obliterating.<sup>7</sup>

**3. By Act of Law** — a. GENERAL PRINCIPLES — (1) *Rule at Common Law.* — At common law certain changes in the condition or circumstances of the testator effected a revocation of his will.<sup>8</sup>

**Reason for Rule.** — This was on the ground of a presumption implied by law that the testator could not have meant his will to stand in view of such changes.<sup>9</sup>

(2) *Rule under Statutes.* — The Statute of Frauds, which, as has been seen, was the first statute in England to regulate the revocation of wills by act of testator,<sup>10</sup> was silent as to the revocation of wills by act of law. The statute was construed, however, not to abrogate, or in any way affect, the common-law rule on the subject.<sup>11</sup> In the United States some statutes are, like the English statute of frauds, silent upon the question of revocation by act of law, and such statutes, it is said, were not intended to affect the common-law rule.<sup>12</sup> Other statutes, after enumerating the ways in which revocation may be effected

1. **Several Signatures.** — Evans's Appeal, 58 Pa. St. 238.

2. **Cancellation of Signature to Codicil.** — Matter of Brookman, (Surrogate Ct.) 11 Misc. (N. Y.) 676.

3. *Grantly v. Garthwaite*, 2 Russ. 90.

4. *Evans's Appeal*, 58 Pa. St. 244.

5. **Will Found Among Worthless Papers.** — *Fellows v. Allen*, 60 N. H. 439. In this case the will was found in the drawer of an old bureau. See to the same effect *Hoitt v. Hoitt*, 63 N. H. 495.

6. **Includes Burning, Tearing, and Canceling.** — *Johnson v. Brailsford*, 2 Nott & M. (S. Car.) 272.

**Tearing in Fragments Is Destroying**, though the fragments may be reunitd. *Evans's Appeal*, 58 Pa. St. 244.

7. **Includes Canceling and Obliterating.** — *Bohanon v. Walcot*, 1 How. (Miss.) 339.

**A Scroll Drawn Over the Name of the Testator**, entirely obliterating and effacing the signature, constitutes a destroying of the will within the

meaning of the statute. *Gay v. Gay*, 60 Iowa 415.

8. *Padelford's Estate*, 7 Pa. Dist. 331.

9. **Reason for Rule.** — *Marston v. Roe*, 8 Ad. & El. 14, 35 E. C. L. 303; *Lansing v. Haynes*, 95 Mich. 16; *Hoitt v. Hoitt*, 63 N. H. 498.

10. See *supra*, this section, *By Act of Party* — *Parol and Written Revocation* — *Under Statutes*.

11. See *Graves v. Sheldon*, 2 D. Chip. (Vt.) 74, where the English statute of frauds is considered.

12. *Booth's Will*, 40 Oregon 154. And see generally the statutes of the various states.

**In Vermont**, where the provisions of the English statute of frauds on revocation have been re-enacted, the decisions do not recognize all implied revocations existing at common law. No will can be revoked in whole or in part but in the way pointed out by the statute, except from the necessity of the case. *Blandin v. Blandin*, 9 Vt. 210.

by act of party, provide that nothing therein contained shall prevent any revocation implied by law from subsequent changes in the condition or circumstances of the testator.<sup>1</sup> Revocations implied by law within the meaning of these statutes are held to be those implied revocations which existed at common law.<sup>2</sup> In a few jurisdictions statutes expressly declare what changes in the condition or circumstances of the testator shall effect a revocation of his will.<sup>3</sup>

(3) *Conclusiveness of Presumption.*—It was formerly held that the presumption implied by law from certain changes in the condition or circumstances of the testator was *prima facie* merely and might be rebutted by evidence showing that the testator really intended his will to stand, notwithstanding such changes.<sup>4</sup> The present rule, however, is that the presumption is conclusive.<sup>5</sup> And it is immaterial that the testator is ignorant that changes in his condition will revoke his will by operation of law.<sup>6</sup>

1. See *Fellows v. Allen*, 60 N. H. 441; *Morey v. Sohler*, 63 N. H. 509.

2. **Meaning of "Revocation Implied by Law."**—*Shorten v. Judd*, 60 Kan. 73; *Warner v. Beach*, 4 Gray (Mass.) 162; *Baacke v. Baacke*, 50 Neb. 22; *Vandever v. Higgins*, 59 Neb. 333; *Hoitt v. Hoitt*, 63 N. H. 497; *Morey v. Sohler*, 63 N. H. 509; *Munday v. Munday*, 8 Ohio Cir. Dec. 44; *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846; *In re Lyon*, 96 Wis. 339; *Glascott v. Bragg*, 111 Wis. 605.

In *Swan v. Hammond*, 138 Mass. 45, the court said: "Section 8 of the *Massachusetts Pub. Stat.*, c. 127, after providing that no will shall be revoked unless by burning, tearing, etc., or some other writing executed in the manner required in the case of a will, goes on as follows: 'But nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.' It is not apparent that an entire revocation by implication of law results from any change of condition or circumstances, except that of a subsequent marriage. See the discussion in *Warner v. Beach*, 4 Gray (Mass.) 162. This clause as to implied revocations was first introduced in the *Massachusetts Rev. Stat.*, c. 62, § 9. The other provisions as to revocation were substantially taken from the statute of 1783, c. 24, § 2. The commissioners, in their note to this section, say: 'The clause as to implied revocations recognizes and adopts the existing law as established and understood among us.' And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made. We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists."

**Implied Revocation Abolished in California.**—In *Matter of Comassi*, 107 Cal. 1, the court declares that the doctrine of implied revocation existing at common law has been abolished in *California* by the code, but that it is still permitted in many of the states under a clause in

their statutes authorizing a revocation to be "implied by law from subsequent changes in the condition or circumstances of the testator."

3. See the statutes of the various states.

**In Rhode Island** it is provided by statute that no will shall be revoked by any presumption of intention on the ground of an alteration in circumstances. *Rhode Island Hospital Trust Co. v. Keith*, (R. I. 1904) 57 Atl. Rep. 1060.

4. **Presumption Prima Facie Merely—England.**—*Lugg v. Lugg*, 2 Salk. 593; *Ex p. Ilchester*, 7 Ves. Jr. 348; *Brady v. Cubitt*, 1 Dougl. 31; *Kenebel v. Scrafton*, 2 East 530.

*New York.*—*Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506.

*Rhode Island.*—*Wheeler v. Wheeler*, 1 R. I. 372.

*Virginia.*—*Yerby v. Yerby*, 3 Call (Va.) 341; *Wilcox v. Rootes*, 1 Wash. (Va.) 140.

**Ecclesiastical Courts Admitted Rebuttable Evidence.**—*Gibbens v. Cross*, 2 Add. Ecc. 455; *Johnston v. Johnston*, 1 Phill. Ecc. 447; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Yerby v. Yerby*, 3 Call (Va.) 341.

5. **Presumption Conclusive—England.**—*Marston v. Roe*, 8 Ad. & El. 14, 35 E. C. L. 303; *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 1 Rob. Ecc. 680; *Doe v. Lancashire*, 5 T. R. 49.

*Alabama.*—*Gay v. Gay*, 84 Ala. 44.

*Illinois.*—*McAnnulty v. McAnnulty*, 120 Ill. 26.

*Kentucky.*—*Knut v. Knut*, (Ky. 1900) 58 S. W. Rep. 583.

*Maryland.*—*Baldwin v. Spriggs*, 65 Md. 381.

*New Hampshire.*—*Morey v. Sohler*, 63 N. H. 510; *Hoitt v. Hoitt*, 63 N. H. 498.

*Pennsylvania.*—*In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846.

*Rhode Island.*—See *Chace v. Chace*, 6 R. I. 407.

*South Carolina.*—*Jacks v. Henderson*, 1 Desaus. (S. Car.) 543.

*Virginia.*—*Phaup v. Wooldridge*, 14 Gratt. (Va.) 332.

*West Virginia.*—*Francis v. Marsh*, 54 W. Va. 545.

*Wisconsin.*—*Glascott v. Bragg*, 111 Wis. 605.

6. **Ignorance of Testator Immaterial.**—*Sloniger v. Sloniger*, 161 Ill. 270; *Hudnall v. Ham*, 183 Ill. 486.



## b. PARTICULAR CHANGES IN TESTATOR'S CONDITION OR CIRCUMSTANCES

—(1) *Marriage* — (a) **At Common Law.** — At common law, the will of an unmarried man was not revoked by his subsequent marriage.<sup>1</sup> But the will of an unmarried woman was revoked by her subsequent marriage,<sup>2</sup> the reason for the rule being that marriage took away the testator's testamentary capacity and destroyed the ambulatory nature of her will.<sup>3</sup> The rule, however, was not without exception.<sup>4</sup> Thus, where the woman's power of disposing of her separate property after marriage was preserved by an antenuptial agreement, her will previously made was not revoked by such marriage.<sup>5</sup>

**1. Will of Unmarried Man Not Revoked by Subsequent Marriage** — *England.* — *Doe v. Barford*, 4 M. & S. 10.

*Alabama.* — *Gay v. Gay*, 84 Ala. 38.

*Connecticut.* — *Goodsell's Appeal*, 55 Conn. 171.

*Georgia.* — *Hart v. Hart*, 70 Ga. 764.

*Indiana.* — *Bowers v. Bowers*, 53 Ind. 430; *Davis v. Fogle*, 124 Ind. 41.

*Iowa.* — *Alden v. Johnson*, 63 Iowa 124.

*Maryland.* — *Baldwin v. Spriggs*, 65 Md. 373.

*Massachusetts.* — *Bancroft v. Ives*, 3 Gray (Mass.) 367; *Warner v. Beach*, 4 Gray (Mass.) 162; *Swan v. Hammond*, 138 Mass. 45.

*Michigan.* — *Noyes v. Southworth*, 55 Mich. 173.

*Nebraska.* — *Baacke v. Baacke*, 50 Neb. 21.

*New Hampshire.* — *Hoitt v. Hoitt*, 63 N. H. 475.

*New York.* — *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506.

*Ohio.* — *Munday v. Munday*, 8 Ohio Cir. Dec. 44.

*Pennsylvania.* — *Walker v. Hall*, 34 Pa. St. 483.

*Rhode Island.* — *Wheeler v. Wheeler*, 1 R. I. 371.

*Texas.* — *Morgan v. Davenport*, 60 Tex. 230.

*West Virginia.* — *Francis v. Marsh*, 54 W. Va. 545.

**2. Will of Unmarried Woman Revoked by Subsequent Marriage** — *England.* — *Forse's Case*, 4 Coke 61; *Doe v. Staple*, 2 T. R. 695; *Cotter v. Layer*, 2 P. Wms. 624; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Long v. Aldred*, 3 Add. Ecc. 48.

*California.* — *Matter of Comassi*, 107 Cal. 1.

*Colorado.* — *Brown v. Scherrer*, 5 Colo. App. 255, affirmed 21 Colo. 481.

*District of Columbia.* — *Chapman v. Dismer*, 14 App. Cas. (D. C.) 446.

*Florida.* — *Colcord v. Conroy*, 40 Fla. 97.

*Georgia.* — *Sutton v. Hancock*, 115 Ga. 857.

*Illinois.* — *Matter of Tuller*, 79 Ill. 99; *Crum v. Sawyer*, 132 Ill. 443; *McAnnulty v. McAnnulty*, 120 Ill. 26.

*Maine.* — *Emery, Appellant*, 81 Me. 275.

*Massachusetts.* — *Swan v. Hammond*, 138 Mass. 45; *Blodgett v. Moore*, 141 Mass. 75; *Nutt v. Norton*, 142 Mass. 242.

*Minnesota.* — *Kelly v. Stevenson*, 85 Minn. 247, distinguishing *Hulett v. Carey*, 66 Minn. 327.

*Mississippi.* — *Garrett v. Dabney*, 27 Miss. 335.

*Nebraska.* — *Baacke v. Baacke*, 50 Neb. 18; *Vandeveer v. Higgins*, 59 Neb. 333.

*New Hampshire.* — *Fellows v. Allen*, 60 N. H. 439; *Morey v. Sohier*, 63 N. H. 510.

*New York.* — *Matter of McLarney*, 153 N. Y. 416, affirming 90 Hun (N. Y.) 361.

*North Carolina.* — *Winslow v. Copeland*, Busb. L. (44 N. Car.) 17.

*Pennsylvania.* — *Young's Appeal*, 39 Pa. St. 115; *Fidelity Ins., etc., Co.'s Appeal*, 121 Pa. St. 1.

*Rhode Island.* — *Miller v. Phillips*, 9 R. I. 141.

*Vermont.* — *Morton v. Onion*, 45 Vt. 145.

*West Virginia.* — *Francis v. Marsh*, 54 W. Va. 545.

*Wisconsin.* — *Ward's Will*, 70 Wis. 251.

**3. Reason for Rule.** — *Doe v. Staple*, 2 T. R. 695; *Stewart v. Mulholland*, 88 Ky. 45; *Swan v. Hammond*, 138 Mass. 45; *Baacke v. Baacke*, 50 Neb. 21; *Morey v. Sohier*, 63 N. H. 510; *Morton v. Onion*, 45 Vt. 145; *In re Carey*, 49 Vt. 236.

In *Noyes v. Southworth*, 55 Mich. 174, the court, by Campbell, J., said: "Laying aside such decisions as are made under statutes, the only foundation which has been suggested for holding a woman's marriage to operate as an implied revocation, is the common-law rule to that effect, which was based on the effect of marriage on a woman's property and testamentary capacity. By marriage her personality devolved on her husband, and left nothing for a will to operate on, unless possibly such rights in action as should not be reduced to possession during coverture. So it was further held that she could make no testamentary provisions during coverture relating to her own property, without her husband's concurrence, and this would prevent a revocation as well as any other testamentary act; and a will cannot be recognized which is not subject to revocation by the testator. These were reasons enough to maintain the common-law doctrine."

**4.** *Ward's Will*, 70 Wis. 251.

**5. Effect of Antenuptial Agreement** — *England.* — *Wright v. Englefield*, Amb. 468; *Rippon v. Dawding*, Amb. 565; *Rich v. Beaumont*, 6 Bro. P. C. (Toml. ed.) 152; *Logan v. Bell*, 1 C. B. 872, 50 E. C. L. 872; *Dillon v. Grace*, 2 Sch. & Lef. 456; *Downes v. Timperon*, 4 Russ. 334; *Douglas v. Cooper*, 3 Myl. & K. 378; *Boyes v. Cook*, 14 Ch. D. 53; *Logan v. Bell*, 1 C. B. 872, 50 E. C. L. 872; *Doe v. Staple*, 2 T. R. 695.

*Kentucky.* — *Stewart v. Mulholland*, 88 Ky. 38.

*Massachusetts.* — *Osgood v. Bliss*, 141 Mass. 477.

*Minnesota.* — *Kelly v. Stevenson*, 85 Minn. 247.

*New Hampshire.* — *Morey v. Sohier*, 63 N. H. 511.

(b) **Under Statutes** — *aa. IN ENGLAND.* — **The Statute of Frauds**, as has been seen, was construed not to affect in any way the common-law rule relating to revocation by act of law.<sup>1</sup>

**Statute of Victoria.** — But by a statute passed in the time of Victoria, and still in existence, it was provided that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distribution.<sup>2</sup>

*bb. IN UNITED STATES — (aa) In General.* — In the United States, statutes relating to revocation by marriage, but differing greatly in their respective provisions, are in force in most of the states.<sup>3</sup> In the absence of provision to the contrary, such statutes are held to be prospective merely.<sup>4</sup>

*(bb) Statutes Relating to Wills of Both Men and Women.* — Some statutes relate to wills of both men and women, and provide that subsequent marriage shall effect a revocation thereof; but many of these statutes, like the English statute of Victoria, except wills made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to testator's heirs, personal representatives, or next of kin.<sup>5</sup>

In **Massachusetts** not only is such exception made, but in ordinary cases, that is, where the testator does not exercise a power of appointment, marriage does not revoke a will which is made in contemplation of such event.<sup>6</sup> But the fact that a will is made in contemplation of marriage must appear from the face of the will, either by an express declaration to that effect or by language in the will from which such contemplation may fairly be inferred.<sup>7</sup>

In **Pennsylvania** the statute provides that when any person shall make his last will and testament and afterwards shall marry, and die leaving a widow, every such person, so far as shall regard the widow, shall be deemed and construed to die intestate.<sup>8</sup> The statute is held to apply to wills of unmarried women as well as to wills of unmarried men, notwithstanding it contains the words "his" and "widow."<sup>9</sup> It is also held under this statute that a widow is not bound to rely on the intestate laws, but may, at her option, consider the

*New York.* — *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *McMahon v. Allen*, 4 E. D. Smith (N. Y.) 519; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523.

*West Virginia.* — *Francis v. Marsh*, 54 W. Va. 545.

*Wisconsin.* — *Ward's Will*, 70 Wis. 255.

1. See *supra*, this section, 3. *a. General Principles — Rule under Statutes.*

2. **Statute of Victoria.** — 1 Vict., c. 26, § 18; *Loustalan v. Loustalan*, 82 L. T. N. S. 806.

3. See the statutes of the various states.

4. **Statutes Prospective.** — *Goodsell's Appeal*, 55 Conn. 171; *Matter of Tuller*, 79 Ill. 99; *Swan v. Sayles*, 165 Mass. 177.

5. **Wills Made in Exercise of Power of Appointment Excepted — Kentucky.** — *Stewart v. Mulholland*, 88 Ky. 38.

*North Carolina.* — *Winslow v. Copeland*, Busb. L. (44 N. Car.) 17; *Sawyer v. Sawyer*, 7 Jones L. (52 N. Car.) 134; *Byrd v. Surles*, 77 N. Car. 435.

*Rhode Island.* — Gen. Laws (1896), c. 203, § 16. An earlier statute in Rhode Island is construed in *Wheeler v. Wheeler*, 1 R. I. 364; *Miller v. Phillips*, 9 R. I. 141.

*Virginia.* — *Phaup v. Wooldridge*, 14 Gratt. (Va.) 332.

*West Virginia.* — *Francis v. Marsh*, 54 W. Va. 545.

6. **Massachusetts Statute.** — The statute provides that the marriage of a person shall act as a revocation of a will made previous to such marriage, unless it appears from the will that it was made in contemplation of such marriage. And if the will is made in the exercise of a power of appointment, and the real and personal property subject to the appointment would not, without the appointment, pass to the persons who would have been entitled to it if it had been the estate and property of the testator making the appointment, and he had died intestate, so much of the will as makes the appointment is not revoked by the marriage. *Os good v. Bliss*, 141 Mass. 474; *Swan v. Sayles*, 165 Mass. 177; *Ingersoll v. Hopkins*, 170 Mass. 401; *Paine v. Price*, 184 Mass. 350.

7. *Ingersoll v. Hopkins*, 170 Mass. 401. For the construction of a similar provision in a *Georgia* statute, see *Ellis v. Darden*, 86 Ga. 368.

8. **Pennsylvania Statute.** — *Fidelity Ins., etc., Co.'s Appeal*, 121 Pa. St. 1; *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846.

9. **Wills of Unmarried Women Included.** — *Owens v. Haines*, 199 Pa. St. 137.

will valid and accept benefits under it.<sup>1</sup>

The Reason for Excepting Wills Made in Exercise of a Power of Appointment from the operation of statutes revoking wills of persons subsequently marrying, is that a donee of a power in making an appointment is acting for the donor in disposing of the donor's property. But where the property in question goes, in default of appointment, to those who would have been entitled to it had it been the property of the donee of the power and he had died intestate, a case arises where the property to be disposed of by the appointment is for all practical purposes the property of the donee of the power, and for that reason it is taken out of the exception and left within the operation of the statute.<sup>2</sup>

(cc) *Statutes Relating to Wills of Unmarried Men Only.* — In some states statutes have been passed providing for the revocation of wills of unmarried men who subsequently marry. These statutes, however, usually except cases where the testator has made some provision for such contingency, either in the will,<sup>3</sup> or in the marriage contract.<sup>4</sup>

(dd) *Statutes Relating to Wills of Unmarried Women Only.* — In several states statutes expressly provide that a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage.<sup>5</sup>

**Who Is an Unmarried Woman.** — An unmarried woman within the meaning of the statutes is any woman who at the time of the execution of her will is not in a state of marriage. She may be either one who has never married or one who has been married, but is then a widow.<sup>6</sup> The term "unmarried woman" does not, however, apply to one who, at the time of the execution of the will, is married, though subsequently she becomes a widow<sup>7</sup> or secures a dissolution of such marriage.<sup>8</sup>

(ee) *Statutes Making Wife Heir of Husband.* — It has been held that statutes making the wife heir to the husband have the effect of abrogating the common-law rule that the marriage of a man does not revoke his will made before the marriage, in cases where the unmarried testator has disposed of his whole estate without making any provision in contemplation of the marriage.<sup>9</sup>

1. *Fidelity Ins., etc., Co.'s Appeal*, 121 Pa. St. 1.

2. **Reason for Exception.** — *Paine v. Price*, 184 Mass. 350.

3. **Provision for Marriage Made in Will.** — *Goodsell's Appeal*, 55 Conn. 171; *Deupree v. Deupree*, 45 Ga. 415; *Ellis v. Darden*, 86 Ga. 371; *Sutton v. Hancock*, 115 Ga. 858.

The Connecticut statute was passed in 1885. Prior to that time marriage did not revoke the will of the testator, though no provision was made in it for the contingency. *Goodsell's Appeal*, 55 Conn. 171.

4. **Provision Made in Marriage Contract.** — In *California* and *South Dakota* it is provided that if, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption must be received. *Corker v. Corker*, 87 Cal. 643; *In re Larsen*, (S. Dak. 1904) 100 N. W. Rep. 738.

**Marriage Contract**, as used in the statute, has reference to such contract or settlement only as expressly purports to be a marriage contract and to make provision for the wife in lieu of a testamentary provision. *Corker v. Corker*, 87 Cal. 643.

5. **Will of Unmarried Woman Revoked by Mar-**

**riage.** — *Sanders v. Simeich*, 65 Cal. 52; *Corker v. Corker*, 87 Cal. 643; *Matter of Comassi*, 107 Cal. 1; *Brown v. Clark*, 77 N. Y. 369; *Matter of Kaufman*, 131 N. Y. 620, *affirming* 61 Hun (N. Y.) 331; *Matter of McLarney*, 153 N. Y. 416, *affirming* 90 Hun (N. Y.) 361; *Lathrop v. Dunlap*, 4 Hun (N. Y.) 213, *affirmed* 63 N. Y. 610; *Matter of Coburn*, (Surrogate Ct.) 9 Misc. (N. Y.) 437; *Davis's Estate*, Tuck. (N. Y.) 107; *Booth's Will*, 40 Oregon 154; *Craft's Estate*, 164 Pa. St. 520.

In *Nebraska* the marriage of a woman revokes her prior will at least to the extent it would operate to exclude her husband from an estate by curtesy in the real estate of which she died seized. *Vandever v. Higgins*, 59 Neb. 333.

6. **Unmarried Woman Is Any Woman Not in State of Marriage.** — *Matter of Kaufman*, 131 N. Y. 620, *affirming* 61 Hun (N. Y.) 331; *Matter of McLarney*, 153 N. Y. 416, *affirming* 90 Hun (N. Y.) 361.

7. **Married Woman Subsequently Becoming a Widow.** — *Matter of Comassi*, 107 Cal. 1; *Matter of McLarney*, 153 N. Y. 416, *affirming* 90 Hun (N. Y.) 361.

8. *Matter of Burton*, (Surrogate Ct.) 4 Misc. (N. Y.) 512.

9. **Effect of Statutes Making Wife Heir of Husband.** — *Tyler v. Tyler*, 19 Ill. 151; *American Board of Foreign Missions v. Nelson*, 72 Ill. 564; *Matter of Tuller*, 79 Ill. 99; *Duryea v. Duryea*, 85 Ill. 50. See also *Brown v. Scherrer*,



This view, however, is not accepted by all of the courts.<sup>1</sup>

(ff) *Statutes Conferring Testamentary Capacity on Married Women.* — In many jurisdictions, married women have been given testamentary capacity either by constitution or by statute, and, as a result thereof, the courts of such jurisdictions have refused to enforce the common-law rule revoking the wills of unmarried women upon their subsequent marriage.<sup>2</sup> The ground for such holding is that the reason upon which the common-law rule was based, to wit, that married women had no testamentary power, no longer exists, and that where the reason for any particular law ceases to exist, so does the law itself.<sup>3</sup> Such courts, however, will enforce a statute which has expressly adopted the common-law rule of revocation,<sup>4</sup> even though such statute was passed prior to the statute giving married women testamentary capacity.<sup>5</sup>

(gg) *Effect of Statutes on Wills Made in Contemplation of Marriage.* — Statutes which provide for the revocation of wills of persons who subsequently marry are generally held to include cases where it appears that the will was made in contemplation of marriage, unless the words of the statute expressly exclude them. The express provisions of the statute cannot be affected by the intention of the testator or testatrix that the will should continue.<sup>6</sup> In *Pennsyl-*

5 Colo. App. 255, *affirmed* 21 Colo. 481; *Colcord v. Conroy*, 40 Fla. 97; *Morgan v. Ireland*, 1 Idaho 786.

1. **Contrary Authority.** — *Goodsell's Appeal*, 55 Conn. 171; *Hulett v. Carey*, 66 Minn. 327; *Munday v. Munday*, 8 Ohio Cir. Dec. 44.

2. **Effect of Statutes Conferring Testamentary Capacity** — *District of Columbia.* — *Chapman v. Dismar*, 14 App. Cas. (D. C.) 446.

*Florida.* — *Colcord v. Conroy*, 40 Fla. 97.

*Illinois.* — *Matter of Tuller*, 79 Ill. 99.

*Maryland.* — *Roane v. Hollingshead*, 76 Md. 369.

*Michigan.* — *Lansing v. Haynes*, 95 Mich. 16; *Noyes v. Southworth*, 55 Mich. 173.

*Minnesota.* — *Kelly v. Stevenson*, 85 Minn. 247.

*Nebraska.* — *Baacke v. Baacke*, 50 Neb. 21.

*New Hampshire.* — *Fellows v. Allen*, 60 N. H. 439; *Morey v. Sohler*, 63 N. H. 507.

*New Jersey.* — *Webb v. Jones*, 36 N. J. Eq. 163.

*Vermont.* — *Morton v. Onion*, 45 Vt. 145; *In re Carey*, 49 Vt. 236.

*Wisconsin.* — *Ward's Will*, 70 Wis. 251; *In re Lyon*, 96 Wis. 339.

3. In *Emery, Appellant*, 81 Me. 275, the court said: "The question is whether the common-law rule that the will of a *feme sole* is revoked by her marriage, is now in force in this state. We think it is not. The rule was an outgrowth of the doctrine that the marriage of a *feme sole* destroyed her testamentary capacity. After her marriage she could neither make nor revoke a will. A will already made, if allowed to remain valid, would make a permanent disposition of her property. This would be contrary to the very essence and nature of a will. It would cease to be ambulatory. It was, therefore, resolved that the marriage of a *feme sole* should, by operation of law, revoke all existing testamentary dispositions of her property. But in this state, the marriage of a *feme sole* does not now destroy her testamentary capacity. In this particular the common law is not now in force. It has been abrogated by the legislature. A married woman can now make, or alter, or revoke a will, as fully and as freely as if she

were not married. Why, then, should her marriage revoke a pre-existing will? We think it should not. *Cessante ratione legis, cessat ipsa lex.* Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

4. **Statute Adopting Common-law Rule Enforced.** — *Matter of Comassi*, 107 Cal. 1; *Swan v. Hammond*, 138 Mass. 45; *Blodgett v. Moore*, 141 Mass. 75.

5. *Matter of McLarney*, 153 N. Y. 416, *affirming* 90 Hun (N. Y.) 361; *Booth's Will*, 40 Oregon 154; *Fransen's Will*, 26 Pa. St. 202.

In *Brown v. Clark*, 77 N. Y. 369, the court said: "Courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married-women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage."

6. **Wills Made in Contemplation of Marriage Revoked.** — *Crum v. Sawyer*, 132 Ill. 457; *Deupree v. Deupree*, 45 Ga. 415; *Fransen's Will*, 26 Pa. St. 202; *Walker v. Hall*, 34 Pa. St. 488; *Francis v. Marsh*, 54 W. Va. 545, *criticising* *Stewart v. Mulholland*, 88 Ky. 38. See also *supra*, this subsection, *Statutes Relating to Wills of Both Men and Women.*

In *Francis v. Marsh*, 54 W. Va. 545, a widow made a will, the second clause whereof read as follows: "If so be I have a wife living at the time of my decease I will to her use one-third of the land I may own at that time to her use during life time I do so order and will it and do also will and bequeath to said wife if such exist one-third of my personal

*vania* it is held that while the will of an unmarried woman who subsequently marries is revoked, still if it is made in contemplation of marriage, with the express consent of her husband, it may be upheld as an antenuptial settlement so far as the husband is concerned,<sup>1</sup> but no children of the marriage can be concluded by it. They have the right to share in the mother's estate as if no will had been made.<sup>2</sup>

(2) *Birth of Issue* — (a) *At Common Law*. — At common law the birth of issue did not revoke any existing will of the father.<sup>3</sup>

Under the *Roman Law*, however, birth of issue alone amounted to a revocation of such will.<sup>4</sup>

A *Will Made in Ignorance of the Existence of a Living Child* is not revoked by the discovery of its existence.<sup>5</sup>

(b) *Under Statutes* — *aa. IN GENERAL*. — Statutes exist in many of the *United States* changing the common-law rule stated above.<sup>6</sup> These statutes vary considerably in their language. Several provide, for instance, that the birth of a child shall revoke any existing will of a parent, whether made in contemplation of the event or not;<sup>7</sup> but the general provision is that the birth of a child shall have a revocatory effect only when no provision is made for after-born children.<sup>8</sup>

estate to her entire use." In other clauses there were references to the possible future wife, accompanied by gifts to her, without naming her or indicating any particular person as his intended wife. It was held that the widower's subsequent marriage revoked the will.

1. *Will Takes Effect as Antenuptial Settlement*. — *Lant's Appeal*, 95 Pa. St. 279.

2. *Children Not Concluded*. — *Craft's Estate*, 164 Pa. St. 520.

3. *At Common Law* — *Doe v. Barford*, 4 M. & S. 10; *Sutton v. Hancock*, 115 Ga. 857; *Swan v. Hammond*, 138 Mass. 45; *Hoitt v. Hoitt*, 63 N. H. 475; *Ordish v. McDermott*, 2 Redf. (N. Y.) 460. See *Young's Appeal*, 39 Pa. St. 115; *Padelford's Estate*, 190 Pa. St. 40.

4. *Under Roman Law*. — See *Sutton v. Hancock*, 115 Ga. 857.

5. *Will Made in Ignorance of Existence of Living Child*. — *Ordish v. McDermott*, 2 Redf. (N. Y.) 460.

6. *Statutes Changing Common-law Rule* — *Arkansas*. — *Branton v. Branton*, 23 Ark. 569.

*California*. — *Matter of Wardell*, 57 Cal. 484. *Georgia*. — *Holloman v. Copeland*, 10 Ga. 79; *Hart v. Hart*, 70 Ga. 764.

*Illinois*. — *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130; *Ward v. Ward*, 120 Ill. 111.

*Indiana*. — *Hughes v. Hughes*, 37 Ind. 183; *Morse v. Morse*, 42 Ind. 365.

*Iowa*. — *McCullum v. McKenzie*, 26 Iowa 510; *Carey v. Baughn*, 36 Iowa 540; *Negus v. Negus*, 46 Iowa 487; *Fallon v. Chidester*, 46 Iowa 588; *Alden v. Johnson*, 63 Iowa 124.

*Maine*. — *Waterman v. Hawkins*, 63 Me. 156.

*Maryland*. — *Baldwin v. Spriggs*, 65 Md. 373.

*Massachusetts*. — *Church v. Crocker*, 3 Mass. 17; *Prentiss v. Prentiss*, 11 Allen (Mass.) 47.

*Missouri*. — *Guitar v. Gordon*, 17 Mo. 408; *Beck v. Metz*, 25 Mo. 70; *Hockensmith v. Slusher*, 26 Mo. 237; *Pounds v. Dale*, 48 Mo. 270; *Wetherall v. Harris*, 51 Mo. 65; *Thomas v. Black*, 113 Mo. 66.

*Nebraska*. — *Baacke v. Baacke*, 50 Neb. 23.

*New Jersey*. — *Stevens v. Shippen*, 28 N. J. Eq. 487; *Coudert v. Coudert*, 43 N. J. Eq. 407.

*New York*. — *Sanford v. Sanford*, 4 Hun (N. Y.) 753; *Matter of Huiell*, 6 Dem. (N. Y.) 352; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; *Cotheal v. Cotheal*, 40 N. Y. 405.

*North Carolina*. — *M'Cay v. M'Cay*, 1 Murph. (5 N. Car.) 447.

*Ohio*. — *Ash v. Ash*, 9 Ohio St. 383; *Evans v. Anderson*, 15 Ohio St. 324; *Rhodes v. Weldy*, 46 Ohio St. 234.

*Pennsylvania*. — *Coates v. Hughes*, 3 Binn. (Pa.) 498; *Squire's Estate*, 11 Phila. (Pa.) 110, 33 Leg. Int. (Pa.) 22; *Tomlinson v. Tomlinson*, 1 Ashm. (Pa.) 224.

*Rhode Island*. — *Chace v. Chace*, 6 R. I. 407; *Potter v. Brown*, 11 R. I. 232. See also *Mercantile Trust, etc., Co. v. Rhode Island Hospital Trust Co.*, 36 Fed. Rep. 863.

*South Carolina*. — *Ellis v. Ellis*, 2 Desaus. (S. Car.) 556.

*Texas*. — *Morgan v. Davenport*, 60 Tex. 230.

*Virginia*. — *Wilcox v. Rootes*, 1 Wash. (Va.) 140; *Armistead v. Dangerfield*, 3 Munf. (Va.) 20; *Savage v. Mears*, 2 Rob. (Va.) 570.

*Washington*. — *McKnight v. McDonald*, 34 Wash. 98.

*West Virginia*. — *Cunningham v. Cunningham*, 30 W. Va. 599.

*Wisconsin*. — *Moon v. Evans*, 60 Wis. 667.

7. See *Evans v. Anderson*, 15 Ohio St. 324.

8. *Goodsell's Appeal*, 55 Conn. 171.

In *Georgia*, the present statute, which has been in force since 1863, provides that in all cases the birth of a child to the testator subsequent to the making of a will in which "no provision is made in contemplation of such an event," shall be a revocation of the will. *Freeman v. Layton*, 41 Ga. 58; *Deupree v. Deupree*, 45 Ga. 415; *Ellis v. Darden*, 86 Ga. 371; *Sutton v. Hancock*, 115 Ga. 857.

Under an earlier statute in that state, passed in 1834, there were slightly different provisions. As to this earlier statute, see *Holloman v. Copeland*, 10 Ga. 79; *Sutton v. Hancock*, 115 Ga. 858.

In *Pennsylvania* the statute provides that where any person shall make his last will and

**Posthumous Child.** — Some statutes expressly extend their provisions to posthumous children; <sup>1</sup> but even in the absence of such an express statutory provision, posthumous children are held to be embraced by the statute. And it makes no difference that the child is at the time of the making of the will *en ventre sa mere*.<sup>2</sup>

**Illegitimate Child.** — An illegitimate child is within the provisions of statutes relating to revocation of wills made by persons who subsequently have issue, provided such child has been given the right of inheritance.<sup>3</sup>

**Adopted Child.** — An adopted child has been held to be not within the provisions of such statutes.<sup>4</sup>

*bb. PROVISION FOR AFTER-BORN CHILDREN.* — Under statutes providing in substance that a will is revoked which does not make some provision for after-born children, it must clearly appear from the face of the will, without the help of extraneous evidence, that provision has been made.<sup>5</sup> But it is not necessary that adequate provision be made, unless, of course, the statute so requires.<sup>6</sup>

(3) *Marriage and Birth of Issue* — (a) **At Common Law.** — At common law, the will of a man who subsequently married and had issue was revoked,<sup>7</sup> unless,

testament, and afterwards shall have a child or children, not provided for in such will, and die, leaving a child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the child or children after born, shall be deemed and construed to die intestate, and such child or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will. *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846.

The statute applies to wills of women as well as to those of men. *Owens v. Haines*, 199 Pa. St. 137.

**In Rhode Island** the statute provides that wherever any child shall be born after the execution of his father's or mother's will, without having any provision made for him in such will, he shall have a right and interest in the estate of his father or mother, in like manner as if the father or mother had died intestate, and the same shall be assigned to him accordingly. *Mercantile Trust, etc., Co. v. Rhode Island Hospital Trust Co.*, 36 Fed. Rep. 863; *Chace v. Chace*, 6 R. I. 407; *Potter v. Brown*, 11 R. I. 232.

1. *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846.

2. **Posthumous Child Included Though Not Referred to in Statutes.** — *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317; *Evans v. Anderson*, 15 Ohio St. 324.

3. **Illegitimate Child.** — *Milburn v. Milburn*, 60 Iowa 411. *Compare* *Kent v. Barker*, 2 Gray (Mass.) 535.

4. **Adopted Child.** — *Davis v. Fogle*, 124 Ind. 47; *Matter of Gregory*, (Surrogate Ct.) 15 Misc. (N. Y.) 407; *Davis v. King*, 89 N. Car. 441. But *compare* *Hilpire v. Claude*, 109 Iowa 150.

5. **Will Must Clearly Show Some Provision Made.** — *Mercantile Trust, etc., Co. v. Rhode Island Hospital Trust Co.*, 36 Fed. Rep. 863; *Chace v. Chace*, 6 R. I. 407.

In *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846, the court said: "what it (the statute) does require is that the testator shall make a provision, to wit, such provision as he deems proper, for the unborn child, and shall do it

in such way as to show that he intends it as a provision."

In *Freeman v. Layton*, 41 Ga. 58, where a testator, who had no children, provided in his will that if he should die leaving a child or children, his property was to be equally divided between them if there was more than one, it was held that the birth of a child did not revoke the will.

But in *Sutton v. Hancock*, 115 Ga. 857, where a testator who had children at the date of the execution of his will provided in it that all his property should at his death go to his wife, because he knew she would protect his name by the prompt payment of his debts, and that she would take every care of his children and do what was just and right by each of them, it was held that the will did not indicate that the father had in contemplation the birth of another child, and that therefore it was revoked by such an event.

6. In *Georgia*, the present statute does not require that the provision shall be a beneficial interest in testator's property. *Sutton v. Hancock*, 115 Ga. 863.

The statute of 1834, however, required a positive beneficial provision. *Holloman v. Copeland*, 10 Ga. 79.

**In Pennsylvania** the rule as stated in the text is declared to be the settled law of that state. *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846, wherein the court reviews the prior unsatisfactory decisions in Pennsylvania.

7. **Marriage and Birth of Issue at Common Law** — *England.* — *Doe v. Edlin*, 4 Ad. & El. 587, 31 E. C. L. 147; *Doe v. Lancashire*, 5 T. R. 49; *Christopher v. Christopher*, 2 Dick. 445; *Spraage v. Stone*, Ambl. 721; *Kenebel v. Scrafton*, 2 East 530; *Brady v. Cubitt*, 1 Dougl. 31; *Israell v. Rodon*, 2 Moo. P. C. 51.

*Alabama.* — *Gay v. Gay*, 84 Ala. 44.

*Colorado.* — *Brown v. Scherrer*, 5 Colo. App. 255, affirmed 21 Colo. 481.

*Connecticut.* — *Goodsell's Appeal*, 55 Conn. 171.

*Florida.* — *Belton v. Summer*, 31 Fla. 139; *Colcord v. Conroy*, 40 Fla. 97.

*Georgia.* — *Sutton v. Hancock*, 115 Ga. 857.



at the time the will was made, the testator, contemplating what subsequently happened, made some provision for the issue, either in his will<sup>1</sup> or in some other manner,<sup>2</sup> or unless no benefit could result to the issue from a revocation.<sup>3</sup>

**History of Rule.** — This rule as to revocation of wills by marriage and birth of issue was borrowed from the civil law,<sup>4</sup> and was applied by the ecclesiastical courts of *England*,<sup>5</sup> first to wills of personalty,<sup>6</sup> and later to wills affecting realty.<sup>7</sup> Finally, it was adopted by the common-law courts.<sup>8</sup>

**Whole Estate Must Be Disposed of.** — Under the common-law rule, it has been held that substantially the whole estate of the testator must be disposed of by his will in order for a revocation to take place on marriage and birth of issue.<sup>9</sup>

**Rule Applicable to Remarriage.** — The common-law rule that a will was revoked by the subsequent marriage of the testator followed by birth of issue, was held to extend to a will made by a married man who later became a widower, remarried, and had issue by his second wife,<sup>10</sup> and to a married man who later had issue, became a widower, and then remarried.<sup>11</sup> And it applied as well to a case where the testator had children by a former wife who were provided for in the will, as where he was without children at the time of its execution.<sup>12</sup>

**Posthumous Issue.** — The rule applied also to posthumous issue, it being immaterial that the testator had no knowledge of the probability that a child would be born.<sup>13</sup>

**Adopted Children.** — The rule has also been held to apply to children adopted

*Illinois.* — *McAnnulty v. McAnnulty*, 120 Ill. 26.

*Kansas.* — *Shorten v. Judd*, 60 Kan. 73.

*Maryland.* — *Baldwin v. Spriggs*, 65 Md. 373. *Massachusetts.* — *Warner v. Beach*, 4 Gray (Mass.) 163; *Nutt v. Norton*, 142 Mass. 242.

*Nebraska.* — *Baacke v. Baacke*, 50 Neb. 21.

*New Hampshire.* — *Morey v. Sohier*, 63 N. H. 510.

*New York.* — *Sherry v. Loyier*, 1 Bradf. (N. Y.) 437; *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Parish v. Parish*, 42 Barb. (N. Y.) 274; *Matter of Burton* (Surrogate Ct.) 4 Misc. (N. Y.) 512.

*North Carolina.* — *Winslow v. Copeland*, Busb. L. (44 N. Car.) 17.

*Pennsylvania.* — *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846; *Tomlinson v. Tomlinson*, 1 Ashm. (Pa.) 224.

*Rhode Island.* — *Wheeler v. Wheeler*, 1 R. I. 371.

*South Carolina.* — *Jacks v. Henderson*, 1 Desaus. (S. Car.) 556.

*Texas.* — *Morgan v. Davenport*, 60 Tex. 230.

*Virginia.* — *Yerby v. Yerby*, 3 Call (Va.) 334; *Wilcox v. Rootes*, 1 Wash. (Va.) 140.

*West Virginia.* — *Francis v. Marsh*, 54 W. Va. 545.

*Wisconsin.* — *In re Lyon*, 96 Wis. 339; *Glascock v. Bragg*, 111 Wis. 605.

**1. Provision Made in Will.** — *Doe v. Edlin*, 4 Ad. & El. 587, 31 E. C. L. 147; *Shorten v. Judd*, 60 Kan. 73; *Baldwin v. Spriggs*, 65 Md. 373; *Warner v. Beach*, 4 Gray (Mass.) 162; *Nutt v. Norton*, 142 Mass. 242.

**2. Provision Made in Previous Settlement.** — *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 1 Rob. Ecc. 680; *Morey v. Sohier*, 63 N. H. 511.

**After-acquired Property Not a Provision for Issue.** — *Baldwin v. Spriggs*, 65 Md. 373.

**3. When No Benefit Could Result from Revocation.**

— *Hollway v. Clarke*, 1 Phill. Ecc. 339; *Wright v. Netherwood*, 2 Salk. 593; *Gibbons v. Caunt*, 4 Ves. Jr. 849; *Sheath v. York*, 1 Ves. & B. 390; *Morey v. Sohier*, 63 N. H. 511.

**4. Rule Borrowed from Civil Law.** — *Swan v. Hammond*, 138 Mass. 45; *Warner v. Beach*, 4 Gray (Mass.) 162; *In re Newlin*, (Pa. 1904) 58 Atl. Rep. 846.

**5. Applied by Ecclesiastical Courts.** — *Brown v. Scherrer*, 5 Colo. App. 255, *affirmed* 21 Colo. 481.

**6. First Applied to Wills of Personalty.** — *Overbury v. Overbury*, 2 Show. 242; *Lugg v. Lugg*, 2 Salk. 593; *Eyre v. Eyre*, 1 P. Wms. 304, note.

**7. Later Applied to Wills of Realty.** — *Christopher v. Christopher*, 2 Dick. 445; *Spraage v. Stone*, AmbL. 721; *Parsons v. Lanoe*, 1 Ves. 192; *Gibbons v. Caunt*, 4 Ves. Jr. 848.

**8. Finally Adopted by Common-law Courts.** — *Brown v. Scherrer*, 5 Colo. App. 255, *affirmed* 21 Colo. 481.

**9. Substantially Whole Estate Must Be Disposed of.** — *Brady v. Cubitt*, 1 Dougl. 31; *Kenebel v. Scrafton*, 2 East 541; *Marston v. Roe*, 8 Ad. & El. 14, 35 E. C. L. 303; *Doe v. Edlin*, 4 Ad. & El. 587, 31 E. C. L. 147; *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27. And see *Glascott v. Bragg*, 111 Wis. 605.

**10. Remarriage and Birth of Issue.** — *Christopher v. Christopher*, 2 Dick. 445, 4 Burr. 2182; *Baldwin v. Spriggs*, 65 Md. 373.

**11. Issue Followed by Remarriage.** — *Gibbons v. Caunt*, 4 Ves. Jr. 848.

**12. Children by Former Wife Provided for.** — *Havens v. Van Den Burgh*, 1 Den. (N. Y.) 27. But see *Doe v. Edlin*, 4 Ad. & El. 587, 31 E. C. L. 147.

**13. Posthumous Issue Included.** — *Doe v. Lancashire*, 5 T. R. 49; *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 1 Rob. Ecc. 680; *Hart v. Hart*, 70 Ga. 764; *Warner v. Beach*, 4 Gray (Mass.) 163; *Squire's Estate*, 11 Phila. (Pa.) 110, 33 Leg. Int. (Pa.) 22.

after the subsequent marriage.<sup>1</sup> There is authority, however, to the contrary.<sup>2</sup>

(b) *Under Statutes.* — The common-law rule in regard to revocation by subsequent marriage and birth of issue has been superseded in some states by statute, either directly<sup>3</sup> or by necessary implication.<sup>4</sup>

(4) *Divorce.* — The question whether a divorce is such a change in the condition or circumstances of a testator as will revoke his will executed before the divorce was obtained is said not to have arisen in *England*.<sup>5</sup> Where the question has arisen in the *United States*, the decisions have not been of a satisfactory nature, owing to the peculiar facts which influenced the court in each particular case.<sup>6</sup>

(5) *Alienation of Estate* — (a) *Rule Stated* — aa. *REAL PROPERTY* — (aa) *Voluntary Alienation.* — A conveyance by the testator, subsequent to the execution of the will, of property devised therein, removes such property from the operation of the will, and of necessity operates as an ademption of the property, and in effect, as a revocation of the will to the extent of the property conveyed. If part only of the property affected by the will is conveyed, the revocation is partial; if all the property affected by the will is conveyed, there is in effect a total revocation of the will, not because of any infirmity or want of operative force in the will, but by reason of the withdrawal of the entire estate from its

1. *Rule Applicable to Adopted Children.* — *Glascott v. Bragg*, 111 Wis. 605.

2. *Matter of Comassi*, 107 Cal. 1.

3. In *Alabama* it is by statute provided that if after the making of any will disposing of his whole estate, the testator marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife of such issue is living at the death of the testator, such will must be deemed revoked, unless provision has been made for such issue by some gift or settlement; or unless such issue has been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence can be received for the purpose of rebutting the presumption of such revocation. *Gay v. Gay*, 84 Ala. 38.

4. In *New Hampshire* it is held that since the passage of a statute allowing the widow and children of a testator, not named or provided for in his will, to receive the same share of his estate as if he had died intestate, there is no longer any necessity for the application of the old common-law rule of implied revocation by subsequent marriage and the birth of a child. *Hoitt v. Hoitt*, 63 N. H. 496; *Morey v. Sohler*, 63 N. H. 511. In the latter case the court said: "The statutory provisions for the widow and children not named or provided for are grounded upon the assumption that the will is not revoked by the failure of the testator to make testamentary provision for them. If the omission to provide for the widow and children operated to revoke the will, the statute would be inoperative."

5. See *Lansing v. Haynes*, 95 Mich. 16.

6. See *Baacke v. Baacke*, 50 Neb. 21.

In *Charlton v. Miller*, 27 Ohio St. 298, it was held that a will executed by an unmarried man in contemplation of marriage, containing a bequest to a certain woman whom he called his intended wife and whom he subsequently married, was not revoked by a divorce obtained by the testator. The reason given for the decision was that the bequest did not depend upon the marriage, and could not, therefore,

be lost by the divorce. The court said: "Undoubtedly, the contemplated marriage of the parties, and a desire to make a provision for the plaintiff as his wife, were prompting causes of the will; but whether these were the only motives of the testator we cannot tell. If so, he might easily have made the bequest upon the conditions that the legatee became his wife and survived him as his widow; but he chose to leave these conditions, if contemplated at all, to be inferred only from words of description that he gave to his legatee as being his 'wife' or 'intended wife.' The bequest is made in absolute and unconditional terms, so far as expressed in the language of the will, and cannot be evaded or overcome by mere argumentative inference drawn from words of the will not used for any such purpose. Had the testator died before the marriage contemplated, the right of the plaintiff to the bequest cannot be doubted, for the marriage was not made a condition precedent to the legacy. Nor is the case different if, after marriage, she ceases to be his wife, for the legacy is not conditioned upon her survivorship as his widow. If, then, her right to the legacy does not depend upon the marriage, it cannot be lost by the divorce, for she can lose no more by the divorce than she gained by the marriage."

In *Lansing v. Haynes*, 95 Mich. 16, however, a contrary result was reached on different facts. There a husband and wife executed mutual wills, which were identical in language, he devising all his property to her, and she devising all her property to him. Subsequently, and pending a divorce suit between them, the husband and wife made a division of the husband's property, he conveying to her by warranty deed certain real estate, and she releasing by quitclaim deed all interest in the remainder of his real estate. They also executed at the same time an agreement in duplicate, by which the husband conveyed to the wife certain real property and the wife agreed to release the husband from all demands of every kind and nature and agreed to pay her own costs and expenses of the divorce suit. It was stated in the agree-

operation.<sup>1</sup> In *Pennsylvania* a subsequent alienation by the testator of so much of his property as renders his scheme of distribution impractical works a total revocation of the will.<sup>2</sup>

**A Mere Agreement to Sell** real property does not effect a revocation of a will devising the same.<sup>3</sup> And this is so in *New York* by statute.<sup>4</sup>

**Proceeds of Sale Not Substituted.** — The proceeds resulting from the sale of real property previously devised, will not be substituted for the property itself.<sup>5</sup>

(bb) **Involuntary Alienation.** — An involuntary conveyance of property previously devised also removes it from the operation of the will and has the effect of revoking the will to the extent of the property conveyed.<sup>6</sup>

ment that the agreement and the deed executed by them were intended as a property settlement between them. It was held that the husband's will was revoked by the divorce.

**1. Effect of Voluntary Alienation of Property Devised** — *England*. — *Hodges v. Green*, 4 Russ. 28; *Kenyon v. Sutton*, cited in 2 Ves. Jr. 600; *Cave v. Holford*, 3 Ves. Jr. 650; *Temple v. Chandos*, 3 Ves. Jr. 685; *Baxter v. Dyer*, 5 Ves. Jr. 656, *overruling* *Harkness v. Bayley*, Prec. Ch. 514; *Harmood v. Oglander*, 6 Ves. Jr. 199, 8 Ves. Jr. 106; *Atty.-Gen. v. Vigor*, 8 Ves. Jr. 281; *Charman v. Charman*, 14 Ves. Jr. 580; *Vawser v. Jeffrey*, 16 Ves. Jr. 519; *Rawlins v. Burgis*, 2 Ves. & B. 382; *Walker v. Armstrong*, 21 Beav. 284; *Goodtitle v. Otway*, 2 H. Bl. 516; *Rider v. Wager*, 2 P. Wms. 334; *Marwood v. Turner*, 3 P. Wms. 163; *Luther v. Kidby*, 3 P. Wms. 169, note; *Briggs v. Watt*, 2 Jur. N. S. 1041; *Power v. Power*, 9 Ir. Ch. Rep. 178; *Titner v. Titner*, cited in *Parsons v. Freeman*, 1 Wils. C. Pl. 309; *Webb v. Temple*, Freem. K. B. 542; *Vernon v. Jones*, 2 Freem. 117; *Perkins v. Walker*, 1 Vern. 97; *Lamb v. Parker*, 2 Vern. 495; *Pollen v. Hubbard*, 1 Eq. Cas. Abr. 412, pl. 12; *Jackson v. Hurlock*, 2 Eden 263; *Lincoln v. Roll*, Show. P. C. 154; *Hodgkinson v. Wood*, Cro. Car. 23; *Jackson v. Parker*, Ambl. 687; *Peach v. Phillips*, 2 Dick. 538; *Risley v. Balinglass*, T. Raym. 240. *Compare* *Knollys v. Alcock*, 5 Ves. Jr. 648; *Phillips v. Turner*, 17 Beav. 194.

*Alabama*. — *Stubbs v. Houston*, 33 Ala. 555; *Moore v. Spier*, 80 Ala. 129.

*Delaware*. — *Duffel v. Burton*, 4 Harr. (Del.) 290.

*Georgia*. — *Epps v. Dean*, 28 Ga. 533; *Coffee v. Coffee*, 119 Ga. 533.

*Indiana*. — *Bowen v. Johnson*, 6 Ind. 110; *Woolery v. Woolery*, 48 Ind. 526; *Belshaw v. Chitwood*, 141 Ind. 377.

*Iowa*. — *Warren v. Taylor*, 56 Iowa 182.

*Maine*. — *Emery v. Union Soc.*, 79 Me. 334; *Carter v. Thomas*, 4 Me. 341.

*Maryland*. — *Clagett v. Hall*, 9 Gill & J. (Md.) 90; *Dugan v. Hollins*, 4 Md. Ch. 139; *Shilling v. Shilling*, 6 Gill (Md.) 171.

*Massachusetts*. — *Warner v. Beach*, 4 Gray (Mass.) 162; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

*Michigan*. — *In re Sprague*, 125 Mich. 363.

*Mississippi*. — *Wells v. Wells*, 35 Miss. 663.

*Nebraska*. — *Baacke v. Baacke*, 50 Neb. 21.

*New Hampshire*. — *Morey v. Sohler*, 63 N. H. 511.

*New Jersey*. — *Clements v. Horn*, 44 N. J. Eq. 505.

*New York*. — *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Vandemark v. Vandemark*, 26 Barb. (N. Y.) 416; *Ametrano v. Downs*, 170 N. Y. 391; *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 146; *Nutzhorn v. Sittig*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 486.

*North Carolina*. — *McRainy v. Clark*, Term (4 N. Car.) 278.

*Pennsylvania*. — *Skerrett v. Burd*, 1 Whart. (Pa.) 246; *Jones v. Hartley*, 2 Whart. (Pa.) 103; *Marshall v. Marshall*, 11 Pa. St. 430; *McTaggart v. Thompson*, 14 Pa. St. 149; *Balliet's Appeal*, 14 Pa. St. 451; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

*Rhode Island*. — *Borden v. Borden*, 2 R. I. 94.

*South Carolina*. — *Gregg v. McMillan*, 54 S. Car. 378.

*Vermont*. — *Blandin v. Blandin*, 9 Vt. 210; *Graves v. Sheldon*, 2 D. Chip. (Vt.) 74; *Parkhill v. Parkhill*, Brayt. (Vt.) 239; *Re Fuller*, 71 Vt. 73.

*Virginia*. — *Hughes v. Hughes*, 2 Munf. (Va.) 209.

**In New York** by statute an alienation of property previously devised revokes the devise. *Walker v. Steers*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 398. *Compare* *Nottbeck v. Wilks*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 315.

**2. Rule in Pennsylvania.** — *In re Copper*, 4 Pa. St. 88; *Marshall v. Marshall*, 11 Pa. St. 430; *Balliet's Appeal*, 14 Pa. St. 457. *Compare* *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

**3. Agreement to Sell Does Not Effect Revocation.** — *Hall v. Bray*, 1 N. J. L. 245.

**4. Statute Governs in New York.** — *Knight v. Weatherwax*, 7 Paige (N. Y.) 182; *Nutzhorn v. Sittig*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 483.

**5. Proceeds of Sale Not Substituted.** — *Adams v. Winne*, 7 Paige (N. Y.) 97; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Gilbert v. Gilbert*, 9 Barb. (N. Y.) 532; *Vandemark v. Vandemark*, 26 Barb. (N. Y.) 416; *Philson v. Moore*, 23 Hun (N. Y.) 152; *McNaughton v. McNaughton*, 34 N. Y. 201; *Ametrano v. Downs*, 170 N. Y. 388, *affirming* 62 N. Y. App. Div. 405.

**Land Devised Exchanged for Other Land.** — Though testator exchange land devised for other land under the mistaken belief that the law will substitute the land received for that conveyed, the devise fails nevertheless. *Gilbert v. Gilbert*, 9 Barb. (N. Y.) 532.

**6. Property Devised Sold for Nonpayment of Taxes.** — *Borden v. Borden*, 2 R. I. 94.

**Property Devised Sold under Condemnation Pro-**



*bb. PERSONAL PROPERTY.* — The effect of the alienation of personal property theretofore bequeathed has been considered elsewhere in this work.<sup>1</sup>

(b) **Revesting of Estate Alienated.** — It was formerly essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will, and that he should continue so seized without interruption until his decease. If, therefore, the testator alienated lands which he had previously devised, but afterwards acquired a new freehold estate in the lands, such newly acquired estate did not pass by the devise, which was necessarily void.<sup>2</sup> By virtue of statutes, however, which now exist generally and which provide in substance that a will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears therein, a conveyance by the testator of land which has been devised by him does not revoke such devise if subsequently, and before his death, the title to the land conveyed reverts in him.<sup>3</sup>

**Taking Back Mortgage Not a Revesting.** — The taking back of a mortgage upon property alienated, where such mortgage passes no title but simply creates a lien upon the property for part of the purchase money, does not prevent the revocation of a previous devise of such property.<sup>4</sup>

**Property Devised Conveyed to Testator in Fee to Uses to Bar Dower.** — Where a testator, by will, devises certain freehold property which he has contracted to purchase, and subsequently thereto the property is conveyed to him in fee to uses to bar dower, the devise is by necessity revoked.<sup>5</sup>

(c) **Inoperative Alienation.** — An inoperative alienation which had failed for want of completion or from incapacity in the grantee to take was, at common law, held to amount to a revocation of the will if it showed an intention on the part of the testator to revoke his will.<sup>6</sup> But since the adoption of statutes prohibiting parol revocations and allowing only written revocations executed with certain formalities, such a conveyance would probably be held not to revoke a will, either in whole or in part.

(6) **Death of Legatee or Devisee.** — The death of a legatee or devisee may operate as a revocation of the will *pro tanto* from necessity, but so long as there remains anything upon which the will can operate there can be no

**ceedings.** — *Ametrano v. Downs*, 170 N. Y. 388, affirming 62 N. Y. App. Div. 405.

1. See the title **ADEMPMENT OF LEGACIES**, vol. 1, p. 610.

2. **Former Rule.** — *Carter v. Thomas*, 4 Me. 341; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350; *Wells v. Wells*, 35 Miss. 663; *Morey v. Sohler*, 63 N. H. 510; *Skerrett v. Burd*, 1 Whart. (Pa.) 246; *Donohoo v. Lea*, 1 Swan (Tenn.) 119.

3. **Effect of Statutes** — *Alabama*. — *Powell v. Powell*, 30 Ala. 697; *Taylor v. Kelly*, 31 Ala. 59. See also *Welsh v. Pounders*, 36 Ala. 668. *Indiana*. — *Woolery v. Woolery*, 48 Ind. 527. *Kentucky*. — *Floyd v. Floyd*, 7 B. Mon. (Ky.) 290.

*Maine*. — *Carter v. Thomas*, 4 Me. 341. *Minnesota*. — *Graham v. Burch*, 47 Minn. 171. *Mississippi*. — *Wells v. Wells*, 35 Miss. 663. *New Hampshire*. — *Morey v. Sohler*, 63 N. H. 507.

*New York*. — *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148. See also *Vreeland v. McClelland*, 1 Bradf. (N. Y.) 393.

*North Carolina*. — *McRainy v. Clark*, Term (4 N. Car.) 278.

*Ohio*. — *Brush v. Brush*, 11 Ohio. 291.

*Pennsylvania*. — *Skerrett v. Burd*, 1 Whart. (Pa.) 246; *Jones v. Hartley*, 2 Whart. (Pa.)

103. Compare *Wogan v. Small*, 11 S. & R. (Pa.) 143.

*South Carolina*. — *Prater v. Whittle*, 16 S. Car. 40.

*Vermont*. — *Blandin v. Blandin*, 9 Vt. 210; *Re Fuller*, 71 Vt. 73.

Compare *In re Tillman*, (Cal. 1892) 31 Pac. Rep. 563.

**Revesting of Property Conveyed by Trust Deed.** — In *Morey v. Sohler*, 63 N. H. 507, a testator conveyed by deed of trust, containing a power of revocation, land theretofore devised by him. This power of revocation was subsequently executed and the title to the land conveyed reverted in the testator. It was held that the devise was not revoked.

4. **Taking Back Mortgage.** — *Emery v. Union Soc.*, 79 Me. 341; *Adams v. Winne*, 7 Paige (N. Y.) 97; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *McNaughton v. McNaughton*, 34 N. Y. 201.

5. *Jacob v. Jacob*, 82 L. T. N. S. 270, affirming 78 L. T. N. S. 825.

6. **Effect of Inoperative Alienation at Common Law.** — *Beard v. Beard*, 3 Atk. 72; *Mountague v. Jeoffereys*, Moo. K. B. 429; *Doe v. Landaff*, 2 B. & P. N. R. 494; *Shove v. Pincke*, 5 T. R. 124; *Vawser v. Jeffrey*, 16 Ves. Jr. 519; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 269.

revocation as matter of law.<sup>1</sup>

(7) *Loss of Estate*. — The loss of testator's entire estate subsequent to the making of a will disposing thereof, by necessity operates as a revocation.<sup>2</sup>

(8) *Increase in Value of Estate*. — An increase in the value of the estate disposed of does not impliedly revoke any provision in the will.<sup>3</sup>

(9) *Insanity of Testator*. — The fact that the testator becomes insane after making his will does not operate to revoke the will.<sup>4</sup>

**X. REVIVAL OR REPUBLICATION — 1. Of Revoked Will — a. SCOPE OF SECTION.** — This section does not deal, except incidentally, with the subject of the revival or republication of a revoked will by means of a codicil. That subject is treated elsewhere in this work.<sup>5</sup>

**b. RULE STATED — (1) At Common Law — (a) In General.** — The common-law rule was that wills, whether of realty or personalty, which had been revoked, could be revived or republished by an informal writing, or even by parol evidence of the testator's acts or declarations, showing an intent to revive.<sup>6</sup> The rule was subject to this exception, however, that a will revoked by a subsequent will still in force could not be revived by parol declarations of the testator to the effect that the earlier will was his last will and that he wished it to be carried into effect.<sup>7</sup>

**A Canceled or Obliterated Will, Which Remained Legible,** might be revived at common law by words or acts of the testator showing that he meant it to operate notwithstanding.<sup>8</sup>

**(b) Of Will Revoked by Operation of Law.** — At common law a will impliedly revoked by operation of law from some change in the testator's condition or circumstances was not revived by the fact that such change ceased to exist.<sup>9</sup> Thus, where a woman executed a will and then married and subsequently became a widow, her will, which was revoked by the marriage, was not revived by the death of her husband.<sup>10</sup>

**1. Death of Legatee or Devisee.** — *Doe v. Edlin*, 4 Ad. & El. 586, 31 E. C. L. 147; *Warner v. Beach*, 4 Gray (Mass.) 162; *Baacke v. Baacke*, 50 Neb. 21; *Fellows v. Allen*, 60 N. H. 439; *Hoitt v. Hoitt*, 63 N. H. 496.

**2. Loss of Estate.** — *Baacke v. Baacke*, 50 Neb. 22; *Hoitt v. Hoitt*, 63 N. H. 495.

**3. Increase in Value of Estate.** — *Warner v. Beach*, 4 Gray (Mass.) 162; *Baacke v. Baacke*, 50 Neb. 21; *Hoitt v. Hoitt*, 63 N. H. 497.

**4. Insanity of Testator.** — *Warner v. Beach*, 4 Gray (Mass.) 162.

**5. Republication by Codicil.** — See the title CODICILS, vol. 6, p. 174.

**6. Common-law Rule — England.** — *Jackson v. Hurlock*, Amb. 494; *Alford v. Earle*, 2 Vern. 209; *Beckford v. Parnecott*, Cro. Eliz. 493; *Long v. Aldred*, 3 Add. Ecc. 48; *Braham v. Burchell*, 3 Add. Ecc. 264; *Miller v. Brown*, 2 Hag. Ecc. 209; *Abney v. Miller*, 2 Atk. 599; *Barnes v. Crowe*, 1 Ves. Jr. 497.

*Georgia.* — *Harwell v. Lively*, 30 Ga. 315.  
*Mississippi.* — *Bohanon v. Walcott*, 1 How. (Miss.) 336.

*Pennsylvania.* — *Havard v. Davis*, 2 Binn. (Pa.) 425; *Jones v. Hartley*, 2 Whart. (Pa.) 103.

**Insufficient Declaration.** — Where the testator was in search of another paper, and a person who was assisting him took up the will by mistake, whereupon the testator said: "That is my will," Lord Hardwicke held the evidence insufficient to establish the *animus republishandi*. *Abney v. Miller*, 2 Atk. 599.

**7. Exception** — In *Daniel v. Nockolds*, 3

Hag. Ecc. 777, the deceased, by a will made in the year 1819, attested by three witnesses, gave his brother a legacy of one hundred pounds, and after bequeathing further legacies left the residue to Mary Tomkins, and appointed Mr. Daniel and Mr. Bush his executors, without a legacy to either. In the year 1823 he made a new will, in which he devised a small freehold to Tomkins, and appointed Parkinson sole executor and residuary legatee. This will contained a clause of revocation, and was duly executed. Both Tomkins and Parkinson died in the testator's lifetime. In 1827, the deceased, on several occasions during his last illness, conversed with different persons respecting his affairs, produced and read to them his will of 1819, declared that it was his last will, and what he wished to be carried into effect; and that Daniel and Bush were his executors, and would have the management of his affairs. After his death the will of 1819 was found carefully deposited and locked up in one of the drawers of his bedroom, and that of 1823 at the bottom of the same drawer, but much soiled and crumpled, among old and useless papers. It was held that the will of 1819 was not revived, and administration with the will of 1823 annexed was decreed to the brother.

**8. Canceled or Obliterated Will.** — *Slade v. Friend*, cited in *Brotherton v. Hellier*, 2 Lee Ecc. 84.

**9. Will Revoked by Operation of Law.** — *Brady v. Cubitt*, 1 Dougl. 31; *Brown v. Clark*, 77 N. Y. 369.

**10.** *Long v. Aldred*, 3 Add. Ecc. 48.



(c) Of Will Revoked by Subsequent Will. — At Common Law the revocation of a subsequent will which revoked, either expressly or impliedly, an earlier will, effected a revival or republication of the earlier will.<sup>1</sup>

In the Ecclesiastical Courts, however, there was no revival or republication of a former will by virtue of the revocation of a subsequent will, unless the testator so intended.<sup>2</sup>

(2) *Under Statutes* — (a) *In General* — *aa. ENGLAND.* — The English Statute of Frauds did not contain any express provision in reference to the republication of wills; but according to some text-book authorities, the effect of the act was to do away with the parol revival or republication of wills of realty.<sup>3</sup> At any rate, the statute did not affect wills of personalty, which could be revived by parol as before.<sup>4</sup>

*Statute of Victoria.* — But a later English statute, passed in the time of Victoria, prohibited the republication or revival of revoked wills by parol, whether such wills related to personalty or realty. The statute provided that no will or codicil, or any part thereof, which should be in any manner revoked, should be revived otherwise than by the re-execution thereof, or by a codicil duly executed and showing an intention to revive the same; and when any will or codicil which should be partly revoked, and afterwards wholly revoked, should be revived, such revival should not extend to so much thereof as should have been revoked before the revocation of the whole thereof, unless an intention to the contrary should be shown.<sup>5</sup>

**1. Rule of Common-law Courts.** — *Brown v. Brown*, 8 El. & Bl. 876, 92 E. C. L. 876; *Dickinson v. Swatman*, 30 L. J. P. 84; *Wood v. Wood*, L. R. 1 P. & D. 309; *Cutto v. Gilbert*, 9 Moo. P. C. 131; *Randall v. Beatty*, 31 N. J. Eq. 643; *Marsh v. Marsh*, 3 Jones L. (48 N. Car.) 77; *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482; *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346; *Re Gould*, 72 Vt. 316.

In *Harwood v. Goodright*, 1 Cowp. 92, Lord Mansfield said: "If a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good."

In *Rudisill v. Rodes*, 29 Gratt. (Va.) 149, the court said: "It seems to have been held generally by the common-law courts that in such a case it was a necessary conclusion of law, admitting of no proof to the contrary, that the former will was revived. This rule was deduced from the nature of the revoking instrument, which is itself revocable and never becomes final and absolute until the death of the testator; and it was considered that the effectual revocation of such instrument restored the former will and left it to operate in like manner and with like effect as if the revoking will had never been executed. *Goodright v. Glazier*, 4 Burr. 2512; *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Bates v. Holman*, 3 Hen. & M. (Va.) 525; 1 Jarm. on Wills (5th ed.) 123; 4 Kent's Com. (13th ed.) 531; 1 Redf. on Wills (4th ed.) 374, 375; 1 Tuck. Com. (Book 2) 295; 2 Minor's Inst. 931, 932. On the other hand, in the ecclesiastical courts, the revival or restoration of the former will was made to depend on the intention of the testator, to be gathered from the facts and circumstances of each particular case, and parol evidence was admissible to show the intention. 1 Jarm. on Wills (5th ed.) 123, and cases

cited in notes on *Lawson v. Morrison*, 2 Am. Lead. Cas. (5th ed.) 482, 518-523. The effect of the rule in the law courts was to exclude arbitrarily all extrinsic evidence of intention upon the question of revival, and thus oftentimes to set up a will contrary to the intention of the testator; while the rule in the ecclesiastical courts threw the door wide open to the admission of such evidence, and suffered the intention of the testator to be determined by 'the uncertain testimony of slippery memory.'"

**2. Rule of Ecclesiastical Courts.** — *Usticke v. Bawden*, 2 Add. Ecc. 116; *Moore v. Moore*, 1 Phill. Ecc. 412; *James v. Cohen*, 3 Curt. Ecc. 770; *Welch v. Phillips*, 1 Moo. P. C. 299; *Wilson v. Wilson*, 3 Phill. Ecc. 554; *Re Gould*, 72 Vt. 316.

"The question is not whether the deceased meant to die testate or intestate, but whether he meant to revive the earlier will by the destruction of the later." Sir H. James Fust in *James v. Cohen*, 3 Curt. Ecc. 770.

**3.** See 1 Williams on Executors, \*206; Schouler on Wills (2d ed.), § 442.

**4. Wills of Personalty Not Affected.** — *Long v. Aldred*, 3 Add. Ecc. 48; *Braham v. Burchell*, 3 Add. Ecc. 264; *Miller v. Brown*, 2 Hag. Ecc. 209.

**5. Statute of Victoria.** — 1 Vict., c. 26, § 22; *Doe v. Walker*, 12 M. & W. 591; *Hale v. Tokelove*, 2 Rob. Ecc. 318.

**Pasting Signature in Its Former Place** will not revive the will. *Bell v. Fothergill*, L. R. 2 P. & D. 148.

**Evidence Held Not to Show Re-execution.** — In *Dunn v. Dunn*, L. R. 1 P. & D. 277, it appeared in evidence that A executed a will in 1837, appointing B, her nephew, an executor and residuary legatee. In May, 1861, being desirous to deliver the will and certain deeds of hers to B for safe custody in the presence of a witness, she sent for C and in his presence delivered the will and deeds to B, saying



*bb. UNITED STATES.*—Under statutes existing in the United States, which either expressly regulate the revival of a revoked will,<sup>1</sup> or are construed to imply so do,<sup>2</sup> it is generally held that the revival or republication of a revoked will is equivalent to the making of a new will, and that the same formalities must be observed.<sup>3</sup> The testator may, however, use the same form of words, without variations or with variations, and the same written or printed document that was used at first.<sup>4</sup>

**Parol Declarations** of the testator are not sufficient to republish a revoked will.<sup>5</sup> But in *Georgia* it is expressly provided by statute that a parol republication in the presence of the required witnesses to the will shall be good.<sup>6</sup>

(b) **Of Will Revoked by Operation of Law.**—Under statutes requiring wills to be executed with certain formalities, a duly executed will which is revoked by operation of law, can only be revived by a re-execution of the will.<sup>7</sup>

(c) **Of Will Revoked by Subsequent Will**—*aa. ENGLAND.*—The statute of Victoria already referred to<sup>8</sup> was held to abolish the doctrine formerly existing in England and stated above, that a will revoked by a later instrument was revived by a revocation of such instrument. And it made no difference whether the revoking instrument owed its revoking efficacy to an express

that she wished him to be a witness to such delivery. Before the delivery, however, she subscribed her name to the will at the foot thereof, and C and B subscribed theirs also, the latter with the prefix of the word "executor." A gave no reason for signing her name and said nothing to B and C about being witnesses to her will. On this evidence it was held that what took place in May, 1861, was not a re-execution of the will, and that the will was entitled to probate by virtue of the original execution.

**1. Express Regulation.**—In *Stetson v. Stetson*, 200 Ill. 601, the court says: "Some thirteen of the American states have adopted either the statute of Victoria, or a similar statute, upon this subject. But no such statute was ever passed or adopted in this state."

**2. Implied Regulation.**—*Barker v. Bell*, 46 Ala. 216.

**3. Statutes in United States Construed**—*United States.*—*Musser v. Curry*, 3 Wash. (U. S.) 481.

*Alabama.*—*Barker v. Bell*, 46 Ala. 216.

*Connecticut.*—*Witter v. Mott*, 2 Conn. 67.

*Iowa.*—*Carey v. Baughn*, 36 Iowa 540.

*Kentucky.*—*Sharp v. Wallace*, 83 Ky. 584; *Sanders v. Babbitt*, 106 Ky. 646.

*Minnesota.*—*In re Penniman*, 20 Minn. 245.

*New York.*—*Brown v. Clark*, 77 N. Y. 369; *Matter of Simpson*, (Surrogate Ct.) 56 How. Pr. (N. Y.) 125; *Jackson v. Potter*, 9 Johns. (N. Y.) 312.

*North Carolina.*—*Battle v. Speight*, 10 Ired. L. (32 N. Car.) 459; *Love v. Johnston*, 12 Ired. L. (34 N. Car.) 355; *Sawyer v. Sawyer*, 7 Jones L. (52 N. Car.) 134.

*Ohio.*—*Reynolds v. Shirley*, 7 Ohio pt. ii 39.

*Pennsylvania.*—*Havard v. Davis*, 2 Binn. (Pa.) 419; *Jones v. Hartley*, 2 Whart. (Pa.) 103; *Wallace v. Blair*, 1 Grant Cas. (Pa.) 75; *Campbell v. Jamison*, 8 Pa. St. 499; *Fransen's Will*, 26 Pa. St. 202; *Gable v. Daub*, 40 Pa. St. 229; *Neff's Appeal*, 48 Pa. St. 509; *Broe v. Boyle*, 108 Pa. St. 82.

*South Carolina.*—*Cogdell v. Widow*, etc., 3

*Desaus*. (S. Car.) 346; *Dunlap v. Dunlap*, 4 *Desaus*. (S. Car.) 321.

*Vermont.*—*Warner v. Warner*, 37 Vt. 356.

In *Jones v. Hartley*, 2 Whart. (Pa.) 110, Sergeant, J., said: "The rule of law is, that the republication of a will must be accomplished by the same solemnities as were necessary to the publication in the first instance."

**Sufficient Republication.**—In *Reynolds v. Shirley*, 7 Ohio pt. ii 39, it appeared in evidence that the testator in the presence of witnesses held up a paper in his hands and said that that was his will and that he called them to witness that it was his last will and testament. He then proposed that a certificate of this fact of reacknowledgment be written on the will. This was done and the certificate was signed by the witnesses, but not by the testator. It was held that the facts showed a good republication, and that it was unnecessary in *Ohio* that the witnesses should see the testator sign the will, it being sufficient if he acknowledged his signature to the witnesses.

**A Will Revoked by Tearing off the Names of the Maker and Attesting Witnesses** cannot be republished unless the will be re-signed and re-attested as required by the statute relating to the execution of wills. *Barker v. Bell*, 46 Ala. 216.

**4. Same Form of Words May Be Used.**—*Barker v. Bell*, 46 Ala. 216.

**5. Parol Declarations Insufficient.**—*Barker v. Bell*, 46 Ala. 216; *McCarn v. Rundall*, 111 Iowa 408; *Warner v. Warner*, 37 Vt. 356. And see *Battle v. Speight*, 10 Ired. L. (32 N. Car.) 459. But see *Hatch v. Hatch*, 2 Hayw. (3 N. Car.) 33.

**An Olographic Will** cannot be republished by parol. *Sawyer v. Sawyer*, 7 Jones L. (52 N. Car.) 134.

**6. Georgia Rule.**—Ga. Code (1895), § 3348.

**7. Revocation by Operation of Law.**—*Long v. Aldred*, 3 Add. Ecc. 48; *In re Wollaston*, 12 W. R. 18; *Brady v. Cubitt*, 1 Dougl. 31; *James v. Shrimpton*, 1 P. D. 431; *Carey v. Baughn*, 36 Iowa 540; *Brown v. Clark*, 77 N. Y. 369; *Re Gillespie*, 26 Pittsb. Leg. J. N. S. (Pa.) 222.

**8. See supra**, this subsection, *In General*.

clause of revocation contained in it, or to a mere inconsistency of disposition. In either case, the revoked will could only be republished by re-execution or the execution of a codicil.<sup>1</sup>

*bb. UNITED STATES.*—In the United States many of the states have statutes similar to the statute of Victoria, and where these statutes exist, it is plain that there can be no revival or republication of a revoked will by the mere revocation<sup>2</sup> of the revoking instrument.<sup>3</sup> In those states, however, which have no express statute on the subject of revival or republication, but rely on implications arising from statutes providing merely that a prior will may be revoked by a subsequent will, the authorities are not in harmony.<sup>3</sup>

**Subsequent Will Containing Express Clause of Revocation.**—Thus, some authorities hold that a will revoked by an express clause in a subsequent will is not revived or republished by the mere revocation of such subsequent will,<sup>4</sup> but that in order for it to take effect again as a will it must either be re-executed or there must be a duly executed codicil, or a duly executed subsequent writing adopting it.<sup>5</sup> The reason for this holding is that the revocatory clause operates immediately, notwithstanding the will which contains it is ambulatory until the death of the testator.<sup>6</sup> Other authorities hold that the revoked will is revived by the revocation of the subsequent will.<sup>7</sup> But the greater number of authorities follow the old ecclesiastical rule, that it is a question of intention to be collected from all the circumstances of the case, whether there is a revival of the earlier will, and that in the absence of affirmative evidence of such intent, there is no revival.<sup>8</sup>

**1. Victorian Statute Construed.**—*Brown v. Brown*, 8 El. & Bl. 876, 92 E. C. L. 876; *Hale v. Tokelove*, 2 Rob. Ecc. 318, 14 Jur. 817; *Boulcott v. Boulcott*, 2 Drew. 25; *Goods of Hodgkinson*, (1893) P. 339; *Major v. Williams*, 3 Curt. Ecc. 432; *Major v. Iles*, 7 Jur. 219.

**2. Statutes Similar to Statute of Victoria.**—*Matter of Lones*, 108 Cal. 688; *Kern v. Kern*, 154 Ind. 29; *Beaumont v. Keim*, 50 Mo. 28; *Rudisill v. Rodes*, 29 Gratt. (Va.) 148; *Francis v. Marsh*, 54 W. Va. 545.

In *New York* the statute provides that if after the making of any will the testator shall duly make and execute a second will, the destruction, cancellation, or revocation of such second will shall not revive the first will, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will, or unless after such destruction, canceling, or revocation he shall duly republish his first will. *Matter of Brewster*, 72 N. Y. App. Div. 587; *Matter of Barnes*, 70 N. Y. App. Div. 523; *Matter of Stickney*, 31 N. Y. App. Div. 382, *affirmed* 161 N. Y. 42.

**3. Authorities Not in Harmony.**—See *Pickens v. Davis*, 134 Mass. 252, for a review of the authorities.

**4. Earlier Will Not Revived.**—*Scott v. Fink*, 45 Mich. 241; *Wurzell v. Beckman*, 52 Mich. 478; *Cheever v. North*, 106 Mich. 393; *Dudley v. Gates*, 124 Mich. 440; *Bohanon v. Walcot*, 1 How. (Miss.) 336; *Hawes v. Nicholas*, 72 Tex. 481; *In re Noon*, 115 Wis. 299. See *Re Jacoby*, 28 Pittsb. Leg. J. N. S. (Pa.) 17.

**5. Re-execution Essential.**—*In re Noon*, 115 Wis. 299. See *In re Knapp*, (Surrogate Ct.) 23 N. Y. Supp. 282.

**6. Reason for the Holding.**—In *In re Noon*, 115 Wis. 299, the court says: "The operation of the revocatory clause is immediate and ab-

solute. It is an act done solemnly and deliberately for present effect, and not one contemplating that future circumstances are to determine whether it shall have force. \* \* \* The addition of the revocatory words is a mode of immediate cancellation of the former will, and renders it totally inoperative as a testamentary instrument."

**7. Earlier Will Revived.**—*Stetson v. Stetson*, 200 Ill. 601; *Randall v. Beatty*, 31 N. J. Eq. 643; *Taylor v. Taylor*, 2 Nott & M. (S. Car.) 482. See *Peck's Appeal*, 50 Conn. 562, *criticising* *James v. Marvin*, 3 Conn. 576.

**8. Revival of Earlier Will a Question of Intention.**—*Barksdale v. Hopkins*, 23 Ga. 332; *Harwell v. Lively*, 30 Ga. 315; *Colvin v. Warford*, 20 Md. 357; *Pickens v. Davis*, 134 Mass. 252; *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705; *Lane v. Hill*, 68 N. H. 275; *Re Gould*, 72 Vt. 316.

In *Pickens v. Davis*, 134 Mass. 256, the court, by Allen, J., said: "The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact we believe that this would comparatively

**Subsequent Will Containing Inconsistent Dispositions.** — Again, in some of the cases a distinction is drawn between a subsequent will whose provisions are inconsistent with the former will, thereby operating to effect a revocation by implication, and a subsequent will which contains a clause expressly revoking all former wills; and it is held that in the former instance a revocation of the subsequent will does not revive the earlier will, but that in the latter instance a revocation of the subsequent will does revive the earlier will.<sup>1</sup> In several states, however, this distinction is expressly held not to exist.<sup>2</sup>

c. **EFFECT OF REVIVAL OR REPUBLICATION** — (1) *In General.* — Revival or republication brings the will republished down to the date of republishing, and makes it speak as of that time,<sup>3</sup> with these exceptions, however, that republication does not revive a devise or bequest which has lapsed by the death of the devisee or legatee in the testator's lifetime,<sup>4</sup> nor does it revive legacies which have been adeemed or satisfied.<sup>5</sup>

seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of canceling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence."*Compare Williams v. Williams, 142 Mass. 515.*

1. **Distinction Between Express and Implied Revocation.** — *Scott v. Fink, 45 Mich. 241; Cheever v. North, 106 Mich. 393.* See *Peck's Appeal, 50 Conn. 562.* And see *Colvin v. Warford, 20 Md. 357; Pickens v. Davis, 134 Mass. 252; Flintham v. Bradford, 10 Pa. St. 82; McClure v. McClure, 86 Tenn. 174.*

In *Scott v. Fink, 45 Mich. 246*, the court, by Graves, J., said: "There seems to have been a material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. Being cut off before having its dispositions of property awakened into life, it could have no affirmative operation through its dispositions upon the estate. In the second case the written declaration is express and in plain terms immediate and absolute. It is a verbal act done solemnly and deliberately for present effect, and not an act contemplating that future circumstances are to determine whether after all it shall have any force. It is not a needful ingredient of the

will. That is perfect without it. The addition of it is a mode of immediate cancellation of prior wills, and quite as unequivocal and unambiguous as many others within the statute whose meaning is open to no controversy. It operates at once, and does not apply as a mere contingent caveat against the objects at which it is aimed. It revokes them without reserve or qualification. And in case the document with which it is connected is itself revoked, that fact can have no effect as a restoration and republication of former revoked wills."

2. **Distinction Not Recognized.** — *Stetson v. Stetson, 200 Ill. 609; Williams v. Miles, (Neb. 1903) 94 N. W. Rep. 705; Lane v. Hill, 68 N. H. 275.*

3. **Will Speaks as of Time When Republished** — *England.* — *Mountcashell v. Smyth, (1895) 1 Ir. 346.*

*United States.* — *Brownell v. De Wolf, 3 Mason (U. S.) 486.*

*Connecticut.* — *Luce v. Dimock, 1 Root (Conn.) 82.*

*Iowa.* — *In re Murfield, 74 Iowa 479.*

*Kentucky.* — *Davis v. Taul, 6 Dana (Ky.) 51; Armstrong v. Armstrong, 14 B. Mon. (Ky.) 269; Sharp v. Wallace, 83 Ky. 587.*

*Massachusetts.* — *Brimmer v. Sohler, 1 Cush. (Mass.) 118; Haven v. Foster, 14 Pick. (Mass.) 543.*

*Nebraska.* — *Hawke v. Euyart, 30 Neb. 149.*

*New Jersey.* — *Den v. Snowhill, 23 N. J. L. 447.*

*New York.* — *Van Kleeck v. Reformed Protestant Dutch Church, 20 Wend. (N. Y.) 457; Kip v. Van Cortlandt, 7 Hill (N. Y.) 346; Brown v. Clark, 77 N. Y. 370.*

*North Carolina.* — *Murray v. Oliver, 6 Ired. Eq. (41 N. Car.) 55.*

*Pennsylvania.* — *Coale v. Smith, 4 Pa. St. 376; Gilmore's Estate, 154 Pa. St. 523.*

*South Carolina.* — *Dunlap v. Dunlap, 4 Desaus. (S. Car.) 305.*

*Compare Ware v. People, 19 Ill. App. 196.*

4. **Lapsed Devises or Bequests Not Revived.** — *Drinkwater v. Falconer, 2 Ves. 626; Doe v. Kett, 4 T. R. 601.* See also *Campbell v. Jamison, 8 Pa. St. 408.* But compare *Perkins v. Micklethwaite, 1 P. Wms. 275.*

5. **Legacies Adeemed or Satisfied Not Revived.** — *Drinkwater v. Falconer, 2 Ves. 626; Powys v. Mansfield, 3 Myl. & C. 359; Ware v. People,*



(2) *After-acquired Property*. — Property acquired between the time of the publication of the will and its republication is included within the will as republished,<sup>1</sup> provided the words of the will are capable of comprehending it.<sup>2</sup>

(3) *Curing Defects* — (a) *In Execution of Will*. — Revival or republication of a revoked will cures defects in its execution.<sup>3</sup>

(b) *In Expression*. — But revival or republication of a will does not cure defects in expressions used therein.<sup>4</sup>

(4) *Prior Inconsistent Wills*. — Revival or republication revokes any will of date prior to that of the republication which is inconsistent with the republished will.<sup>5</sup>

(5) *Codicils in Will as Republished*. — If the will republished has codicils added to it, the *prima facie* presumption is that the testator intended to republish the will as amended by the codicils, and not otherwise.<sup>6</sup>

**2. Of Will of Married Woman.** — At common law, a married woman was unable to make a will. And, while the death of the husband would remove such disability,<sup>7</sup> yet such death would not of itself revive a will executed by the wife in his lifetime. In such a case, republication by the wife was necessary.<sup>8</sup> So, under a statute prohibiting a married woman from disposing of

19 Ill. App. 196; *Paine v. Parsons*, 14 Pick. (Mass.) 318; *Langdon v. Astor*, 16 N. Y. 57.

In *Powys v. Mansfield*, 3 Myl. & C. 376, Lord Cottenham said: "It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied."

**1. After-acquired Property** — *England*. — *Duppa v. Mayo*, 1 Saund. 277; *Powys v. Mansfield*, 3 Myl. & C. 376; *Neate v. Pickard*, 2 Notes Cas. (Eng.) 406; *Mynpenny v. Bristow*, 2 Russ. & M. 117.

*Georgia*. — *Jones v. Shewmaker*, 35 Ga. 151.

*Kentucky*. — *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390.

*Massachusetts*. — *Haven v. Foster*, 14 Pick. (Mass.) 540.

*New York*. — *Mooers v. White*, 6 Johns. Ch. (N. Y.) 375.

*North Carolina*. — *Den v. Maney*, 1 Murph. (5 N. Car.) 258.

*Pennsylvania*. — *Jack v. Shoenberger*, 22 Pa. St. 416.

See also *supra*, this title, *What May Be Devised or Bequeathed* — *After-acquired Property*.

**2.** *Haven v. Foster*, 14 Pick. (Mass.) 541. See *Mynpenny v. Bristow*, 2 Russ. & M. 117.

**3. Defects in Execution Cured.** — *In re* *Murfield*, 74 Iowa 479; *McCurdy v. Neall*, 42 N. J. Eq. 333. But see *Sharp v. Wallace*, 83 Ky. 584.

**4. Defects in Expressions Not Cured.** — *Lane v. Wilkins*, 10 East 241. See *Campbell v. Jamison*, 8 Pa. St. 499.

**5. Prior Inconsistent Will Revoked.** — *Serocold v. Heming*, 2 Lee Ecc. 490; *Walpole v. Orford*, 3 Ves. Jr. 402; *Walpole v. Cholmondeley*, 7 T. R. 138; *Rogers v. Pittis*, 1 Add. Ecc. 38.

**Revocation of Intermediate Will by Codicil Republishing Former.** — In *Rogers v. Pittis*, 1

Add. Ecc. 38, it was held that a codicil operates as the republication of that will to which it applies, and consequently as the revocation of any intermediate will. Sir John Nicholl said: "I apprehend it to be clearly settled that making a codicil to a will republishes that will — that a codicil, even of personality, if executed so as to act on the subject, that is, if attested by three witnesses, republishes a will of lands; so that a will of personality *a fortiori*, or a mixed will, so far as respects personality, is republished by a codicil, whether so attested or not. No evidence of intention to republish is requisite in either case; the very act of making the codicil, *prima facie* at least, infers the intention. It is true, indeed, that this *prima facie* inference may be rebutted by proof that the act was done by the deceased in error, or obtained from him by fraud. So the cancellation of a will may be shown to have taken place in error, or the execution of a new will to have been procured by fraud. *Prima facie* at least, however, the making of a codicil to a will as much republishes that will as a will is revoked, *prima facie*, by its cancellation, and as a new will, *prima facie*, annuls and makes void any will of a prior date. Secondly, the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to its own date, and makes it speak, as it were, at that time. In short, the will so republished is, to all intents and purposes, a new will. Consequently, upon the ordinary and universal principle that, of any number of wills, the last and newest is that in force, it revokes any will of a date prior to that of the republication."

**6. Codicils in Will as Republished.** — *Crosbie v. MacDoual*, 4 Ves. Jr. 610; *Bunny v. Bunny*, 3 Beav. 109; *Cartwright v. Shephard*, 17 Beav. 301; *Grand v. Reeve*, 11 Sim. 66. Compare *Alsop's Appeal*, 9 Pa. St. 374; *Wikoff's Appeal*, 15 Pa. St. 281.

**7.** See *supra*, this title, *Who May Make a Will* — *Married Women*.

**8. Republication Necessary After Death of Hus-**

her estate by will, a will made by a woman during her husband's lifetime was held properly admitted to probate upon evidence of due republication thereof after the death of the husband.<sup>1</sup> But where a married woman has made during the husband's life a valid will, either under statutory authority or with the consent of her husband, the death of the husband does not affect the validity of the will so as to require its republication.<sup>2</sup>

**XI. CONSTRUCTION — 1. General Rules of Interpretation — a. INTENTION OF TESTATOR — Statement of Rule.** — The fundamental and cardinal rule in the interpretation of wills is that the intention of the testator, if not inconsistent with some established rule of law or with public policy, must control, and it is the duty of the courts to ascertain such intention and to give force and effect to the scheme that he had in mind for the disposition of his estate.<sup>3</sup>

**band.** — *Scammell v. Wilkinson*, 2 East 552; *Willock v. Noble*, L. R. 7 H. L. 580; *Osgood v. Breed*, 12 Mass. 525. See also *Gregory v. Oates*, 92 Ky. 532.

**Sufficiency of Republication.** — In *Willock v. Noble*, L. R. 7 H. L. 580, Lord Chelmsford said: "If the validity of the will depended upon her husband's assent, and, as already shown, his dying in her lifetime prevented that assent from having any efficiency, Mrs. Dawes could not have given new life to the will without a republication, and that could not be without an execution of it with all the formalities required by law." But see *Miller v. Brown*, 2 Hag. Ecc. 209, holding that words and acts of a widow showing that she meant an instrument executed by her during coverture to be her will, amounted to a republication.

1. *Porter v. Ford*, 82 Ky. 191.

2. *Grimke v. Grimke*, 1 Desaus. (S. Car.) 366; *Thorndike v. Reynolds*, 22 Gratt. (Va.) 32.

**3. Intention of Testator — England.** — In *re Plant*, 47 W. R. 183; In *re Appleby*, (1903) 1 Ch. 565, 88 L. T. N. S. 219; *Law Union, etc., Ins. Co. v. Hill*, (1902) A. C. 263, affirming *Shuttleworth v. Murray*, (1900) 1 Ch. 795.

**Canada.** — In *re Waddell*, 35 Nova Scotia 435; In *re McDonald*, 35 Nova Scotia 500.

**United States.** — *Burwell v. Cowood*, 2 How. (U. S.) 560; *Lane v. Vick*, 3 How. (U. S.) 464; *Zeller v. Eckert*, 4 How. (U. S.) 289; *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 113; *Finlay v. King*, 3 Pet. (U. S.) 346; *Smith v. Bell*, 6 Pet. (U. S.) 68; *Waldron v. Chastaney*, 2 Blatchf. (U. S.) 62.

**Alabama.** — *Bell v. Hogan*, 1 Stew. (Ala.) 536; *Moore v. Dudley*, 2 Stew. (Ala.) 170; *Capal v. McMillan*, 8 Port. (Ala.) 197; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Thrasher v. Ingram*, 32 Ala. 646; *Barr v. Weaver*, 132 Ala. 216.

**California.** — *Matter of Fair*, 132 Cal. 523; *Matter of Willey*, 128 Cal. 1.

**Connecticut.** — *Holms v. Williams*, 1 Root (Conn.) 332; *Weed v. Scofield*, 73 Conn. 670; *Connecticut Trust, etc., Co. v. Hollister*, 74 Conn. 228.

**Georgia.** — *Hertz v. Abrahams*, 110 Ga. 707; *Sumpter v. Carter*, 115 Ga. 893.

**Illinois.** — *Crerar v. Williams*, 145 Ill. 625; *Greenwood v. Greenwood*, 178 Ill. 387; *Hubbard v. Hubbard*, 198 Ill. 621; *Penn v. Fogler*, 77 Ill. App. 365; *Randolph v. Hamilton*, 84 Ill. App. 399.

**Indiana.** — *Lutz v. Lutz*, 2 Blackf. (Ind.) 72; *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Baker v. Riley*, 16 Ind. 479.

**Iowa.** — *Johnson v. Mayne*, 4 Iowa 180; *Hambel v. Hambel*, (Iowa 1898) 75 N. W. Rep. 673; *Flynn v. Holman*, 119 Iowa 731.

**Kentucky.** — *Augustus v. Seabolt*, 3 Met. (Ky.) 155; *Maupin v. Goodloe*, 6 T. B. Mon. (Ky.) 399; *Atty.-Gen. v. Wallace*, 7 B. Mon. (Ky.) 611; *Bedford v. Bedford*, 99 Ky. 273; *McBrayer v. McBrayer*, 95 Ky. 475; *Dowell v. Workman*, 78 S. W. Rep. 857, 25 Ky. L. Rep. 1761; *Flournoy v. Flournoy*, 4 Bush (Ky.) 519; *Brown v. Brown*, 1 Dana (Ky.) 39; *Calmes v. Eubank*, (Ky. 1897) 40 S. W. Rep. 669; *Ross v. Barr*, (Ky. 1899) 53 S. W. Rep. 658.

**Louisiana.** — *Gueydan v. Montagne*, 109 La. 38; *Armorer v. Case*, 9 La. Ann. 288; *Thorame's Succession*, 12 La. Ann. 384; *Maguire v. Maguire*, 110 La. 279.

**Maine.** — *Tappan v. Deblois*, 45 Me. 122; *Elder v. Elder*, 50 Me. 535; *Page v. Marston*, 94 Me. 342; *Bradbury v. Jackson*, 97 Me. 449; *Wentworth v. Fernald*, 92 Me. 282.

**Maryland.** — *Bowly v. Lamont*, 3 Har. & J. (Md.) 4; *Siemer v. Siemer*, 2 Gill & J. (Md.) 100; *Stewart v. Pattison*, 8 Gill (Md.) 46; *Smith v. Donnell*, 9 Gill (Md.) 84; *Waters v. Waters*, 1 Md. Ch. 196; *Holmes v. Mitchell*, 4 Md. Ch. 162; *Zimmerman v. Hafer*, 81 Md. 347.

**Massachusetts.** — *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472; *Hayden v. Stoughton*, 5 Pick. (Mass.) 536; *Crocker v. Crocker*, 11 Pick. (Mass.) 257; *Lamb v. Lamb*, 11 Pick. (Mass.) 375; *Eliot v. Carter*, 12 Pick. (Mass.) 436; *Wright v. Barrett*, 13 Pick. (Mass.) 41; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Sawyer v. Baldwin*, 20 Pick. (Mass.) 378; *Richardson v. Noyes*, 2 Mass. 56; *Davis v. Hayden*, 9 Mass. 514; *Allen v. White*, 97 Mass. 504.

**Michigan.** — *Gregory v. Tompkins*, (Mich. 1903) 93 N. W. Rep. 245.

**Minnesota.** — *Brookhouse v. Pray*, (Minn. 1904) 100 N. W. Rep. 235.

**Mississippi.** — *Lucas v. Lockhart*, 10 Smed. & M. (Miss.) 466; *Sorsby v. Vance*, 36 Miss. 564.

**Missouri.** — *Austin v. Watts*, 19 Mo. 293; *Hall v. Howdeshell*, 33 Mo. 475; *Turney v. Sparks*, 88 Mo. App. 363; *White v. McCracken*, 87 Mo. App. 262.

**Nebraska.** — *St. James Orphan Asylum v. Shelby*, 60 Neb. 796; *Chick v. Ives*, (Neb. 1902) 90 N. W. Rep. 751.

The intention which controls is that which existed at the date of the will,<sup>1</sup> and that which is expressed in the language of the will, not which existed only in the testator's mind.<sup>2</sup> It is also the legal, not necessarily the actual.

*New Hampshire.*—Hall v. Chaffee, 14 N. H. 215; Adams v. Derry, 71 N. H. 544.

*New Jersey.*—Mullany v. Mullany, 4 N. J. Eq. 16; Brearley v. Brearley, 9 N. J. Eq. 21; Stokes v. Tilly, 9 N. J. Eq. 130; Sims v. Sims, 10 N. J. Eq. 158; Current v. Current, 11 N. J. Eq. 186; Den v. Crawford, 8 N. J. L. 90; Den v. Snitcher, 14 N. J. L. 53; Hadley v. Simmons, (N. J. 1901) 49 Atl. Rep. 816; Carter v. Gray, 58 N. J. Eq. 411.

*New York.*—Olmsted v. Harvey, 1 Barb. (N. Y.) 102; Lasher v. Lasher, 13 Barb. (N. Y.) 106; Dodge v. Dodge, 31 Barb. (N. Y.) 414; Cole v. Cole, 53 Barb. (N. Y.) 608; Jackson v. Wight, 3 Wend. (N. Y.) 109; Chapin v. Marvin, 12 Wend. (N. Y.) 538; Bradhurst v. Bradhurst, 1 Paige (N. Y.) 331; Crosby v. Wendell, 6 Paige (N. Y.) 548; Matter of James, 146 N. Y. 78; Jackson v. Jansen, 6 Johns. (N. Y.) 73; Morton v. Morton, 2 Edw. (N. Y.) 457; Mason v. Mason, 2 Sandf. Ch. (N. Y.) 433; Hafner v. Hafner, 62 N. Y. App. Div. 316, 171 N. Y. 633; Brown v. Quintard, 79 N. Y. App. Div. 635; Haug v. Schumacher, 50 N. Y. App. Div. 562, 166 N. Y. 506.

*North Carolina.*—Winder v. Smith, 2 Jones L. (47 N. Car.) 327; Lowe v. Carter, 2 Jones Eq. (55 N. Car.) 377; Bost v. Bost, 3 Jones Eq. (56 N. Car.) 484; Shepard v. Wright, 5 Jones Eq. (58 N. Car.) 20; Simpson v. Spence, 5 Jones Eq. (58 N. Car.) 208; Faribault v. Taylor, 5 Jones Eq. (58 N. Car.) 219; Gillis v. Harris, 6 Jones Eq. (59 N. Car.) 267; Hauser v. Craft, 134 N. Car. 319.

*Ohio.*—Decker v. Decker, 3 Ohio 157; Stevenson v. Evans, 10 Ohio St. 307; Ober v. Hickox, 10 Ohio Cir. Dec. 128.

*Pennsylvania.*—Belshoover v. Brandt, 18 Pa. St. 473; McKeen's Appeal, 42 Pa. St. 479; Campbell's Estate, 202 Pa. St. 459; Christy v. Christy, 162 Pa. St. 485; Shallcross's Estate, 9 Pa. Dist. 690; Bender's Appeal, 3 Grant Cas. (Pa.) 210; Plummer v. New York, etc., Coal Co., 5 Lack. Leg. N. (Pa.) 58; Thran v. Herzog, 12 Pa. Super. Ct. 551, 17 Lanc. L. Rev. 153; Muliken v. Earnshaw, (Pa. 1904) 58 Atl. Rep. 286.

*Rhode Island.*—Watson v. Woods, 3 R. I. 226.

*South Carolina.*—Guery v. Vernon, 1 Nott & M. (S. Car.) 69; Heyward v. Brailsford, 2 Bay (S. Car.) 255; Collin v. Green, 2 Mill (S. Car.) 346; M'Leomore v. Blocker, Harp. Eq. (S. Car.) 272; Ellis v. Woods, 9 Rich. Eq. (S. Car.) 19.

*Tennessee.*—Anderson v. McCullough, 3 Head (Tenn.) 614; Wirt v. Cannon, 4 Coldw. (Tenn.) 121; Rozell v. Thomas, (Tenn. Ch. 1896) 39 S. W. Rep. 350.

*Texas.*—Philleo v. Holliday, 24 Tex. 38.

*Utah.*—In re Campbell, (Utah 1904) 75 Pac. Rep. 851.

*Virginia.*—Reno v. Davis, 4 Hen. & M. (Va.) 283; Mooberry v. Marye, 2 Munf. (Va.) 453; Land v. Otley, 4 Rand. (Va.) 213; Wootton v. Redd, 12 Gratt. (Va.) 196.

*West Virginia.*—Furbee v. Furbee, 49 W. Va. 191; Collins v. Feather, 52 W. Va. 107.

*Wisconsin.*—In re Moran, 118 Wis. 177.

**Description Disregarded in Carrying Out Intention.**—In re Pope, (Minn. 1904) 97 N. W. Rep. 1046.

**Intention Not Affected by Error in Calculation.**—Wood v. Carpenter, 166 Mo. 465.

**Intention to Regard Unenforceable Claims as Valid Debts.**—Re Rowe, 77 L. T. N. S. 475.

**Statements as to Intention Corresponding with Will Made.**—Wombacher v. Barthelme, 194 Ill. 425.

**Direction to Pay Taxes on Bequest—Future Taxes Not Intended.**—Magee's Estate, 205 Pa. St. 37.

**Provision for Division of "Accumulation and Income"—Intention to Divide Principal.**—Hussey v. Sargent, (Ky. 1903) 75 S. W. Rep. 211.

**Clear Proof of Intention Necessary to Change Legal Effect.**—Houghteling v. Stockbridge, (Mich. 1904) 99 N. W. Rep. 759, 11 Detroit Leg. N. 100.

**Intention as to Payment of Specific Sum at All Events.**—Where a testator devised lands in trust to pay legatee a certain sum, after payment of taxes, and the income was insufficient to pay the legacy, it was held to be the testator's intention to pay the excess of the income over the taxes, but not in excess of the sum named. Hopkins v. Remy, 64 N. J. Eq. 12.

**1. Intention at Date of Will.**—Maupin v. Goodloe, 6 T. B. Mon. (Ky.) 399.

**2. Intention Expressed in Will Governs.**—England. — In re Plant, 47 W. R. 183.

*Canada.*—Maclean v. Henning, 33 Can. Sup. Ct. 305.

*Georgia.*—Hertz v. Abrahams, 110 Ga. 807.

*Illinois.*—Bingel v. Volz, 142 Ill. 214; McFarland v. McFarland, 177 Ill. 208; Engelthaler v. Engelthaler, 196 Ill. 230; Dearlove v. Otis, 99 Ill. App. 104; Gee v. Gee, 107 Ill. App. 313, affirmed 204 Ill. 588; Davis v. People, 111 Ill. App. 207.

*Indiana.*—Sturgis v. Work, 122 Ind. 134.

*Iowa.*—Huston v. Huston, 37 Iowa 668; Chambers v. Watson, 60 Iowa 339; Eckford v. Eckford, (Iowa 1892) 53 N. W. Rep. 345.

*Kentucky.*—Wade v. Dean, (Ky. 1897) 43 S. W. Rep. 441.

*Louisiana.*—Maguire v. Maguire, 110 La. 279.

*Maryland.*—Zimmerman v. Hafer, 81 Md. 347.

*Massachusetts.*—Child v. Child, 185 Mass. 376.

*Michigan.*—Kinney v. Kinney, 34 Mich. 250.

*Mississippi.*—Elliott v. Topp, 63 Miss. 138.

*New York.*—Mann v. Mann, 14 Johns. (N. Y.) 1.

*Pennsylvania.*—Hannes's Estate, 2 Pa. Dist. 21; Whitaker's Estate, 6 Pa. Dist. 140.

*Virginia.*—Harrison v. Haskins, 2 Patt. & H. (Va.) 388; Burke v. Lee, 76 Va. 386.

*West Virginia.*—Couch v. Eastham, 29 W. Va. 784.

*Wisconsin.*—In re Moran, 118 Wis. 177.

**Express Declaration as to Intent Unnecessary.**



intention which governs.<sup>1</sup>

**When Interpretation Not Needed.** — If the language of the will is free from doubt, and the intention of the testator is plainly and intelligibly expressed, there is no need, and the courts will refuse, to apply technical rules of construction.<sup>2</sup>

**Extrinsic Evidence of Intention.** — In case of a latent ambiguity in the will, extrinsic evidence of the testator's intention is admissible.<sup>3</sup>

**Unjust or Unreasonable Disposition.** — When a testator has made known his purposes in respect to his property by the use of plain and unambiguous language, though his purposes may seem unreasonable, unjust, or absurd to others, his will is its own expositor, and a law unto the courts, where it violates no principles of law or morality.<sup>4</sup>

**b. ENTIRE WILL TO BE CONSIDERED.** — In determining what was the intention of the testator, isolated statements or separate clauses and provisions must not be considered alone, but the courts must look at the entire instrument and compare all of its clauses and directions in order to arrive at its general plan and purpose.<sup>5</sup>

— In *Hughes v. Hughes*, 14 La. Ann. 85, it was held that an express declaration to effectuate a certain disposition is not necessary where the intention is apparent on the face of the will.

**1. Legality of Intention.** — *Smith v. Clark*, 10 Md. 186; *Martindale v. Warner*, 15 Pa. St. 471. See *Worthington v. McPherson*, 5 Gill (Md.) 51.

**2. When Interpretation Not Needed** — *Maine*. — *Bradbury v. Jackson*, 97 Me. 449.

*Minnesota*. — *Brookhouse v. Pray*, (Minn. 1904) 100 N. W. Rep. 235.

*New Jersey*. — *Burroughs v. Jamieson*, 62 N. J. Eq. 651.

*Ohio*. — *Brasher v. Marsh*, 15 Ohio St. 108. *Pennsylvania*. — *Still v. Spear*, 45 Pa. St. 170; *Thran v. Herzog*, 12 Pa. Super. Ct. 551, 17 Lanc. L. Rev. 153.

*South Carolina*. — *Carr v. Jeanneret*, 2 McCord L. (S. Car.) 66.

*Virginia*. — *Tebbs v. Duval*, 17 Gratt. (Va.) 349; *Emory, etc., College v. Shoemaker College*, 92 Va. 320.

*Wisconsin*. — *Holmes v. Walter*, 118 Wis. 409.

*Canada*. — *In re Waddell*, 35 Nova Scotia 435.

In *Still v. Spear*, 45 Pa. St. 170, *Strong, J.*, said rules of interpretation were "only applicable in cases of doubtful construction. They are never allowed to defeat a plain intent expressed."

In *Tebbs v. Duval*, 17 Gratt. (Va.) 349, *Joynes, J.*, in delivering the opinion of the court said: "Where a will affords no satisfactory clue to the intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and the rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no application where the intention thus appears."

**3. See *infra*, this section, *Parol Evidence in Aid of Construction* — *In General*.** See also the title *AMBIGUITY*, vol. 2, p. 206.

**4. Unjust or Unreasonable Disposition.** — *Jackson v. Hoover*, 26 Ind. 511; *In re Townsend*, (Iowa 1904) 97 N. W. Rep. 1108; *Elliott v. Topp*, 63 Miss. 138; *Brearily v. Brearily*, 9

N. J. Eq. 21; *Bacot v. Wetmore*, 17 N. J. Eq. 250; *Marshall v. Hadley*, 50 N. J. Eq. 547; *Matter of Cruger*, (Surrogate Ct.) 36 Misc. (N. Y.) 477; *Matter of Eddy*, (Surrogate Ct.) 41 Misc. (N. Y.) 283; *Lewis's Estate*, 152 Pa. St. 477.

**Presumption Against Discrimination.** — *Willcox v. Beecher*, 27 Conn. 134.

**5. Entire Will to Be Considered** — *England*. — *Law Union, etc., Ins. Co. v. Hill*, (1902) A. C. 263, affirming *Shuttleworth v. Murray*, (1900) 1 Ch. 795; *Strong v. Cummin*, 2 Burr. 770.

*Canada*. — *In re McDonald*, 35 Nova Scotia 500; *Travers v. Roman Catholic Bishop*, 2 N. Bruns. Eq. Rep. 372.

*United States*. — *Lane v. Vick*, 3 How. (U. S.) 464.

*Alabama*. — *Leavans v. Butler*, 8 Port. (Ala.) 380; *Moore v. Dudley*, 2 Stew. (Ala.) 170; *Palmer v. Benson*, 19 Ala. 594; *Thrasher v. Ingram*, 32 Ala. 646; *Coleman v. Camp*, 36 Ala. 159.

*Arkansas*. — *Campbell v. Campbell*, 13 Ark. 513.

*Connecticut*. — *Gold v. Judson*, 21 Conn. 616; *Minor v. Ferris*, 22 Conn. 371; *Colt v. Colt*, 32 Conn. 422; *Loomer v. Loomer*, 76 Conn. 522.

*District of Columbia*. — *McCaffrey v. Manogue*, 22 App. Cas. (D. C.) 385.

*Georgia*. — *Cook v. Weaver*, 12 Ga. 47; *Hunter v. Stenbridge*, 12 Ga. 192; *Bivins v. Crawford*, 26 Ga. 225.

*Illinois*. — *Griffiths v. Griffiths*, 198 Ill. 632; *Biggerstaff v. Van Pelt*, 207 Ill. 611; *Randolph v. Hamilton*, 84 Ill. App. 399; *Primm v. Primm*, 111 Ill. App. 211.

*Indiana*. — *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Baker v. Riley*, 16 Ind. 479; *Wing v. Mix*, 17 Ind. 344; *Jackson v. Hoover*, 26 Ind. 511.

*Iowa*. — *Johnson v. Mayne*, 4 Iowa 180.

*Kentucky*. — *Brown v. Brown*, 1 Dana (Ky.) 39; *Turner v. Patterson*, 5 Dana (Ky.) 292; *Logan v. Moore*, 7 Dana (Ky.) 80; *Milner v. Calvert*, 1 Met. (Ky.) 472; *Augustus v. Seabolt*, 3 Met. (Ky.) 155; *Dunlap v. Shreve*, 2 Duv. (Ky.) 334; *Bedford v. Bedford*, 99 Ky. 273.

*Louisiana*. — *Clark v. Preston*, 2 La. Ann. 581; *Boone's Succession*, 7 La. Ann. 127; *Lebeau v. Trudeau*, 10 La. Ann. 164.

**Introductory Clause.** — Although the introductory clause of a will does not operate to dispose of any property, yet it may be considered in order to ascertain the testator's intention, where another clause is not clear.<sup>1</sup>

**Revoked Clause.** — So a clause afterwards revoked by codicil may nevertheless be considered with reference to the testator's intention.<sup>2</sup>

**Void Clause.** — And it seems that a clause which is void for the purpose of passing an estate may operate to show what was the intention of the testator.<sup>3</sup>

**c. WILL TO BE GIVEN EFFECT AS A WHOLE.** — A will should be so construed as to give effect to every word and every part thereof without change or rejection, and the several clauses should be made to harmonize, and effect given to all, provided the effect is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument.<sup>4</sup>

*Maine.* — *Orr v. Moses*, 52 Me. 287.

*Maryland.* — *Bowly v. Lammt*, 3 Har. & J. (Md.) 4; *Levering v. Levering*, 14 Md. 30; *Smithers v. Jackson*, 23 Md. 273.

*Massachusetts.* — *Lamb v. Lamb*, 11 Pick. (Mass.) 375; *Wright v. Barrett*, 13 Pick. (Mass.) 41; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Sawyer v. Baldwin*, 20 Pick. (Mass.) 378; *Cook v. Holmes*, 11 Mass. 528; *Quincy v. Atty-Gen.*, 160 Mass. 431; *Dana v. Dana*, 185 Mass. 156; *Powers v. Rafferty*, 184 Mass. 85; *Child v. Child*, 185 Mass. 376.

*Minnesota.* — *Yates v. Shern*, 84 Minn. 161.

*Mississippi.* — *Sorsby v. Vance*, 36 Miss. 564.

*Missouri.* — *Turney v. Sparks*, 88 Mo. App. 363; *Hurst v. Von de Veld*, 158 Mo. 239.

*Nebraska.* — *Chick v. Ives*, (Neb. 1902) 90 N. W. Rep. 751.

*New Jersey.* — *Pennington v. Van Houten*, 8 N. J. Eq. 272; *Tuttle v. Howell*, 17 N. J. Eq. 176; *Wiggins v. Wiggins*, (N. J. 1903) 56 Atl. Rep. 148.

*New York.* — *Benjamin v. Welch*, 73 Hun (N. Y.) 371; *Bundy v. Bundy*, 47 Barb. (N. Y.) 135; *Hoxie v. Hoxie*, 7 Paige (N. Y.) 187; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Haug v. Schumacher*, 166 N. Y. 506.

*North Carolina.* — *Alston v. Branch*, 1 Murph. (5 N. Car.) 356; *Alexander v. Alexander*, 6 Ired. Eq. (41 N. Car.) 229; *Sherrill v. Echard*, 7 Ired. L. (29 N. Car.) 161; *Lawrence v. Mitchell*, 3 Jones L. (48 N. Car.) 190; *Patton v. Patton*, 2 Jones Eq. (55 N. Car.) 494; *Coakley v. Daniel*, 4 Jones Eq. (57 N. Car.) 89; *Jenkins v. Hall*, 4 Jones Eq. (57 N. Car.) 334; *Scales v. Scales*, 6 Jones Eq. (59 N. Car.) 163; *Mitchener v. Atkinson*, 63 N. Car. 585; *Hauser v. Craft*, 134 N. Car. 319.

*Ohio.* — *Young v. M'Intire*, 3 Ohio 502; *Stevenson v. Evans*, 10 Ohio St. 307; *Starling v. Price*, 16 Ohio St. 29.

*Pennsylvania.* — *Zimmerman v. Anders*, 6 W. & S. (Pa.) 220; *Mütter's Estate*, 38 Pa. St. 314; *Shreiner's Appeal*, 53 Pa. St. 106; *Grove's Estate*, 58 Pa. St. 429; *Thomson's Appeal*, 89 Pa. St. 36; *Miller's Appeal*, 113 Pa. St. 459; *Baker's Appeal*, 115 Pa. St. 590; *In re Moran*, 13 Pa. Super. Ct. 251; *Dalrymple's Estate*, 13 Pa. Super. Ct. 289; *Whitaker's Estate*, 6 Pa. Dist. 140.

*South Carolina.* — *Garrett v. Garrett*, 1 Strobb. Eq. (S. Car.) 96; *Dill v. Dill*, 1 Desaus. (S. Car.) 241; *Ewing v. Ewing*, 2 Desaus. (S. Car.) 451.

*Tennessee.* — *Jarnagin v. Conway*, 2 Humph. (Tenn.) 50; *Wirt v. Cannon*, 4 Coldw. (Tenn.)

121; *Rozell v. Thomas*, (Tenn. Ch. 1896) 39 S. W. Rep. 350.

*Virginia.* — *Parker v. Wasley*, 9 Gratt. (Va.) 477; *Cheshire v. Purcell*, 11 Gratt. (Va.) 771; *Selden v. King*, 2 Call (Va.) 72; *Hopkins v. Graff*, 101 Va. 377.

*West Virginia.* — *Rutter v. Anderson*, 48 W. Va. 215.

"The testator's meaning," said Lord Mansfield, in *Strong v. Cummin*, 2 Burr. 770, "must be collected from the will itself, by attending to the several parts of it, and comparing and considering them together."

**1. Introductory Words May Be Considered.** — *Meyer v. Rusterholtz*, 23 Ind. App. 569; *Bourke v. Boone*, 94 Md. 472; *Schrivier v. Meyer*, 19 Pa. St. 87.

**2. Revoked Clause May Be Considered.** — *Colt v. Colt*, 32 Conn. 422; *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 591.

**3. Inoperative Clause May Be Considered.** — *Van Kleeck v. Reformed Protestant Dutch Church*, 20 Wend. (N. Y.) 457. See also *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 591. But compare *Warley v. Warley*, *Bailey Eq.* (S. Car.) 397.

**4. Effect Given to Will as a Whole** — *England.* — *Strong v. Cummin*, 2 Burr. 770.

*United States.* — *Wright v. Denn*, 10 Wheat. (U. S.) 239.

*Alabama.* — *Moore v. Dudley*, 2 Stew. (Ala.) 170; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Thrasher v. Ingram*, 32 Ala. 645; *Vandiver v. Vandiver*, 115 Ala. 328.

*California.* — *Matter of Upham*, 127 Cal. 90; *Matter of Granniss*, 142 Cal. 1.

*Connecticut.* — *Colt v. Colt*, 32 Conn. 422.

*Hawaii.* — *Paaluhi v. Keliiahaleole*, 11 Hawaii 103.

*Illinois.* — *Jones v. Doe*, 2 Ill. 276; *Greenwood v. Greenwood*, 178 Ill. 387; *Griffiths v. Griffiths*, 198 Ill. 632; *Turner v. Hause*, 199 Ill. 464; *Thompson v. Adams*, 205 Ill. 552; *Randolph v. Hamilton*, 84 Ill. App. 399; *Huff v. Browning*, 96 Ill. App. 612; *Hubbard v. Hubbard*, 99 Ill. App. 555, *affirmed* 198 Ill. 621; *Primm v. Primm*, 111 Ill. App. 244.

*Indiana.* — *Cameron v. Parish*, 155 Ind. 329.

*Kansas.* — *Ernst v. Foster*, 58 Kan. 438.

*Kentucky.* — *McCasland v. Martin*, 4 Bush (Ky.) 198; *Bedford v. Bedford*, 99 Ky. 273; *Harvey v. Bell*, (Ky. 1904) 81 S. W. Rep. 671.

*Louisiana.* — *Gueydan v. Montagne*, 109 La. 38.

*Maryland.* — *Bowly v. Lammt*, 3 Har. & J. (Md.) 4; *Pue v. Pue*, 1 Md. Ch. 382.

*d. WILL AND CODICIL TO BE CONSTRUED TOGETHER.* — In construing a will and codicil, or separate codicils, it is a clear and settled rule that they are to be taken and construed together, in connection with each other, as parts of one and the same instrument, and the codicils shall not be taken to vary or modify the will unless such was the manifest intention of the testator.<sup>1</sup>

*e. EFFECT OF VOID CLAUSE.* — Where effect cannot be given to the whole will, or to an entire provision thereof, consistently with the rules of law, any part of it which is conformable to such rules will be upheld, if it can be separated from the rest of the will without violating the testator's general intent; but if such void clause is so connected with the general scheme of the testator that it cannot be consistently separated and disconnected therefrom, the whole will or provision is thereby invalidated.<sup>2</sup>

*Massachusetts.* — *Dawes v. Swan*, 4 Mass. 208; *Parsons v. Winslow*, 6 Mass. 169; *Gallison v. Quinn*, 183 Mass. 241.

*Michigan.* — *Gregory v. Tompkins*, (Mich. 1903) 93 N. W. Rep. 245.

*New Hampshire.* — *Hall v. Blodgett*, 70 N. H. 437.

*New York.* — *Matter of Bogart*, 43 N. Y. App. Div. 582; *Trunkay v. Van Sant*, 176 N. Y. 535, reversing 83 N. Y. App. Div. 272.

*North Carolina.* — *Winder v. Smith*, 2 Jones L. (47 N. Car.) 331; *Owen v. Owen*, Busb. Eq. (45 N. Car.) 121; *Cheeves v. Bell*, 1 Jones Eq. (54 N. Car.) 234; *Edens v. Williams*, 3 Murph. (7 N. Car.) 27; *Dalton v. Scales*, 2 Ired. Eq. (37 N. Car.) 523.

*Ohio.* — *James v. Pruden*, 14 Ohio St. 254.

*Pennsylvania.* — *Mutter's Estate*, 38 Pa. St. 315; *Shreiner's Appeal*, 53 Pa. St. 106; *Phillip's Estate*, 205 Pa. St. 504; *Kelly's Estate*, 7 Pa. Dist. 750.

*Rhode Island.* — *In re Willis*, 25 R. I. 332.

*South Carolina.* — *Dill v. Dill*, 1 Desaus. (S. Car.) 237.

*Tennessee.* — *Duncan v. Philips*, 3 Head (Tenn.) 415; *Hale v. Hale*, 99 Tenn. 532.

*Virginia.* — *Hopkins v. Graff*, 101 Va. 377.

*West Virginia.* — *Furbee v. Furbee*, 49 W. Va. 191.

**Two Clauses Making Same Provision Regarded as Unintentional Repetition.** — *Thompson v. Betts*, 74 Conn. 576; *Waters v. Hatch*, 181 Mo. 262; *Dickinson v. Overton*, 57 N. J. Eq. 26.

**Residuary Clauses Treated as Such Regardless of Position.** — *In re McKee*, 17 Pa. Co. Ct. 548, 43 Pittsb. Leg. J. N. S. (Pa.) 385.

**Provision Restricted to Clause in Which It Appears.** — *Connecticut Trust, etc., Deposit Co. v. Chase*, 75 Conn. 683.

**1. Will and Codicil to Be Construed Together** — *England.* — *In re Jaques*, (1903) 1 Ch. 267.

*United States.* — *Home for Incurables v. Noble*, 172 U. S. 383.

*Alabama.* — *Leavens v. Butler*, 8 Port. (Ala.) 380; *Kenan v. Graham*, 135 Ala. 585.

*California.* — *Matter of Scott*, 141 Cal. 485.

*Connecticut.* — *Colt v. Colt*, 32 Conn. 422.

*Illinois.* — *Ellis v. Dick*, 165 Ill. 637; *Minkler v. Simons*, 172 Ill. 323; *Hubbard v. Hubbard*, 99 Ill. App. 555, affirmed 198 Ill. 621.

*Iowa.* — *Matter of Newcomb*, 98 Iowa 175.

*Kentucky.* — *Bedford v. Bedford*, 99 Ky. 273.

*Maryland.* — *Boyle v. Parker*, 3 Md. Ch. 42; *Buchanan v. Lloyd*, 88 Md. 642.

*Massachusetts.* — *Gray v. Sherman*, 5 Allen (Mass.) 198; *Pendergast v. Tibbetts*, 164 Mass.

270; *Dunbar v. Dunbar*, 181 Mass. 236; *Chase v. Chase*, 173 Mass. 483.

*Michigan.* — *Dexter v. Gordon*, (Mich. 1904) 98 N. W. Rep. 1016, 10 Detroit Leg. N. 1026.

*New Hampshire.* — *Stratton v. Stratton*, 68 N. H. 582.

*New Jersey.* — *Lyon v. Clawson*, 56 N. J. Eq. 642, affirmed (N. J. 1899) 43 Atl. Rep. 1098; *Dickinson v. Overton*, 57 N. J. Eq. 26.

*New York.* — *Howland v. Union Theological Seminary*, 5 N. Y. 194; *Smith v. Chesebrough*, 176 N. Y. 317; *Southgate v. Continental Trust Co.*, 176 N. Y. 588, affirming (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415; *Herzog v. Title Guarantee, etc., Co.*, 177 N. Y. 86; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 343; *Matter of Manning*, 50 N. Y. App. Div. 407; *Cooper v. Heatherton*, 65 N. Y. App. Div. 561.

*Ohio.* — *Ober v. Hickox*, 10 Ohio Cir. Dec. 128, 19 Ohio Cir. Ct. 42.

*Pennsylvania.* — *Weiser v. Zeigler*, 192 Pa. St. 394; *In re Murbach*, 45 Pittsb. Leg. J. (Pa.) 100; *In re White*, 29 Pittsb. Leg. J. N. S. (Pa.) 37.

*South Carolina.* — *Vaughan v. Bridges*, 61 S. Car. 155.

*Tennessee.* — *Ward v. Saunders*, 2 Swan (Tenn.) 174; *McKee v. McKee*, (Tenn. Ch. 1899) 52 S. W. Rep. 320.

*Vermont.* — *Lyman v. Morse*, 69 Vt. 325.

*Washington.* — *Hunt v. Hunt*, 18 Wash. 14.

*Wisconsin.* — *Lawrence v. Barber*, 116 Wis. 294.

See also the title **CODICILS**, vol. 6, p. 179.

**A Codicil, Which in No Way Affects a Clause in a will, has no bearing upon it as to a proper construction thereof.** *Neal v. Hodges*, (Tenn. Ch. 1898) 48 S. W. Rep. 263.

**A Codicil Unattested and Inoperative** cannot be looked to in order to ascertain the intention of the testatrix in the use of the terms employed by her in the residuary clause of the will. *Crenshaw v. McCormick*, 19 App. Cas. (D. C.) 494.

**Substantial Legacies in Codicil.** — *Gould v. Chamberlain*, 184 Mass. 115.

**Codicil Confirming Will "Except as Herein Changed."** — *Kelley v. Snow*, 185 Mass. 288.

**Codicil Revoking Legacy Does Not Revoke Legatee's Interest in Residue.** — *In re White*, 29 Pittsb. Leg. J. N. S. (Pa.) 37.

**2. Effect of Void Clause** — *California.* — *Matter of Fair*, 132 Cal. 523, reversing 60 Pac. Rep. 453; *Matter of Pichoir*, 139 Cal. 682.

*Connecticut.* — *Ketchum v. Corse*, 65 Conn. 85.



*f. SURROUNDING FACTS AND CIRCUMSTANCES TO BE CONSIDERED.*—In endeavoring to construe a will so as to ascertain the intention of the testator, the courts will put themselves as far as possible in the position of the testator by taking into consideration his modes of thought and the circumstances surrounding him at the time of the execution of the will.<sup>1</sup> Thus, the

*Georgia.*—Cobb *v.* Battle, 34 Ga. 458.  
*Illinois.*—Lawrence *v.* Smith, 163 Ill. 149;  
 Eldred *v.* Meek, 183 Ill. 26.  
*Indiana.*—Murphey *v.* Brown, 159 Ind. 106;  
 Phillips *v.* Heldt, (Ind. 1904) 71 N. E. Rep. 520.

*Iowa.*—Miller *v.* Chittenden, 4 Iowa 252.  
*Kentucky.*—Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611; Johnson *v.* Johnson, (Ky. 1904) 79 S. W. Rep. 293.

*Louisiana.*—May's Succession, 109 La. 994;  
 Kernan's Succession, 52 La. Ann. 48; Dufour *v.* Deresheid, 110 La. 344.

*Maine.*—Andrews *v.* Lincoln, 95 Me. 541.  
*Michigan.*—Dean *v.* Mumford, 102 Mich. 510; Niles *v.* Mason, 126 Mich. 482.

*Nebraska.*—McClary *v.* Stull, 44 Neb. 175.

*New York.*—Parks *v.* Parks, 9 Paige (N. Y.) 107; De Kay *v.* Irving, 5 Den. (N. Y.) 646; Lang *v.* Ropke, 5 Sandf. (N. Y.) 363; Tucker *v.* Tucker, 5 Barb. (N. Y.) 99; Sanford *v.* Goodell, 82 Hun (N. Y.) 369; Harris *v.* Clark, 7 N. Y. 242; Williams *v.* Williams, 8 N. Y. 525; Savage *v.* Burnham, 17 N. Y. 561; Oxley *v.* Lane, 35 N. Y. 340; Hascall *v.* King, 162 N. Y. 134; Kalish *v.* Kalish, 166 N. Y. 368; Hafner *v.* Hafner, 171 N. Y. 633; Brown *v.* Quintard, 177 N. Y. 75; Haxtum *v.* Corse, 2 Barb. Ch. (N. Y.) 506; Mullins *v.* Mullins, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 463; Brandt *v.* Brandt, (N. Y. Super. Ct. Eq. T.) 13 Misc. (N. Y.) 431; Finch *v.* Wilkes, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 428; Becker *v.* Becker, 13 N. Y. App. Div. 342; Dunklee *v.* Butler, 38 N. Y. App. Div. 99; Franklin *v.* Minertzhagen, 39 N. Y. App. Div. 555; Haug *v.* Schumacher, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 671; Brown *v.* Brown, 54 N. Y. App. Div. 6; Mansbach *v.* New, 58 N. Y. App. Div. 191; U. S. Trust Co. *v.* Maresi, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 539; Siefke *v.* Siefke, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 77; Hafner *v.* Hafner, 62 N. Y. App. Div. 316; Matter *v.* Murray, 75 N. Y. App. Div. 246; Mendel *v.* Levis, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 271; Denison *v.* Denison, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 295; Leetson *v.* Stoops, 91 N. Y. App. Div. 185.

*Ohio.*—Albery *v.* Sessions, 3 Ohio Dec. 330.  
*Pennsylvania.*—Gerber's Estate, 196 Pa. St. 366; Forsythe's Estate, 30 Pittsb. Leg. J. N. S. (Pa.) 73.

**Void Clause Independent of Others.**—Mansbach *v.* New, 170 N. Y. 585, *affirming* 58 N. Y. App. Div. 191.

**Void Clause Accessory to Principal Devise.**—Bourhaus *v.* Cole, 94 Wis. 617.

**Void Clause Not Primary Object.**—Morris *v.* Bolles, 65 Conn. 45.

**Void Provision Relating to Distribution of Income.**—Chilcott *v.* Hart, 23 Colo. 40.

**Valid Power of Sale Not Connected with Void Trust.**—Lindo *v.* Murray, 157 N. Y. 697.

**Void Clause Permissive and in Nature of Condi-**

**tion Subsequent.**—Phillips *v.* Harrow, 93 Iowa 92.

**Void Limitation to Grandchildren Not Dependent on Limitation to Collateral Heirs.**—Nevitt *v.* Woodburn, 190 Ill. 283, *reversing* 82 Ill. App. 649.

**Present Devise Invalid Where Remainder Fails.**—Tweddell *v.* New York L. Ins. Co., 166 N. Y. 608, *affirming* 49 N. Y. App. Div. 258.

**Contingent Remainder in Double Aspect — Invalidity of First Remainder Does Not Affect Validity of Second Remainder.**—Thresher's Appeal, 74 Conn. 40.

**Wills Relating to Emancipation of Slaves.**—Pinckard *v.* McCoy, 22 Ga. 28; Bivins *v.* Crawford, 26 Ga. 225; Jolliffe *v.* Fanning, 10 Rich. L. (S. Car.) 186.

**Repugnant Clauses.**—If a clause is void it cannot operate to destroy a subsequent clause merely because the latter is repugnant to the former. Greenwood *v.* Greenwood, 178 Ill. 387.

**1. Surrounding Facts and Circumstances to Be Considered — United States.**—Wilkins *v.* Allen, 18 How. (U. S.) 385; Danbridge *v.* Washington, 2 Pet. (U. S.) 370; Patch *v.* White, 117 U. S. 210; Canfield *v.* Canfield, (C. C. A.) 118 Fed. Rep. 5.

*Alabama.*—Moore *v.* Moore, 18 Ala. 242.  
*Connecticut.*—Bond's Appeal, 31 Conn. 183.

*Georgia.*—Sumpter *v.* Carter, 115 Ga. 893.  
*Illinois.*—Dearlove *v.* Otis, 99 Ill. App. 99.

*Indiana.*—Price *v.* Price, 89 Ind. 90; Black *v.* Richards, 95 Ind. 184; Daugherty *v.* Rogers, 119 Ind. 254; Whiteman *v.* Whiteman, 152 Ind. 263.

*Kansas.*—Ernst *v.* Foster, 58 Kan. 438.  
*Louisiana.*—Thorame's Succession, 12 La. Ann. 384.

*Maine.*—Bradbury *v.* Jackson, 97 Me. 449.  
*Massachusetts.*—Lamb *v.* Lamb, 11 Pick. (Mass.) 375; Smith *v.* Wells, 7 Met. (Mass.) 240; Popkin *v.* Sargent, 10 Cush. (Mass.) 327.

*Missouri.*—Records *v.* Fields, 155 Mo. 321;  
 Hurst *v.* Von de Veld, 158 Mo. 239.

*New Jersey.*—White *v.* Olden, 4 N. J. Eq. 343; Snyder *v.* Warbasse, 11 N. J. Eq. 466;  
 Leigh *v.* Savidge, 14 N. J. Eq. 124.

*New Hampshire.*—Stratton *v.* Stratton, 68 N. H. 582.

*New York.*—Wolfe *v.* Van Nostrand, 2 N. Y. 436.

*North Carolina.*—Lawrence *v.* Mitchell, 3 Jones L. (48 N. Car.) 190; Barham *v.* Gregory, Phil. Eq. (62 N. Car.) 243; Lassiter *v.* Wood, 63 N. Car. 360; Mitchener *v.* Atkinson, 63 N. Car. 585; Edens *v.* Williams, 3 Murph. (7 N. Car.) 27.

*Ohio.*—Jewett *v.* Jewett, 12 Ohio Cir. Dec. 131, 21 Ohio Cir. Ct. 278; Starling *v.* Price, 16 Ohio St. 29.

*Pennsylvania.*—Boudinot *v.* Bradford, 2 Yeates (Pa.) 170; Eyster *v.* Young, 3 Yeates (Pa.) 511; Hutchinson's Appeal, 47 Pa. St. 84.

*Rhode Island.*—Perry *v.* Hunter, 2 R. I. 80.

courts will consider the condition of his family and estate,<sup>1</sup> the comparative amounts of realty and personalty,<sup>2</sup> his affection for the legatees,<sup>3</sup> his social relations,<sup>4</sup> the mode of life in which his family have been reared, and the means provided by him in his lifetime for their culture and happiness.<sup>5</sup>

**Parol Evidence.** — In arriving at the facts and circumstances which surrounded the testator parol evidence may be resorted to in order to establish their existence.<sup>6</sup>

**Change of Circumstances After Will.** Where the intention of the testator is plain, the fact that his estate increased largely after the date of the will, has no effect upon its interpretation;<sup>7</sup> but when on account of unforeseen and unexpected circumstances it becomes impossible to carry out the literal intention of the testator, the court will approximate the scheme enunciated as far as possible.<sup>8</sup>

**g. CONSTRUCTION IN FAVOR OF WILL.** — When a will fairly construed is susceptible of two constructions, one of which would render it inoperative and the other give effect to it, the duty of the court is to adopt the latter construction.<sup>9</sup> Thus, where one construction is consistent and another construction is inconsistent with the law, the former must prevail and the will be declared valid.<sup>10</sup>

*Vermont.* — *Wells v. Wells*, 37 Vt. 483; *Clark v. Peck*, 41 Vt. 145.

*Virginia.* — *Hooe v. Hooe*, 13 Gratt. (Va.) 245; *Rhett v. Mason*, 18 Gratt. (Va.) 541.

*Canada.* — *Travers v. Roman Catholic Bishop*, 2 N. Bruns. Eq. Rep. 372.

In *Gannaway v. Tarpley*, 1 Coldw. (Tenn.) 572, Caruthers, J., said: "The rule that the intention of the testator must be collected from the will itself, and not elsewhere, or by parol evidence, except in cases of latent ambiguity, does not forbid a reference to the state of facts under which the will was made; but an investigation of the surrounding circumstances often tends to illustrate the true intention and meaning of the testator."

**Statutory Provision — California.** — *Matter of Langdon*, 129 Cal. 451.

**Independent Agreement with Beneficiary Considered.** — *George v. George*, (Mass. 1904) 71 N. E. Rep. 85.

"Home and Residence" held, under the circumstances, to include the whole farm. *Graham v. Heidrick*, 204 Pa. St. 238.

**1. Testator's Family and Estate Considered.** — *McLeod v. McDonnell*, 6 Ala. 236; *Greenwood v. Greenwood*, 178 Ill. 387; *Dana v. Dana*, 185 Mass. 156; *Stratton v. Stratton*, 68 N. H. 582; *Wiggins v. Wiggins*, (N. J. 1903) 56 Atl. Rep. 148; *Lassiter v. Wood*, 63 N. Car. 360; *Perry v. Hunter*, 2 R. I. 80; *Blackmore v. Blackmore*, 3 Sneed (Tenn.) 365.

**2. Adamson v. Ayres**, 5 N. J. Eq. 353.

**3. Affection for Legatees.** — *Smith v. Bell*, 6 Pet. (U. S.) 68; *Hurst v. Von de Veld*, 158 Mo. 239.

**4. Wiggins v. Wiggins**, (N. J. 1903) 46 Atl. Rep. 148.

**5. Dana v. Dana**, 185 Mass. 156.

**6. See infra**, this section, *Parol Evidence in Aid of Construction — Surrounding Facts and Circumstances*.

**7. Effect of Increase of Estate.** — *Ogilvie v. Ogilvie*, 21 Quebec Super. Ct. 130.

**8. Literal Administration Impossible.** — *Wilke v. Woolley*, 81 Ga. 106. See also *Lane v. Albertson*, 78 N. Y. App. Div. 607.

**9. Construction in Favor of Will.** — *Chaman v. Brown*, 3 Burr. 1626; *Young Women's Christian Home v. French*, 187 U. S. 401; *Wilson v. Hays*, 109 Ky. 321; *Goodwin v. Coddingtton*, 154 N. Y. 283; *Matter of James*, 20 Hun (N. Y.) 371; *Banning v. Banning*, 12 Ohio St. 437; *Charch v. Charch*, 57 Ohio St. 561; *Silk v. Merry*, 23 Ohio Cir. Ct. 218; *In re Williamson*, 8 Ohio Dec. 47, 6 Ohio N. P. 79; *Moore v. Powell*, 95 Va. 258; *Holmes v. Walter*, 118 Wis. 409. See *Vandiver v. Vandiver*, 115 Ala. 328.

In *Den v. Crawford*, 8 N. J. L. 97, Ewing, C. J., in giving the opinion of the court said: "It is only when a reasonable construction and the discovery of the intent of the testator are utterly hopeless that all effect should be denied to a will."

**10. Construction Consistent with Law — England.** — *Keiley v. Fowler*, Wilmot 298.

*Illinois.* — *Chapman v. Cheney*, 191 Ill. 584.

*Louisiana.* — *May's Succession*, 109 La. 994; *Mcunier's Succession*, 52 La. Ann. 79.

*Maine.* — *Towle v. Doe*, 97 Me. 427.

*Massachusetts.* — *Quincy v. Atty.-Gen.*, 160 Mass. 431.

*New Jersey.* — *In re Vreeland*, (N. J. 1904) 57 Atl. Rep. 903.

*New York.* — *Butler v. Butler*, 3 Barb. Ch. (N. Y.) 304; *Burke v. Valentine*, 52 Barb. (N. Y.) 412; *Du Bois v. Ray*, 35 N. Y. 162; *Hooker v. Hooker*, 41 N. Y. App. Div. 235; *Coon v. Coon*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 693.

*North Carolina.* — *Thompson v. Newlin*, 8 Ired. Eq. (43 N. Car.) 32.

*Ohio.* — *James v. Pruden*, 14 Ohio St. 254.

*Pennsylvania.* — *McBride's Estate*, 152 Pa. St. 192.

See *Joy v. Fesler*, 67 N. H. 257.

In *James v. Pruden*, 14 Ohio St. 254, it was said: "When an instrument of any kind is open to two constructions, the one consistent and the other repugnant to law, or the one will give effect to the whole and the other will destroy a part, the former must always be adopted."

**k. PRESUMPTION AGAINST PARTIAL INTESTACY.** — The natural and reasonable presumption is that when so solemn and important an instrument as a will is executed, the testator intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property, which presumption is overcome only where the intention of the testator to do otherwise is plain and unambiguous, or is necessarily implied.<sup>1</sup> This presumption, however, cannot be made to override the positive rule of law which requires in a devise either express words of limitation, or language reasonably indicating an intention to create more than a life estate, in order that such devise may be construed as creating other than a life estate.<sup>2</sup>

**i. HEIRS FAVORED.** — Where any ambiguity exists in a will, it is a well-established rule of construction that the law favors the heir in preference to one not so nearly related by blood or not related at all.<sup>3</sup> Thus, heirs at law

**1. Presumption Against Partial Intestacy** — *United States*. — Given *v.* Hilton, 95 U. S. 591; Kenaday *v.* Sinnott, 179 U. S. 606; Canfield *v.* Canfield, (C. C. A.) 118 Fed. Rep. 1.

*California*. — Matter of Young, 123 Cal. 337; Matter of Granniss, 142 Cal. 1.

*District of Columbia*. — Kennedy *v.* Alexander, 21 App. Cas. (D. C.) 424.

*Illinois*. — Higgins *v.* Dwen, 100 Ill. 554; Woman's Union Missionary Soc. *v.* Mead, 131 Ill. 338; King *v.* King, 168 Ill. 273; Minkler *v.* Simons, 172 Ill. 323; Greenwood *v.* Greenwood, 178 Ill. 387; Vestal *v.* Garrett, 197 Ill. 398; Biggerstaff *v.* Van Pelt, 207 Ill. 611; Craw *v.* Craw, 210 Ill. 246; Blakeslee *v.* Mansfield, 66 Ill. App. 116; Cooper *v.* English, 83 Ill. App. 148, affirmed 183 Ill. 203; Primm *v.* Primm, 111 Ill. App. 244.

*Indiana*. — Cate *v.* Cranor, 30 Ind. 292; Roy *v.* Rowe, 90 Ind. 54; Mills *v.* Franklin, 128 Ind. 444; Groves *v.* Culph, 132 Ind. 186; Borgner *v.* Brown, 133 Ind. 391; Korf *v.* Gerichs, 145 Ind. 134; Pate *v.* Bushong, 161 Ind. 533; Hammond *v.* Croxton, (Ind. 1901) 61 N. E. Rep. 596.

*Kentucky*. — Trusty *v.* Trusty, 59 S. W. Rep. 1094, 22 Ky. L. Rep. 1127; Mayes *v.* Karn, 115 Ky. 264; Waters *v.* Waters, (Ky. 1894) 28 S. W. Rep. 958.

*Maryland*. — Siemer *v.* Siemer, 2 Gill & J. (Md.) 100; Bourke *v.* Boone, 94 Md. 472.

*Massachusetts*. — Dole *v.* Johnson, 3 Allen (Mass.) 364; Damon *v.* Bibber, 135 Mass. 458.

*Missouri*. — Hurst *v.* Von de Veld, 158 Mo. 239; Willard *v.* Darrah, 168 Mo. 660; Simmons *v.* Cabanne, 177 Mo. 336.

*New Jersey*. — Leigh *v.* Savidge, 14 N. J. Eq. 124.

*New York*. — Matter of Kimberly, 150 N. Y. 90; Kelley *v.* Hogan, 71 N. Y. App. Div. 343; Haug *v.* Schumacher, 50 N. Y. App. Div. 562; Eakin *v.* Knabe, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 224. See Smith *v.* Secor, 157 N. Y. 402.

*North Carolina*. — Boyd *v.* Latham, Busb. L. (44 N. Car.) 365; Robertson *v.* Roberts, 1 Jones L. (46 N. Car.) 74; Foust *v.* Ireland, 1 Jones L. (46 N. Car.) 184; Apple *v.* Allen, 3 Jones Eq. (56 N. Car.) 120; Brown *v.* Hamilton, 135 N. Car. 10.

*Ohio*. — Gilpin *v.* Williams, 17 Ohio St. 397.

*Pennsylvania*. — Randenbach's Appeal, 87 Pa. St. 51; Phillips's Estate, 205 Pa. St. 504; Cox's Estate, 180 Pa. St. 139; Woodside's Estate,

188 Pa. St. 45; Klapp's Estate, 19 Pa. Super. Ct. 150; Wambold *v.* Scholl, 12 Montg. Co. Rep. (Pa.) 173. See also Lloyd's Estate, 188 Pa. St. 451.

*Rhode Island*. — Smith *v.* Greene, 19 R. I. 558.

*South Carolina*. — Dill *v.* Dill, 1 Desaus. (S. Car.) 241.

*Tennessee*. — Jarnagin *v.* Conway, 2 Humph. (Tenn.) 50; Deadrick *v.* Armour, 10 Humph. (Tenn.) 588; Gourley *v.* Thompson, 2 Sneed (Tenn.) 387; Oldham *v.* York, 99 Tenn. 68.

*West Virginia*. — Carney *v.* Kain, 40 W. Va. 758.

*Wisconsin*. — Saxton *v.* Webber, 83 Wis. 619.

In James *v.* Pruden, 14 Ohio St. 253, Ranney, J., said: "It very seldom happens that a man who goes to the trouble of making a will intends to die intestate as to any of the property that he may own at the time of his death."

"The rule, *ut res magis valeat quam pereat*, comes in aid of the general presumption that one who makes a will intends to dispose of all of his property." Boyd *v.* Latham, Busb. L. (44 N. Car.) 365.

**That a Clause of the Will Is Made Surplusage** by a construction against intestacy, is no objection to the adoption of such construction. Meeks *v.* Meeks, 32 N. Y. App. Div. 520.

**Statutory Provisions in Ohio.** — Section 5970 of the Revised Statutes of Ohio provides that every devise of lands, tenements, or hereditaments in any will made thereafter, shall be construed to convey all the estate of the deviser which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate. It has been held that this section does not necessarily mean that the whole estate must be devised to the first taker unless the intention of the testator is clearly shown, nor that each item should show such intention, but only that such intention may be gathered from the whole will. Kiersted *v.* Smith, 10 Ohio Dec. 279.

**2. McCaffrey *v.* Manogue**, 22 App. Cas. (D. C.) 385.

**3. Heirs Favored** — *United States*. — Walker *v.* Parker, 13 Pet. (U. S.) 166.

*Connecticut*. — Pendleton *v.* Larrabee, 62 Conn. 393.

*Georgia*. — Downing *v.* Bain, 24 Ga. 372.

*Louisiana*. — Miller *v.* Hirsch, 110 La. 259.

*New York*. — Vail *v.* Vail, 10 Barb. (N. Y.)



are not to be disinherited by conjecture, but only by express words or by necessary implication.<sup>1</sup> Mere negative words will not suffice, but there must be an actual disposition of the estate to some other person.<sup>2</sup> And words equally plain are requisite to charge the estate of an heir, for a charge is *pro tanto* a disinheritance.<sup>3</sup>

**Presumption of Equality.** — Where the meaning of a will is doubtful or obscure the courts will presume that the testator intended to make equal distribution among heirs of the same class.<sup>4</sup>

**Presumption in Favor of Statutory Form of Distribution.** — Where a testator gives the whole or a part of his estate to his next of kin, and leaves the amounts which each is to receive in doubt, it is natural to presume that he had the statutory form of distribution in mind, and to interpret the will accordingly. This principle is to be applied in aid of construction rather than as a rule to govern.<sup>5</sup>

**Statutory Provision as to Pretermitted Children.** — In some states it is provided by statute that a child omitted from the will shall take as if the testator had died intestate, unless it appears that the omission was intentional.<sup>6</sup>

69; *Mullarky v. Sullivan*, 136 N. Y. 227; *Central Trust Co. v. Richards*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 247; *Matter of Boyce*, (Surrogate Ct.) 37 Misc. (N. Y.) 146.

*Ohio*. — *Bane v. Wick*, 19 Ohio 328; *Davis v. Davis*, 62 Ohio St. 411.

*Pennsylvania*. — *Malone v. Dobbins*, 23 Pa. St. 296; *Biddle's Estate*, 28 Pa. St. 59; *Turner's Estate*, 5 Pa. Dist. 285.

*Wisconsin*. — *In re Donges*, 103 Wis. 497.

**1. Disinheritance Only by Express Words or Necessary Implication** — *England*. — *Thomas v. Thomas*, 6 T. R. 671.

*United States*. — *Wilkins v. Allen*, 18 How. (U. S.) 385; *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 99.

*Georgia*. — *Wright v. Hicks*, 12 Ga. 155.

*Illinois*. — *Johnson v. Charleston First Nat. Bank*, 192 Ill. 541; *Randolph v. Hamilton*, 84 Ill. App. 399.

*Maine*. — *Howard v. American Peace Soc.*, 49 Me. 288; *Young v. Quimby*, 98 Me. 167.

*Maryland*. — *Stewart v. Pattison*, 8 Gill (Md.) 46.

*New Jersey*. — *Leigh v. Savidge*, 14 N. J. Eq. 124.

*Ohio*. — *Bane v. Wick*, 19 Ohio 328; *Crane v. Doty*, 1 Ohio St. 279.

*Pennsylvania*. — *Bender v. Dietrick*, 7 W. & S. (Pa.) 287; *McIntyre v. Ramsey*, 23 Pa. St. 321; *Hitchcock v. Hitchcock*, 35 Pa. St. 397; *Hubbert's Estate*, 6 Pa. Dist. 96.

*Tennessee*. — *Hoover v. Gregory*, 10 Yerg. (Tenn.) 444.

*Virginia*. — *Wootton v. Redd*, 12 Gratt. (Va.) 196; *Wildberger v. Check*, 94 Va. 517.

In *Wright v. Hicks*, 12 Ga. 155, Lumpkin, J., said: "In the absence of anything in the will to the contrary, the presumption is, that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect."

In *Bender v. Dietrick*, 7 W. & S. (Pa.) 287, Rogers, J., said: "It is a maxim which applies here as well as in *England*, that an heir at law can only be disinherited by express devise or necessary implication, and that im-

plication has been defined to be such a strong probability, that an intention to the contrary cannot be supposed."

**2. Actual Disposition to Another Necessary** — *England*. — *Denn v. Gaskin*, 2 Cowp. 657; *Houell v. Barnes*, Cro. Car. 382.

*Georgia*. — *Wright v. Hicks*, 12 Ga. 163; *Haralson v. Redd*, 15 Ga. 148.

*Maryland*. — *Zimmerman v. Hafer*, 81 Md. 347; *Bourke v. Boone*, 94 Md. 472.

*Missouri*. — *Hurst v. Von de Veld*, 158 Mo. 239.

*New York*. — *Jackson v. Schaubert*, 7 Cow. (N. Y.) 187; *Schauber v. Jackson*, 2 Wend. (N. Y.) 13.

*Pennsylvania*. — *Hitchcock v. Hitchcock*, 35 Pa. St. 393.

*South Carolina*. — *Gordon v. Blackman*, 1 Rich. Eq. (S. Car.) 61.

Thus, an heir is not barred from claiming his share of the residue of an estate undisposed of by will, when the testator in giving him a legacy said that it included all of his estate that was intended for such legatee. *Ford v. Whedbee*, 1 Dev. & B. Eq. (21 N. Car.) 16.

**3. Words Essential to Charge Heir's Estate.** — *Davis v. Gardiner*, 2 P. Wms. 188; *Leigh v. Savidge*, 14 N. J. Eq. 134.

**4. Presumption of Equality.** — *Taylor v. Taylor*, 23 Conn. 579; *Munday v. Broadus*, (Ky. 1897) 40 S. W. Rep. 926; *Button v. Button*, 57 N. Y. App. Div. 297; *Malone v. Dobbins*, 23 Pa. St. 296; *Mehard's Estate*, 5 Pa. Super. Ct. 336. See also *Willcox v. Beecher*, 27 Conn. 135.

In *Grant v. Mosely*, (Tenn. Ch. 1899) 52 S. W. Rep. 508, it was held that the general purpose of preserving equality between the kin of the testatrix and those of her husband was not disturbed by the particular provisions made as to each family, and only affecting the members thereof.

**5. Presumption in Favor of Statutory Form of Distribution.** — *Geery v. Skelding*, 62 Conn. 499; *Dunlap's Appeal*, 116 Pa. St. 500.

**6. Statutory Provision in Favor of Pretermitted Heirs** — *United States*. — *Blagge v. Miles*, 1 Story (U. S.) 426; *Loring v. Marsh*, 6 Wall. (U. S.) 337.

*California*. — *Rhoton v. Blevin*, 99 Cal. 645.

*j.* LANGUAGE OF WILL — (1) *Meaning of Words Generally.* — In the construction of wills, words not technical are to be understood, as a general rule, as used in their plain and usual sense, and will be liberally construed to that end in the absence of a manifest intention of the testator to the contrary, and when such interpretation is not inconsistent with the rest of the will.<sup>1</sup>

† **General Words May Be Restricted by Specific Words** to mean less than their natural import when both are used in a will, and such restriction is justified by the context,<sup>2</sup> as where devises or bequests are made by words of enumeration,

*Massachusetts.* — *Wilson v. Fosket*, 6 Met. (Mass.) 400; *Prentiss v. Prentiss*, 11 Allen (Mass.) 47; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 357.

*Michigan.* — *Matter of Stebbins*, 94 Mich. 304; *Forbes v. Darling*, 94 Mich. 621.

*Minnesota.* — *Case v. Young*, 3 Minn. 209.

*Missouri.* — *Block v. Block*, 3 Mo. 594; *Bradley v. Bradley*, 24 Mo. 311; *Hargadine v. Pulte*, 27 Mo. 423; *Jourden v. Meier*, 31 Mo. 40; *Thomas v. Black*, 113 Mo. 66.

*Texas.* — *Parker v. Parker*, 10 Tex. 83.

*Washington.* — *Bower v. Bower*, 5 Wash. 225; *Matter of Barker*, 5 Wash. 390; *Mason v. McLean*, 6 Wash. 31; *Hill v. Hill*, 7 Wash. 409.

See also *supra*, this title, *Restraints on Testamentary Power — Disinheritance of Children.*

**1. Meaning of Words Generally — England.** — *Hamilton v. Ritchie*, (1894) A. C. 310; *Shuttleworth v. Murray*, (1901) 1 Ch. 819, *affirmed* Law Union, etc., Ins. Co. v. Hill, (1902) A. C. 263; *In re Jaques*, (1903) 1 Ch. 267.

*United States.* — *Danbridge v. Washington*, 2 Pet. (U. S.) 370; *Wright v. Denn*, 10 Wheat. (U. S.) 239.

*Alabama.* — *Bell v. Hogan*, 1 Stew. (Ala.) 536; *Capal v. McMillan*, 8 Port. (Ala.) 197.

*Connecticut.* — *Hemingway v. Hemingway*, 22 Conn. 463; *Lord v. Lord*, 22 Conn. 595; *Crosby v. Mason*, 32 Conn. 482.

*Georgia.* — *Hunter v. Stembridge*, 12 Ga. 192; *Murphey v. Murphey*, 20 Ga. 549; *Robertson v. Johnston*, 24 Ga. 102.

*Illinois.* — *Blackmore v. Blackmore*, 187 Ill. 108; *Biggerstaff v. Van Pelt*, 207 Ill. 611; *Hileman v. Tuthill*, 97 Ill. App. 258.

*Kentucky.* — *Birney v. Richardson*, 5 Dana (Ky.) 424; *Griffith v. Coleman*, 5 J. J. Marsh. (Ky.) 600.

*Louisiana.* — *Roy v. Latiolas*, 5 La. Ann. 557; *Michel v. Beale*, 10 La. Ann. 352; *Leonora v. Scott*, 10 La. Ann. 651.

*Maine.* — *Young v. Quimby*, 98 Me. 167.

*Massachusetts.* — *Adams v. Jones*, 176 Mass. 185.

*Mississippi.* — *Vannerson v. Culbertson*, 19 Smed. & M. (Miss.) 150; *Lusby v. Cobb*, 80 Miss. 715.

*New Jersey.* — *Brearely v. Lalor*, 15 N. J. Eq. 108; *Fisher v. Skillman*, 18 N. J. Eq. 229.

*New York.* — *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Smith v. Gage*, 41 Barb. (N. Y.) 60; *Harvey v. Olmsted*, 1 N. Y. 483; *Hone v. Van Schaick*, 3 N. Y. 538; *Matter of Oakley*, 171 N. Y. 652; *Roosevelt v. Thurman*, 1 Johns. Ch. (N. Y.) 220.

*North Carolina.* — *Harrison v. Ward*, 5 Jones Eq. (58 N. Car.) 236.

*Pennsylvania.* — *Soohan v. Philadelphia*, 33 Pa. St. 9; *Logan's Appeal*, 39 Pa. St. 237; *Bedford's Appeal*, 40 Pa. St. 18; *Gable's Appeal*, 40 Pa. St. 231; *Hancock's Appeal*, 112 Pa. St. 532; *Magee's Estate*, 205 Pa. St. 37; *Hubbert's Estate*, 6 Pa. Dist. 96.

*Rhode Island.* — *Bailey v. Brown*, 19 R. I. 669; *Mason v. Perry*, 22 R. I. 491; *Tiffany v. Emmet*, 24 R. I. 411.

*South Carolina.* — *Ketchin v. Beaty*, 5 Rich. Eq. (S. Car.) 83; *Nash v. Savage*, 2 Hill Eq. (S. Car.) 50; *Seibels v. Whatley*, 2 Hill Eq. (S. Car.) 605; *Atty.-Gen. v. Jolly*, 2 Strobh. Eq. (S. Car.) 379.

*Vermont.* — *Hart v. White*, 26 Vt. 260.

*Virginia.* — *Tompkins v. Griffin*, 92 Va. 307.

**Words Construed According to Law of Testator's Domicil.** — *In re Fergusson*, (1902) 1 Ch. 483.

**Construction of Language of Unlearned Testator.** — *Priester's Estate*, 23 Pa. Super. Ct. 386.

**Primary and Secondary Meaning.** — When a word used in a will has a strict and primary meaning, and also a secondary meaning, it is a sound rule of construction that it is to be given the former unless the context indicates that the testator intended otherwise. *Connecticut Trust, etc., Co. v. Chase*, 75 Conn. 683.

**Bequest of Half of Estate "Including" Policies.** — *In re Duncombe*, 3 Ont. L. Rep. 510.

**"Die Without Child or Children" Held to Mean "Die Without Child or Children then Living,"** that is, at the time of death. *In re Booth*, (1900) 1 Ch. 768.

**"And Also."** — If a testator devises a tract of land to his daughter, "and also" another tract to her for life, the words "and also" are held to indicate the intention of the testator to limit the first devise as well as the second for the life of the devisee. *Noble v. Ayers*, 61 Ohio St. 491.

**"Expenses" of Administration.** — Under a clause bequeathing to a legatee a certain sum of money after paying out of it the cost of tombstone "and expenses of the administration of my estate," the word "expenses" was held to include such disbursements as a representative is called upon to make in securing the proper and orderly settlement of the affairs of the deceased, but not the commissions of the representatives. *Matter of Pray*, (Surrogate Ct.) 40 Misc. (N. Y.) 516.

**2. General Words Restricted by Specific.** — *Webster v. Wiers*, 51 Conn. 569; *Allen v. White*, 97 Mass. 504; *White v. McCracken*, 87 Mo. App. 262; *Freeman v. Coit*, 96 N. Y. 63; *Dela-mater's Estate*, 1 Whart. (Pa.) 362; *Urich's Appeal*, 86 Pa. St. 386; *Perry v. High*, 3 Head (Tenn.) 349. *Compare Jarnagin v. Conway*, 2 Humph. (Tenn.) 50.

which are coupled in the same clause with words of general description. In such case the latter may be confined to matters *ejusdem generis*.<sup>1</sup>

**Words Expressive of Desire Merely.** — Words which are merely expressive of a desire or which are merely advisory, and not directory, will not be construed as disposing of the property referred to, unless it is the apparent intention of the testator that they shall be mandatory.<sup>2</sup>

**How Meaning Determined.** — The meaning of words used may be determined by looking to the language and context of the will, together with evidence properly admissible, and the meaning of the expressions used.<sup>3</sup>

(2) *Technical Words.* — Where the testator uses technical words, he is presumed to employ them in a technical sense, unless a clear intention to use them in another is apparent from the context. In such case the intention of the testator will be observed and the words given the meaning he intended them to have.<sup>4</sup> But this rule is subject to an exception where certain words and phrases have become so well settled and defined by the courts as to become rules of property.<sup>5</sup>

(3) *Repetition of Words.* — Words occurring more than once in a will are presumed to be used always in the same sense when the context does not show a contrary intention, or when the words are not applied to different subjects.<sup>6</sup> However, there is no inconsistency in construing the same word

**1. General Words Confined to Matters Ejusdem Generis.** — Given *v.* Hilton, 95 U. S. 591; Dole *v.* Johnson, 3 Allen (Mass.) 364; Jameson, Appellant, 1 Mich. 99; Funchess *v.* Seibe, 27 Miss. 26; Lock *v.* Noyes, 9 N. H. 430.

**2. Words Expressive of Desire.** — Angus *v.* Noble, 73 Conn. 56; Hutchinson's Succession, 112 La. 656; Meehan *v.* Brennan, 16 N. Y. App. Div. 395.

**3. How Meaning of Words Determined.** — *In re* Cozens, (1903) 1 Ch. 138; Marionneaux *v.* Dupuy, 47 La. Ann. 943.

**4. Technical Words** — *England.* — Shuttleworth *v.* Murray, (1900) 1 Ch. 795.

*California.* — Matter of Bennett, 134 Cal. 320.

*Georgia.* — Jossey *v.* Brown, 119 Ga. 758.

*Illinois.* — Heuser *v.* Harris, 42 Ill. 425.

*Indiana.* — Dean *v.* Lyon, 8 Ind. 71.

*Kentucky.* — Johnson *v.* Johnson, 2 Met. (Ky.) 331.

*Massachusetts.* — Hawley *v.* Northampton, 8 Mass. 37.

*New Jersey.* — See Marshall *v.* Hadley, 50 N. J. Eq. 547.

*New York.* — Smith *v.* Gage, 41 Barb. (N. Y.) 60; Matter of James, 80 Hun (N. Y.) 371; Wilson *v.* Wilson, 76 N. Y. App. Div. 232.

*North Carolina.* — Grandy *v.* Sawyer, Phil. Eq. (62 N. Car.) 8.

*Ohio.* — McCormick *v.* Dunker, 24 Ohio Cir. Ct. 553.

*Pennsylvania.* — Fetrow's Estate, 58 Pa. St. 424.

*South Carolina.* — Evans *v.* Godbold, 6 Rich. Eq. (S. Car.) 26.

*Virginia.* — Allison *v.* Allison, 101 Va. 537; Brett *v.* Donaghe, 101 Va. 786.

See also *infra*, this section, *Construction of Particular Words*. And see the various words and phrases defined throughout this work.

"There is no technical rule of construction which defeats the intent of the testator if that intent be manifested by his words." Kelly's Estate, 193 Pa. St. 45.

**Technical Language Unnecessary.** — "The rule of construction of wills is, that no technical form is necessary to convey the testator's meaning." Mansfield, J., in Strong *v.* Cummin, 2 Burr. 770. See Annable *v.* Patch, 3 Pick. (Mass.) 360.

**5. Where Words Are Rules of Property.** — Hertz *v.* Abrahams, 110 Ga. 707; Henderson *v.* Rost, 11 La. Ann. 541; Mulliken *v.* Earnshaw, (Pa. 1904) 58 Atl. Rep. 286; Hawley *v.* Northampton, 8 Mass. 3. See Annable *v.* Patch, 3 Pick. (Mass.) 360.

**Effect of Precedent.** — In Smith *v.* Bell, 6 Pet. (U. S.) 68, it is said: "The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills."

**6. Effect of Repetition of Words** — *England.* — *In re* Birks, (1900) 1 Ch. 417; Clavering *v.* Ellison, 3 Drew. 451; Whitmore *v.* Craven, 2 Ch. Cas. 167, 22 Eng. R. (Reprint) 897.

*Illinois.* — Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144.

*Indiana.* — State Bank *v.* Ewing, 17 Ind. 68.

*Massachusetts.* — Eliot *v.* Carter, 12 Pick. (Mass.) 436.

*New Hampshire.* — Varrell *v.* Wendell, 20 N. H. 431.

*New Jersey.* — Stewart *v.* Stewart, 61 N. J. Eq. 25.

*New York.* — Carr *v.* Smith, 25 N. Y. App.



to have different meanings in the same will.<sup>1</sup>

(4) *Rules of Grammar Applied.* — The rules of grammar will be upheld and applied, unless the testator clearly uses the words or expressions incorrectly, and it becomes necessary to disregard the technical rules in order to carry out the testator's intention.<sup>2</sup>

k. PUNCTUATION. — In the interpretation of a will, punctuation may sometimes be resorted to for the purpose of solving an ambiguity, but not when the only ambiguity is created by the punctuation;<sup>3</sup> and punctuation will be disregarded where it conflicts with the testamentary intent, and where, by such course, the meaning of the will is made more obvious and unquestionable.<sup>4</sup>

l. CONSTRUCTION BY ARBITRATORS OR PERSONS IN INTEREST — *By Arbitrators.* — A testator may provide in his will that all questions of construction arising thereunder shall be referred for determination to a certain person, who shall act as umpire or arbitrator,<sup>5</sup> and whose decisions are binding upon all parties interested, if honestly made in good faith and with no abuse of power, although they may appear to the court erroneous.<sup>6</sup> A decision which destroys or changes the testator's intent will not be accepted.<sup>7</sup> The fact that the

Div. 214, affirmed 161 N. Y. 636, 55 N. E. Rep. 1106.

Pennsylvania. — Klapp's Estate, 19 Pa. Super. Ct. 150.

Rhode Island. — *In re Tillinghast*, 25 R. I. 338.

Texas. — *McMurry v. Stanley*, 69 Tex. 227.

In *Allen's Appeal*, 69 Conn. 702, it was said that the rule "applies with double force where the word in question is found in two sentences in immediate succession."

Question of Intention. — *Madison v. Larmon*, 170 Ill. 65; *Matter of Stewart*, 30 N. Y. App. Div. 368, affirmed 163 N. Y. 593, 57 N. E. Rep. 1125.

1. Different Meanings. — *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348.

2. Rules of Grammar Applied. — *Matter of Fair*, 132 Cal. 523; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Twiss v. Simpson*, 183 Mass. 212; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Lowe v. Carter*, 2 Jones Eq. (55 N. Car.) 377; *Jones v. Posten*, 1 Ired. L. (23 N. Car.) 166; *McGinnis v. Harris*, 7 Jones L. (52 N. Car.) 213. See *Brasher v. Marsh*, 15 Ohio St. 108.

In *Hart v. White*, 26 Vt. 269, *Bennett, J.*, said: "In the construction of a will the grammatical one, if obvious, should not be departed from, unless it would lead to absurdity or unless there is enough in the will to satisfy the mind that it was not the intention of the testator to have it construed according to its grammatical construction." See also *Putnam v. American Bible Soc.*, 37 Vt. 271.

Ignorance of the Testator to Be Considered. — In *Delph v. Delph*, 2 Bush (Ky.) 171, it was observed that the fact that the testamentary document was unskillfully written by the testator himself, must be considered in the judicial interpretation of his pervading intent, and *Lord Mansfield*, in *Strong v. Cummin*, 2 Burr. 770, seems to have been of the same opinion. Commenting upon the will, he said: "It is very plain from the spelling and phraseology of this will that it is of a rough draft of the testator's own making or dictating, without assistance from any person capable of advising him." See also *Wootton v. Redd*, 12 Gratt. (Va.) 196.

In *Ihrle's Estate*, 35 W. N. C. (Pa.) 60, it was held, however, that mere illiteracy of the testator raises no presumption of an incorrect use of words in his will.

3. Interpretation by Means of Punctuation. — *Weatherly v. Mister*, 39 Md. 629; *Lycan v. Miller*, 112 Mo. 548; *Arcularius v. Sweet*, 25 Barb. (N. Y.) 403. See *Napier v. Davis*, 7 J. J. Marsh. (Ky.) 282.

Use of Capital Letter. — When the punctuation accords with the sense of the will, the use of a capital letter in the middle of a sentence must be regarded as accidental and should not be permitted to confuse a construction otherwise reasonably clear. *Kinkele v. Wilson*, 151 N. Y. 269.

4. Punctuation Disregarded. — *Johnson v. Charleston First Nat. Bank*, 192 Ill. 541; *Black v. Herring*, 79 Md. 146; *Matter of Knoblauch*, (Surrogate Ct.) 31 Misc. (N. Y.) 418; *Lewisohn v. Henry*, 92 N. Y. App. Div. 532; *Reynolds v. Reynolds*, 65 S. Car. 390.

5. Testator May Select Arbitrator. — *Naglee's Estate*, 52 Pa. St. 154; *Phillips's Estate*, 10 Pa. Co. Ct. 374; *Moore v. Harper*, 27 W. Va. 362.

6. Decision in Good Faith Binding. — *Pray v. Belt*, 1 Pet. (U. S.) 670; *American Board of Com'rs v. Ferry*, 15 Fed. Rep. 696; *Wait v. Huntington*, 40 Conn. 9; *Greene v. Huntington*, 73 Conn. 106; *Moore v. Harper*, 27 W. Va. 362.

"As a rule the courts will not interpose to correct a mere mistake in the judgment of the arbitrator, but if he refuses to act, rules upon a matter not submitted, makes an incomplete determination, or commits a gross mistake or error of judgment, evincing partiality, corruption, or prejudice, transcends his authority, or violates some statutory requirement on which the dissatisfied party had a right to rely, or commits some other like error, courts of equity may interfere and correct the error, and in proper cases and upon good cause shown, restrain all further abuse of the granted powers." *American Board of Com'rs v. Ferry*, 15 Fed. Rep. 696.

7. Decision Contrary to Testator's Intent. — *McBrayer v. McBrayer*, 95 Ky. 475.

arbitrator, subsequent to his decision, becomes counsel in the case does not affect his decision, although he would have been disqualified had such professional connection preceded or been contemporaneous with the judgment.<sup>1</sup> An arbitrator is not disqualified although he is directly interested in the residue of the estate which may be affected by his decision, if the testator had knowledge of such interest when he made the appointment.<sup>2</sup>

**By Parties in Interest.** — Although the interpretation placed upon a will by the parties in interest is a circumstance in favor of a similar construction by the court,<sup>3</sup> yet their interpretation is not entitled to control the court.<sup>4</sup> Thus, the intent of the testator is not to be determined by one of the devisees, even though his construction is against his own interest.<sup>5</sup> Where all the parties interested agree, they may supply deficiencies or reject words, as they alone are affected thereby;<sup>6</sup> and where they have construed a will and acted thereunder, parting with valuable rights, the courts will enforce the construction adopted,<sup>7</sup> although it appears erroneous.<sup>8</sup>

**2. Parol Evidence in Aid of Construction** — *a. IN GENERAL* — General Rule. — It is well settled that parol evidence is not admissible to add to, vary, or contradict the words of a written will, not only because the will itself is the best evidence of the testator's intention, but also because wills are required by the statute of frauds to be in writing.<sup>9</sup>

**But Parol Evidence Is Admissible** to explain a will in case of a latent ambiguity, or to rebut a resulting trust.<sup>10</sup>

**1. Subsequent Employment as Counsel.** — Phillips's Estate, 10 Pa. Co. Ct. 374.

**2. American Board of Com'rs v. Ferry,** 15 Fed. Rep. 696.

**3. Construction by Persons Interested.** — Smith v. Bartlett, 79 N. Y. App. Div. 174.

**4. Not Entitled to Control.** — Matter of Turner, 48 Mich. 369.

**5. Magee's Estate,** 11 Pa. Co. Ct. 559.

**6. Words Supplied or Rejected by Parties Interested.** — Thorington v. Hall, 111 Ala. 323; Santee v. Santee, 64 Pa. St. 473.

**7. Parties Estopped to Deny Construction.** — Pate v. French, 122 Ind. 10; Hagerty v. Albright, 52 Pa. St. 274; Wrights v. Oldham, 8 Leigh (Va.) 306.

**8. Construction Erroneous.** — Follmers' Appeal, 37 Pa. St. 121.

**9. Parol Evidence Inadmissible** — *England.* — Whitton v. Russel, 1 Atk. 448; King v. Badeley, 3 Myl. & K. 417; Gladding v. Yapp, 5 Madd. 59; Hurst v. Beach, 5 Madd. 360.

*Indiana.* — Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; Daugherty v. Rogers, 119 Ind. 254.

*Kentucky.* — Jackson v. Payne, 2 Met. (Ky.) 567.

*New Jersey.* — Cleveland v. Havens, 13 N. J. Eq. 101, 78 Am. Dec. 90; Leigh v. Savidge, 14 N. J. Eq. 124.

*Pennsylvania.* — Torbert v. Twining, 1 Yeates (Pa.) 432.

*Rhode Island.* — McGough v. Hughes, 18 R. I. 768.

*Texas.* — Hunt v. White, 24 Tex. 643.

See also the titles **PAROL EVIDENCE**, vol. 21, p. 1077; **SECONDARY EVIDENCE**, vol. 25, p. 161; **VERBAL AGREEMENTS (STATUTE OF FRAUDS)**, vol. 29, p. 824.

**Evidence of Acts of Appraisers.** — Parol evidence of what appraisers have set apart, which aids but does not vary or contradict provisions

of the will, is admissible. Vedder v. Saxton, 46 Barb. (N. Y.) 188.

**10. When Parol Evidence Admissible** — *England.* — Hall v. Hill, 1 Dr. & War. 94; Ulrich v. Litchfield, 2 Atk. 372; Charter v. Charter, L. R. 7 H. L. 364; Page v. Leapingwell, 18 Ves. Jr. 466; Druce v. Denison, 6 Ves. Jr. 385; *In re Grainger*, (1900) 2 Ch. 756; Chichester v. Quatrefages, (1895) P. 186.

*United States.* — Patch v. White, 117 U. S. 210; Gallego v. Chevallie, 2 Brock. (U. S.) 285, 9 Fed. Cas. No. 5,200.

*Alabama.* — Vandiver v. Vandiver, 115 Ala. 328.

*Delaware.* — Hearn v. Ross, 4 Harr. (Del.) 46.

*Georgia.* — See Billingslea v. Moore, 14 Ga. 370.

*Illinois.* — Engelthaler v. Engelthaler, 196 Ill. 230.

*Indiana.* — Grimes v. Harmon, 35 Ind. 198; Whiteman v. Whiteman, 152 Ind. 263.

*Iowa.* — Christy v. Badger, 72 Iowa 581; Flynn v. Holman, 119 Iowa 731.

*Kentucky.* — Tudor v. Terrel, 2 Dana (Ky.) 47; Stephen v. Walker, 8 B. Mon. (Ky.) 600; Jackson v. Payne, 2 Met. (Ky.) 567.

*Maryland.* — Walston v. White, 5 Md. 297; Mitchell v. Mitchell, 6 Md. 224.

*Minnesota.* — *In re Pope*, (Minn. 1904) 97 N. W. Rep. 1046.

*Mississippi.* — Love v. Buchanan, 40 Miss. 758.

*Missouri.* — Hockensmith v. Slusher, 26 Mo. 237.

*Nebraska.* — Pawnee City Second United Presb. Church v. Pawnee City First United Presb. Church, (Neb. 1904) 99 N. W. Rep. 252.

*New Jersey.* — Den v. Cubberly, 12 N. J. L. 308.

*New York.* — Tole v. Hardy, 6 Cow. (N. Y.) 333; Ryerss v. Wheeler, 22 Wend. (N. Y.) 148;

**Intention Different from That Expressed.** — Although evidence is admissible in case of latent ambiguity, there are numerous cases denying the admission of evidence to show an intention different from that expressed in the will.<sup>1</sup>

*Tillotson v. Race*, 22 N. Y. 122; *Brown v. Quintard*, 177 N. Y. 75; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231, 14 Johns. (N. Y.) 1, 7 Am. Dec. 416.

*North Carolina.* — *North Carolina Institute v. Norwood*, Busb. Eq. (45 N. Car.) 65; *Lowe v. Carter*, 2 Jones Eq. (55 N. Car.) 377; *Kincaid v. Lowe*, Phil. Eq. (62 N. Car.) 41; *Taylor v. Maris*, 90 N. Car. 619; *Tilley v. Ellis*, 119 N. Car. 233.

*Pennsylvania.* — *Wampole's Estate*, 3 Pa. Super. Ct. 414; *Bryson's Estate*, 7 Pa. Super. Ct. 624.

*Rhode Island.* — *McGough v. Hughes*, 18 R. I. 768.

*South Carolina.* — *Patterson v. Leith*, 2 Hill Eq. (S. Car.) 15; *Donald v. Dendy*, 2 McMull. L. (S. Car.) 123.

*Virginia.* — *Shelton v. Shelton*, 1 Wash. (Va.) 53; *Wootton v. Redd*, 12 Gratt. (Va.) 196; *Roy v. Rowzie*, 25 Gratt. (Va.) 599; *Hawkins v. Garland*, 76 Va. 149; *Burke v. Lee*, 76 Va. 386; *Senger v. Senger*, 81 Va. 687.

*West Virginia.* — *Couch v. Eastham*, 29 W. Va. 784.

See also the titles **AMBIGUITY**, vol. 2, p. 298; **IMPLIED TRUSTS**, vol. 15, p. 1177.

In *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231, it was said: "It is a well-settled rule, that seems not to stand in need of much proof, or illustration, for it runs through all the books, from *Cheyney's Case* (5 Coke 68), down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: 1. Where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and, 2. To rebut a resulting trust."

**Evidence to Fortify or Create Legal Presumption.** — Parol evidence of the intention of the testator is not admissible to fortify a legal presumption raised against the apparent intention of the testator, except in answer to evidence impeaching it, or to create a presumption contrary to the apparent intention, when no such presumption is raised by law. *Hurst v. Beach*, 5 Madd. 351; *Reynolds v. Robinson*, 82 N. Y. 103.

**It Is Not Every Ambiguity** or uncertainty apparent on a will that justifies the introduction of parol evidence to explain it, but only such a one as would otherwise avoid the instrument. *Wusthoff v. Dracourt*, 3 Watts (Pa.) 240; *Whilden v. Whilden*, *Riley Eq.* (S. Car.) 205.

**1. Intention Different from That Expressed** — *England.* — *Martin v. Drinkwater*, 2 Beav. 215; *Cambridge v. Rous*, 8 Ves. Jr. 22; *Powell v. Mouchett*, 6 Madd. 216.

*United States.* — *Lyman v. Lyman*, 2 Paine (U. S.) 11, 15 Fed. Cas. No. 8,628; *Hanner v. Moulton*, 23 Fed. Rep. 5.

*Connecticut.* — *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669.

*Indiana.* — *McCray v. Lipp*, 35 Ind. 116; *Rapp v. Reehling*, 124 Ind. 36.

*Kentucky.* — *Long v. Duvall*, 6 B. Mon. (Ky.) 219; *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Tuttle v. Berryman*, 94 Ky. 553.

*Maryland.* — *Chase v. Stockett*, 72 Md. 235.

*Missouri.* — *Pickens v. Dorris*, 20 Mo. App. 1.

*New Jersey.* — *Den v. Cubberly*, 12 N. J. L. 308.

*North Carolina.* — *Reeves v. Reeves*, 1 Dev. Eq. (16 N. Car.) 390.

*Rhode Island.* — *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446.

*South Carolina.* — *Hall v. Hall*, 8 Rich. L. (S. Car.) 407, 64 Am. Dec. 758; *Clarke v. Clarke*, 46 S. Car. 230, 57 Am. St. Rep. 675.

*Tennessee.* — *Dixon v. Cooper*, 88 Tenn. 177.

In *Mitchell v. Walker*, 17 B. Mon. (Ky.) 61, where the devise was of "my land," the court said: "This is a question, however, arising upon the face or words of the will and does not admit of extrinsic evidence further than to illustrate the meaning and application of the words. If, with such aids, the question of intention be still doubtful, the case is one of latent ambiguity, for which there is no remedy by a resort to direct extrinsic evidence of actual intention. This is only admissible in case of a latent ambiguity which arises, not when there are two or more objects of a like kind which may both be included in the general terms used to describe what is given, but only when there are two or more objects, persons, or things, to each of which the terms of the gift, though not embracing all, are equally applicable. \* \* \* But we know of no case in which it has been held that when the words used in describing the subject of the gift comprehended several objects, such evidence is admissible to exclude from the description one or more of them, on the ground that they, or some of them, were not actually intended to be included. In such a case the intention is to be sought for in the words of the will, and although parol testimony may be sometimes resorted to for ascertaining the intended sense of the words, it cannot be resorted to for the purpose of ascertaining and giving effect to a secret intention inconsistent with the words themselves, or restrictive of their natural and legal import."

In *Ritter v. Fox*, 6 Whart. (Pa.) 99, it was said: "The ambiguity in general raised and removed by the admission of parol evidence is either in regard to the object of the devise or bequest, or the subject of it. But in no case, I apprehend, has parol evidence been received for the purpose of establishing a bequest or devise not given by or contained in the will itself, because it is perfectly obvious that such evidence would tend necessarily to vary and alter the written will, which would be contrary to the common-law rule on the subject; and, in the next place, would go to substitute the verbal declarations of the testator for his last will and testament, in violation of the statute relative thereto, which requires that everything of the sort shall be reduced into writing."

**Evidence Wholly Dehors Will Inadmissible.** —



**No Ambiguity — Patent Ambiguity.** — Where there is no ambiguity, or it is a patent one, the will must be its own expositor.<sup>1</sup>

**Explanation of Language.** — Although it is often inaccurately stated otherwise, evidence of extrinsic facts is admissible to explain the meaning of language used, that is, to explain what the testator has written, as distinguished from what he intended to write.<sup>2</sup>

**Unintelligible Language.** — A will which is so insensible and unintelligible as to be incapable of being interpreted or executed cannot be explained by parol.<sup>3</sup>

**Fraud.** — Parol evidence is admissible to show that fraud has been practiced upon the testator, and that the will is therefore void.<sup>4</sup>

**b. WHEN TERMS PLAIN AND UNAMBIGUOUS.** — If there is no latent ambiguity, and the terms of the will are plain and free from doubt, there can be no question but that parol evidence is inadmissible to show an intention of the testator different from that expressed in the will.<sup>5</sup>

Intention cannot be gathered wholly from facts *dehors* the will, and such evidence to prove that a devise to a parent was intended for parent's children is inadmissible, although the parent was known to be dead when will was made. *Judy v. Williams*, 2 Ind. 449.

**A Thing Not Described** cannot be shown by extrinsic evidence to have been intended to be referred to by will, as the effect would be to set aside the will and substitute extrinsic evidence. *Pell v. Ball*, Spears Eq. (S. Car.) 48.

**Evidence of Intention of Testator as to Lapsed Devise.** — *Chenault v. Chenault*, 88 Ky. 83.

**Evidence of Intent to Evade Statute Rule Limiting Amount of Estate Devised to Charities.** — *Scott v. Ives*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 749.

**1. No Ambiguity — Patent Ambiguity — California.** — *Matter of Young*, 123 Cal. 337.

**Connecticut.** — *Canfield v. Bostwick*, 21 Conn. 550.

**Kentucky.** — *Timberlake v. Parish*, 5 Dana (Ky.) 345; *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Smith v. Smith*, 72 S. W. Rep. 766, 24 Ky. L. Rep. 1964.

**Mississippi.** — *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527.

**New Jersey.** — *Nevius v. Martin*, 30 N. J. L. 465.

**New York.** — *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Bradhurst v. Field*, 135 N. Y. 564, *affirming* 63 Hun (N. Y.) 633. See *Matter of Miner*, 72 Hun (N. Y.) 568, *affirmed* 146 N. Y. 121.

**North Carolina.** — *Field v. Eaton*, 1 Dev. Eq. (16 N. Car.) 283; *North Carolina Institute v. Norwood*, Busb. Eq. (45 N. Car.) 65.

**Pennsylvania.** — *Presbyterian Congregation v. Strugeon*, 9 Pa. St. 321.

**South Carolina.** — *Holbrook v. Gaillard*, *Riley Eq.* (S. Car.) 167.

**Tennessee.** — *Weatherhead v. Sewell*, 9 Humph. (Tenn.) 272; *Clark v. Clark*, 2 Lea (Tenn.) 723; *Horton v. Thompson*, 3 Tenn. Ch. 581.

See also the title **AMBIGUITY**, vol. 2, p. 296.

**Rule Limited.** — In *Schlottman v. Hoffman*, 73 Miss. 188, it was said that the rule against the introduction of parol testimony in cases of patent ambiguity was very generally stated too broadly, and that it was not true that, an ambiguity appearing on the face of the paper, if that alone was looked to, could not be ex-

plained by parol. Thus, where the amount bequeathed was expressed by the dollar mark, the figure five, and two ciphers connected together, but separated from the five by a distinct space, although not by a decimal mark, and written slightly above the line, it was held that an ambiguity existed, and that parol evidence was admissible to determine whether the testator intended five dollars or five hundred dollars.

**In Georgia**, by statute, parol evidence is admissible to explain both patent and latent ambiguities. *Rogers v. Rogers*, 78 Ga. 688.

**2. Parol Evidence to Explain Language — England.** — *Hampshire v. Peirce*, 2 Ves. 216; *Radnor v. Shafto*, 11 Ves. Jr. 457; *Herbert v. Reid*, 16 Ves. Jr. 481; *Gordon v. Gordon*, L. R. 5 H. L. 254; *Goblet v. Beechey*, 3 Sim. 24; *Kell v. Charmer*, 23 Beav. 195. But see *Stratton v. Payne*, 3 Bro. P. C. 257.

**Georgia.** — *Doyal v. Smith*, 28 Ga. 262.

**Kentucky.** — *Mitchell v. Walker*, 17 B. Mon. (Ky.) 61; *Allan v. Vanmeter*, 1 Met. (Ky.) 264. **Maryland.** — *Walston v. White*, 5 Md. 297; *Hawman v. Thomas*, 44 Md. 30; *Chase v. Stockett*, 72 Md. 235.

**New York.** — *Klock v. Stevens*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 383; *Armstrong v. Galusha*, 43 N. Y. App. Div. 248.

**Pennsylvania.** — *Phelp's Estate*, 4 Pa. Dist. 258, 7 Kulp (Pa.) 485; *Sharp v. Wightman*, 205 Pa. St. 285.

**3. Unintelligible Language.** — *In re Stephenson*, (1897) 1 Ch. 75; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Kelley v. Kelley*, 25 Pa. St. 460.

**4. Parol Evidence of Fraud.** — *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Collins v. Hope*, 20 Ohio 492. See the title **FRAUD AND DECEIT**, vol. 14, p. 199.

**5. When Terms Plain and Unambiguous — England.** — *Clementson v. Gandy*, 1 Keen 309, 5 L. J. Ch. 260; *Maybank v. Brooks*, 1 Bro. C. C. 84; *Hensman v. Fryer*, L. R. 3 Ch. 420, 37 L. J. Ch. 97.

**United States.** — *Warner v. Brinton*, 29 Fed. Cas. No. 17,179; *Aspen's Estate*, 2 Wall. Jr. (C. C.) 368, 2 Fed. Cas. No. 589.

**California.** — *Matter of Callaghan*, 119 Cal. 571.

**Connecticut.** — *Spalding v. Huntington*, 1 Day (Conn.) 8; *Jackson v. Alsop*, 67 Conn. 249; *Thompson v. Betts*, 74 Conn. 576.

**District of Columbia.** — *McAleer v. Schnei-*

c. SURROUNDING FACTS AND CIRCUMSTANCES.—Where the will contains a latent ambiguity, or its language is uncertain and indefinite, it is a firmly established rule that parol evidence is admissible to show the facts and circumstances that surrounded the testator at the time of the execution of the will, such as the condition and situation of his property and family, so that the court may be placed as nearly as possible in his position, and thus arrive at his intention; <sup>1</sup> but when the words of the will are plain and unambiguous,

der, 2 App. Cas. (D. C.) 461; *Kaiser v. Brandenburg*, 16 App. Cas. (D. C.) 310.

*Georgia*.—*Lowe v. Bryant*, 30 Ga. 528; *Hill v. Alford*, 46 Ga. 247; *Hill v. Felton*, 47 Ga. 455, 15 Am. Rep. 643; *Atwood v. Geiger*, 69 Ga. 498; *Cochran v. Hudson*, 110 Ga. 762.

*Illinois*.—*Heslop v. Gattion*, 71 Ill. 528; *Bishop v. Morgan*, 82 Ill. 351, 25 Am. Rep. 327; *Engelthaler v. Engelthaler*, 196 Ill. 230; *Vestal v. Garrett*, 197 Ill. 398; *Dearlove v. Otis*, 99 Ill. App. 99.

*Indiana*.—*Fraim v. Millison*, 59 Ind. 123; *Judy v. Gilbert*, 77 Ind. 96.

*Kentucky*.—*Knut v. Knut*, 58 S. W. Rep. 583, 22 Ky.-L. Rep. 972.

*Maryland*.—*Walston v. White*, 5 Md. 297; *Stannard v. Barnum*, 51 Md. 440.

*Michigan*.—*Kinney v. Kinney*, 34 Mich. 250; *Waldron v. Waldron*, 45 Mich. 354; *Forbes v. Darling*, 94 Mich. 621; *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584.

*Missouri*.—*Krechter v. Grofe*, 166 Mo. 385. *New Hampshire*.—*Brown v. Brown*, 43 N. H. 17; *Emery v. Haven*, 67 N. H. 503.

*New Jersey*.—*Hand v. Hoffman*, 8 N. J. L. 71; *Brearley v. Brearley*, 9 N. J. Eq. 21.

*New York*.—*Charter v. Otis*, 41 Barb. (N. Y.) 525; *Bunner v. Storm*, 1 Sandf. Ch. (N. Y.) 357; *Shanley v. Shanley*, 34 N. Y. App. Div. 172; *Matter of Smith*, 75 N. Y. App. Div. 339.

*Ohio*.—*Charch v. Charch*, 57 Ohio St. 561.

*Pennsylvania*.—*Gilmore's Estate*, 154 Pa. St. 523, 35 Am. St. Rep. 855, 32 W. N. C. (Pa.) 272; *Root's Estate*, 187 Pa. St. 118; *Rouser's Estate*, 8 Pa. Super. Ct. 188; *Allshouse's Estate*, 23 Pa. Super. Ct. 146.

*Rhode Island*.—*McGough v. Hughes*, 18 R. I. 768.

*South Carolina*.—*Reynolds v. Reynolds*, 65 S. Car. 390.

*Tennessee*.—*Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138.

*Texas*.—*Ellis v. Birkhead*, 30 Tex. Civ. App. 529.

*Vermont*.—*Wells v. Wells*, 37 Vt. 483.

1. Evidence of Surrounding Facts and Circumstances.—*England*.—*Hensman v. Fryer*, L. R. 3 Ch. 420, 37 L. J. Ch. 97; *Wilson v. O'Leary*, L. R. 7 Ch. 448; *Doe v. Martin*, 4 B. & Ad. 771, 24 E. C. L. 159; *Doe v. Hiscocks*, 5 M. & W. 363; *Shore v. Atty.-Gen.*, 9 Cl. & F. 355, 5 Scott N. R. 958; *In re Grainger*, (1900) 2 Ch. 756; *Gordon v. Gordon*, L. R. 5 H. L. 254; *Bernasconi v. Atkinson*, 10 Hare 345, 17 Jur. 128; *Drake v. Drake*, 8 H. L. Cas. 172, 25 Beav. 642; *Radnor v. Shafto*, 11 Ves. Jr. 457; *Bengough v. Walker*, 15 Ves. Jr. 514; *Martin v. Drinkwater*, 2 Beav. 215; *Pasmore v. Huggins*, 21 Beav. 103; *Hyde v. Price*, Coop. Pr. Cas. 193; *Innes v. Sayer*, 3 Macn. & G. 606; *Fonnereau v. Poyntz*, 1 Bro. C. C. 472;

*Colpoys v. Colpoys*, Jac. 451; *Boys v. Williams*, 2 Russ. & M. 689; *Atty.-Gen. v. Grote*, 2 Russ. & M. 699; *Lowe v. Huntingtower*, 4 Russ. 532, note, 26 Rev. Rep. 633; *Blundell v. Gladstone*, 11 Sim. 467; *Webber v. Stanley*, 10 Jur. N. S. 657; *Crone v. Odell*, 1 Ball & B. 449; *Charter v. Charter*, L. R. 7 H. L. 364; *Sullivan v. Sullivan*, Ir. R. 4 Eq. 457.

*United States*.—*Smith v. Bell*, 6 Pet. (U. S.) 68; *Gilmer v. Stone*, 120 U. S. 586; *Barber v. Pittsburgh*, etc., R. Co., 166 U. S. 83; *Hanner v. Moulton*, 23 Fed. Rep. 5.

*Alabama*.—*Travis v. Morrison*, 28 Ala. 494. *Arkansas*.—*Fitzhugh v. Hubbard*, 41 Ark. 64.

*California*.—*Matter of Langdon*, 129 Cal. 451.

*Connecticut*.—*Bond's Appeal*, 31 Conn. 183; *Fritsche v. Fritsche*, 75 Conn. 285.

*Florida*.—*Lines v. Darden*, 5 Fla. 51.

*Georgia*.—*Billingslea v. Moore*, 14 Ga. 370; *McElrath v. Haley*, 48 Ga. 641; *Guerard v. Guerard*, 73 Ga. 506; *White v. Holland*, 92 Ga. 216, 44 Am. St. Rep. 87.

*Illinois*.—*Decker v. Decker*, 121 Ill. 341; *Dearlove v. Otis*, 99 Ill. App. 99; *Hawhe v. Chicago*, etc., R. Co., 165 Ill. 561; *Hubbard v. Hubbard*, 198 Ill. 621, affirming 99 Ill. App. 555.

*Indiana*.—*Stevenson v. Druley*, 4 Ind. 519; *Jackson v. Hoover*, 26 Ind. 511; *Daugherty v. Rogers*, 119 Ind. 254; *Whiteman v. Whiteman*, 152 Ind. 263.

*Kansas*.—*Donohue v. Donohue*, 54 Kan. 136; *Smith v. Holden*, 58 Kan. 535.

*Kentucky*.—*Henry v. Henry*, 81 Ky. 342.

*Louisiana*.—*Thorame's Succession*, 12 La. Ann. 384.

*Massachusetts*.—*Crocker v. Crocker*, 11 Pick. (Mass.) 252; *Gould v. Chamberlain*, 184 Mass. 115; *George v. George*, (Mass. 1904) 71 N. E. Rep. 85.

*Mississippi*.—*Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498.

*Nebraska*.—*Little v. Giles*, 255 Neb. 313; *Seebrock v. Fedawa*, 33 Neb. 413, 29 Am. St. Rep. 488.

*New Hampshire*.—*Webster v. Atkinson*, 4 N. H. 22; *Hopkinton Second Cong. Soc. v. Hopkinton First Cong. Soc.*, 14 N. H. 327; *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 327; *Lummus v. Mitchell*, 34 N. H. 39; *Goodhue v. Clark*, 37 N. H. 533; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213.

*New Jersey*.—*Leigh v. Savidge*, 14 N. J. Eq. 124; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Perrine v. Perrine*, 6 N. J. L. 133, 10 Am. Dec. 392; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251; *Blair v. Scribner*, (N. J. 1904) 57 Atl. Rep. 318.

*New York*.—*Ex p. Hornby*, 2 Bradf. (N. Y.) 420; *Matter of Hastings*, 6 Dem. (N. Y.) 307;

such evidence is inadmissible.<sup>1</sup>

**Circumstances Mere Aids to Construction.** — Although collateral aids, such as a view of the situation and circumstances surrounding the testator, are often necessary to enable a court to see things as he saw them, and to apply his language as he understood and intended it, yet the will must speak for itself and the intention of the testator must be gathered from what appears on its face. To allow the natural import of the words thus ascertained to be varied or contradicted, or omissions supplied, or apparent ambiguities removed, or intention supplied by parol evidence, would be to repeal the law requiring a

*Williams v. Crary*, 4 Wend. (N. Y.) 443; *Terpening v. Skinner*, 30 Barb. (N. Y.) 373, affirmed 29 N. Y. 506; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *White v. Hicks*, 33 N. Y. 383; *Matter of Wells*, 113 N. Y. 396, 10 Am. St. Rep. 457; *Mason v. Mason*, 2 Sandf. Ch. (N. Y.) 432; *Robertson v. Schemerhorn*, (Supm. Ct. Gen. T.) 14 N. Y. St. Rep. 304.

*North Carolina.* — *Edens v. Williams*, 3 Murph. (7 N. Car.) 27; *Woods v. Woods*, 2 Jones Eq. (55 N. Car.) 420.

*Oregon.* — *Moreland v. Brady*, 8 Oregon 303, 34 Am. Rep. 581.

*Pennsylvania.* — *In re Marshall*, 2 Pa. St. 388; *In re Barr*, 2 Pa. St. 428; *Brownfield v. Brownfield*, 12 Pa. St. 136, 51 Am. Dec. 590; *Rewalt v. Ulrich*, 23 Pa. St. 388.

*South Carolina.* — *Brennan v. Winkler*, 37 S. Car. 457.

*Tennessee.* — *Cooper v. Pearce*, (Tenn. Ch. 1901) 62 S. W. Rep. 223.

*Texas.* — *Hunt v. White*, 24 Tex. 643; *Peet v. Commerce, etc.*, St. R. Co., 70 Tex. 522; *Herring v. Patten*, 18 Tex. Civ. App. 147.

*Vermont.* — *Holmes v. Holmes*, 36 Vt. 525; *Keeler v. Keeler*, 39 Vt. 550.

*Virginia.* — *Wootton v. Redd*, 12 Gratt. (Va.) 196.

See also *supra*, this section, *General Rules of Interpretation—Surrounding Facts and Circumstances to Be Considered.*

**Statement of Rule.** — “It is competent to admit parol evidence to explain a will, by showing the situation of the testator by proof of the surrounding circumstances, in order that it may be read in the light of the circumstances in which he was placed at the time he made it. His intent must be ascertained entirely from the meaning of the words in the instrument, but as he may be supposed to have used the language with reference to the situation in which he was placed, to the state of his family, his property, and other circumstances relating to himself individually and to his affairs, the law admits extrinsic evidence of those facts and circumstances to enable the courts to discover the meaning attached by the testator to the words used in the will and to apply them to the particular facts of the case. For this purpose, every material fact that will enable the court to identify the persons or things mentioned in the will is admissible, in order to place the court, whose province it is to determine the meaning of the words, as near as may be in the situation of the testator, when he used them in making the will.” *Hunt v. White*, 24 Tex. 643.

In *Georgia*, the code, § 2457, provides in express terms that “when called upon to construe

a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of its execution; so the court may hear parol evidence to explain all ambiguities, both latent and patent.” *Rogers v. Rogers*, 78 Ga. 688.

**After-occurring Circumstances Not Considered.** — *Moggridge v. Thackwell*, 3 Bro. C. C. 517; *Welby v. Welby*, 2 Ves. & B. 192; *Smith v. Streatfield*, 1 Meriv. 358; *Morris v. Sickly*, 133 N. Y. 456.

**Evidence Admissible to Raise Latent Ambiguity** — *Brainerd v. Cowdrey*, 16 Conn. 1.

**Erroneous Date — Evidence Admissible under Issue that Writing Not a Will.** — *Whiteman v. Whiteman*, 152 Ind. 263.

**Evidence that Land Described Was All the Real Estate Possessed Was Competent.** — *Lomax v. Shinn*, 162 Ill. 124.

**Evidence to Determine Whether Legacy Residuary.** — *Morgan v. Dodge*, 44 N. H. 255.

**Where Realty Charged with Education of Children.** — *Neff v. Neff*, 3 Ohio Dec. (Reprint) 75.

**When Will Drawn by Illiterate Person.** — *Donohue v. Donohue*, 54 Kan. 136.

**Deed Made Prior to Will and Not Connected Therewith Not Considered.** — *Chamblee v. Broughton*, 120 N. Car. 170.

**Evidence of Execution of Power.** — Evidence of the state of a testator's property at the date of the will, to show an intention to execute a power, is inadmissible, where the gift is not specific but general. *In re Huddleston*, (1894) 3 Ch. 595.

**Words Importing Trust Construed as Expressions of Recommendation.** — In construing precatory words in a devise, a court of equity will look at the circumstances existing at the date of the will, and if necessary will construe words importing a trust as mere expressions of recommendation or confidence. *Van Amee v. Jackson*, 35 Vt. 173.

**1. When Words Plain and Unambiguous.** — *Gray v. Pash*, (Ky. 1902) 66 S. W. Rep. 1026; *Pittman v. Burr*, 79 Mich. 539; *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527; *Kingman v. Winchell*, (Mo. 1892) 20 S. W. Rep. 296; *Ex p. Hornby*, 2 Bradf. (N. Y.) 420; *Rapalye v. Rapalye*, 27 Barb. (N. Y.) 610; *Matter of Keleman*, 126 N. Y. 73, affirming 57 Hun (N. Y.) 165; *Bradhurst v. Field*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 535, 135 N. Y. 564; *Williamson v. Williamson*, 4 Jones Eq. (57 N. Car.) 281; *Perry v. Hunter*, 2 R. I. 80.

In *Currie v. Murphy*, 35 Miss. 473, it was said that the safest mode of construction was to adhere to the words of the instrument, without considering circumstances arising *aliunde*.



will to be in writing and to introduce all the uncertainty, fraud, and perjury the statutes were designed to prevent.<sup>1</sup>

*d. DECLARATIONS AND INSTRUCTIONS OF TESTATOR.* — Where the provisions of a will are clearly defined in unambiguous terms, parol evidence of declarations or instructions of the testator before, contemporaneously with, or after its making, are inadmissible in order to interpret the will as meaning something different from the expressed intent.<sup>2</sup> Nor is such evidence admis-

**1. Circumstances Mere Aids to Construction** — *United States*. — *Wilkins v. Allen*, 18 How. (U. S.) 385; *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83.

*Alabama*. — *Simmons v. Simmons*, 73 Ala. 235.

*Illinois*. — *Brownfield v. Wilson*, 78 Ill. 467.

*Indiana*. — *Chappell v. Missionary Soc.*, 3 Ind. App. 356, 50 Am. St. Rep. 276.

*Maryland*. — *Waters v. Howard*, 1 Md. Ch. 112.

*New Jersey*. — *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251.

*New York*. — *Myers v. Eddy*, 47 Barb. (N. Y.) 263.

*North Carolina*. — *Watkins v. Flora*, 8 Ired. L. (30 N. Car.) 374.

*Ohio*. — *Worman v. Teagarden*, 2 Ohio St. 380.

*Pennsylvania*. — *Gilmor's Estate*, 154 Pa. St. 523.

*Texas*. — *Lenz v. Sens*, 27 Tex. Civ. App. 442.

**2. Declarations and Instructions of Testator Inadmissible** — *England*. — *Atkinson v. Morris*, (1897) P. 40; *Gooding v. Gooding*, 1 Ves. 231; *Standen v. Standen*, 2 Ves. Jr. 589; *Eden v. Smyth*, 5 Ves. Jr. 341; *Murray v. Jones*, 2 Ves. & B. 318; *Bernasconi v. Atkinson*, 10 Hare 345, 17 Jur. 128; *Drake v. Drake*, 8 H. L. Cas. 172, 25 Beav. 642; *Ulrich v. Litchfield*, 2 Atk. 372; *McClure v. Evans*, 29 Beav. 422; *Sullivan v. Sullivan*, Ir. R. 4 Eq. 457; *Charter v. Charter*, L. R. 7 H. L. 364; *Dwyer v. Lysaght*, 2 Ball & B. 162; *Storke v. Storke*, 3 P. Wms. 51; *Towers v. Moor*, 2 Vern. 98; *Matthews v. Foulshaw*, 4 N. R. 500; *Horwood v. Griffith*, 4 De G. M. & G. 700. See also *Pendleton v. Grant*, 2 Vern. 517; *Baker v. Ker*, L. R. 11 Ir. 8; *In re Mayo*, (1901) 1 Ch. 404.

*United States*. — *Stevens v. Vancleve*, 4 Wash. (U. S.) 262, 23 Fed. Cas. No. 13,412.

*Alabama*. — *Foscue v. Lyon*, 55 Ala. 440; *Alexander v. Bates*, 127 Ala. 328.

*California*. — *Matter of Gilmore*, 81 Cal. 240.

*Connecticut*. — *Chappel v. Avery*, 6 Conn. 31; *Crosby v. Mason*, 32 Conn. 482; *Woodruff v. Migeon*, 46 Conn. 236.

*Delaware*. — *Walter v. Miller*, 5 Harr. (Del.) 151.

*District of Columbia*. — *McAlee v. Schneider*, 2 App. Cas. (D. C.) 461.

*Georgia*. — *Welman v. Neufville*, 75 Ga. 124.

*Illinois*. — *Brownfield v. Wilson*, 78 Ill. 467; *Kirkland v. Conway*, 116 Ill. 438; *Hubbard v. Hubbard*, 99 Ill. App. 555, *affirmed* 198 Ill. 621.

*Maine*. — *Turner v. Hallowell Sav. Inst.*, 76 Me. 527.

*Maryland*. — *Frick v. Frick*, 82 Md. 218.

*Massachusetts*. — *Crocker v. Crocker*, 11 Pick. (Mass.) 252; *Farrar v. Ayres*, 5 Pick. (Mass.)

404; *Tucker v. Seaman's Aid Soc.*, 7 Met. (Mass.) 188; *Weston v. Foster*, 7 Met. (Mass.) 297; *Osborne v. Varney*, 7 Met. (Mass.) 301; *Denfield, Petitioner*, 156 Mass. 265; *Foster v. Smith*, 156 Mass. 379; *Gould v. Chamberlain*, 184 Mass. 115.

*Mississippi*. — *Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354.

*Missouri*. — *Gregory v. Cowgill*, 19 Mo. 415; *Mersman v. Mersman*, 136 Mo. 244.

*New Hampshire*. — *Johnson v. Johnson*, 18 N. H. 594; *Utley v. Titcomb*, 63 N. H. 129.

*New Jersey*. — *Massaker v. Massaker*, 13 N. J. Eq. 264; *Leigh v. Savidge*, 14 N. J. Eq. 124; *Zabriskie v. Huyler*, 62 N. J. Eq. 697, *affirmed* 64 N. J. Eq. 794.

*New York*. — *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466; *Charter v. Otis*, 41 Barb. (N. Y.) 525; *Hogle v. Hogle*, 49 Hun (N. Y.) 313; *Reynolds v. Robinson*, 82 N. Y. 103, 37 Am. Rep. 555; *Williams v. Freeman*, 83 N. Y. 561; *Hosea v. Skinner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653.

*North Carolina*. — *Thomas v. Lines*, 83 N. Car. 191.

*Pennsylvania*. — *Comfort v. Mather*, 2 W. & S. (Pa.) 450, 37 Am. Dec. 523; *Presbyterian Congregation v. Sturgeon*, 9 Pa. St. 321; *Myers v. Myers*, 16 Pa. Super. Ct. 511, 18 Lanc. L. Rev. 195.

*Texas*. — *Peet v. Commerce, etc., St. R. Co.*, 70 Tex. 522.

**Admissible to Prove Situation of Property.** — *Puller v. Fuller*, 3 Rand. (Va.) 83. See *supra*, this section, 2. *c. Surrounding Facts and Circumstances.*

**Admissible on Question of Existence of Will.** — *Patterson v. Wilson*, 101 N. Car. 594.

**Inadmissible to Show Absolute Bequest Conditional.** — *Crocker v. Crocker*, 11 Pick. (Mass.) 252.

**Inadmissible to Show Debts Not Intended to Be Included in Clause of Release.** — *Coale v. Smith*, 4 Pa. St. 376.

**Inadmissible as to Boundary Lines.** — *Cadmus v. Vreeland*, 28 N. J. Eq. 356; *Taylor v. Boggs*, 20 Ohio St. 516. See the title **BOUNDARIES**, vol. 4, p. 847.

**Inadmissible as to Meaning of Words "Ex 'Aequo'."** — *Archer v. Morris*, 61 N. J. Eq. 152.

**Where Such Evidence Does Not Contradict the Will**, but is consistent with it, and only relates to declarations of the testator at the time of making his will and to a fact on which he made it, it is admissible. *Webley v. Langstaff*, 3 Desaus. (S. Car.) 504.

**Sense in Which Word "Moneys" Used.** — Where the testator uses the word "moneys," and there is nothing in the will to show that it is used in its extended sense, the declarations of the testator, and a reference to the state of his property, are not admissible to show

sible where the words used to describe a beneficiary are not applicable to any known organization,<sup>1</sup> or are too unintelligible to admit of explanation.<sup>2</sup> But such declarations are admissible when they have been communicated to the legatee, assented to by him, and such assent has been acted on by the testator.<sup>3</sup>

**Patent Ambiguity.** — Where the ambiguity is patent, evidence of the testator's declarations or instructions is not admissible.<sup>4</sup>

**Latent Ambiguity.** — But where there is such an uncertainty in the language used as to raise a latent ambiguity, declarations of the testator at and about the time the will was drawn are admissible upon the question of intention, in accordance with the general rule governing the admissibility of parol evidence in such cases.<sup>5</sup>

**Reference in Will to "Verbal Instructions."** — In *Virginia*, where a bequest was made to a trustee "to be disposed of by him as a private trust, about which I shall give him specific verbal directions," parol evidence was not admitted to establish the directions, on the ground that it would violate the statute requiring wills to be in writing, etc.<sup>6</sup> And in *England* it has been held incompetent to explain by parol evidence a provision of the will that the devisee of a life interest should dispose of the estate "in accordance with my wishes verbally expressed by me to her."<sup>7</sup> But in *Illinois*, where a bequest was made to executors "to be used and disposed of by them according to verbal instructions given them," it was held that it was competent to show by parol what the instructions were.<sup>8</sup>

**e. FEELINGS AND RELATIONS OF TESTATOR.** — If the language of the instrument is uncertain, or there is a latent ambiguity, evidence is admissible of the testator's feelings towards, and his relation to, the persons affected by the will, in order to interpret his intention and to explain the doubtful words.<sup>9</sup> But where the language of the will is plain and unambiguous, such

a different intent. *Mann v. Mann*, 14 Johns. (N. Y.) 1.

1. *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669.

2. **Terms Unintelligible.** — *Weatherhead v. Baskerville*, 11 How. (U. S.) 329.

3. **Assent by Legatee and Action Thereon by Testator.** — *Vreeland v. Williams*, 32 N. J. Eq. 734.

4. **Patent Ambiguity.** — *Carson v. Doe*, 4 Houst. (Del.) 328; *Clark v. Hardwick Seminary*, 2 Ohio Cir. Dec. 87, 3 Ohio Cir. Ct. 152.

In *Lewis v. Douglass*, 14 R. I. 604, it was said: "To permit parol evidence to be given in aid of a patent ambiguity would not only be in violation of the well-settled rule that the testator's intent is to be ascertained by the will itself, but would also be contrary to the statute which requires wills to be in writing. The declarations or instructions of the testator to the witness are therefore inadmissible for the purpose of showing what he meant by the provision of the will."

5. **Latent Ambiguity — England.** — *Doe v. Hiscocks*, 5 M. & W. 363.

*Alabama.* — *Vandiver v. Vandiver*, 115 Ala. 328.

*Connecticut.* — *Pinney v. Newton*, 66 Conn. 141.

*Indiana.* — *Dennis v. Holsapple*, 148 Ind. 297.

*Maine.* — *Cotton v. Smithwick*, 66 Me. 360.

*Massachusetts.* — *Wadsworth v. Ruggles*, 6 Pick. (Mass.) 63.

*Mississippi.* — *Gilliam v. Brown*, 43 Miss. 641.

*Missouri.* — *Thomson v. Thomson*, 115 Mo. 56; *Hurst v. Von de Veld*, 158 Mo. 239.

*New Hampshire.* — *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317.

*New Jersey.* — *Leigh v. Savidge*, 14 N. J. Eq. 124; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251.

*New York.* — *Doe v. Roe*, 1 Wend. (N. Y.) 541; *Ex p. Hornby*, 2 Bradf. (N. Y.) 420; *Board of Missions v. Scovell*, 3 Dem. (N. Y.) 516; *Chace v. Lamphere*, 51 Hun (N. Y.) 524; *Matter of Wheeler*, 161 N. Y. 652, 32 N. Y. App. Div. 183, affirmed 161 N. Y. 652, 57 N. E. Rep. 1128; *Ladies' Union Benev. Soc. v. Van Natta*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 217.

*Pennsylvania.* — *Vernor v. Henry*, 3 Watts (Pa.) 385; *Phelp's Estate*, 4 Pa. Dist. 258.

*Virginia.* — *Wootton v. Redd*, 12 Gratt. (Va.) 196.

*Wisconsin.* — *Morgan v. Burrows*, 45 Wis. 211, 30 Am. Rep. 717; *Scott v. Neeves*, 77 Wis. 305.

See *Weatherhead v. Baskerville*, 11 How. (U. S.) 329. See also *supra*, this section, *Parol Evidence in Aid of Construction — In General*; and see the title AMBIGUITY, vol. 2, p. 296.

6. **Verbal Instructions Referred to in Will.** — *Sims v. Sims*, 94 Va. 580.

7. *In re Hetley*, (1902) 2 Ch. 866.

8. *Cagney v. O'Brien*, 83 Ill. 72.

9. **Evidence of Testator's Feelings and Relations.** — *Hitchings v. Wood*, 2 Moo. P. C. 355; *In re Taylor*, 34 Ch. D. 255, 56 L. J. Ch. 171; *Gilmer v. Stone*, 120 U. S. 586; *Skinner v. Harrison*, 71 Ind. 139; *Hinckley v. Thatcher*, 139

evidence is inadmissible.<sup>1</sup>

*f. MISTAKE OR OMISSION* — (1) *Mistake*. — Parol evidence is not admissible to show that there is a mistake in a will,<sup>2</sup> unless such mistake is apparent upon the face thereof.<sup>3</sup>

But the Execution of a Will Through Fraud or Mistake may be shown by parol, as the object of such evidence is not to correct the will, but to deny its existence.<sup>4</sup>

(2) *Omission*. — It is well settled that omissions in a will, though due to accident or mistake, cannot be supplied by parol proof of intention.<sup>5</sup>

*Omission of Children*. — It is provided by statute in some of the states that any child of a testator for whom he has omitted to provide in his will shall take such share of his estate as if he had died intestate, unless the omission appears to have been intentional.<sup>6</sup> Under such a statute in *Massachusetts*, it need not appear from the will itself that the omission was intentional, but such fact may be shown by parol evidence.<sup>7</sup> The same rule applies in *Nebraska*;<sup>8</sup> and in *Utah*, if it appears from the will itself that there were other children, the statute raises a presumption that the omission was unintentional, which presumption, however, may be rebutted by parol evidence.<sup>9</sup> But in *California* and *Washington* the rule is otherwise, and parol evidence is not admissible to show an intentional omission, which must appear from the will itself.<sup>10</sup>

*g. TESTIMONY OF ATTORNEY, SCRIVENER, OR WITNESS*. — As a general rule it may be stated that the expressed intention of the testator cannot be

Mass. 477, 52 Am. Rep. 719; *Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498; *Hurst v. Von de Veld*, 158 Mo. 239; *Webb v. Hayden*, 166 Mo. 39; *Domestic, etc., Missionary Soc.'s Appeal*, 30 Pa. St. 425.

In *Woodruff v. Migeon*, 46 Conn. 236, evidence was admitted that other notes, such as were described in the will, had existed, but were not found by the executor, for the purpose of showing the relation which the testator had sustained to his children and sons-in-law. A knowledge of such facts was held to enable the court to see more clearly what was in the mind of the testator at the time the will was drawn.

**Assumption by Testator of Relation of Parent to Legatee** may be proved by parol. *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 139.

**1. When Language Plain and Unambiguous**. — *Stratton's Estate*, 112 Cal. 513; *Wilson v. Bull*, 97 Md. 128; *McQueen v. Lilly*, 131 Mo. 9; *Reynolds v. Reynolds*, 65 S. Car. 390.

**2. Evidence of Mistake**. — *Avery v. Chappel*, 6 Conn. 270, 16 Am. Dec. 53; *Bunnell v. Bunnell*, 73 Ind. 163; *Eckford v. Eckford*, (Iowa 1892) 53 N. W. Rep. 345; *Creasy v. Alverson*, 43 Mo. 13; *Jones v. Jones*, 13 N. J. Eq. 236; *Nevius v. Martin*, 30 N. J. L. 465; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; *Harrison v. Morton*, 2 Swan (Tenn.) 461; *Skipwith v. Cabell*, 19 Gratt. (Va.) 758.

**Contra**. — Where testator gives stock as standing in his own name, and the stock is in the name of a trustee, parol evidence is admissible to show the mistake. *Hewson v. Reed*, 5 Madd. 451.

**3. Mistake Apparent on Face**. — *Warner v. Brinton*, 29 Fed. Cas. No. 17,179; *McAlister v. Butterfield*, 31 Ind. 25; *Grimes v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289; *Jackson v. Payne*, 2 Met. (Ky.) 567; *Gifford v. Dyer*, 2 R. I. 99, 57 Am. Dec. 708.

**4. Hearn v. Ross**, 4 Harr. (Del.) 46.

**5. Evidence of Omissions** — *United States*. — *Warner v. Brinton*, 29 Fed. Cas. No. 17,179.

*Alabama*. — *Abercrombie v. Abercrombie*, 27 Ala. 489.

*Georgia*. — *Willis v. Jenkins*, 30 Ga. 167.

*Indiana*. — *Bunnell v. Bunnell*, 73 Ind. 163.

*Iowa*. — *Christy v. Badger*, 72 Iowa 581.

*Kentucky*. — *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Caldwell v. Caldwell*, 7 Bush (Ky.) 515.

*Maryland*. — *Hawman v. Thomas*, 44 Md. 30; *Cesar v. Chew*, 7 Gill & J. (Md.) 127; *Gaither v. Gaither*, 3 Md. Ch. 158.

*Michigan*. — *Crooks v. Whitford*, 47 Mich. 283.

*Missouri*. — *Davis v. Davis*, 8 Mo. 56.

*New Hampshire*. — *Loring v. Woodward*, 41 N. H. 391.

*New Jersey*. — *Andress v. Weller*, 3 N. J. Eq. 604.

*New York*. — *Arthur v. Arthur*, 10 Barb. (N. Y.) 9; *Sturges v. Cargill*, 1 Sandf. Ch. (N. Y.) 318; *Matter of Knoblauch*, (Surrogate Ct.) 31 Misc. (N. Y.) 418.

*North Carolina*. — *Taylor v. Maris*, 90 N. Car. 619.

*Texas*. — *Hunt v. White*, 24 Tex. 643.

But see *Geer v. Winds*, 4 Desaus. (S. Car.) 85.

**6. See supra**, this section, *General Rules of Interpretation* — *Heirs Favored*. See also *supra*, this title, *Restraints on Testamentary Power* — *Disinheritance of Children*.

**7. Massachusetts Rule**. — *Converse v. Wales*, 4 Allen (Mass.) 512; *Wilson v. Fosket*, 6 Met. (Mass.) 400, 39 Am. Dec. 736; *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8.

**8. Nebraska Rule**. — *Brown v. Brown*, (Neb. 1904) 98 N. W. Rep. 718.

**9. Utah Rule**. — *Coulam v. Doull*, 4 Utah 267.

**10. Parol Evidence Inadmissible**. — *Matter of Garraud*, 35 Cal. 336; *Hill v. Hill*, 7 Wash. 409.



varied by the testimony of the attorney who drew the will,<sup>1</sup> the scrivener who wrote it,<sup>2</sup> or the attesting witness to the testator's signature, as to what was the intention of the testator, or what he meant by the use of certain words or expressions.<sup>3</sup>

**h. NATURE AND AMOUNT OF ESTATE.** — Although it is sometimes permissible to look beyond the face of the will, yet, where the language used is clear and plain, and there is no latent ambiguity, parol evidence is inadmissible to explain, enlarge, or diminish an estate actually devised, or to explain or change the nature thereof.<sup>4</sup>

**A Patent Ambiguity** may not be explained by parol so as to show that the testator intended to create separate estates in his daughters.<sup>5</sup>

**Surrounding Facts and Circumstances.** — But, as in other cases, parol evidence of the facts and circumstances surrounding the testator at the time of making the will is admissible in determining the testator's intention.<sup>6</sup>

**i. INTENT TO DISCHARGE DEBT OR OBLIGATION.** — In accordance with the general rule that parol evidence is inadmissible except in case of latent ambiguity, and to rebut a resulting trust,<sup>7</sup> such evidence is inadmissible to create the presumption that a legacy was intended as in satisfaction of a debt, but is admissible to repel or confirm such presumption after it is raised.<sup>8</sup>

**1. Testimony of Attorney.** — *Wilson v. O'Leary*, L. R. 7 Ch. 448; *In re Cheadle*, (1900) 2 Ch. 620; *Lincoln v. Perry*, 149 Mass. 368; *Scott v. Ives*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 749; *Rothmahler v. Myers*, 4 Desaus. (S. Car.) 215, 6 Am. Dec. 613.

**2. Testimony of Scrivener.** — *Elder v. Ogle-tree*, 36 Ga. 64; *McCauley v. Buckner*, 87 Ky. 191; *Frick v. Frick*, 82 Md. 218; *Wheeler v. Wood*, 104 Mich. 414; *Nevius v. Martin*, 30 N. J. L. 465; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251; *M'Allister v. Tate*, 11 Rich. L. (S. Car.) 509, 73 Am. Dec. 119; *Button v. American Tract Soc.*, 23 Vt. 336; *Taylor v. Horst*, 23 Wash. 446.

**Admissible When Part of Res Gestæ.** — *Klock v. Stevens*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 383. See *Nolan v. Bolton*, 25 Ga. 352. See also the title *RES GESTÆ*, vol. 24, p. 660.

**3. Testimony of Attesting Witness.** — *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 472; *Gaither v. Gaither*, 3 Md. Ch. 158; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482; *Read v. Payne*, 3 Call (Va.) 225, 2 Am. Dec. 550.

**4. Evidence of Nature and Amount of Estate — United States.** — *King v. Ackerman*, 2 Black (U. S.) 408, affirming 14 Fed. Cas. No. 7,786; *Hanner v. Moulton*, 23 Fed. Rep. 5; *Hatch v. Ferguson*, 57 Fed. Rep. 966.

*Connecticut.* — *Bishop v. Howarth*, 59 Conn. 455.

*Florida.* — *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692.

*Georgia.* — *Armistead v. Armistead*, 32 Ga. 597; *Gillespie v. Schuman*, 62 Ga. 252.

*Illinois.* — *Wentworth v. Read*, 166 Ill. 139.

*Indiana.* — *Doe v. Kinney*, 3 Ind. 50.

*Iowa.* — *Moran v. Moran*, 104 Iowa 216.

*Maine.* — *Golder v. Chandler*, 87 Me. 63.

*Maryland.* — *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573.

*New Jersey.* — *Matter of Haines*, 8 N. J. Eq. 506.

*New York.* — *Miller v. Miller*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 582.

*Rhode Island.* — *Chapin v. Hill*, 1 R. I. 446; *McGough v. Hughes*, 18 R. I. 768.

*South Carolina.* — *Pinckney v. Pinckney*, 2 Rich. Eq. (S. Car.) 218.

*Texas.* — *Brown v. Bryant*, 17 Tex. Civ. App. 454.

In *Maeck v. Nason*, 21 Vt. 115, 52 Am. Dec. 41, it was said: "It was conceded in the argument that extrinsic evidence, to show the quantity of interest of the testator in an estate intended to be devised, might be admissible; but it is urged that the quantity of interest intended to be devised, when it is to be carved out of a greater interest in the testator, is of a different character; and that evidence of such interest is not admissible. This distinction is almost too nice to be intelligibly stated, and we are unable to discover any ground for it either in reason or from authority."

**Admissible to Show Gift Either Absolute or as Advancement.** — *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 153; *Graves v. Spedden*, 46 Md. 527; *Justis v. Justis*, (Md. 1904) 57 Atl. Rep. 23.

**Evidence to Show Illegal Trust.** — Parol evidence is admissible to show that an absolute bequest is a trust, where the trust is illegal, and the intention of the testator is to evade the law. *Kenrick v. Cole*, 61 Mo. 572.

**5. Patent Ambiguity.** — *Johnson v. Johnson*, 32 Ala. 637.

**6. Surrounding Facts and Circumstances.** — *Lomax v. Shinn*, 162 Ill. 124; *Riggs v. Myers*, 20 Mo. 239; *Snyder v. Warbase*, 11 N. J. Eq. 463; *Leigh v. Savidge*, 14 N. J. Eq. 124; *Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138. See also *supra*, this section, *Parol Evidence in Aid of Construction — Surrounding Facts and Circumstances*.

<sup>7</sup> See *supra*, this section, 2. a. In General.

**8. Evidence of Discharge of Debt or Obligation.** — *Hall v. Hill*, 1 Dr. & War. 94; *Woodruff v. Migeon*, 46 Conn. 236; *Cloud v. Clinkinbeard*, 8 B. Mon. (Ky.) 397, 48 Am. Dec. 397; *Thum's Estate*, 5 Pa. Dist. 739. But see *Stagg v. Beekman*, 2 Edw. (N. Y.) 80.

In *Gilliam v. Brown*, 43 Miss. 641, the court said: "The admission of testimony *aliunde* has never been received with great favor.

**j. IDENTIFICATION OF LEGATEE OR DEVISEE.** — It may be stated generally that where the beneficiary under a will is not designated with precision, parol evidence is admissible to show who was intended.<sup>1</sup> Thus, where a latent ambiguity results from the fact that the description of the legatee or devisee is perfectly answered by two or more persons or is applicable in part to two or more persons, parol evidence to identify the person intended is admissible.<sup>2</sup>

Slight circumstances upon the face of the will have been taken hold of to repel the presumption, such as the express declaration in the will that all debts must be paid, or words of similar import, or that the legacy is payable upon a contingency, or is in some particular less beneficial than the debt, though more so in others, as where the legacy, though greater in amount, is payable at a future date."

**Testator's Declarations as Defense to Action on Debt.** — The testator's declarations at and after making the will that he did not intend the debt of a legatee should be demanded is a defense to an action to recover it. *Zeigler v. Eckert*, 6 Pa. St. 13.

**1. Identification of Legatee or Devisee — General Rule** — *England.* — *Charter v. Charter*, L. R. 7 H. L. 364; *Brown v. Langley*, 2 Barnard 118; *Stringer v. Gardiner*, 4 De G. & J. 468.

*Connecticut.* — *Dunham v. Averill*, 45 Conn. 61; *Brewster v. McCall*, 15 Conn. 274; *Ayres v. Weed*, 16 Conn. 291; *Beardsley v. American Home Missionary Soc.*, 45 Conn. 327.

*Illinois.* — *Missionary Soc. v. Cadwell*, 69 Ill. App. 280.

*Iowa.* — *Chambers v. Watson*, 56 Iowa 676; *Covert v. Sebern*, 73 Iowa 564.

*Kansas.* — *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. Rep. 903.

*Maine.* — *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Howard v. American Peace Soc.*, 49 Me. 288.

*Massachusetts.* — *Tucker v. Seaman's Aid Soc.*, 7 Met. (Mass.) 188.

*New Jersey.* — *Evans v. Hays*, 3 N. J. Eq. 204; *Moore v. Moore*, 50 N. J. Eq. 554.

*New York.* — *Lefevre v. Lefevre*, 59 N. Y. 434; *Leonard v. Davenport*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 385; *Hart v. Marks*, 4 Bradf. (N. Y.) 161; *Tallman v. Tallman*, (N. Y. Super. Ct. Eq. T.) 3 Misc. (N. Y.) 465; *Jay v. Lee*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 13.

*Ohio.* — *McCormick v. Dunker*, 24 Ohio Cir. Ct. 553.

*Pennsylvania.* — *Powell v. Biddle*, 2 Dall. (Pa.) 70, 1 Am. Dec. 263; *Gaston's Estate*, 188 Pa. St. 374.

*Virginia.* — *Maund v. M'Phail*, 10 Leigh (Va.) 207; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

*West Virginia.* — *Ross v. Kiger*, 42 W. Va. 402.

**Designation by Wrong Christian Name.** — *Conolly v. Pardon*, 1 Paige (N. Y.) 291.

**"Daughter" Intended for Adopted Daughter.** — *Matter of Cahn*, 3 Redf. (N. Y.) 31.

**Words of Designation but Mistake in Name.** — *Reformed Presb. Church v. McMillan*, 31 Wash. 643.

**Evidence Admissible to Identify Members of "Family."** — *Hall v. Stephens*, 65 Mo. 670; *Phillips v. Ferguson*, 85 Va. 509.

**Name by Which Corporation Was Known.** — Where the name used in a will to designate a corporate beneficiary was incorrect parol evidence was admitted to show that the name used in the will was the one by which the testator knew and designated the corporation. *Van Nostrand v. Board of Domestic Missions*, 59 N. J. Eq. 19.

**2. Latent Ambiguity** — *England.* — *Harris v. Lincoln*, 2 P. Wms. 136; *Goods of Chappell*, (1894) P. 98; *Charter v. Charter*, L. R. 7 H. L. 364; *Re Waller*, 80 L. T. N. S. 701.

*Connecticut.* — *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472.

*Illinois.* — *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

*Maine.* — *Howard v. American Peace Soc.*, 49 Me. 288.

*Massachusetts.* — *Bodman v. American Tract Soc.*, 9 Allen (Mass.) 447; *Faulkner v. National Sailors' Home*, 155 Mass. 458.

*Missouri.* — *Gordon v. Burris*, 141 Mo. 602; *Willard v. Darrah*, 168 Mo. 660.

*Nebraska.* — *Pawnee City Second United Presb. Church v. First United Presb. Church*, (Neb. 1904) 99 N. W. Rep. 252.

*New Hampshire.* — *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317; *Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321; *Smith v. Kimball*, 62 N. H. 606.

*New Jersey.* — *Van Nostrand v. Board of Domestic Missions*, 59 N. J. Eq. 19.

*New York.* — *Episcopate v. Colegrove*, 6 Thomp. & C. (N. Y.) 614; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Pritchard v. Hicks*, 1 Paige (N. Y.) 270; *Gallup v. Wright*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 286; *Smith v. Smith*, 1 Edw. (N. Y.) 189.

*North Carolina.* — *North Carolina Institute v. Norwood*, Busb. Eq. (45 N. Car.) 65; *Tilley v. Ellis*, 119 N. Car. 233; *Keith v. Scales*, 124 N. Car. 497.

*South Carolina.* — *Donald v. Dendy*, 2 McMull. L. (S. Car.) 123.

*Tennessee.* — *Ward v. Epsy*, 6 Humph. (Tenn.) 447; *Gass v. Ross*, 3 Sneed (Tenn.) 211.

*Virginia.* — *Roy v. Rowzie*, 25 Gratt. (Va.) 599; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

*West Virginia.* — *Wilson v. Perry*, 29 W. Va. 169.

*Wisconsin.* — *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278.

See also the title AMBIGUITY, vol. 2, p. 296.

**Failure of Legacy Through Misdescription.** — If the ambiguity is such that it is impossible to ascertain from proof *dehors* the will who was intended as legatee, the misdescription will render the legacy void. *Smith v. Smith*, 4 Paige (N. Y.) 271.

**Devise to "the Nursery."** — Where a legacy was given to "the Nursery," it was held that

But where there is no ambiguity, and the object of the testator's bounty is sufficiently designated by plain language, so that it is clear who was intended, the construction is for the court, and parol evidence is inadmissible, although it might be thereby shown that the testator's intention was entirely different from that expressed in the will.<sup>1</sup>

**Illegitimate Persons Answering Description.** — Where the testator bequeaths or devises to a class, as to his children, nephews, nieces, issue, etc., no latent ambiguity arises upon proof of the existence of illegitimate children, etc., so as to admit parol evidence of an intent to include them, and the legitimate children, etc., take to the exclusion of the others, unless the intention of the testator to include them is manifested by clear expression, or necessary implication on the face of the will itself.<sup>2</sup>

**Charitable Bequests.** — In case of charitable bequests, where the language of the testator is obscure and uncertain in designating the objects intended, parol evidence is admissible to show who was intended, and to show the situation in which the testator stood towards such legatees or devisees.<sup>3</sup>

**k. IDENTIFICATION OF LEGACY OR DEVISE — General Rule.** — As in the case of the legatee or devisee, so, where the subject-matter of a legacy or devise is described in indefinite or uncertain terms, parol evidence is admissible as a general rule to explain, locate, or identify the same; but the description given in the will must not be so indefinite and uncertain that the effect of the admission of parol evidence is to make a new will, and thus violate the rule requiring such instruments to be in writing.<sup>4</sup> Thus, where the description

an institution not so known, and not properly speaking a nursery, could not show by parol that it was entitled thereto. *Wood v. Hammond*, 16 R. I. 98.

**1. When No Ambiguity Exists — Connecticut.** — *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669.

*Georgia.* — *Carson v. Searcy*, 66 Ga. 550.

*Indiana.* — *Judy v. Williams*, 2 Ind. 449.

*Maryland.* — *Stokeley v. Gordon*, 8 Md. 496.

*New York.* — *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *St. Luke's Home v. Association, etc.*, 52 N. Y. 191, 11 Am. Rep. 697, reversing 34 N. Y. Super. Ct. 241; *Union Trust Co. v. St. Luke's Hospital*, 175 N. Y. 505, affirming 74 N. Y. App. Div. 330; *Smith v. Smith*, 1 Edw. (N. Y.) 189.

*Pennsylvania.* — *Sword v. Adams*, 3 Yeates (Pa.) 34; *Jeanes's Estate*, 3 Pa. Dist. 314, 34 W. N. C. (Pa.) 190; *Root's Estate*, 187 Pa. St. 118.

*Tennessee.* — *Weatherhead v. Sewell*, 9 Humph. (Tenn.) 272.

**Devise to "Children."** — A devise to the testator's children, where he has children of his own and step-children, does not embrace the step-children; and parol evidence is inadmissible to prove that the testator intended to include them. *Fouke v. Kemp*, 5 Har. & J. (Md.) 135; *Hawman v. Thomas*, 44 Md. 44.

**2. Illegitimate Persons Answering Description.** — *In re Fish*, (1894) 2 Ch. 83; *Flora v. Anderson*, 67 Fed. Rep. 182; *Heater v. Van Auken*, 14 N. J. Eq. 159; *Brower v. Bowers*, 1 Abb. App. Dec. (N. Y.) 214; *Crosby v. Lewis*, 2 Edm. Sel. Cas. (N. Y.) 26, 1 Code Rep. (N. Y.) 90; *Appel v. Byers*, 98 Pa. St. 479; *Shearman v. Angel, Bailey Eq.* (S. Car.) 351, 23 Am. Dec. 166; *Ferguson v. Mason*, 2 Sneed (Tenn.) 618.

**3. Charitable Bequests.** — *McCormick v. Dunker*, 24 Ohio Cir. Ct. 553; *Domestic, etc., Missionary Society's Appeal*, 30 Pa. St. 425; *Amberston's Estate*, 204 Pa. St. 397; *Ross v. Kiger*, 42 W. Va. 402. See also the title CHARITIES, vol. 5, p. 893.

**Will Held to Fail to Indicate Any Corporation as Beneficiary.** — *Domestic, etc., Missionary Soc. v. Reynold*, 9 Md. 341.

**4. Identification of Legacy or Devise — General Rule — England.** — *Ricketts v. Turquand*, 1 H. L. Cas. 473; *Horwood v. Griffith*, 4 De G. M. & G. 700; *Sandford v. Raikes*, 1 Meriv. 653.

*Connecticut.* — *Spencer v. Higgins*, 22 Conn. 521; *Crosby v. Mason*, 32 Conn. 482.

*Georgia.* — *Rogers v. Rogers*, 78 Ga. 688.

*Illinois.* — *Smith v. Dennison*, 112 Ill. 367; *Decker v. Decker*, 121 Ill. 341.

*Indiana.* — *Cruse v. Cunningham*, 79 Ind. 402; *Funk v. Davis*, 103 Ind. 281.

*Iowa.* — *Chambers v. Watson*, 60 Iowa 339, 46 Am. Rep. 70.

*Kentucky.* — *Thomas v. Scott*, (Ky. 1903) 72 S. W. Rep. 1129, 74 S. W. Rep. 694.

*Maryland.* — *Walston v. White*, 5 Md. 297; *Frick v. Frick*, 82 Md. 218.

*Massachusetts.* — *Cleverly v. Cleverly*, 124 Mass. 314.

*Minnesota.* — *Case v. Young*, 3 Minn. 209.

*Missouri.* — *Riggs v. Myers*, 20 Mo. 239.

*New Hampshire.* — *Hopkinton Second Cong. Soc. v. Hopkinton First Cong. Soc.*, 14 N. H. 315.

*New Jersey.* — *Stanford v. Lyon*, 37 N. J. L. 426, 18 Am. Rep. 736.

*New York.* — *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. (N. Y.) 144; *Thorne v. Underhill*, 1 Dem. (N. Y.) 306; *Matter of Hastings*, 6 Dem. (N. Y.) 307; *Smith v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77.

*North Carolina.* — *Morton v. Edwards*, 4



of the legacy or devise raises a latent ambiguity as to the intention of the testator, parol evidence is admissible to explain his meaning.<sup>1</sup> But where there is no ambiguity, and the words used are definite and clearly refer to an object, parol evidence is inadmissible, although it may be apparent that the testator has made a mistake.<sup>2</sup>

**Devise or Bequest in General Terms.**—Where a devise or bequest is made in general terms, parol evidence is admissible to designate what the testator intended to include within such terms.<sup>3</sup>

*Dev. L.* (15 N. Car.) 507; *Kinsey v. Rhem*, 2 Ired. L. (24 N. Car.) 192; *Lillard v. Reynolds*, 3 Ired. L. (25 N. Car.) 366; *Cox v. Cox*, 91 N. Car. 256; *Grubb v. Foust*, 99 N. Car. 286; *Bell v. Couch*, 132 N. Car. 346.

*Ohio.*—*Ashworth v. Carleton*, 12 Ohio St. 381; *Boggs v. Taylor*, 26 Ohio St. 604; *Black v. Hill*, 32 Ohio St. 313.

*Oregon.*—*Jones v. Dove*, 6 Oregon 188; *Jones v. Dove*, 7 Oregon 467.

*Pennsylvania.*—*Thompson v. Kaufman*, 9 Pa. Super. Ct. 305, 6 Pa. Dist. 522; *Myers v. Myers*, 16 Pa. Super. Ct. 511, 18 Lanc. L. Rev. 195.

*South Carolina.*—*Wilson v. Robertson*, Harp. Eq. (S. Car.) 56.

**Devise of Tract on Which Certain Person Lives, or Tract Bought from Certain Grantor.**—*Douglas v. Blackford*, 7 Md. 8; *Horton v. Lee*, 99 N. Car. 227; *Coleman v. Eberly*, 76 Pa. St. 197; *Perry v. Morgan*, 1 Strobl. L. (S. Car.) 8; *Jones v. Quattlebaum*, 31 S. Car. 606; *McCorry v. King*, 3 Humph. (Tenn.) 267.

**Tract Lying in Certain County Bought of Certain Person.**—*McCorry v. King*, 3 Humph. (Tenn.) 267.

**"All that Tract of Land, a Part of Which Is Known as the H. R. Place."**—*Jones v. Quattlebaum*, 31 S. Car. 606.

**Devise of "Home Farm."**—*Taylor v. Boggs*, 20 Ohio St. 516.

**Devise of "My Land."**—*Mitchell v. Walker*, 17 B. Mon. (Ky) 61.

**Devise of "My Plantation."**—*Holton v. White*, 23 N. J. L. 330.

**Devise of "My Estate."**—*Williams v. Swift*, 8 Ohio Dec. (Reprint) 258, 6 Cinc. L. Bul. 722.

**Devise of "Back Lands."**—Where a testator gives all his "back lands" to certain people parol evidence is admissible to designate the premises by showing that certain of his lands were so called, and so known by him, his family, and neighbors. *Ryerss v. Wheeler*, 22 Wend. (N. Y.) 148.

**"Homestead."**—Before it was defined by statute, the word "homestead" was indeterminate, and imported no specific quantity of land, and was used in common acceptance to include all the land that was appurtenant to, used and considered by the testator as making up the farm which he cultivated and upon which he resided. Thus, in construing a will, which devised the homestead, evidence *aliunde* was admissible to show what lands were so regarded. *Hopkins v. Grimes*, 14 Iowa 73. See also the title **HOMESTEAD**, vol. 15, p. 516.

**Identification of Life Insurance Policy.**—*Hartwig v. Schiefer*, 147 Ind. 64.

**1. Latent Ambiguity.**—*United States.*—*Allen v. Lyons*, 2 Wash. (U. S.) 475, 1 Fed. Cas. No. 227.

*Alabama.*—*Vandiver v. Vandiver*, 115 Ala. 328.

*Connecticut.*—*Nichols v. Lewis*, 15 Conn. 137.

*Georgia.*—*Elder v. Ogletree*, 36 Ga. 64.

*Indiana.*—*Pate v. Bushong*, 161 Ind. 533.

*Iowa.*—*Eckford v. Eckford*, 91 Iowa 54; *In re Frahm*, 120 Iowa 85; *Flynn v. Holman*, 119 Iowa 731.

*Kentucky.*—*Thomas v. Scott*, (Ky. 1903) 72 S. W. Rep. 1129, 74 S. W. Rep. 694.

*Massachusetts.*—*Storer v. Freeman*, 6 Mass. 435; *Sargent v. Towne*, 10 Mass. 303.

*New Hampshire.*—*Winkley v. Kaime*, 32 N. H. 268; *Pickering v. Pickering*, 50 N. H. 349; *Shapleigh v. Shapleigh*, 69 N. H. 577.

*New Jersey.*—*Den v. Cubberly*, 12 N. J. L. 308.

*New York.*—*Reynolds v. Robinson*, 82 N. Y. 103; *Peters v. Porter*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 422; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231.

*North Carolina.*—*McCall v. Gillespie*, 6 Jones L. (51 N. Car.) 533.

*Ohio.*—*Boggs v. Taylor*, 26 Ohio St. 604; *Williams v. Swift*, 8 Ohio Dec. (Reprint) 258, 6 Cinc. L. Bul. 722.

*Pennsylvania.*—*Best v. Hammond*, 55 Pa. St. 409; *Knight's Estate*, 10 Pa. Co. Ct. 225.

*South Carolina.*—*Elsworth v. Buckmyer*, 1 Nott & M. (S. Car.) 431.

*Virginia.*—*Reno v. Davis*, 4 Hen. & M. (Va.) 283; *Roy v. Rowzie*, 25 Gratt. (Va.) 599.

See also *In re Cheadle*, (1900) 2 Ch. 620. And see the title **AMBIGUITY**, vol. 2, p. 296.

**Patent Ambiguity.**—*Schlottman v. Hoffman*, 73 Miss. 188.

**2. Where No Ambiguity Exists.**—*England.*—*Horwood v. Griffith*, 4 De G. M. & G. 700.

*District of Columbia.*—*Patch v. White*, 1 Mackey (D. C.) 468.

*Delaware.*—*Carson v. Doe*, 4 Houst. (Del.) 328.

*Indiana.*—*Groves v. Culph*, 132 Ind. 186.

*Massachusetts.*—*Brown v. Saltonstall*, 3 Met. (Mass.) 423; *American Bible Soc. v. Pratt*, 9 Allen (Mass.) 109.

*Mississippi.*—*Ehrman v. Hoskins*, 67 Miss. 192, 19 Am. St. Rep. 297.

*New York.*—*Waugh v. Waugh*, 28 N. Y. 94.

*North Carolina.*—*Barnes v. Simms*, 5 Ired. Eq. (40 N. Car.) 392, 49 Am. Dec. 435; *McDaniel v. King*, 90 N. Car. 597.

*Pennsylvania.*—*Best v. Hammond*, 55 Pa. St. 409; *Baker's Appeal*, 115 Pa. St. 590; *Thompson v. Kaufman*, 6 Pa. Dist. 522, 9 Pa. Super. Ct. 305.

*South Carolina.*—*Bethea v. Bethea*, 1 Hill L. (S. Car.) 64.

**3. Devise or Bequest in General Terms.**—*Benson v. Whittam*, 2 Sim. 493; *Spencer v. Hig-*

**7. PRESUMPTIONS AND BURDEN OF PROOF — Presumptions.** — Where the testator's title is uncertain, the presumption is that he intended to devise the title he had, and parol evidence is inadmissible to contradict the presumption, or to establish that he intended to do what he had no legal right to do.<sup>1</sup> Where the devise was for the support of the devisee "and family," the presumption is that there is a family.<sup>2</sup> So, where there is no evidence that there is a misdescription, the presumption is that the testator properly described the debts and property in the will.<sup>3</sup>

**Burden of Proof.** — The burden of proving a misdescription in the will is upon the party making such assertion.<sup>4</sup> Likewise, the burden of overcoming the presumption that there is a family, where the testator has devised to a certain person and family, is upon the party negating the existence thereof.<sup>5</sup>

**3. Inconsistency and Repugnancy.** — If possible, the court will reconcile two apparently inconsistent and repugnant provisions in a will, in order to carry out the testator's intentions as to the disposition of his estate, and in so doing will endeavor not to disturb the first provision further than is absolutely necessary to give effect to the second.<sup>6</sup> But if the provisions are absolutely

gins, 22 Conn. 521; *Flannery v. Hightower*, 97 Ga. 592; *Stephen v. Walker*, 8 B. Mon. (Ky.) 600; *Frick v. Frick*, 82 Md. 218; *Miller v. Springer*, 70 Pa. St. 269.

1. *Tompkins v. Merriman*, 155 Pa. St. 440.

2. **Devise to A "and Family."** — *White v. White*, 30 Vt. 338.

3. **Presumption as to Description.** — *Hopkins v. Holt*, 9 Wis. 228. See generally the titles EVIDENCE, vol. 11, p. 484; PAROL EVIDENCE, vol. 21, p. 1077; PRESUMPTIONS, vol. 22, p. 1232, and the references there given.

4. **Proving Misdescription.** — *Hopkins v. Holt*, 9 Wis. 228.

5. *White v. White*, 30 Vt. 338.

6. **Inconsistency and Repugnancy** — *England*. — *Doe v. Davies*, 4 M. & W. 599; *Langham v. Sanford*, 19 Ves. Jr. 647; *Briggs v. Penny*, 3 De G. & Sm. 539; *Brocklebank v. Johnson*, 20 Beav. 205; *Shipperdson v. Tower*, 1 Y. & C. Ch. 459; *Kerr v. Clinton*, L. R. 8 Eq. 462; *Crossman v. Bevan*, 27 Beav. 502; *In re Dixon*, (1903) 2 Ch. 458.

*Canada*. — *McMillan v. McMillan*, 30 Ont. 627, affirmed 27 Ont. App. 209.

*United States*. — *Lane v. Vick*, 3 How. (U. S.) 464; *Smith v. Bell*, 6 Pet. (U. S.) 74; *Walker v. Parker*, 13 Pet. (U. S.) 166; *Ward v. Amory*, 1 Curt. (U. S.) 419.

*Alabama*. — *Leavens v. Butler*, 8 Port. (Ala.) 396; *Stallsworth v. Stallsworth*, 5 Ala. 143; *Walker v. Walker*, 17 Ala. 396; *Miller v. Flournoy*, 26 Ala. 724; *Pace v. Bonner*, 27 Ala. 307; *Weathers v. Patterson*, 30 Ala. 404; *Thrasher v. Ingram*, 32 Ala. 646; *Wynne v. Walthall*, 1 Ala. Sel. Cas. 273.

*Connecticut*. — *Warner v. Willard*, 54 Conn. 470; *Blakeslee v. Pardee*, 76 Conn. 267.

*Georgia*. — *Robert v. West*, 15 Ga. 22.

*Illinois*. — *Brownfield v. Wilson*, 78 Ill. 467; *Rountree v. Talbot*, 89 Ill. 246; *Jenks v. Jackson*, 127 Ill. 342; *Phayer v. Kennedy*, 169 Ill. 360; *Vestal v. Garrett*, 197 Ill. 398.

*Indiana*. — *Anderegg v. Ross*, 13 Ind. 413; *White v. Allen*, 81 Ind. 224; *Parks v. Kimes*, 100 Ind. 151; *Davis v. Hoover*, 112 Ind. 423.

*Iowa*. — *Heidlebaugh v. Wagner*, 72 Iowa 601.

*Kentucky*. — *Hunt v. Johnson*, 10 B. Mon. (Ky.) 342; *Jacob v. Jacob*, 4 Bush (Ky.) 110; *Delph v. Delph*, 2 Bush (Ky.) 171; *Proctor v. Duncan*, 1 Duv. (Ky.) 318; *Hickman v. Holliday*, 6 T. B. Mon. (Ky.) 582; *Sigler v. Tapp*, 66 S. W. Rep. 608, 23 Ky. L. Rep. 2049; *Hatchett v. Henderson Trust Co.*, (Ky. 1897) 39 S. W. Rep. 235; *Smith v. Isaacs*, (Ky. 1904) 78 S. W. Rep. 434.

*Louisiana*. — *Lyon v. Fisk*, 1 La. Ann. 444.

*Maryland*. — *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Lee v. Pindle*, 12 Gill & J. (Md.) 289; *Iglehart v. Kirwan*, 10 Md. 559; *Henning v. Varner*, 34 Md. 106; *Pue v. Pue*, 1 Md. Ch. 382; *Boyle v. Parker*, 3 Md. Ch. 42; *In re Banks*, 87 Md. 425.

*Massachusetts*. — *Lillie v. Pierce*, 8 Cush. (Mass.) 566; *Lamb v. Lamb*, 11 Pick. (Mass.) 371; *Gray v. Sherman*, 5 Allen (Mass.) 198; *Dawes v. Swan*, 4 Mass. 215; *Chaffin v. Ashton*, 128 Mass. 443.

*Michigan*. — *Stebbins v. Stebbins*, 86 Mich. 474.

*Mississippi*. — *Dean v. Nunnally*, 36 Miss. 358.

*Missouri*. — *Austin v. Watts*, 19 Mo. 293; *Carter v. Alexander*, 71 Mo. 585; *Prosser v. Hardesty*, 101 Mo. 593; *Varnon v. Varnon*, 67 Mo. App. 534.

*New Jersey*. — *Jones v. Creveling*, 19 N. J. L. 127; *In re Donner*, (N. J. 1903) 55 Atl. Rep. 1104.

*New York*. — *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Sweet v. Geisenhainer*, 3 Bradf. (N. Y.) 114; *Harrison v. Jewell*, 2 Dem. (N. Y.) 37; *Kane v. Astor*, 5 Sandf. (N. Y.) 467; *Sweet v. Chase*, 2 N. Y. 73; *Tyson v. Blake*, 22 N. Y. 558; *Van Vechten v. Keator*, 63 N. Y. 52; *Wager v. Wager*, 96 N. Y. 164; *Tiers v. Tiers*, 98 N. Y. 568; *Crozier v. Bray*, 120 N. Y. 374; *M'Donald v. Walgrove*, 1 Sandf. Ch. (N. Y.) 274; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334; *In re Van Beuren*, (Surrogate Ct.) 13 N. Y. Supp. 261; *Meehan v. Brennan*, 16 N. Y. App. Div. 395; *Matter of Talmage*, 32 N. Y. App. Div. 10, affirmed 160 N. Y. 704, 55 N. E. Rep. 1125; *McKinlay v. Van Dusen*, 76 N. Y. App. Div. 200; *Noble v. Thayer*, 19 N. Y. App.

irreconcilable, the latter will be preferred, and will prevail over the former.<sup>1</sup>

Div. 446. See also *Hascall v. King*, 28 N. Y. App. Div. 280.

*North Carolina*.—*Jones v. Paschall*, 1 Ired. Eq. (36 N. Car.) 430; *Dalton v. Scales*, 2 Ired. Eq. (37 N. Car.) 521; *Crissman v. Crissman*, 5 Ired. L. (27 N. Car.) 498; *Baird v. Baird*, 7 Ired. Eq. (42 N. Car.) 265; *Bradley v. Gibbs*, 2 Jones Eq. (55 N. Car.) 13; *Dalton v. Houston*, 5 Jones Eq. (58 N. Car.) 401; *Biddle v. Carraway*, 6 Jones Eq. (59 N. Car.) 95; *Jenkins v. Maxwell*, 7 Jones L. (52 N. Car.) 612; *Payne v. Sale*, 2 Dev. & B. Eq. (22 N. Car.) 455.

*Ohio*.—*Young v. McIntire*, 3 Ohio 499; *Baxter v. Bowyer*, 19 Ohio St. 490.

*Pennsylvania*.—*Mutter's Estate*, 38 Pa. St. 314; *Newbold v. Boone*, 52 Pa. St. 167; *Shreiner's Appeal*, 53 Pa. St. 106; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Sheetz's Appeal*, 82 Pa. St. 213; *Finney's Appeal*, 113 Pa. St. 11; *McDevitt's Appeal*, 113 Pa. St. 103; *Jones v. Strong*, 142 Pa. St. 496; *Sullivan v. Straus*, 161 Pa. St. 145; *Hart v. Stoyer*, 164 Pa. St. 523, 35 W. N. C. (Pa.) 415; *Bonwill's Estate*, 10 Pa. Dist. 98.

*Rhode Island*.—*Ives v. Harris*, 7 R. I. 413; *In re Willis*, 25 R. I. 332.

*South Carolina*.—*Petters v. Petters*, 4 McCord L. (S. Car.) 151; *Fraser v. Boone*, 1 Hill Eq. (S. Car.) 360; *Seabrook v. Seabrook*, McMull. Eq. (S. Car.) 201; *Tisdale v. Mitchell*, 12 Rich. Eq. (S. Car.) 263.

*Tennessee*.—*Vancil v. Evans*, 4 Coldw. (Tenn.) 340.

*Vermont*.—*Hibbard v. Hurlburt*, 10 Vt. 173; *Conant v. Palmer*, 63 Vt. 310; *Semmig v. Merrihew*, 67 Vt. 38.

*Virginia*.—*Hooe v. Hooe*, 13 Gratt. (Va.) 245; *Rayfield v. Gaines*, 17 Gratt. (Va.) 1.

*West Virginia*.—*Houser v. Ruffner*, 18 W. Va. 245.

**To Render a Subsequent Provision in a Will Repugnant** to a previous one, the last provision must be absolutely incompatible with the first, so that, if effect be given to the last, the other must entirely fail; but no such incompatibility exists where a testator, by one clause of his will, gives in absolute terms a legacy to his wife, to be paid out of the proceeds of the sale of his real estate, and by a subsequent clause orders his executors to sell such real estate after the decease of his wife; because under such will, the legacy becomes vested on the death of the testator, although not payable until after the death of the legatee, and the legatee has the same right to dispose of it that she has in respect to any other property, and on her death, if undisposed of, it goes to her personal representatives, who may enforce the payment against the executors. *Sweet v. Chase*, 2 N. Y. 73.

**Provision for Termination of Trust**.—*In re Luscombe*, 109 Wis. 186.

**1. Latter Provision Governs**—*England*.—*Crone v. Odell*, 1 Ball & B. 449; *Ulrich v. Litchfield*, 2 Atk. 372; *Paice v. Canterbury*, 14 Ves. Jr. 366; *Morrall v. Sutton*, 1 Phill. 533; *Roe v. Avis*, 4 T. R. 605; *Sherratt v. Bentley*, 2 Myl. & K. 149; *Gravenor v. Watkins*, L. R. 6 C. P. 500; *In re Brooks*, 2 Drew. & Sm. 362;

*Wykham v. Wykham*, 18 Ves. Jr. 421; *Doe v. Biggs*, 2 Taunt. 109; *Sims v. Doughty*, 5 Ves. Jr. 243; *Constantine v. Constantine*, 6 Ves. Jr. 100; *Marks v. Solomon*, 19 L. J. Ch. 555.

*Canada*.—*McMillan v. McMillan*, 30 Ont. 627, affirmed 27 Ont. App. 209.

*United States*.—*Smith v. Bell*, 6 Pet. (U. S.) 74; *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Warner v. Howell*, 3 Wash. (U. S.) 12.

*Alabama*.—*Moore v. Dudley*, 2 Stew. (Ala.) 170; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Hitchcock v. U. S. Bank*, 7 Ala. 386; *Flinn v. Davis*, 18 Ala. 132; *Hunter v. Green*, 22 Ala. 329; *Miller v. Flournoy*, 26 Ala. 724; *Pace v. Bonner*, 27 Ala. 307; *Thrasher v. Ingram*, 32 Ala. 646; *Griffin v. Pringle*, 56 Ala. 486.

*Arkansas*.—*McKenzie v. Roleson*, 28 Ark. 102.

*Georgia*.—*Robert v. West*, 15 Ga. 122.

*Illinois*.—*Jones v. Doe*, 2 Ill. 276; *Brownfield v. Wilson*, 78 Ill. 467; *Greenwood v. Greenwood*, 178 Ill. 387; *Harris v. Ferguy*, 207 Ill. 534; *Walford v. Hemmer*, (Ill. 1891) 28 N. E. Rep. 806; *Smith v. Curry*, 52 Ill. App. 227.

*Indiana*.—*Evans v. Hudson*, 6 Ind. 293; *Holdefer v. Teifel*, 51 Ind. 343; *Parks v. Kimes*, 100 Ind. 151.

*Iowa*.—*Rona v. Meier*, 47 Iowa 607; *Covert v. Sebern*, 73 Iowa 564; *Heidlebaugh v. Wagner*, 72 Iowa 601.

*Kentucky*.—*Hunt v. Johnson*, 10 B. Mon. (Ky.) 342; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 269; *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 279; *Jacob v. Jacob*, 4 Bush (Ky.) 110; *Howard v. Howard*, 4 Bush (Ky.) 495.

*Louisiana*.—*Lyon v. Fisk*, 1 La. Ann. 444.

*Maine*.—*Ramsdell v. Ramsdell*, 21 Me. 288; *Pickering v. Langdon*, 22 Me. 413; *Orr v. Moses*, 52 Me. 287; *Woodbury v. Woodbury*, 74 Me. 413; *Carter v. Lowell*, 76 Me. 342.

*Maryland*.—*Iglehart v. Kirwan*, 10 Md. 559; *Hollins v. Coonan*, 9 Gill (Md.) 62; *Lee v. Pindle*, 12 Gill & J. (Md.) 288; *Pue v. Pue*, 1 Md. Ch. 382; *Boyle v. Parker*, 3 Md. Ch. 42.

*Massachusetts*.—*Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Lamb v. Lamb*, 11 Pick. (Mass.) 371; *Homer v. Shelton*, 2 Met. (Mass.) 194; *Pratt v. Rice*, 7 Cush. (Mass.) 209; *Dawes v. Swan*, 4 Mass. 215.

*Michigan*.—*Mandlebaum v. McDonnell*, 29 Mich. 78.

*Missouri*.—*Carter v. Alexander*, 71 Mo. 585.

*New Jersey*.—*Hendershot v. Shields*, 42 N. J. Eq. 317; *Lippincott v. Davis*, 59 N. J. L. 241; *In re Donner*, (N. J. 1903) 55 Atl. Rep. 1104.

*New York*.—*Covenhoven v. Shuler*, 2 Paige (N. Y.) 122; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Matter of Manice*, 31 Hun (N. Y.) 119; *Bradstr. v. Clarke*, 12 Wend. (N. Y.) 602; *M'Donald v. Walgrove*, 1 Sandf. Ch. (N. Y.) 274; *Sweet v. Chase*, 2 N. Y. 73; *Van Nostrand v. Moore*, 52 N. Y. 12; *Van Vechten v. Keator*, 63 N. Y. 52; *Noble v. Thayer*, 19 N. Y. App. Div. 446.

*North Carolina*.—*Jones v. Paschall*, 1 Ired. Eq. (36 N. Car.) 430; *Baird v. Baird*, 7 Ired. Eq. (42 N. Car.) 265.

*Ohio*.—*Davis v. Boggs*, 20 Ohio St. 550.

*Pennsylvania*.—*Drinker's Estate*, 13 Phila.



Thus, where a will and a codicil are irreconcilable, the codicil, as the last indication of the testator's intention, must prevail.<sup>1</sup>

**General and Specific Provisions.** — But where there is inconsistency between a general and a specific provision, the latter must prevail regardless of the order in which it stands.<sup>2</sup>

**4. General and Particular Intent.** — If the general intention of the testator can be collected from the whole will, particular terms used which are inconsistent with that intention must be rejected, as introduced by mistake or ignorance on the part of the testator as to the force of the words used, in order that the paramount intent of the testator shall prevail.<sup>3</sup>

**5. Cutting Down Clear Gift by Doubtful Expressions.** — It has become a settled rule of construction that when the words of the will in the first instance distinctly indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provision which is ambiguous or inferential and which is not equally as distinct as the former; or, the rule may be stated that a clear gift is not to be cut down by anything which does not, with reasonable certainty,

(Pa.) 330, 37 Leg. Int. (Pa.) 105; Lewis's Estate, 3 Whart. (Pa.) 162; Stickle's Appeal, 29 Pa. St. 234; Mütter's Estate, 38 Pa. St. 314; Newbold v. Boone, 52 Pa. St. 167; Seibert v. Wise, 70 Pa. St. 147; Snively v. Stover, 78 Pa. St. 484; Ulrich's Appeal, 86 Pa. St. 386; Sheetz's Appeal, 82 Pa. St. 213; Hart v. Stoyer, 164 Pa. St. 523; Chestnut St. Nat. Bank v. Fidelity Ins., etc., Co., 186 Pa. St. 333; Markle's Estate, 187 Pa. St. 639; Grimm's Estate, 19 Pa. Co. Ct. 144, 6 Pa. Dist. 21. See also *In re Edward*, 209 Pa. St. 19.

*South Carolina.* — Fraser v. Boone, 1 Hill Eq. (S. Car.) 360; Petters v. Petters, 4 McCord L. (S. Car.) 151.

*Tennessee.* — Vancil v. Evans, 4 Coldw. (Tenn.) 340.

*Vermont.* — Hayes v. Davenport, 25 Vt. 109.

*Virginia.* — Waring v. Boshier, 91 Va. 286.

**1. Will and Codicil.** — Duffield v. Pike, 71 Conn. 521; Gray v. Sherman, 5 Allen (Mass.) 198; Boyle v. Parker, 3 Md. Ch. 42; Flood v. Howser, 1 Nott & M. (S. Car.) 321.

**2. General and Specific Provisions.** — White v. McCracken, 87 Mo. App. 262; *In re Donner*, (N. J. 1903) 55 Atl. Rep. 1104; Waring v. Boshier, 91 Va. 286.

**3. General and Particular Intent** — *England.* — Sherratt v. Bentley, 2 Myl. & K. 157.

*United States.* — Smith v. Bell, 6 Pet. (U. S.) 68.

*Alabama.* — Leavens v. Butler, 8 Port. (Ala.) 380; Stallworth v. Stallworth, 5 Ala. 143; Thrasher v. Ingram, 32 Ala. 645; Hollingsworth v. Hollingsworth, 65 Ala. 321.

*Delaware.* — Workman v. Cannon, 5 Harr. (Del.) 91.

*District of Columbia.* — St. John's Mite Assoc. v. Buchly, 5 Mackey (D. C.) 406.

*Georgia.* — Robert v. West, 15 Ga. 122; Nussbaun v. Evans, 71 Ga. 753.

*Kentucky.* — Adie v. Cornwell, 3 T. B. Mon. (Ky.) 279; Cundiff v. Seaton, (Ky. 1899) 49 S. W. Rep. 179.

*Louisiana.* — Clark v. Preston, 2 La. Ann. 580.

*Maine.* — Pickering v. Langdon, 22 Me. 413.

*Maryland.* — Chase v. Lockerman, 11 Gill & J. (Md.) 185; Pue v. Pue, 1 Md. Ch. 382.

*Massachusetts.* — Dawes v. Swan, 4 Mass.

208; Cook v. Holmes, 11 Mass. 528. *Compare Allen v. White*, 97 Mass. 504.

*Mississippi.* — Sorsby v. Vance, 36 Miss. 564; Watson v. Blackwood, 50 Miss. 15. *Compare Lucas v. Lockhart*, 10 Smed. & M. (Miss.) 466.

*Missouri.* — Peters v. Carr, 16 Mo. 54; Rose v. McHose, 26 Mo. 590.

*New Jersey.* — Den v. Wortendyk, 7 N. J. L. 363; Den v. McMurtrie, 15 N. J. L. 276; Baldwin v. Taylor, 37 N. J. Eq. 78.

*New York.* — Van Vechten v. Van Veghten, 8 Paige (N. Y.) 104; Parks v. Parks, 9 Paige (N. Y.) 107; Kane v. Astor, 5 Sandf. (N. Y.) 467; Barheydt v. Barheydt, 20 Wend. (N. Y.) 576; Hopbock v. Tucker, 1 Hun (N. Y.) 132; Phillips v. Davies, 92 N. Y. 199; Wager v. Wager, 96 N. Y. 164; Stimson v. Vroman, 99 N. Y. 74; Roe v. Vingut, 117 N. Y. 204; Haxtun v. Corse, 2 Barb. Ch. (N. Y.) 506; Earl v. Grim, 1 Johns. Ch. (N. Y.) 494.

*North Carolina.* — Bivens v. Phifer, 2 Jones L. (47 N. Car.) 436; Purnell v. Dudley, 4 Jones Eq. (57 N. Car.) 203; Lassiter v. Wood, 63 N. Car. 360.

*Pennsylvania.* — Hitchcock v. Hitchcock, 35 Pa. St. 393; Shreiner's Appeal, 53 Pa. St. 106; Schott's Estate, 78 Pa. St. 40; Ulrich's Appeal, 86 Pa. St. 390; Jones's Appeal, 3 Grant Cas. (Pa.) 169; Menohar's Estate, 18 Pa. Super. Ct. 335.

*Rhode Island.* — Bailey v. Brown, 19 R. I. 669.

*Texas.* — Cooper v. Horner, 62 Tex. 357; McMurry v. Stanley, 69 Tex. 230.

*Virginia.* — Price v. Cole, 83 Va. 343.

*West Virginia.* — Bell v. Humphrey, 8 W. Va. 1; Houser v. Ruffner, 18 W. Va. 245.

**Rule as to Inconsistent Clauses Inapplicable.** — The rule that of two inconsistent clauses the latter must prevail is inapplicable where the general intent is clear. *Jesson v. Wright*, 2 Bligh 57; *Price v. Cole*, 83 Va. 343.

**Directions in Codicil for Location of Devise.** — Where a certain number of acres of land of uniform value was devised, and by a codicil directions were given for the location of the land, it was held that the controlling idea was the number of acres, which would be given effect, although the provisions of the codicil had to be disregarded in part. *Churchill v. Churchill*, (Ky. 1902) 67 S. W. Rep. 265.

indicate an intention to cut it down. Whichever form of language be adopted, however, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded.<sup>1</sup>

**6. Rejecting Words.** — In applying the rule that the intention of the testator shall be given due regard in the interpretation of wills, words and passages absolutely irreconcilable with the general context may be rejected in order to

\* **1. Cutting Down Clear Gift by Doubtful Expressions** — *England*. — *In re Smith*, 2 Johns. & H. 594; *Randfield v. Randfield*, 8 H. L. Cas. 225; *Davis v. Bennet*, 30 Beav. 226; *Crozier v. Crozier*, L. R. 15 Eq. 282; *Kerr v. Clinton*, L. R. 8 Eq. 462; *In re Larkin*, 2 Jur. N. S. 229; *Clavering v. Ellison*, 3 Drew. 451; *Kellett v. Kellett*, L. R. 3 H. L. 167; *In re Wilcock*, (1898) 1 Ch. 95; *In re Roberts*, (1903) 2 Ch. 200.

*United States*. — *Weatherhead v. Baskerville*, 11 How. (U. S.) 329; *McClellan v. Mackenzie*, (C. C. A.) 126 Fed. Rep. 701.

*California*. — *Matter of Upham*, 127 Cal. 90; *Matter of Marti*, 132 Cal. 666.

*Connecticut*. — *Webb v. Lines*, 57 Conn. 154.

*Illinois*. — *Siegwald v. Siegwald*, 37 Ill. 430; *Rountree v. Talbot*, 89 Ill. 250; *Wicker v. Ray*, 118 Ill. 472.

*Indiana*. — *Hochstedler v. Hochstedler*, 108 Ind. 510; *Commons v. Commons*, 115 Ind. 162.

*Iowa*. — *Alden v. Johnson*, 63 Iowa 127; *Bills v. Bills*, 80 Iowa 269.

*Maryland*. — *Blackshire v. Samuel Ready School*, 94 Md. 773.

*Massachusetts*. — *Martin v. Smith*, 124 Mass. 111; *Schmaunz v. Goss*, 132 Mass. 141; *Damrell v. Hartt*, 137 Mass. 218; *Rhodes v. Rhodes*, 137 Mass. 343; *Parker v. Iasigi*, 138 Mass. 416; *Potter v. Merrill*, 143 Mass. 189; *Olney v. Balch*, 154 Mass. 318.

*Mississippi*. — *Dean v. Nunnally*, 36 Miss. 358.

*Missouri*. — *Balliett v. Veal*, 140 Mo. 187; *Roberts v. Crume*, 173 Mo. 572.

*New Jersey*. — *Casper v. Walker*, 33 N. J. Eq. 36; *Kendall v. Kendall*, 36 N. J. Eq. 91; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21.

*New York*. — *Field v. New York*, 38 Hun (N. Y.) 590; *Thomson v. Hill*, 87 Hun (N. Y.) 111, affirmed 155 N. Y. 677, 49 N. E. Rep. 1104; *Oothout v. Rogers*, 59 Hun (N. Y.) 97; *Roseboom v. Roseboom*, 81 N. Y. 356; *Clarke v. Leupp*, 88 N. Y. 228; *Campbell v. Beumont*, 91 N. Y. 464; *Freeman v. Coit*, 96 N. Y. 67; *Temple v. Sammis*, 97 N. Y. 526, affirming 48 N. Y. Super. Ct. 324; *Byrnes v. Stilwell*, 103 N. Y. 453; *Washbon v. Cope*, 144 N. Y. 287; *Banzer v. Banzer*, 156 N. Y. 429; *Thomas v. Troy City Nat. Bank*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 470; *Eakin v. Knabe*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 225; *Cruikshank v. Cruikshank*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 401; *Matter of Talmage*, 32 N. Y. App. Div. 101, affirmed 160 N. Y. 704, 55 N. E. Rep. 1125; *Gross v. Mathewson*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 370; *Matter of Peters*, 69 N. Y. App. Div. 465.

*Ohio*. — *Collins v. Collins*, 40 Ohio St. 364.

*Pennsylvania*. — *Biddle's Estate*, 28 Pa. St. 59; *Ulrich's Appeal*, 86 Pa. St. 386; *Hopkins v. Glunt*, 111 Pa. St. 287; *Gillmer v. Daix*, 141 Pa. St. 507; *Good v. Fichthorn*, 144 Pa. St.

287; *Yost v. McKee*, 179 Pa. St. 381, 39 W. N. C. (Pa.) 432; *Nevin's Estate*, 7 Pa. Dist. 761; *Keller's Estate*, 11 Lanc. L. Rev. 185.

*Rhode Island*. — *Hodges v. Potter*, 12 R. I. 245.

*Texas*. — *McMurry v. Stanley*, 69 Tex. 233.

*Utah*. — *In re Campbell*, (Utah 1904) 75 Pac. Rep. 851.

*Vermont*. — *Judevine v. Judevine*, 61 Vt. 587; *Conant v. Palmer*, 63 Vt. 310.

*Virginia*. — *Barksdale v. White*, 28 Gratt. (Va.) 224; *Cole v. Cole*, 79 Va. 251; *Hall v. Palmer*, 87 Va. 354; *Bowen v. Bowen*, 87 Va. 438; *Waring v. Boshier*, 91 Va. 286.

*West Virginia*. — *Wilmoth v. Wilmoth*, 34 W. Va. 426; *Smith v. Schlegel*, 51 W. Va. 249.

**Rule Stated.** — In *Matter of Granniss*, 142 Cal. 1, the rule was well stated as follows: "When the absolute estate has been conveyed in one clause of the will it will not be cut down or limited by subsequent words, except such as indicate as clear an intention as would the words used in creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed."

And Lord Campbell, in *Randfield v. Randfield*, 8 H. L. Cas. 235, stated the rule as follows: "If there be a clear gift it is not to be cut down by anything subsequent which does not, with reasonable certainty, indicate the intention of the testator to cut it down; but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity."

**Rule Laid Down by Statute.** — In *California* it is expressly provided by § 1322 of the Civil Code that "a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." *Matter of Upham*, 127 Cal. 90.

**Will and Codicil.** — A clear gift by will will not be cut down by a codicil, except to the extent to which the codicil is inconsistent with it. *Davis's Estate*, 6 Pa. Dist. 45.

**Devise to Daughter — Subsequent Provisions Ambiguous.** — A devise was in the following words: "I give to my daughter A everything of which I die possessed. In the event of my daughter's death without children:" then specifying subsequent dispositions to be made. It was held that the devise to A was absolute, and that the subsequent dispositions were intended to take effect only in the event of A's death in the lifetime of testator. *Biddle's Estate*, 28 Pa. St. 59. See also *supra*, this title, *Revocation*.

effectuate such intention,<sup>1</sup> but not upon mere conjecture, nor unless absolutely irreconcilable with the context, even though their intention may sometimes produce rather absurd consequences.<sup>2</sup> And words or phrases which are

**1. Rejecting Words — England.** — *Boon v. Cornforth*, 2 Ves. 277; *Coryton v. Helyar*, 2 Cox Ch. 340; *Doe v. Stenlake*, 12 East 515; *Doe v. Thomas*, 3 Ad. & El. 123, 30 E. C. L. 48; *Smith v. Pybus*, 9 Ves. Jr. 566; *Smith v. Crabtree*, 6 Ch. D. 591; *Hanbury v. Tyrell*, 21 Beav. 322; *Campbell v. Bouskell*, 27 Beav. 325; *Jones v. Price*, 11 Sim. 557; *Aspinall v. Audus*, 7 M. & G. 912, 49 E. C. L. 912; *Lunn v. Osborne*, 7 Sim. 56; *Towns v. Wentworth*, 11 Moo. P. C. 545; *Hugo v. Williams*, L. R. 14 Eq. 224.

*United States.* — *Wright v. Denn*, 10 Wheat. (U. S.) 205.

*California.* — *Matter of Wood*, 36 Cal. 81.

*Illinois.* — *Rose v. Hale*, 185 Ill. 378.

*Indiana.* — *Jackson v. Hoover*, 26 Ind. 511; *Pate v. Bushong*, 161 Ind. 533.

*Maryland.* — *Burke v. Chamberlain*, 22 Md. 298.

*Massachusetts.* — *Needham v. Ide*, 5 Pick. (Mass.) 510; *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 420; *Hall v. Hall*, 123 Mass. 120.

*Michigan.* — *Jameson, Appellant*, 1 Mich. 99.

*Missouri.* — *Prosser v. Hardesty*, 101 Mo. 596; *White v. McCracken*, 87 Mo. App. 262.

*New Hampshire.* — *Drew v. Drew*, 28 N. H. 489.

*New Jersey.* — *Den v. Young*, 24 N. J. L. 775; *Hendershot v. Shields*, 42 N. J. Eq. 317.

*New York.* — *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Mason v. Jones*, 2 Barb. (N. Y.) 229; *Lottimer v. Blumenthal*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 360; *Phillips v. Davies*, 92 N. Y. 199.

*Ohio.* — *Davis v. Boggs*, 20 Ohio St. 550.

*Pennsylvania.* — *McKeehan v. Wilson*, 53 Pa. St. 74; *McBride v. Smyth*, 54 Pa. St. 248.

*South Carolina.* — *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414.

*Tennessee.* — *Duncan v. Philips*, 3 Head (Tenn.) 415.

*Texas.* — *McMurry v. Stanley*, 69 Tex. 227.

*Virginia.* — *Wootton v. Redd*, 12 Gratt. (Va.) 196; *East v. Garrett*, 84 Va. 523.

**Word Undesignedly Inserted.** — If the contents of a will show that a word has been undesignedly inserted, and demonstrate what rejection by construction will fulfil the intention with which the document was written, the rejection will, by construction, be made. *Pride v. Fooks*, 3 De G. & J. 266.

Thus a will made by a woman after marriage, bequeathing "all my estate, real and personal, meaning all the estate and property secured, etc., to me, etc., by certain articles of agreement" (referring to the marriage contract), was held to be a valid appointment under such contract; the intent of disposing of all her personal estate being manifest, the term "real estate," although inoperative, because there was no real estate, did not invalidate the appointment, as far as it was pursuant to the power. *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 420.

**2. Must Be Absolutely Irreconcilable with Context.** — *Chambers v. Brailsford*, 18 Ves. Jr. 368;

*Goodright v. Hall*, 1 Wils. C. Pl. 148; *Mellish v. Mellish*, 4 Ves. Jr. 48; *Roe v. Foster*, 9 East 405; *Ridgeway v. Munkittrick*, 1 Dr. & War. 84; *Langley v. Thomas*, 6 De G. M. & G. 645; *Ridout v. Pain*, 3 Atk. 493; *Greenwood v. Greenwood*, 5 Ch. D. 954; *In re Daniel*, 1 Ch. D. 375; *Sweeting v. Prideaux*, 2 Ch. D. 413; *Caldwell v. Willis*, 57 Miss. 555; *Baxter v. Bowyer*, 19 Ohio St. 490; *Graham v. Graham*, 23 W. Va. 36.

"The rejection of one clause to uphold another is a desperate remedy, to be resorted to only in case of necessity." *Jenks v. Jackson*, 127 Ill. 350.

In *Chambers v. Brailsford*, 18 Ves. Jr. 368, affirmed on appeal 19 Ves. Jr. 652, a testator, after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estate "to the use of the said Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease, to the use of the said Thomas Brailsford, son of my nephew Samuel Brailsford, his heirs and assigns forever." The only Thomas Brailsford mentioned in the will was the son of Samuel, but the testator had another nephew of that name (who was uncle of the legatee), to whom, therefore, it was contended that the devise to "the said Thomas Brailsford," applied, though he was not before named, according to the case in *Hawkins*, 2 Hawk. P. C. 271, § 106, that father and son having the same name, the son, not the father, is distinguished by an addition. The words "the said," it was observed, might be considered surplusage; and that the devise was either void for uncertainty, or there must be an inquiry. It was held that by the words, "the said Thomas Brailsford," the Thomas Brailsford who had been before mentioned was intended. Sir W. Grant, M. R., said: "The argument on the other side rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that; but the devise as it stands is not so insensible or contradictory as to drive the court to the necessity of expunging or adding words to give it a meaning."

**Devise Not Controlled by Reason Assigned.** — Where testator stated that he vested a general power to distribute his property in his trustees, by reason of his personal confidence in them, and then conferred the power upon them, and the heirs, executors, and administrators of the survivor of them, Sir W. Grant said: "Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorized to strike these words out of the will, upon the supposition, though not improbable, that they were introduced in this part by inadvertence and mistake. I do not apprehend that a bequest actually made or a power given can be controlled by the reason assigned. The



mere repetitions or surplusage may be rejected.<sup>1</sup>

**7. Supplying Words.** — Where it is evident from the context that the testator's intention has been inaccurately or incompletely expressed by the words used, and it is also equally evident what words have been omitted, these words may be supplied in order that the testator's intention may be given effect.<sup>2</sup> In all such cases the court acts upon the assumption that the contingency or state of circumstances which was present in the testator's mind

assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear." *Cole v. Wade*, 16 Ves. Jr. 27. See *Thompson v. Whitelock*, 5 Jur. N. S. 991.

**1. Surplusage.** — *Wright v. Denn*, 10 Wheat. (U. S.) 239; *Thompson v. Betts*, 74 Conn. 576; *Bartlet v. King*, 12 Mass. 542; *Waters v. Hatch*, 181 Mo. 262; *Dickinson v. Overton*, 57 N. J. Eq. 26; *Matter of Murray*, 75 N. Y. App. Div. 246.

**2. Supplying Words** — *England.* — *Re Wroe*, 74 L. T. N. S. 302; *Abbot v. Middleton*, 1 Jur. N. S. 1126; *In re Daniel*, 1 Ch. D. 375; *Greenwood v. Greenwood*, 5 Ch. D. 954; *In re Redfern*, 6 Ch. D. 133; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Parker v. Tootal*, 11 H. L. Cas. 143; *Hope v. Potter*, 3 Kay & J. 206; *Goods of Morony*, L. R. 1 Ir. 483; *Doe v. Turner*, 2 Dowl. & R. 398, 16 E. C. L. 69; *Atkins v. Atkins*, Cro. Eliz. 248; *Spalding v. Spalding*, Cro. Car. 185; *Sheppard v. Lessingham*, Amb. 122; *Radford v. Radford*, 1 Keen 486; *Lang v. Pugh*, 1 Y. & C. Ch. 718.

*Canada.* — *May v. Logie*, 27 Ont. 501, affirmed 23 Ont. App. 785, 27 Can. Sup. Ct. 443.

*Connecticut.* — *Couch v. Gorham*, 1 Conn. 39; *Kellogg v. Mix*, 37 Conn. 243.

*Delaware.* — *Cooper v. Roe*, 7 Houst. (Del.) 488.

*Georgia.* — *Cleland v. Waters*, 16 Ga. 496.

*Illinois.* — *Bishop v. Morgan*, 82 Ill. 354; *Glover v. Condell*, 163 Ill. 566; *Young v. Harkleroad*, 166 Ill. 318; *Leffingwell v. Bentley*, 74 Ill. App. 292; *Penn v. Fogler*, 77 Ill. App. 365.

*Indiana.* — *Jackson v. Hoover*, 26 Ind. 511; *Grimes v. Harmon*, 35 Ind. 198; *State v. Joyce*, 48 Ind. 310.

*Kentucky.* — *Barclay v. Dupuy*, 6 B. Mon. (Ky.) 98; *Hunt v. Johnson*, 10 B. Mon. (Ky.) 344; *Aulick v. Wallace*, 12 Bush (Ky.) 533; *Augustus v. Seabolt*, 3 Met. (Ky.) 156; *Dulaney v. Dulaney*, 79 S. W. Rep. 195, 25 Ky. L. Rep. 1659.

*Maine.* — *Pickering v. Langdon*, 22 Me. 413; *Clifford v. Stewart*, 95 Me. 38.

*Maryland.* — *Creswell v. Lawson*, 7 Gill & J. (Md.) 227; *Heald v. Heald*, 56 Md. 300.

*Massachusetts.* — *Metcalf v. Framingham First Parish*, 128 Mass. 375; *Boston Safe Deposit, etc., Co. v. Coffin*, 152 Mass. 98; *Child v. Child*, 185 Mass. 376; *Boston Safe Deposit, etc., Co. v. Buffum*, (Mass. 1904) 71 N. E. Rep. 549.

*Michigan.* — *Jameson*, Appellant, 1 Mich. 99.

*Missouri.* — *Thomson v. Thomson*, 115 Mo. 56; *Briant v. Garrison*, 150 Mo. 655; *White v. McCracken*, 87 Mo. App. 262.

*New Hampshire.* — *Greenough v. Cass*, 64 N. H. 327.

*New Jersey.* — *Den v. McMurtrie*, 15 N. J.

L. 276; *Den v. Combs*, 18 N. J. L. 27; *Creveling v. Jones*, 21 N. J. L. 573; *Den v. Young*, 24 N. J. L. 775; *Van Houten v. Pennington*, 8 N. J. Eq. 745; *Wurts v. Page*, 19 N. J. Eq. 365; *Patterson v. Read*, 42 N. J. Eq. 149.

*New York.* — *Mumford v. Rochester*, 4 Redf. (N. Y.) 451; *Covenhoven v. Shuler*, 2 Paige (N. Y.) 122; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Drake v. Pell*, 3 Edw. (N. Y.) 251; *Carter v. Bloodgood*, 3 Sandf. Ch. (N. Y.) 293; *Matter of Schweigert*, (Surrogate Ct.) 17 Misc. (N. Y.) 186.

*North Carolina.* — *Dew v. Barnes*, 1 Jones Eq. (54 N. Car.) 149; *Sessoms v. Sessoms*, 2 Dev. & B. Eq. (22 N. Car.) 453; *Howerton v. Henderson*, 88 N. Car. 597.

*Pennsylvania.* — *McKeehan v. Wilson*, 53 Pa. St. 74; *Zerbe v. Zerbe*, 84 Pa. St. 147; *Keller's Estate*, 11 Lanc. L. Rev. 185.

*South Carolina.* — *Geiger v. Brown*, 4 McCord L. (S. Car.) 418; *Seabrook v. Mikell*, Cheves Eq. (S. Car.) 80.

*Tennessee.* — *Duncan v. Philips*, 3 Head (Tenn.) 415; *Reid v. Hancock*, 10 Humph. (Tenn.) 368.

*Virginia.* — *Wootton v. Redd*, 12 Gratt. (Va.) 196; *Lynch v. Hill*, 6 Munf. (Va.) 114; *Selden v. King*, 2 Call (Va.) 73; *East v. Garrett*, 84 Va. 523.

*West Virginia.* — *Furbee v. Furbee*, 49 W. Va. 191.

"A court is never swift to detect inaccuracy of expression, but rather inclined to read into the instrument such words as may give reasonable effect to its provisions." *Haug v. Schumacher*, 166 N. Y. 506.

**Word Undesignedly Omitted.** — If the contents of a will show that a word has been undesignedly omitted and demonstrate what addition by construction will fulfil the intention with which the document was written, the addition will, by construction, be made. *Pride v. Fooks*, 3 De G. & J. 266.

**Technical Words Supplied.** — *Liston v. Jenkins*, 2 W. Va. 62; *Furbee v. Furbee*, 49 W. Va. 191.

**The Words "Under Twenty-one" Supplied.** — *Kirkpatrick v. Kirkpatrick*, 13 Ves. Jr. 476; *Wheable v. Withers*, 16 Sim. 505; *Else v. Else*, L. R. 13 Eq. 196; *Radley v. Lees*, 3 M. & G. 327, 42 E. C. L. 177; *Pennington v. Van Houten*, 8 N. J. Eq. 272, affirmed 8 N. J. Eq. 745; *Den v. Combs*, 18 N. J. L. 27.

**Supplying Words to Provide for an Alternative Event.** — *Doe v. Scudamore*, 2 B. & P. 296; *Doe v. Micklem*, 6 East 486; *Pearsall v. Simpson*, 15 Ves. Jr. 29.

**Supplying Objects by Reference to Preceding Limitations.** — *Doe v. Turner*, 2 Dowl. & R. 398, 16 E. C. L. 96; *Langston v. Pole*, 2 M. & P. 490; *Parker v. Tootal*, 11 H. L. Cas. 143; *Clarke v. Clemmans*, 36 L. J. Ch. 171; *Biss*

was imperfectly described, and hence, when the testator has himself overlooked a particular event, which, had it occurred to him, he would probably have guarded against, the omission cannot be supplied by inserting the necessary clause; to do so would be too much like making a will for the testator, rather than construing that already made.<sup>1</sup>

**8. Changing Words.** — To authorize the court to change the language employed by the testator, it must be apparent, not only that the testator has used the wrong word or phrase, but also what is the right one; if this be clear, the change is warranted by established principles of construction in order to prevent absurdity or the destruction of the devise for uncertainty, and not otherwise.<sup>2</sup>

*v. Smith*, 2 H. & M. 105; *Grimson v. Downing*, 4 Drew. 132; *Marsh v. Hague*, 1 Edw. (N. Y.) 174; *Simpson v. Smith*, 1 Sneed (Tenn.) 394.

**"Without Issue" Read "Without Leaving Issue."** — *Sheppard v. Lessingham*, Amb. 122; *Pye v. Linwood*, 6 Jur. 618; *Radford v. Radford*, 1 Keen. 486.

**"On Marriage" Read "at Twenty-one" or "Marriageable."** — *Lang v. Pugh*, 1 Y. & C. Ch. 718; *King v. Cullen*, 2 De G. & Sm. 252; *Woodburne v. Woodburne*, 3 De G. & Sm. 643.

**Word "Pay" Supplied.** — Where the testator gave all his estate to his sister and provided that "she shall \$100" to his brother, it was held that the word "pay" had been omitted, and it was supplied. *In re Holden*, 5 Ont. L. Rep. 156.

**Effect of Arranging Clauses Numerically.** — Where a testator divides his will into sections numerically arranged, and in some instances places the words of limitation at the end of each section, they will be considered applicable to the several devises contained in the section, and not be confined to those in immediate juxtaposition. 1 Jarm. on Wills (5th ed.) 499; *Fenny v. Ewestace*, 4 M. & S. 58; *Child v. Elsworth*, 2 De G. M. & G. 679; *Gordon v. Gordon*, L. R. 5 H. L. 282.

**1. New Will Cannot Be Made** — *England*. — *Eastwood v. Lockwood*, L. R. 3 Eq. 487; *Abbott v. Middleton*, 7 H. L. Cas. 80.

*Alabama*. — *Hollingsworth v. Hollingsworth*, 65 Ala. 321.

*Kentucky*. — *Augustus v. Seabolt*, 3 Met. (Ky.) 156.

*Maine*. — *Pickering v. Langdon*, 22 Me. 413.

*Maryland*. — *Heald v. Heald*, 56 Md. 300.

*Massachusetts*. — *Butterfield v. Hamant*, 105 Mass. 339.

*Mississippi*. — *Caldwell v. Willis*, 57 Miss. 571.

*New York*. — *Arthur v. Arthur*, 10 Barb. (N. Y.) 9.

*Pennsylvania*. — *Murgitroyd's Estate*, 1 Brews. (Pa.) 317; *McKeehan v. Wilson*, 53 Pa. St. 74; *Varner's Appeal*, 87 Pa. St. 422.

*South Carolina*. — *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414.

*Tennessee*. — *Simpson v. Smith*, 1 Sneed (Tenn.) 394.

*Virginia*. — *Lynch v. Hill*, 6 Munf. (Va.) 114.

*West Virginia*. — *Liston v. Jenkins*, 2 W. Va. 62.

**Courts Cannot Determine by Mere Conjecture** that the testator omitted from his will provisions that he would have incorporated if he

had not overlooked probable future occurrences, and undertake to rectify such omission. *McFarland v. McFarland*, 177 Ill. 208.

Thus it has been held that while a word may be rejected, if the other parts of the will show that it was improperly or incautiously used, it will not be discarded on a mere conjecture, based upon a presumption that the testator intended a provision similar to the statute of distributions. *Caldwell v. Willis*, 57 Miss. 555. See also *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414, where it was held that the court was not authorized to supply words in order to satisfy a conjectural intent.

**2. Changing Words** — *England*. — *Taylor v. Richardson*, 2 Drew. 16; *Doe v. Gallini*, 5 B. & Ad. 621, 27 E. C. L. 138; *Hart v. Tulk*, 2 De G. M. & G. 300; *Woodstock v. Shillito*, 6 Sim. 416; *Matter of Bayliss*, 17 Sim. 178; *Pasmore v. Huggins*, 21 Beav. 103; *Philipps v. Chamberlaine*, 4 Ves. Jr. 51; *Dent v. Pepys*, 6 Madd. 350; *Horridge v. Ferguson*, Jac. 583; *Taylor v. Creagh*, 8 Ir. Ch. Rep. 281.

*Arkansas*. — *Cox v. Britt*, 22 Ark. 567.

*Connecticut*. — *Phelps v. Bates*, 54 Conn. 11.

*Georgia*. — *Tennell v. Ford*, 30 Ga. 707;

*Taylor v. Meador*, 66 Ga. 232.

*Kentucky*. — *Robb v. Belt*, 12 B. Mon. (Ky.) 643.

*Maine*. — *Butterfield v. Haskins*, 33 Me. 392; *Dow v. Dow*, 36 Me. 211.

*Maryland*. — *Slingluff v. Johns*, 87 Md. 273.

*Massachusetts*. — *Minot v. Tappan*, 122 Mass. 535.

*Mississippi*. — *Edwards v. Kelly*, 83 Miss. 145.

*New Jersey*. — *Den v. McMurtrie*, 15 N. J. L. 276; *Den v. Combs*, 18 N. J. L. 27; *Den v. Young*, 24 N. J. L. 775; *Cody v. Bunn*, 46 N. J. Eq. 131.

*New York*. — *Armstrong v. Moran*, 1 Bradf. (N. Y.) 314; *Matter of Thompson*, 5 Dem. (N. Y.) 393; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Du Bois v. Ray*, 35 N. Y. 162; *Roe v. Vingut*, 117 N. Y. 204; *Patchen v. Patchen*, 121 N. Y. 432.

*North Carolina*. — *Taylor v. Johnson*, 63 N. Car. 381; *Fulford v. Hancock*, Busb. Eq. (45 N. Car.) 55.

*Ohio*. — *Collier v. Collier*, 3 Ohio St. 369.

*Pennsylvania*. — *Sloan v. Hanse*, 2 Rawle (Pa.) 28; *Hallowell's Estate*, 11 Phila. (Pa.) 55, 32 Leg. Int. (Pa.) 127; *Horwitz v. Norris*, 60 Pa. St. 261; *Castner's Appeal*, 88 Pa. St. 491; *Hancock's Appeal*, 112 Pa. St. 543.

*Texas*. — *Hawes v. Foote*, 64 Tex. 27.

**"Or" Construed "And" and Vice Versa.** — As the words "or" and "and" are often carelessly interchanged, in many instances the court has been called upon to rectify the blunder and to preserve the manifest intention of the testator by supplying "and" for "or," and *vice versa*, "or" for "and."<sup>1</sup> The change is never made, however, unless it is necessary to carry out the manifest design of the testator,<sup>2</sup> and is never permitted where it would counteract a previously clearly expressed intention, or where it would operate as a divestiture of an estate previously devised.<sup>3</sup>

**Gifts Over on Death under Age "or" Without Issue.** — In the case of a gift over, if the first taker die under age "or" without issue, "or" is construed "and," in order to effectuate the general intent of the testator, and the gift does not take effect unless both events happen.<sup>4</sup>

*Virginia.* — *Brooke v. Croxton*, 2 Gratt. (Va.) 506; *East v. Garrett*, 84 Va. 523.

**"Any" Read "All."** — *In re Banks*, 87 Md. 425.

**"Oldest" Read "Youngest."** — *Tayloe v. Johnson*, 63 N. Car. 381.

**"Part" Read "Share"** — *Fulford v. Hancock*, Busb. Eq. (45 N. Car.) 55.

**1. "Or" and "And" — England.** — *Stapleton v. Stapleton*, 2 Sim. N. S. 212; *Miles v. Dyer*, 5 Sim. 435; 8 Sim. 330; *Grimshaw v. Pickup*, 9 Sim. 591; *Green v. Harvey*, 1 Hare 428; *Richardson v. Spragg*, 1 P. Wms. 434; *Eccard v. Brooke*, 2 Cox Ch. 213; *Maude v. Maude*, 22 Beav. 290; *Bentley v. Meech*, 25 Beav. 197; *Maynard v. Wright*, 26 Beav. 285; *Malmesbury v. Malmesbury*, 31 Beav. 407; *Greated v. Greated*, 26 Beav. 621; *Hawes v. Hawes*, 1 Ves. 13; *Jackson v. Jackson*, 1 Ves. 217; *Weddell v. Mundy*, 6 Ves. Jr. 341.

*United States.* — *Doe v. Watson*, 8 How. (U. S.) 263.

*Georgia.* — *Robertson v. Johnston*, 24 Ga. 102.

*Kentucky.* — *Moore v. Sleet*, 113 Ky. 600; *Truesdell v. Darnall*, (Ky. 1903) 73 S. W. Rep. 755; *Davie v. Davie* (Ky. 1904) 81 S. W. 246.

*Maine.* — *Sayward v. Sayward*, 7 Me. 210; *Butterfield v. Haskins*, 33 Me. 393.

*Maryland.* — *Cornish v. Willson*, 6 Gill (Md.) 299; *Janney v. Sprigg*, 7 Gill (Md.) 197; *Dallam v. Dallam*, 7 Har. & J. (Md.) 220; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42.

*Massachusetts.* — *Carpenter v. Heard*, 14 Pick. (Mass.) 449; *Sawyer v. Baldwin*, 20 Pick. (Mass.) 378.

*New Hampshire.* — *Hall v. Blodgett*, 70 N. H. 437.

*New Jersey.* — *Ely v. Ely*, 20 N. J. Eq. 43; *Courter v. Stagg*, 27 N. J. Eq. 305.

*New York.* — *Roome v. Phillips*, 24 N. Y. 463; *Jackson v. Topping*, 1 Wend. (N. Y.) 388; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163; *Armstrong v. Moran*, 1 Bradf. (N. Y.) 314; *O'Brien v. Heeney*, 2 Edw. (N. Y.) 242; *Hawn v. Banks*, 4 Edw. (N. Y.) 664; *Jackson v. Blanshan*, 6 Johns. (N. Y.) 54.

*North Carolina.* — *Harrison v. Bowe*, 3 Jones Eq. (56 N. Car.) 478; *Turner v. Whitted*, 2 Hawks (9 N. Car.) 613; *Montgomery v. Wynns*, 4 Dev. & B. L. (20 N. Car.) 527.

*Pennsylvania.* — *Englefield v. Woelpart*, 1 Yeates (Pa.) 41; *Denn v. Woodward*, 1 Yeates (Pa.) 316; *Boyd's Estate*, 9 Phila. (Pa.) 337,

30 Leg. Int. (Pa.) 392; *Hunter's Estate*, 10 Pa. Dist. 120. See *Kelley v. Kelley*, 182 Pa. St. 131.

*South Carolina.* — *Bostick v. Lawton*, 1 Spears L. (S. Car.) 258; *Shands v. Rogers*, 7 Rich. Eq. (S. Car.) 422.

*Virginia.* — *Brewer v. Opie*, 1 Call (Va.) 212; *East v. Garrett*, 84 Va. 523; *Brooke v. Croxton*, 2 Gratt. (Va.) 506.

But "and" will not be substituted for "or" where it will be necessary also to ignore and disregard the words "then and in either of these events," which are used in the same sentence and in direct connection with the word "or," and apparently for the purpose of rendering definite and certain the idea the testator intended to express by the use of that disjunctive word. *Parrish v. Vaughan*, 12 Bush (Ky.) 97.

**2. Manifest Design of Testator to Be Effectuated.** — *Cooke v. Mirehouse*, 34 Beav. 27; *Lillie v. Willis*, 31 Ont. 198; *Harrison v. Bowe*, 3 Jones Eq. (56 N. Car.) 478. See also cases in preceding note.

**3. Christy v. Phyfe**, 19 N. Y. 344.

**4. Death under Twenty-one "or" Without Issue** — *England.* — *Soule v. Gerrard*, Cro. Eliz. 525; *Walsh v. Peterson*, 3 Atk. 193; *Doe v. Burnsall*, 6 T. R. 34; *Doe v. Selby*, 4 Dowl. & R. 608; *Eastman v. Baker*, 1 Taunt. 174; *Johnson v. Simcock*, 6 H. & N. 6; *Hasker v. Sutton*, 1 Bing. 500, 8 E. C. L. 611; *Morris v. Morris*, 17 Beav. 198; *Fairfield v. Morgan*, 2 B. & P. N. R. 38.

*Connecticut.* — *Phelps v. Bates*, 54 Conn. 11.

*Georgia.* — *Tennell v. Ford*, 30 Ga. 707.

*Illinois.* — *Kindig v. Deardorff*, 39 Ill. 300.

*Maryland.* — *Neal v. Cosden*, 34 Md. 421; *Carpenter v. Boulden*, 48 Md. 122.

*Massachusetts.* — *Ray v. Enslin*, 2 Mass. 554.

*New Jersey.* — *Den v. Mugway*, 15 N. J. L. 330; *Den v. English*, 17 N. J. L. 280; *Den v. Lake*, 24 N. J. L. 686. *affirmed* 25 N. J. L. 605.

*North Carolina.* — *Turner v. Whitted*, 2 Hawks (9 N. Car.) 613.

*Ohio.* — *Ward v. Barrows*, 2 Ohio St. 242.

*Pennsylvania.* — *Beltzhoover v. Costen*, 7 Pa. St. 13; *Menoher's Estate*, 18 Pa. Super. Ct. 335.

*South Carolina.* — *Scanlan v. Porter*, 1 Bailey L. (S. Car.) 427; *Witsell v. Mitchell*, 3 Rich. L. (S. Car.) 289; *Shands v. Rogers*, 7 Rich. Eq. (S. Car.) 422; *Munro v. Holmes*, 1 Brev. (S. Car.) 319.



"Nor" Construed "or Not." — In a condition precedent, "nor" will be construed "or not," if the result is to vest the gift in either of two events.<sup>1</sup>

9. **Transposing Words.** — Where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being transposed, the court is warranted in making the transposition; but no transposition is authorized when the intent is clear. To justify such a transposition the meaning of the testator must be certain, but it is not absolutely necessary that the words shall be entirely senseless or contradictory.<sup>2</sup>

10. **Uncertainty** — *a.* IN GENERAL. — Where it is impossible to ascertain the subject-matter or the objects of a gift, it will be void for uncertainty.<sup>3</sup>

*Virginia.* — *Brewer v. Opie*, 1 Call (Va.) 212. See also *AND*, vol. 2, p. 333 *et seq.*

In *Jackson v. Blanshan*, 6 Johns. (N. Y.) 54, a testator devised "all his estate, real and personal, to his six children, by name, to be equally divided between them, share and share alike; but if any one of them should die before reaching maturity, or without lawful issue, that then his, her, or their part should devolve upon, and be equally divided among, the surviving children and their heirs and assigns forever." All the children survived the testator. Four of them subsequently died, leaving issue; and the fifth, after reaching maturity, died intestate, and without lawful issue, having previously conveyed his share of the estate. It was held that the word "or" was to be construed as "and," so that the devise over did not take effect; and the surviving child was not entitled to the share of the one dying without lawful issue.. See also *Kindig v. Dear-dorff*, 39 Ill. 300.

*Compare Brooke v. Croxton*, 2 Gratt. (Va.) 506. In this case a testator, after directing that his estate should be equally divided among his seven children, added: "It is my will and desire that if any of my children should die before they attain to legal age, or without a lawful heir, in either case, that all such property as they may receive in the division of my property, return to my surviving children or their lawful heirs." It was held that the limitation over took effect upon the happening of either contingency, and that upon the death of one under age, or without heirs, his share vested absolutely in the survivors; and upon the death of one of such survivors, under age, or without children, the portion which he received as survivor would not pass to his survivors.

1. "Nor" Construed "or Not." — *Mackenzie v. King*, 17 L. J. Ch. 448.

2. **Transposing Words** — *England.* — *Goods of Durlacher*, 75 L. T. N. S. 664; *Wilson v. Eden*, 1 Exch. 772, 4 H. L. Cas. 257; *Mosley v. Massey*, 8 East 149; *Marshall v. Hopkins*, 15 East 309; *Doe v. Allcock*, 1 B. & Ald. 137; *Mason v. Robinson*, 2 Sim. & St. 295; *Bradwin v. Harpur*, Amb. 374; *Spark v. Purnell*, Hob. 75; *Cole v. Rawlinson*, 1 Salk. 236; *Mohun v. Mohun*, 1 Swanst. 201; *East v. Cook*, 2 Ves. 32.

*Alabama.* — *Walker v. Walker*, 17 Ala. 396.

*Illinois.* — *Rose v. Hale*, 185 Ill. 378.

*Indiana.* — *Jackson v. Hoover*, 26 Ind. 511.

*Iowa.* — *Latham v. Latham*, 30 Iowa 297.

*Kentucky.* — *Hunt v. Johnson*, 10 B. Mon. (Ky.) 344; *Augustus v. Seabolt*, 3 Met. (Ky.) 156.

*Maine.* — *Davis v. Callahan*, 78 Me. 318.

*Maryland.* — *Linstead v. Green*, 2 Md. 82.

*New Jersey.* — *Creveling v. Jones*, 21 N. J. L. 573.

*New York.* — *Ex p. Hornby*, 2 Bradf. (N. Y.) 420; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Wager v. Wager*, 96 N. Y. 172; *Hull v. Pearson*, 36 N. Y. App. Div. 224. *Compare Patchen v. Patchen*, 121 N. Y. 432.

*North Carolina.* — *Baker v. Pender*, 5 Jones L. (50 N. Car.) 351.

*North Dakota.* — *Adair v. Adair*, 11 N. Dak. 175.

*Pennsylvania.* — *Pennsylvania L. Ins. Co. v. Stokes*, 1 Brews. (Pa.) 486; *Leidich v. Leidich*, 8 W. & S. (Pa.) 363; *Mutter's Estate*, 38 Pa. St. 314; *Ferry's Appeal*, 102 Pa. St. 207; *Merkel's Appeal*, 109 Pa. St. 235; *Nebinger's Estate*, 6 Pa. Dist. 340; *Klapp's Estate*, 19 Pa. Super. Ct. 150.

*South Carolina.* — *O'Neill v. Boozer*, 4 Rich. Eq. (S. Car.) 22.

*Texas.* — *Hawes v. Foote*, 64 Tex. 27.

*West Virginia.* — *Furbee v. Furbee*, 49 W. Va. 191.

*Compare Mooberry v. Marye*, 2 Munf. (Va.) 453.

3. **Gift Void for Uncertainty** — *United States.* — *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 99.

*California.* — *Matter of Traylor*, 81 Cal. 9.

*Connecticut.* — *White v. Fisk*, 22 Conn. 31; *Treat's Appeal*, 30 Conn. 113; *Nelson v. Pome-roy*, 64 Conn. 257.

*Georgia.* — *Drane v. Beall*, 21 Ga. 21; *Armistead v. Armistead*, 32 Ga. 597.

*Illinois.* — *Heuser v. Harris*, 42 Ill. 425; *Mather v. Mather*, 103 Ill. 607; *Heller v. Heller*, 147 Ill. 621.

*Indiana.* — *Piercy v. Piercy*, 19 Ind. 467; *Pocock v. Redinger*, 108 Ind. 573; *Edens v. Miller*, 147 Ind. 208.

*Iowa.* — *Lepage v. McNamara*, 5 Iowa 124; *Eckford v. Eckford*, 91 Iowa 54.

*Kentucky.* — *Byers v. Byers*, 6 Dana (Ky.) 313.

*Maine.* — *Howard v. American Peace Soc.*, 49 Me. 288.

*Maryland.* — *Stokeley v. Gordon*, 8 Md. 496. *Massachusetts.* — *Tucker v. Seaman's Aid Soc.*, 7 Met. (Mass.) 188; *Hosea v. Jacobs*, 98 Mass. 65; *Darcy v. Kelley*, 153 Mass. 433.

*Michigan.* — *Tewksbury v. French*, 44 Mich. 100.

*Missouri.* — *Howe v. Wilson*, 91 Mo. 45.

*New Jersey.* — *Taylor v. Tolen*, 38 N. J. Eq. 95.

*New York.* — *Woods v. Moore*, 4 Sandf. (N.

But it is well established that however many errors there may be in the description of a devise or the subject of a devise, the devise will not be avoided, if after rejecting the errors or false words enough remains to show with reasonable certainty what was intended, when considered from the position of the testator.<sup>1</sup>

*b. UNCERTAINTY AS TO SUBJECT-MATTER OF GIFT.*—In order that a specific devise or bequest shall be effective it is necessary that the subject-matter thereof shall be so described as to make it sufficiently certain what was the testator's intention; and when the gift is a pecuniary one it is necessary that the amount intended shall be definite and certain.<sup>2</sup> An optional gift

Y.) 579; *Smith v. Smith*, 4 Paige (N. Y.) 271; *Ryerss v. Wheeler*, 22 Wend. (N. Y.) 148; *New York Blind Inst. v. How*, 10 N. Y. 84; *Beekman v. Bonsor*, 23 N. Y. 298; *Bascom v. Albertson*, 34 N. Y. 584; *Bowman v. Domestic, etc., Missionary Soc.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 574.

*North Carolina.*—*Taylor v. American Bible Soc.*, 7 Ired. Eq. (42 N. Car.) 201; *Timberlake v. Harris*, 7 Ired. Eq. (42 N. Car.) 188; *Ballantyne v. Turner*, 6 Jones Eq. (59 N. Car.) 224; *Stith v. Barnes*, Law Repos. (4 N. Car.) 484.

*Pennsylvania.*—*M'Cullough v. Gilmore*, 11 Pa. St. 370; *Kelley v. Kelley*, 25 Pa. St. 460.

*Texas.*—*Slagle v. Payne*, (Tex. Civ. App. 1899) 50 S. W. Rep. 500.

*Virginia.*—*Wootton v. Redd*, 12 Gratt. (Va.) 196.

*Washington.*—*McAleer v. Schneider*, 2 App. Cas. (D. C.) 461, 22 Wash. L. Rep. 193; *Cross v. Cross*, 23 Wash. 673.

*West Virginia.*—*Wilson v. Perry*, 29 W. Va. 170.

*Wisconsin.*—*Hoppen's Estate*, 70 Wis. 522; *Willey v. Clark*, 105 Wis. 22.

**Will Void in Toto.**—Where a will was so artificially drawn that it was impossible to arrive at any satisfactory conclusion as to what estates or interests in the property were intended to be given, it was declared void. *Bayeaux v. Bayeaux*, 8 Paige (N. Y.) 333.

**Will Made Effective if Possible.**—*Winder v. Smith*, 2 Jones L. (47 N. Car.) 327.

**1. Devise Upheld if Intention Ascertainable.**—*England.*—*Re Hooper*, 88 L. T. N. S. 160; *Goodtitle v. Southern*, 1 M. & S. 299; *Day v. Trig*, 1 P. Wms. 286; *In re Weeding*, (1896) 2 Ch. 364.

*United States.*—*Boardman v. Reed*, 6 Pet. (U. S.) 328; *Patch v. White*, 117 U. S. 210.

*Connecticut.*—*Crosgrove v. Crosgrove*, 69 Conn. 416.

*Illinois.*—*Huffman v. Young*, 170 Ill. 290; *Peterson v. Jackson*, 196 Ill. 40; *Vestal v. Garrett*, 197 Ill. 398; *Brack v. Boyd*, 202 Ill. 440; *Whitcomb v. Rodman*, 156 Ill. 116.

*Indiana.*—*Groves v. Culph*, 132 Ind. 186; *Rook v. Wilson*, 142 Ind. 24; *Pate v. Bushong*, 161 Ind. 533; *Chappell v. Missionary Soc.*, 3 Ind. App. 356, 50 Am. St. Rep. 276; *Priest v. Lackey*, 140 Ind. 399.

*Iowa.*—*Eckford v. Eckford*, 91 Iowa 54; *Stewart v. Stewart*, 96 Iowa 620; *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 472.

*Kansas.*—*Zirkle v. Leonard*, 61 Kan. 636.

*Maryland.*—*Reilly v. Union Protestant In-*

*firmary*, 87 Md. 664; *Scarlett v. Montell*, 95 Md. 148.

*Massachusetts.*—*Worthington v. Hylyer*, 4 Mass. 196.

*Minnesota.*—*McGovern v. McGovern*, 75 Minn. 314.

*Missouri.*—*Riggs v. Myers*, 20 Mo. 239.

*New Hampshire.*—*South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317; *Winkley v. Kaime*, 32 N. H. 268.

*New York.*—*Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. (N. Y.) 144; *Jackson v. Sill*, 11 Johns. (N. Y.) 201; *Loomis v. Jackson*, 19 Johns. (N. Y.) 449; *Gallagher v. Quinlan*, 10 N. Y. App. Div. 402; *Eakin v. Knabe*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 221.

*North Carolina.*—*Lowe v. Carter*, 2 Jones Eq. (55 N. Car.) 377; *Peebles v. Graham*, 128 N. Car. 222; *Brown v. Hamilton*, 135 N. Car. 10.

*Oregon.*—*Portland Trust Co. v. Beatie*, 32 Oregon 305.

*Rhode Island.*—*Peard v. Vose*, 19 R. I. 654.

*Vermont.*—*In re Bradley*, 73 Vt. 253.

*Washington.*—*In re Gorkow*, 20 Wash. 563.

*Wisconsin.*—*Hanley v. Kraftczyk*, 119 Wis. 352.

**2. Uncertainty as to Subject-matter of Gift.**—*England.*—*Asten v. Astens*, (1894) 3 Ch. 260; *Jubber v. Jubber*, 9 Sim. 503; *Boyce v. Boyce*, 16 Sim. 476; *Jerningham v. Herbert*, 4 Russ. 388; *Peck v. Halsey*, 2 P. Wms. 387. See *Jones v. Hancock*, 4 Dow. 145.

*Canada.*—*Brewster v. Foreign Mission Board*, 2 N. Bruns. Eq. 172.

*United States.*—*Handley v. Palmer*, (C. C. A.) 103 Fed. Rep. 39.

*California.*—*Matter of Young*, 123 Cal. 337; *Matter of Lynch*, 142 Cal. 373.

*District of Columbia.*—*McAleer v. Schneider*, 2 App. Cas. (D. C.) 461.

*Georgia.*—*Armistead v. Armistead*, 32 Ga. 597.

*Illinois.*—*Maurer v. Bowman*, 65 Ill. App. 261. See *Van Schaack v. Leonard*, 164 Ill. 602.

*Indiana.*—*Tobin v. Tobin*, (Ind. 1904) 69 N. E. Rep. 440.

*Maine.*—*Mace v. Mace*, 95 Me. 283.

*Maryland.*—*Sisters of Mercy v. Benzinger*, 95 Md. 684.

*Michigan.*—*Caspari v. Cutcheon*, 110 Mich. 86.

*Minnesota.*—*In re Pope*, (Minn. 1904) 97 N. W. Rep. 1046.

*Missouri.*—*Waters v. Hatch*, 181 Mo. 262.

*New York.*—*Beekman v. Bonsor*, 23 N. Y.

whereby the beneficiary may take at his option a sum not in excess of a certain amount,<sup>1</sup> or may take either a certain sum of money or a certain tract of land, is not void for uncertainty.<sup>2</sup>

c. **UNCERTAINTY AS TO OBJECTS OF GIFT.** — Similarly the objects of the testator's bounty, and the purposes to which he desires his estate to be applied, must be so defined that his intention shall be sure and certain.<sup>3</sup> Thus, a

298; *Beecher v. Yale*, (Supm. Ct. Spec. T.) 45 N. Y. Supp. 622; *Fairbrass v. Purdy*, 44 N. Y. App. Div. 636; *Carley v. Greenwood Cemetery*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 70; *Trunkay v. Van Sant*, 83 N. Y. App. Div. 272, reversed 176 N. Y. 535.

*North Carolina.* — *Ballantyne v. Turner*, 6 Jones Eq. (59 N. Car.) 224.

**Two Subjects, One Partially and the Other Entirely Satisfying Description.** — Where a subject is found that fits and satisfies a description in every particular, and another is found that does not satisfy the description in an important particular, the former is presumed to be the subject for which the description was intended. *Booker v. Booker*, 20 Ga. 786.

**Devise of "What Shall Remain" or "Be Left" at Death of Legatee.** — *Sarle v. Probate Court*, 7 R. I. 270.

**Devise of All Testator's "Upland" Sufficiently Certain.** — *Vandiver v. Vandiver*, 115 Ala. 328.

**Legacy of an English Education Not Void for Uncertainty.** — *Allen's Succession*, 48 La. Ann. 1036.

**Devise of All Remaining at Death.** — Where an estate was devised to one generally, without expressing what estate, and the direction was added that if the devisee should die without children all the property remaining at his death should go over, it was held that the description of what went over was sufficiently certain. *Burton v. Black*, 30 Ga. 638.

**"All of One's Estate" — Certain "Plantation" in a Given County.** — A devise of "all of one's estate," or of a certain "plantation," described as being in a given county, is not void for uncertainty. *Flannery v. Hightower*, 97 Ga. 592.

**Maintenance of Legatee According to Condition in Life.** — A direction that a legatee shall be maintained according to her condition in life is not void for uncertainty. *Cresap v. Cresap*, 34 W. Va. 310.

**If the Testator Supplies a Measure of the Bequest,** the court will ascertain how much ought to be expended; thus, a gift of a sum of money to an executor for his trouble, or even of a house or garden to be built at the expense of his executors, is good, and the court will fix the amount. *Jackson v. Hamilton*, 3 J. & La T. 702; *Edwardes v. Jones*, 35 Beav. 474. See *Dundee v. Morris*, 3 Macq. H. L. Cas. 134.

**Trust Void — Surplus to Valid Object.** — In the case of a fund bequeathed upon trust, to apply a portion to a purpose which is void and the surplus to charity, it seems the whole fund may be applied to charity, though the amount applicable to the invalid object may not be ascertainable. For instance, if a fund is given upon trust to apply the income in repairing a tomb, and to give the surplus to a charitable object, the charitable object is entitled to the whole fund. *Fisk v. Atty. Gen.*, L. R. 4 Eq. 521;

*Hunter v. Bullock*, L. R. 14 Eq. 45; *Dawson v. Small*, L. R. 18 Eq. 114; *In re Williams*, 5 Ch. D. 735; *In re Birkett*, 9 Ch. D. 576. See *Fowler v. Fowler*, 33 Beav. 616; *Kirkman v. Lewis*, 38 L. J. Ch. 570.

Possibly, if the invalid object is such that the whole fund might fairly be expended upon it, the whole gift will be void. *Chapman v. Brown*, 6 Ves. Jr. 404; *Cramp v. Playfoot*, 4 Kay & J. 479.

The court will, if possible, ascertain the amount necessary for each object, in order to prevent the gift of the surplus from being void for uncertainty. *Mitford v. Reynolds*, 1 Phill. 185; *Dundee v. Morris*, 3 Macq. H. L. Cas. 134; *Fisk v. Atty. Gen.*, L. R. 4 Eq. 521.

**1. Optional Gift.** — *Seale v. Seale*, 1 P. Wms. 290; *Thompson v. Thompson*, 1 Coll. Ch. Cas. 395; *Cope v. Wilmot*, 1 Coll. Ch. Cas. 396, note; *Gough v. Bult*, 16 Sim. 45.

**2. Money or Land.** — *Flood v. Kerwin*, 113 Wis. 673.

**3. Objects and Purposes of Testator to Be Certain.** — *In re Macduff*, (1896) 2 Ch. 451; *Huntsville v. Smith*, 137 Ala. 382; *Heuser v. Harris*, 42 Ill. 425; *Harris v. Ferguy*, 207 Ill. 534; *Dennis v. Holsapple*, 148 Ind. 297; *Bartlet v. King*, 12 Mass. 537; *Parker v. Cowell*, 16 N. H. 149; *Morton v. Woodbury*, 153 N. Y. 243; *Jones's Estate*, 7 Pa. Dist. 361.

In *Treat's Appeal*, 30 Conn. 113, a testator made the following bequest: "I give and bequeath to M., N., and G., and to their successors forever (who shall, as a board of trustees, add to and perpetuate their number, so long as in their opinion the objects of this bequest shall require it), all my estate, to be held by them in trust, for the promotion of education among the Indian and African children and youth of the United States or elsewhere, as in their judgment they shall deem best. I leave it entirely with them to decide in what manner to expend this bequest to secure the object, either by using the principal for the education of a number of youth, and thus prepare them for immediate usefulness; or to use only the annual interest and educate a smaller number, and thus continue; or if they shall judge it best let them use the whole amount and establish an academy, to be a lasting benefit to that class of my fellow men for whose benefit I have given all my property; wishing it to be used in that way, time, and place which they shall judge best, after due consideration upon the condition that the people of color shall be in, in the United States, at the time that this bequest shall be at their disposal." It was held that the bequest was not void for uncertainty, either as to the objects of the charity, or as to the mode of carrying the charity into effect.

**Designation of Residuary Legatee.** — *Stratton's Estate*, 112 Cal. 513; *Morton v. Woodbury*, 153 N. Y. 243.



bequest to the "three oldest and poorest people" in a certain municipality is sufficiently certain and definite to permit of enforcement,<sup>1</sup> as is a provision that a remainder shall pass to the persons entitled to inherit real estate under the laws in force in a certain state,<sup>2</sup> or a provision that the use of a permanent fund shall be applied to the support of a certain denomination,<sup>3</sup> or a bequest of a certain sum to be paid out annually in bread for ten years for the poor of a congregation,<sup>4</sup> or a bequest of a fund to be used by the legatee as he deems proper for the support of himself and "family" during his life, with remainder to his children upon his death,<sup>5</sup> or a provision for the application of the interest of an investment towards the education of young students in the ministry of a congregation.<sup>6</sup> On the other hand, where the will fails to designate with certainty the objects of the testator's bounty, it is void for uncertainty in description.<sup>7</sup> Thus, a devise to the heirs of a living man is void for uncertainty,<sup>8</sup> as is a gift to the children of a named son, when there are three of that name known to testator,<sup>9</sup> or a devise to a corporation to be incorporated,<sup>10</sup> or a bequest of property to "five persons who shall be named and appointed as trustees by the Supreme Court of Vermont, to establish an institution for the education of females,"<sup>11</sup> or a direction that the proceeds of an estate sold shall be "drawn to assist in aiding good and worthy objects,"<sup>12</sup> or a devise to trustees for the education of "poor children of the members" of a church,<sup>13</sup> or a bequest "to some promising young man of good talents and of the Baptist order, to be selected by my executors,"<sup>14</sup> or a direction that a sum be expended by trustees for "the support of indigent, pious young men preparing for the ministry" in a certain city,<sup>15</sup> or a gift creating institutions of learning, the surplus to "be used for the education of such youth as are not able to pay teachers' fees," and providing that testator's "relations be admitted as students, free of tuition fees."<sup>16</sup> It frequently

**Selection of Beneficiary Intrusted to Discretion of Trustees.**—*Landis v. Wooden*, 1 Ohio St. 160; *Whelan v. Reilly*, 3 W. Va. 597.

**Where Three Devises Answer the Description**, each will take a third of the devise. *Harris v. Keasbey*, (N. J. 1902) 53 Atl. Rep. 555.

**A Bequest to "the Baptist Society for Foreign and Domestic Missions and the American and Foreign Bible Society"** is valid and sufficiently specific, and if the societies can be found which were organized and known by those names at the time of the testator's death they will be considered the ones referred to in the will and capable of taking the bequest. But if such societies did not exist at the time of the testator's death, or cannot now be found, the bequest must be considered and disposed of as a lapsed legacy. *Carter v. Balfour*, 19 Ala. 814.

**Charities.**—For a full discussion of the question of uncertainty of description of beneficiary in a charitable gift, as affecting the validity of such gifts, see the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 905.

1. *Law v. Acton*, 14 Manitoba 246.

2. **Persons Entitled by Law to Inherit.**—*Van Driele v. Kotvis*, 97 N. W. Rep. 700, 10 Detroit Leg. N. 733.

3. *North Adams First Universalist Soc. v. Fitch*, 8 Gray (Mass.) 421.

4. *Witman v. Lex*, 17 S. & R. (Pa.) 88.

5. *Amsterdam First Nat. Bank v. Miller*, 24 N. Y. App. Div. 551, 27 Civ. Pro. (N. Y.) 167.

6. *Witman v. Lex*, 17 S. & R. (Pa.) 88.

7. **Will Void for Uncertainty**—*England*.—*In re Moore*, (1901) 1 Ch. 936; *In re Hetley*,

(1902) 2 Ch. 866; *Langham v. Peterson*, 87 L. T. N. S. 744.

*Maryland*.—*Trinity M. E. Church v. Baker*, 91 Md. 539.

*New York*.—*Trunkey v. Van Sant*, 83 N. Y. App. Div. 272, reversed 176 N. Y. 535.

*North Carolina*.—*Taylor v. American Bible Soc.*, 7 Ired. Eq. (42 N. Car.) 201.

In *Bridges v. Pleasants*, 4 Ired. Eq. (39 N. Car.) 26, it was held that a will containing a bequest of one thousand dollars "to be applied to foreign missions and to the poor saints; this is to be disposed of and applied as my executor may think the proper objects according to the scriptures, the greater part, however, to be applied to missionary purposes, say nine hundred dollars," and also providing that anything that was left after satisfying certain legacies and devises should be applied to home missions, was too indefinite and uncertain, and therefore void.

8. **Heirs of Living Man.**—*Timberlake v. Harris*, 7 Ired. Eq. (42 N. Car.) 188.

9. *In re Stephenson*, (1897) 1 Ch. 75.

10. **Corporation to Be Incorporated.**—*Matter of Round*, (Surrogate Ct.) 25 Misc. (N. Y.) 101.

11. *Bascom v. Albertson*, 34 N. Y. 584.

12. **"Good and Worthy Objects."**—*Brewster v. Foreign Mission Board*, 2 N. Bruns. Eq. 172.

13. *State v. Bates*, 2 Harr. (Del.) 18; *Dashiell v. Atty.-Gen.*, 5 Har. & J. (Md.) 392.

14. *Hester v. Hester*, 2 Ired. Eq. (37 N. Car.) 330.

15. *White v. Fisk*, 22 Conn. 31.

16. *Literary Fund v. Dawson*, 10 Leigh (Va.) 153.

happens that the devisee or legatee is incorrectly or erroneously described, but if it appears, nevertheless, who was intended by the testator the gift does not fail.<sup>1</sup>

**11. Estates Arising from Implication** — *a.* IN GENERAL. — Courts have, from an early day, repeatedly upheld devises or bequests by implication, when no gift seems to have been made in the will in formal language.<sup>2</sup>

**Implication Founded upon Two Grounds.** — Implication may be founded upon two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or it may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction.<sup>3</sup>

**Necessary Implication.** — The weight of authority sustains the position that the implication, to be effective, must be necessary, by which is meant, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. Mere conjecture must not be taken for implication.<sup>4</sup> Thus, the fact that a testator has made

**1. Incorrect Description, but Intention Apparent** — *England.* — *Re Waller*, 80 L. T. N. S. 701.

*Canada.* — *In re Whitty*, 30 Ont. 300.

*Connecticut.* — *Weed v. Scofield*, 73 Conn. 670; *Preston v. Foster*, 75 Conn. 709.

*Maryland.* — *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 199.

*Nebraska.* — Second United Presb. Church v. First United Presb. Church, (Neb. 1904) 99 N. W. Rep. 252.

*New Jersey.* — *Moore v. Moore*, 50 N. J. Eq. 554; *Atterbury v. Strafford*, 58 N. J. Eq. 186; *Van Nostrand v. Board of Domestic Missions*, 59 N. J. Eq. 19; *Kerrigan v. Conelly*, (N. J. 1900) 46 Atl. Rep. 227; *Palmer v. Munsell*, (N. J. 1896) 46 Atl. Rep. 1094; *Smith v. Bloomsbury First Presb. Church*, 26 N. J. Eq. 132.

*New York.* — *Tallman v. Tallman*, (N. Y. Super. Ct. Eq. T.) 3 Misc. (N. Y.) 465; *Preston v. Howk*, 3 N. Y. App. Div. 43; *Matter of Foley*, (Surrogate Ct.) 27 Misc. (N. Y.) 77.

**2. Devises by Implication Upheld** — *England.* — *Ouseley v. Anstruther*, 10 Beav. 459; *Ives v. Dodgson*, L. R. 9 Eq. 401; *Ex p. Wynch*, 5 De G. M. & G. 221; *Langston v. Langston*, 2 Cl. & F. 194; *In re Telfair*, 86 L. T. N. S. 496; *In re Springfield*, (1894) 3 Ch. 603; *Thompson v. Whitelock*, 5 Jur. N. S. 991; *Doe v. Homfray*, 6 Ad. & El. 206, 33 E. C. L. 55; *Oates v. Cooke*, 3 Burr. 1686; *Affleck v. James*, 17 Sim. 121.

*Canada.* — *Wilson v. Butler*, 2 Ont. L. Rep. 576.

*Alabama.* — *Hollingsworth v. Hollingsworth*, 65 Ala. 321.

*Connecticut.* — *Peckham v. Lego*, 57 Conn. 559.

*Georgia.* — *Hertz v. Abrahams*, 110 Ga. 707.

*Indiana.* — *Sibert v. Cox*, 100 Ind. 392.

*Kentucky.* — *Chinn v. Respass*, 1 T. B. Mon. (Ky.) 25.

*Maine.* — *Deering v. Adams*, 37 Me. 264.

*Massachusetts.* — *Metcalf v. Framingham*, 128 Mass. 370; *Boston Safe Deposit, etc., Co. v. Coffin*, 152 Mass. 98.

*New York.* — *Post v. Hover*, 33 N. Y. 599; *Matter of Vowers*, 113 N. Y. 569; *Masterson v. Townshend*, 123 N. Y. 458; *Miller v. Cou-*

*dert*, 73 N. Y. App. Div. 538; *Matter of Stafford*, (Surrogate Ct.) 11 Misc. (N. Y.) 436.

*Pennsylvania.* — *Bentley v. Kaufman*, 12 Phila. (Pa.) 435, 34 Leg. Int. (Pa.) 12; *McMasters v. Shellito*, 14 Pa. Super. Ct. 303.

**3.** *Per Lord Chancellor Westbury in Parker v. Tootal*, 11 H. L. Cas. 143.

**4. Necessary Implication** — *England.* — *Wilkinson v. Adam*, 1 Ves. & B. 466.

*Alabama.* — *Hollingsworth v. Hollingsworth*, 65 Ala. 321.

*California.* — *Matter of Reinhardt*, 74 Cal. 371.

*Georgia.* — *McMichael v. Pye*, 75 Ga. 191.

*Indiana.* — *Kelly v. Stinson*, 8 Blackf. (Ind.) 387; *Rusing v. Rusing*, 25 Ind. 63; *Waugh v. Riley*, 68 Ind. 482.

*Maine.* — *Howard v. American Peace Soc.*, 49 Me. 288.

*Maryland.* — *Ridgely v. Bond*, 18 Md. 448.

*Massachusetts.* — *Hayden v. Stoughton*, 5 Pick. (Mass.) 536; *Grout v. Hapgood*, 13 Pick. (Mass.) 164; *Ferson v. Dodge*, 23 Pick. (Mass.) 287.

*Missouri.* — *Eneberg v. Carter*, 98 Mo. 647.

*New Jersey.* — *McCoury v. Leek*, 14 N. J. Eq. 70; *Denise v. Denise*, 37 N. J. Eq. 163.

*New York.* — *Post v. Hover*, 33 N. Y. 593; *Matter of Vowers*, 113 N. Y. 569; *Decker v. High St. M. E. Church*, 27 N. Y. App. Div. 408; *Miller v. Coudert*, 73 N. Y. App. Div. 538.

*North Carolina.* — *Edens v. Williams*, 3 Murph. (7 N. Car.) 27.

*Pennsylvania.* — *Piper's Estate*, 11 Phila. (Pa.) 141, 33 Leg. Int. (Pa.) 228; *McKeehan v. Wilson*, 53 Pa. St. 77; *Jacobs's Estate*, 140 Pa. St. 268; *De Silver's Estate*, 142 Pa. St. 75.

*Virginia.* — *Sutherland v. Sydnor*, 84 Va. 880.

In *Post v. Hover*, 33 N. Y. 599, the court said: "To devise an estate by implication there must be such a strong probability of an intention to give one that the contrary cannot be supposed."

In *O'Hearn v. O'Hearn*, 114 Wis. 428, it was said: "The rule upon which a devise by implication is based is that it is raised only

provision for one of his heirs in the will is not sufficient to justify the presumption that he intended that property otherwise undisposed of should go to other heirs in equal shares, in the absence of anything in the will to indicate such intention. To allow such a presumption to prevail is to make a will for the testator, which the law does not permit.<sup>1</sup>

The Express Language of the Will cannot be overruled by implication.<sup>2</sup>

*b. IMPLICATION FROM RECITALS.* — An estate by implication may result from recitals in the will.

**Recital of Gift in Another Part of Will.** — Thus, where the recital is to the effect that the testator has made a gift in another part of the will, when in fact he has not done so, and therefore the recital turns out to be erroneous, such recital is construed to show a purpose and intention on the part of the testator to make such gift, which the courts proceed to carry out by raising an estate by implication.<sup>3</sup>

**Recital of Gift in Another Instrument.** — Where, however, the recital in the will is to the effect that the testator has, by some instrument other than the will, given property to a certain named person, when in fact he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the devisor to give by the will, and in such case resort must be had to the other instrument, and not to the will, by persons interested.<sup>4</sup>

**Recital that Party Has Interest Independent of Will.** — A recital which, in effect, merely amounts to a declaration that the testator supposes the party referred to has an interest independent of the will is no evidence of an intent to give by the will, and does not raise a gift by implication.<sup>5</sup> But a recital that the

under a will where the contract requires it and the devise is not in express terms. It is only admitted as a means of carrying out what the testator appears on the whole to have really meant, but failed somehow to express as distinctly as he should have done. In other words, a gift by implication must be founded upon some expressions in the will from which such intention can be inferred. It cannot be inferred from an absolute silence on the subject. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind."

1. *O'Hearn v. O'Hearn*, 114 Wis. 428.

2. **Express Language Cannot Be Overruled** — *England*. — *Patton v. Randall*, 1 Jac. & W. 196.

*United States*. — *Wright v. Denn*, 10 Wheat. (U. S.) 204.

*California*. — *Matter of Reinhardt*, 74 Cal. 365.

*Georgia*. — *Mallery v. Dudley*, 4 Ga. 52.

*Indiana*. — *Kelly v. Stinson*, 8 Blackf. (Ind.) 387.

*Maine*. — *McLellan v. Turner*, 15 Me. 436.

*Massachusetts*. — *Bowers v. Porter*, 4 Pick. (Mass.) 198.

*New Jersey*. — *Den v. Cook*, 7 N. J. L. 41.

*New York*. — *In re Herrick*, (Surrogate Ct.) 12 N. Y. Supp. 105.

*Ohio*. — *Crane v. Doty*, 1 Ohio St. 279.

*Pennsylvania*. — *Burkart v. Bucher*, 2 Binn. (Pa.) 455; *Dewitt v. Eldred*, 4 W. & S. (Pa.) 414; *Dixon v. Ramage*, 2 W. & S. (Pa.) 142.

*Rhode Island*. — *Moore v. Dimond*, 5 R. I. 126.

*South Carolina*. — *Manigault v. Holmes*, Bailey Eq. (S. Car.) 298; *Carr v. Porter*, 1 McCord Eq. (S. Car.) 60.

3. **Recital of Gift in Another Part of Will** — *England*. — *Skerratt v. Oakley*, 7 T. R. 488; *Smith v. Fitzgerald*, 3 Ves. & B. 2; *Mackenzie v. Bradbury*, 35 Beav. 620; *Nugent v. Nugent*, 8 Ir. Ch. 78; *Ives v. Dodgson*, L. R. 9 Eq. 401; *Adams v. Adams*, 1 Hare 540; *Yates v. Thomson*, 3 Cl. & F. 572; *Bibin v. Walker*, Ambl. 661; *Harrus v. Harris*, Ir. R. 3 Eq. 610. *Georgia*. — *Atwood v. Geiger*, 69 Ga. 498.

*Illinois*. — *Hunt v. Evans*, 134 Ill. 496.

*Maryland*. — *Zimmerman v. Hafer*, 81 Md. 347.

*New York*. — *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Marsh v. Hague*, 1 Edw. (N. Y.) 174; *Culhane v. Fitzgibbons*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 331.

**A Gift Alleged to Be "in Addition" to a Prior Gift** where there is, in fact, no such prior gift is sufficient evidence of an intention to confer the supposed prior gift. *Jordan v. Fortescue*, 10 Beav. 259; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 24.

4. **Recital of Gift in Another Instrument.** — *Hunt v. Evans*, 134 Ill. 496; *Zimmerman v. Hafer*, 81 Md. 347.

5. **Recital of Supposed Interest Independent of Will** — *England*. — *Harris v. Harris*, Ir. R. 3 C. L. 294; *Adams v. Adams*, 1 Hare 540; *Westcott v. Culliford*, 3 Hare 265; *Langslow v. Langslow*, 21 Beav. 552; *Circuit v. Perry*, 23 Beav. 275; *Yates v. Thomson*, 3 Cl. & F. 572; *Wright v. Wyvell*, 2 Vent. 56; *Right v. Hamond*, 1 Stra. 427; *Dashwood v. Peyton*, 18 Ves. Jr. 27; *Box v. Barrett*, L. R. 3 Eq. 244; *Lane v. Wilkins*, 10 East 241; *Ralph v. Watson*, 9 L. J. Ch. 328; *Poulson v. Wellington*, 2 P. Wms. 533.

*United States*. — *Gaines v. Spann*, 2 Brock. (U. S.) 81.

*Georgia*. — *Williams v. Allen*, 17 Ga. 81.



testator does not give to a legatee a certain sum of money because she is absolutely entitled to it, when in fact it is within the disposition of the testator, amounts to a gift of the sum in question.<sup>1</sup>

**A Recital that the Testator Is About to Make a Conveyance** to a certain person does not raise an implication of a gift to such person.<sup>2</sup>

**c. IMPLICATION OF LIFE ESTATES.**—A devise to the testator's heir at law, after the death of A, gives A an estate for life by implication; but under a devise to B, a stranger, or to the heir and others jointly, after the death of A, A takes no estate by implication, since the heir at law may have been intended to take in the meantime.<sup>3</sup> A devise to one of several coheiresses after the death of A gives A an estate for life.<sup>4</sup>

**Bequest to Next of Kin.**—Upon the same principle, if personal property be given to the next of kin, or to one of the next of kin, after the death of A, A will take a life interest by implication if there is no residuary bequest.<sup>5</sup>

**d. IMPLICATION OF ESTATES TAIL.**—Under a will containing a provision for a devise to A and his heirs, or to A for life, followed by a gift over on an indefinite failure of issue,<sup>6</sup> A takes an estate tail by implication.<sup>7</sup> It is

*Illinois.*—*Hunt v. Evans*, 134 Ill. 496; *Benison v. Hall*, 150 Ill. 60.

*Minnesota.*—*In re Swenson*, 55 Minn. 300.

*Missouri.*—*Clamorgan v. Lane*, 9 Mo. 446.

1. *Hall v. Lietch*, L. R. 9 Eq. 376.

2. **Recital that Testator Is About to Make Conveyance.**—*Hurlbut v. Hutton*, 42 N. J. Eq. 16.

3. **Life Estate by Implication—England.**—*Rex v. Ringstead*, 9 B. & C. 224, 17 E. C. L. 359; *Gardner v. Sheldon*, Vaugh. 259, *Tuder L. C.* 541; *Aspinall v. Petvin*, 1 Sim. & St. 544; *Upton v. Ferrers*, 5 Ves. Jr. 804; *Dyer v. Dyer*, 1 Meriv. 414; *In re Springfield*, (1894) 3 Ch. 603.

*Indiana.*—*Kelly v. Stinson*, 8 Blackf. (Ind.) 387.

*New Jersey.*—*McCoury v. Leek*, 14 N. J. Eq. 70; *Den v. Holton*, 23 N. J. L. 425.

*New York.*—*Rathbone v. Dyckman*, 3 Paige (N. Y.) 9; *Lovett v. Gillender*, 35 N. Y. 617.

*Pennsylvania.*—*Anders v. Gerhard*, 140 Pa. St. 156.

In *Ralph v. Carrick*, 11 Ch. D. 878, where it was held that if the gift over was to the heir at law conjointly with other persons, no estate arose by implication, *Cotton, L. J.*, said: "As regards the raising gifts for life by implication arising from a gift to some person after the death of the person to whom it is sought to give a life estate by implication, we have two rules. As to real estate, if there is a gift to a testator's heir at law after the death of A, that does give by implication a life estate to A. If there is a gift of the testator's real estate to a stranger after the death of A, that does not raise the implication."

**Rebuttal by Contrary Implication.**—Where a testator, being seized of a dwelling house and farm, and of other property, both real and personal, gave a pecuniary legacy to his daughter, payable at twenty-one, or on her marriage, and gave to his wife the house and farm and his furniture for life, and one-third of his personal property absolutely, and then concluded as follows: "And after the death of my wife, in case I should have no more children, I give, devise, and bequeath unto my said daughter, my said dwelling house and farm, together with all the rest and residue of my

personal and real estate," it was held that the wife did not take a life estate in such residue by implication. *Rathbone v. Dyckman*, 3 Paige (N. Y.) 10. In giving the opinion in the above case the court used the following language: "It is upon the principle of carrying into effect the supposed intention of the testator that all the cases of devises and bequests by implication have been decided. If the particular devise or bequest cannot reasonably be accounted for, except upon the supposition that the testator intended to make the corresponding disposition of other parts of his property, or of previous estates therein, the courts will carry into effect the intention of the testator, by implying such corresponding disposition. \* \* \* On the other hand, if the particular devise or bequest can be reasonably accounted for, taking the whole will together, without supposing that the testator must have intended to make some corresponding disposition of other parts of the property or previous estates therein, not expressed, such corresponding disposition will not be implied. An implication may also be rebutted by a contrary implication which is equally strong."

4. **Devise to One of Several Coheiresses.**—*Hutton v. Simpson*, 2 Vern. 723. See *Rex v. Ringstead*, 9 B. & C. 218, 17 E. C. L. 359.

5. **Bequest to Next of Kin.**—*In re Springfield*, (1894) 3 Ch. 603; *Stevens v. Hale*, 2 Drew & Sm. 22; *Cock v. Cock*, 21 W. R. 807; *Blackwell v. Bull*, 1 Keen 176. Compare *White v. Green*, 1 Ired. Eq. (36 N. Car.) 45.

6. **Distinction Between Indefinite and Definite Failure of Issue.**—See the title **ISSUE (DESCENDANTS)**, vol. 17, p. 542.

7. **Gift Over on Indefinite Failure of Issue—England.**—*Wyld v. Lewis*, 1 Atk. 432; *Matchell v. Weeding*, 8 Sim. 4; *Daintry v. Daintry*, 6 T. R. 307; *Matter of Banks*, 2 Kay & J. 387; *Butt v. Thomas*, 11 Exch. 235, 1 H. & N. 109; *Walter v. Drew*, 1 Comyns 373; *Doe v. Halley*, 8 T. R. 5; *Doe v. Gallini*, 5 B. & Ad. 621, 27 E. C. L. 138, 3 Ad. & El. 340, 30 E. C. L. 112; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93; *Andrew v. Andrew*, 1 Ch. D. 410; *Atkinson v. Holthy*, 10 H. L. Cas. 313.

*Georgia.*—*Hertz v. Abrahams*, 110 Ga. 707.

held, however, that if the gift over is on a definite failure of issue there is no estate tail by implication taken.<sup>1</sup>

**A Devise to A as Long as He Lives**, but should he die without leaving a family then over, creates in A a fee tail.<sup>2</sup>

**e. IMPLICATION OF ABSOLUTE INTERESTS.**—It has been held that a devise or bequest of property to trustees in trust for a certain person till he attains the age of twenty-one does not vest in that person by implication the absolute interest in the property.<sup>3</sup> There is authority to the contrary, however,<sup>4</sup> and an absolute interest has been implied from a direction that the trust should cease at twenty-one,<sup>5</sup> from a separate clause in the will appointing the trustees to be trustees for the legatee,<sup>6</sup> and also from a direction that

*New Jersey.*—See *Den v. Taylor*, 5 N. J. L. 475.

*Pennsylvania.*—*Smith's Appeal*, 23 Pa. St. 9; *Beilstein v. Beilstein*, 194 Pa. St. 153.

*Rhode Island.*—*Burrough v. Foster*, 6 R. I. 534.

*Virginia.*—See *McClintic v. Manns*, 4 Munf. (Va.) 328.

**Illustrations.**—In *Pott's Appeal*, 30 Pa. St. 168, a testator devised real and personal estate in trust "to pay one-fifth of the rents, income, and interest thereof to each of my four sisters now living, M., E., F., and A., for and during all the term of their natural lives; and the remaining fifth part of my said residuary estate, real and personal, to the children of my deceased sister S., in equal parts and shares in fee." And "upon the decease of any and either of my said sisters or nieces, without issue (if with issue, the issue to inherit their shares), I grant and convey their portion of my estate for the use of my other sisters and children, in equal parts and shares in fee." It was held that the devisees took an estate tail in the realty.

In *Simmons v. Simmons*, 8 Sim. 22, testator gave all his real and personal property to his daughter for her separate use for life: "at her decease, she shall be at liberty to will the same to her issue; but in case of her dying without issue, I wish the property to go to my brother and sister, for their lives. In the event of my brother's death prior to the death of my daughter, then to the children of my brother." It was held that the daughter took an estate tail in the realty, and an absolute interest in the personalty.

In *Jackson v. Billinger*, 18 Johns. (N. Y.) 368, H., by his will dated April 5, 1771, devised as follows: "My will and pleasure is, that my son John shall have the farm which I now live upon, etc., two of the best negroes, all my wearing apparel, three geldings, etc. But if my said son may happen to die unmarried, without lawful issue, then it is my will and pleasure, that the said estate shall descend to my next heir of the name of H. and that he may not sell, exchange, or dispose of any part of said estate without the consent, approbation, and concurrence of my executors." The testator died in August, 1775, leaving five sons and eight daughters. John, the devisee, died April 20, 1817, unmarried, and without issue, leaving one sister, and nephews and nieces living. It was held that John, the devisee, took an estate tail by implication; that the devise over, depending on an indefinite

failure of issue, was not good as an executory devise; and that the estate tail, being converted into an estate in fee simple by the statute, descended, on the death of John, to his heirs at law, according to the statute regulating descents.

**1. Gift Over on Definite Failure of Issue.**—*Turner v. Withers*, 23 Md. 18; *Den v. Snitcher*, 14 N. J. L. 53; *Woodlief v. Duckwall*, 10 Ohio Cir. Dec. 686, 19 Ohio Cir. Ct. 564.

**2.** *Beilstein v. Beilstein*, 194 Pa. St. 152.

**3. Absolute Interest Does Not Vest in Cestui.**—*Hedley's Trusts*, 25 W. R. 529. In this case it appeared that a testatrix, after directing payment of debts and legacies, gave all the residue of her estate and effects to a trustee, upon trust for her daughter till she should attain the age of twenty-one years or marry, whichever should first happen, and appointed the trustee sole executor of her will. It was held that there was no implied gift of the capital to the daughter on her attaining twenty-one or marrying. And see *McCutcheon v. Allen*, L. R. 5 Ir. 268.

**4. Contra.**—In *Hale v. Beck*, 2 Eden 229, a legacy was bequeathed to trustees to be put out upon security, the interest to be paid to A, and in case she should marry or die, the interest to be paid to B, in trust for her till she came to the age of twenty-one years. It was held that B was absolutely entitled to the legacy. See also *Atkinson v. Paice*, 1 Bro. C. C. 91; *Tunaley v. Roch*, 3 Drew. 720.

**5. Trust to Cease at Twenty-one.**—In *Peat v. Powell*, 1 Eden 479, there was a devise of the residue of the testator's real and personal estate to his executors in trust for A till he should attain twenty-one, at which time the trust should cease. It was held that A took the whole beneficial interest.

**6. Trustees Appointed Trustees for Legatee.**—In *Wilks v. Williams*, 2 Johns. & H. 125, a testatrix having, by her will, directed the trustees, who were also the executors of her will, to invest the residue of her property, left the interest to two nieces, to be paid to them half-yearly, and at their decease "the half-yearly dividends to be continued to their children till they came to the age of twenty-one years." She then "constituted and appointed" the said executors (*nominatim*) trustees for the said nieces and their children. All the children of a deceased niece had attained twenty-one. It was held that they were entitled absolutely to the moiety given to her for life. The court said: "The testatrix directs all the residue of her property to be invested by Hill and Dace;

the trustees should apply not only the interest, but the produce, till the legatees should attain twenty-one.<sup>1</sup>

**Provision for Gift Over if Person Die in Meantime.** — Where property is devised or bequeathed in trust for a certain person until he reaches the age of twenty one, and it is provided that if he die before reaching that age the property shall go over to another person, there is generally held to be a clear implication that if the former person reaches the age of twenty-one, the property is to go to him absolutely.<sup>2</sup>

**f. IMPLICATION OF GIFT TO ISSUE FROM GIFT OVER IN DEFAULT OF ISSUE.** — It has been held that a gift to issue will not be implied from a gift to A, and in the event of there being a definite failure of issue then over to a third person.<sup>3</sup>

**Gift to A for Life.** — So it has been held that a gift to issue will not be implied from a gift to A for life, and in the event of there being a definite failure of issue then over to a third person.<sup>4</sup> But according to some authorities the court will lay hold of any indication of intention to raise a gift to the issue, and avoid imputing to the testator so extraordinary an intent as that the gift over is to take effect if the first taker have no child, but that the property is

she places the whole of that residue in their hands, and then constitutes and appoints the said Hill and Dace 'trustees' (trustees, that is, of the entire residue) 'for the said Fanny Williams and Rebecca Wilks, and their children.' It is clear, that, upon these words alone, without the intermediate bequest of the dividends until the children should attain twenty-one, there would have been an absolute gift for the testatrix's nieces and their children. In an independent sentence, the testatrix appoints Hill and Dace executors of her will. In the absence of the clause constituting them trustees for the nieces and their children, it would have been their duty to pay the dividends, as directed, until the children attained twenty-one. The insertion of that clause, therefore, must be looked upon as emphatic, and as indicating that, after the children attained twenty-one, the trust for their benefit was still to continue."

**1. Trustees to Apply Both Interest and Produce.** — *Newland v. Shephard*, 2 P. Wms. 194. In this case the testator after the devise of several parts of his real and personal estates to several persons devised the interest and produce of the surplus of his real and personal estate to his grandchildren until they reached the age of twenty-one. It was held that the will passed the absolute right and property of the real and personal estate to the grandchildren after that age.

**2. Provision for Gift Over.** — *Tomkins v. Tomkins*, cited in 1 Burr. 234; *Paylor v. Pegg*, 24 Beav. 105; *Gardiner v. Stevens*, 30 L. J. Ch. 199; *In re Harrison*, L. R. 5 Ch. 408; *Cropton v. Davies*, L. R. 4 C. P. 159; *Wilks v. Williams*, 2 Johns. & H. 125; *Savage v. Tyers*, L. R. 7 Ch. 356; *Culhane v. Fitzgibbons*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 331.

But see *Fitzhenry v. Bonner*, 2 Drew. 36, wherein a testator gave his residue to his wife, for her own and her son's support, clothing, and education, until the son should attain twenty-one. If the son died under twenty-one, then the testator gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter.

It was held that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. *Kindersley, V. C.*, said: "The testator having provided for his widow and his son, till he should attain twenty-one, and having provided what is to take place, if his son should die under twenty-one, has not in express terms made any provision for the event of his living to attain twenty-one. Now, can I imply a gift to the son, in the event of his attaining twenty-one, of the whole of the property? No doubt there are many cases where the court will, in the absence of express gift, raise a gift by implication; but it will not do so unless the implication is necessary, irresistible, that is, where, looking at the language, at all the dispositions of the will, and the circumstances, there is an irresistible inference in favor of implying a gift. But do I find here any such irresistible inference? What are the previous dispositions? Until the son attains twenty-one, they are in favor of the widow and the son; if he dies under twenty-one, they are in favor of his widow. What is there to lead to an irresistible inference that, if the son should attain twenty-one, he is to be benefited, exclusively of the testator's widow? Then, as to the circumstances, there is not even a probability that a man leaving a widow and a son should intend to provide for the son exclusively, leaving the mother at the mercy of the son, who may or may not fulfil the moral obligation cast upon him; still less is there anything in the circumstances in this case to lead to an irresistible inference of any such intention."

**3. Gift to Issue Not Implied.** — *Monypenny v. Dering*, 7 Hare 588; *Cooper v. Pitcher*, 4 Hare 485; *Addison v. Busk*, 14 Beav. 459; *Dowling v. Dowling*, L. R. 1 Eq. 442. But see *Still v. Spear*, 3 Grant Cas. (Pa.) 307. And see the title *ISSUE (DESCENDANTS)*, vol. 17, p. 542.

**4. Gift to A for Life.** — *Greene v. Ward*, 1 Russ. 262; *Ranelagh v. Ranelagh*, 12 Beav. 200; *Sparks v. Restal*, 24 Beav. 218; *Neighbour v. Thurlow*, 28 Beav. 33; *In re Hayton*, 4 N. R. 54; *Seymour v. Kilbec*, L. R. 3 Ir. 33; *Cooper v. Pi cher*, 4 Hare 485.



not to go to the child, if there is one, on the death of its parent.<sup>1</sup>

*g.* IMPLICATION THAT EQUITABLE DISPOSITIONS COINCIDE WITH LEGAL. — Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intends the legal and equitable dispositions to be co-extensive.<sup>2</sup>

*h.* IMPLICATIONS ARISING FROM FAILURE TO EXERCISE POWER OF APPOINTMENT. — Where property is given, or appointed under a general power, to A for life, and after his death to such children, relations, or other defined class of objects, or in such shares, as he shall appoint, a gift over will generally be implied to the objects in default of appointment, on the assumption that the testator could not have intended the objects to be disappointed by the neglect of the donee to exercise the power in their favor.<sup>3</sup> An express gift over in default of appointment, however, precludes all implication,<sup>4</sup> but

**1. Court Will Raise Gift to Issue if Possible.** — *Ex p. Rogers*, 2 Madd. 447; *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154; *Sturges v. Cargill*, 1 Sandf. Ch. (N. Y.) 318. See also *Still v. Spear*, 3 Grant Cas. (Pa.) 307.

In *Bentley v. Kaufman*, 12 Phila. (Pa.) 435, 34 Leg. Int. (Pa.) 12, a testatrix by her last will and testament directed that all her estate, real and personal, should be converted into money by her executors and the proceeds invested, the interest to be paid to her son during his lifetime, and if he should die without issue, then the whole amount to be given to charitable purposes. In the construction of this language, it was held that the words "die without leaving issue" were to be construed as meaning issue living at the death of the son; that the son, therefore, took, not an absolute interest in the fund, but only a life interest in the income, and that there was a gift by implication of the corpus of the legacy to the son's issue, if he should have any, and if not a gift over.

**2. Implication that Equitable Dispositions Coincide with Legal.** — *Jackson v. Noble*, 2 Keen 590. Compare *Ackers v. Phipps*, 9 Bligh N. S. 431, 3 Cl. & F. 665.

In *Stubbs v. Sargon*, 2 Keen 255, 3 Myl. & C. 507, a testatrix devised to trustees and their heirs her copyhold dwelling house (wherein she principally resided), garden and ground, together with the furniture and effects therein, and the coach-house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, etc., and the heirs or assigns of the survivor, should pay the rents of the said hereditaments to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said hereditaments, during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the heirs or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grandnephews and grandnieces, as S. S. should appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns

of such survivor, should sell and dispose of the said hereditaments and premises; and the testatrix directed that the produce of such sale should constitute part of her residuary personal estate. The will contained a general residuary clause. Lord Langdale, M. R., held that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord Cottenham, on appeal, was of the same opinion, observing, that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention.

**3. Gift Over in Default of Appointment.** — *England.* — *Brown v. Higgs*, 4 Ves. Jr. 708, 5 Ves. Jr. 495, 8 Ves. Jr. 561; *Cruwys v. Colman*, 9 Ves. Jr. 319; *Forbes v. Ball*, 3 Meriv. 437; *Walsh v. Wallinger*, 2 Russ. & M. 78; *Fordyce v. Bridges*, 10 Beav. 90; *Fenwick v. Greenwell*, 10 Beav. 412; *Reid v. Reid*, 25 Beav. 469; *Izod v. Izod*, 32 Beav. 242; *Salisbury v. Denton*, 3 Kay & J. 535; *Alloway v. Alloway*, 4 Dr. & War. 380; *Burrough v. Philcox*, 5 Myl. & C. 73; *Falkner v. Wynford*, 15 L. J. Ch. 8; *Caplin's Will*, 2 Drew. & Sm. 527.

*New Hampshire.* — *Varrell v. Wendell*, 20 N. H. 431.

*New York.* — *Smith v. Floyd*, 140 N. Y. 337; *Decker v. High St. M. E. Church*, 27 N. Y. App. Div. 408.

**Estate Given to Wife to Be Divided Among Children.** — In *Cathey v. Cathey*, 9 Humph. (Tenn.) 470, there was a bequest made in the following language: "I give to my wife my estate, for her to divide amongst my children as she may think best. If she should marry it is my desire that the property be divided between my wife and my children, share and share alike." It was held that by this clause the children received an interest in the property, and that it was a gift to them; that, though the wife might postpone the division, and, when it was made, divide the estate unequally, she could not defeat the gift; and that if she did not divide the estate, the children were entitled to equal portions. *Compare Word v. Morgan*, 5 Coldw. (Tenn.) 407.

**4. Express Gift Over in Default of Appointment.** — *Pattison v. Pattison*, 19 Beav. 638; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Goldring v.*

a gift over in default of objects of the power strengthens the implication in their favor.<sup>1</sup> An implication is held not to arise where the donee has absolute discretion to appoint,<sup>2</sup> or where the exercise of the power is dependent upon events which never happen,<sup>3</sup> or where the power is to appoint in favor of some one person or of a certain member out of a class.<sup>4</sup>

*i.* IMPLICATION OF CROSS-REMAINDERS. — Under a devise to several persons in tail, being tenants in common, with a limitation over for want or in default of issue, cross-remainders are to be implied among the devisees in tail.<sup>5</sup> This rule applies whether the devise be to two persons or a larger

Inwood, 3 Giff. 139. Compare *In re Jefferys*, L. R. 14 Eq. 136.

1. Gift over in Default of Objects of Power. — *Butler v. Gray*, L. R. 5 Ch. 30. See *Kellett v. Kellett*, Ir. R. 5 Eq. 298.

2. Absolute Discretion of Donee to Appoint. — *Re Eddows*, 1 Drew. & Sm. 395. Compare *Brook v. Brook*, 3 Smale & G. 280.

3. Halfhead *v.* Shepherd, 5 Jur. N. S. 1162.

4. *Carthew v. Enraght*, 20 W. R. 743.

5. Devise to Several in Tail with Limitation over in Default of Issue — *England*. — *Taaffe v. Connee*, 10 H. L. Cas. 85; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116; *Holmes v. Meynel*, T. Raym. 452.

*United States*. — *Lillibridge v. Adie*, 1 Mason (U. S.) 224.

*Georgia*. — *Smith v. Usher*, 108 Ga. 231.

*Maryland*. — *Hoxton v. Archer*, 3 Gill & J. (Md.) 199. Compare *Fenby v. Johnson*, 21 Md. 106.

*Massachusetts*. — *Allen v. Ashley School Fund*, 102 Mass. 262; *Dow v. Doyle*, 103 Mass. 489.

*Pennsylvania*. — *Turner v. Fowler*, 10 Watts (Pa.) 325; *Pierce v. Hakes*, 23 Pa. St. 231; *Wall v. Maguire*, 24 Pa. St. 248; *Kerr v. Verner*, 66 Pa. St. 326.

*South Carolina*. — *Seabrook v. Mikell*, Cheves Eq. (S. Car.) 80.

In *Parker v. Parker*, 5 Met. (Mass.) 134, a testator, after giving the use and improvement of all his real and personal property to his wife during her widowhood, made the following residuary devise: "I give to my five sons all the residue and remainder of my real estate, to be equally divided among them, they to come into possession when my wife's improvement ends; and if any or either of my said sons should die before they arrive to the age of twenty-one years, or should die without any legal heir of their body, then, and in that case, their share or shares shall descend equally to their surviving brother or brothers." It was held that each of the sons took an estate tail in one-fifth of the land devised, with cross-remainders.

**Mr. Theobald's Conclusions.** — Mr. Theobald deduces the following propositions from the English cases:

"First. If there is a devise of lands to two or more as tenants in common, and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe v. Webb*, 1 Taunt. 234; *Powell v. Howells*, L. R. 3 Q. B.

655; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116. And if the gift over is limited, not expressly in default of issue, but as a remainder, the same result follows. *Doe v. Burville*, 2 East 47, note. The word 'reversion' would probably now be held to have the same force, notwithstanding *Pery v. White*, 2 Cowp. 777. The arguments against the implication of cross-remainders, founded upon the number of the devisees and such words as 'severally' and 'respectively,' or the fact that the whole is not expressly given over, must now be considered exploded.

"Second. The result will be the same if the gift over is in default of issue, to take under the preceding limitations, living at the death of their parents. *Maden v. Taylor*, 45 L. J. Ch. 569.

"Third. It has been said that if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. *Clache's Case*, 3 Dyer 330b, however, which is usually cited on this point, is no authority for any such proposition. All that case decides is that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks of the Lord Justice Turner in *Atkinson v. Barton*, 3 De G. F. & J. 339; and the decision in *Rabbeth v. Squire*, 19 Beav. 77, 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Turner, L. J.: 'Cross-remainders are to be implied or not, according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it.' *Atkinson v. Barton*, 3 De G. F. & J. 339 (reversed on appeal, but on different grounds, *Atkinson v. Holtby*, 10 H. L. Cas. 313). See too *Vanderplank v. King*, 3 Hare 1; *In re Ridge*, L. R. 7 Ch. 665.

"Fourth. Cross-remainders will be implied even though, as the result of legal rules and not of the testator's intention, the class of persons between whom they are implied take different interests, if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. *Vanderplank v. King*, 3 Hare 1.

"Fifth. Cross-remainders will be implied in



number, though it be made to them "respectively," and though in the devise over the testator have not used the words "the said premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares.<sup>1</sup> The rule also applies though the ulterior devise is on a failure of issue at a particular period.<sup>2</sup> The same rule applies in regard to executory trusts at least, though there be an express direction to insert cross-remainders among another class of objects, or a limitation over among some of the same objects, and even in direct devises an express limitation of cross-remainders among another class of objects has been held not to repel the implication.<sup>3</sup>

a devise to the children of A which carries to them only a life estate, with a gift over for want of such issue of A. *Ashley v. Ashley*, 6 Sim. 358.

"Sixth. And where realty or personalty is given to several persons as tenants in common for life, with remainders to their issue, followed by a gift over if all should die without leaving issue, cross-limitations between the first takers and their families will be implied. *In re Ridge*, L. R. 7 Ch. 665; *In re Clark*, 11 W. R. 871. See also *Coates v. Hart*, 3 De G. J. & S. 504.

"Seventh. But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption against intestacy, but where there are vested interests there can be no intestacy. See *Rabbeth v. Squire*, 19 Beav. 70, 4 De G. & J. 406; *In re Clark*, 11 W. R. 871. Upon the same principle, when the testator has disposed of his whole interest in realty or personalty, if, for instance, absolute vested interests have been given to several tenants in common, with a gift over upon the death of all in certain events, cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. *Skey v. Barnes*, 3 Meriv. 335; *Bromhead v. Hunt*, 2 Jac. & W. 459; *Baxter v. Losh*, 14 Beav. 612; *Beaver v. Nowell*, 25 Beav. 551.

"Eighth. If, however, the interests are not vested, but contingent, with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations, on the ground that they would divest vested gifts, and therefore, in all probability, cross-limitations would be implied. *Mackell v. Winter*, 3 Ves. Jr. 236, 536; *Scott v. Bargeman*, 2 P. Wms. 68, 3 Eq. Abr. 542, pl. 12; *Graves v. Waters*, 10 Ir. Eq. 234. There are no grounds for supposing *Scott v. Bargeman*, 2 P. Wms. 68, to be overruled. The point in *Beauman v. Stock*, 2 Ball & B. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in *Vize v. Stoney*, 1 Dr. & War. 348, and followed by *Graves v. Waters*, 10 Ir. Eq. 234." *Theobald on Wills* (2d ed.) 571.

**1. Devise to Two Persons or Larger Number, Etc.** — *Taaffe v. Connee*, 10 H. L. Cas. 85; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116.

**If the Several Shares Are to Go Over to the**

**Ulterior Devisee** upon the failure of issue of any of them, cross-remainders will not be implied. *Fenby v. Johnson*, 21 Md. 106; *Baldrick v. White*, 2 Bailey L. (S. Car.) 442.

**2.** *Maden v. Taylor*, 45 L. J. Ch. 569. In this case a testator devised freehold estate on trust for his nieces, M., B., S., and J., for their respective lives, as tenants in common, and on the death of all or any or them, then as to the part of her or them so dying, in trust for all and every child and the children of them respectively, and the heirs of their bodies; and if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies; and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body; and in case of a total failure of issue of them, then in trust for his heirs. B. died having had four children, three of whom died infants and unmarried. J. died having had three children, one of whom died an infant and unmarried. M. died a spinster. S. was a spinster, and over sixty. It was held that cross-remainders in tail were to be implied between the children of the tenants for life. Sir G. Jessel, M. R., said: "The difficulty I feel in implying cross-remainders here is that the gift over is on failure of issue at a particular period. In the ordinary case where the gift over is on an indefinite failure of issue, the implication makes an exhaustive disposition: nothing can descend to the heir. But where the failure of issue is restricted to the death of the tenant for life, the heir may come in after all, notwithstanding the implication, for the tenant in tail may survive the tenant for life, on the particular period, and then die without issue. Still, I am in favor of extending the rule, if it is an extension."

**3.** In *Horne v. Varton*, 19 Ves. Jr. 398, under a devise in trust to settle on the testator's children in equal shares and proportions, undivided, for and during their respective lives, the remainder to their issue, severally and respectively in tail general, with cross-remainders over, there being two daughters, cross-remainders were inserted, not only among the several children of each, but also as between the two families. Sir W. Grant said: "This is not a question about raising cross-remainders by implication; but the settlement contains an express direction to insert cross-remainders. Estates for life only are given to the children, with remainders in tail to their several and respective issue; and the cross-remainders are directed to be inserted after such limitation.



The Word "Remainder" Following a Devise to Several in Tail will raise cross-remainders among them.<sup>1</sup>

Inequality Among Devisees Whose Issue Is Referred To. — It is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to, some of them being tenants in tail and others tenants for life, with remainders to their issue in tail.<sup>2</sup>

A Devise to the Children of A for Life, and for Want and in Default of Such Issue then Over, creates, by implication, cross-remainders for life among such devisees.<sup>3</sup>

j. IMPLICATION OF CROSS-EXECUTORY LIMITATIONS. — In the case of limitations in fee of the realty, or of absolute interests in personalty among several devisees or legatees, as tenants in common, with a limitation over in case they all die under age, the better opinion is that cross-executory limitations among the several devisees or legatees will not be implied, and hence the share of any one of them dying during his minority will devolve upon his representatives, unless and until they all die under age.<sup>4</sup>

12. Period Referred To — a. WORDS DESCRIPTIVE OF OBJECT. — In the absence of a contrary intent, words descriptive of the objects of a gift refer to the death of the testator, and not to the date of the will or period of execution.<sup>5</sup> But it must be remembered that only so far as facts and circumstances are susceptible of anticipation by the testator, so that he can place himself in the position in which he will be at the time of his death relatively to his family, is he presumed to speak from that time. Accordingly, a construction which would declare that he intended to include a child adopted after the will was

That direction would not be substantially complied with without inserting a direction that, upon failure of issue of the one, the estate should go to the other. Even under a direction that in default of such issue it should go over, upon the modern decisions cross-remainders would be implied. Here is no disposition of the reversion, but it is not probable that he meant his children, to whom he intended to give only estates for life, should take the fee, while there was any issue to take the inheritance." See also *Green v. Stephens*, 12 Ves. Jr. 419.

1. Word "Remainder" Following Devise to Several in Tail — *Doe v. Burville*, 2 East 47, note. Compare *Pery v. White*, 2 Cowp. 777.

2. See *Vanderplank v. King*, 3 Hare 1.

3. Devise to Children of A for Life and in Default of Such Issue Over. — *Ashley v. Ashley*, 6 Sim. 358. See also *Pearce v. Edmeades*, 3 Y. & C. Exch. 246; *Walmsley v. Foxhall*, 1 De G. J. & S. 605; *Loring v. Coolidge*, 99 Mass. 191; *Cudworth v. Thompson*, 3 Desaus. (S. Car.) 256; *Williams v. Kibler*, 10 S. Car. 427.

4. Cross-executory Limitations — When Not Implied. — *Skey v. Barnes*, 3 Meriv. 335; *Turner v. Frederick*, 5 Sim. 466; *Templeman v. Warington*, 13 Sim. 267; *Cohen v. Waley*, 15 Sim. 318; *Baxter v. Losh*, 14 Beav. 612; *Edwards v. Tuck*, 23 Beav. 268; *Mair v. Quilter*, 2 Y. & C. Ch. 465; *In re Ridge*, L. R. 7 Ch. 665; *Fenby v. Johnson*, 21 Md. 111.

5. Words Descriptive of Object Generally — *England*. — *In re Nash*, 71 L. T. N. S. 5; *Re Frith*, 85 L. T. N. S. 455.

*Canada*. — *Thompson v. Smith*, 23 Ont. App. 29.

*United States*. — *Abbott v. Essex Co.*, 18 How. (U. S.) 202.

*California*. — *Matter of Pearsons*, 113 Cal. 577.

*Connecticut*. — *Gold v. Judson*, 21 Conn. 616; *Johnson v. Webber*, 65 Conn. 501.

*Georgia*. — *Wood v. McGuire*, 15 Ga. 202.

*Illinois*. — *Lancaster v. Lancaster*, 187 Ill. 540.

*Indiana*. — *Aspy v. Lewis*, 152 Ind. 493.

*Kentucky*. — *Turner v. Patterson*, 5 Dana (Ky.) 292; *Arnold v. Arnold*, 11 B. Mon. (Ky.) 81; *Dohn v. Dohn*, 110 Ky. 905.

*Maryland*. — *Cherbonnier v. Goodwin*, 79 Md. 55.

*Massachusetts*. — *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Keniston v. Mayhew*, 169 Mass. 166; *Pierce v. Knight*, 182 Mass. 72.

*Minnesota*. — *In re Swenson*, 55 Minn. 300.

*New York*. — *Goodall v. McLean*, 2 Bradf. (N. Y.) 306; *Van Alstyne v. Van Alstyne*, 28 N. Y. 377; *Lynes v. Townsend*, 33 N. Y. 564. Compare *Matter of Maloney*, (Surrogate Ct.) 41 Misc. (N. Y.) 539.

*North Carolina*. — *Shinn v. Motley*, 3 Jones Eq. (56 N. Car.) 490; *Meares v. Meares*, 4 Ired. L. (26 N. Car.) 192; *Bullock v. Bullock*, 2 Dev. Eq. (17 N. Car.) 307.

*Pennsylvania*. — *McCrea's Estate*, 5 Pa. Dist. 448; *Gantz v. Tyrrell*, 7 Pa. Super. Ct. 249; *Kelly's Estate*, 7 Pa. Dist. 750; *Presbyterian Congregation v. Sturgeon*, 9 Pa. St. 321; *Stook's Appeal*, 20 Pa. St. 349. See also *Smith's Estate*, 7 Pa. Dist. 381.

*Rhode Island*. — *Coggeshall v. Home for Friendless Children*, 18 R. I. 696.

*Tennessee*. — *Grant v. Mosely*, (Tenn. Ch. 1899) 52 S. W. Rep. 508.

*Virginia*. — *Pendleton v. Hoomes*, Wythe (Va.) 4; *Peyton v. Perkinson*, 98 Va. 215. Compare *Cowan v. Eppes*, 2 Patt. & H. (Va.) 520.

*West Virginia*. — *Carney v. Kain*, 40 W. Va. 758.

*Wisconsin*. — *Patton v. Ludington*, 103 Wis.

executed and which also tends partially to defeat the rights of the testator's own children cannot be favored.<sup>1</sup> Under a gift to fluctuating classes, as children or descendants, all who answer the description at the death of the testator are entitled, irrespectively of those to whom the description was applicable at the date of the will, but who subsequently died in the testator's lifetime, or who were born after his death.<sup>2</sup> But when the gift is to persons actually existing,<sup>3</sup> as to descendants "now living,"<sup>4</sup> or to the testator's servants merely, as distinguished from those who "shall be in his service at his decease,"<sup>5</sup> the language is referred to the date of the will, and not to the death, as the latter is a prospective event, and those only are entitled who answer the description at that time. So a gift to a particular individual living at the date of the will, as to "my son," or "my son John," will take effect in favor of the person answering the description at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and the testator should afterwards have another son of the same name, who survived him, such after-born son would not be an object of the gift.<sup>6</sup>

**Gift to "Wife."**—A gift to the wife of A, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and by parity of reasoning is under all circumstances confined to her; but if A have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; or if there be no such person, either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period.<sup>7</sup> Where the words used are broad enough to include any wife, the case is removed from the general rule.<sup>8</sup>

Where the Date and the Time of Actual Execution Differ it seems that the will is to

629; *Trenton Trust, etc., Co. v. Donnelly*, (N. J. 1903) 55 Atl. Rep. 92.

1. *Matter of Hopkins*, (Surrogate Ct.) 43 Misc. (N. Y.) 464.

2. See *infra*, this section, *Construction of Gifts to Classes—Time of Ascertaining Class*.

3. **Persons Actually Existing.**—*Starling v. Price*, 16 Ohio St. 29; *Merriam v. Wolcott*, (Supm. Ct.) 61 How. Pr. (N. Y.) 380.

**A Gift to "My Present Attending Physician"** refers to the date of the will. *Everett v. Carr*, 59 Me. 325.

4. **Descendants "Now Living."**—*Crossly v. Clare*, Amb. 397; *Abney v. Miller*, 2 Atk. 593; *All Souls College v. Coddington*, 1 P. Wms. 597; *Starling v. Price*, 16 Ohio St. 29; *Ellis v. Ellis*, 2 Desaus. (S. Car.) 556. Compare *Rowland v. Gorsuch*, 2 Cox Ch. 187; *Gold v. Judson*, 21 Conn. 616; *Mackie v. Alston*, 2 Desaus. (S. Car.) 362.

**A Gift to Each of My Cousins in the First Degree** does not describe first cousins already deceased when the words are used, or the issue of such cousins. *White v. Massachusetts Institute*, 171 Mass. 84.

5. **Gifts to Servants.**—*Parker v. Marchant*, 1 Y. & C. Ch. 290; *Darlow v. Edwards*, 1 H. & C. 547.

**A Person Leaving the Employment of the Testator Before the Date of a Will** but who was in such employment fifteen years will not be excluded from the benefit of a clause reading, "I direct my trustees to pay to each man who shall have been in any employment in London over ten years the sum of £10 for each year beyond the

said ten years." *Re Sharland*, 74 L. T. N. S. 20.

6. **Gifts to Particular Persons.**—*Everett v. Carr*, 59 Me. 325; *Morse v. Mason*, 11 Allen (Mass.) 37; *Voorhies v. Otterson*, (N. J. 1904) 57 Atl. Rep. 428; *Butler v. Butler*, 3 Barb. Ch. (N. Y.) 309; *Eells v. Lynch*, 8 Bosw. (N. Y.) 481; *Board of Education v. Ladd*, 26 Ohio St. 213; *Anshutz v. Miller*, 81 Pa. St. 212. See also *Hawkins v. Garland*, 76 Va. 155.

**Gift to Unborn Child.**—A gift to the child with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favor of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child was left unprovided for. *Foster v. Cook*, 3 Bro. C. C. 347.

7. **Gift to "Wife."**—*Garratt v. Niblock*, 1 Russ. & M. 629; *Bryan's Trust*, 2 Sim. N. S. 103; *In re Coley*, (1903) 2 Ch. 102; *Franks v. Brooker*, 27 Beav. 635; *Johnson v. Webber*, 65 Conn. 501; *Davis v. Kerr*, 3 N. Y. App. Div. 322; *Anshutz v. Miller*, 81 Pa. St. 212. See also *Lloyd v. Davies*, 15 C. B. 76. 80 E. C. L. 75; *Beers v. Narramore*, 61 Conn. 13; *Humphrey v. Winship*, 28 Hun (N. Y.) 33.

**Where a Gift to a Wife or Husband Is by Way of Remainder**, after the death of the husband or wife, such remainder vests in the first person who answers the description of wife or husband. *Driver v. Frank*, 3 M. & S. 25; *Radford v. Willis*, L. R. 7 Ch. 7; *Boreham v. Bignall*, 8 Hare 131.

8. *Re Drew*, 79 L. T. N. S. 656.

be construed with reference to the law in force at the time it was actually executed.<sup>1</sup>

**b. WORDS DESCRIPTIVE OF PROPERTY — Personality.** — By the common-law rule, a general bequest of all the testator's personal estate, or all the residue of his personal estate, carries all his personal estate existing at the time of his death,<sup>2</sup> and the better opinion is that, upon the same principle, a bequest of all the property of a particular kind or description, as "all household goods," carries property of this description belonging to the testator at his death.<sup>3</sup> But where a testator refers to a specific subject of gift, he is considered as pointing at the state of facts existing while penning the instrument, and not that existing at his decease.<sup>4</sup> And so where an actually existing state of things is referred to, the language of the testator should be held as referring to the date of the will, and not to his death, as this is then a prospective event.<sup>5</sup>

**Realty.** — The question as to when a will speaks in respect of the real property of the testator, that is, whether it speaks from the date of the will so as to exclude, or from the testator's death so as to include, after-acquired realty, has been considered elsewhere in this title.<sup>6</sup>

**Vesting Back of Gift.** — A devise of real estate or of real and personal estate vests by relation back to the time of the death of the testator and not to the time of the filing and recording of the will.<sup>7</sup>

1. *Randfield v. Randfield*, 8 H. L. Cas. 225. And see *supra*, this title, *Scope of Title*.

2. **General Bequest of Personality at Common Law — England.** — *Wilde v. Holtzmeier*, 5 Ves. Jr. 816.

*Alabama.* — *Atwood v. Beck*, 21 Ala. 625.

*Connecticut.* — *Canfield v. Bostwick*, 21 Conn. 554; *Gold v. Judson*, 21 Conn. 616.

*Kentucky.* — *Warner v. Swearingen*, 6 Dana (Ky.) 196; *Walton v. Walton*, 7 J. J. Marsh. (Ky.) 59; *Curling v. Curling*, 8 Dana (Ky.) 38; *Marshall v. Porter*, 10 B. Mon. (Ky.) 2.

*Maryland.* — *Dalrymple v. Gamble*, 68 Md. 523.

*New York.* — See *Cairns v. Chaubert*, 9 Paige (N. Y.) 160.

*North Carolina.* — *Aydtlett v. Small*, 115 N. Car. 1.

*Pennsylvania.* — *Philadelphia v. Davis*, 1 Whart. (Pa.) 509; *Donaugher's Estate*, 2 Pars. Eq. Cas. (Pa.) 164.

*South Carolina.* — *Garrett v. Garrett*, 2 Strobb. Eq. (S. Car.) 283; *Dennis v. Dennis*, 5 Rich. L. (S. Car.) 468.

*Tennessee.* — *Nichols v. Allen*, 87 Tenn. 131.

*Wisconsin.* — *Graves v. Mitchell*, 90 Wis. 306.

**Possession of a Chattel** is not essential to a valid bequest thereof. *Puryear v. Beard*, 14 Ala. 121.

**Growing Crops** have been held not to pass under a bequest of personality. *Kinsman v. Kinsman*, 1 Root (Conn.) 180. And see the title CROPS, vol. 8, p. 310.

3. **Bequest of Property of Particular Kind or Description.** — *Masters v. Masters*, 1 P. Wms. 424; *Banks v. Thornton*, 11 Hare 176; *In re Holden*, 5 Ont. L. Rep. 156; *Gold v. Judson*, 21 Conn. 623; *Van Vechten v. Van Veghten*, 8 Paige (N. Y.) 118. See also *Bridgman v. Dove*, 3 Atk. 201; *Gilmer v. Gilmer*, 42 Ala. 9.

**A Leasehold Interest for Years** may be disposed of by a will, made before the testator acquired that interest. But the general doctrine is that such an intention on the part of the testator

must be shown. *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hone v. Medcraft*, 1 Bro. C. C. 265; *James v. Dean*, 11 Ves. Jr. 390.

4. **Reference to Specific Subject of Gift.** — *Pattison v. Pattison*, 1 Myl. & K. 12; *Miller v. Little*, 2 Beav. 259; *Cockran v. Cockran*, 14 Sim. 248; *Farish v. Cook*, 78 Mo. 212; *Phillipsburgh v. Bruch*, 37 N. J. Eq. 482; *Quinn v. Hardenbrook*, 54 N. Y. 88; *Sharpe v. Allen*, 5 Lea (Tenn.) 81.

5. **Reference to Actually Existing State of Things — England.** — *Blundell v. Dunn*, cited in *Beachcroft v. Beachcroft*, 1 Madd. 430; *Crossly v. Clare*, Ambl. 397; *All Souls College v. Coddington*, 1 P. Wms. 597; *Abney v. Miller*, 2 Atk. 593; *Bridgman v. Dove*, 3 Atk. 201; *Cockran v. Cockran*, 14 Sim. 248. *Compare* *Blaud v. Lamb*, 2 Jac. & W. 399; *Wilde v. Holtzmeier*, 5 Ves. Jr. 816; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229.

*Connecticut.* — *Gold v. Judson*, 21 Conn. 622.

*Illinois.* — *Udpike v. Tompkins*, 100 Ill. 409.

*New York.* — *Quinn v. Hardenbrook*, 54 N. Y. 88.

*North Carolina.* — *Hines v. Mercer*, 125 N. Car. 71.

*Pennsylvania.* — *Walls v. Walls*, 182 Pa. St. 226.

*Tennessee.* — *Sharpe v. Allen*, 5 Lea (Tenn.) 81.

6. See *supra*, this title, *What May Be Devised or Bequeathed — After-acquired Property*.

7. **Devises of Real Estate Relate Back to Death of Testator.** — *Re Potter*, 83 L. T. N. S. 405; *White v. Keller*, 68 Fed. Rep. 796, 30 U. S. App. 275; *Spring v. Parkman*, 12 Me. 127; *Putnam Free School v. Fisher*, 30 Me. 523; *Grant v. Eliot*, etc., Mut. F. Ins. Co., 75 Me. 196; *Green v. Alden*, 92 Me. 177. See also *Hamilton v. Ritchie*, [1894] A. C. 310; *Perry v. Perry*, 110 Ky. 16; *Maison's Estate*, 7 Pa. Dist. 380. And see *infra*, this section, *Vested and Contingent Interests*, and the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 374.



*c. WORDS IMPORTING DEATH — (1) Words Referring to Death Simply —*  
 (a) *When the Gift Is Immediate.* — If there is an immediate gift to A, and a gift over in case of his death, or if he die, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A's death before the testator.<sup>1</sup> The rule applies where, after a gift to several, there is a gift over "in case of the death of either in the lifetime of the others or other," since the death of one before the other is a certain and not a contingent event.<sup>2</sup> So, under a gift to A, and in case of "his decease, or at his decease, to B," A takes an absolute interest if he survives the testator.<sup>3</sup> But under a gift to A, and at his decease to B, A takes for life only, with remainder to B;<sup>4</sup> so, also, where the gift is to A for life, and in case of his death to B.<sup>5</sup> In regard to realty, if the deviser gives A the fee, a gift over, in case of A's death, will be held to refer to his death before the testator.<sup>6</sup>

**1. Gift Over After Immediate Gift—England.**  
 — *Bindon v. Suffolk*, 1 P. Wms. 96; *Schenk v. Agnew*, 4 Kay & J. 405; *Taylor v. Stainton*, 2 Jur. N. S. 634; *Turner v. Moor*, 6 Ves. Jr. 557; *Crigan v. Baines*, 7 Sim. 40; *Cambridge v. Rous*, 8 Ves. Jr. 12; *Ingham v. Ingham*, Ir. R. 11 Eq. 101.

*United States.* — *Britton v. Thornton*, 112 U. S. 533; *McClellan v. Mackenzie*, (C. C. A.) 126 Fed. Rep. 701.

*Connecticut.* — *Webb v. Lines*, 57 Conn. 156; *Johnes v. Beers*, 57 Conn. 303.

*Delaware.* — *Jones v. Webb*, 5 Del. Ch. 132.

*Indiana.* — *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 498; *Wright v. Charley*, 129 Ind. 257.

*Kentucky.* — *Wills v. Wills*, 85 Ky. 486.

*Maryland.* — *Dorsey v. Dorsey*, 9 Md. 31; *Hammett v. Hammett*, 43 Md. 311; *Engel v. State*, 65 Md. 544.

*Massachusetts.* — *Briggs v. Shaw*, 9 Allen (Mass.) 516; *Crossman v. Field*, 119 Mass. 172.

*Mississippi.* — *Sims v. Conger*, 39 Miss. 231.

*New Hampshire.* — *Whitney v. Whitney*, 45 N. H. 311.

*New Jersey.* — *Herbert v. Smith*, 1 N. J. Eq. 141; *Beatty v. Montgomery*, 21 N. J. Eq. 324; *Baldwin v. Taylor*, 37 N. J. Eq. 81; *Bishop v. McClelland*, 44 N. J. Eq. 450; *Burde v. Walling*, 45 N. J. Eq. 10.

*New York.* — *Traver v. Schell*, 20 N. Y. 89; *Black v. Williams*, 51 Hun (N. Y.) 280; *Ash v. Coleman*, 24 Barb. (N. Y.) 645; *Kerr v. Bryan*, 32 Hun (N. Y.) 51; *Kelly v. Kelly*, 61 N. Y. 50; *Matter of New York, etc.*, R. Co., 105 N. Y. 89; *Vanderzee v. Slingerland*, 103 N. Y. 47; *Fowler v. Ingersoll*, 127 N. Y. 477. *Compare Lyons v. Weeks*, 53 N. Y. App. Div. 212.

*North Carolina.* — *Davis v. Parker*, 69 N. Car. 276; *Burton v. Conigland*, 82 N. Car. 102; *Buchanan v. Buchanan*, 99 N. Car. 312.

*Ohio.* — *Patterson v. Earhart*, 6 Ohio Dec. 16.

*Pennsylvania.* — *Fulton v. Fulton*, 2 Grant Cas. (Pa.) 28; *Karker's Appeal*, 60 Pa. St. 141; *Stevenson v. Fox*, 125 Pa. St. 571.

*South Carolina.* — *Hamilton v. Boyles*, 1 Brev. (S. Car.) 418; *Reams v. Spann*, 26 S. Car. 561.

*Tennessee.* — *Katzenberger v. Weaver*, 110 Tenn. 620.

**The Words of the Will Are to Be Read Literally,** and where there is an absolute gift and then

a gift over in the event of death, an event not contingent but certain, in order to avoid the repugnancy of an absolute giving and an absolute taking away the court is forced to read the words "in case of death" as meaning in case of death before the interest vests. *O'Mahoney v. Burdett*, L. R. 7 H. L. 395.

**That Death at Any Time** is referred to may be shown by the context. *Fowler v. Ingersoll*, 127 N. Y. 472; *Simpson v. Cherry*, 34 S. Car. 68. *Compare Hottell v. Browder*, 13 Lea (Tenn.) 676.

**2. Gift Over After Gift to Several.** — *Clarke v. Lubbock*, 1 Y. & C. Ch. 492; *Howard v. Howard*, 21 Beav. 550; *Thompson v. Vidal*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 711; *Miller's Estate*, 17 Pa. Co. Ct. 296, 4 Pa. Dist. 764; *Armistead v. Hartt*, 97 Va. 316; *Sealy v. Laurens*, 1 Desaus. (S. Car.) 137. See *Underwood v. Wing*, 4 De G. M. & G. 659; *Wing v. Angrave*, 8 H. L. Cas. 199.

**A Gift Over to Persons "Then Living" or to Survivors** is governed by the same rule. *Trotter v. Williams*, Prec. Ch. 78; *King v. Taylor*, 5 Ves. Jr. 806. See *Whitney v. Whitney*, 45 N. H. 311.

**A Gift, in Case of A's Death, to His Children** is subject to the same rule. *Slade v. Milner*, 4 Madd. 144; *Schenk v. Agnew*, 4 Kay & J. 405.

**3. Arthur v. Hughes**, 4 Beav. 506. *Compare Whitecar's Estate*, 9 Pa. Dist. 295, 24 Pa. Co., Ct. 268.

**4. Gift to A and at His Decease to B.** — *Constable v. Bull*, 3 De G. & S. 411; *Joslin v. Hammond*, 3 Myl. & K. 110; *Adams' Trusts*, 14 W. R. 18; *Bibbens v. Potter*, 10 Ch. D. 733; *Reid v. Reid*, 25 Beav. 469; *Waters v. Waters*, 26 L. J. Ch. 624. See *Stone v. McEckron*, 57 Conn. 194.

**5. Gift to A for Life and in Case of His Death to B.** — *Tilson v. Jones*, 1 Russ. & M. 553; *Smart v. Clark*, 3 Russ. 365; *Ingham v. Ingham*, Ir. R. 11 Eq. 101; *Barney v. Arnold*, 15 R. I. 78.

**6. Fee to A with Gift Over in Case of His Death.** — *Rogers v. Rogers*, 7 W. R. 541; *Randfield v. Randfield*, 8 H. L. Cas. 225; *Edwards v. Edwards*, 15 Beav. 357; *Smith v. Smith*, 139 Ala. 406; *Walsh v. McCutcheon*, 71 Conn. 283; *Galbraith v. Swisher*, 19 Pa. Super. Ct. 143. See also *Hill v. Hill*, 5 Gill & J. (Md.) 87; *Briggs v. Shaw*, 9 Allen (Mass.) 517; *Whitney v. Whitney*, 45 N. H. 311; *Ash v. Coleman*, 24 Barb. (N. Y.) 646.

(b) **When the Gift Is Postponed.** — If the gift is after a life estate, or a time is appointed for payment, the words, "in case of death," refer to death at any time before the vesting in possession, whether before or after the death of the testator.<sup>1</sup>

(2) **Words Referring to Death Coupled with Contingency.** — It may be laid down as a general rule of construction that, where the context is silent, words referring to the death of a prior devisee or legatee, in connection with some collateral event, apply to the contingency happening at any time, as well after as before the death of the testator.<sup>2</sup> The rule is generally the same whether the gift be immediate, as where the bequest is to A, and if she die unmarried, or without children or issue, to B;<sup>3</sup> or postponed to a life interest, as to X for life, remainder to A, and if A dies unmarried, or without children or issue, to B.<sup>4</sup>

**In Jurisdictions Where the Fee Passes Without Words of Limitation,** it would seem to be immaterial whether the devise be to A and his heirs, or simply to A. If the devise merely gives A a life estate, the limitation over would probably be construed by way of remainder. *Bowen v. Scowcroft*, 2 Y. & C. Exch. 640. See also *Leppes v. Lee*, 92 Ky. 16. But see *Wright v. Stephens*, 4 B. & Ald. 574, 6 E. C. L. 607.

**1. When Gift Is Postponed—England.** — *Hervey v. McLaughlin*, 1 Price 264; *James v. Baker*, 8 Jur. 750; *Green v. Barrow*, 10 Hare 459; *Johnston v. Antrobus*, 21 Beav. 556; *Bolitho v. Hillyar*, 34 Beav. 180; *In re Powell*, (1900) 2 Ch. 525, 83 L. T. N. S. 24.

*Illinois.* — *Huff v. Browning*, 96 Ill. App. 612. *Kentucky.* — *Stockwell v. Bowman*, (Ky. 1902) 67 S. W. Rep. 379; *Clements v. Reese*, (Ky. 1903) 74 S. W. Rep. 1047.

*Maryland.* — *Engel v. State*, 65 Md. 544. *Massachusetts.* — *Leonard v. Haworth*, 171 Mass. 496.

*Mississippi.* — *Sims v. Conger*, 39 Miss. 235. *New Jersey.* — *Beatty v. Montgomery*, 21 N. J. Eq. 327.

*New York.* — *Peget v. Melchner*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 196; *Cox v. Wisner*, 43 N. Y. App. Div. 591; *Fowler v. Ingersoll*, 127 N. Y. 472; *Bisson v. West Shore R. Co.*, 143 N. Y. 125.

*North Carolina.* — *Davis v. Parker*, 69 N. Car. 276; *Burton v. Conigland*, 82 N. Car. 102. *Pennsylvania.* — *Merrefield's Estate*, 5 Pa. Dist. 463.

*Vermont.* — *Shepard v. Shepard*, 60 Vt. 118.

**In Connecticut** this distinction has been disregarded, and the words importing death confined to death in the lifetime of the testator. *Johnes v. Beers*, 57 Conn. 295.

**The Death of One of Several Devisees Within a Specified Time** after the making of the will may be fixed by the testator as regulating the vesting of the gift over. *Andrews v. Sargent*, 71 Vt. 257.

**The Death of One of Several Devisees "Previous to the Probating or Execution"** of a will has been construed to mean death before the will was executed and the property ready for distribution. *In re Lambs*, 122 Mich. 239.

**2. Words Referring to Death Coupled with a Contingency.** — *In re Schnadhorst*, (1901) 2 Ch. 338, 84 L. T. N. S. 587; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Child v. Giblett*, 3 Myl. & K. 71; *Farthing v. Allen*, 2 Madd. 308;

*Bowers v. Bowers*, L. R. 5 Ch. 244; *Wurts v. Page*, 19 N. J. Eq. 365; *Matter of Cramer*, 59 N. Y. App. Div. 541. Compare *Ware v. Watson*, 7 De G. M. & G. 248; *Britton v. Thornton*, 112 U. S. 526; *Smith v. Hunter*, 23 Ind. 580; *Buchanan v. Buchanan*, 99 N. Car. 313; *Shadden v. Hembree*, 17 Oregon 14; *Barney v. Arnold*, 15 R. I. 78; *Harwell v. Benson*, 8 Lea (Tenn.) 344; *Shepard v. Shepard*, 60 Vt. 109; *Tomlinson v. Nickell*, 24 W. Va. 148.

**If the Event Happens in the Testator's Lifetime** the ulterior gift is accelerated. *State v. Turner*, 18 S. Car. 103.

**3. Gift Immediate—England.** — *Theobald on Wills* (2d ed.) 485; *In re Edwards*, (1894) 3 Ch. 644; *Varley v. Winn*, 2 Kay & J. 705; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Smith v. Stewart*, 4 De G. & S. 253; *Bowers v. Bowers*, L. R. 8 Eq. 283, L. R. 5 Ch. 244; *Else v. Else*, L. R. 13 Eq. 196; *Cotton v. Cotton*, 23 L. J. Ch. 489.

*Canada.* — *Trail v. Reg.*, 7 Can. Exch. 98. *Connecticut.* — *St. John v. Dann*, 66 Conn. 401; *Hollister v. Butterworth*, 71 Conn. 57.

*Georgia.* — See *Gibson v. Hardaway*, 68 Ga. 370.

*Illinois.* — *Field v. Peeples*, 180 Ill. 376.

*Indiana.* — See *Smith v. Hunter*, 23 Ind. 580.

*Iowa.* — *Jordan v. Hinkle*, 111 Iowa 43.

*Kentucky.* — *Jones v. Moore*, 96 Ky. 273; *Harvey v. Bell*, (Ky. 1904) 81 S. W. Rep. 671; *Cooksey v. Hill*, 106 Ky. 297.

*Maryland.* — *Hutchins v. Pearce*, 80 Md. 434. *Massachusetts.* — *Gardiner v. Savage*, 182 Mass. 521.

*New York.* — *Matter of Miller*, 11 N. Y. App. Div. 337. See also *Nellis v. Nellis*, 99 N. Y. 505; *Fowler v. Ingersoll*, 127 N. Y. 478.

*North Carolina.* — *Buchanan v. Buchanan*, 99 N. Car. 308.

*Ohio.* — *Walker v. Walker*, 11 Ohio Cir. Dec. 291, 20 Ohio Cir. Ct. 409.

*Pennsylvania.* — *Klapp's Estate*, 19 Pa. Super. Ct. 150. See also *Jessup v. Smuck*, 16 Pa. St. 327.

*Rhode Island.* — *De Wolf v. Middleton*, 18 R. I. 810.

*South Carolina.* — *Marshall v. Marshall*, 42 S. Car. 436.

*Tennessee.* — *Cook v. Collier*, (Tenn. Ch. 1901) 62 S. W. Rep. 658.

*West Virginia.* — See *Tomlinson v. Nickell*, 24 W. Va. 148.

**4. Gift Postponed.** — *O'Mahoney v. Burdett*,

A Contrary Doctrine, however, has been often declared, to the effect that dying unmarried or without children, and similar expressions, are to be restrained

L. R. 7 H. L. 388; *Ingram v. Soutten*, L. R. 7 H. L. 408; *Vanluven v. Allison*, 2 Ont. L. Rep. 198; *Wilson v. Bull*, 97 Md. 128; *Mullreed v. Clark*, 110 Mich. 229. See also *Sims v. Conger*, 39 Miss. 233; *Nellis v. Nellis*, 99 N. Y. 505. But compare *Weakley v. Hanna*, (Ky. 1899) 51 S. W. Rep. 570.

**Instances in Which the Period of Defeasibility Is Limited.**—In *Theobald on Wills* (4th ed.) 532, it is said: "There may, however, be circumstances in the will limiting the defeasibility to some earlier time than the death of the legatee without issue. Some of the cases decided on the authority of *Edwards v. Edwards*, 15 Beav. 357, are probably not reconcilable with the rule laid down in *Ingram v. Soutten*, L. R. 7 H. L. 408. See *Allen's Estate*, 3 Drew. 380.

"The following rules seem, however, to be admitted in *O'Mahoney v. Burdett*, L. R. 7 H. L. 388.

"1. Possibly, where there is a gift over, if any members of a class die without issue, to the survivors, the gift over must take effect, if at all, before the time when the survivors are to be ascertained.

"Thus, if the gift is immediate, the gift over may be limited to the happening of the event in the testator's lifetime. *Johnson v. Smaling*, 26 W. R. 231. See *Apsey v. Apsey*, 36 L. T. N. S. 941, a case apparently inconsistent with *Bowers v. Bowers*, L. R. 8 Eq. 283.

"If the gift is, after a life estate, to several, and if any die without issue to the survivors, the gift over may, in the same way, be limited to death without issue before the tenant for life. See *Clark v. Henry*, L. R. 11 Eq. 222, L. R. 6 Ch. 588; *Besant v. Cox*, 6 Ch. D. 604.

"2. If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of prior legatees without issue are contemplated as taking through the medium of the same trustees, there is *prima facie* reason for restricting the death without issue to death without issue before the period of distribution. *Galland v. Leonard*, 1 Swanst. 161; *Wheable v. Withers*, 16 Sim. 505; *Edwards v. Edwards*, 15 Beav. 357; *Beckton v. Barton*, 27 Beav. 99; *Dean v. Handley*, 2 Hem. & M. 635. See *Smith v. Colman*, 25 Beav. 217; *In re Hayward*, 19 Ch. D. 470; *In re Luddy*, 25 Ch. D. 394; *Lewin v. Killey*, 13 App. Cas. 783.

"But words directing payment or distribution at a certain time will not confine the contingency to that time, if the persons to take upon the death without issue of a prior legatee are not treated as taking through the medium of the same payment or distribution. *Gosling v. Townshend*, 17 Beav. 245, 2 W. R. 23.

"3. And if there are no trustees, but payment or division is directed at the death of the tenant for life, and all the subsequent dispositions are made with reference to the same payment or division, the death without issue will be confined to such death before the period of distribution. *Olivant v.*

*Wright*, 1 Ch. D. 346; *Re Thompson to Curzon*, 52 L. T. N. S. 498. See *Re Anstice*, 23 Beav. 135; *Pearman v. Pearman*, 33 Beav. 394.

"So, if there is a life tenancy and then a gift to a class to be paid when they respectively attain twenty-one, and, if any die without issue, to the survivors, to be paid at the same time as the original share, death without issue will be limited to such death under twenty-one. *In re Johnson*, 10 L. T. N. S. 455; *In re Hayne*, 18 L. T. N. S. 16.

"Similarly, if the gift is to A if living at the death of the tenant for life, and if not, to his children, and if he dies without children, over, the ultimate gift over is confined to the lifetime of the tenant for life. *Andrews v. Lord*, 6 Jur. N. S. 865, 8 W. R. 405. See *Wood v. Wood*, 35 Beav. 587; *In re Hill*, L. R. 12 Eq. 302.

"4. When there is a direction that a legatee is to have the absolute control of her legacy at a particular time, a subsequent gift over will be limited to take effect before that time. *Clark v. Henry*, L. R. 11 Eq. 222, L. R. 6 Ch. 588.

"5. If there is a gift over upon death, without issue, before a given time, of all the legatees whose shares have previously been given over upon death leaving issue indefinitely, or if the gift to the persons who are to take upon death of the prior legatees, without issue, is again given over upon the death of such persons before a certain time, there is a strong argument for restraining the prior gift over to death of the prior legatees without issue before the same time. *In re Hayes*, 9 Jur. N. S. 1068; *In re Sarjeant*, 11 W. R. 203; *Da Costa v. Keir*, 3 Russ. 360. See *Doe v. Sparrow*, 13 East 359; *Lloyd v. Davies*, 15 C. B. 76, 80 E. C. L. 75.

"6. If the gift is followed by words of limitation or benefit, as 'to A, his heirs and assigns,' or 'to A forever,' or 'to A for his own use and benefit,' and the property is then given over upon contingencies, one or other of which must happen, as, for instance, upon death either with or without children, the defeasibility will be limited by the period of distribution, whether it is the testator's death or some other time, in order not to cut down the previous absolute interest to life interests merely. *Doe v. Sparrow*, 13 East 359; *Clayton v. Lowe*, 5 B. & Ald. 636, 7 E. C. L. 218; *Gee v. Manchester*, 17 Q. B. 737, 79 E. C. L. 735; *Woodburne v. Woodburne*, 23 L. J. Ch. 336; *Da Costa v. Keir*, 3 Russ. 360; *Slaney v. Slaney*, 33 Beav. 631.

"If, however, the gift is merely in general words without any express indication that it is intended to be absolute, the fact that the contingencies upon which the property is given over in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. *Gosling v. Townshend*, 2 W. R. 23; *Cooper v. Cooper*, 1 Kay & J. 658; *Bowers v. Bowers*, L. R. 8 Eq. 283, L. R. 5 Ch. 244.

"7. It is not, however, necessary in order to limit the defeasibility that the gifts over should



to dying in the lifetime of the testator; <sup>1</sup> and it has been held that a gift in remainder after life interest, containing words importing death without children, will *prima facie* be restricted to the event of death before the period of distribution.<sup>2</sup>

be upon contingencies, one or other of which must occur, so as to cut down the prior interest to a life estate, unless the defeasibility is limited. In *Clayton v. Lowe*, 5 B. & Ald. 636, 7 E. C. L. 218; *Gee v. Manchester*, 17 Q. B. 737, 79 E. C. L. 735, and *Woodburne v. Woodburne*, 23 L. J. Ch. 336, the interest of the surviving legatee would not necessarily have been reduced to a life estate, and if it is once clear that the legatee is to take an absolute interest, a gift over in one event is as inconsistent with that absolute interest as a gift over in several, one of which must occur.

"And accordingly, where the intention to give indefeasible interests at a particular time is clear, the gift over upon a single contingency, as upon death without issue, will be limited to death without issue before that time. *Ware v. Watson*, 7 De G. M. & G. 248; *Clark v. Henery*, L. R. 11 Eq. 222, L. R. 6 Ch. 588; *Brotherton v. Bury*, 18 Beav. 65; *Re Anstice*, 23 Beav. 135. Perhaps *Barker v. Cocks*, 6 Beav. 82, and *Davenport v. Bishop*, 2 Y. & C. Ch. 463, come under this head.

"8. If the gift is contingent, as to A at twenty-one, there is some reason for restricting a gift over upon death coupled with a contingency to such death under twenty-one.

"It seems clear that this construction would be adopted if the gift over is upon the death of A leaving children to his children, in order to provide for the children of A, if he dies under twenty-one leaving children. *Home v. Pillans*, 2 Myl. & K. 15.

"It seems that the same would be the case if the person to take under the gift is the widow of the legatee. *Randfield v. Randfield*, 8 H. L. Cas. 225.

"The gift over upon death without issue cannot, however, be restricted to the time of vesting, where there is an express gift over upon death merely, before the time of vesting. *Martineau v. Rogers*, 8 De G. M. & G. 328.

"Whether the defeasibility would be limited where the gift over is to strangers, is more doubtful. See *Andrews v. Lord*, 6 Jur. N. S. 865. And see *In re Dowling*, L. R. 14 Eq. 463; *Smith v. Spencer*, 6 De G. M. & G. 631.

"9. If what is given over is the share the legatee would have taken, this confines the gift over to the testator's lifetime. *In re Hayward*, 19 Ch. D. 470.

"10. Where there is a gift to two persons, and if either dies under twenty-one without issue to the survivor, and if both die without issue, over, the defeasibility will be restricted to the age of twenty-one. *Kirkpatrick v. Kirkpatrick*, 13 Ves. Jr. 476; *Thackeray v. Hampson*, 2 Sim. & St. 214. See *Else v. Else*, L. R. 13 Eq. 196.

"11. Where there is a gift at twenty-one, or upon marriage with consent, a gift over upon marriage without consent has been confined to the age of twenty-one. *Deslody v. Boyville*, 2 P. Wms. 547; *Knapp v. Noyes*, Amb. 662; *Oshorn v. Brown*, 5 Ves. Jr. 527; *West v.*

*West*, 4 Giff. 198; *Duggan v. Kelly*, 10 Ir. Eq. 295.

"12. It may be noticed that where there is a gift to several, and in case of the death of any to the survivors, and if they die without children over, the gift, in case of death, will not be extended to mean death at any time, nor will the gift upon death without children be confined to such death in the lifetime of the testator. *Clarke v. Lubbock*, 1 Y. & C. Ch. 492; *Child v. Giblett*, 3 Myl. & K. 71."

See also *Cain v. Robertson*, 27 Ind. App. 198; *Bentz v. Maryland Bible Soc.*, 86 Md. 102; *Dawson v. Schaefer*, 52 N. J. Eq. 341.

1. **Contrary Doctrine** — *United States*. — *Covington First Nat. Bank v. De Pauw*, (C. C. A.) 86 Fed. Rep. 722.

*Connecticut*. — *Coe v. James*, 54 Conn. 511.

*Indiana*. — *Wright v. Charley*, 129 Ind. 257; *Antioch College v. Branson*, 145 Ind. 312; *Morgan v. Robbins*, 152 Ind. 362.

*Iowa*. — *Collins v. Collins*, 116 Iowa 703.

*Kentucky*. — *Jackman v. Jackman*, (Ky. 1903) 73 S. W. Rep. 776. See also *Jones v. Moore*, 96 Ky. 273.

*Massachusetts*. — See *Donnell v. Newburyport Homœopathic Hospital*, 179 Mass. 187.

*New Jersey*. — *Joseph v. Utitz*, 34 N. J. Eq. 1; *Denise v. Denise*, 37 N. J. Eq. 163; *Barrell v. Barrell*, 38 N. J. Eq. 60.

*New York*. — *Mead v. Maben*, 60 Hun (N. Y.) 268; *McLoughlin v. Maher*, 17 Hun (N. Y.) 215; *Gibson v. Walker*, 20 N. Y. 479; *Conkie v. Grisson*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 115; *Leonard v. Kingsland*, (C. Pl. Gen. T.) 67 How. Pr. (N. Y.) 431; *Vanderzee v. Slingerland*, 103 N. Y. 47; *Wasbon v. Cope*, 144 N. Y. 287; *Benson v. Corbin*, 145 N. Y. 351.

*North Carolina*. — *Murchison v. Whitted*, 87 N. Car. 460.

*Ohio*. — *Baker v. McGrew*, 41 Ohio St. 113; *Patterson v. Earhart*, 6 Ohio Dec. 16.

*Pennsylvania*. — *Hancock's Estate*, 13 Phila. (Pa.) 283, 36 Leg. Int. (Pa.) 450; *Fitzwater's Appeal*, 94 Pa. St. 141; *Stevenson v. Fox*, 125 Pa. St. 568; *Biddle's Estate*, 28 Pa. St. 59; *King v. Frick*, 135 Pa. St. 575; *Morrison v. Truby*, 145 Pa. St. 540; *In re Jackson*, 179 Pa. St. 77; *In re Engel*, 180 Pa. St. 215; *Flick v. Forest Oil Co.*, 188 Pa. St. 317; *Bell's Estate*, 5 Pa. Dist. 421.

*Rhode Island*. — *In re Johnson*, 23 R. I. 111.

*South Carolina*. — *Chaplin v. Turner*, 2 Rich. Eq. (S. Car.) 138.

*Tennessee*. — *Stratton v. McKinnie*, (Tenn. Ch. 1900) 62 S. W. Rep. 636; *Meacham v. Graham*, 98 Tenn. 190.

*Wisconsin*. — *Lovass v. Olson*, 92 Wis. 616. See also the title *ISSUE (DESCENDANTS)*, vol. 11.

2. **Gift in Remainder After Life Interest**. — *Edwards v. Edwards*, 15 Beav. 357; *M'Graw v. Davenport*, 6 Port. (Ala.) 319; *Birney v. Richardson*, 5 Dana (Ky.) 430; *Howell v. Gifford*, 64 N. J. Eq. 180; *Wolfe v. Van Nostrand*, 2

**13. Construction of Particular Words** — *a. WORDS DESCRIPTIVE OF PROPERTY* — (1) *Generally.* — Many words descriptive of property have received specific treatment in this work as to their proper construction when used to designate the subject-matter of legacies and devises, and as to such words little more is here necessary than a reference to the appropriate titles or definitions.<sup>1</sup>

N. Y. 436; *Price v. Johnson*, 90 N. Car. 592; *McCormick v. McElligott*, 127 Pa. St. 230.

1. "**All My Moneys, Bonds, Notes and Money in Savings Banks**" has been held to include railroad stock and scrip where such was manifestly the testator's intention. *Scoville v. Mason*, 76 Conn. 459.

"**Appurtenances.**" — See APPURTENANCE — APPURTENANT, vol. 2, p. 520.

"**Articles of Household or Domestic Ornament.**" — Articles of domestic use or ornament include valuable flowers brought into the house for ornament. *Re Owen*, 78 L. T. N. S. 643.

"**Articles of Personal Use and Ornament**" does not include a yacht. *Parry's Estate*, 188 Pa. St. 33, *affirming* 20 Pa. Co. Ct. 184.

"**Barn.**" — The words "all the contents of barns" as used in a will, will not include property stored in a house built for the shelter of buggies or carriages. *Johnson v. Johnson*, 48 S. Car. 408. See also BARN, vol. 3, p. 856.

"**Books.**" — The word "books" has been held not to include a bank book. *Jackson v. Piscataqua Sav. Bank*, 70 N. H. 283. See also BOOK, vol. 4, p. 703.

"**Cash.**" — The term "cash" will not include bonds, long annuities, or promissory notes. *Beales v. Crisford*, 13 Sim. 592. See also CASH, vol. 5, p. 757.

"**Choses in Action.**" — "Choses in action," when used in connection with other words indicating an intent to limit the term to those choses in action pertaining to a particular business, will not pass a deposit in the bank not strictly confined to the uses of such business. *Koss v. Kastelberg*, 98 Va. 278. See also CHOSSES IN ACTION, vol. 6, p. 2.

"**Credits**" has been held to mean assets, instead of being confined to mere book accounts in favor of the testator. *Brandon v. Yeakle*, 66 Ark. 377.

"**Curtilage.**" — See CURTILAGE, vol. 8, p. 527.

"**Dower.**" — The word "dower" is usually taken in its legal acceptation, as applicable exclusively to realty. *Brackett v. Leighton*, 7 Me. 383. See also the title DOWER, vol. 10, p. 122.

"**Dwelling.**" — See DWELLING, DWELLING HOUSE, ETC., vol. 10, p. 353.

"**Effects.**" — See EFFECTS, vol. 10, p. 446.

"**Farm.**" — See FARM — FARMING, vol. 12, p. 881.

"**Furniture.**" — See FURNITURE, vol. 14, p. 568.

"**Hereditaments.**" — See HEREDITAMENTS, vol. 15, p. 337.

"**Homestead.**" — For a definition of the word "homestead" see the title HOMESTEAD, vol. 15, p. 516.

The term has been held to be intended by a testator to mean merely his dwelling house rather than, more broadly, his home place. *Frazer v. Weld*, 177 Mass. 513.

A homestead does not include two houses, one

the family residence and the other devoted to other purposes, though both are situated on the same tract of land. *Smith v. Dennis*, 163 Ill. 631.

A smaller lot, cultivated by testator and used as part of the farm whereon testator resided, was held to pass with the farm property where the language of the will was "the homestead and lands and premises belonging thereto." *Lord v. Simonson*, (N. J. 1899) 42 Atl. Rep. 741.

As to the amount of land intended by a testator to be included in the devise of a homestead, see *Kilburn v. Dodd*, (N. J. 1894) 30 Atl. Rep. 868.

"**House.**" — See HOUSE, vol. 15, p. 767.

"**Household Goods.**" — See HOUSEHOLD, vol. 15, p. 773.

"**Interest**" held to mean "income." — Matter of *Murphy*, 80 N. Y. App. Div. 238.

"**Interest in Estate**" does not include money received by the testator on account of such interest before his death, but applies to the interest of a testator in said estate uncollected and not received by him at the time of his death. *Aydlett v. Small*, 115 N. Car. 1.

"**Investment.**" — The words "any other investment" may be taken to include money, consisting of ready cash on hand, where otherwise the testator would die intestate as to such money. *Pearson's Estate*, 10 Pa. Dist. 189.

"**Lot.**" — A devise of a lot by number will include the whole thereof, although the rear part of the same is fenced off and a house erected thereon fronting on another street from that whereon the lot is located by number. *Kelly's Estate*, 8 Pa. Dist. 51.

Where there is a reference to lots by numbers, but such lots have never been plotted, the numbers will be taken to apply to the lots in the order in which they were bought by the testator. *McNally v. McNally*, 23 R. I. 180. See also LOT, vol. 19, p. 585, and the following cases: *Myers v. Norman*, (Ky. 1898) 46 S. W. Rep. 214; *Webb v. Carney*, (N. J. 1895) 32 Atl. Rep. 205; *Hammel v. Palmer*, 4 Ohio Cir. Dec. 90, 12 Ohio Cir. Ct. 184; *Updegraff v. McCormick*, 199 Pa. St. 590.

"**Message.**" — See MESSAGE, vol. 20, p. 610.

"**Money**" — "Money Due and Owning." — See MONEY, vol. 20, p. 837.

"**Other Items**" has been held to pass all other items of personal property of which the testator died possessed that were not otherwise specifically bequeathed. *Walton v. Spaulding*, 9 Pa. Dist. 383.

"**Possessions.**" — The word "possessions" may include real estate if so intended, though such would not be its technical signification. *Blaisdell v. Hight*, 69 Me. 309. See also *Chapman v. Chick*, 81 Me. 109, and TITLE, OWNERSHIP, AND POSSESSION, vol. 28, p. 232.

(2) "*Lands*" and "*Real Estate*" — (a) *In General*. — It may be said generally that a devise of "land," unless the term is expressly restricted, will pass whatever the soil may hold either above or below its surface, such as buildings, mines, wells, springs, etc.<sup>1</sup>

(b) *Reversionary Interests*. — A general devise of "lands" or "real estate" will carry reversionary interests, in the absence of a contrary intent on the part of the testator.<sup>2</sup> A devise of lands "not settled" includes an unsettled

"*Premises*." — See PREMISES, vol. 22, p. 1175.

"*Proceeds*" Held Equivalent to "*Income*." — Chubbock v. Murray, 30 Nova Scotia 23.

"*Ready Money*." — See MONEY, vol. 20, p. 840, and READY MONEY, vol. 23, p. 892.

"*Residue*." — See Young v. Quimby, 98 Me. 167. See also RESIDUE — RESIDUARY, vol. 24, p. 701.

"*Securities*." — See *infra*, this section, "*Mortgages*" and "*Securities for Money*." See also SECURE — SECURITY, ETC., vol. 25, p. 175.

"*Share and Interest in Business*." — A bequest by a testator to his partner of all his "share and interest in the business" includes both the capital and the undrawn profits. *Re Barfield*, 84 L. T. N. S. 28. See also Peck v. Cavagna, 7 Ohio Dec. 142. And see BUSINESS, vol. 5, p. 71.

"*Stock*" has been held not to include debenture certificates convertible into stock at the option of the holder. *Connecticut Trust, etc., Co. v. Chase*, 75 Conn. 683. *Compare Conley's Estate*, 197 Pa. St. 291; *In re Weedling*, (1896) 2 Ch. 364.

A bequest of stock will include shares issued to the testator and standing in his name on the books of the company, though he had never received the stock certificate and though the company had agreed with the testator to issue a promissory note for such shares. *In re Frahm*, 120 Iowa 85. See also Gillett v. Gillett, 109 Ill. App. 75. And see the title STOCK AND STOCKHOLDERS, vol. 26, p. 808.

*Stock "and" Trade* has been held to include money on deposit, cash on hand, cordwood for use in shop and dwelling house, horses, harness, vehicles, and promissory notes given in settlement of book debts. *In re Holden*, 5 Ont. L. Rep. 156. See also STOCK, STOCK IN TRADE, ETC., vol. 26, p. 785.

"*Sums Owng*." — The legacy of a certain sum in addition to "the sums owing" from the husband of the testatrix, will pass an I. O. U. and a note given without consideration, where testatrix knows the circumstances and such is her evident intent. *In re Rowe*, (1898) 1 Ch. 153, 77 L. T. N. S. 495.

"*Tenements*." — See TENEMENT, vol. 28, p. 42, and LAND, vol. 18, p. 140.

"*Things*." — See THING, vol. 28, p. 136.

1. Schouler on Wills (2d ed.), § 498; Co. Litt. 4a; 3 Kent's Com. (13th ed.) 378; Heydon's Will, 2 Anderson 123.

See also LAND, vol. 18, p. 140; REAL ESTATE, vol. 23, p. 893.

*Spring*. — See *Re Fuller*, 71 Vt. 73.

*Coal Mine* held included in devise of land in fee simple. *Cruzen v. Boughner*, 196 Pa. St.

*Land under Water*. — As to a devise of land, in terms bounded by a river, but held to in-

clude the land under the water, see *Smith v. Bartlett*, 79 N. Y. App. Div. 174.

"*Freehold*." — A devise of "freehold" has been held to include land commonly known as freehold, or customary freehold, though such designation is not strictly correct, in the absence of any evident intent by the testator to use the term in its technical sense. *In re Steel*, (1903) 1 Ch. 135, 87 L. T. N. S. 548. See also FREEHOLD — FREEHOLDER, vol. 14, p. 53.

"*Other Real Estate*." — A devise of the testator's "other real estate" has been held to mean, under the circumstances, a family plot, a pew in a church, and a homestead. *Morse v. Tilden*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 560.

"*Unimproved Real Estate*." — A devise of "all unimproved real estate" includes lands, improvements on which have been made by and belong to tenants. *Coles v. Coles*, (N. J. 1897) 37 Atl. Rep. 1025. See also *Robb v. Robb*, 173 Pa. St. 620. And see UNIMPROVED, vol. 29, p. 117.

*Adowsons in Gross* will pass under a devise of "all other my real estate" in a certain county. *In re Hodgson*, (1898) 2 Ch. 545, 79 L. T. N. S. 345.

*An Interest Arising from a Certificate of Sale under Execution* is included within a general devise of "real estate," although the time for redemption of the property has not expired. *Morgan v. Joslyn*, (Minn. 1903) 97 N. W. Rep. 449.

*A Devise of a Part of a Tract of Land*, together with the home place, will be construed to mean that part of the tract adjoining the home place, rather than another part separated therefrom. *Dunford v. Jackson*, (Va. 1895) 22 S. E. Rep. 853.

"*Grounds Attached*." — As to lands held to be not included within the expression "grounds attached," see *Hayden v. Matthews*, 4 N. Y. App. Div. 338, affirmed 158 N. Y. 735.

"*My Home Place Where I Now Live*." — As to the property included in a devise of "my home place where I now live," see *McKeough v. McKeough*, 69 Vt. 34.

2. *Reversionary Interests*. — *Church v. Mundy*, 15 Ves. Jr. 396; *Ford v. Ford*, 6 Hare 486; *Chester v. Chester*, 3 P. Wms. 56; *Doe v. Fossick*, 1 B. & Ad. 186, 20 E. C. L. 374; *Mostyn v. Champneys*, 1 Scott 293, 1 Bing. N. Cas. 341, 27 E. C. L. 411; *Blakely v. Quinlan*, 101 Ky. 52; *Drew v. Wakefield*, 54 Me. 297; *O'Neale v. Ward*, 3 Har. & M. (Md.) 93; *Hayden v. Stoughton*, 5 Pick. (Mass.) 538; *Brown v. Boyd*, 9 W. & S. (Pa.) 128; *McCay v. Hugus*, 6 Watts (Pa.) 347.

Where the Testator Treats the Reversion as Undisposed of by the will, it does not pass. *Strong v. Teatt*, 2 Burr. 912.



reversion in settled lands.<sup>1</sup> A charge of annuities upon the lands passing by the general words will not exclude reversions,<sup>2</sup> nor will the fact that some of the limitations of the will are inapplicable to the reversion.<sup>3</sup>

(c) *Leaseholds for Lives.* — A devise of all testator's "lands and hereditaments," or all his "real estate," carries leaseholds for lives as well as freeholds in fee, notwithstanding some parts of the will are inapplicable to them.<sup>4</sup>

(d) *Leaseholds for Years.* — At common law, a devise of "real estate," "lands," "lands and tenements," or "lands, tenements, and hereditaments," did not carry leaseholds for years, unless at the time of the devise the testator had no freehold lands answering the description.<sup>5</sup> The rule, however, readily yielded to indications from the context of an intent to pass leaseholds, as where the devise was of lands of which the testator stood "seized or possessed or in any way interested."<sup>6</sup> Under the English Wills Act, a devise of "lands" includes leaseholds, unless an intent to the contrary appears;<sup>7</sup> but it seems that a devise expressly of "freehold" lands or "real estate" is not within the act and only passes leaseholds if there are no freeholds.<sup>8</sup> Statutes similar to the English Wills Act exist in some of the *United States*.<sup>9</sup>

(e) *Beneficial Interest in Mortgages.* — A general devise of all testator's lands, tenements, and hereditaments does not carry the beneficial interest in money secured by mortgages.<sup>10</sup> But a devise of particular lands of which the testator is only mortgagee, to several persons in succession, would, it seems, pass the beneficial interest, as something was clearly intended to pass, and the limitations are inappropriate to a devise of the mere legal estate.<sup>11</sup>

(f) *Trust and Mortgage Estates.* — A general devise of testator's "lands," or "real estate," includes lands of which the testator was seized as trustee or mortgagee, unless an intention to the contrary appears.<sup>12</sup> Words of benefit

1. *Lands "Not Settled."* — *Glover v. Spendlove*, 4 Bro. C. C. 337; *Incorporated Soc. v. Richards*, 1 Dr. & War. 258; *Chester v. Chester*, 3 P. Wms. 56; *Atty.-Gen. v. Vigor*, 8 Ves. Jr. 256; *Jones v. Skinner*, 5 L. J. Ch. N. S. 87; *Kelly v. Duffy*, L. R. 4 Ir. 601

2. *Doe v. Fossick*, 1 B. & Ad. 186, 20 E. C. L. 374; *Doe v. Jeyes*, 1 B. & Ad. 593, 20 E. C. L. 448.

3. *Limitations of Will Inapplicable to Reversion.* — *Theobald on Wills* (2d ed.) 163; *Doe v. Weatherby*, 11 East 322; *William v. Thomas*, 12 East 141; *Freeman v. Chandos*, 1 Cowp. 363; *Doe v. Bartle*, 5 B. & Ald. 492, 7 E. C. L. 170; *Morris v. Lloyd*, 33 L. J. Exch. 202. See also *Church v. Mundy*, 12 Ves. Jr. 426; *Ford v. Ford*, 6 Hare 486; *Roe v. Avis*, 4 T. R. 605; *Goodtitle v. Miles*, 6 East 494.

4. *Weigall v. Brome*, 6 Sim. 99; *Fitzroy v. Howard*, 3 Russ. 225.

5. *Leaseholds for Years.* — *Rose v. Bartlett*, Cro. Car. 293; *Thompson v. Lawley*, 2 B. & P. 313; *Gully v. Davis*, L. R. 10 Eq. 562; *Chapman v. Hart*, 1 Ves. 271. See also *Day v. Trig*, 1 P. Wms. 286; *Doe v. Cranstoun*, 7 M. & W. 1; *Minnis v. Aylett*, 1 Wash. (Va.) 300; *Shreve v. Shreve*, 17 N. J. Eq. 487.

Under Statutes Which Provide that the Will Shall Speak from the Death, the question would seem to be whether the testator had freehold at his death, not when the will was made. *Gully v. Davis*, L. R. 10 Eq. 562.

6. *Addis v. Clement*, 2 P. Wms. 456. See also *Hartley v. Hurler*, 5 Ves. Jr. 540; *Swift v. Swift*, 1 De G. F. & J. 160.

Similar Limitations, however, without the word "possessed," have been held not to pass

leaseholds. *Pistol v. Riccardson*, 2 P. Wms. 459, note; *Davis v. Gibbs*, 3 P. Wms. 26.

7. Stat. 1 Vict., c. 26, § 26.

8. *Gully v. Davis*, L. R. 10 Eq. 562. See also *Emuss v. Smith*, 2 De G. & S. 722; *Stone v. Greening*, 13 Sim. 390; *Turner v. Turner*, 21 L. J. Ch. 843; *In re Guyton*, (1901) 2 Ch. 591, 85 L. T. N. S. 66.

9. See the statutes of the various states.

*Lease of Spring.* — A spring, leased by the testator for so long a time as a certain rental therefor shall be paid, will pass under a devise of the testator's lands. *Re Fuller*, 71 Vt. 73.

10. *Beneficial Interest in Mortgages.* — 1 Jarm. on Wills (5th ed.) \*689; *Strode v. Russel*, 2 Vern. 624; *Casborne v. Scarfe*, 1 Atk. 605, 2 Jac. & W. 194. See also *Martin v. Mowlin*, 2 Burr. 969; *Re Dods*, 1 Ont. L. Rep. 7; *Martin v. Smith*, 124 Mass. 111; *Coles v. Coles*, (N. J. 1897) 37 Atl. Rep. 1025.

A Devise of "My Two Houses and Stable" will operate to pass the mortgage debt secured by such property, of which the testator is the mortgagee in possession. *In re Carter*, (1900) 1 Ch. 801, 82 L. T. N. S. 526.

A Devise of All the Right and Interest of a testator in real property does not include the interest secured by mortgages upon such property. *Miller v. Miller*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 582.

11. *Theobald on Wills* (2d ed.) 167; *Woodhouse v. Meredith*, 1 Meriv. 450. See also *Burdus v. Dixon*, 4 Jur. N. S. 967; *Knollys v. Shepherd*, cited in *Wall v. Bright*, 1 Jac. & W. 479; *Clarke v. Abbot*, Barn. Ch. 461.

12. *Trust and Mortgage Estates.* — *Theobald on Wills* (2d ed.) 168.

will not prevent trust estates from passing under a general devise;<sup>1</sup> but such estates will not pass if there is a charge of debts, where legacies have been previously given,<sup>2</sup> or where the devise is on trust for sale,<sup>3</sup> or where the devise is to uses in strict settlement.<sup>4</sup>

(g) **Lands Contracted for.** — An equitable interest in land founded on a contract to purchase passes by a general devise of all the testator's lands, although not actually conveyed.<sup>5</sup>

(h) **Lands Contracted to Be Sold.** — A general devise of lands carries the legal estate in lands which the testator has contracted to sell,<sup>6</sup> together with the title to purchase-money notes given therefor.<sup>7</sup>

(3) **"Free Use" and "Use and Occupation."** — A devise of the "free use" or of the "use and occupation" of land passes an estate in the land, and, consequently, a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for a more limited construction.<sup>8</sup>

(4) **"Rents and Profits" — "Income."** — A devise of "rents and profits"<sup>9</sup>

*England.* — *Braybrooke v. Inskip*, 8 Ves. Jr. 435; *Bainbridge v. Ashburton*, 2 Y. & C. Exch. 347; *Leeds v. Monday*, 3 Ves. Jr. 348; *Wall v. Bright*, 1 Jac. & W. 474; *Galliers v. Moss*, 9 B. & C. 267, 17 E. C. L. 375; *In re Clowes*, (1893) 1 Ch. 214; *In re Stevens*, L. R. 6 Eq. 597. See also *In re Packman*, 1 Ch. D. 215; *Doe v. Lightfoot*, 8 M. & W. 553; *Martin v. Laverton*, L. R. 9 Eq. 563.

*United States.* — *Taylor v. Benham*, 5 How. (U. S.) 270.

*Alabama.* — *Drane v. Gunter*, 19 Ala. 731.

*Kentucky.* — See *Breckinridge v. Waters*, 4 Dana (Ky.) 620.

*Maine.* — *Richardson v. Woodbury*, 43 Me. 206; *Abbott, Petitioner*, 55 Me. 580.

*Massachusetts.* — *Ballard v. Carter*, 5 Pick. (Mass.) 112; *Bangs v. Smith*, 98 Mass. 270; *Martin v. Smith*, 124 Mass. 111.

*New Jersey.* — *Wills v. Cooper*, 25 N. J. L. 161; *Van Wagenen v. Brown*, 26 N. J. L. 196; *Marshall v. Hadley*, 50 N. J. Eq. 547.

*New York.* — *Jackson v. Delancy*, 13 Johns. (N. Y.) 537; *Merritt v. Farmers F. Ins., etc., Co.*, 2 Edw. (N. Y.) 547; *Downing v. Marshall*, 23 N. Y. 366.

*Pennsylvania.* — *Heath v. Knapp*, 4 Pa. St. 230.

*South Carolina.* — *Cogdell v. Widow, etc.*, 3 Desaus. (S. Car.) 346; *Gibbes v. Holmes*, 10 Rich. Eq. (S. Car.) 484.

**A Devise of a Freehold Estate** will not pass a mortgage taken back by a testator, upon a sale of the property subsequent to making the will. *In re Clowes*, (1893) 1 Ch. 214.

**1. Effect of Words of Benefit.** — *Bainbridge v. Ashburton*, 2 Y. & C. Exch. 347; *Sharpe v. Sharpe*, 12 Jur. 598; *Lewis v. Mathews*, L. R. 2 Eq. 177. See also *Ex p. Shaw*, 8 Sim. 159.

**2. When There Is Charge of Debts.** — *Roe v. Reade*, 8 T. R. 118; *Leeds v. Munday*, 3 Ves. Jr. 348; *Hope v. Liddell*, 21 Beav. 183; *In re Bellis' Trusts*, 5 Ch. D. 504. Compare *In re Brown*, 3 Ch. D. 156.

**3. Devise on Trust for Sale.** — *Ex p. Marshall*, 9 Sim. 555; *In re Cantley*, 17 Jur. 124; *Morley's Will*, 10 Hare 293; *In re Smith*, 4 Ch. D. 70.

**4. Thompson v. Grant**, 4 Madd. 439. See also *Lindsell v. Thacker*, 12 Sim. 178.

**5. Lands Contracted for.** — *Collison v. Girling*,

4 Myl. & C. 75; *Atcherley v. Vernon*, 10 Mod. 518; *Matter of Champion*, Busb. Eq. (45 N. Car.) 248; *Gist v. Robinet*, 3 Bibb (Ky.) 4; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316; *Smith v. Jones*, 4 Ohio 121. And see *supra*, this title, *What May Be Devised or Bequeathed* — *Lands Contracted for by Testator*.

**6. Lands Contracted to Be Sold.** — *Knollys v. Shepherd*, cited in *Wall v. Bright*, 1 Jac. & W. 479; *Lysaght v. Edwards*, 2 Ch. D. 499; *LeFebvre's Estate*, 100 Wis. 192. See also *Purser v. Darby*, 4 Kay & J. 41; *Ex p. Morgan*, 10 Ves. Jr. 101. And see *supra*, this title, *What May Be Devised or Bequeathed* — *Rights of Entry and Action*.

**7. Atwood v. Weems**, 99 U. S. 183.

**8. "Free Use" and "Use and Occupation."** — 1 Jarm. on Wills (6th ed.) 741, citing the following cases: *Cook v. Gerrard*, 1 Saund. 186; *Whittome v. Lamb*, 12 M. & W. 813; *Rabbeth v. Squire*, 4 De G. & J. 406; *Mannox v. Greener*, L. R. 14 Eq. 456; *Fillingham v. Bromley*, T. & R. 536; *Maclaren v. Stainton*, 27 L. J. Ch. 442; *Stone v. Parker*, 29 L. J. Ch. 874. See also *Garland v. Garland*, 73 Me. 97; *Hogan v. Hogan*, 44 Mich. 147; *Tobias v. Cohn*, 36 N. Y. 363; *Beekman v. Hudson*, 20 Wend. (N. Y.) 53; *Pardue v. Givens*, 1 Jones Eq. (54 N. Car.) 307.

**9. "Rents and Profits"** — *England.* — *Parker v. Plummer*, Cro. Eliz. 190; *Johnson v. Arnold*, 1 Ves. 171; *Baines v. Dixon*, 1 Ves. 42; *Doe v. Lakeman*, 2 B. & Ad. 42, 22 E. C. L. 19; *South v. Alleine*, 1 Salk. 228; *Blann v. Bell*, 2 De G. M. & G. 781.

*Georgia.* — *Smith v. Dunwoody*, 19 Ga. 237.

*Illinois.* — *Handberry v. Doolittle*, 38 Ill. 202; *Baker v. Scott*, 62 Ill. 86; *Ryan v. Allen*, 120 Ill. 648.

*Kentucky.* — *Mayes v. Karn*, (Ky. 1903) 72 S. W. Rep. 1111.

*Maine.* — *Earl v. Rowe*, 35 Me. 419.

*Maryland.* — *Cassilly v. Meyer*, 4 Md. 1; *Cooke v. Husbands*, 11 Md. 492.

*New York.* — *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 94; *Chapman v. Nichols*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 275.

*Pennsylvania.* — *Anderson v. Greble*, 1 Ashm. (Pa.) 138; *Sill's Appeal*, 1 Grant Cas. (Pa.) 235; *France's Estate*, 75 Pa. St. 220.

or of the "income" <sup>1</sup> of land passes the land itself, both at law and in equity, in the absence of anything in the context indicating a contrary intent. <sup>2</sup> At common law, such a devise carried only an estate for life, unless words of inheritance were added; <sup>3</sup> but under the English Wills Act it passes a fee, or at least the whole estate of which the testator had power to dispose. <sup>4</sup> By the early rule, a direction in a will to pay an annuity out of "rents and profits" was held to create a charge upon the *corpus* of the land; <sup>5</sup> but this rule has been much relaxed, it is said, and the courts may now exercise their judgment as to whether the testator intended that the annuity should be paid in full and at all events, or merely that it should be paid out of the "annual rents and profits" of the estate. <sup>6</sup>

(5) "*Estate.*" — "Estate" is a word of comprehensive signification, and carries both real and personal property, unless confined to the personalty by the context or by clear intent, apparent upon the whole will; <sup>7</sup> and, *a fortiori*, the word "estate," if coupled with other words which are themselves sufficient to carry the whole personal estate, will carry the realty, as otherwise it would be inoperative. <sup>8</sup> Whether the word will be confined to personalty, by a context composed of words *ejusdem generis* exclusively applicable to that species of property which are not in themselves sufficient to pass the entire personal estate, is very doubtful. The weight of authority is, perhaps, in favor of the restriction. <sup>9</sup>

(6) "*Property.*" — The principles applicable to the construction of the word "estate" apply equally to the construction of the word "property." <sup>10</sup>

(7) "*Ground Rents.*" — A devise of freehold or leasehold "ground rents" passes the reversion. <sup>11</sup>

*Texas.* — *Gitley v. Lovenberg*, (Tex. Civ. App. 1904) 79 S. W. Rep. 831.

And see RENTS AND PROFITS, vol. 24, p. 470.

**Fee Not Necessarily Devised.** — A devise of the rents, income, and profits of land is not always equivalent to a devise of the fee. It may merely pass such an estate as by the express words of the will or by operation of law is given to the devisee. *Morrison v. Schorr*, 197 Ill. 554.

"Use, Rents, Interest, and Income" implies an intention to secure to the beneficiary the entire benefit of the usufruct of the *corpus*. *In re McCollum*, 80 N. Y. App. Div. 362.

1. "*Income.*" — *Mannox v. Greener*, L. R. 14 Eq. 456; *Sampson v. Randall*, 72 Me. 109; *Reed v. Reed*, 9 Mass. 372; *Drusadow v. Wilde*, 63 Pa. St. 170; *Curry v. Patterson*, 183 Pa. St. 238; *Beilstein v. Beilstein*, 194 Pa. St. 152. See also *Kornegay v. Morris*, 122 N. Car. 199. And see INCOME, vol. 16, p. 147.

2. *Boyle v. Parker*, 3 Md. Ch. 45; *Ring v. Zimmerman*, 94 Md. 10; *Collier v. Grimesey*, 36 Ohio St. 17.

"Income, Rents, Issues, and Profits" of lands and real estate may be intended by the testator, as shown from the context, to refer as well to personalty as to realty. *Haug v. Schumacher*, 166 N. Y. 506.

3. 1 Jarm. on Wills \*798; *Hodson v. Ball*, 14 Sim. 571.

4. *Penty v. West*, 6 C. B. 201, 60 E. C. L. 199; *Mannox v. Greener*, L. R. 14 Eq. 456.

5. "*Rents and Profits a Charge upon Land.*" — *Allan v. Backhouse*, 2 Ves. & B. 65; *Trafford v. Ashton*, 1 P. Wms. 415; *Bootle v. Blundell*, 1 Meriv. 232; *Wilson v. Halliley*, 1 Russ. & M. 590; *Phillips v. Gutteridge*, 3 De G. J. & S.

332; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361. See also *Heneage v. Andover*, 3 Y. & J. 360; *Forbes v. Richardson*, 11 Hare 354; *Dickin v. Edwards*, 4 Hare 273; *Homer v. Landis*, 95 Md. 320.

6. **Rule Relaxed.** — *Delaney v. Aulen*, 84 N. Y. 16. See also *Green v. Belcher*, 1 Atk. 505; *Wilson v. Halliley*, 1 Russ. & M. 590; *Small v. Wing*, 5 Bro. P. C. (Toml. ed.) 66; *Baker v. Baker*, 6 H. L. Cas. 616; *Birch v. Sherratt*, L. R. 2 Ch. 644; *Schermerhorne v. Schermerhorne*, 6 Johns. Ch. (N. Y.) 70; *Pierrepont v. Edwards*, 25 N. Y. 128; *Morse v. Tilden*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 560. (7. See *Estate*, vol. 11, p. 358.

8. When "*Estate*" Inclusive of Realty. — *Theobald on Wills* (2d ed.) 157; *Tilley v. Simpson*, 2 T. R. 659, note b; *Edwards v. Barnes*, 2 Bing. N. Cas. 252, 29 E. C. L. 324; *Doe v. Langlands*, 14 East 370; *Jongsma v. Jongsma*, 1 Cox Ch. 362; *Patterson v. Huddart*, 17 Beav. 210; *Hamilton v. Buckmaster*, L. R. 3 Eq. 323. See also *Dobson v. Bowness*, L. R. 5 Eq. 404; *Loftus v. Stoney*, 17 Ir. Ch. 178; *Mayo v. Bland*, 4 Md. Ch. 484.

9. When "*Estate*" Confined to Personalty. — *Tilley v. Simpson*, 2 T. R. 659, note b; *D'Almaine v. Moseley*, 1 Drew. 632. See also *Loftus v. Stoney*, 17 Ir. Ch. 178; *Re Greenwich Hospital Imp. Act*, 20 Beav. 458; *White v. McCracken*, 87 Mo. App. 262.

10. See *supra*, this subsection, *Estate*, and the title PROPERTY, vol. 23, p. 259.

**Property Pertaining to a Law Business** does not include claims for legal services performed by testator. *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 5.

11. **Ground Rents.** — *Theobald on Wills* (2d ed.) 155; *Maundy v. Maundy*, 2 Stra. 1020; *Kaye v.*



(8) "*Mortgages*" and "*Securities for Money*." — A bequest of "mortgages," "securities for money," or "money as securities," carries both the beneficial interest in the security and the legal estate in the land subject to the mortgage, upon the principle that the testator meant the legatee to receive the money and possess all powers necessary to recover it.<sup>1</sup> The phrase "securities for money," however, has been held not to include mere debts,<sup>2</sup> shares of stock,<sup>3</sup> liens for unpaid purchase money,<sup>4</sup> or money loaned upon mortgage where the legal estate is in trustees and the testator was entitled to a residue merely, after certain payments were made.<sup>5</sup>

(9) "*Goods and Chattels*." — The phrase "goods and chattels," unrestrained by the context, will carry the whole personal estate.<sup>6</sup> "Chattels, real and personal," unexplained by the context, will not pass realty.<sup>7</sup> Under a bequest of goods and chattels in a particular place, choses in action, as bonds or securities for money, will not pass, since they have in themselves no locality distinct from the domicile of the owner, except for purposes of probate jurisdiction.<sup>8</sup>

**b. WORDS DESCRIPTIVE OF OBJECTS.** — Questions concerning the construction of words descriptive of the objects of legacies or devises, such as children, heirs, issue, and the like, have been fully considered elsewhere in this work under specific titles or definitions, to which reference is made in the notes.<sup>9</sup>

Laxon, 1 Bro. C. C. 76; *Alexander v. Paxson*, 47 Pa. St. 12.

**1. Legal Estate Passes with Mortgage.** — *In re King*, 5 De G. & S. 644; *Renvoize v. Cooper*, 6 Madd. 371; *Knight v. Robinson*, 2 Kay & J. 503; *In re Arrowsmith*, 4 Jur. N. S. 1123; *Doe v. Bennett*, 6 Exch. 892. Compare *In re Cantley*, 17 Jur. 124. See also MONEY, vol. 20, p. 837.

"**Mortgage**" Includes "**Bond**." — Where testator retains possession of both the bond and the mortgage down to the time of his death, a bequest of the mortgage without reference to the bond will carry with it the bond. *Klock v. Stevens*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 383.

**A Bequest of "Bonds and Mortgages of Every Kind"** will include corporation bonds secured by a general trust mortgage. *Hammell v. Swan*, 61 N. J. Eq. 179.

**Interest Accruing on Mortgage.** — Where a will bequeathed "all the mortgages (including the notes and all other obligations therein described, and for which the mortgages are security)" it was held that the testator intended to bequeath the accrued interest together with the notes and mortgages. *Matter of Clark*, (Surrogate Ct.) 16 Misc. (N. Y.) 405.

**2. Re Mason**, 34 Beav. 494.

**I. O. U.'s.** — *Barry v. Harding*, 1 J. & La T. 475.

**Bank Deposits.** — *Vaisey v. Reynolds*, 5 Russ. 12; *Hopkins v. Abbott*, L. R. 19 Eq. 222.

**3. Shares of Stock.** — *Hudleston v. Gouldsbury*, 10 Beav. 547; *Turner v. Turner*, 21 L. J. Ch. 843; *Ogle v. Knipe*, L. R. 8 Eq. 434; *Re Maitland*, 74 L. T. N. S. 274. Compare *Re Johnson*, 89 L. T. N. S. 84, 520.

**4. Gould v. Teague**, 5 Jur. N. S. 116.

"**Loans Secured by Mortgage.**" — A bequest of "all loans secured by mortgage upon real estate" will not include a mortgage in favor of the testator as vendor upon land sold by him, when there is no one personally indebted or liable for the sum secured. *Connecticut Trust, etc., Co. v. Chase*, 75 Conn. 683.

**5. Ogle v. Knipe**, L. R. 8 Eq. 434.

**6. "Goods and Chattels."** — *Kendall v. Kendall*, 4 Russ. 370; *Moore v. Moore*, 1 Bro. C. C. 127. See also CHATTELS, vol. 5, p. 1022; GOODS, vol. 14, p. 1079.

**7. Theobald on Wills** (2d ed.) 160; *Grayson v. Atkinson*, 1 Wils. C. Pl. 333.

**8. When "Goods and Chattels" Not Inclusive of Choses in Action.** — *Moore v. Moore*, 1 Bro. C. C. 127; *Brooke v. Turner*, 7 Sim. 681; *Fleming v. Brook*, 1 Sch. & Lef. 318; *Chapman v. Hart*, 1 Ves. 271; *Aylesbury's Case*, cited in *Stuart v. Bute*, 11 Ves. Jr. 662; *Hertford v. Lowther*, 7 Beav. 1; *Blackmer v. Blackmer*, 63 Vt. 236.

**9. "Brother."** — See BROTHER, vol. 4, p. 990. "**Child.**" — See the title CHILD — CHILDREN, vol. 5, p. 1082.

"**Cousin.**" — See COUSIN, vol. 8, p. 40.

"**Descendant.**" — See DESCENDANT, vol. 9, p. 399.

"**Executor.**" — Under a devise or bequest to an executor, the latter takes as trustee merely, unless it clearly appears to be intended that he shall have a beneficial interest. *Chesnut v. Strong*, 1 Hill Eq. (S. Car.) 122. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720.

"**Family.**" — See the title FAMILY, vol. 12, p. 866.

"**Grandchild.**" — See GRANDCHILD, vol. 14, p. 1110.

"**Heir.**" — See the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318.

"**Issue.**" — See the title ISSUE (DESCENDANTS), vol. 17, p. 542.

"**Legal Representative.**" — See LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES, REPRESENTATIVES, ETC., vol. 18, p. 813.

"**Lessee.**" — See LESSEES — LESSORS, vol. 18, p. 827; and the titles LANDLORD AND TENANT, vol. 18, p. 149; LEASES, vol. 18, p. 593.

"**Nephew**" — "**Niece.**" — See NEPHEW — NIECE, vol. 21, p. 528.

"**Next of Kin.**" — See the title NEXT OF KIN, vol. 21, p. 537.

#### 14. Construction of Gifts to Classes — *a*. DEFINITION AND CHARACTERISTICS.

— **A Class Gift May Be Defined** as a gift to a number of persons not named, who are included and comprehended under the same general description, and who bear a certain relation to the testator.<sup>1</sup> A gift to a class has also been defined to be a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the actual number.<sup>2</sup>

**Where Individuals Named.** — A gift to a class is nevertheless a class gift because some of the individuals of the class are named;<sup>3</sup> but a gift is not a gift to a class when it is to named individuals, the number and share being certain, and not dependent for its amount upon the members who shall survive.<sup>4</sup> This rule of construction, however, being designed, as are all similar rules, to settle the testator's intention, will yield to a contrary intention appearing from the will itself.<sup>5</sup>

**Where Individuals and Class Named.** — Where in a legacy or devise the individuals and the class are both named, the general rule is that the persons named take as individuals and not as a class, unless some other clause of the will, or some evidence outside of it, calls for a different construction.<sup>6</sup>

**Rights of Survivors.** — If the gift is to a class, and one or more die before the period of distribution, the survivors take the whole gift; but if the gift is to

**"Relative."** — See RELATIVE — RELATION — RELATIONSHIP, vol. 24, p. 278.

**"Servant."** — See SERVANT, vol. 25, p. 477.

**1. Definition of Class.** — *Kingsbury v. Walter*, (1901) A. C. 187, *affirming* (1899) 2 Ch. 314; *Mitchell v. Mitchell*, 73 Conn. 303; *Harrison's Estate*, 202 Pa. St. 331.

In *Denlinger's Estate*, 170 Pa. St. 104, it was said: "A bequest to a number of persons not named, in answering a general description, is a gift to them as a class. What persons constitute the class are to be ascertained when the time comes at which the gift takes effect. *Gross's Estate*, 10 Pa. St. 360; *Hunt's Estate*, 133 Pa. St. 260. Those persons only take in such case who are in being when the gift vests."

**A Direction to Distribute "under the Intestate Laws"** is a gift to a class. *McGovran's Estate*, 190 Pa. St. 375.

**2. Matter of Kimberly**, 150 N. Y. 90; *Matter of Russell*, 168 N. Y. 169; *Herzog v. Title Guarantee, etc., Co.*, 177 N. Y. 86.

**3. Where Some Individuals Named.** — *Kingsbury v. Walter*, (1901) A. C. 187, *affirming* (1899) 2 Ch. 314. See *Kekewich v. Barker*, 88 L. T. N. S. 130, *reversing* *Capes v. Dalton*, 86 L. T. N. S. 129.

**"All," When Used with Reference to a Class**, includes all of the class unless words of qualification or restriction are used, in which case the word has only such influence as the qualifying language permits. But where a testator devises to "all my nieces and nephews," and adds, "they are the following," naming some of them, only those who are named are entitled to take. *Wildberger v. Cheek*, 94 Va. 517.

**4. Number and Share of Named Individuals Certain.** — *Matter of Hittell*, 141 Cal. 432; *Matter of Kimberly*, 150 N. Y. 90; *Moffett v. Elmendorf*, 152 N. Y. 475, *affirming* 82 Hun (N. Y.) 470; *Herzog v. Title Guarantee, etc., Co.*, 177 N. Y. 86; *Shangle v. Hallock*, 6 N. Y.

App. Div. 55; *McDonald v. McDonald*, 71 N. Y. App. Div. 116; *Wiley v. Bricker*, 11 Ohio Cir. Dec. 429.

"It will be observed that in the present case the gifts are not made to a mere class. \* \* \* The beneficiaries are distinctly named, thus showing that the testator's scheme was to fix at once the persons who were to take, and not to leave the matter to future contingencies. *Carr v. Smith*, 25 N. Y. App. Div. 214." *Matter of Brown*, (Surrogate Ct.) 28 Misc. (N. Y.) 273.

**Equal Division Between Wife and Children.** — In the absence of a clear intent to the contrary, a devise by a testator of his estate to be divided equally between his wife and children, share and share alike, gives them the estate distributively and not as a class. *Matter of Russell*, 168 N. Y. 169.

**5. Intention of Testator Governs.** — *Swallow v. Swallow*, 166 Mass. 241; *Sorver v. Berndt*, 10 Pa. St. 213; *Denlinger's Estate*, 170 Pa. St. 104; *Harrison's Estate*, 202 Pa. St. 331. See *Benson's Estate*, 169 Pa. St. 602.

**Language of Will.** — "Whether a devise or bequest in a will is to a class or to the individuals as tenants in common must depend upon the language employed by the testator in making the gift. All the provisions of the will may be consulted and sometimes aid may be sought from the situation and relation of the parties." *Matter of Russell*, 168 N. Y. 169.

"Although the general rule is that where there is a bequest to certain parties, who were named, share and share alike, such parties take individually, and not as a class, yet where, from the whole language of the will, it can be ascertained that the testator desired that the individuals thus named should take as a class, the court will so determine." *Roosevelt v. Porter*. (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 441.

**6. Individuals and Class Named.** — *Matter of Hittell*, 141 Cal. 432.

individuals, the survivors only take their original share.<sup>1</sup>

*b. TIME OF ASCERTAINING CLASS* — (1) *In General*. — As a general rule, in case of a devise to a class, the members of the class are to be ascertained upon the death of the testator, since a will usually speaks from that day. This rule, however, is not unyielding, and where a contrary intention is indicated in the will, such intent is adopted and enforced.<sup>2</sup> Thus, a gift to

**1. Rights of Survivors.** — *Kingsbury v. Wal-ter*, (1901) A. C. 187, *affirming* (1899) 2 Ch. 314; *Mitchell v. Mitchell*, 73 Conn. 303; *Swallow v. Swallow*, 165 Mass. 241; *Brewster v. Mack*, 69 N. H. 52; *Trenton Trust, etc., Co. v. Sibbits*, 62 N. J. Eq. 131; *Langley v. Westchester Trust Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 735; *McGovran's Estate*, 190 Pa. St. 375; *Coffin's Estate*, 4 Pa. Dist. 93. See also *infra*, this section, *Survivorship*; *Substitution*.

"Where the gift is to a class, if the class is to be fixed not at the time of distribution, but by some event happening in the testator's lifetime which individuates its members — as, for example, if instead of a gift to 'the brothers and sisters of A,' it is to 'the brothers and sisters of A, living at the death of B,' and B dies before the testator, the class being thus ascertained to consist of C, D, E, and F, — the death of one of them will cause a lapse inuring to the benefit of the residuary legatee, etc., and the surviving brothers and sisters will take no more than their original shares." *Coffin's Estate*, 4 Pa. Dist. 93.

**2. Time of Ascertaining Class** — *England*. — *In re Powell*, 67 L. J. Ch. 148, (1898) 1 Ch. 227; *Ringrose v. Bramham*, 2 Cox Ch. 384; *Devisme v. Mello*, 1 Bro. C. C. 537.

*Canada*. — *Thompson v. Smith*, 27 Can. Sup. Ct. 628, *affirming* 23 Ont. App. 29.

*Alabama*. — *Inge v. Jones*, 109 Ala. 175.

*Connecticut*. — *Canfield v. Bostwick*, 21 Conn. 553; *Ruggles v. Randall*, 70 Conn. 44; *Hoadly v. Wood*, 71 Conn. 452.

*Delaware*. — *State v. Raughley*, 1 Houst. (Del.) 561.

*Georgia*. — *Walker v. Williamson*, 25 Ga. 549; *Martin v. Mercer University*, 98 Ga. 320. Compare *Lewis v. Lewis*, 62 Ga. 265.

*Illinois*. — *Updike v. Tompkins*, 100 Ill. 406; *Ingraham v. Ingraham*, 169 Ill. 432; *Clark v. Shawen*, 190 Ill. 47. Compare *Madison v. Larmon*, 170 Ill. 65.

*Iowa*. — *Matter of Nicholson*, 115 Iowa 493.

*Kentucky*. — *Gray v. Pash*, (Ky. 1902) 66 S. W. Rep. 1026.

*Maine*. — *Webber v. Jones*, 94 Me. 429.

*Maryland*. — *Conn v. Conn*, 1 Md. Ch. 212; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185.

*Massachusetts*. — *Richardson v. Willis*, 163 Mass. 130; *Pierce v. Knight*, 182 Mass. 72.

*Minnesota*. — *In re Swenson*, 55 Minn. 300; *Yates v. Shern*, 84 Minn. 161.

*Missouri*. — See *Thomas v. Thomas*, 149 Mo. 426.

*Nebraska*. — *Bollinger v. Knox*, (Neb. 1902) 92 N. W. Rep. 994.

*New Jersey*. — *Den v. Sayre*, 3 N. J. L. 183; *Buzby v. Roberts*, 53 N. J. Eq. 566.

*New York*. — *Matter of Brown*, 154 N. Y. 313; *Campbell v. Rawdon*, 19 Barb. (N. Y.) 494; *Baylies v. Hamilton*, 36 N. Y. App. Div.

133; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47; *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Van Vechten v. Van Veghten*, 8 Paige (N. Y.) 104; *Merriam v. Wolcott*, (Supm. Ct.) 61 How. Pr. (N. Y.) 380; *Weston v. Goodrich*, 12 N. Y. App. Div. 250; *Dougherty v. Thompson*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 738. See also *Matter of Sparks*, (Surrogate Ct.) 23 Misc. (N. Y.) 350; *Matter of Green*, 60 Hun (N. Y.) 510.

*North Carolina*. — *Jourdan v. Green*, 1 Dev. Eq. (16 N. Car.) 270; *Petway v. Powell*, 2 Dev. & B. Eq. (22 N. Car.) 308; *Shinn v. Motley*, 3 Jones Eq. (56 N. Car.) 490; *Meares v. Meares*, 4 Ired. L. (26 N. Car.) 192; *Fleetwood v. Fleetwood*, 2 Dev. Eq. (17 N. Car.) 222; *Robinson v. McDiarmid*, 87 N. Car. 455; *Wise v. Leonhardt*, 128 N. Car. 289.

*Ohio*. — *Mooney v. Purpus*, 70 Ohio St. 57; *Wiley v. Bricker*, 11 Ohio Cir. Dec. 429; *Ranney v. Ranney*, 10 Ohio Cir. Dec. 434, 19 Ohio Cir. Ct. 77.

*Pennsylvania*. — *Gantz v. Tyrrell*, 7 Pa. Super. Ct. 249, 42 W. N. C. (Pa.) 326; *Crawford's Estate*, 17 Pa. Super. Ct. 170; *Kellerman's Estate*, 18 Pa. Super. Ct. 530.

*Rhode Island*. — *Re Kimball*, 20 R. I. 619.

*South Carolina*. — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 256; *Waddell v. Waddell*, (S. Car. 1904) 47 S. E. Rep. 375. Compare *M'Leomore v. Blocker*, 1 Harp. Eq. (S. Car.) 272.

*Tennessee*. — *Grant v. Mosely*, (Tenn. Ch. 1899) 52 S. W. Rep. 508.

See also *supra*, this section, *Period Referred to*.

**Class Determined at Date of Will.** — "If the testator devises property to children as a class, whom he describes as now living, meaning at the execution of the will, only those who are living at that date will be entitled to take, to the exclusion of the heirs of those who have died before the execution, and of children who are born subsequently thereto." *Wiley v. Bricker*, 11 Ohio Cir. Dec. 429.

**The Death of the Testator's Wife** may be intended as the period of distribution to a class, and in such case the persons who will take under the gift are those who belong to such class at the wife's death. *Matter of Wyatt*, (Surrogate Ct.) 9 Misc. (N. Y.) 285.

**"Or Hereafter Born"** following the expression "to each of my grandchildren now born," if used by a testator familiar with the extent of the meaning of such words, refers only to the time between the making of the will and the testator's death. *Ranney v. Ranney*, 7 Ohio Dec. 105.

**The Clause, "The Children Receiving the Share Coming to My Children,"** following the clause, "To my children or their heirs, share alike," has been construed to mean that the children of deceased children shall receive the share



brothers and sisters of the testator means a gift to those persons who come within the description at the testator's death, unless there is something to show that such is not the intention.<sup>1</sup>

**Vesting of Gift.** — Where the legacy or devise to a class is not to take effect in point of enjoyment at the death of the testator, but at a subsequent time, all those who are embraced in the class at such subsequent time will be included.<sup>2</sup>

(2) *Gifts to Children* — (a) **Immediate Gift.** — If a gift to children is to become effective upon the death of the testator, it will be divided among those living at that time, to the exclusion of those born afterwards, and the representatives of those dying before the testator.<sup>3</sup> The fact that there is a gift over in default of children, or in case any die under age, does not enlarge the class.<sup>4</sup>

which would be coming to such deceased children if living. *Baldwin v. Tucker*, 61 N. J. Eq. 412.

In **Maine** it has been held that a bequest in trust to a person and his children cannot be construed as meaning the children living at the time of the testator's decease unless such meaning is evident from the context. It cannot be forced against the plain language of the will so as to apply only to those of the same class who might legally take the equitable estate. *Towle v. Doe*, 97 Me. 427.

In **Pennsylvania**, by statute, when a person who is actually within a class dies, leaving issue, such issue takes by substitution. However, it is imperative that the person so dying was a member of the class at some time in the period during which the will remained ambulatory. *Harrison's Estate*, 202 Pa. St. 331.

**Intention to Provide for All Grandchildren.** — *Matter of Watts*, 68 N. Y. App. Div. 357.

**1. Gift to Brothers and Sisters.** — *Smith v. Smith*, (Mass. 1904) 71 N. E. Rep. 314.

**When Only One Brother Is Living** and two dead at the time the will is made, a bequest to "brothers and sisters" will be construed so as to include all the brothers and sisters as a class, the dead as well as the living, and the issue of the dead brothers and sisters will take by substitution. *Fuller v. Martin*, 96 Ky. 500.

**2. Vesting of Gift** — *Connecticut*. — *Jones's Appeal*, 48 Conn. 60; *Belfield v. Booth*, 63 Conn. 299; *Mitchell v. Mitchell*, 73 Conn. 303.

*Massachusetts*. — *Hall v. Hall*, 123 Mass. 124.

*Michigan*. — *McLain v. Howald*, 120 Mich. 274.

*Missouri*. — *Thomas v. Thomas*, 149 Mo. 426.  
*Pennsylvania*. — *Gross's Estate*, 10 Pa. St. 360; *Hunt's Estate*, 133 Pa. St. 260; *Denlinger's Estate*, 170 Pa. St. 104; *Gerber's Estate*, 196 Pa. St. 366.

*Rhode Island*. — *Tingley v. Harris*, 20 R. I. 517.

*South Carolina*. — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 256, 16 Am. Dec. 648; *Waddell v. Waddell*, (S. Car. 1904) 47 S. E. Rep. 375.

*Virginia*. — *Cheatham v. Gower*, 94 Va. 383.

*Canada*. — *Re Williams*, 5 Ont. L. Rep. 345.

**3. Immediate Gift to Children** — *England*. — *Pulsford v. Hunter*, 3 Bro. C. C. 416; *Singleton v. Gilbert*, 1 Cox Ch. 68; *Viner v. Francis*, 2 Cox Ch. 190; *Heathe v. Heathe*, 2 Atk. 121; *Scott v. Harwood*, 5 Madd. 332; *Hill v. Chapman*, 1 Ves. Jr. 405; *Garbrand v. Mayot*, 2

*Vern*. 105; *Cook v. Cook*, 2 Vern. 545; *Northey v. Strange*, 1 P. Wms. 341.

*United States*. — *Abbott v. Essex Co.*, 18 How. (U. S.) 202.

*Arkansas*. — *Wyman v. Johnson*, 68 Ark. 369.

*Connecticut*. — *Greene v. Huntington*, 73 Conn. 106.

*Georgia*. — *Wood v. McGuire*, 15 Ga. 202; *Springer v. Congleton*, 30 Ga. 977.

*Indiana*. — *Griffin v. Lynch*, 16 Ind. 396.

*Maryland*. — *Shotts v. Poe*, 47 Md. 514; *Conner v. Ogle*, 4 Md. Ch. 425.

*Massachusetts*. — *Gardiner v. Guild*, 106 Mass. 25. See *Merriam v. Simonds*, 121 Mass. 198.

*New Hampshire*. — *Yeaton v. Roberts*, 28 N. H. 459; *Hall v. Smith*, 61 N. H. 144.

*New Jersey*. — *Post v. Herbert*, 27 N. J. Eq. 540; *Chasmar v. Bucken*, 37 N. J. Eq. 415.

*New York*. — *Tucker v. Bishop*, 16 N. Y. 402; *Downing v. Marshall*, 23 N. Y. 373; *Baylies v. Hamilton*, 165 N. Y. 641; *Mowatt v. Carow*, 7 Paige (N. Y.) 339; *Palmer v. Horn*, 20 Hun (N. Y.) 70; *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348.

*North Carolina*. — *Meares v. Meares*, 4 Ired. L. (26 N. Car.) 192; *Knight v. Knight*, 3 Jones Eq. (56 N. Car.) 167; *Wise v. Leonhardt*, 128 N. Car. 289.

*Ohio*. — *Soteldo v. Clement*, 11 Ohio Dec. (Reprint) 802, 20 Cinc. L. Bul. 384.

*Pennsylvania*. — *Gross's Estate*, 10 Pa. St. 361; *McGovran's Estate*, 190 Pa. St. 375; *Harrison's Estate*, 10 Pa. Dist. 45.

*Rhode Island*. — *Sherman v. Baker*, 20 R. I. 446.

Thus, a devise to "B.'s children, their heirs and assigns forever," vests the property in such as may be *in esse* at the testator's death. *Wood v. McGuire*, 15 Ga. 202.

**Kentucky Rule — After-born Children Share When No Intention to Exclude Is Manifest.** — *Goodridge v. Schaefer*, (Ky. 1902) 68 S. W. Rep. 411. See *Williams v. Duncan*, 92 Ky. 130; *Lynn v. Hall*, 101 Ky. 738.

**Gift to a Class in Default of Appointment.** — *Coleman v. Seymour*, 1 Ves. 209; *Longmore v. Broom*, 7 Ves. Jr. 124.

**4. Effect of Gift Over.** — *Davidson v. Dallas*, 14 Ves. Jr. 576; *Berkeley v. Swinburne*, 16 Sim. 275; *Andrews v. Partington*, 3 Bro. C. C. 401; *Scott v. Harwood*, 5 Madd. 332; *Hutcheson v. Jones*, 2 Madd. 123; *Walker v. Williamson*, 25 Ga. 549; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Chasmar v. Bucken*, 37 N. J. Eq.

If there are no children *in esse* at the testator's death, the better opinion is that all children born at any time afterwards are entitled.<sup>1</sup>

(b) **Gifts by Way of Remainder.** — Under a gift to children by way of remainder, all are entitled who are in existence at the period of distribution, to the exclusion of those who may come into existence at any time afterwards, or who may die previous to that time.<sup>2</sup> Under such a limitation the children *in esse* at the death of the testator take vested interests, subject to open up and let in those afterwards born before the period of distribution.<sup>3</sup> The rule

415; *Den v. Sayre*, 3 N. J. L. 183; *Lorillard v. Coster*, 5 Paige (N. Y.) 172.

**1. No Children in Esse at Testator's Death.** — *Weld v. Bradbury*, 2 Vern. 705; *Harris v. Lloyd*, T. & R. 310; *Hutcheson v. Jones*, 2 Madd. 124; *Shepherd v. Ingram*, Ambl. 448.

Formerly there was some doubt as to whether a devise of realty in such case would not fail altogether; but the better opinion now is that such devise would go to all after-born children. *Theobald on Wills* (2d ed.) 544, citing *Fear. Rem.* 532; *Shep. Touch.* 438.

**2. Gift by Way of Remainder — England.** — *In re Roberts*, (1903) 2 Ch. 200; *Re Ibbetson*, 88 L. T. N. S. 461; *Leake v. Robinson*, 2 Meriv. 363; *Haight v. Dangerfield*, 5 Ont. L. Rep. 274. *Alabama.* — *Ballentine v. Foster*, 128 Ala. 638.

*Connecticut.* — *Clarke v. Terry*, 34 Conn. 176. *Indiana.* — *Heilman v. Heilman*, 129 Ind. 59. *Massachusetts.* — *Lombard v. Willis*, 147 Mass. 13.

*New Hampshire.* — *Hill v. Rockingham Bank*, 45 N. H. 270; *Akerman v. Akerman*, 71 N. H. 55. *New York.* — *Ted v. Morton*, 60 N. Y. 503; *Cox v. Wisner*, 167 N. Y. 579; *Eckert v. Wilkow*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 294.

*North Carolina.* — *Knight v. Knight*, 3 Jones Eq. (56 N. Car.) 167; *Britton v. Miller*, 63 N. Car. 268.

*Pennsylvania.* — *Sorver v. Berndt*, 10 Pa. St. 213; *Haskins v. Tate*, 25 Pa. St. 249; *Everitt's Estate*, 195 Pa. St. 450; *Wilson v. Corbin*, 1 Pars. Eq. Cas. (Pa.) 347.

*Rhode Island.* — *Tingley v. Harris*, 20 R. I. 517.

*South Carolina.* — *Tindal v. Neal*, 59 S. Car. 4; *Swinton v. Legare*, 2 McCord Eq. (S. Car.) 440; *Cole v. Creyon*, 1 Hill Eq. (S. Car.) 311. *Tennessee.* — *Nichols v. Guthrie*, 109 Tenn. 535.

*Virginia.* — *Hamlett v. Hamlett*, 12 Leigh (Va.) 350.

In *Hickling v. Fair*, (1899) A. C. 15, it was said: "It is an elementary principle in the construction of wills that a gift to a class after a life interest of life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency."

**Remainder to Family of Children Who May Be**

30 C. of L.—46

**Thereafter Born.** — When a vested estate is limited in remainder to a family of children who may be thereafter born, if one is alive when the testator dies, all succeeding children are let in and vested as of that period; if none are alive, then the remainder vests in the first one born, and all succeeding children become vested as of the time of birth of the first. *Tindal v. Neal*, 59 S. Car. 4.

**Death of Life Tenant — Remainder to Children "Then Living."** — *Thran v. Herzog*, 12 Pa. Super. Ct. 551, 17 Lanc. L. Rev. 153.

**Gifts to Class in Default of Appointment.** — *Crone v. O'Dell*, 1 Ball & B. 449, 3 Dow 68; *Norman v. Norman*, Beatty 430; *Lambert v. Thwaites*, L. R. 2 Eq. 151; *Grieverson v. Kirsopp*, 2 Keen 653. See also *Re White*, Johns. Ch. (Eng.) 656; *In re Phene*, L. R. 5 Eq. 346.

**3. Children in Esse Take Vested Interests — England.** — *In re Roberts*, (1903) 2 Ch. 200; *Re Ibbetson*, 88 L. T. N. S. 461; *Kingsbury v. Walter*, (1901) A. C. 187, affirming (1899) 2 Ch. 314.

*United States.* — *McArthur v. Scott*, 113 U. S. 340; *Forest Oil Co. v. Crawford*, (C. C. A.) 77 Fed. Rep. 106.

*Connecticut.* — *Johnson v. Webber*, 65 Conn. 501.

*Georgia.* — *Cleghorn v. Scott*, 88 Ga. 496.

*Indiana.* — *Bruce v. Bissell*, 119 Ind. 529.

*Kentucky.* — *Phillips v. Johnson*, 14 B. Mon. (Ky.) 140.

*Massachusetts.* — *Dole v. Keyes*, 143 Mass. 237; *Denny v. Allen*, 1 Pick. (Mass.) 147; *Annable v. Patch*, 3 Pick. (Mass.) 360.

*Michigan.* — *Hovey v. Nellis*, 98 Mich. 374.

*Missouri.* — *Gates v. Seibert*, 157 Mo. 254; *Doerner v. Doerner*, 161 Mo. 399.

*New Hampshire.* — *Yeaton v. Roberts*, 28 N. H. 459.

*New Jersey.* — *Budd v. Haines*, 52 N. J. Eq. 488.

*New York.* — *Campbell v. Stokes*, 142 N. Y. 23; *Losey v. Stanley*, 147 N. Y. 560; *Johnson v. Valentine*, 4 Sandf. (N. Y.) 36; *Nodine v. Greenfield*, 7 Paige (N. Y.) 544.

*Pennsylvania.* — *Haskins v. Tate*, 25 Pa. St. 249.

*South Carolina.* — *Crim v. Knotts*, 4 Rich. Eq. (S. Car.) 340; *McGregor v. Toomer*, 2 Strobb. Eq. (S. Car.) 51.

*Tennessee.* — *Smith v. Smith*, 108 Tenn. 21; *Harris v. Alderson*, 4 Sneed (Tenn.) 250.

*Virginia.* — *Hamlett v. Hamlett*, 12 Leigh (Va.) 357.

"Where the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interest in their share subject to the distribution of those shares as the mem-

is the same whether the gift over be a remainder or an executory interest.<sup>1</sup> Nor does the fact that there is a gift over in case of the decease of any of the children under age affect the construction.<sup>2</sup> The principle seems to extend to all cases in which the distribution is postponed to a period subsequent to the testator's death, as to a gift to be divided a certain number of years after his death.<sup>3</sup> If no children are born before the death of the tenant for life, all after-born children are admitted, unless there is a clear intent to make distribution once for all when the fund falls into possession.<sup>4</sup>

(c) **Reversionary Interest.** — Upon the same principle, if the interest bequeathed

bers of this class are increased by future births, and on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives." *Wiley v. Bricker*, 11 Ohio Cir. Dec. 429.

**1. Whether Remainder or Executory Interest.** — *Stanley v. Wise*, 1 Cox Ch. 432; *Ellison v. Airey*, 1 Ves. 111; *Haughton v. Harrison*, 2 Atk. 329; *Baldwin v. Rogers*, 3 De G. M. & G. 649; *Demill v. Reid*, 71 Md. 187; *Mercer v. Hopkins*, 88 Md. 292.

**Future Contingent Devise or Bequest.** — "This is the case of a devise to a class of persons consisting of the sisters of the testator and the children of his deceased brother, and it is the general rule of construction that a future contingent devise or bequest to a class takes effect on the happening of the contingency on which the limitation depends, only in favor of those objects who at the time come within the description." *Matter of Allen*, 151 N. Y. 243.

**2. Berkeley v. Swinburne**, 16 Sim. 275.

**3. Principle Extends to All Cases Where Distribution Postponed** — *England.* — *Oppenheim v. Henry*, 10 Hare 441; *In re Hannam*, (1897) 2 Ch. 39; *In re Averill*, (1898) 1 Ch. 523; *Re Gardner*, 3 Ont. L. Rep. 343; *Doe v. Sheffield*, 13 East 526.

*United States.* — *McArthur v. Scott*, 113 U. S. 340.

*California.* — *Matter of Cavarly*, 119 Cal. 406.

*Connecticut.* — *Webster v. Welton*, 53 Conn. 184.

*Maine.* — *Webber v. Jones*, 94 Me. 429.

*New Jersey.* — *Voorhies v. Otterson*, (N. J. 1904) 57 Atl. Rep. 428.

*New York.* — *Schwencke v. Haffner*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 293; *Teed v. Morton*, 60 N. Y. 506; *Goebel v. Wolf*, 113 N. Y. 405; *Matter of Smith*, 131 N. Y. 239; *Phelps v. Phelps*, 28 Barb. (N. Y.) 121.

*North Carolina.* — *Fleetwood v. Fleetwood*, 2 Dev. Eq. (17 N. Car.) 222; *Wise v. Leonhardt*, 128 N. Car. 289.

*South Carolina.* — *Bradley v. Richardson*, 62 S. Car. 494.

*Tennessee.* — *Fulkerson v. Bullard*, 3 Sneed (Tenn.) 260.

**Rule Stated.** — "Where there is by the will a postponement of the division of the legacy until a period subsequent to the testator's death, every one who answers the description, so as to come within the class at the time fixed for the division, is entitled to share, though not *in esse* at the death of the testator, unless there is something in the will to show a contrary intention on the part of the testa-

tor. And persons living at the death of the testator, but afterwards deceased before the time of distribution, are not entitled to share. The class takes in all who answer the description at the time fixed for distribution, and no others." *Webber v. Jones*, 94 Me. 429.

"Where the distribution is by the terms of the will deferred to some time after the testator's death, the gift will embrace not only all the children or members of the class living at the death of the testator, but all who shall subsequently come into existence and are living at the time designated for the distribution. If the bequest is a present bequest, the beneficiaries who are *in esse* at the death of the testator will take vested interest in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution; and, where the distribution is postponed until the attainment of a given age by the children, the legacy will apply only to those who are living at the death of the testator and who shall come into existence before the first child attains the age named, this being the period when the fund is first distributed with respect to any member of the class." *Wiley v. Bricker*, 11 Ohio Cir. Dec. 429.

**Postponement of Possession for Special Purposes.**

— But see, as to postponements of possession for special purposes, as to pay annuities and the like, *Singleton v. Gilbert*, 1 Cox Ch. 68; *Coventry v. Coventry*, 2 Drew. & Sm. 470; *Hill v. Chapman*, 1 Ves. Jr. 405; *Cort v. Winder*, 1 Coll. Ch. Cas. 320; *Thomman's Estate*, 161 Pa. St. 444.

**4. No Children Born Prior to Period for Distribution.** — *Chapman v. Blissett*, Cas. t. Talb. 145; *Wyndham v. Wyndham*, 3 Bro. C. C. 58; *Conduitt v. Soane*, 4 Jur. N. S. 502, explaining *Godfrey v. Davis*, 6 Ves. Jr. 43.

**Remainders of Freehold, Where the Legal Estate Is in Trustees or Mortgagees.** — *In re Eddels*, L. R. 11 Eq. 559; *Berry v. Berry*, 7 Ch. D. 657; *Astley v. Micklethwait*, 15 Ch. D. 59.

**Destruction of Contingent Remainder by Determination of Particular Estate.** — But in states in which a contingent remainder of a freehold still continues liable to destruction, by determination of the particular estate before it is ready to vest, a remainder of the freehold fails if there are no children *in esse* when the prior life estate determines. *Rhodes v. Whitehead*, 2 Drew. & Sm. 532; *Price v. Hall*, L. R. 5 Eq. 399; *Perceval v. Perceval*, L. R. 9 Eq. 386; *Brackenbury v. Gibbons*, 2 Ch. D. 417; *Cunliffe v. Branner*, 3 Ch. D. 393. See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 410 *et seq.*



is reversionary, the class remains open till the interest falls into possession.<sup>1</sup> But the rule does not apply where a residue is given, and some portion of the property which falls into it is reversionary, unless there are provisions indicating an intention to treat the reversionary property separately.<sup>2</sup>

(d) **Aggregate Fund Payable on Marriage or Attainment of Given Age.** — When there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on marriage or on attaining a given age, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded.<sup>3</sup>

**Gift to Be Paid at Twenty-one.** — Where the gift is "to be paid at twenty-one, or to such as attain twenty-one," if any member of the class attain twenty-one in the lifetime of the testator, the class is fixed at the testator's death.<sup>4</sup> But if none attain such age during his life, all born at his death or coming into existence before the oldest attains such age are admitted.<sup>5</sup> It seems that if there are no children at testator's death, all are admitted, whether born before or after the eldest attains twenty-one.<sup>6</sup> When a particular sum is given to each member of the class, the class is determined at the death of the testator,

1. **Reversionary Interest.** — *Walker v. Shore*, 15 Ves. Jr. 122; *Harvey v. Stracey*, 1 Drew. 122.

2. **When Rule Inapplicable.** — *Hill v. Chapman*, 1 Ves. Jr. 405; *Hagger v. Payne*, 23 Beav. 474; *Coventry v. Coventry*, 2 Drew. & Sm. 470; *King v. Cullen*, 2 De G. & Sm. 252.

3. **Aggregate Fund Payable on Marriage or Attainment of Given Age** — *England.* — *Andrews v. Partington*, 3 Bro. C. C. 403; *Whitbread v. St. John*, 10 Ves. Jr. 152; *Dawson v. Oliver-Massey*, 2 Ch. D. 753; *Brandon v. Aston*, 2 Y. & C. Ch. 24; *Clarke v. Clarke*, 8 Sim. 59.

*Alabama.* — *Travis v. Morrison*, 28 Ala. 494. *Illinois.* — *Handberry v. Doolittle*, 38 Ill. 206; *Hempstead v. Dickson*, 20 Ill. 193.

*Kentucky.* — *Hocker v. Gentry*, 3 Met. (Ky.) 463.

*Massachusetts.* — *Emerson v. Cutler*, 14 Pick. (Mass.) 108; *Fosdick v. Fosdick*, 6 Allen (Mass.) 43.

*New York.* — *Tucker v. Bishop*, 16 N. Y. 404; *Drake v. Pell*, 3 Edw. (N. Y.) 251; *Collin v. Collin*, 1 Barb. Ch. (N. Y.) 636; *Doubleday v. Newton*, 27 Barb. (N. Y.) 431.

*North Carolina.* — *Simpson v. Spence*, 5 Jones Eq. (58 N. Car.) 208; *Fleetwood v. Fleetwood*, 2 Dev. Eq. (17 N. Car.) 222; *Vanhook v. Rogers*, 3 Murph. (7 N. Car.) 178.

*Ohio.* — *Wiley v. Bricker*, 11 Ohio Cir. Dec. 420.

*Pennsylvania.* — *Buckley v. Reed*, 15 Pa. St. 83; *Heisse v. Markland*, 2 Rawle (Pa.) 274; *Wilson v. Corbin*, 1 Pars. Eq. Cas. (Pa.) 347.

*South Carolina.* — *Richardson v. Sinkler*, 2 Desaus. (S. Car.) 127.

*Texas.* — *Thornton v. Zea*, 22 Tex. Civ. App. 509.

In *Hubbard v. Lloyd*, 6 Cush. (Mass.) 522, it was held that a bequest of a residue "unto all the children of M. equally, when they shall severally attain the age of twenty-five years," includes all the children born before one attains that age, although born after the death of the testator, but does not include those born after one attains that age.

4. *Hagger v. Payne*, 23 Beav. 474.

A Child en Ventre at the testator's death was

held not to be included in *In re Gardiner*, L. R. 20 Eq. 647, *sed quare*. See *Bortoft v. Wadsworth*, 12 W. R. 523.

5. **None Reaching Twenty-one in Testator's Lifetime.** — *Hoste v. Pratt*, 3 Ves. Jr. 730; *Balm v. Balm*, 3 Sim. 492; *Blease v. Burgh*, 2 Beav. 221; *Oppenheim v. Henry*, 10 Hare 441; *Gillman v. Daunt*, 3 Kay & J. 48; *Locke v. Lamb*, L. R. 4 Eq. 372. As a rule each child attaining twenty-one is entitled to have his share paid to him, but this is not so if the whole income is given for maintenance and there are children who require maintenance. *Berry v. Briant*, 2 Drew. & Sm. 1.

6. **No Children at Testator's Death.** — *Armitage v. Williams*, 27 Beav. 346; *Mainwaring v. Beevor*, 8 Hare 44. See *Harris v. Lloyd*, T. & R. 310.

**Exceptions to Rule.** — "(a) If the time fixed for payment would carry the class beyond the limits of perpetuity, members coming into existence after the testator's death, and before the time of payment, will not be admitted. *Kevern v. Williams*, 5 Sim. 171; *quare* as to *Elliott v. Elliott*, 12 Sim. 276. (b) Maintenance out of the shares or presumptive shares of the children will not extend the class. *Gimblett v. Purton*, L. R. 12 Eq. 427. But if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in. *Iredell v. Iredell*, 25 Beav. 485; *Bateman v. Gray*, L. R. 6 Eq. 215. In *Defflis v. Goldschmidt*, 19 Ves. Jr. 566, 1 Meriv. 417, where expressions were used showing that the parent could not die leaving a child who would not be entitled to maintenance, all children were included. See *Evans v. Harris*, 5 Beav. 45. (c) If distribution is to be made when all attain twenty-one, or when the youngest attains twenty-one, all children will be admitted. *Hughes v. Hughes*, 3 Bro. C. C. 434, 14 Ves. Jr. 256; *Mainwaring v. Beevor*, 8 Hare 44, and perhaps *Armitage v. Williams*, 27 Beav. 346. On the other hand, the class would again be restricted if the distribution is to be made when the youngest for the time being attains twenty-one. *Gooch v. Gooch*, 14

whether possession is postponed to twenty-one or not.<sup>1</sup>

**Remainder to Children Attaining Twenty-one** — If the gift is to A for life, and then to children who attain twenty-one, the class will be fixed as regards exclusion at the death of A, or when the eldest attains twenty-one, whichever is last.<sup>2</sup>

(e) **Children en Ventre Sa Mero.** — A child *en ventre* at the time when the class closes, is admitted even though the word "living" or "born" be added to the description.<sup>3</sup>

(f) **Gifts to Children "to Be Born," etc.** — It seems to be the better opinion that the words "to be born," or "to be begotten," annexed to an immediate gift to children, so that, but for the words, it would have been confined to children existing at the testator's death, will have the effect of extending the gift to all children who shall ever come into existence, since by such construction only, can the words in question be given some operation.<sup>4</sup> But this rule does not apply to general pecuniary legacies, since its effect would be to postpone the distribution of the general estate (out of which the legacies are payable) until the death of the parent of the legatees.<sup>5</sup> Nor does it apply to gifts preceded by a life estate, or where distribution is to be made at some future time,

Beav. 565, 3 De G. M. & G. 366." Theobald on Wills (2d ed.) 243.

1. **Particular Sum Given to Each Member.** — Ringrose v. Bramham, 2 Cox Ch. 384; Storrs v. Benbow, 2 Myl. & K. 46, 3 De G. M. & G. 390; Butler v. Lowe, 10 Sim. 317. And if there are no children then in existence, the gift fails. Mann v. Thompson, Kay 638; Rogers v. Mutch, 10 Ch. D. 25.

2. **Remainder to Children Attaining Twenty-one.** — Clarke v. Clarke, 8 Sim. 59; Robley v. Ridings, 11 Jur. 813; Beckton v. Barton, 27 Beav. 99; Parsons v. Justice, 34 Beav. 598; *In re Emmet*, 13 Ch. D. 484; Brandon v. Aston, 2 Y. & C. Ch. 24.

3. **Children en Ventre.** — Doe v. Clarke, 2 H. Bl. 399; Clarke v. Blake, 2 Bro. C. C. 320; Trower v. Butts, 1 Sim. & St. 181; Wiley v. Bricker, 11 Ohio Cir. Dec. 429.

**In England.** — "It is now fully settled, that a child *en ventre sa mere* is within the intention of a gift to children living at the death of a testator; not because such a child (and especially in the early stages of conception) can strictly be considered as answering the description of a child living, but because the potential existence of such a child places it plainly within the reason and motive of the gift. Sir J. Leach in Trower v. Butts, 1 Sim. & St. 184. Similarly when there is a gift to the children of a tenant for life, a gift over if at the end of five years she has not had a child, will not take effect if she then has a child *en ventre*. Pearce v. Carrington, L. R. 8 Ch. 969. A child *en ventre* is for this purpose supposed to be born at the time of distribution; if, therefore, supposing it to have been then born, it would have been illegitimate, it will not be admitted to take, notwithstanding the marriage of its parents before its birth. *In re Corlass*, 1 Ch. D. 460. But though a child *en ventre* is looked upon as existing for the purpose of receiving a benefit, it is not looked upon as existing for any other purpose, if, for instance, distribution is to be made when the youngest child for the time being attains twenty-one; the fact that there is a child *en ventre* when the youngest attains twenty-one will not postpone the division.

Blasson v. Blasson, 2 De G. J. & S. 665." Theobald on Wills (2d ed.) 249.

**In the United States** the doctrine that a child *en ventre* will be considered a child living whenever it is for his benefit to be considered, has been frequently recognized. Groce v. Rittenberry, 14 Ga. 234; Jenkins v. Freyer, 4 Paige (N. Y.) 47; Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 508; Steadfast v. Nicoll, 3 Johns. Cas. (N. Y.) 18; Petway v. Powell, 2 Dev. & B. Eq. (22 N. Car.) 308; Picot v. Armistead, 2 Ired. Eq. (37 N. Car.) 226; McKnight v. Read, 1 Whart. (Pa.) 213; Swift v. Duffield, 5 S. & R. (Pa.) 38; Laird's Appeal, 85 Pa. St. 339; Burke v. Wilder, 1 McCord Eq. (S. Car.) 551; Smart v. King, Meigs (Tenn.) 149. Compare Starling v. Price, 16 Ohio St. 29; Armistead v. Dangerfield, 3 Munf. (Va.) 20. See also the title SUCCESSION, vol. 27, pp. 316, 327; and see POSTHUMOUS CHILD, vol. 22, p. 1082; UNBORN CHILDREN, vol. 29, p. 93.

But whether he can take as a child "born," has been seriously questioned. Hall v. Hancock, 15 Pick. (Mass.) 258.

4. **Gifts to Children "to Be Born."** — Mogg v. Mogg, 1 Meriv. 654; Gooch v. Gooch, 14 Beav. 565, 3 De G. M. & G. 366; Eddowes v. Eddowes, 30 Beav. 603; Howard v. Napier, 3 Ga. 202; Shinn v. Motley, 3 Jones Eq. (56 N. Car.) 490. See Butterfield v. Haskins, 33 Me. 392; Bullock v. Bullock, 2 Dev. Eq. (17 N. Car.) 316. Compare Burke v. Wilder, 1 McCord Eq. (S. Car.) 551. In some cases it has been said that the doctrine of the text is confined to devises of realty. Sprackling v. Rainer, 1 Dick. 344; Dias v. De Livera, 5 App. Cas. 132. The soundness of any such distinction may well be questioned. 2 Jarm. on Wills (5th ed.) 180, note (h), by Randolph & Talcott.

5. **Rule Inapplicable to General Pecuniary Legacies.** — Storrs v. Benbow, 2 Myl. & K. 46; Townsend v. Early, 28 Beav. 429; Whitbread v. St. John, 10 Ves. Jr. 152; Gilbert v. Boorman, 11 Ves. Jr. 238. But see Bullock v. Bullock, 2 Dev. Eq. (17 N. Car.) 316; Shinn v. Motley, 3 Jones Eq. (56 N. Car.) 491.

as when the children attain a specified age, or marry; since the words may be satisfied without departure from the ordinary construction.<sup>1</sup>

**Children in Existence Before Will.** — The words "which shall be begotten," or even "hereafter to be born," annexed to the description of children or issue, will not exclude those in existence before the making of the will.<sup>2</sup>

**Children Born After Will, but Prior to Distribution.** — A gift to children "born" or "begotten" extends to children coming *in esse* after the making of the will, and even after the death of the testator, where the time of distribution being posterior to that event, the gift would, by the general rule of construction, include such after-born children.<sup>3</sup>

(g) **Gifts to Children Born at Particular Time.** — Under a devise to children born at a particular time, children take a vested interest immediately on their birth, not subject to be divested by death before the specified period.<sup>4</sup>

(3) **Gifts to Other Classes of Relatives.** — The foregoing principles applicable to the construction of gifts to children as a class, apply equally to gifts to issue of every degree, as grandchildren, great-grandchildren, etc., as well as to gifts to brothers, sisters, nephews, nieces, and cousins.<sup>5</sup>

(4) **Gifts to Remote Relations.** — Under a gift to relations, *prima facie* the class is to be ascertained at the death of the *propositus*. Therefore, where the gift is immediate or in remainder to the testator's relations after gifts to persons who are some of the next of kin, his next of kin at his death alone take.<sup>6</sup> If the gift is to such relatives as survive the tenant for life, the class is ascertained at the death of the testator, while those who die before the tenant for life are excluded.<sup>7</sup> But where there is a gift to A, either for life with remainder to her children, or to A absolutely, followed by a gift over, if A dies without issue, to the testator's relations, and A is the sole next of kin at the date of the will and death, the class will be ascertained at A's death.<sup>8</sup> The testator may himself, of course, fix the exact time at which the class is to be ascertained, as where he bequeaths the property to such of them as

1. Rule Inapplicable Where Distribution of Gifts Postponed. — *Whitbread v. St. John*, 10 Ves. Jr. 152; *Gilbert v. Boorman*, 11 Ves. Jr. 238; *Paul v. Compton*, 8 Ves. Jr. 375; *Yeaton v. Roberts*, 28 N. H. 459; *Jackson v. Housel*, 17 Johns. (N. Y.) 281; *Brown v. Williams*, 5 R. I. 318. See also *Theobald on Wills* (2d ed.) 251.

**Intention of Testator.** — But of course if the testator shows an intent not to exclude any after-born children, such intention will be carried into effect. *Deffis v. Goldschmidt*, 1 Meriv. 417, 19 Ves. Jr. 566; *Hutcheson v. Jones*, 2 Madd. 123. Compare *Ballard v. Ballard*, 18 Pick. (Mass.) 41; *Moore v. Weaver*, 16 Gray (Mass.) 305; *Hawkins v. Everett*, 5 Jones Eq. (58 N. Car.) 45; *Moore v. Dimond*, 5 R. I. 121; *Harris v. Alderson*, 4 Sneed (Tenn.) 254.

2. **Children in Existence Before Will.** — *Doe v. Hallett*, 1 M. & S. 124; *Hebblethwaite v. Cartwright*, Cas. t. Talb. 31; *Re Pickup*, 1 Johns. & H. 389; *Almack v. Horn*, 1 Hem. & M. 630. Compare *Matchwick v. Cock*, 3 Ves. Jr. 611; *Freemantle v. Taylor*, 15 Ves. Jr. 363; *Matter of Sheppard*, 1 Kay & J. 260; *Early v. Benbow*, 2 Coll. Ch. Cas. 342; *Wilkinson v. Adam*, 1 Ves. & B. 468.

3. **Children Born After Will, but Before Period for Distribution.** — *Browne v. Groombridge*, 4 Madd. 495; *Ringrose v. Bramham*, 2 Cox Ch. 384; *Doe v. White*, 1 Exch. 526, 2 Exch. 797.

4. *Paterson v. Mills*, 18 L. J. Ch. 449.

5. **Gifts to Other Classes of Relatives.** — *Beardsley v. Bridgeport Protestant Orphan Asylum*, 76 Conn. 560; *Bigelow v. Clap*, 166 Mass. 88; *Matter of Woodward*, 117 N. Y. 523; *Chase v. Peckham*, 17 R. I. 385. The fact that a legacy is given a member of a class as an individual does not prevent his sharing in the gift to the class. See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 374. See also generally the cases cited *supra*, this subsection, (2) *Gifts to Children*.

6. **Gifts to Remote Relations.** — *Rayner v. Mowbray*, 3 Bro. C. C. 234; *Masters v. Hooper*, 4 Bro. C. C. 207; *Pearce v. Vincent*, 1 Cromp. & M. 598. See *Eagles v. Le Breton*, L. R. 15 Eq. 148; *Stert v. Platel*, 5 Bing. N. Cas. 434, 35 E. C. L. 165; *Jones v. Oliver*, 3 Ired. Eq. (38 N. Car.) 373. But see *Hardy v. Gage*, 66 N. H. 552.

**Ascertainment of Class in Default of Appointment.** — *Cole v. Wade*, 16 Ves. Jr. 27.

7. *Bishop v. Cappel*, 1 De G. & Sm. 411.

**Ascertainment of Class in Default of Appointment.** — *Harding v. Glyn*, 1 Atk. 469; *Birch v. Wade*, 3 Ves. & B. 198. See *Brown v. Higgs*, 8 Ves. Jr. 561; *Pope v. Whitcombe*, 3 Meriv. 689; *Finch v. Hollingsworth*, 21 Beav. 112; *Re Caplin*, 2 Drew. & Sm. 527; *Doyley v. Atty.-Gen.*, 4 Vin. Abr. 485.

8. *Marsh v. Marsh*, 1 Bro. C. C. 203; *Jones v. Colbeck*, 8 Ves. Jr. 38; *Lees v. Massey*, 3 De G. F. & J. 113.



claim within a specified time after advertisement.<sup>1</sup>

(5) *Gifts to Heirs or Next of Kin*. — Under a gift to heirs or next of kin, the objects of the gift are to be ascertained at the death of the ancestor, and where there is, in addition, a reference to the statute of distributions, or to intestacy, this rule is almost without exception.<sup>2</sup>

c. **TAKING PER CAPITA OR PER STIRPES** — (1) *General Rule*. — Whenever property is given by will to devisees or legatees who are individually named, they take *per capita* and not *per stirpes*, as they take in their own right and not as the representatives of another; and the same rule applies when the members of a class stand in the same degree of relationship to the testator and claim directly from him in their own rights. But when the members of the class are of different degrees of relationship, they take, as a general rule,

1. **Time Fixed by Testator**. — *Tiffin v. Longman*, 15 Beav. 275.

2. **Gifts to Heirs or Next of Kin** — *England*. — *Moss v. Dunlop*, Johns. Ch. (Eng.) 490; *Bird v. Luckie*, 8 Hare 301; *Spink v. Lewis*, 3 Bro. C. C. 355; *Doe v. Lawson*, 3 East 278; *Ware v. Rowland*, 2 Phil. 635; *Holloway v. Holloway*, 5 Ves. Jr. 399; *Matter of Barber*, 1 Smale & G. 118; *Gorbell v. Davison*, 18 Beav. 556; *Starr v. Newberry*, 23 Beav. 436; *Lee v. Lee*, 1 Drew. & Sm. 85; *Wharton v. Barker*, 4 Kay & J. 483; *Murphy v. Donegan*, 3 Jo. & La T. 534; *Baker v. Gibson*, 12 Beav. 101; *Harrison v. Harrison*, 28 Beav. 21; *Mitchell v. Bridges*, 13 W. R. 200; *Seifferth v. Badham*, 9 Beav. 372. See *Cooper v. Denison*, 13 Sim. 290; *Urquhart v. Urquhart*, 13 Sim. 613; *Minter v. Wraith*, 13 Sim. 52; *Nicholson v. Wilson*, 14 Sim. 549.

*Connecticut*. — *Rand v. Butler*, 48 Conn. 293.

*Illinois*. — *Kellett v. Shepard*, 139 Ill. 433.

*Maine*. — *Cushman v. Goodwin*, 95 Me. 353.

*Massachusetts*. — *Dove v. Torr*, 128 Mass. 38; *Whall v. Converse*, 146 Mass. 348. Compare *Sears v. Russell*, 8 Gray (Mass.) 95; *Wood v. Bullard*, 151 Mass. 325; *Proctor v. Clark*, 154 Mass. 45; *Peck v. Carlton*, 154 Mass. 231.

*New Jersey*. — *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 36, note; *Whittaker v. Whittaker*, 40 N. J. Eq. 33.

*New York*. — *Woodward v. James*, 44 Hun (N. Y.) 95; *Lawton v. Corlies*, 58 Hun (N. Y.) 566. Compare *Delaney v. McCormack*, 88 N. Y. 174.

*North Carolina*. — *Bullock v. Bullock*, 2 Dev. Eq. (17 N. Car.) 307; *Jones v. Oliver*, 3 Ired. Eq. (38 N. Car.) 373.

*Pennsylvania*. — *Buzby's Appeal*, 61 Pa. St. 111.

*Vermont*. — *Re Tucker*, 63 Vt. 104.

*Virginia*. — *Allison v. Allison*, 101 Va. 537.

Compare *Hardy v. Gage*, 66 N. H. 552; *Gourdin v. Shewsbury*, 11 S. Car. 1.

"**Nearest of Kin of My Own Family**." — *Clapton v. Bulmer*, 5 Myl. & C. 108.

**Next of Kin of Dead Persons at Date of Will**. — *Philips v. Evans*, 4 De G. & Sm. 188.

**Next of Kin of Person Dying in Testator's Lifetime After Will**. — *Vaux v. Henderson*, 1 Jac. & W. 388, note; *In re Grylls*, L. R. 6 Eq. 580. But rule yields to intention of testator. *Matter of Ham*, 2 Sim. N. S. 106, 15 Jur. 121.

**The Next of Kin of a Person Surviving the Testator** are ascertained as of the death of such

person. *Gundry v. Pinniger*, 1 De G. M. & G. 502; *Jacobs v. Jacobs*, 16 Beav. 557; *Markham v. Ivatt*, 20 Beav. 579.

**Use of Word "Then"**. — If the gift is, after the decease of the tenant for life, to such person as shall "then be my next of kin," the word "then" must refer to the death of tenant for life. *Long v. Blackall*, 3 Ves. Jr. 486; *Wharton v. Barker*, 4 Kay & J. 483. See *Clowes v. Hilliard*, 4 Ch. D. 413; *In re Morley*, 25 W. R. 825. But it must be clear that the word "then" is used temporally and not equivalent to thereupon, and that it may not be referred to other words pointing to the testator's death, as will be the case if the gift is, for instance, "to such persons as would, by virtue of the statutes for the distribution of intestates' estates, have become and been then entitled thereto in case I had died intestate." *Bullock v. Downes*, 9 H. L. Cas. 1; *Doe v. Lawson*, 3 East 278; *Cable v. Cable*, 16 Beav. 507; *Wheeler v. Addams*, 17 Beav. 417; *Fletcher v. Fletcher*, 3 De G. F. & J. 775; *Day v. Day*, Ir. R. 4 Eq. 385; *Mortimore v. Mortimore*, 4 App. Cas. 448.

**Use of Words of Futurity**. — The mere use of words of futurity will not alter the ordinary rule; for instance, if the bequest be to A for life, and after his death for such persons as "shall be my next of kin." *Holloway v. Holloway*, 5 Ves. Jr. 399; *Doe v. Lawson*, 3 East 278; *Rayner v. Mowbray*, 3 Bro. C. C. 234.

**The Testator May Direct** the class of next of kin to be ascertained at any time or in any manner he chooses. *Pinder v. Pinder*, 28 Beav. 44; *White v. Springett*, L. R. 4 Ch. 300.

**Heirs Construed Next of Kin**. — In bequests of personalty the expression "heirs" or "heirs at law," has frequently been construed next of kin. *Hascall v. Cox*, 40 Mich. 435; *Hardy v. Gage*, 66 N. H. 552; *Tillman v. Davis*, 95 N. Y. 17; *McCormick v. Burke*, 2 Dem. (N. Y.) 137; *Matter of Sinzheimer*, 5 Dem. (N. Y.) 321. But compare *Gordon v. Small*, 53 Md. 550. See the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 327.

**Next of Kin**. — In *England* the words "next of kin" mean those nearest in equal degree to the *propositus*, and are not equivalent to "next of kin according to the statute of distributions." *Hawkins on Wills*, § 97; *Elmsley v. Young*, 2 Myl. & K. 780; *Withy v. Mangles*, 4 Beav. 358; *Rook v. Atty-Gen.*, 31 Beav. 313; *Avison v. Simpson*, Johns. Ch. (Eng.) 43. See the title NEXT OF KIN, vol. 21, p. 537.

according to the stock they represent.<sup>1</sup> So when the gift is to an individual, or several named individuals, and to others as a class, the latter take *per stirpes*; <sup>2</sup> but this rule yields when the testator uses language indicating an intention that the members of the class shall share equally with the named individuals.<sup>3</sup>

(2) *Application of Rule* — (a) *In General* — *Per Stirpes Distribution*. — The class takes *per stirpes* where the testator provides that each grandchild "shall take his parent's share or title by right of representation," or the like, or where such an intent may be gathered from the will.<sup>4</sup>

*Per Capita Distribution*. — But under a gift to "children and grandchildren," or to A, and the children of B,<sup>5</sup> or to the children of several persons,

1. *Taking Per Capita or Per Stirpes in General* — *California*. — *De Laurencel v. De Boom*, 67 Cal. 362.

*Connecticut*. — *Hoadly v. Wood*, 71 Conn. 452.

*Delaware*. — *Kean v. Roe*, 2 Harr. (Del.) 103.

*Georgia*. — *Clifton v. Holton*, 27 Ga. 321; *Huggins v. Huggins*, 72 Ga. 825.

*Illinois*. — *Kelley v. Vigas*, 112 Ill. 242.

*Maryland*. — *Allender v. Keplinger*, 62 Md. 7.

*Massachusetts*. — *Niles v. Almy*, 161 Mass. 29; *Minot v. Taylor*, 129 Mass. 160; *Morrill v. Phillips*, 142 Mass. 240; *Balcom v. Haynes*, 14 Allen (Mass.) 204.

*New Jersey*. — *Walker v. Hill*, 22 N. J. Eq. 520; *Hayes v. King*, 37 N. J. Eq. 1; *Fisk v. Fisk*, 60 N. J. Eq. 195.

*New York*. — *Ferrer v. Pync*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 N. Y. 505; *Bisson v. West Shore R. Co.*, 143 N. Y. 125; *Collins v. Hoxie*, 9 Paige (N. Y.) 81; *Bodine v. Brown*, 12 N. Y. App. Div. 335; *Jay v. Lee*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 13; *Matter of Griswold*, (Surrogate Ct.) 42 Misc. (N. Y.) 230.

*North Carolina*. — *Cureton v. Moore*, 2 Jones Eq. (55 N. Car.) 204; *Harris v. Philpot*, 5 Ired. Eq. (40 N. Car.) 324; *Marsh v. Dellinger*, 127 N. Car. 360.

*Ohio*. — *Huston v. Crook*, 38 Ohio St. 328; *McKelvey v. McKelvey*, 43 Ohio St. 213.

*Oregon*. — *Gerrish v. Hinman*, 8 Oregon 348.

*Pennsylvania*. — *John's Estate*, 11 Phila. (Pa.) 144, 33 Leg. Int. (Pa.) 256; *Peale's Estate*, 11 Phila. (Pa.) 147, 33 Leg. Int. (Pa.) 374; *Wistar v. Scott*, 105 Pa. St. 200; *Scott's Estate*, 163 Pa. St. 169.

*South Carolina*. — *Allen v. Allen*, 13 S. Car. 512; *Lemacks v. Glover*, 1 Rich. Eq. (S. Car.) 17.

*Virginia*. — *Hamlett v. Hamlett*, 12 Leigh (Va.) 350; *Taylor v. Fauver*, (Va. 1897) 28 S. E. Rep. 317.

*Rule Stated*. — "When the devise is to several persons belonging to different classes, bearing different degrees of relationship to the testator, and the language of the will leaves the question of distribution in doubt, or the language does not exclude a distribution *per stirpes*, the will must be construed as intending a distribution *per stirpes* and not *per capita*." *West v. Rassman*, 135 Ind. 278.

"If a division is to be made among near and remote heirs the law favors a distribution *per stirpes* in preference to *per capita*. If the division is to be made among persons standing in

the same degree of relationship the distribution will be *per capita*." *Rohrer v. Burris*, 27 Ind. App. 344.

2. *Gift to Individual and Class*. — *Ruggles v. Randall*, 70 Conn. 44; *Bethel v. Major*, 68 S. W. Rep. 631, 24 Ky. L. Rep. 398; *Balcom v. Haynes*, 14 Allen (Mass.) 204; *Ferrer v. Pync*, 81 N. Y. 281; *Matter of Walker*, (Surrogate Ct.) 39 Misc. (N. Y.) 680; *Matter of U. S. Trust Co.*, (Surrogate Ct.) 36 Misc. (N. Y.) 378; *Spivey v. Spivey*, 2 Ired. Eq. (37 N. Car.) 100; *Thompson's Estate*, 10 Pa. Dist. 276; *Hoxton v. Griffith*, 18 Gratt. (Va.) 574. See *Penney's Estate*, 159 Pa. St. 346.

*Statement of Rule*. — "A gift to a person described as standing in a certain relation to the testator and to the heirs of another person standing in the same relation to him imports an intention upon the part of the testator that the persons named and described shall take *per stirpes*; while the general rule is that a gift to a person described as standing in a certain relation to the testator and to the children of another standing in the same relation imports an intention that the legatees shall take *per capita*." *Matter of Griswold*, (Surrogate Ct.) 42 Misc. (N. Y.) 230.

3. In *Penney's Estate*, 159 Pa. St. 346, where the gift was "to my sister M. one share, and to my step-daughter O. one share, and to each of my nephews and nieces then living, one share," it was held that the distribution was *per capita*. But it was said "had the testator mentioned them as a class, nephews and nieces then living one share," he would undoubtedly have indicated a division *per stirpes*. See also *infra*, this subsection, *Presumption Yields to Contrary Intent*.

4. *Per Stirpes Distribution*. — *Kean v. Roe*, 2 Harr. (Del.) 103; *Farmer v. Kimball*, 46 N. H. 435; *Matter of U. S. Trust Co.*, (Surrogate Ct.) 36 Misc. (N. Y.) 378; *Matter of Allen*, 81 Hun (N. Y.) 91, *affirmed* 151 N. Y. 243; *Huston v. Crook*, 38 Ohio St. 328; *Dible's Estate*, 81\* Pa. St. 279; *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408; *Wessenger v. Hunt*, 9 Rich. Eq. (S. Car.) 459; *Kimbrow v. Johnston*, 15 Lea (Tenn.) 78.

5. *Gift to "Children and Grandchildren," or to A, and the Children of B* — *England*. — *Dowding v. Smith*, 3 Beav. 541; *Rickabe v. Garwood*, 8 Beav. 579; *Tyndale v. Wilkinson*, 23 Beav. 74; *Lenden v. Blackmore*, 10 Sim. 626; *Payne v. Webb*, L. R. 19 Eq. 26.

*Alabama*. — *Howard v. Howard*, 30 Ala. 391.

*Georgia*. — *Clifton v. Holton*, 27 Ga. 321; *Almand v. Whitaker*, 113 Ga. 889.

whether it be to the children of A and B,<sup>1</sup> or to the children of A and the children of B,<sup>2</sup> or to A and B and their children, or to a class and their

*Illinois*.—*McCartney v. Osburn*, 118 Ill. 404.

*Kentucky*.—*Crozier v. Cundall*, 99 Ky. 202;

*Lachland v. Downing*, 11 B. Mon. (Ky.) 32;

*Wells v. Newton*, 4 Bush (Ky.) 158.

*New Jersey*.—*Roome v. Counter*, 6 N. J. L. 113; *Stokes v. Tilly*, 9 N. J. Eq. 130; *Owen v. Owen*, 13 N. J. Eq. 188; *Burnet v. Burnet*, 30 N. J. Eq. 595.

*New York*.—*Bunner v. Storm*, 1 Sandf. Ch. (N. Y.) 357; *Seabury v. Brewer*, 53 Barb. (N. Y.) 662.

*North Carolina*.—*Waller v. Forsythe*, Phil. Eq. (62 N. Car.) 353; *Grandy v. Gaudy*, Phil. Eq. (62 N. Car.) 8; *Martin v. Gould*, 2 Dev. Eq. (17 N. Car.) 305.

*Pennsylvania*.—*Pemberton v. Parke*, 5 Binn. (Pa.) 601; *Osburn's Appeal*, 104 Pa. St. 637; *Green's Estate*, 140 Pa. St. 253.

*Virginia*.—*Walker v. Webster*, 95 Va. 377.

*West Virginia*.—*Collins v. Feather*, 52 W. Va. 107.

In delivering the opinion of the court in *Hoxton v. Griffith*, 18 Gratt. (Va.) 574, *Joynes, J.*, said: "Where a bequest is made to several persons, in general terms indicating that they are to take equally as tenants in common, each individual will, of course, take the same share; in other words, the legatees will take *per capita*. The same rule applies where a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the statute of distributions might operate upon those relations in case of intestacy. Thus, where property is given 'to my brother A, and to the children of my brother B,' A takes a share only equal to that of each of the children of B. So, where the gift is to A's and B's children, or to the children of A and the children of B, the children take as individuals, *per capita*. The substance of this rule of construction is that, in the absence of explanation, the children in such a case are presumed to be referred to as individuals, and not as a class, and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to control this presumption. The general rule is well established, and has been fully recognized by the decisions of this court. *Brewer v. Opie*, 1 Call (Va.) 212; *Crow v. Crow*, 1 Leigh (Va.) 74; *McMaster v. McMaster*, 10 Gratt. (Va.) 275."

**1. Gift to Children of A and B**—*England*.—*Weld v. Bradbury*, 2 Vern. 705; *Lugar v. Harman*, 1 Cox Ch. 250; *Pattison v. Pattison*, 19 Beav. 638; *Armitage v. Williams*, 27 Beav. 346. *Connecticut*.—*Raymond v. Hillhouse*, 45 Conn. 467.

*District of Columbia*.—*Follansbee v. Follansbee*, 7 App. Cas. (D. C.) 282.

*Georgia*.—*Almand v. Whitaker*, 113 Ga. 889.

*Indiana*.—*West v. Rassman*, 135 Ind. 278.

*Maryland*.—*Thompson v. Young*, 25 Md. 461.

*Mississippi*.—*Nichols v. Denny*, 37 Miss. 59.

*New Jersey*.—*Budd v. Haines*, 52 N. J. Eq. 488.

*North Carolina*.—*Ward v. Stow*, 2 Dev. Eq. (17 N. Car.) 509; *Adams v. Adams*, 2 Jones Eq. (55 N. Car.) 215; *Lowe v. Carter*, 2 Jones Eq. (55 N. Car.) 377.

*South Carolina*.—*Ex p. Leith*, 1 Hill Eq. (S. Car.) 152.

*Virginia*.—*Walker v. Webster*, 95 Va. 377; *Hoxton v. Griffith*, 18 Gratt. (Va.) 574.

See 2 Jarman on Wills (6th ed.) 206.

"A gift to children of A and B, or even to class A and class B and C, gives *per capita* to all." Theobald on Wills (4th ed.) 251, citing *Dowding v. Smith*, 3 Beav. 541; *Dugdale v. Dugdale*, 11 Beav. 402; *Amson v. Harris*, 19 Beav. 210; *Tyndale v. Wilkinson*, 23 Beav. 74; *Rook v. Atty.-Gen.*, 31 Beav. 313; *Baker v. Baker*, 6 Hare 269.

**2. Gifts to Children of A and Children of B**—*England*.—*Walker v. Moore*, 1 Beav. 607; *Bolger v. Mackell*, 5 Ves. Jr. 509; *Barnes v. Patch*, 8 Ves. Jr. 604; *Lincoln v. Pelham*, 10 Ves. Jr. 166; *Heron v. Stokes*, 3 Dr. & War. 89.

*Georgia*.—*Almand v. Whitaker*, 113 Ga. 889.

*Maryland*.—*Allender v. Keplinger*, 62 Md. 7. See *Alder v. Beall*, 11 Gill & J. (Md.) 123; *Levering v. Levering*, 14 Md. 30.

*Massachusetts*.—*Hill v. Bowers*, 120 Mass. 135. But see *Bassett v. Granger*, 100 Mass. 348.

*Mississippi*.—*Nichols v. Denny*, 37 Miss. 59; *Scott v. Terry*, 37 Miss. 65.

*North Carolina*.—*Britton v. Miller*, 63 N. Car. 268; *Bryant v. Scott*, 1 Dev. & B. Eq. (21 N. Car.) 156; *Ward v. Stow*, 2 Dev. Eq. (17 N. Car.) 509.

*South Carolina*.—*Wessenger v. Hunt*, 9 Rich. Eq. (S. Car.) 459.

*Virginia*.—*Senger v. Senger*, 81 Va. 687; *Hamlett v. Hamlett*, 12 Leigh (Va.) 350. See *Ingram v. Smith*, 1 Head (Tenn.) 427. But see *Young's Appeal*, 83 Pa. St. 59.

In *Britton v. Miller*, 63 N. Car. 268, where a testatrix, by will, gave "to the children of my brother, Stephen W. Britton, and of my sister, Mary F. Miller, all of my property of every description, to them and their heirs forever," it was held that the children of Stephen and Mary took *per capita*. Compare *Hamlett v. Hamlett*, 12 Leigh (Va.) 357, where a testator bequeathed the residue of his estate, after his wife's death or marriage, to be equally divided among James, Mary, Patsey, Nancy, and Narcissa, who were the testator's children, the children of his son George, the children of his daughter Elizabeth, the children of his son Bedford, deceased, and the children of his daughter Obedience. His five children legatees were all married, and had, in all, thirty-one children living at his death; his son Bedford left three children, and his son George and daughters Elizabeth and Obedience were married, and these four had, in all, eighteen children living at the testator's death; and the three last had five children born after his death and during his widow's life. It was held that the grandchildren took *per stirpes* and not *per capita*.



children,<sup>1</sup> all take *per capita* in the absence of an intention to the contrary on the face of the will.

**Where Gift to Class Substitutional.** — But if the gift to the children is merely substitutional, as in the case of a bequest to A and B, "or their children," the distribution will be *per stirpes*.<sup>2</sup>

(b) **Gifts to Tenants in Common — Without Right of Survivorship.** — Under a gift to two or more for their lives as tenants in common, without right of survivorship, with remainder to their children, it seems to be the better opinion that the children take *per stirpes*.<sup>3</sup>

**With Right of Survivorship.** — But if the tenants for life take jointly, or as tenants in common with right of survivorship, the children take<sup>4</sup> so also, if the general distribution among children is postponed until after the death of the last surviving tenant for life, even though the life interest does not survive.<sup>5</sup>

(c) **Gifts to Descendants.** — Under a gift to descendants, *prima facie* all living at the time of distribution take *per capita*.<sup>6</sup> Yet the word "descendants," when used as a word of purchase and coupled with a gift to the ancestor, has a substitutional and representative sense, so that in a gift to several and their descendants, the latter would not take in competition with their ancestors.<sup>7</sup>

(d) **Gifts to Relatives.** — Under a gift to relatives, persons capable of taking within the statute of distributions take *per capita* and not in the proportions

**A and B Both Males.** — In *Burnet v. Burnet*, 30 N. J. Eq. 595, it was held that a gift to the children of A and B, both of whom were males, must be construed according to the plain grammatical sense of words used, and constitutes a gift to B himself and to the children of A.

**1. Gift to Class and Their Children.** — *Cunningham v. Murray*, 1 De G. & Sm. 366; *Abbey v. Howe*, 1 De G. & Sm. 470; *Northey v. Strange*, 1 P. Wms. 340; *Murray v. Murray*, 3 Ir. Ch. Rep. 120; *Law v. Thorp*, 4 Jur. N. S. 447; *Almand v. Whitaker*, 113 Ga. 889; *Ferry v. Langley*, 1 Mackey (D. C.) 140; *Farmer v. Kimball*, 46 N. H. 435; *Soteldo v. Clement*, 11 Ohio Dec. (Reprint) 802, 29 Cinc. L. Bul. 384.

**2. Substitutional Gift to Class.** — *Price v. Lockley*, 6 Beav. 180; *Burrell v. Baskerfield*, 11 Beav. 525; *Congreve v. Palmer*, 16 Beav. 435; *Timins v. Stockhouse*, 27 Beav. 434; *Armstrong v. Stockham*, 7 Jur. 230; *Minchell v. Lee*, 17 Jur. 727; *Shailer v. Groves*, 6 Hare 162; *In re Sibley*, 5 Ch. D. 494; *Bethea v. Bethea*, 116 Ala. 265; *Connecticut Trust, etc., Co. v. Hollister*, 74 Conn. 228; *Bartine v. Davis*, 60 N. J. Eq. 202. But compare *Atkinson v. Bartrum*, 28 Beav. 219.

"A simple gift, however, to several or their issue, though it would import a distribution *per stirpes* among the families, would not prevent all the issue of each family from taking *per capita inter se*." *Gowling v. Thompson*, 19 L. T. N. S. 242; *In re Sibley*, 5 Ch. D. 494." *Theobald on Wills* (4th ed.) 254.

**3. Without Right of Survivorship.** — *Willes v. Douglas*, 10 Beav. 47; *Bradshaw v. Mellings*, 19 Beav. 417; *Sarel v. Sarel*, 23 Beav. 87; *Turner v. Whittaker*, 23 Beav. 196; *Archer v. Legg*, 31 Beav. 187; *Pery v. White*, 2 Cowp. 777; *Taniere v. Pearkes*, 2 Sim. & St. 383; *Flinn v. Jenkins*, 1 Coll. Ch. Cas. 365; *Arrow v. Mellish*, 1 De G. & Sm. 355; *Hunt v. Dorsett*, 5 De G. M. & G. 570; *Doe v. Royle*, 13 Q. B. 100, 66 E. C. L. 100; *In re Lavenck*, 18 Jur. 304; *Milnes v. Aked*, 6 W. R. 430; *Wills v.*

*Wills*, L. R. 20 Eq. 342; *Coles v. Witt*, 2 Jur. N. S. 1226.

**4. With Right of Survivorship.** — *Malcolm v. Martin*, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. Exch. 246; *Stevenson v. Gullan*, 18 Beav. 590; *Parker v. Clarke*, 6 De G. M. & G. 110; *Parfitt v. Hember*, L. R. 4 Eq. 443. Compare *Shand v. Kidd*, 19 Beav. 310; *Begley v. Cook*, 3 Drew. 662; *Taaffe v. Conmee*, 10 H. L. Cas. 64.

**5. Nockolds v. Locke**, 3 Kay & J. 6.

**6. Gift to Descendants.** — *Crossly v. Clare*, Ambl. 397; *Butler v. Stratton*, 3 Bro. C. C. 367; *Levering v. Orrick*, 97 Md. 139; *Wistar v. Scott*, 105 Pa. St. 200; *Pearce v. Rickard*, 18 R. I. 142; *Corbett v. Lorens*, 5 Rich. Eq. (S. Car.) 301. But the expression "descendants or representatives," imports a distribution *per stirpes*. *Rowland v. Gorsuch*, 2 Cox Ch. 187.

**7. "Descendants" Used in Substitutional and Representative Sense.** — *Tucker v. Billing*, 2 Jur. N. S. 483; *Jones v. Torin*, 6 Sim. 255; *Smith v. Pepper*, 27 Beav. 86; *Best v. Stonehewer*, 2 De G. J. & S. 537; *Thompson v. Young*, 25 Md. 450; *Grandy v. Sawyer*, Phil. Eq. (6: N. Car.) 8; *McNeillidge v. Galbraith*, 8 S. & R. (Pa.) 43. Compare *Orrit's Appeal*, 35 Pa. St. 267.

In *Baskin's Appeal*, 3 Pa. St. 304, a testator, after making certain bequests, ordered thus: "Then my will is, that the remaining part of my goods, stocks, etc., shall be impartially appraised; and after such appraisement made, that the same shall be equally divided between all the heirs." It was held that the testator, by this language, and his intention as gathered from the whole will, meant his own heirs, who could only be ascertained by resorting to the statute of distribution; and that taking the statute for the rule, the remaining part of his property bequeathed descended to his children and grandchildren, *per stirpes*; the rule under the statute not only designating who are to

fixed by the statute.<sup>1</sup>

(e) **Gifts to Heirs, etc.** — Where there is a gift to "heirs," "heirs at law," "legal heirs," "issue," etc., without any indication of the intention of the testator as to the shares of distribution, it is held that as the statute of distributions must be invoked to determine the persons who constitute the class, its provisions must also be followed as to the quantity they shall take, it being presumed the testator had such scheme in mind.<sup>2</sup>

take, but also the *quantum* of the estate to be taken; and that by "all the heirs" the testator meant his children and his grandchildren, who, in his eye and by intendment of the law, constituted but one heir.

**1. Gift to Relatives.** — *Tiffin v. Longman*, 15 Beav. 275; *Eagles v. Le Breton*, L. R. 15 Eq. 118.

**Property to Be Equally Divided Between "Her Relations and Mine."** — In *Young's Appeal*, 83 Pa. St. 59, a testator devised "the residue of my estate, real, personal, and mixed, to my beloved wife, for and during her life; and further, I will that at her decease such moneys or property as she may possess be equally divided between her relations and mine, or such of them as she shall believe most worthy." The testator's wife survived him, and died leaving a will, in which she directed the estate to be equally divided between her late husband's relations and her own, one-half to go to six of her relations, share and share alike, and the other half to nineteen of her husband's relations, in proportions named in her will. The court below held that the wife had power to appoint the beneficiaries under the will of her husband, but that she should have distributed the funds among the appointees *per capita*. It was held (*reversing* the court below) that the division of the property made by the wife was in accordance with the true intent of the testator. In this case the court, *per* *Mercur, J.*, said: "After the expiration of the life estate of his wife, he directs the property to 'be equally divided between her relations and mine.' He and his wife were childless. There was no issue of either to whom the property could be transmitted. It may have been the joint product of their industry and economy. This or some other moving cause prompted him to direct that the property be 'equally divided' between families of different blood. The language clearly points to one general division, one separation of the fund. Two classes were in his mind. One class was his relations, the other class was his wife's relations. The property was to be equally divided 'between' these two classes, and each class to take one-half: his relations one-half, his wife's relations the other half. Neither the language nor the spirit of the will indicates that each relation should have an equal share. To reach such a result would require all the relations of each, the testator and his wife, to be thrown together in one class, regardless of their relative number. So, if the wife had twenty and the testator two, her relations would take ten times as much as his relations. That would be a most manifest disregard of the direction for an equal division between the two families."

So, under a bequest "to the heirs of my

late husband and to my heirs equally," each class of heirs take *per stirpes* one-half of the sum bequeathed. *Bassett v. Granger*, 100 Mass. 348.

**2. Gifts to Heirs, etc. — England.** — *Bullock v. Downes*, 9 H. L. Cas. 1.

*Connecticut.* — *Cook v. Catlin*, 25 Conn. 387; *Lyon v. Acker*, 33 Conn. 224; *Raymond v. Hillhouse*, 45 Conn. 467; *Heath v. Bancroft*, 49 Conn. 220; *Conklin v. Davis*, 63 Conn. 377; *Healy v. Healy*, 70 Conn. 467; *Jackson v. Alsop*, 67 Conn. 249; *Connecticut Trust, etc., Co. v. Hollister*, 74 Conn. 228.

*Illinois.* — *Richards v. Miller*, 62 Ill. 417; *Kelley v. Vigas*, 112 Ill. 242; *Thomas v. Miller*, 161 Ill. 60; *Auger v. Tatham*, 191 Ill. 296; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144; *Thornley v. Kershaw*, 109 Ill. App. 113, *affirmed* 204 Ill. 266.

*Maryland.* — *Plummer v. Shepherd*, 94 Md. 466.

*Massachusetts.* — *Bassett v. Granger*, 100 Mass. 348; *International Trust Co. v. Williams*, 183 Mass. 173.

*Michigan.* — *Bailey v. Bailey*, 25 Mich. 185.

*New York.* — *Woodward v. James*, 115 N. Y. 359; *Cogan v. McCabe*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 739; *Matter of Griswold*, (Surrogate Ct.) 42 Misc. (N. Y.) 230.

*Oregon.* — *Ramsey v. Stephenson*, 34 Oregon 408.

*Pennsylvania.* — *Baskin's Appeal*, 3 Pa. St. 304; *Harris's Estate*, 74 Pa. St. 452; *Hoch's Estate*, 154 Pa. St. 417.

*South Carolina.* — *Dukes v. Faulk*, 37 S. Car. 255.

*Vermont.* — *Hodges v. Phelps*, 65 Vt. 303.

In *Johnson v. Bodine*, 108 Iowa 594, it was said: "A devise to 'heirs,' whether it be to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but also the manner and portions in which they are to take, and that, when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

**Division Between Heirs Named in Will.** — A testator provided that the residue of his estate should be divided "in a *pro rata* rate between heirs named in my will." In the will bequests were given to his brothers and sisters who were living and also to the children of his deceased brothers and sisters, who were called the heirs of such brothers or sisters, and received their share in the capacity of such heirs by reason of their parentage, and not separately or by name. It was held that the heirs of the deceased brothers and sisters took *per stirpes*. *Corbley v. Patterson*, 3 Ohio Dec. 702, 3 Ohio N. P. 315.

**Division Among Classes of Heirs.** — Where the testator directs that his estate be equally divided among certain classes of heirs, as between "my heirs and my wife's heirs," or between the heirs of A and the heirs of B, the heirs take *per stirpes* and not *per capita*, which is presumed to be the testator's intention in the absence of a contrary intent appearing.<sup>1</sup>

**Division in Accordance with Intestate Laws.** — Where the testator provides that his estate shall "be divided among my heirs at law, in accordance with the laws applicable to persons who die intestate," the expressed intention of the testator will be followed, and the heirs will take *per stirpes*.<sup>2</sup>

(3) **Effect of Words Importing Equal Division.** — It is well settled that where the subject of testamentary disposition is directed to be "equally divided," or to be divided "share and share alike," or where similar words are used which indicate an equal division among a class, the persons among whom the division is to be made take *per capita*,<sup>3</sup> unless a contrary intention is discoverable from the will.<sup>4</sup> This rule is applicable where the named class

**Per Capita Distribution Intended.** — Auger v. Tatham, 191 Ill. 296.

1. **Division Among Classes of Heirs** — Connecticut. — Lockwood's Appeal, 55 Conn. 157.

Georgia. — Maclean v. Williams, 116 Ga. 257.

Kentucky. — Butler v. Butler, 97 Ky. 136.

Maryland. — Plummer v. Shepherd, 94 Md. 466; Alder v. Beall, 11 Gill & J. (Md.) 123.

Massachusetts. — Bassett v. Granger, 100 Mass. 348.

Missouri. — Records v. Fields, 155 Mo. 314.

New Jersey. — Roome v. Counter, 6 N. J. L. 111.

North Carolina. — Lowe v. Carter, 2 Jones Eq. (55 N. Car.) 377.

Pennsylvania. — Fissel's Appeal, 27 Pa. St. 55; Harris's Estate, 74 Pa. St. 452.

West Virginia. — Ross v. Kiger, 42 W. Va. 402.

2. **Division in Accordance with Intestate Laws.** — Woodward v. James, 115 N. Y. 346; Lawton v. Corlies, 127 N. Y. 100; Armstrong v. Galusha, 43 N. Y. App. Div. 248. See also Hopkins v. Keazer, 89 Me. 347; Fisk v. Fisk, 60 N. J. Eq. 195.

3. **Effect of Words Importing Equal Division** — England. — *In re Stone*, (1895) 2 Ch. 196.

Canada. — Houghton v. Bell, 23 Can. Sup. Ct. 498; Remillard v. Chabot, 33 Can. Sup. Ct. 328; *In re Bossi*, 5 British Columbia 446.

United States. — McIntire v. McIntire, 192 U. S. 116, citing Walker v. Griffin, 11 Wheat. (U. S.) 379; Balcom v. Haynes, 14 Allen (Mass.) 204; Hill v. Bowers, 120 Mass. 135.

Alabama. — Ballentine v. Foster, 128 Ala. 638.

District of Columbia. — Follansbee v. Follansbee, 7 App. Cas. (D. C.) 282; McIntire v. McIntire, 14 App. Cas. (D. C.) 337.

Georgia. — Almand v. Whitaker, 113 Ga. 889.

Indiana. — Rohrer v. Burris, 27 Ind. App. 344.

Iowa. — Kling v. Schnellbecker, 107 Iowa 636.

Kentucky. — Miller v. Wilson, 66 S. W. Rep. 755, 23 Ky. L. Rep. 2130. Compare Lachland v. Downing, 11 B. Mon. (Ky.) 32.

Maryland. — Brittain v. Carson, 46 Md. 186.

New Hampshire. — Farmer v. Kimball, 46 N. H. 435.

New York. — Stevenson v. Lesley, 70 N. Y.

512; Bisson v. West Shore R. Co., 143 N. Y. 125; Central Trust Co. v. Richards, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 247; Matter of Walker, (Surrogate Ct.) 39 Misc. (N. Y.) 680; Bodine v. Brown, 12 N. Y. App. Div. 335.

North Carolina. — Burgin v. Patton, 5 Jones Eq. (58 N. Car.) 426; Johnston v. Knight, 117 N. Car. 122; Lee v. Baird, 132 N. Car. 755; Ward v. Stow, 2 Dev. Eq. (17 N. Car.) 509; Hill v. Spruill, 4 Ired. Eq. (39 N. Car.) 244.

Ohio. — Mooney v. Purpus, 70 Ohio St. 57.

Pennsylvania. — Dible's Estate, 81\* Pa. St. 279; Hiestand v. Meyer, 150 Pa. St. 501; Priestler's Estate, 23 Pa. Super. Ct. 386; Bender's Appeal, 3 Grant Cas. (Pa.) 210; McNeillidge v. Galbraith, 8 S. & R. (Pa.) 43; Pemberton v. Parke, 5 Binn. (Pa.) 601; Gest v. Way, 2 Whart. (Pa.) 445.

Wisconsin. — McWilliams v. Gough, 116 Wis. 576.

**Rule Stated.** — "When an estate is to be divided equally between certain persons, whether specifically named, or designated by more general terms, as the children or heirs of certain persons, the language imports the taking of an equal share by each legatee, in the absence of other provisions showing a contrary intention, and that they take *per capita*, and not *per stirpes*. It has been truly said, however, that 'this rule will yield to a very faint glimpse of a different intention in the context.'" Kling v. Schnellbecker, 107 Iowa 636; Johnson v. Bodine, 108 Iowa 594.

**Division Between Named Sons and Children of a Daughter.** — A testator gave land and slaves to his daughter for life, and then "to be equally divided between the children of the said daughter and my sons M. and R." It was held that the property, at the decease of the daughter, should be divided, *per capita*, between M., R., and the children of the daughter. Waller v. Forsythe, Phil. Eq. (62 N. Car.) 353.

**Division Among Children of Brothers and Sisters.** — *Re Gardner*, 3 Ont. L. Rep. 343.

**Division Among Children and Grandchildren.** — Wells v. Newton, 4 Bush (Ky.) 158; Brearley v. Lalor, 15 N. J. Eq. 108.

**Words "Share and Share Alike" Referring to Classes.** — Rixey v. Stuckey, 129 Mo. 377.

4. See *infra*, this subsection, (4) *Presumption Yields to Contrary Intent*.



are the "heirs," or "heirs at law," of the testator,<sup>1</sup> and especially where the testator uses the words "be divided in equal parts among those who would be my heirs at law" under the statute "in case I had died intestate."<sup>2</sup> But on this point there are decisions to the contrary, it being held by some authorities that the word "heirs" not only refers to those alone who are entitled to take under the statute of distributions, but also indicates that they shall take in the proportions given by such statute, notwithstanding the use of such words as "equally to be divided," etc.<sup>3</sup> Words importing an

1. **Equal Division Among "Heirs"**—*Alabama*.—Ballentine v. Foster, 128 Ala. 638; Remillard v. Chabot, 33 Can. Sup. Ct. 328.

*Delaware*.—Kean v. Roe, 2 Harr. (Del.) 103.

*Illinois*.—Richards v. Miller, 62 Ill. 417; Best v. Farris, 21 Ill. App. 49.

*Iowa*.—Kling v. Schnellbecker, 107 Iowa 636.

*Massachusetts*.—Bragg v. Carter, 171 Mass. 324.

*New York*.—Bisson v. West Shore R. Co., 143 N. Y. 125; Matter of Griswold, (Surrogate Ct.) 42 Misc. (N. Y.) 230.

*North Carolina*.—Tuttle v. Pruitt, 68 N. Car. 543; Johnston v. Knight, 117 N. Car. 122; Ward v. Stow, 2 Dev. Eq. (17 N. Car.) 509; Harris v. Philpot, 5 Ired. Eq. (40 N. Car.) 324.

*Ohio*.—McKelvey v. McKelvey, 43 Ohio St. 213.

*Oregon*.—Ramsey v. Stephenson, 34 Oregon 408.

*South Carolina*.—Dukes v. Faulk, 37 S. Car. 255.

*Virginia*.—Walker v. Webster, 95 Va. 377.

**Rule Stated.**—"In affixing, to the gift of his estate to his heirs and his wife's heirs, the words 'their heirs and assigns forever, share and share alike,' the testator may be said by his language to have grouped all of the heirs in one class; the individuals of which are indistinguishable one from the other as objects of his bounty. There being but one class, there can be no doubt but that the division must be made *per capita* among the persons entitled and not *per stirpes*. I think the words 'share and share alike' make that sufficiently clear. Such a direction cannot be distinguished, practically, from one to divide equally." Bisson v. West Shore R. Co., 143 N. Y. 125.

"We think we may now announce as the law of this commonwealth, that, when the words, 'heirs of the body,' occur in a devise, accompanied by the words, 'share and share alike,' or 'equally,' or 'in equal parts' or kindred words, and also the words, 'their heirs, executors, administrators, and assigns,' that we must look to the statutes of distributions of our state for the parties who shall answer the description, and, therefore, take the devise, but that the method of distribution is fixed by the devise itself to be *per capita*, and not *per stirpes*, and that the estate is one of purchase, and not of descent." Dukes v. Faulk, 37 S. Car. 255.

2. Walker v. Webster, 95 Va. 377, wherein the court said: "The reference to the statute of descents and distributions was simply to designate the persons who were to take the residuum of the estate. The testator did not thereby intend to prescribe also the manner of

the division. He does not say that the persons designated were to take as if he had died intestate, which would give some color to the contention that they take in the manner prescribed by the statute, but merely that those persons should take who would be his heirs in case he had died intestate. The reference to the statute ascertains who shall take, but not how they shall take. How they are to take is otherwise prescribed; they are to take 'in equal parts.' If the testator had meant that both the persons who were to take and the manner of the division should be in accordance with the statute as if he had died intestate, then this clause in his will was entirely useless."

3. **Contra.**—Lord v. Moore, 20 Conn. 122; Lyon v. Acker, 33 Conn. 222; Thomas v. Miller, 161 Ill. 60; Fisher v. Skillman, 18 N. J. Eq. 229; Baskin's Appeal, 3 Pa. St. 304; Hoch's Estate, 154 Pa. St. 417; Road's Estate, 21 Pa. Co. Ct. 291. See Lachland v. Downing, 11 B. Mon. (Ky.) 32; Ashton's Estate, 134 Pa. St. 390.

In Maclean v. Williams, 116 Ga. 257, the court said: "It is the general rule that a devise to named individuals in equal shares would call for a *per capita* distribution, and that a devise to a class, such as 'all my nephews,' and the like, would also call for a *per capita* distribution. When the words 'heirs at law' are used in a will, unless there is something to indicate a contrary intention, it is to be presumed that the testator intended not only that the persons taking should be those who would take under the statute of distributions, but that the quantum of interest of each should be what each individual would take under the statute. Is the use of the expression 'equal shares' alone sufficient to overcome this presumption? The shares under the statute of distributions are equal. As was said in Odam v. Caruthers, 6 Ga. 42, persons standing in unequal degrees are allowed to take *per stirpes* 'to fulfil the equity of the statute, which contemplates an equal distribution.' If all the heirs at law stand in the same relation to the decedent, they take equally *per capita*. If some stand in different degrees from others, they take *per stirpes*, but they take equally nevertheless. The estate in either event is divided into shares, and equal shares, although in the one case each share goes to an individual, and in the other case the equal shares go to a class of individuals."

**Contra Cases Criticised.**—"Under the terms of the will, resort to the statute is necessary to determine who are the persons entitled to take, but not to ascertain how they shall take. By the phrase 'heirs at law' the testator designated his devisees, and by the word 'equally' the

equal division do not necessarily indicate a division among individuals, as they apply just as readily and appropriately to classes.<sup>1</sup> But this cannot be said of such words when coupled with the expression "each to take."<sup>2</sup>

(4) *Presumption Yields to Contrary Intent.*—The presumption in favor of a *per capita* distribution yields readily in favor of a faint indication of an intention of the testator that the distribution shall be *per stirpes*.<sup>3</sup> Thus, the

manner in which they should take. It is difficult to conceive what language the testator could have used better adapted to make his intention manifest. He directs that his trustee shall sell and dispose of the residue of his estate, and divide the proceeds equally among his heirs; and we do not feel justified in substituting, for his declared will, a mode of distribution by which his property will not be so divided. It is true some of the authorities cited by defendants do not support this conclusion. *Baskin's Appeal*, 3 Pa. St. 304; *Hoch's Estate*, 154 Pa. St. 417; *Kelley v. Vigas*, 112 Ill. 242. These cases proceed upon the theory that, because the statute of distributions has to be consulted in order to ascertain who are heirs, it must also govern as to the manner of the distribution, notwithstanding the language of the will. This reasoning overlooks the fact that the testator himself has indicated the quantum of the estate which each heir shall take, and that it is only necessary to consult the statute for the purpose of determining who are heirs. In other words the statute governs in ascertaining who shall take, but the will controls in determining the quantum to which each beneficiary is entitled. There is, therefore, no necessity for resorting to the statute to ascertain the manner of the distribution; nor can it be done, it seems to us, without disregarding the expressed intention of the testator." *Ramsey v. Stephenson*, 34 Oregon 408.

1. *Words Refer to Classes as Well as Individuals.*—*Raymond v. Hillhouse*, 45 Conn. 467; *Scott's Estate*, 163 Pa. St. 165.

2. *"Each to Take."*—*Scott's Estate*, 163 Pa. St. 165.

3. *Presumption Yields to Contrary Intent—England.*—*Brett v. Horton*, 4 Beav. 239; *Turner v. Hudson*, 10 Beav. 222; *Johnson v. Cope*, 17 Beav. 561; *Archer v. Legg*, 31 Beav. 187; *Crone v. O'Dell*, 1 Ball & B. 449; *Nockolds v. Locke*, 3 Kay & J. 6; *Nettleton v. Stephenson*, 18 L. J. Ch. 191; *Pearson v. Stephen*, 2 Dow. & Cl. 328; *Hunt v. Dorsett*, 5 De G. M. & G. 570.

*United States.*—*Walker v. Griffin*, 11 Wheat. (U. S.) 375.

*Alabama.*—*Billinslea v. Abercrombie*, 2 Stew. & P. (Ala.) 24.

*Connecticut.*—*Geery v. Skelding*, 62 Conn. 499; *Conklin v. Davis*, 63 Conn. 377.

*Georgia.*—*Randolph v. Bond*, 12 Ga. 362; *White v. Holland*, 92 Ga. 216; *Almand v. Whitaker*, 113 Ga. 889.

*Illinois.*—*Madison v. Larmon*, 170 Ill. 65.

*Kentucky.*—*Fields v. Fields*, 93 Ky. 619.

*Louisiana.*—*Allen's Succession*, 48 La. Ann. 1036.

*Maine.*—*Carter v. Lowell*, 76 Me. 342.

*Maryland.*—*Alder v. Beall*, 11 Gill & J. (Md.) 123; *Levering v. Levering*, 14 Md. 30; *Slingluff v. Johns*, 87 Md. 273.

*Massachusetts.*—*Minot v. Taylor*, 129 Mass. 160; *Leland v. Adams*, 12 Allen (Mass.) 286; *Balcom v. Haynes*, 14 Allen (Mass.) 204.

*New Jersey.*—*Fisher v. Skillman*, 18 N. J. Eq. 229; *Burnet v. Burnet*, 30 N. J. Eq. 599.

*New York.*—*Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 N. Y. 505; *Woodward v. James*, 115 N. Y. 359; *Matter of Walker*, (Surrogate Ct.) 39 Misc. (N. Y.) 680; *Rushmore v. Rushmore*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 776; *Matter of Keenan*, (Surrogate Ct.) 15 Misc. (N. Y.) 368.

*North Carolina.*—*Bivens v. Phifer*, 2 Jones L. (47 N. Car.) 436; *Adams v. Adams*, 2 Jones Eq. (55 N. Car.) 215; *Lockhart v. Lockhart*, 3 Jones Eq. (56 N. Car.) 205; *Roper v. Roper*, 5 Jones Eq. (58 N. Car.) 16; *Rogers v. Brickhouse*, 5 Jones Eq. (58 N. Car.) 301; *Spivey v. Spivey*, 2 Ired. Eq. (37 N. Car.) 100.

*Pennsylvania.*—*Young's Appeal*, 83 Pa. St. 59; *Osburn's Appeal*, 104 Pa. St. 637; *Oshburner's Estate*, 159 Pa. St. 545; *Ihrie's Estate*, 162 Pa. St. 369; *Scott's Estate*, 163 Pa. St. 169.

*South Carolina.*—*Collier v. Collier*, 3 Rich. Eq. (S. Car.) 555; *Britton v. Johnson*, 2 Hill Eq. (S. Car.) 430.

*Tennessee.*—*Seay v. Winston*, 7 Humph. (Tenn.) 472.

*Virginia.*—*Hoxton v. Griffith*, 18 Gratt. (Va.) 574.

In *Scott's Estate*, 163 Pa. St. 169, it was said: "When there is a testamentary gift to one person, and to the children of another person who stand in the same relation to the testator, the donees take *per capita*. This rule under the English authorities yields to slight indications of a contrary intent; and in *Pennsylvania* the contrary intent is inferred where under the intestate laws, which are always resorted to in cases of doubtful interpretation, the distribution would be made *per stirpes*, as in the case of a gift to a son or brother of the testator and to the children or heirs of a deceased son or brother. Where, however, the gift is to persons or classes of persons who stand in the same relation to the testator the analogy furnished by the intestate laws indicates a division *per capita*."

Where the Direction Is that the Issue Are to Take a Parent's Share, and the word "parent" is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be stirpital throughout. *Ross v. Ross*, 20 Beav. 645; *In re Orton*, L. R. 3 Eq. 375; *Palmer v. Crutwell*, 8 Jur. N. S. 479. So, too, where the direction is that the children or grandchildren are to take an original share between them. *Powell v. Powell*, 28 L. T. N. S. 730.

But a mere direction that the share of any of the original takers dying is to go to his issue

presumption in favor of a *per capita* distribution arising from the use of words importing equal division will yield to a contrary intention discoverable from the will.<sup>1</sup> Similarly, the presumption in favor of a *per stirpes* distribution arising from the use of the words "heirs," "heirs at law," etc., will yield to a contrary intention on the part of the testator, either expressed or implied.<sup>2</sup>

*d.* WHERE ENUMERATION OF CLASS IS ERRONEOUS. — Where the testator has described the class as consisting of a specified number, which varies from the actual number, the numerical statement is wholly disregarded, and all who fall within the class take under the will.<sup>3</sup> The ground for this rule is

would, it seems, not have the effect of preventing remoter issue from taking that share with issue less remote *per capita* between them. *Birdsall v. York*, 5 Jur. N. S. 1237; *Southam v. Blake*, 2 W. R. 446; *Weldon v. Hoyland*, 4 De G. F. & J. 564. *Robinson v. Sykes*, 23 Beav. 40, which is *contra*, was on a marriage settlement.

If the Gift Is to Several, and Their Issue Per Stirpes, the stirpetal distribution will be carried throughout, so that no children of remoter issue can take in competition with the parents. *Dick v. Lacy*, 8 Beav. 214; *Gibson v. Fisher*, L. R. 5 Eq. 51.

1. Presumption from Use of Words Importing Equal Division.—*Illinois*. — *Kelley v. Vidas*, 112 Ill. 242.

*Massachusetts*. — *Siders v. Siders*, 169 Mass. 523.

*New Hampshire*. — *Farmer v. Kimball*, 46 N. H. 435.

*New York*. — *Bisson v. West Shore R. Co.*, 143 N. Y. 125; *Matter of Walker*, (Surrogate Ct.) 39 Misc. (N. Y.) 680.

*North Carolina*. — *Martin v. Gould*, 2 Dev. Eq. (17 N. Car.) 305; *Spivey v. Spivey*, 2 Ired. Eq. (37 N. Car.) 100; *Henderson v. Womack*, 6 Ired. Eq. (41 N. Car.) 437; *Burgin v. Patton*, 5 Jones Eq. (58 N. Car.) 426; *Johnston v. Knight*, 117 N. Car. 122; *Lee v. Baird*, 132 N. Car. 755.

*Pennsylvania*. — *Crawford's Estate*, 17 Pa. Super. Ct. 170; *Priester's Estate*, 23 Pa. Super. Ct. 386; *Bender's Appeal*, 3 Grant Cas. (Pa.) 210.

*Rhode Island*. — *Swineburne's Petition*, 16 R. I. 208.

In *Minter's Appeal*, 40 Pa. St. 111, it was said: "The testator says 'share and share alike among the children of my brother A., and the children of my brother M., and to my sister B.,' and by thus expressing himself he seems to make three classes and three equal shares. In another clause he leaves his thought more doubtful. What then can we do but resort to the usual distribution of the law for an analogy to help us? When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly. This would classify the legatees as he seems to have done, and as the court below did, and allows the three classes to take as their parents would have done; thus they themselves take by a *quasi* representation and *per stirpes*. If he meant that his nephews should be each equal

to his sisters, the word 'each' would have made his meaning clear."

2. Presumption from Use of "Heirs, etc." — *Johnson v. Bodine*, 108 Iowa 594; *Matter of U. S. Trust Co.*, (Surrogate Ct.) 36 Misc. (N. Y.) 378; *Matter of Allen*, 81 Hun (N. Y.) 91, affirmed 151 N. Y. 243; *Harris's Estate*, 74 Pa. St. 452.

3. Erroneous Enumeration of Class.—*England*. *Stebbing v. Walkey*, 2 Bro. C. C. 85; *Garvey v. Hibbert*, 19 Ves. Jr. 125; *McKechie v. Vaughan*, L. R. 15 Eq. 289; *Berkeley v. Palling*, 1 Russ. 496; *Lane v. Green*, 4 De G. & Sm. 239; *Daniell v. Daniell*, 3 De G. & Sm. 337; *Harrison v. Harrison*, 1 Russ. & M. 72; *Lee v. Pain*, 4 Hare 249; *Morrison v. Martin*, 5 Hare 507; *Yeats v. Yeats*, 16 Beav. 170; *Newman v. Piercey*, 4 Ch. D. 41. See also *Newman v. Piercey*, 4 Ch. D. 46; *Lee v. Lee*, 10 Jur. N. S. 1041; *Spencer v. Ward*, L. R. 9 Eq. 507; *In re Bassett*, L. R. 14 Eq. 54; *Selsey v. Lake*, 1 Beav. 151.

*Maryland*. — *Thompson v. Young*, 25 Md. 450.

*New York*. — *Kalbfleisch v. Kalbfleisch*, 67 N. Y. 360.

*North Carolina*. — *Shepard v. Wright*, 5 Jones Eq. (58 N. Car.) 22.

*Pennsylvania*. — *Proctor's Estate*, 2 Pa. Dist. 474.

In *McMasters v. Shellito*, 14 Pa. Super. Ct. 303, it was said: "Where a testator devises to the sons or daughters of a person named, and incorrectly speaks of them as being of a particular number, the number mentioned will be disregarded and all who fall within the class, whatever their actual number, will take under the devise."

Illustration. — A testator, in the eighth item of his will, bequeathed to his grandson by name the sum of \$500, "in addition to his share of the residue" of his estate as thereafter given. In the thirteenth item he bequeathed to him by name a gold watch and certain stock. In the twelfth item he provided: "As to all the rest and residue of my estate, real and personal," etc., "I give and bequeath the same to be divided equally *per capita* between my grandchildren as follows, to wit, the children of my deceased daughter, Sarah, except, etc.; the children of my deceased daughter, Jane, except, etc.; the child of my deceased daughter, Catherine Culbertson, etc.; they, however, to receive only such portion of this residue as shall be necessary to equalize them with the bequests with my other grandchildren, estimating the bequests heretofore given to their mother and them." Catherine had two children, viz., a son, the devisee of the eighth and thirteenth items, and a daughter, who was one of the plaintiffs.



that there has been a mere slip in expression, and the fact that the testator knew the true number is not sufficient reason for departing therefrom.<sup>1</sup> But the rule applies only where it appears from the will itself that it was the testator's intention to benefit the whole class.<sup>2</sup> If the number mentioned by the testator agrees with the number existing at the date of the will, there is no reason to extend the gift to an after-born child.<sup>3</sup>

**15. Quantity of Interest Passing** — *a. CONSIDERATIONS COMMON TO REALTY AND PERSONALTY* — (1) *Entire Interest of Testator Construed to Pass.* — On account of the disfavor with which the law regards partial intestacy it will be presumed, as a rule, that the testator, in devising or bequeathing his property, disposed of his entire interest therein.<sup>4</sup>

*Language Covering Greater Interest than Testator Possessed.* — The fact that the language used in a will purports to dispose of an interest greater than the testator possessed in the property does not defeat the devise or bequest, but the will is effectual to dispose of such an interest as the testator had to give.<sup>5</sup>

(2) *Effect of Particular Provisions* — (a) *In General.* — The rule is fundamental that the intention of the testator will, if possible, be ascertained from all the provisions of the will, viewed in the light of the circumstances of the maker at the time the testament was executed, and that the intention, when thus ascertained, will be carried out, if not in opposition to law, public policy, or some fixed rule of property.<sup>6</sup> The testator may not know, and need not in terms declare, whether the estate to be taken shall be a fee, a life estate, or other interest, but if he makes apparent the quality and characteristics of the estate he intends to convey, it will be given a name and vitality, if not contrary to law.<sup>7</sup> In pursuance of this principle, the courts, in determining the interest or estate which passes, have interpreted certain testamentary provisions with such uniformity that these provisions possess almost the same legal force and significance as apt technical language, and the interpretations

It was held that the daughter was entitled as well as the son to a part of the residuary estate. *Urie v. Irvine*, 21 Pa. St. 310.

That a Blank Is Left for the insertion of the names of the legatees makes no difference. *McKechnie v. Vaughan*, L. R. 15 Eq. 289.

**Evidence of Intention Is Not Admissible** to show that the testator meant certain of his children, or the children of a particular marriage, who may correspond in number with the number mentioned in the will. *Daniell v. Daniell*, 3 De G. & Sm. 337; *Matthews v. Foulshaw*, 12 W. R. 1141.

**1. Ground for Rule.**—*Daniell v. Daniell*, 3 De G. & Sm. 337; *Scott v. Fenoulhett*, 1 Cox Ch. 79. See also *Harrison v. Harrison*, 1 Russ. & M. 72.

**2. Intention of Testator Controls.**—*Lane v. Green*, 4 De G. & Sm. 239; *Wrightson v. Calvert*, 1 Johns. & H. 250; *In re Stephenson*, (1897) 1 Ch. 75.

**3. Where Number Correct at Date of Will.**—*Sherer v. Bishop*, 4 Bro. C. C. 55; *In re Emery*, 3 Ch. D. 300.

**Child en Ventre at Date of Will Takes Nothing.**—*In re Emery*, 3 Ch. D. 300.

**Omission and Repetition.**—When the testator gives the correct number of children, but in naming them omits one and repeats the name of another, all take. *Garth v. Meyrick*, 1 Bro. C. C. 30; *Eddels v. Johnson*, 1 Giff. 22.

And when the residue is given to the testator's seven children, but only six are named, all seven share in the property. *Humphreys v. Humphreys*, 2 Cox Ch. 184.

**4. Entire Interest of Testator Passing**—*England.*—*Jenings v. Baily*, 17 Beav. 118; *In re Lowman*, (1895) 2 Ch. 348, 72 L. T. N. S. 816; *Wadley v. North*, 3 Ves. Jr. 367.

*Canada.*—*Matter of Chapman*, 4 Ont. L. Rep. 130.

*Georgia.*—*Ford v. Gill*, 109 Ga. 691.

*Indiana.*—*Mills v. Franklin*, 128 Ind. 444; *Hammond v. Croxton*, (Ind. App. 1901) 61 N. E. Rep. 596.

*Kentucky.*—*Miller v. Tilton*, (Ky. 1899) 49 S. W. Rep. 967.

*New Jersey.*—*Yawger v. Yawger*, 37 N. J. Eq. 218; *Carter v. Gray*, 58 N. J. Eq. 411.

*New York.*—*Vernon v. Vernon*, 53 N. Y. 361.

*North Carolina.*—*Turner v. Kittrell*, 1 Winst. Eq. (60 N. Car.) 39.

*Pennsylvania.*—*Schuldt v. Herbine*, 3 Pa. Super. Ct. 65.

See *supra*, this section, *General Rules of Interpretation*—*Presumption Against Partial Intestacy*. And see *infra*, this subsection, *Estates in Fee and for Life*—*Sufficiency of Language to Pass the Fee*.

**5. Crosgrove v. Crosgrove**, 69 Conn. 416.

**6. Intention Prevails if Not in Contravention of Rules of Property.**—*Rock River Paper Mill Co. v. Fisk*, 47 Mich. 212; *Barnes v. Marshall*, 102 Mich. 248; *Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138; *In re Kopmeier*, 113 Wis. 233. See *supra*, this section, *General Rules of Interpretation*—*Entire Will to Be Considered*.

**7. In re Kopmeier**, 113 Wis. 233.

given have come to be fixed rules of testamentary construction. The more important of these rules are applicable alike to devises and bequests, and are discussed immediately following.

(b) **Power of Disposition and Control** — *aa. GENERAL DEVISES AND BEQUESTS.* — It is a general rule that where an estate in real and personal property is given to a person generally with an unlimited power of disposition and control, a fee in the real estate, and an absolute interest in the personal property, pass to the devisee or legatee.<sup>1</sup> So, too, if the language of the will leaves it in doubt whether a life estate or fee was intended, the power of disposal is generally regarded as conclusive in favor of the fee.<sup>2</sup> Accordingly, since a remainder or executory interest, though intended by the testator, cannot be created in a thing which is already absolutely disposed of, a limitation over after a general gift with an absolute power of disposal in the first taker is void.<sup>3</sup> This rule applies to both real and personal property.<sup>4</sup> It is, however, not a rule of positive law, but merely a rule of intention.<sup>5</sup>

**Implied Power of Sale.** — The power to sell will be implied from words in the will clearly indicating that such was the testator's intention, such as limitations over of "whatever shall remain," or property "not otherwise disposed of," or "in case anything be left."<sup>6</sup> But such words do not always imply a

**1. General Gift with Unlimited Power of Disposition** — *England.* — *Timewell v. Perkins*, 2 Atk. 102; *Goodtitle v. Otway*, 2 Wils. C. Pl. 6. *Alabama.* — *Allen v. White*, 16 Ala. 181; *Flinn v. Davis*, 18 Ala. 132; *Randall v. Shrader*, 20 Ala. 338; *Whorton v. Moragne*, 62 Ala. 201.

*Arkansas.* — *Byrne v. Weller*, 61 Ark. 366.

*Georgia.* — *Hollingshed v. Alston*, 13 Ga. 277.

*Illinois.* — *Muhlke v. Tiedemann*, 177 Ill. 606.

*Indiana.* — *Hammond v. Croxton*, (Ind. App. 1901) 61 N. E. Rep. 596; *Logan v. Sills*, 28 Ind. App. 170.

*Iowa.* — *Lowrie v. Ryland*, 65 Iowa 584; *Jordan v. Woodin*, 93 Iowa 453.

*Kansas.* — *McNutt v. McComb*, 61 Kan. 25.

*Kentucky.* — *Lillard v. Robinson*, 3 Litt. (Ky.) 415. See also *Constantine v. Moore*, (Ky. 1901) 62 S. W. Rep. 1016.

*Maine.* — *Ramsdell v. Ramsdell*, 21 Me. 288.

*Maryland.* — *Benesch v. Clark*, 49 Md. 497.

*Massachusetts.* — *Bassett v. Nickerson*, 184 Mass. 169; *Spooner v. Lovejoy*, 108 Mass. 529; *Todd v. Sawyer*, 147 Mass. 570; *Veeder v. Meader*, 157 Mass. 413; *Lloyd v. Lloyd*, 173 Mass. 97.

*New York.* — *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Mersereau v. Camp*, (Supm Ct. Spec T.) 42 Misc. (N. Y.) 253; *Matter of Palmer*, 85 N. Y. App. Div. 117.

*Pennsylvania.* — *Kinter v. Jenks*, 43 Pa. St. 445; *Kiefel v. Keppler*, 173 Pa. St. 181.

*Rhode Island.* — *Carpenter v. Brown*, 6 R. I. 383.

*South Carolina.* — *Dunlap v. Garlington*, 17 S. Car. 567; *Charleston Nat. Banking Assoc. v. Dowling*, 52 S. Car. 345.

*Tennessee.* — *Wooten v. Reed*, (Tenn. Ch. 1899) 53 S. W. Rep. 991.

*Vermont.* — *Stowell v. Hastings*, 59 Vt. 494.

*West Virginia.* — *Baker v. Baker*, 53 W. Va. 165.

**Use of Property in Uncontrolled Discretion.** — Where the will read, "I give and bequeath to my beloved wife all my property, both real and personal and mixed and of every kind, man-

ner, and nature, to use to her own use and benefit, as she shall deem best," the wife took an absolute title. *Bulfer v. Willigrod*, 71 Iowa 620. To the same effect see *In re Barrett*, 111 Iowa 570.

**2. Power of Disposal Conclusive Where Estate Doubtful.** — *Lewis v. Palmer*, 46 Conn. 454; *Dills v. Adams*, (Ky. 1897) 43 S. W. Rep. 680; *Harris v. Knapp*, 21 Pick. (Mass.) 412; *Burbank v. Whiting*, 24 Pick. (Mass.) 146; *Smith v. Jackman*, 115 Mich. 192; *Jackson v. Coleman*, 2 Johns. (N. Y.) 391; *Helmer v. Shoemaker*, 22 Wend. (N. Y.) 137.

**3. Subsequent Limitation Defeated by Power of Disposition** — *Georgia.* — *Cook v. Walker*, 15 Ga. 457.

*Illinois.* — *Wolfer v. Hemmer*, 144 Ill. 554.

*Indiana.* — *Van Gorder v. Smith*, 99 Ind. 404; *Outland v. Bowen*, 115 Ind. 150; *Essick v. Caple*, 131 Ind. 207; *Cain v. Robertson*, 27 Ind. App. 198; *Mulvane v. Rude*, 146 Ind. 476; *Hammond v. Croxton*, (Ind. App. 1901) 61 N. E. Rep. 596.

*Iowa.* — *Law v. Douglass*, 107 Iowa 606.

*Maryland.* — *Combs v. Combs*, 67 Md. 17.

*New Jersey.* — *Dodson v. Sevars*, 52 N. J. Eq. 611.

*New York.* — *Banzer v. Banzer*, (C. Pl. Eq. T.) 10 Misc. (N. Y.) 24.

*Rhode Island.* — *Re Kimball*, 20 R. I. 619.

*Tennessee.* — *Pillow v. Rye*, 1 Swan (Tenn.) 185; *Meacham v. Graham*, 98 Tenn. 190.

The *Alabama Statute* provides that when a power of disposition is given to any person to whom no particular estate is limited, such person takes a fee subject to any future estate which may be limited thereon. *Hood v. Bramlett*, 105 Ala. 660.

**4. Rule Applicable to Both Realty and Personalty.** — *Ide v. Ide*, 5 Mass. 500; *Merrill v. Emery*, 10 Pick. (Mass.) 507; *Bassett v. Nickerson*, 184 Mass. 169.

**5. Rule of Intention Only.** — *Zimmerman's Estate*, 23 Pa. Super. Ct. 130.

**6. Implied Power of Sale** — *Alabama.* — *Evins v. Cawthon*, 132 Ala. 184.

*Illinois.* — *Henderson v. Blackburn*, 104 Ill.

power of disposition. They may refer only to natural losses and not to property to be disposed of by the legatee or devisee.<sup>1</sup>

*bb. DEFINITE DEVISES AND BEQUESTS.*—Where the quantity of the estate is devised definitely and specifically, the rule that a devise coupled with an unlimited power of disposition and control carries an absolute interest in the property has no application, and only a life estate coupled with a power of disposal passes.<sup>2</sup> This power, it has been adjudged, is only coextensive with

227; *In re Cashman*, 134 Ill. 88; *Skinner v. McDowell*, 169 Ill. 365; *Saeger v. Bode*, 181 Ill. 514; *Dalrymple v. Leach*, 192 Ill. 51.

*Indiana.*—*Cain v. Robertson*, 27 Ind. App. 198.

*Maine.*—*Ramsdell v. Ramsdell*, 21 Me. 288.

*Massachusetts.*—*Harris v. Knapp*, 21 Pick. (Mass.) 412.

*New York.*—*Thomas v. Wolford*, 49 Hun (N. Y.) 145; *Leggett v. Firth*, 132 N. Y. 7.

*Virginia.*—*Robertson v. Hardy*, (Va. 1895) 23 S. E. Rep. 766.

*Canada.*—*Bissett v. Taylor*, 35 Nova Scotia 440.

**Instance of Implied Power to Sell.**—Where the words of the will were, "But should she die without issue and leave any property at her death given by this will," then over, it was held that an implied power of sale was given and that the devisee acquired a fee in the property. *Galloway v. Durham*, (Ky. 1904) 81 S. W. Rep. 650.

**1. Words Referring to Natural Losses Only.**—Where a testator, after providing for the payment of his debts, gave "the remainder that is left" to his wife "during her natural lifetime," describing the property as lands, moneys, notes, bonds, and all kinds of personal property, "to go to her, for her to have full control of the same, as long as she lives, and that after her death what is left" to go to other designated persons, it was held that the words "what is left" had reference only to natural losses and did not impliedly confer a power of disposal which would make the interest of the first taker absolute. *Bramell v. Cole*, 136 Mo. 201; *Bramell v. Adams*, 146 Mo. 70. See also *Matter of Skinner*, 81 N. Y. App. Div. 449; *Burns v. Burns*, (Mich. 1903) 93 N. W. Rep. 1077.

**2. Definite Devise for Life Not Enlarged to Absolute Interest by Power of Disposal.**—*England.*—Anonymous, 3 Leon. 71; *Reith v. Seymour*, 4 Russ. 263; *Thomlinson v. Dighton*, 1 Salk. 239; *Reid v. Shergold*, 10 Ves. Jr. 370; *In re Sanford*, (1901) 1 Ch. 939, 84 L. T. N. S. 456.

*California.*—*Morffew v. San Francisco, etc., R. Co.*, 107 Cal. 587.

*Georgia.*—*Hollingshed v. Alston*, 13 Ga. 277.

*Illinois.*—*Welsh v. Belleville Sav. Bank*, 94 Ill. 206; *Henderson v. Blackburn*, 104 Ill. 227; *Hamlin v. U. S. Express Co.*, 107 Ill. 443; *Skinner v. McDowell*, 169 Ill. 365; *Mann v. Martin*, 172 Ill. 18; *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350, *affirming* 111 Ill. App. 183; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144.

*Indiana.*—*Downie v. Buennagel*, 94 Ind. 228; *Wood v. Robertson*, 113 Ind. 323; *Wiley v. Gregory*, 135 Ind. 647; *Rogers v. Winklespleck*, 143 Ind. 373; *Mulvane v. Rude*, 146 Ind. 476; *Rusk v. Zuck*, 147 Ind. 388.

*Iowa.*—*Podaril v. Clark*, 118 Iowa 264.

*Kentucky.*—*Gibson v. Dubourg*, (Ky. 1900) 57 S. W. Rep. 240.

*Maryland.*—*Benesch v. Clark*, 49 Md. 497; *Foos v. Scarf*, 55 Md. 310; *Smith v. Hardesty*, 88 Md. 387; *Mills v. Bailey*, 88 Md. 320.

*Massachusetts.*—*Collins v. Wickwire*, 162 Mass. 143; *Bassett v. Nickerson*, 184 Mass. 169.

*Minnesota.*—*Semper v. Coates*, (Minn. 1904) 100 N. W. Rep. 662.

*Missouri.*—*Evans v. Folks*, 135 Mo. 397; *Underwood v. Cave*, 176 Mo. 1.

*New Hampshire.*—*Langley v. Tilton*, 67 N. H. 88.

*New Jersey.*—*Robeson v. Shotwell*, 55 N. J. Eq. 318, *affirmed* 55 N. J. Eq. 824, 41 Atl. Rep. 1115.

*New York.*—*Jackson v. Robins*, 16 Johns. (N. Y.) 586; *Thomas v. Wolford*, 49 Hun (N. Y.) 145; *Terry v. Wiggins*, 47 N. Y. 512; *Leggett v. Firth*, 132 N. Y. 7.

*Pennsylvania.*—*Gross v. Strominger*, 178 Pa. St. 64.

*South Carolina.*—*Dye v. Beaver Creek Church*, 48 S. Car. 444.

*Wisconsin.*—*Derse v. Derse*, 103 Wis. 113.

**Distinction Discussed.**—"The distinction is perhaps slight which exists between a gift for life, with a power or disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But the distinction is perfectly established that in the latter case the property vests. A gift to A and to such persons as he shall appoint is absolutely property in A without any appointment. But if it is to him for life and after his death to such person as he shall appoint by will, he must make an appointment to entitle that person to anything." *Bradly v. Westcott*, 13 Ves. Jr. 453, *per* Sir William Grant.

**Property Made Liable for Debts by Power of Disposal.**—*Kenny v. Keplinger*, 89 Ill. App. 570; *Small v. Thompson*, 92 Me. 539.

**Life Estate in Money Without Bond or Trustee.**

—Where a sum of money was devised for life with a remainder over, the fact that no trustee was interposed for the protection of the fund and that no bond was required before payment to the life tenant does not give the legatee an unlimited power of disposition so as to destroy the estate in remainder. *Cook v. Collier*, (Tenn. Ch. 1901) 62 S. W. Rep. 658.

**New York, Alabama, and Minnesota Statutes.**—In some states it is provided by statute that where an absolute power of disposition not accompanied by a trust is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and incumbrancers, but subject to any future estates limited thereon in case the power of absolute disposition is not executed and the property is not sold for the satisfaction of debts, during the



the estate which the devisee takes under the will, and means only such disposal as a tenant for life could make.<sup>1</sup> It is clear, however, that by appropriate expressions of intent the power will not refer merely to the life interest of the first taker, but will give him a life estate coupled with a power to dispose of the entire estate absolutely, which power, if exercised during his lifetime, is effective to pass a fee or absolute interest in the estate to his purchaser or legatee;<sup>2</sup> but if such a power is not exercised during the life of the devisee, the estate will go to the heirs or next of kin of the testator as intestate property,<sup>3</sup> or to the remainderman named in the will in case such a remainder has been created;<sup>4</sup> for it is well settled that a power of sale or testamentary disposition in the life tenant does not necessarily defeat a remainder or executory interest.<sup>5</sup>

**Contrary View.**—A view contrary to the doctrine just stated has been announced. In some jurisdictions the rule is that if the first taker is given

continuance of such particular estate. *Dobsworth v. Dam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 684; *Deegan v. Wade*, 144 N. Y. 573; *Hume v. Randall*, 141 N. Y. 499; *Hood v. Bramlett*, 105 Ala. 660; *Smith v. Phillips*, 131 Ala. 629. See also *Hershey v. Meeker County Bank*, 71 Minn. 255; *Ashton v. Great Northern R. Co.*, 78 Minn. 201.

Under the *Alabama* statute, the future estates to which the prior estate is declared to be subject must be expressly limited and cannot rest upon mere implication. *Young v. Sheldon*, 139 Ala. 444.

**Intrusting Care of Fund.**—The fact that the care of a certain fund is intrusted to the legatee of a life interest therein, does not enlarge his interest. *Snider v. Snider*, 11 N. Y. App. Div. 171.

**1. Power Only Coextensive with Estate of Life Tenant.**—*Kaufman v. Breckinridge*, 117 Ill. 313; *In re Cashman*, 134 Ill. 88; *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350, affirming 111 Ill. App. 183; *Russell v. Werntz*, 88 Md. 210.

**2. Power to Dispose of Fee Expressly Intended to Be Conferred**—*United States*.—*Roberts v. Lewis*, 153 U. S. 367.

*Alabama*.—*Cain v. Cain*, 127 Ala. 440.

*Illinois*.—*Skinner v. McDowell*, 169 Ill. 365.

*Indiana*.—*Rinkenberger v. Meyer*, 155 Ind. 152.

*Iowa*.—*Spaan v. Anderson*, 115 Iowa 121; *Podaril v. Clark*, 118 Iowa 264.

*Kansas*.—*Ernst v. Forster*, 58 Kan. 438.

*Kentucky*.—*Graham v. Botner*, (Ky. 1896) 37 S. W. Rep. 583.

*Massachusetts*.—*Harris v. Knapp*, 21 Pick. (Mass.) 412; *Dodge v. Moore*, 100 Mass. 335; *Hale v. Marsh*, 100 Mass. 468; *Cummings v. Shaw*, 108 Mass. 159; *Woodbridge v. Jones*, 183 Mass. 549; *Sawin v. Cormier*, 179 Mass. 420.

*Missouri*.—*Underwood v. Cave*, 176 Mo. 1.

*New York*.—See *Simmons v. Taylor*, 19 N. Y. App. Div. 499.

*Pennsylvania*.—*Tibben's Estate*, 8 Pa. Dist. 234; *Henninger v. Henninger*, 202 Pa. St. 207; *Yetzer v. Brisse*, 190 Pa. St. 346.

*Tennessee*.—*Young v. Mutual L. Ins. Co.*, 101 Tenn. 311.

*Texas*.—*Davis v. Kirksey*, 14 Tex. Civ. App. 380; *Livingston v. Koenig*, 20 Tex. Civ. App. 398.

*West Virginia*.—*Englerth v. Kellar*, 50 W. Va. 259.

**Power of Disposition During Life but Not by Will.**—*Minges v. Mathewson*, 66 N. Y. App. Div. 379; *Keniston v. Mayhew*, 169 Mass. 166.

**Power of Disposition During Widowhood.**—Where a testator devised and bequeathed to his wife "all my estate, real and personal, of which I die seized, the same to be and remain hers, with full power, right, and authority to dispose of the same as shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike," the widow was held to take an estate, which, during her widowhood, she could convey in fee simple. *Roberts v. Lewis*, 153 U. S. 367, overruling *Giles v. Little*, 104 U. S. 291.

**3. Descent to Heirs as Intestate Property.**—*Adams v. Lillibridge*, 73 Conn. 655; *Pate v. Barrett*, 2 Dana (Ky.) 427; *Fogler v. Titcomb*, 92 Me. 184; *Benesch v. Clark*, 49 Md. 497; *Mills v. Bailey*, 88 Md. 320.

**Unexecuted Power of Appointment by Will.**—Where there is a gift to one for life with a general power of appointment by will, the power, though general, does not enlarge the life estate into an absolute interest, and nothing passes under the clause conferring the power unless it be executed. *Sires v. Sires*, 43 S. Car. 266.

**4. Estate Passing to Remainderman.**—*Kaufman v. Breckinridge*, 117 Ill. 305; *Skinner v. McDowell*, 169 Ill. 365; *Mann v. Martin*, 172 Ill. 18, affirming 69 Ill. App. 501; *McCullough v. Anderson*, 90 Ky. 127; *Saeger v. Bode*, 181 Ill. 514; *Mills v. Bailey*, 88 Md. 320; *Collins v. Wickwire*, 162 Mass. 143; *Bassett v. Nickerson*, 184 Mass. 169; *Langley v. Tilton*, 67 N. H. 88; *Tilton's Petition*, 21 R. I. 426.

**5. Future Interest Not Defeated by Power of Disposition in Life Tenant.**—*Whittaker v. Gutheridge*, 52 Ill. App. 460; *Wiley v. Gregory*, 135 Ind. 647; *Bowser v. Mattler*, 137 Ind. 649; *Payne v. Johnson*, 95 Ky. 175; *Lee v. Fidelity Trust, etc., Co.*, (Ky. 1900) 57 S. W. Rep. 239; *Brady v. Brady*, 78 Md. 461; *Baker v. Thompson*, 162 Mass. 40; *Chusky v. Burns*, 120 Mo. 567; *Murray v. Kluck*, 87 Wis. 566.

an estate for life, coupled with an unlimited power of disposition, the fee, or absolute estate, vests in the first taker, and any limitation over is void.<sup>1</sup> In some other jurisdictions this rule appears to have influenced the courts in the decision of certain cases.<sup>2</sup> In still another jurisdiction it has been held in regard to personal property, the court remaining noncommittal as to the doctrine applicable to real estate, that whenever a bequest of such property is made for life, with a full power of disposition, by will or otherwise, at the pleasure of the devisee, without limitation or restriction as to the time, mode, or purposes of the execution of the power, the life estate is controlled by the unlimited power of disposition and an absolute estate in the property is thereby created in the legatees;<sup>3</sup> and this rule seems to have met with some favor in isolated cases.<sup>4</sup>

**Property Consumed in Using.** — A bequest for life of articles of personal property which, in their very nature, will be consumed in using, gives the legatee an absolute instead of a life interest.<sup>5</sup> Where the property is of such a character that it is to be used but not necessarily consumed in the using, as household goods and furniture, farm stock, implements of husbandry, and the like, and there is no stipulation that the legatee shall not be liable for waste or depreciation, only a life estate will pass.<sup>6</sup> If, however, a bequest of such property be made with the declaration that the devisee is not to be impeached for waste nor be liable to account for any diminution or depreciation of the property bequeathed, the gift will be construed to be an absolute one, because the legatee might allow the entire bequest to deteriorate until it would become valueless without incurring any obligation to replace it or account for its loss.<sup>7</sup>

**1. Life Estate Converted into Fee by Power of Disposition.** — *Dills v. La Tour*, (Mich. 1904) 98 N. W. Rep. 1004; *Bradley v. Carnes*, 94 Tenn. 27, 45 Am. St. Rep. 696; *Hair v. Caldwell*, 109 Tenn. 148; *Madden v. Madden*, 2 Leigh (Va.) 377; *May v. Joynes*, 20 Gratt. (Va.) 692; *Farish v. Wayman*, 91 Va. 430; *Robertson v. Hardy*, (Va. 1895) 23 S. E. Rep. 766; *Honaker v. Duff*, 101 Va. 675; *Smith v. Schlegel*, 51 W. Va. 245.

**Devise Giving Exclusive Use and Control.** — A devise to the testator's wife, during her natural life, of certain real estate, to have "the exclusive use, control and management" thereof, will give her only a life estate. *Austin v. Hyndman*, 119 Mich. 615.

**2. Life Estate Apparently Made Absolute by Power of Disposition.** — *Hale v. Marsh*, 100 Mass. 468; *Lepley v. Smith*, 7 Ohio Cir. Dec. 264, 13 Ohio Cir. Ct. 189.

A *Pennsylvania* will was as follows: "I give and bequeath to my wife all the remainder of my estate whether real, personal or mixed, of which I may die seized or that I may be in any wise entitled to receive at present or remainder or reversion to have and enjoy during her natural life \* \* \* and further my wish and desire is that if it is my fortune to accumulate any more property real or personal or mixed shall fall wholly to my wife immediately after my decease, to have and to hold during her natural life with power to will and bequeath to whom she shall prefer to be transferred according to her desires after her decease." It was held that the wife took absolutely all the property possessed by the testator at his death. *Hardaker's Estate*, 204 Pa. St. 181.

**3. Unlimited Power of Disposition of Personalty**

**Transforming Express Life Estate into Absolute Estate.** — *Van Gorder v. Smith*, 99 Ind. 404. But see *Rusk v. Zuck*, 147 Ind. 388.

**4. Rule in Regard to Personalty Favored.** — *Irwin v. Farrer*, 19 Ves. Jr. 86; *Patty v. Goolsby*, 51 Ark. 61; *Turner v. Turner*, 3 Indian Ter. 582; *Cummings v. Shaw*, 108 Mass. 159; *Diehl's Appeal*, 36 Pa. St. 120.

**Life Estate in Money with Power to Use Corpus.** — A gift of money for life, with the power to use the corpus, and without the intervention of a trustee or any limitation over, is a gift absolute. *Hartman's Estate*, 11 Pa. Super. Ct. 35.

**5. Property Consumed in Using.** — *Phillips v. Beal*, 32 Beav. 25. Here a wine merchant possessed of a large stock of wine, by his will gave his property to his wife for life, with a remainder over at her death. It was held that the wife took absolutely the wine which the testator had for his private use, and only a life interest in that which was to be used for the purpose of trade.

In *Patty v. Goolsby*, 51 Ark. 61, it was held that a bequest of a life estate in personal property with remainder over gives the first taker, without any express power for that purpose, the absolute right to all perishable articles, or those like corn, wine, and other articles of food or drink, whose use consists in their consumption, and he may dispose of them at pleasure unless restrained by other provisions in the will.

See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 439.

**6. Goods Not Consumed in Using.** — *Myers v. Washbrook*, 8; *L. T. N. S. 671*; *Groves v. Wright*, 1 Kay & L. 417, 1 Jur. N. S. 777.

**7. Stipulation of Nonliability for Waste or De-**

... **WHETHER POWER OF DISPOSITION ABSOLUTE OR LIMITED.** — What is meant by the absolute power of disposition which makes the estate of the first taker absolute and defeats an executory devise, can best be ascertained by referring to the reason upon which the principle is founded. The executory interest is wholly exempted from the power of the first taker. If, therefore, there be an absolute power of disposition given by the will to the first taker, the devise over is void, because inconsistent with the absolute power of disposition in the first taker. The absolute power of disposition which defeats the limitation over is, therefore, a power to destroy it by alienation, and not merely a power to alien the estate vested in the first taker.<sup>1</sup> Moreover, the power of disposition must not only embrace the entire estate and every interest therein, but must leave entirely to the discretion of the legatee or devisee the manner of the disposition and the persons who are to be the objects thereof. A power of disposition by will only to the exclusion of the power of disposition during the lifetime of the legatee by sale or otherwise,<sup>2</sup> or a power of disposition during life to the exclusion of a power of testamentary disposition,<sup>3</sup> is only a limited power. Certainly, where the power of testamentary disposition is confined to certain designated objects, it is limited.<sup>4</sup> Likewise, if the purpose of the disposition is restricted, as that the sale of the property shall be for reinvestment only,<sup>5</sup> or for the necessary support or comfortable maintenance of the devisee,<sup>6</sup> the power cannot be said to be general or absolute

teriation. — *Breton v. Mockett*, 9 Ch. D. 95; *Myers v. Washbrook*, 83 L. T. N. S. 633.

**1. Whether Power or Disposition Absolute or Limited.** — *McRee v. Means*, 34 Ala. 349; *In re Banks*, 87 Md. 425; *Jackson v. Robins*, 16 Johns. (N. Y.) 585.

**2. No Power of Disposition Except by Will.** — *Honaker v. Duff*, 101 Va. 675. But see *Moseley v. Stewart*, (Tenn. Ch. 1899) 52 S. W. Rep. 671.

**In New York** the rule is that the power of disposition by will is a general beneficial power, and that a devise or bequest of property to one absolutely for life, with the power of disposition at death as the legatee or devisee may deem fit, confers an absolute power of disposition, and where no remainder is limited on the property the legatee or devisee takes an absolute estate. *Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 295; *New York L. Ins., etc., Co. v. Livingston*, 133 N. Y. 125; *Deegan v. Wade*, 144 N. Y. 573; *Matter of Moehring*, 154 N. Y. 423.

**3. No Power of Testamentary Disposition.** — *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144.

**Disposition Restricted to Sale During Life.** — Where the testator gave to the legatee his residuary estate "to be disposed of at her discretion; at her decease to go to my nearest kin," the power of disposition was limited to a sale during the life of the legatee and could not be executed by will. *Keniston v. Mayhew*, 169 Mass. 166.

**4. Power of Disposition Confined to Specified Persons.** — Where property is devised to a person for life with a limited power to devise it to certain specified persons, the devisee for life has no general power of testamentary disposition, and a devise to another person is void, although the persons to whom the property could have been devised under the will are all dead. *Smith v. Hardesty*, 88 Md. 387.

**Disposition Limited to Testator's Children.** — Where the testator gave to his wife all his

property with the power to dispose of the same among his children, only a life estate coupled with such limited power passed. *Degman v. Degman*, 98 Ky. 717. See also *Thayer v. Rivers*, 179 Mass. 280.

**5. Sale for Reinvestment Only.** — *Waller v. Martin*, 106 Tenn. 341.

**6. Disposition for Support and Maintenance — Connecticut.** — *Mansfield v. Shelton*, 67 Conn. 390; *Little v. Geer*, 69 Conn. 411.

**Iowa.** — *Baldwin v. Morford*, 117 Iowa 72; *Rowe v. Rowe*, 120 Iowa 17.

**Massachusetts.** — *Collins v. Wickwire*, 162 Mass. 143; *Morse v. Natick*, 176 Mass. 510.

**New Jersey.** — *Hunt v. Smith*, 58 N. J. Eq. 25.

**New York.** — *Matter of Weeden*, (Surrogate Ct.) 37 Misc. (N. Y.) 716; *Matter of Hunt*, (Surrogate Ct.) 38 Misc. (N. Y.) 30; *Swarthout v. Ranier*, 143 N. Y. 499.

**Ohio.** — *Johnson v. Johnson*, 51 Ohio St. 446.

**Pennsylvania.** — *Geist's Estate*, 193 Pa. St. 398.

**Tennessee.** — *Watson v. Watson*, (Tenn. Ch. 1900) 57 S. W. Rep. 385.

**Devises Construed to Confer Limited Power.** — Where a testator gave to his wife for life the beneficial enjoyment of the residue of his property during her life, and in connection with this gave her the right "to use and dispose of so much of the principal of said residuary estate during her lifetime as she should see fit," and she was not otherwise given any claim upon the principal fund or any right to resort to the principal of the residuary estate, it was held that only a limited power of disposition, such as would enable her to supply her necessary wants, was given her. *Terry v. St. Stephen's Protestant Episcopal Church*, 79 N. Y. App. Div. 527.

A gift of the residue of the testator's estate to his wife to use as she shall see fit, or so much of the same as she shall need for



in its nature, though it is absolute to the extent necessary for the purposes contemplated and is not restricted to a disposition of the life interest only.<sup>1</sup>

(c) **Charges** — *aa. AGAINST DEVISEE PERSONALLY.* — It is well settled that if one devise his estate to another who is charged with the payment of the testator's debts or with the payment of a sum in gross, an absolute interest must necessarily pass, because, as the devisee is personally charged with the payment of the debts or money in all events, and his interest may cease before he is repaid out of the estate, if it be only an estate for life, he may be a loser, which the testator cannot be supposed to have intended. The testator is therefore deemed to have devised an interest which will secure the payment of the debts or sum in gross by the devisee without the hazard of loss on his part.<sup>2</sup> This rule applies only to cases where the devise is so indefinite that the intention of the testator cannot be easily ascertained, and not where the estate is devised in fee simple by appropriate language.<sup>3</sup>

*bb. ON PROPERTY DEVISED OR BEQUEATHED.* — Where, however, the charge is on the property or on the rents or profits instead of the person of the devisee or legatee, the rule has no application.<sup>4</sup>

(d) **Limitations Over** — *aa. UNCERTAIN ESTATES.* — In ascertaining the estate taken, when by the terms of the devise the quantity of the estate is left in doubt, the fact that there is or is not a limitation over is an important consideration in arriving at the testator's true intention. A limitation over is generally held to restrict to an interest for life an estate in the first taker which is otherwise doubtful.<sup>5</sup> And where the gift is to a person and then to others

support, comfort, and maintenance during the whole term of her natural life, is not a gift of the property absolutely, nor of the earnings of the estate, and consequently she cannot remit interest due on a mortgage in favor of the estate. *In re Mallary*, 127 Mich. 119.

1. **Absolute Disposition for Purposes Expressed.** — *Martin v. Barnhill*, (Ky. 1900) 56 S. W. Rep. 160, (Ky. 1904) 77 S. W. Rep. 1097; *Barker v. Clark*, 72 N. H. 334.

2. **Charges Against Devisee Personally** — *England*. — *Moor v. Denn*, 2 B. & P. 249; *Colyer's Case*, 6 Coke 16.

*United States*. — *Wright v. Page*, 10 Wheat. (U. S.) 204; *Abbott v. Essex County*, 18 How. (U. S.) 202.

*Alabama*. — *Whorton v. Moragne*, 62 Ala. 201.

*Connecticut*. — *Little v. Geer*, 69 Conn. 411.

*District of Columbia*. — *McCaffrey v. Manogue*, 22 App. Cas. (D. C.) 385.

*Illinois*. — *McFarland v. McFarland*, 177 Ill. 208; *Parsons v. Millar*, 189 Ill. 107.

*Indiana*. — *Korf v. Gerichs*, 145 Ind. 134.

*Kansas*. — *Donohue v. Donohue*, 54 Kan. 136.

*Maine*. — *McLellan v. Turner*, 15 Me. 436; *Varney v. Stevens*, 22 Me. 331.

*Maryland*. — *Snyder v. Nesbitt*, 77 Md. 576.

*Massachusetts*. — *Wait v. Belding*, 24 Pick. (Mass.) 129.

*New York*. — *Jackson v. Bull*, 10 Johns. (N. Y.) 148; *Heard v. Horton*, 1 Den. (N. Y.) 165; *Harvey v. Olmsted*, 1 N. Y. 483.

**Charge by Stating Purposes of Gift.** — Where a legacy is given to a person with the express purpose that it is to be used to better enable him to maintain, educate, and provide for his family, he takes an absolute interest which is not reduced by precatory language. *Holder*

*v. Holder*, 40 N. Y. App. Div. 255; *Clarke v. Leupp*, 88 N. Y. 228.

3. **Rule Applicable Only to Indefinite Devise.** — *Walker v. Walker*, 11 Ohio Cir. Dec. 291, in which it was held that a will, which by one provision gives the testator's children land in fee simple and by another imposes upon the devisees the burden of making a large payment of money to his executors to be used in the payment of legacies to other children, and for the payment of the debts of the testator, will not be construed as indicating an intention on the part of the testator to give a fee simple title to the land subject only to the charges imposed.

4. **Charge on Property.** — *Henry v. Pittsburgh Clay Mfg. Co.*, (C. C. A.) 80 Fed. Rep. 485; *McLellan v. Turner*, 15 Me. 436; *Varney v. Stevens*, 22 Me. 331; *Snyder v. Nesbitt*, 77 Md. 576; *Harvey v. Olmsted*, 1 N. Y. 483; *Jackson v. Bull*, 10 Johns. (N. Y.) 148; *Fox v. Phelps*, 17 Wend. (N. Y.) 393.

5. **Life Estate Resulting from Limitation Over** — *Illinois*. — *Healy v. Eastlake*, 152 Ill. 424; *Lombard v. Witbeck*, 173 Ill. 396. See also *Bowerman v. Sessel*, 191 Ill. 651.

*Indiana*. — *Fenstermaker v. Holman*, 158 Ind. 71; *Koons v. Manifold*, 27 Ind. App. 643; *Hammond v. Croxton*, (Ind. 1903) 69 N. E. Rep. 250, rehearing denied (1904) 70 N. E. Rep. 368; *Shannon v. Bonham*, 27 Ind. App. 369.

*Iowa*. — *Rice v. Moyer*, 97 Iowa 96; *Hambel v. Hambel*, (Iowa 1898) 75 N. W. Rep. 673.

*Kentucky*. — *Loeb v. Struck*, (Ky. 1897) 42 S. W. Rep. 401.

*Maine*. — *Hatch v. Caine*, 86 Me. 282.

*Massachusetts*. — *Chase v. Ladd*, 153 Mass. 126; *Kent v. Morrison*, 153 Mass. 137.

*Michigan*. — *Cousino v. Cousino*, 86 Mich. 323; *Defreese v. Lake*, 109 Mich. 415; *In re Mallary*, 127 Mich. 119.

in words of purchase and not words of limitation, as to his "children,"<sup>1</sup> or "descendants,"<sup>2</sup> a life estate passes to the first taker with a remainder in fee over. On the other hand, the circumstance that there is no limitation over is a circumstance in favor of construing a devise to be absolute.<sup>3</sup> That a general and indefinite devise is made presumptively absolute by statute will not cause an absolute estate to pass in the face of a limitation over.<sup>4</sup>

*bb. ABSOLUTE ESTATES.* — When there is an absolute and unlimited devise or bequest of property, a subsequent clause imposing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit the estate or interest in the property to the right of possession and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language only;<sup>5</sup> or, if the limitation over is in language so express and positive that it cannot be disposed of by such a construction, the limitation over will be adjudged repugnant and void.<sup>6</sup> But the doctrine of repugnancy applies only if the first legatee or devisee survives the testator, and has no application to gifts that fail; for the doctrine does not come into operation until somebody takes, and it is only those limitations which defeat the interest someone takes that are void on the ground that they are inconsistent with what is given to him.<sup>7</sup>

**Absolute Gift Cut Down by Subsequent Limitation.** — It has been held that notwithstanding a gift is absolute, where the testator gives the remainder of the estate

*New Hampshire.* — Langley v. Tilton, 67 N. H. 88; Miller v. Lamprey, 68 N. H. 376.

*New York.* — Owens v. Owens, 64 N. Y. App. Div. 212; Matter of Talmage, 32 N. Y. App. Div. 10, affirmed 160 N. Y. 704; Matter of Grover, (Surrogate Ct.) 12 Misc. (N. Y.) 629; Schmeig v. Kochersberger, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 617.

*Ohio.* — See Hull v. Hull, 9 Ohio Cir. Dec. 19, 16 Ohio Cir. Ct. 688.

*Pennsylvania.* — Noble's Estate, 182 Pa. St. 188; Tyson's Estate, 191 Pa. St. 218; *In re Shade*, 194 Pa. St. 599; Byer's Estate, 11 York Leg. Rec. (Pa.) 85; Kraemer v. Guarantee Trust, etc., Co., 1 Pa. Super. Ct. 4.

*Tennessee.* — Young v. Mutual L. Ins. Co., 101 Tenn. 311.

*Texas.* — Sprinkle v. Leslie, (Tex. Civ. App. 1904) 81 S. W. Rep. 1018.

*Vermont.* — *In re Keniston*, 73 Vt. 75.

*Wisconsin.* — *In re Stuart*, 115 Wis. 294.

**1. Gift Over in Words of Purchase.** — Forest Oil Co. v. Erskine, (C. C. A.) 83 Fed. Rep. 109, following Forest Oil Co. v. Crawford, (C. C. A.) 77 Fed. Rep. 106; Adams v. Adams, (Ky. 1898) 47 S. W. Rep. 335; Reynolds v. Reynolds, 65 S. Car. 390.

**2.** *In re Wain*, 189 Pa. St. 631.

See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 374.

**3. Absolute Interest Favored by Absence of Limitation Over.** — Huber's Appeal, 80 Pa. St. 348; *In re Engel*, 180 Pa. St. 215; Wilkinson v. Chambers, 181 Pa. St. 437.

**4. Statutory Presumption of Absolute Estate Overcome by Gift Over.** — Thomas v. Miller, 161 Ill. 60; Griffiths v. Griffiths, 198 Ill. 632; Patterson v. Madden, (N. J. 1895) 33 Atl. Rep. 51; Kiersted v. Smith, 10 Ohio Dec. 279; Grubb's Estate, 5 Pa. Dist. 422.

**5. Limitation Over Merely Precatory.** — *In re Jones*, (1898) 1 Ch. 438, 78 L. T. N. S. 74;

*Bills v. Bills*, 80 Iowa 270; *Jordan v. Woodin*, 93 Iowa 453; *Stivers v. Gardner*, 88 Iowa 307; *Grindem v. Grindem*, 89 Iowa 295; *Barth v. Barth*, (Ky. 1897) 38 S. W. Rep. 511; *Cox v. Anderson*, (Ky. 1902) 69 S. W. Rep. 953; *Reeves v. School Dist.*, No. 59, 24 Wash. 282.

**Bequest of Personality in Trust.** — A bequest of personality to a trustee for the use and benefit of another, without words of restriction, vests the absolute property in the fund bequeathed in the beneficiary, and words of limitation over are construed to be in harmony with the general intent of the testator to give an absolute property, if they can be reconciled with it. *Martin v. Fort*, (C. C. A.) 83 Fed. Rep. 19.

**6. Limitation Over Repugnant and Void** — *England.* — Weale v. Ollive, 32 Beav. 421; *In re Jones*, (1898) 1 Ch. 438, 78 L. T. N. S. 74.

*United States.* — Howard v. Carusi, 109 U. S. 725; McClellan v. Mackenzie, (C. C. A.) 126 Fed. Rep. 701.

*Connecticut.* — Mansfield v. Shelton, 67 Conn. 390; Central M. E. Church v. Harris, 62 Conn. 93; Browning v. Southworth, 71 Conn. 224.

*Illinois.* — Wilson v. Turner, 164 Ill. 398, reversing 55 Ill. App. 543; Kohtz v. Eldred, 208 Ill. 60.

*Indiana.* — Mulvane v. Rude, 146 Ind. 476.

*Iowa.* — Channell v. Aldinger, 121 Iowa 297.

*Nebraska.* — Spencer v. Scovill, (Neb. 1903) 96 N. W. Rep. 1016.

*New York.* — Snedeker v. Congdon, 41 N. Y. App. Div. 433; Mersereau v. Camp, 92 N. Y. App. Div. 616, affirming 42 Misc. (N. Y.) 253.

*Pennsylvania.* — Gilchrist v. Empfield, 194 Pa. St. 397.

*Rhode Island.* — Cooke v. Bucklin, 18 R. I. 666.

*Virginia.* — Brown v. Strother, (Va. 1903) 47 S. E. Rep. 236.

**7. Necessity that First Estate Shall Vest.** —

over with as much clearness as the preceding words give the absolute estate, the intention of the testator is manifested as much by the last clause as by the first, and both clauses are equally operative and alike claim the attention of those who may construe the will, and the last may no more be disregarded than the first;<sup>1</sup> the question whether the primary gift is in fee, so as to exhaust the entire estate, being one to be decided in each case upon a careful examination of the entire will, aided by legitimate extrinsic evidence, to ascertain the actual intent of the testator, which intent when so discovered and made obvious is controlling.<sup>2</sup>

(e) **Gift of Rents and Profits or Income.** — A gift of the income of personal property or of the rents and profits of land, perpetually or without limit as to time, carries the personal property absolutely or the lands in fee simple.<sup>3</sup> Likewise a gift of the income of property with a power of disposition by will confers an absolute interest in the property;<sup>4</sup> and a gift of the income to a person for life and then over indefinitely gives the second taker an absolute estate in remainder.<sup>5</sup> If the enjoyment of the income be restricted to the life of the legatee or devisee, a life estate in the property passes,<sup>6</sup> or if

*In re Lowman*, (1895) 2 Ch. 348, 72 L. T. N. S. 816.

**1. Absolute Gift Cut Down by Subsequent Limitation.** — *Smith v. Bell*, 6 Pet. (U. S.) 68; *Chesebro v. Palmer*, 68 Conn. 207; *Hamlin v. U. S. Express Co.*, 107 Ill. 443; *Calvin v. Springer*, 28 Ind. App. 443; *Barnes v. Marshall*, 102 Mich. 248.

**Limitation of Doctrine.** — In *Hopkins v. Keazer*, 89 Me. 347, it was said: "If a testator first bequeaths property by absolute and unconditional terms, he cannot afterwards by a different provision in the same will, unless it be a full or partial revocation of the first provision, carve a remainder out of what he has already disposed of. But that doctrine should be applied carefully where it manifestly conflicts with the real intention of the testator, and some judges and jurists think that the doctrine has already gone too far in some cases."

**Illustration of Doctrine.** — In *Kurtz v. Wiechmann*, 75 N. Y. App. Div. 26, it was held that where the testator devised to his wife the residue of his estate "to be hers in fee simple absolutely and forever," but provided in a subsequent clause that after the death of his wife the remainder of the estate was to be divided in halves between his own legal heirs and the legal heirs of his wife, share and share alike, the subsequent provision of the will limited the estate to the wife to a life estate, such provision being as clearly expressed as the gift to her of the fee in the prior clause of the will.

**2. Intent Gathered from Entire Will Controlling.** — *Mansfield v. Shelton*, 67 Conn. 390; *Chesebro v. Palmer*, 68 Conn. 207.

**3. Unrestricted Gift of Income a Gift of Property Absolutely** — *England*. — 4 Kent's Com. 536; *Watkins v. Weston*, 32 Beav. 238; *Parker v. Plummer*, Cro. Eliz. 190; *Kerry v. Derrick*, Cro. Jac. 104; *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Stewart v. Garnett*, 3 Sim. 398.

*Canada*. — *Re Thomas*, 2 Ont. L. Rep. 660.

*United States*. — *Wellford v. Snyder*, 137 U. S. 521; *Martin v. Fort*, (C. C. A.) 83 Fed. Rep. 19.

*Indian Territory*. — *Turner v. Turner*, 3 Indian Ter. 582.

*Maine*. — *Earl v. Rowe*, 35 Me. 414; *Wilson*

*v. Curtis*, 90 Me. 463; *Fuller v. Fuller*, 84 Me. 475.

*New Jersey*. — *Craft v. Snook*, 13 N. J. Eq. 122; *Gulick v. Gulick*, 27 N. J. Eq. 408; *Passman v. Guarantee Trust, etc., Co.*, 57 N. J. Eq. 273. See also *Baldwin v. Tucker*, 61 N. J. Eq. 412.

*New York*. — *Fox v. Carr*, 16 Hun (N. Y.) 566; *Jennings v. Conboy*, 73 N. Y. 230.

*North Carolina*. — *McMichael v. Hunt*, 83 N. Car. 344.

*Ohio*. — *Isherwood v. Isherwood*, 8 Ohio Cir. Dec. 409.

*Pennsylvania*. — *Keyser's Estate*, 19 Pa. Ct. 364.

See also *supra*, this section, *Construction of Particular Words — Words Descriptive of Property — "Rents and Profits" and "Income."*

**Rule One of Intention.** — In *Adamson v. Armistage*, 19 Ves. Jr. 418, Sir William Grant said: "*Prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity; and is consequently a gift of the fund itself, unless there is something upon the face of the will to show that such was not the intention."

**4. Power of Disposition of Income Confers Absolute Interest.** — *Southouse v. Bate*, 16 Beav. 132; *Weale v. Ollive*, 32 Beav. 421.

**5. Absolute Estate in Remainderman.** — *Clough v. Wynne*, 2 Madd. 188; *Matter of Chapman*, 4 Ont. L. Rep. 130.

**Gift Over to Survivors.** — A residuary bequest upon trust to pay the dividends of stock to A for life and at her death to divide the dividend equally between B and C and the survivors of them, gives the survivors only a life interest. *Blann v. Bell*, 2 De G. M. & G. 775.

**6. Gift of Income for Life a Gift of Life Estate.** — *Lewis v. Harrower*, 197 Ill. 315; *Andrews v. Boyd*, 5 Me. 199; *Butterfield v. Haskins*, 33 Me. 392; *Stone v. North*, 41 Me. 265; *Sampson v. Randall*, 72 Me. 109; *Fuller v. Fuller*, 84 Me. 475; *Paine v. Forsaith*, 86 Me. 357; *Wilson v. Curtis*, 90 Me. 463; *Fogler v. Titcomb*, 92 Me. 184; *Diamant v. Lore*, 31 N. J. L. 220.

Where the "Income Only" is directed to be paid semi-annually to the legatee, he takes only the income for his life. *Wynn v. Bartlett*, 167 Mass. 292.



restricted to the life of another person,<sup>1</sup> or to some other limited interest in the income, only an estate commensurate with such interest will pass.<sup>2</sup> The rule applies whether the property is given directly or through the intervention of trustees.<sup>3</sup>

(f) **Precatory Provisions.** — Words of recommendation, desire, and hope in respect to the interest passing must yield if against rules of law or if so inconsistent with other provisions of the will that both cannot stand together.<sup>4</sup> Whether words in a will attached to a gift, explaining the desire of the testator in respect to its use, constitute a limitation of the bequest or are to be regarded as advisory only, depends upon the intention of the testator as gathered from all the provisions of the will bearing upon the subject.<sup>5</sup>

*b. ESTATES IN FEE AND FOR LIFE* — (1) *Sufficiency of Language to Pass the Fee* — (a) **Independent of Statute.** — Although the most appropriate and apt expression to pass a fee by devise has always been a limitation to the devisee and his heirs, it has generally been held, independent of the English Wills Act and analogous statutes in the United States, that words of limitation are not essential, and that where the words of the devise, according to their natural import, construed in connection with all other parts of the will, manifestly show that it was the intention of the testator to give an estate in fee, and where the general purpose and particular intent of the testator, as expressed or gathered by fair and plain implication from the will itself, cannot be carried into effect without such construction, whatever may be the words in which the devise is expressed, it passes an estate in fee.<sup>6</sup> But a court cannot, of course, conclude from arbitrary conjecture, though founded upon the highest

1. **Estate for Life of Another.** — *Newton v. Odom*, 67 S. Car. 1, in which it was held that a provision in a will that certain persons should occupy lands free of rent during the life of another person, gave them an estate in the lands during such life.

2. **Limited Interest in Income.** — *Morrison v. Schorr*, 197 Ill. 554; *Fox v. Phelps*, 17 Wend. (N. Y.) 398; *Steinmetz's Estate*, 168 Pa. St. 171.

**Distinction Between Gift During Widowhood and Gift While Devisee Remains Unmarried.** — In *Rishton v. Cobb*, 5 Myl. & C. 145, it was held that a gift of income during widowhood is a gift for life or during widowhood; but a gift of income to a legatee, so long as she continues unmarried, is a gift of an absolute interest if the legatee does not marry.

3. **Rule Not Affected by Intervention of Trustee.** — *Elton v. Shephard*, 1 Bro. C. C. 532; *Philipps v. Chamberlaine*, 4 Ves. Jr. 51; *Rawlings v. Jennings*, 13 Ves. Jr. 39; *Boosey v. Gardner*, 18 Beav. 471; *Haig v. Swiney*, 1 Sim. & St. 487; *Watkins v. Weston*, 32 Beav. 238, 3 De G. J. & S. 434; *Gulick v. Gulick*, 27 N. J. Eq. 498.

4. **Precatory Provisions.** — *Van Gorder v. Smith*, 99 Ind. 404; *Taylor v. Brown*, 88 Me. 56; *Negroes Chase v. Plummer*, 17 Md. 165; *Bal-liett v. Veal*, 140 Mo. 187; *Clay v. Wood*, 91 Hun (N. Y.) 398; *Brown v. Perry*, 51 N. Y. App. Div. 11; *Craig v. Reilly*, 13 Pa. Super. Ct. 536.

5. **Whether Words Precatory a Question of Intent.** — *Thomas v. Troy City Nat. Bank*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 470; *Riker v. Leo*, 133 N. Y. 519.

See the title **PRECATORY TRUSTS**, vol. 22, p. 1162.

6. **Words Passing Fee Independent of Statute** —

*England.* — *Frogmorton v. Holyday*, 3 Burr. 1618.

*United States.* — *Abbott v. Essex County*, 18 How. (U. S.) 202.

*Alabama.* — *Whorton v. Moragne*, 62 Ala. 201.

*Connecticut.* — *Holms v. Williams*, 1 Root (Conn.) 332; *White v. White*, 52 Conn. 518.

*District of Columbia.* — *French v. Campbell*, 2 Mackey (D. C.) 321.

*Florida.* — *Robinson v. Randolph*, 21 Fla. 629.

*Georgia.* — *Hollingshed v. Alston*, 13 Ga. 277.

*Illinois.* — *Siddons v. Cockrell*, 131 Ill. 653; *Muhlke v. Tiedemann*, 177 Ill. 606.

*Indiana.* — *Cleveland v. Spilman*, 25 Ind. 95.

*Iowa.* — *Sherman v. Wooster*, 26 Iowa 272.

*Kentucky.* — *Chinn v. Respass*, 1 T. B. Mon. (Ky.) 25; *Lachland v. Downing*, 11 B. Mon. (Ky.) 32; *Carroll v. Carroll*, 12 B. Mon. (Ky.) 637.

*Maine.* — *Russell v. Elden*, 15 Me. 193; *Jos-selyn v. Hutchinson*, 21 Me. 339; *Varney v. Stevens*, 22 Me. 331; *Deering v. Tucker*, 55 Me. 284; *Bromley v. Gardner*, 79 Me. 246; *Chapman v. Chick*, 81 Me. 109.

*Maryland.* — *Moody v. Elliott*, 1 Md. Ch. 290; *Edelen v. Smoot*, 2 Har. & G. (Md.) 285; *Owings v. Reynolds*, 3 Har. & J. (Md.) 141; *Beall v. Holmes*, 6 Har. & J. (Md.) 205; *Hammond v. Hammond*, 8 Gill & J. (Md.) 436; *Burke v. Chamberlain*, 22 Md. 298.

*Massachusetts.* — *Baker v. Bridge*, 12 Pick. (Mass.) 27; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Gibbens v. Curtis*, 8 Gray (Mass.) 392; *Parker v. Parker*, 5 Met. (Mass.) 134; *Tracy v. Kilborn*, 3 Cush. (Mass.) 557; *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458; *Goodwin v. McDonald*, 153 Mass. 481; *Bassett v. Nickerson*, 184 Mass. 169.

*Mississippi.* — *Sims v. Conger*, 39 Miss. 231.

degree of probability, that the testator intended to pass a fee and failed to do so from ignorance of the rules of law, or for other reasons; but it must appear satisfactorily and affirmatively from a construction of the will itself that such was his intention.<sup>1</sup>

**Expressions Sufficient to Pass Fee.** — The word "heirs" being unnecessary to create a fee, other words denoting an intention to pass the whole interest of the testator, such as a devise of "all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth or own," "all my right," "all my title," "all I shall die possessed of," or "my entire property, both real and personal," and many other expressions of like import, will carry an estate of inheritance if there be nothing in the other parts of the will to limit or control the operation of such words.<sup>2</sup>

**Common-law Rule.** — The common-law rule is that a devise of land without words of limitation or description of the extent of the interest devised, creates

*Missouri.* — *Small v. Field*, 102 Mo. 105.

*New Hampshire.* — *Leavitt v. Wooster*, 14 N. H. 550; *Lummas v. Mitchell*, 34 N. H. 39.

*New Jersey.* — *Herbert v. Smith*, 1 N. J. Eq. 141; *Carter v. Gray*, 58 N. J. Eq. 411; *Den v. Snitcher*, 14 N. J. L. 53; *Den v. Young*, 24 N. J. L. 775.

*New York.* — *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Fox v. Phelps*, 17 Wend. (N. Y.) 393; *Roseboom v. Roseboom*, 81 N. Y. 356; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185; *Jackson v. Wells*, 9 Johns. (N. Y.) 222; *Jackson v. Bull*, 10 Johns. (N. Y.) 148; *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Jackson v. Wilson*, 12 Johns. (N. Y.) 318; *Jackson v. Housel*, 17 Johns. (N. Y.) 281; *Harris v. Slaght*, 46 Barb. (N. Y.) 470.

*North Carolina.* — *Turner v. Kittrell*, 1 Winst. Eq. (60 N. Car.) 39.

*Ohio.* — *Piatt v. Sinton*, 37 Ohio St. 353; *Flickinger v. Saum*, 40 Ohio St. 600.

*Pennsylvania.* — *Martin v. McDevitt*, 10 Phila. (Pa.) 19, 30 Leg. Int. (Pa.) 92; *Morrison v. Semple*, 6 Binn. (Pa.) 94; *Harper v. Blean*, 3 Watts (Pa.) 471; *Frame v. Stewart*, 5 Watts (Pa.) 433; *McIntyre v. Ramsey*, 23 Pa. St. 317; *Fulton v. Moore*, 25 Pa. St. 468; *Williams v. Leech*, 28 Pa. St. 89; *Hall v. Dickinson*, 31 Pa. St. 76; *Schoonmaker v. Stockton*, 37 Pa. St. 461; *Brown's Estate*, 38 Pa. St. 289; *Jaureche v. Proctor*, 48 Pa. St. 466; *Snyder v. Baer*, 144 Pa. St. 278.

*Rhode Island.* — *Carpenter v. Brown*, 6 R. I. 383; *Atkinson v. Staigg*, 13 R. I. 725; *Harris v. Dyer*, 18 R. I. 540.

*South Carolina.* — *Moon v. Moon*, 2 Strobb. Eq. (S. Car.) 327; *Smith v. Hilliard*, 3 Strobb. Eq. (S. Car.) 211; *Carr v. Jeannerett*, 2 McCord L. (S. Car.) 66; *Bowers v. Newman*, 2 McMull. L. (S. Car.) 472; *Hall v. Goodwyn*, 2 Nott & M. (S. Car.) 383.

*Tennessee.* — *King v. Miller*, 11 Lea (Tenn.) 633.

*Vermont.* — *Hart v. White*, 26 Vt. 260.

*Virginia.* — *Kennon v. M'Roberts*, 1 Wash. (Va.) 96; *Shermer v. Richardson*, Wythe (Va.) 6; *Wyatt v. Sadler*, 1 Munf. (Va.) 537.

*Wisconsin.* — *Dew v. Kuehn*, 64 Wis. 293.

**1. Intention Must Appear from Will Itself.** — *Chapman v. Brown*, 3 Burr. 1626; *Lambert v. Paine*, 3 Cranch (U. S.) 137; *Whorton v. Moragne*, 62 Ala. 210; *Bromley v. Gardner*, 79 Me. 246; *Baker v. Bridge*, 12 Pick. (Mass.)

27; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Harvey v. Olmsted*, 1 N. Y. 491.

**Competency of Evidence.** — Extrinsic evidence is not competent for the purpose of showing the testator's intention unless some provision of the will is so ambiguous as to make his intention doubtful. In that event, his situation, the objects of his bounty, and all the surrounding circumstances may be considered. *Roberts v. Crume*, 173 Mo. 572; *Hunt v. White*, 24 Tex. 652; *Cleveland v. Cleveland*, 89 Tex. 445. See also *supra*, this section, *Parol Evidence in Aid of Construction*.

**2. Expressions Sufficient to Pass Fee — England.** — 4 Kent's Com. 555; *Doe v. Morgan*, 6 B. & C. 512, 13 E. C. L. 239; *Pitman v. Stevens*, 15 East 505; *Hill v. Brown*, (1894) A. C. 125. *United States.* — *Abbott v. Essex County*, 18 How. (U. S.) 202.

*Connecticut.* — *White v. White*, 52 Conn. 518. *Georgia.* — *Hollingshed v. Alston*, 13 Ga. 277. *Indiana.* — *Rogers v. Winklespleck*, 143 Ind. 373.

*Maine.* — *Josselyn v. Hutchinson*, 21 Me. 339; *Deering v. Tucker*, 55 Me. 284.

*Maryland.* — *Hammond v. Hammond*, 8 Gill & J. (Md.) 436.

*Massachusetts.* — *Baker v. Bridge*, 12 Pick. (Mass.) 27; *Dewey v. Morgan*, 18 Pick. (Mass.) 295; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537; *Tracy v. Kilborn*, 3 Cush. (Mass.) 557; *Parker v. Parker*, 5 Met. (Mass.) 134; *Smith v. Rice*, 183 Mass. 251.

*New Hampshire.* — *Leavitt v. Wooster*, 14 N. H. 550.

*New Jersey.* — *Carter v. Gray*, 58 N. J. Eq. 411; *Steward v. Knight*, 62 N. J. Eq. 232; *Den v. Schenck*, 8 N. J. L. 29; *Morehouse v. Cotheal*, 22 N. J. L. 430.

*New York.* — *Fox v. Phelps*, 17 Wend. (N. Y.) 393; *Jackson v. Merrill*, 6 Johns. (N. Y.) 389; *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Ferris v. Smith*, 17 Johns. (N. Y.) 221; *Jackson v. Housel*, 17 Johns. (N. Y.) 281.

*Pennsylvania.* — *Morrison v. Semple*, 6 Binn. (Pa.) 94.

*Vermont.* — *Hart v. White*, 26 Vt. 260.

**Words "Estate," "Property," etc., Used as Words of Reference.** — In *Hill v. Brown*, (1894) A. C. 125, it was held that although the words "estate," "property," or their equivalent, in the operative part of the devise, would enlarge the gift, they would not have that effect when used

a life estate only, in the absence of a contrary intent;<sup>1</sup> and this rule cannot be made to yield to the rule of construction founded on the disfavor with which partial intestacy is regarded.<sup>2</sup> At the same time, in order to enlarge an estate into a fee it is not necessary to employ technical terms or any particular form of words. Any words which sufficiently show the intention of the testator to create more than a life estate will be given that effect no matter what their form may be, and the whole will may be looked to in order to ascertain the meaning to be given to this particular part.<sup>3</sup> In some jurisdictions of the *United States* the common-law rule is still in force.<sup>4</sup>

**Rule in Shelley's Case.** — Under the rule in Shelley's case, devises of a freehold estate to a person with a limitation over by way of remainder to his heirs, vests the entire estate in the ancestor, the word "heirs" being a word of limitation and not a word of purchase. This rule is made the subject of a separate title in this work, and its application to devises will there be found fully discussed.<sup>5</sup>

(b) **By Statute.** — In order to aid testators who intend by their wills to pass absolute estates but omit to use the technical expressions best adapted for that purpose, it is provided by the English Wills Act,<sup>6</sup> and similar statutes in most of the *United States*, that every devise shall be construed to convey a fee simple, or all the interest which the testator could lawfully devise in the lands described, unless it clearly appears by the will that he intended to convey a less estate.<sup>7</sup> The effect of these enactments is to change the common-law

in another part of the will as words of reference only. See also *supra*, this section, *Construction of Particular Words—Words Descriptive of Property*.

**1. Common-law Rule.** — *Hill v. Brown*, (1894) A. C. 125; *Cook v. Walker*, 15 Ga. 457; *Carroll v. Carroll*, 12 B. Mon. (Ky.) 637; *McLellan v. Turner*, 15 Me. 436; *Varney v. Stevens*, 22 Me. 331; *Bromley v. Gardner*, 79 Me. 246; *Moody v. Elliott*, 1 Md. Ch. 290; *Newton v. Griffith*, 1 Har. & G. (Md.) 111; *Harvey v. Olmsted*, 1 N. Y. 483.

**2. Rule Not Affected by Law's Aversion to Partial Intestacy.** — *McCaffrey v. Manogue*, 22 App. Cas. (D. C.) 385; *Rusk v. Zuck*, 147 Ind. 388.

**3. Technical Words Unnecessary.** — *McCaffrey v. Manogue*, 22 App. Cas. (D. C.) 385; *Korf v. Gerichs*, 145 Ind. 134; *Carroll v. Carroll*, 12 B. Mon. (Ky.) 638; *Dew v. Kuehn*, 64 Wis. 293.

**4. Common-law Rule Retained.** — *McAleer v. Schneider*, 2 App. Cas. (D. C.) 461; *McCaffrey v. Manogue*, 22 App. Cas. (D. C.) 385; *Robinson v. Randolph*, 21 Fla. 629; *Cleveland v. Spilman*, 25 Ind. 95; *Roy v. Rowe*, 90 Ind. 54; *Lennen v. Craig*, 95 Ind. 167; *Morgan v. McNeely*, 126 Ind. 537; *Mills v. Franklin*, 128 Ind. 444; *Mulvane v. Rude*, 146 Ind. 476; *Fenstermaker v. Holman*, 158 Ind. 71.

**5.** See the title *SHELLEY'S CASE (RULE IN)*, vol. 25, p. 639.

**6.** Stat. 1 Vict., c. 26, § 28.

**7. Georgia.** — *Cook v. Walker*, 15 Ga. 457.

**Illinois.** — *Wolfer v. Hemmer*, 144 Ill. 554; *Thomas v. Miller*, 161 Ill. 60; *McFarland v. McFarland*, 177 Ill. 208; *Lambe v. Drayton*, 182 Ill. 110; *Davis v. Ripley*, 194 Ill. 399; *Summers v. Higley*, 191 Ill. 193; *Bowen v. John*, 201 Ill. 292; *Metzen v. Schopp*, 202 Ill. 275.

**Kansas.** — *Boston Safe Deposit, etc., Co. v. Stich*, 61 Kan. 474.

**Kentucky.** — *Miller v. Tilton*, (Ky. 1899) 49 S. W. Rep. 967; *Leonard v. Hummel*, (Ky.

1902) 68 S. W. Rep. 19; *Dalmazzo v. Simmons*, (Ky. 1904) 78 S. W. Rep. 179; *Galloway v. Durham*, (Ky. 1904) 81 S. W. Rep. 659.

**Maine.** — *Bromley v. Gardner*, 79 Me. 246; *Hopkins v. Keazer*, 89 Me. 347.

**Maryland.** — *Hammond v. Hammond*, 8 Gill & J. (Md.) 436; *Whitby v. Jump*, 94 Md. 185.

**Massachusetts.** — *Simonds v. Simonds*, 168 Mass. 144; *Smith v. Rice*, 183 Mass. 251; *Bassett v. Nickerson*, 184 Mass. 169.

**Mississippi.** — *Johnson v. Delone Land, etc., Co.*, 77 Miss. 15.

**Missouri.** — *Cook v. Couch*, 100 Mo. 34; *Yocum v. Siler*, 160 Mo. 281; *Simmons v. Cabanne*, 177 Mo. 336; *Rothwell v. Jamison*, 147 Mo. 601.

**New Jersey.** — *Carter v. Gray*, 58 N. J. Eq. 411; *Feit v. Richards*, 64 N. J. Eq. 16; *Steward v. Knight*, 62 N. J. Eq. 232; *Den v. Snitcher*, 14 N. J. L. 53.

**New York.** — *Mitchell v. Van Allen*, 75 N. Y. App. Div. 297.

**North Carolina.** — *McKrow v. Painter*, 89 N. Car. 437.

**Ohio.** — *Silk v. Merry*, 23 Ohio Cir. Ct. 218; *Halley v. Hengstler*, 23 Ohio Cir. Ct. 504.

**Pennsylvania.** — *Schuldt v. Herbine*, 3 Pa. Super. Ct. 65; *Huber's Appeal*, 80 Pa. St. 348; *Good v. Fitchthorn*, 144 Pa. St. 287; *Mitchell v. Pittsburg, etc., R. Co.*, 165 Pa. St. 645; *Ahl v. Bosler*, 175 Pa. St. 526.

**Rhode Island.** — *Atkinson v. Staigg*, 13 R. I. 725; *In re Willis*, 25 R. I. 332; *In re Johnson*, 23 R. I. 111.

**South Carolina.** — *Bowers v. Newman*, 2 McMull. L. (S. Car.) 472; *Johnson v. Johnson*, 48 S. Car. 408.

**Tennessee.** — *King v. Miller*, 11 Lea (Tenn.) 633.

**Washington.** — *Reeves v. School Dist. No. 59*, 24 Wash. 282.

**West Virginia.** — *Morrison v. Clarksburg Coal, etc., Co.*, 52 W. Va. 331.



rule of construction and make an indefinite devise, without any words of perpetuity annexed, pass an estate in fee simple, instead of an estate for life. The statutes do not exclude the consideration of the other parts of the will and the surrounding circumstances in determining what estate passes. Whether an estate in fee goes to the devisee or only an estate for life is still a question of intention, but the rule of construction is reversed. Formerly an estate for life only, would pass by an indefinite devise unless a contrary intention could be inferred from the will. Now an estate in fee will pass by such a devise, unless an intention to pass a less estate appears by construction or operation of law.<sup>1</sup>

**Use of Word "Heirs" Unnecessarily.** — Although the use of the word "heirs" in a devise has been rendered unnecessary by statutes, it does not follow that technical words appropriate to pass a fee will have any other than their usual effect. The word "heirs" used unnecessarily is still a word of limitation and not of purchase.<sup>2</sup>

(2) *Language Necessary to Create Life Estate.* — As to the language necessary to pass a life estate, the foregoing discussion is pertinent. Whether the cases arise under a statute which raises a presumption in favor of the devise of a fee-simple estate in the absence of a plain intent to pass only a life estate, or under the common-law rule that the devisee takes only a life estate unless an intent is shown to devise the fee, is, of course, a material consideration and often conclusive in determining what interest passes.<sup>3</sup> Where, under the statutes generally prevailing, the intent of the testator to pass a life estate or less estate than a fee must appear, the language of the will and the circumstances of the parties will be considered in endeavoring to ascertain whether that intention existed. The statement of any rule on this subject other than a general one is impossible, owing to the varying language of the wills construed and the endless diversity of attendant conditions and circumstances. Manifestly no particular form of words is required to restrict the estate to an estate for life. Devises for the life, or during the natural life, or during or for the lifetime of the devisee, and other expressions of similar import are effective limitations of a life estate notwithstanding other provisions of the will which, if standing alone, might show a purpose to pass a greater estate.<sup>4</sup>

**Words Overcoming Statutory Presumption that Fee Passes.** — Where a testator by a codicil devised all his estate to his wife indefinitely, so that under the English Wills Act of 1837 the estate passing was presumptively absolute, and then provided in respect to the estate that the devisee should "have full possession of it and full power and control over it to deal with it or act with regard to it as she may think proper," it was held that the use of the words conferring upon the devisee the power of control and the right of possession over the property overcame the presumption raised by statute that an absolute estate passed, and showed that the testator intended the devisee to take an estate for life with a power of disposition. *In re Sanford*, (1901) 1 Ch. 939, 84 L. T. N. S. 456.

But it has also been held that the effect of the words "for her sole use and benefit" after a residuary gift to his wife of all the testator's property, is not to cut down the gift, but merely to emphasize the testator's intention that a fee simple in the realty and an absolute title in the personalty shall pass. *Garrison v. Quinn*, 183 Mass. 241.

**The Use of Words of Limitation with One Gift and Not with Another**, as where the testator divides his property into five equal parts and

provides that four parts shall go "to my four sons and their heirs forever, and the fifth I bequeath to my daughter," will not be construed to cut down the gift with respect to which no words of limitation are used, to less than an absolute interest. *Bedford v. Bedford*, 99 Ky. 273.

**1. Effect of Statutes on Common Law.** — *Carroll v. Carroll*, 12 B. Mon. (Ky.) 638; *Hammond v. Hammond*, 8 Gill & J. (Md.) 436; *Grubb's Estate*, 5 Pa. Dist. 422; *Dew v. Kuehn*, 64 Wis. 293.

**2. Use of Word "Heirs" Unnecessarily.** — *Smith v. Rice*, 183 Mass. 251; *Gannon v. Albright*, (Mo. 1904) 81 S. W. Rep. 1162.

**3.** See *supra*, this subsection, *Sufficiency of Language to Pass the Fee*.

**4. Devises "for Life," etc., Effective Limitations of Life Estate — England.** — *Morris v. Atherden*, 71 L. T. N. S. 179.

*Canada.* — *King v. Evans*, 24 Can. Sup. Ct. 356.

*Alabama.* — *Rosenau v. Childress*, 111 Ala. 214.

*Delaware.* — *Jamison v. McWhorter*, 7 Houst. (Del.) 242.

*Georgia.* — *Cochran v. Hudson*, 110 Ga. 762; *Crowley v. Crouch*, 114 Ga. 135; *Smith v. Usher*, 108 Ga. 231.

**Gift During Widowhood.** — A gift to the testator's wife so long as she remains his widow, or during her widowhood, gives at most an estate for life,<sup>1</sup> and this notwithstanding the presumption created by statute that all devises are of a fee-simple estate.<sup>2</sup>

(3) *Technical Language Controlling* — (a) **In General.** — The rule that the intention of the testator is to be discovered and given effect to, if possible, is subject to the qualification that such intention must be expressed in conformity to the laws by which the right of property is secured and established;<sup>3</sup> for, in construing any devise, if it be made by words which have long received a particular technical construction, and thus become a rule of property, that construction ought to be received, or titles to estates held under such a rule will be unsettled.<sup>4</sup>

(b) **Reducing Fee Expressly Created.** — Where a fee is given by the express words of a will, subsequent words will not operate to cut down that estate, unless they indicate a decisive and unmistakable intention on the part of the testator so to do.<sup>5</sup> And where, with an absolute gift in fee, there are provisions

*Illinois.* — Lomax v. Shinn, 162 Ill. 124.

*Indiana.* — Rusk v. Zuck, 147 Ind. 388; Cain v. Robertson, 27 Ind. App. 198.

*Iowa.* — Everett v. Croskrey, 92 Iowa 333; Matter of Proctor, 95 Iowa 172; Zavitz v. Preston, 96 Iowa 52; Smith v. Runnels, 97 Iowa 55; Matter of Stumpenhousen, 108 Iowa 555.

*Kansas.* — Chase v. Howie, 64 Kan. 320.

*Kentucky.* — Hood v. Dawson, 98 Ky. 285; Robinson v. Talbott, (Ky. 1900) 56 S. W. Rep. 717; Call v. Shewmaker, (Ky. 1902) 69 S. W. Rep. 749.

*Louisiana.* — Weller's Succession, 107 La. 466.

*Massachusetts.* — Sise v. Willard, 164 Mass. 48; Faxon v. Faxon, 174 Mass. 509.

*Michigan.* — Austin v. Hyndman, 119 Mich. 615; Anderson v. Ettridge, 125 Mich. 464; Van Driele v. Kotvis, (Mich. 1903) 97 N. W. Rep. 700.

*Missouri.* — Cross v. Hoch, 149 Mo. 325.

*Nebraska.* — Schimpf v. Rhodewald, 62 Neb. 105.

*New Hampshire.* — Paul v. Dole, 70 N. H. 593; Clough v. Clough, 71 N. H. 412.

*New Jersey.* — Chambers v. Sharp, 61 N. J. Eq. 253; Bryan v. Bryan, 61 N. J. Eq. 45.

*New York.* — Jewett v. Schmidt, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 502; Wood v. Ward, 76 N. Y. App. Div. 567; Moak v. Moak, 8 N. Y. App. Div. 197.

*North Carolina.* — Bird v. Gilliam, 121 N. Car. 326; May v. Lewis, 132 N. Car. 115; Hauser v. Craft, 134 N. Car. 319.

*Ohio.* — Swartz v. Gehring, 6 Ohio Cir. Dec. 173, 11 Ohio Cir. Ct. 625.

*Oregon.* — Winchester v. Hoover, 42 Oregon 310.

*Pennsylvania.* — McMasters v. Shellito, 14 Pa. Super. Ct. 303; Zimmerman's Estate, 23 Pa. Super. Ct. 130; Lancaster v. Flowers, 23 Pa. Co. Ct. 613; Reynold's Estate, 175 Pa. St. 257; Du Four v. Bubb, 199 Pa. St. 107; Yerkes v. Yerkes, 200 Pa. St. 419.

*Rhode Island.* — Simmons v. Morgan, 25 R. I. 212; In re Willis, 25 R. I. 332.

*South Carolina.* — Vaughan v. Bridges, 61 S. Car. 155; Wood v. Wood, 45 S. Car. 590; Mims v. Hair, 56 S. Car. 4.

*Tennessee.* — Waller v. Martin, 106 Tenn. 341; Overton v. Nashville Trust Co., 110 Tenn. 50.

*Texas.* — Morris v. Eddins, 18 Tex. Civ. App. 38.

*Vermont.* — Buck v. Smith, 70 Vt. 178.

*Virginia.* — Robertson v. Hardy, (Va. 1895) 23 S. E. Rep. 766.

*West Virginia.* — Le Sage v. Le Sage, 52 W. Va. 323.

*Wisconsin.* — Swarthout v. Swarthout, 111 Wis. 102.

**A Devise of the Use and Occupancy** of a store-room gives a life estate therein. Wilson v. Curtis, 90 Me. 463.

**Property Purchased with the Rents and Profits** accruing during the life tenancy go to the remaindermen, the life tenant having only a life estate therein. Esman v. Esman, 10 Ohio Cir. Dec. 257.

**1. Gift During Widowhood.** — Kratz v. Kratz, 189 Ill. 276; Rose v. Hale, 185 Ill. 378; Fuller v. Wilbur, 170 Mass. 506; Dubois v. Van Valen, 61 N. J. Eq. 331; Rausch v. Rausch, (Supm. Ct. Spec. T.) 31 N. Y. Supp. 786; Patton v. Church, 168 Pa. St. 321.

**2. In re Brooks,** 125 N. Car. 136.

**3. Intention Controlled by Rules of Construction.** — Ramsdell v. Ramsdell, 21 Me. 288; Van Gorder v. Smith, 99 Ind. 404; Hammond v. Croxton, (Ind. App. 1901) 61 N. E. Rep. 596.

**4. Reason of Rule.** — Ide v. Ide, 5 Mass. 500; Lilliman v. Whitaker, 119 N. Car. 89; Carroll v. Burns, 108 Pa. St. 386.

**5. Fee Not Reduced Except by Positive Provisions** — England. — Constable v. Bull, 3 De G. & Sm. 411; In re Jones, (1898) 1 Ch. 438, 78 L. T. N. S. 74.

*United States.* — McClellan v. Mackenzie, (C. C. A.) 126 Fed. Rep. 701; Yocum v. Parker, 130 Fed. Rep. 722.

*Georgia.* — Cook v. Walker, 15 Ga. 457.

*Illinois.* — Wolfer v. Hemmer, 144 Ill. 554.

*Indiana.* — Rogers v. Winklespleck, 143 Ind. 373; Fowler v. Duhme, 143 Ind. 248; Mitchell v. Mitchell, 143 Ind. 113.

*Iowa.* — Jordan v. Woodin, 93 Iowa 453.

*Kentucky.* — Cox v. Anderson, (Ky. 1902) 70 S. W. Rep. 839; Smith v. Smith, (Ky. 1903) 72 S. W. Rep. 766.

purporting to confine the interest of the first taker to a life estate or less interest than a fee, as by a limitation over by way of an executory devise, reversion, or remainder, the limitation over will be held inoperative and void,<sup>1</sup> although the limitation may clearly express the actual intent of the testator.<sup>2</sup> The same is true of any other condition or restriction annexed to a devise and

*Maryland*.—*Blackshere v. Samuel Ready School*, 94 Md. 773.

*Massachusetts*.—*Smith v. Rice*, 183 Mass. 251.

*Missouri*.—*Balliett v. Veal*, 140 Mo. 187.

*New Jersey*.—*Feit v. Richards*, 64 N. J. Eq. 16.

*New York*.—*Haight v. Pine*, 3 N. Y. App. Div. 434; *Roseboom v. Roseboom*, 81 N. Y. 356; *Banzer v. Banzer*, 156 N. Y. 429.

*Pennsylvania*.—*Bellas's Estate*, 176 Pa. St. 122.

**Words Held Insufficient to Reduce Absolute Interest.**—In *In re Jones*, (1898) 1 Ch. 438, 78 L. T. N. S. 74, it was held that a gift of real and personal estate to the testator's wife "for her absolute use and benefit so that, during her lifetime for the purpose of her maintenance and support, she shall have the fullest power to sell and dispose of my said estate absolutely," and such parts as shall remain undisposed of at her death, over, vested an absolute interest in the estate in the widow and the gift over was void.

**An Express Power of Sale with a devise in fee** is not sufficient evidence that the testator intended to give less than a fee. *Street v. Gordon*, 41 N. Y. App. Div. 439.

**Power of Sale if Necessary for Devisee's Support.**—A clause in a will providing that a devisee to whom an estate has been given in fee "may sell the premises or any parts thereof if it should be necessary for his support," cannot be construed to divest the estate in fee previously vested. *Bowen v. John*, 201 Ill. 292.

**Devise in Fee—Habendum for Life.**—Where real estate is devised to a person and her "heirs and assigns" the devisee takes a fee-simple title which is not qualified or reduced by the habendum by which the devisee is to have and to hold the estate for her "lifetime." *Lambe v. Drayton*, 182 Ill. 110.

**Personal Right in Lands Devised in Fee.**—Where the testator devised certain lands to one daughter and adjacent lands to another daughter, using words of inheritance in both devises, a provision that the second daughter should always have the privilege of spreading hay upon the land given to the first daughter, conferred merely a personal right and not an easement. *Metcalf v. Crystal Brook Park Assoc.*, 63 N. Y. App. Div. 445.

**1. Limitations Over in Derogation of Fee, Void**—*Connecticut*.—*Central M. E. Church v. Harris*, 62 Conn. 93; *St. John v. Dann*, 66 Conn. 401; *Mansfield v. Shelton*, 67 Conn. 390; *Fanning v. Main*, (Conn. 1904) 58 Atl. Rep. 472.

*Illinois*.—*Howe v. Hodge*, 152 Ill. 252; *Burton v. Gagnon*, 180 Ill. 345; *Lambe v. Drayton*, 182 Ill. 110.

*Indiana*.—*Cameron v. Parish*, 155 Ind. 329; *Langman v. Marbe*, 156 Ind. 330; *Snodgrass v. Brandenburg*, (Ind. 1904) 71 N. E. Rep. 137.

*Iowa*.—*Meyer v. Weiler*, 121 Iowa 51; *Brew-*

*ster v. Douglas*, (Iowa 1899) 80 N. W. Rep. 304.

*Kentucky*.—*Briscoe v. Briscoe*, (Ky. 1895) 32 S. W. Rep. 212; *Clay v. Chenault*, 108 Ky. 77; *Kephart v. Hieatt*, (Ky. 1904) 78 S. W. Rep. 425.

*Maryland*.—*Hammett v. Hammett*, 43 Md. 307; *Combs v. Combs*, 67 Md. 17.

*Massachusetts*.—*Ide v. Ide*, 5 Mass. 500.

*Missouri*.—*Roth v. Rauschenbusch*, 173 Mo. 582.

*Nebraska*.—*Spencer v. Scovil*, (Neb. 1903) 96 N. W. Rep. 1016, rehearing denied (Neb. 1904) 98 N. W. Rep. 843.

*New Jersey*.—*Benz v. Fabian*, 54 N. J. Eq. 615.

*New York*.—*Newcomb v. Lush*, 84 Hun (N. Y.) 254; *Thomson v. Hill*, 87 Hun (N. Y.) 111; *Matter of Peters*, 69 N. Y. App. Div. 465; *Davis v. Davis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 90; *Mersereau v. Camp*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 253.

*Pennsylvania*.—*Lare's Estate*, 15 Pa. Co. Ct. 355; *Evans v. Smith*, 166 Pa. St. 625; *Keating v. McAdoo*, 180 Pa. St. 5; *Murray v. Lowrie*, 208 Pa. St. 1; *Bailey v. Pittsburg, etc.*, R. Co., 208 Pa. St. 45.

*Tennessee*.—*Bradley v. Carnes*, 94 Tenn. 27; *Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138.

**A Fee Which Vests under the Rule in Shelley's Case** is not affected by contingent limitations over at the death of the devisee. *Ewing v. Barnes*, 156 Ill. 61; *Fenstermaker v. Holman*, (Ind. App. 1901) 61 N. E. Rep. 599; *Benninghoff v. Evangelical Assoc. Church*, 28 Ind. App. 374; *Travers v. Wallace*, 93 Md. 507.

For general principles relating to the effect of limitations over in devises and bequests alike, see *supra*, this subsection, *Considerations Common to Realty and Personalty—Effect of Particular Provisions*.

**2. Limitation Over Void Although Expressing Testator's Intent.**—*Hammond v. Croxton*, (Ind. App. 1901) 61 N. E. Rep. 596. *Contra*, *Kurtz v. Wiechmann*, 75 N. Y. App. Div. 26.

**Insufficient Creation of Executory Devise.**—A testator, after directing that "as regards the residue of my real and personal estate—I devise and bequeath it to my three daughters—in fee as tenants in common," requested in his will that the executors, in dividing and appropriating the residue of his estate thus disposed of, require of the said daughters that their daughters receive of the estate, as far as practicable, severally, about double the amount that the sons of the said daughters receive severally. It was held that the subsequent request was no more than an expression of a desire, and was therefore inoperative to create an executory devise in favor of the sons and daughters of the three daughters, who were the residuary legatees, and that the three daughters took an estate in fee simple. *Bellas's Estate*, 176 Pa. St. 122.



repugnant to the estate in fee given therein, as where the testator directs the payment of certain sums of money out of the proceeds of the sale of the estate,<sup>1</sup> or that the lands devised be leased for a term of years,<sup>2</sup> or that the devisees are at all times to hold the property, or enjoy it in a particular manner.<sup>3</sup> If the fee is made determinable on a stated contingency, an executory devise over is not inconsistent with the estate previously created and will take effect.<sup>4</sup>

(c) **Enlarging Life Estate Expressly Created.** — A life estate expressly created will not be converted into a fee, absolute or qualified, or into any other form greater than a life estate, by inference or implication, or any language which falls short of positive provision.<sup>5</sup> The result will not be attained by reason of there being coupled with the devise a power of disposition or control, however general and extensive,<sup>6</sup> or because of the fact that the remainder is not disposed of,<sup>7</sup> or by a direction to pay legacies,<sup>8</sup> or to provide for the support of others.<sup>9</sup> It may happen that the expression of a general intent to give a devisee a larger estate will overcome even an express gift for life; but this has been held only when it appeared impossible to confer all the interests which the testator manifestly intended to confer if the first taker was confined to a life estate.<sup>10</sup> Where the language in respect to the quantity of the estate is clearly conflicting, effect will be given to that clause which seems to express the intention of the testator;<sup>11</sup> and if a gift is not expressed in such appropriate technical language that the rules of property require the devise to be construed according to such language, the devisee will take such an estate as it appears, from the other provisions of the will, the testator intended to

**1. Repugnant Direction to Pay Sums of Money.**

— Where a testator gave absolutely certain lands, subject to the payments of his debts and funeral expenses, and then provided in the will that on any sale by the devisee of the said lands, "I will and direct her to pay to my brother the sum of £1,000 out of the proceeds of the sale, also the further sum of £500" to the testator's sister, it was held that the will imposed no obligation on the devisee to sell and that the direction to pay the sums of money stated was repugnant and void. *In re Elliot*, (1896) 2 Ch. 353, 75 L. T. N. S. 138.

**2. Blackshere v. Samuel Ready School**, 94 Md. 773.

**3. Direction as to Use and Enjoyment of Estate.**

— *Smith v. Clark*, 10 Md. 186; *Stansbury v. Hubner*, 73 Md. 228.

**Restriction on Testamentary Disposition.**

— Where the will gave to the testator's wife certain lands and then provided, "and she may will it, I mean the old homestead, to any of my children at her own discretion," an estate in fee simple became vested in the devisee, the attempted restraint upon testamentary disposition being in conflict with the fee given by the preceding sentence, and void. *Ahl v. Bosler*, 175 Pa. St. 526.

See *infra*, this section, *Conditional Devises and Bequests*. And see the title *CONDITIONS*, vol. 6, p. 499.

**4. Executory Devise After Determinable Fee.**

— *In re Banks*, 87 Md. 425. Here the testator created a fee in remainder determinable on the death of the remainderman under age and without issue, with an executory devise over in that event. There was no absolute power of disposal in the remainderman. It was held that the limitation over was good. See also *Combs v. Combs*, 67 Md. 17.

**5. Express Life Estate Not Enlarged to Fee Except by Positive Provisions.** — *Mansfield v. Shelton*, 67 Conn. 390; *Cook v. Walker*, 15 Ga. 457; *Metzen v. Schopp*, 202 Ill. 275.

**6. Express Life Estate Not Converted into Fee by Power of Disposition.** — *Brant v. Virginia Coal. etc., Co.*, 93 U. S. 326; *Sheldon v. Rose*, 41 Conn. 371; *Lewis v. Palmer*, 46 Conn. 454; *Glover v. Stillson*, 56 Conn. 316; *Peckham v. Lego*, 57 Conn. 553; *Mansfield v. Shelton*, 67 Conn. 390; *Kennedy v. Alexander*, 21 App. Cas. (D. C.) 424; *Griffiths v. Griffiths*, 198 Ill. 632; *Rusk v. Zuck*, 147 Ind. 388; *Austin v. Hyndman*, 119 Mich. 615.

**7. Estate Not Enlarged by Absence of Limitation Over.** — *Evans's Appeal*, 51 Conn. 435; *Shaner v. Wilson*, 207 Pa. St. 550.

**8. Estate Not Enlarged by Direction to Pay Legacies.** — *Crawford v. Forest Oil Co.*, 208 Pa. St. 5.

**9. Brendel v. Hansen**, 127 Mich. 396.

For a more extended discussion of these principles, see *supra*, this subsection, *Considerations Common to Realty and Personality — Effect of Particular Provisions*.

**10. Expression of General Intent Subservient to Particular Devise.** — *Roe v. Doe*, 2 Houst. (Del.) 76; *Chandler v. Gibson*, 2 Ont. L. Rep. 442.

**11. Conflicting Language.** — Where a husband conveyed all his "right, title, interest, and claim" to certain lands to his wife, "her heirs and assigns, for her sole benefit and use during her natural life," and after her death to be divided among his legal heirs, and then provided that the conveyance should not take effect until after his death, it was held that the paper was testamentary in character and that the wife did not take a fee-simple estate in the lands. *Coulter v. Shelmadine*, 204 Pa. St. 120.

devise.<sup>1</sup>

(4) *Determinable Fees* — (a) *Limitation Over upon Failure of Issue.* — A determinable, base, or qualified fee is one which, upon the concurrence of collateral circumstances, may endure forever to a man and his heirs, but which is liable to be determined by some act or event expressed on its limitation to circumscribe its continuance, or inferred by law as bounding its extent.<sup>2</sup> Determinable fees usually arise under a devise to a person in fee simple with a limitation over in case he "die without issue" or "leave no issue," or similar words importing a failure of issue.<sup>3</sup> In order that a determinable or qualified fee may pass, the failure of issue contemplated must be a definite failure thereof; otherwise, an estate tail, and not a determinable fee, will be created.<sup>4</sup> In many jurisdictions statutes have been passed requiring the failure of issue to be construed as definite unless a contrary intent is clear.<sup>5</sup> And whether such an intent exists must be determined from the language of the will considered from the testator's point of view of the pertinent surrounding circumstances.<sup>6</sup> By one rule of construction the dying without children or issue will be construed to mean the death of the devisee during the lifetime of the testator,<sup>7</sup> so that the devisee upon surviving the testator takes an absolute estate though childless.<sup>8</sup> But this rule is controlled by the manifestation of a contrary intent.<sup>9</sup>

*Death Without Issue Associated with Other Event or Condition.* — Where a limitation over is upon the death of the first taker under the age of twenty-one, or some other specified age, without issue, or unmarried and without issue, or where the dying without issue is associated with some other specific event or circumstance, the failure of issue is necessarily definite,<sup>10</sup> and the devise passes a determinable fee with an executory devise over.<sup>11</sup> Where the conditions, combined with the failure of issue, upon the happening of which the estate is to go over, become impossible, the fee becomes indefeasible in the first taker.<sup>12</sup>

1. See *supra*, this subsection, *Considerations Common to Realty and Personalty — Effect of Particular Provisions.*

2. See the title ESTATES, vol. 11, p. 368.

3. See the title ISSUE (DESCENDANTS), vol. 17, p. 542.

4. See the titles ISSUE (DESCENDANTS), vol. 17, p. 574 *et seq.*; REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 431 *et seq.*

5. See the title ISSUE (DESCENDANTS), vol. 17, p. 572.

6. *Whether Failure of Issue Definite or Indefinite.* — *Stewart v. Knight*, 62 N. J. Eq. 232, in which it was held that a will devising the residue of the testatrix's estate to her nephew "and in case he shall die without children my will then is that both my real and personal estate be divided equally among his surviving brothers and sisters," contemplated a definite and not an indefinite failure of issue, so that the first devisee passed a qualified fee-simple estate with an executory devise over upon the happening of the named contingency.

7. See the title ISSUE (DESCENDANTS), vol. 17, p. 573. And see *supra*, this section, *Period Referred to.*

8. *Devisee Surviving Testator Takes Absolute Estate.* — *Teal v. Richardson*, 160 Ind. 119; *Galbraith v. Swisher*, 19 Pa. Super. Ct. 143.

9. See the title ISSUE (DESCENDANTS), vol. 17, p. 574.

10. *Contrary Intent Shown.* — A testator gave to his wife "for her sole benefit" all his estate, both real and personal, and subsequently di-

rected that, as between his wife and his son; "if one or the other dies, the one that survives the other" should take all the property. It was held that the death contemplated was not a death during the testator's lifetime and that the widow took a life estate which would be merged in a fee in case of the death of the son during her life, and in the event of the widow's death prior to that of her son, the remainder in fee simple would become vested in him. *Littlewood's Will*, 96 Wis. 608.

10. See the title ISSUE (DESCENDANTS), vol. 17, pp. 566, 567.

11. *Failure of Issue Construed with Other Circumstances Passes Determinable Fee.* — *Covington First Nat. Bank v. De Pauw*, 75 Fed. Rep. 775; *McAdams v. Norton*, (Ky. 1904) 78 S. W. Rep. 880; *Morehouse v. Morehouse* 161 N. Y. 654, affirming 33 N. Y. App. Div. 250.

12. *Indefeasible Fee When Associated Conditions Become Impossible.* — A testator disposed of his lands as follows: "I give unto my son R. all my real estate excepting such part as I give and grant unto my two daughters as hereafter mentioned." After making a devise to said daughters, he adds: "My will is, that if any of my children should happen to die without issue alive, that such share or dividend shall be divided by the survivor of them." It was held that R. took a fee simple defeasible on condition that he had no issue at his death, and his sisters survived him. When the sisters died, the condition became impossible, and at that time it became an absolute fee simple in R. *Den v. Schenck*, 8 N. J. L. 29.

**Death of Devisee Without Other Contingency.** — In a bequest to A, and in case he die or in the event of his death, simply, without any further words of contingency, then over to B, the contingency intended is the death of A before the testator; for, death being a certain and inevitable event at some time, and in no sense contingent except as associated with other circumstances, as death without issue, or death before or after a certain other event, and the like, the testator cannot be supposed to have made the death of A at any time the contingency upon which the limitation over to B is to take effect; and the contingency of A's dying before the testator is adopted as the most reasonable interpretation of the testator's meaning. The devisee, therefore, having survived the testator, takes an estate in fee, free from any condition.<sup>1</sup> But this rule will yield where there are other expressions or dispositions in the will which indicate a contrary intention.<sup>2</sup>

(b) **Limitation Over upon Other Contingencies.** — The determinable estate in fee may be made dependent upon various other contingencies, as in the case of a devise to A and his heirs while tenants of a certain manor,<sup>3</sup> or where it is provided that the devisee shall pay the taxes on the land and, in case of his failure to pay the tax, the land shall go over.<sup>4</sup> Likewise, a devise to a charitable purpose provided a certain relative of the testator who has disappeared shall not reappear, gives a fee determinable upon the reappearance of the person designated.<sup>5</sup> Estates whose continued duration depends upon the survivorship of the devisee beyond the life of some other person, are also determinable fees.<sup>6</sup> A determinable fee and a fee simple in trust are not to be confused.<sup>7</sup>

**Estate Defeasible Only in Manner Described.** — When there are clear words of gift the courts will not permit the gift to be defeated unless it is manifest that the case has happened in which it is declared the interest shall cease. The rule applies when prior or particular estates are created. If the ulterior estate is expressed to arise on a contingent determination of the preceding interest and the prior gift in event has taken place, but is afterwards determined in a different mode from that expressed by the testator, the ulterior gift fails, and the first becomes absolute.<sup>8</sup>

To the same effect is *Anderson v. Brown*, 84 Md. 261. Here a testator, after creating a life estate in his wife in certain lands, devised it at her death to his children (certain children being excluded by reason of advancements) in fee, "and in case of the death of any one of them without issue living at the time of his or her death," he gave "his or her share to the survivor or survivors." It was held that the children took an estate in fee, as tenants in common, defeasible as to each on his or her death without issue, in which event the share of the person so dying passed to the survivors, so that the last survivor took his estate, together with that which survived to him, in fee absolutely.

**1. Death of Devisee Without Other Contingency.** — *Wright v. Stephens*, 4 B. & Ald. 574; *Hinckley v. Simmons*, 4 Ves. Jr. 160; *King v. Taylor*, 5 Ves. Jr. 806; *Cambridge v. Rous*, 8 Ves. Jr. 12; *Webster v. Hale*, 8 Ves. Jr. 410; *Ommaney v. Bevan*, 18 Ves. Jr. 291; *McClellan v. Mackenzie*, (C. C. A.) 126 Fed. Rep. 701; *Clements v. Reese*, (Ky. 1903) 74 S. W. Rep. 1047; *Sims v. Conger*, 39 Miss. 231.

**2. Rule Subject to Intent of Testator.** — *Billings v. Sandom*, 1 Bro. C. C. 393; *Nowlan v. Nelligan*, 1 Bro. C. C. 489; *Chalmers v. Storil*, 2 Ves. & B. 222; *Douglas v. Chalmer*, 2 Ves. Jr. 501; *Sims v. Conger*, 39 Miss. 231.

**3.** 2 Black. Com. 109.

**4. Estate Conditioned upon Payment of Taxes.** — *Hoselton v. Hoselton*, 166 Mo. 182.

**5.** *Com. v. Pollitt*, (Ky. 1903) 76 S. W. Rep. 412.

**6. Estates Conditioned on Survivorship.** — *Pulse v. Osborn*, 30 Ind. App. 631; *Matter of Geissler*, 72 N. Y. App. Div. 85, reversing (*Surrogate Ct.*) 36 Misc. (N. Y.) 750.

**7. Determinable Fee and Fee Simple in Trust Distinguished.** — A testator devised a burial ground to his son "and his heirs in fee in trust for the use of a burial ground forever," and directed that all his relatives should have the privilege of burial in the burial ground free of cost, and set aside a fund to be used in keeping the burial ground in repair. It was held that the limitation was not a qualification of the estate devised, but of the uses to which, in the hands of the trustee, it might be applied, and that the son acquired a fee-simple estate in trust for a charitable use and not a base or determinable fee. *Funck's Estate*, 16 Pa. Super. Ct. 434.

**8. Estate Defeasible Only in Manner Described.** — *Sherrod v. Sherrod*, 38 Ala. 537; *Smith v. Chadwick*, 111 Ala. 542.

**Estate Defeasible by Having Bodily Heirs.** — Where a testator devised a farm to a trustee for the benefit of J., to apply the rents and



(5) *Executory Devises*. — The estate limited over by the will to take effect after a determinable fee is known as an executory devise. The nature of an executory devise and the provisions in a will necessary to create it have been fully treated under another title.<sup>1</sup>

(6) *Fee-simple Estates Created Out of Estates Tail*. — In many jurisdictions it is provided by statute that words formerly passing an estate tail shall be construed to pass a fee-simple estate.<sup>2</sup>

(7) *Merger*. — Where there is a devise of a life estate coupled with a devise of the remainder to the same devisee, there being no intervening estate, the two interests are merged and the devisee takes the estate absolutely.<sup>3</sup>

c. ESTATES TAIL. — (1) *Expressions Sufficient to Create* — (a) *In General*. — A limitation to the devisee and the heirs of his body is the most apt and appropriate expression to pass an estate tail.<sup>4</sup> And when words are used without explanation or qualification in the context, which, according to a settled rule of law, import an estate tail, the legal meaning of the language is controlling.<sup>5</sup> The strict rule of the common law is that there must be words of inheritance, as a limitation to the heirs of the devisee, and that there must also be a limitation to a particular class of heirs by words of procreation. Without words of inheritance, only an estate for life will pass, and if the word "heirs" be general and unrestricted in meaning, the estate taken will be a fee simple. In last wills and testaments greater indulgence is allowed and an estate tail may be created by less regular forms of expression;<sup>6</sup> but this is due to the readiness with which the courts give effect to the testator's intention regardless of the particular words in which it is expressed, and not to any change in the general principle applicable to the creation of the estate. It is essential in devises as well as in conveyances that expressions be used

profits to the support of J., and provided that after the death of J. the estate should pass to his children if he had any, but that if he had no heirs of his body it should pass to any person to whom J. should will or devise it, to be theirs forever, it was held that there was a general devise to J. in fee which could only be defeated upon the happening of the event of his having bodily heirs, and that event never having transpired, the fee became absolute. *McCallister v. Bethel*, 97 Ky. 1. See also *Harrison v. Weatherby*, 180 Ill. 418.

1. See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 426 *et seq.*

2. See *infra*, this subsection, *Estates Tail — Abolition of Estates Tail by Statute*.

3. *Merger*. — *Spencer v. Kimball*, 98 Me. 499; *Newton v. Odom*, 67 S. Car. 1. See the title MERGER, vol. 20, p. 592.

4. *Estate Tail Passed by Gift to Devisee and Heirs of Body*. — *Peterson v. Jackson*, 196 Ill. 40; *Metzen v. Schopp*, 202 Ill. 275; *Sanders v. Wade*, (Ky. 1895) 30 S. W. Rep. 656; *Harris v. McCann*, 75 Miss. 805; *Miller v. Ensminger*, (Mo. 1904) 81 S. W. Rep. 442; *Ralston v. Truesdall*, 178 Pa. St. 429; *Boyd v. Weber*, 193 Pa. St. 651; *In re Tillinghast*, 25 R. I. 338; *Holden v. Wells*, 18 R. I. 802; *Middleton v. Smith*, 1 Coldw. (Tenn.) 144.

*Statute in Rhode Island*. — Gen. Laws R. I., c. 202, § 21, expressly recognizes estates tail and provides for their creation by the use of the words "in tail" or "heirs of the body." *In re Tillinghast*, 25 R. I. 338.

*Estates Tail Favored Rather than Gifts of Usufruct*. — *Ryan v. Ryan*, 22 Quebec Super. Ct. 174.

*Estates Tail under Rule in Shelley's Case*. — See SHELLEY'S CASE (RULE IN), vol. 25, p. 639.

*Classes of Estates Tail*. — For a classification of estates tail, and the words by which they may be created, see the title ESTATES, vol. 11, p. 371.

5. *Settled Meaning of Words to Prevail*. — *Pearsol v. Maxwell*, (C. C. A.) 76 Fed. Rep. 428; *Marshall v. Walker*, (Ky. 1904) 80 S. W. Rep. 1132; *Travers v. Wallace*, 93 Md. 507; *Vaughan v. Dickes*, 20 Pa. St. 509; *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537.

6. 2 Bl. Com. 114.

*Estate Tail Passed by Word "Family"*. — The word "family" is not a technical word nor can it be given any technical meaning irrespective of the context and scope in which a testator uses it; but where the devise was to a daughter of the testator, "as long as she lives, but should she die without leaving a family," then over, it was held to mean death without issue or heirs of the body, and to refer to an indefinite failure of issue which creates a fee-tail estate. *Beilstein v. Beilstein*, 194 Pa. St. 152.

*The Word "Offspring"* in a clause of a will devising property to A., and in the event of her "dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be equally divided between the heirs of J.," is equivalent to the word "issue," and gives A. an estate tail. *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, *affirming* 69 Fed. Rep. 501.

*At Common Law an estate tail may be created by a devise to a man "and his seed," or to a man and "his heirs male."* 2 Bl. Com., p. 115.

which can be construed as words of inheritance or limitation as distinguished from words of purchase,<sup>1</sup> and that the limitation be to a particular class of heirs by a fair and reasonable construction of the language employed.<sup>2</sup> The limitation to a particular class of heirs, and a consequent estate tail, will be implied, however, under certain circumstances; for where there is a devise over after dying without heirs generally, and the person to whom the limitation over is made be a relative, and capable of being a collateral heir to the first devisee, the first devisee takes only an estate tail, because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended.<sup>3</sup>

(b) **Limitations to "Children"** — *aa. GENERAL CONSTRUCTION OF TERM.* — The word "children" primarily indicates not heritable succession but individual acquisition, and although the rules of construction permit the word to be used in the more comprehensive sense of the words "heirs of the body," in cases in which a clear explanation will justify a departure from the ordinary meaning, yet there must be an express warrant for this change, under the hand of the author of the gift, and conjecture, doubt, or even equilibrium or apparent intention will not suffice; the word "children" being a word of purchase and not of limitation, except where there is an express authority for construing it otherwise to be found in the will.<sup>4</sup>

*bb. RULE IN WILD'S CASE.* — At common law, under the rule in Wild's case,

1. **Words of Limitation Must Be Used.** — *Stone v. Bradlee*, 183 Mass. 165; *Millsaps v. Estes*, 134 N. Car. 486; *Guthrie's Appeal*, 37 Pa. St. 9; *Clemens v. Heckscher*, 185 Pa. St. 476.

2. **Limitation Must Be to Particular Class of Heirs.** — *Smith v. Rice*, 183 Mass. 251; *Jones v. Jones*, 201 Pa. St. 548; *Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138.

3. **Estate Tail Implied by Devise Over to Collateral Relation.** — *In re Waugh*, (1903) 1 Ch. 744, 88 L. T. N. S. 54; *In re McDonald*, 6 Ont. L. Rep. 478.

4. **"Children" Not Generally a Word of Limitation.** — *Buffar v. Bradford*, 2 Atk. 220; *Crawford v. Forest Oil Co.*, 77 Fed. Rep. 534, *affirmed* (C. C. A.) 77 Fed. Rep. 106; *Turner v. Paterson*, 5 Dana (Ky.) 292; *Stone v. Bradlee*, 183 Mass. 165; *Chew's Appeal*, 37 Pa. St. 23; *Guthrie's Appeal*, 37 Pa. St. 9; *Huber's Appeal*, 80 Pa. St. 348; *Oyster v. Oyster*, 100 Pa. St. 538; *Carroll v. Burns*, 108 Pa. St. 386; *Affolter v. May*, 115 Pa. St. 54; *Lancaster v. Flowers*, 198 Pa. St. 614; *Crawford v. Forest Oil Co.*, 208 Pa. St. 5. See also the title CHILD — CHILDREN, vol. 5, p. 1092.

In Kentucky the rule is that gifts from a father to his daughter and her children, or to a son and his children, or from a husband to a wife and children, will give the daughter, son, or wife, as the case may be, an estate for life with a remainder to the children. *Melford v. Dougherty*, 89 Ky. 58, 25 Am. Rep. 521; *Adams v. Adams*, (Ky. 1898) 47 S. W. Rep. 335; *Kuhn v. Kuhn*, (Ky. 1902) 68 S. W. Rep. 16; *Sims v. Skinner*, (Ky. 1904) 81 S. W. Rep. 703.

"**Bodily Heirs**" Used in Sense of "Children." — Even a devise to a testator's daughter and her "bodily heirs," when it appears that "bodily heirs" was used in the sense of "children," has been held to give the daughter an estate for life with a remainder to her children. *Mitchell v. Simpson*, 88 Ky. 125.

**"Children" Combined with Other Expressions.**

— Where the devise was to the testator's "children or legal heirs" it was held that an estate tail passed to the first taker. *Sheeley v. Neidhammer*, 182 Pa. St. 163.

**Children in Sense of Heirs Generally.** — A devise to one, and, if he die without children, remainder over, may be an estate tail; and where the children are all heirs and the testator manifestly used the term "children" in the sense of heirs, an estate in fee will pass. *Rothwell v. Jamison*, 147 Mo. 601.

**Estates Tail Passed by Limitation to "Children."** — "The words 'child or children' are ordinarily construed to be words of purchase, and not words of limitation; but there are many cases involving the construction of wills in which such words have been held to be words of limitation, and synonymous with 'issue.' They have frequently been given such broader and more general meaning in order to carry out the manifest intention of the testator as gathered from the entire will. It is true that such words, unaided by the context, and unaffected by any other language in the will showing an intention to use them in a more comprehensive sense, would ordinarily restrict the failure of issue to the death of the first taker. But courts have not been slow to seize upon any other words employed by the testator which show that his desire and intention was that the failure of issue was to be a general and indefinite one, and that not only children, but grandchildren, and even remoter issue, should be beneficiaries of his bounty." *Per Pennewill, J.*, in *Caulk v. Caulk*, 3 Penn. (Del.) 528. See also *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537, 41 W. N. C. (Pa.) 85.

**Other Instances** in which the word "children" has been construed to mean heirs of the body and pass an estate tail, are furnished in the following cases: *Hood v. Dawson*, 98 Ky. 285; *Potts v. Kline*, 174 Pa. St. 513; *Vilsack's Estate*, 207 Pa. St. 611.

where there is a devise to A and his children, and A has no children at the time of the devise, the term "children" is construed as a word of limitation equivalent to issue or heirs of the body and the parent takes an estate tail; but when under such a devise A has children living at the time of the devise, the word "children" will be construed *prima facie* to be a word of purchase, and the parent and the children will take concurrently as joint tenants.<sup>1</sup> This rule, however, is only a rule of construction and not a positive rule of law. Acting upon the rule in both its branches the courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator as gathered from other passages of the will.<sup>2</sup>

**1. Rule in Wild's Case—England.**—Wylde's Case, 6 Coke 17; Buffar v. Bradford, 2 Atk. 221; Davie v. Stevens, 1 Dougl. 321; Wood v. Baron, 1 East 259; Byng v. Byng, 10 H. L. Cas. 171; Clifford v. Koe, 5 App. Cas. 447; *Re* Wilmot, 76 L. T. N. S. 415; *De Witte v. De Witte*, 11 Sim. 41; Paine v. Wagner, 12 Sim. 188; Cook v. Cook, 2 Vern. 545; Morton v. Tewart, 2 Y. & C. Ch. 81.

*United States.*—Parkman v. Bowdoin, 1 Sumn. (U. S.) 359.

*California.*—Matter of Utz, 43 Cal. 200.

*Georgia.*—Wiley v. Smith, 3 Ga. 551; Hoyle v. Jones, 35 Ga. 40; Butler v. Ralston, 69 Ga. 485; Sumpter v. Carter, 115 Ga. 893.

*Illinois.*—Faloon v. Simshauser, 130 Ill. 649.

*Indiana.*—King v. Rea, 56 Ind. 1; Glass v. Glass, 71 Ind. 392; Biggs v. McCarty, 86 Ind. 352; Moore v. Gary, 149 Ind. 51.

*Kentucky.*—Turner v. Patterson, 5 Dana (Ky.) 292; Williams v. Duncan, 92 Ky. 125.

*Maryland.*—Shotts v. Poe, 47 Md. 513.

*Massachusetts.*—Annable v. Patch, 3 Pick. (Mass.) 360; Nightingale v. Burrell, 15 Pick. (Mass.) 104; Allen v. Hoyt, 5 Met. (Mass.) 324; Wheatland v. Dodge, 10 Met. (Mass.) 504.

*Mississippi.*—Hubbard v. Selser, 44 Miss. 712.

*Missouri.*—Small v. Field, 102 Mo. 105; Rothwell v. Jamison, 147 Mo. 601.

*New Jersey.*—Jones v. Jones, 13 N. J. Eq. 236.

*New York.*—Hannan v. Osborn, 4 Paige (N. Y.) 336.

*North Carolina.*—Hampton v. Wheeler, 99 N. Car. 222; Heath v. Heath, 114 N. Car. 547; Silliman v. Whitaker, 119 N. Car. 89.

*Ohio.*—Moushand v. Rodetzky, 7 Ohio Dec. 225.

*Pennsylvania.*—Ellet v. Paxson, 2 W. & S. (Pa.) 436; Graham v. Flower, 13 S. & R. (Pa.) 439.

*Virginia.*—Merryman v. Merryman, 5 Munf. (Va.) 440.

**2. Rule of Construction Only.**—Byng v. Byng, 10 H. L. Cas. 171; *Re* Wilmot, 76 L. T. N. S. 415; Grieve v. Grieve, L. R. 4 Eq. 180; Oates v. Jackson, 2 Stra. 1172; Jeffery v. Honywood, 4 Madd. 398; Wylde's Case, 6 Coke 16; Allen v. Hoyt, 5 Met. (Mass.) 324; Jones v. Jones, 13 N. J. Eq. 236; Merryman v. Merryman, 5 Munf. (Va.) 440.

**Express Power of Appointment Among Children.**—Under the first branch of this rule the parent takes an estate tail, although the will expressly gives him the power to settle the estate on all or any of his issue in such way as he should appoint. Seale v. Barter, 2 B. & P. 485. In

this case Lord Alvanley said: "On the part of the defendants it has been contended that, admitting the general doctrine that a devise to a man and his children, he having no children at the time of the devise, must embrace all the posterity of the devisee, yet that it appears from the circumstances of this particular case that the testator did not intend so to limit his estate; and in the course of the argument the power given to John Seale to settle the estate on such of his children as he should think proper was mainly relied upon, and contended to be inconsistent with a devise of an estate tail to John Seale himself. It was urged that the power would be altogether unnecessary if an estate tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit, by cutting off the entail. But it may be observed that the power had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. Independent, however, of the operation of this power, I think there is a fallacy in the argument; for it supposes that the testator knew the legal consequences of all the words which he had used, and all the privileges attached to a tenancy in tail.

\* \* \* The true question to be considered is, whether the testator meant to give the estate to John Seale and his posterity. Probably, if it had been asked of the testator whether he meant that his son should have a power to defeat the limitation, he would have answered that he did not understand the effect of an estate tail, but that he wished the estate to go to his son and posterity. If he meant to give his estate to his son and his posterity generally, it is an estate tail; on the other hand, if he meant to give it first to his son, and afterwards to select the sons and daughters of his son in order to give the estate to them, the son took only an estate for life. Now, we are of opinion, upon all the authorities, that the words 'children lawfully to be begotten,' in this case, are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son and the issue of his body generally. And though perhaps the power would not have been added had the testator known the full effect of the words which he has used, yet we do not think the power sufficient to control the effect which, according to the authorities referred to, has always been given to those words. We give no opinion what would have been the case if there had been children born at the time of the devise."

**Intention that Estate Tail Should Not Pass.**—



If it is specially provided that the gift to the children does not take effect until the death of the parent, the rule can have no application.<sup>1</sup>

**Ascertainment of Issue to Take.** — Since under the second branch of the rule the word "children" is regarded as a word of purchase, and under a devise to A and his children A and his children take concurrently as purchasers, the question arises as to when the class of issue to take is to be ascertained. The rule is that the devise or bequest to children as a class, distributable at the death of some other person, vests in all children in existence at the death of the testator; the gift opening, however, so as to let in such after-born children, if any, as may come into existence before the period of distribution.<sup>2</sup> Children then born or *en ventre sa mere* take as joint tenants or tenants in common, but children born afterwards are not entitled to come in.<sup>3</sup>

**Limitations in Tail Male.** — Upon the authority of Wild's case it has been held that a devise to A and his sons in tail male, and for want of such issue male over, has been held, where A has no sons, to give him an estate tail.<sup>4</sup>

**Modification of Rule by Statute.** — While the rule in Wild's case has been as uniformly followed in the *United States* as in *England*, it has been with a necessary modification; for in the former, estates tail having been generally converted by statute into fee-simple estates or life estates, where formerly under the rule an estate tail would pass, the parent now takes an estate in fee simple or a life estate, as the case may be;<sup>5</sup> and further, where under the original rule the parent and children would take as joint tenants, they now take as tenants in common, since, in most jurisdictions, joint tenancies have been abolished, or the quality of survivorship in such estates taken away, or tenancies in common are favored, and estates in common are declared to pass unless a contrary intention clearly appears from the creating instrument.<sup>6</sup>

(c) **Limitations in Terms of "Issue."** — The effect of testamentary limitations in which the word "issue" is used, as a devise to A and his issue, or to A for

In *Buffar v. Bradford*, 2 Atk. 220, the will gave a certain portion of the testator's estate to his niece and the children born of her body. The devisee had no child when the will was made, but one was born afterwards in the lifetime of the testator; and the devisee died in the testator's lifetime. It was held that an estate tail did not pass, and that consequently the legacy did not lapse, but that the mother and child, although the child was born after the devise, took as joint tenants, and that upon the mother's death the entire estate vested in the child.

In *Grieve v. Grieve*, L. R. 4 Eq. 180, the doctrine that the rule in Wild's case is only a *prima facie* rule of construction is approved. Here there was a devise of a house to the testator's nieces and their children, and if they have none, over; "the furniture to go with the house." It was held that the direction as to the furniture was a sufficient reason for not vesting an estate tail in his nieces, and that they took the house and furniture for their lives, with immediate remainder to the children of each coming into being during the lives of the nieces.

1. **Specific Provisions as to When Gift Takes Effect Not Within Rule.** — *Grant v. Fuller*, 33 Can. Sup. Ct. 34; *Young v. Denike*, 2 Ont. L. Rep. 723.

2. **Ascertainment of Issue to Take.** — *Browne v. Hammond*, Johns. Ch. (Eng.) 210; *Re Wilmot*, 76 L. T. N. S. 415.

3. **Children en Ventre Sa Mere Take.** — *Gay v. Baker*, 5 Jones Eq. (58 N. Car.) 344; *Heath v.*

*Heath*, 114 N. Car. 547; *Moushand v. Rodetzky*, 7 Ohio Dec. 225.

**Subsequent Birth of Children.** — Where the devise was to a daughter and "all her children if she shall have any," and she had no children, the devise created, under the rule in Wild's case, an estate tail in the daughter which the statute converted into a fee-simple estate, the clause "if she shall have any" not affecting the construction; and the fact that the daughter gave birth to children subsequent to the death of the testator did not divest her estate. *Silliman v. Whitaker*, 119 N. Car. 89.

In *Gillespie v. Schuman*, 62 Ga. 252, it was held that a devise to a woman and "her children, if any living," meant at the death of the testator, and as none were then living, the woman took a fee-simple estate, which was not divested by the subsequent birth of a child.

4. **Limitation in Tail Male.** — *Wharton v. Gresham*, 2 W. Bl. 1083.

5. **Modification of Rule by Statutes Abolishing Estates Tail.** — *Hunt v. Satterwhite*, 85 N. Car. 74; *Hampton v. Wheeler*, 99 N. Car. 222; *Silliman v. Whitaker*, 119 N. Car. 89.

And see *infra*, this subsection, *Abolition of Estates Tail by Statute*.

6. **Parent and Children Now Take as Tenants in Common.** — *Matter of Utz*, 43 Cal. 200; *Anabel v. Patch*, 3 Pick. (Mass.) 360; *Allen v. Hoyt*, 5 Met. (Mass.) 324; *Hunt v. Satterwhite*, 85 N. Car. 74; *Hampton v. Wheeler*, 99 N. Car. 222; *Silliman v. Whitaker*, 119 N. Car. 89; *Moushand v. Rodetzky*, 7 Ohio Dec. 225.

life and after his decease to his issue, and devises to A or to A and his heirs, and if he die without issue over, and other similar limitations are fully discussed elsewhere in this work.<sup>1</sup> In order to pass an estate tail by such expressions it is essential that the failure of issue intended shall be an indefinite failure of issue.<sup>2</sup>

(2) *Abolition of Estates Tail by Statute.*—Estates tail have been widely abolished by statutes.<sup>3</sup> The inquiry, however, as to when an estate tail passes under a devise is not rendered less important on that account. These estates may still be created and will be given effect, according to the provision of the statute, either as fee-simple estates,<sup>4</sup> or estates for life.<sup>5</sup>

*d. INTERESTS IN PERSONALTY*—(1) *Passing of Absolute Interest Favored*—(a) *In General.*—Although a life estate may be lawfully created in personal property,<sup>6</sup> it is clear that the rule which favors the vesting of absolute estates in real property under a general devise applies with additional force to bequests, and that where a reasonable construction of all the terms of a will discloses no contrary intention an absolute interest passes to the legatee.<sup>7</sup> And

See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 657.

1. See the title ISSUE (DESCENDANTS), vol. 17, p. 542.

2. See the titles ISSUE (DESCENDANTS), vol. 17, p. 558 *et seq.*; ESTATES, vol. 11, p. 372.

3. See the title ESTATES, vol. 11, p. 376.

4. *Estates Tail Given Effect as Fee-simple Estates*—*United States.*—Pearsol v. Maxwell, 68 Fed. Rep. 513.

*Georgia.*—Wiley v. Smith, 3 Ga. 551; Hertz v. Abrahams, 110 Ga. 707.

*Indiana.*—Moore v. Gary, 149 Ind. 51.

*Kentucky.*—Hood v. Dawson, 98 Ky. 285; Dulaney v. Dulaney, (Ky. 1904) 79 S. W. Rep. 195; Marshall v. Walker, (Ky. 1904) 80 S. W. Rep. 1132.

*Maryland.*—Newton v. Griffith, 1 Har. & G. (Md.) 111; Travers v. Wallace, 93 Md. 507.

*Michigan.*—Eldred v. Shaw, 112 Mich. 237.

*New York.*—Grout v. Townsend, 2 Hill (N. Y.) 554, *affirmed* 2 Den. (N. Y.) 336.

*Pennsylvania.*—Seybert v. Hibbert, 5 Pa. Super. Ct. 537; Palethorp v. Palethorp, 8 Pa. Dist. 135, 22 Pa. Co. Ct. 622, 194 Pa. St. 408; Potts v. Kline, 174 Pa. St. 513; Sheeley v. Neidhammer, 182 Pa. St. 163; Beilstein v. Beilstein, 194 Pa. St. 152; Stouch v. Zeigler, 196 Pa. St. 489; Simpson v. Reed, 205 Pa. St. 53; Pifer v. Locke, 205 Pa. St. 616; McCafferty v. Duerr, 207 Pa. St. 261; Vilsack's Estate, 207 Pa. St. 611; Graham v. Abbott, 208 Pa. St. 68.

*Tennessee.*—Middleton v. Smith, 1 Coldw. (Tenn.) 144.

And see the title ESTATES, vol. 11, p. 376.

5. *Estates Tail Given Effect as Life Estates*—*Illinois.*—Welliver v. Jones, 166 Ill. 80; Peterson v. Jackson, 196 Ill. 40; Metzen v. Schopp, 202 Ill. 275.

*Missouri.*—Yocum v. Siler, 160 Mo. 281; Brown v. Rogers, 125 Mo. 392; Miller v. Ensminger, (Mo. 1904) 81 S. W. Rep. 422; Gannon v. Albright, (Mo. 1904) 81 S. W. Rep. 1162.

*New Jersey.*—Patterson v. Madden, 54 N. J. Eq. 714; Steward v. Knight, 62 N. J. Eq. 232; Holme v. Shinn, 62 N. J. Eq. 1.

*Ohio.*—Naylor v. Loomis, 6 Ohio Cir. Dec. 41, 9 Ohio Cir. Ct. 96, 2 Ohio Dec. 114.

*Tennessee.*—Stratton v. McKinnie, (Tenn. Ch. 1900) 62 S. W. Rep. 636.

*Vermont.*—*In re Kelso*, 69 Vt. 272.

6. *Life Estate in Personality.*—Dickinson v. Griggsville Nat. Bank, 209 Ill. 350, *affirming* 111 Ill. App. 183; Mace v. Mace, 95 Me. 283; Dozier v. Dozier, (Mo. 1904) 81 S. W. Rep. 890; *In re Vreeland*, (N. J. 1904) 57 Atl. Rep. 903; Simonson v. Waller, 9 N. Y. App. Div. 503, *reversing* 4 Misc. (N. Y.) 95; Matter of Ryder, 41 N. Y. App. Div. 247.

A Bequest of Money to the legatee "to have and to hold during the term of her natural life" gives only the right to the possession and custody of the fund during life, and not an absolute interest. Harris v. Dawley, 22 R. I. 633.

7. *Passing of Absolute Interest Favored*—*England.*—*In re Johnston*, (1894) 3 Ch. 204, 8 Reports 563.

*Canada.*—Kerrison v. Kaye, 2 N. Bruns. Eq. Rep. 455; Ryan v. Ryan, 22 Quebec Super. Ct. 174.

*United States.*—Martin v. Fort, (C. C. A.) 83 Fed. Rep. 19.

*Indiana.*—Mulvane v. Rude, 146 Ind. 476.

*Iowa.*—Talbot v. Snodgrass, (Iowa 1904) 100 N. W. Rep. 500.

*Louisiana.*—Hutchinson's Succession, 112 La. 656.

*Maine.*—Loring v. Hayes, 86 Me. 351.

*Maryland.*—Bentz v. Maryland Bible Soc., 86 Md. 102.

*Massachusetts.*—Twiss v. Simpson, 183 Mass. 212; Thissell v. Schillinger, (Mass. 1904) 71 N. E. Rep. 300.

*New Jersey.*—Baldwin v. Tucker, 61 N. J. Eq. 412; *In re Vreeland*, (N. J. 1904) 57 Atl. Rep. 903.

*New York.*—Matter of Turner, (Surrogate Ct.) 34 Misc. (N. Y.) 366; Karstens v. Karstens, 29 N. Y. App. Div. 229, *affirming* 20 Misc. (N. Y.) 251; Trask v. Sturges, 170 N. Y. 482, *reversing* 68 N. Y. Supp. 1149; Oakes v. Massey, 94 N. Y. App. Div. 165.

*Pennsylvania.*—Borda's Estate, 10 Pa. Dist. 117.

*Rhode Island.*—Nye v. Koehne, 22 R. I. 118.

*Wisconsin.*—Lovass v. Olson, 92 Wis. 616.

*Property Placed in Trust.*—The fact that a

it has been held that, in a will, language which creates a fee conditional in real property, creates an absolute interest in the personal property, for the reason that perpetuity is never tolerated in perishable property.<sup>1</sup> It is doubtless true, however, that personal property may, by apt language, be bequeathed on condition or in fee tail; but such a construction should not be put on the provisions of a will giving a legacy unless the language clearly and explicitly requires it.<sup>2</sup>

**Absolute Interest in Undefined Portion of Estate.** — If the bequest is of the income and such portion of the principal as the legatee may require, an absolute interest in such portion of the principal passes;<sup>3</sup> but the privilege given to a legatee to use such part of the *corpus* of the legacy as may be necessary, is not to be construed as an absolute gift of the entire *corpus*, where such a construction would defeat the plain purpose of the testator and operate as a virtual fraud upon the residuary legatee.<sup>4</sup>

(b) **Effect upon Personalty of Words Creating Estate Tail in Realty.** — It is a general rule that words in a devise which would give an estate tail to the first taker, with or without a remainder over, will, in a bequest of personal property, give the first taker an absolute estate,<sup>5</sup> and any remainder over is

fund is placed in the hands of a trustee does not affect the absolute character of the interest passing, where there is no limitation upon the estate and no devise over. *Drye v. Medley*, (Ky. 1903) 74 S. W. Rep. 272; *Schwab's Estate*, 22 Pa. Co. Ct. 218.

**1. Words Creating Conditional Fee in Realty Give Absolute Interest in Personalty.** — *Dunlap v. Garlington*, 17 S. Car. 567; *Daintry v. Daintry*, 6 T. R. 307; *Carr v. Porter*, 1 McCord Eq. (S. Car.) 60; *Henry v. Felder*, 2 McCord Eq. (S. Car.) 339; *Addison v. Addison*, 9 Rich. Eq. (S. Car.) 58; *Bedon v. Bedon*, 2 Bailey L. (S. Car.) 248.

**2.** *Talbot v. Snodgrass*, (Iowa 1904) 100 N. W. Rep. 500.

**3. Absolute Interest in Portion of Principal.** — *Russell v. Hilton*, 80 N. Y. App. Div. 178, affirmed 175 N. Y. 525, 67 N. E. Rep. 1089; *Matter of Stickney*, (Surrogate Ct.) 41 Misc. (N. Y.) 70; *Silk v. Merry*, 23 Ohio Cir. Ct. 218.

**4. Not Gift of Entire Corpus.** — *La Bar's Estate*, 181 Pa. St. 1; *Gross v. Strominger*, 178 Pa. St. 64.

**5. Effect upon Personalty of Words Creating Estate Tail in Realty** — *England*. — *Fereyes v. Robertson*, Bunb. 301 *Windham v. Love*, 2 Ch. Rep. 14; *Matter of Wynch*, 5 De G. M. & G. 188; *In re Lowman*, (1895) 2 Ch. 348, 72 L. T. N. S. 816; *Tothill v. Pitt*, 1 Madd. 488; *Crawford v. Trotter*, 4 Madd. 361; *Simmons v. Simmons*, 8 Sim. 22; *Ware v. Polhill*, 11 Ves. Jr. 257; *Elton v. Eason*, 19 Ves. Jr. 73; *Adshead v. Willets*, 9 W. R. 405; *Seale v. Seale*, 1 P. Wms. 290.

*Canada*. — *In re McDonald*, 6 Ont. L. Rep. 478.

*United States*. — *Wright v. Scott*, 4 Wash. (U. S.) 16.

*Alabama*. — *M'Graw v. Davenport*, 6 Port. (Ala.) 319; *Darden v. Burns*, 6 Ala. 365; *Goldsby v. Goldsby*, 38 Ala. 404; *Bethea v. Smith*, 40 Ala. 415.

*Arkansas*. — *Moody v. Walker*, 3 Ark. 147.

*Maryland*. — *Dashiell v. Dashiell*, 2 Har. & G. (Md.) 127; *Jones v. Sothoron*, 10 Gill & J. (Md.) 187; *Hatton v. Weems*, 12 Gill & J. (Md.) 83.

*Massachusetts*. — *Albee v. Carpenter*, 12 Cush. (Mass.) 352; *Hall v. Priest*, 6 Gray (Mass.) 18.

*Missouri*. — *Chism v. Williams*, 29 Mo. 288. *New Jersey*. — *Kent v. Armstrong*, 6 N. J. Eq. 648; *Fairchild v. Crane*, 13 N. J. Eq. 105.

*New York*. — *Moffat v. Strong*, 10 Johns. (N. Y.) 12; *Jackson v. Bull*, 10 Johns. (N. Y.) 19; *Patterson v. Ellis*, 11 Wend. (N. Y.) 259.

*North Carolina*. — *Cox v. Marks*, 5 Ired. L. (27 N. Car.) 281; *Ferrand v. Howard*, 3 Ired. Eq. (38 N. Car.) 381; *Matthews v. Daniel*, 1 Murph. (5 N. Car.) 42.

*Ohio*. — *King v. Beck*, 12 Ohio 390.

*Pennsylvania*. — *Smith's Appeal*, 23 Pa. St. 9; *Pott's Appeal*, 30 Pa. St. 168.

*Rhode Island*. — *Cooke v. Bucklin*, 18 R. I. 666; *In re Tillinghast*, 25 R. I. 338.

*South Carolina*. — *Henry v. Felder*, 2 McCord Eq. (S. Car.) 323; *Postell v. Postell*, Bailey Eq. (S. Car.) 390; *McLure v. Young*, 3 Rich. Eq. (S. Car.) 559.

*Tennessee*. — *Duncan v. Martin*, 7 Yerg. (Tenn.) 519; *Bowman v. Tucker*, 3 Humph. (Tenn.) 648; *Clark v. Clark*, 2 Head (Tenn.) 336.

*Vermont*. — *White v. White*, 21 Vt. 250.

*Virginia*. — *Didlake v. Hooper*, Gilmer (Va.) 194; *Dunn v. Bray*, 1 Call (Va.) 338; *Goodwyn v. Taylor*, 4 Call (Va.) 305; *Wilkins v. Taylor*, 5 Call (Va.) 150; *Williamson v. Ledbetter*, 2 Munf. (Va.) 521; *Deane v. Hansford*, 9 Leigh (Va.) 253.

**Absolute Interest Not Passed by Word "Entail."**

— Where the testator bequeathed to his daughter, who was a *feme sole*, certain slaves and sums of money, with directions to his executor to invest the money in young negroes for her benefit, subject to the provision that "the said negroes with their increase shall be entailed on my said daughter and her children and not be taken for the debts of her husband," it was held that the rule that words creating an estate tail in realty create an absolute interest in personal property had no application, because by the use of the word "entail" the testator had no intention to create an estate tail in the technical sense of that



void.<sup>1</sup> This rule is based upon the rational presumption that the testator did not intend that personal property should be tied up to await an indefinite failure of issue.<sup>2</sup> The rule is relaxed in modern decisions to carry out the testator's intention. If the words "heirs of the body" are used in their technical sense, and nothing appears to show that they are not so used, the rule applies. But when it is apparent from other portions of the will that such words are used in the sense merely of issue of children, the rule has no application, and effect will be given to the words only in the sense in which the testator intended to employ them.<sup>3</sup> Then, too, it should be remembered that the tendency to construe such words as "issue," "children," and similar informal expressions, as words of limitation, is much less marked in reference to personal property than real estate,<sup>4</sup> the failure of issue spoken of in connection with a bequest of personal property being usually construed to mean a definite failure of issue and not an indefinite failure so as to pass an estate tail, which, under the rule here stated, would become an absolute interest;<sup>5</sup> that the application of the rule in Wild's case is extremely doubtful;<sup>6</sup> and that the rule in Shelley's case only applies when "heirs" or "heirs of the body" are used in their strict technical sense.<sup>7</sup>

(2) *Effect of Particular Limitations* — (a) **Gift to A and His Executors or Representatives.** — A gift to A and his executors, or to A and his representatives, gives A the absolute interest;<sup>8</sup> the terms "representatives," "legal representatives," and "personal representatives" meaning those persons claiming as executors or administrators.<sup>9</sup>

**Gift to A for Life, then to His Personal Representatives.** — Under a gift to A for life, and then to his executors, administrators, or personal representatives, A takes an absolute interest.<sup>10</sup>

**When Representatives Take Beneficially.** — Where the gift is to A expressly for life, and then to his executors or administrators or personal representatives for their own use and benefit, expressly so stated, the personal representatives take beneficially.<sup>11</sup> And although the gift is not to A expressly for life or to his representatives beneficially, the representatives referred to will be construed to mean the next of kin or descendants and will take beneficially,

term, and that the daughter took the property for life with remainder to her children. *Clark v. Clark*, 2 Head (Tenn.) 336.

1. *Albee v. Carpenter*, 12 Cush. (Mass.) 352.  
2. **Reason of Rule.** — *M'Graw v. Davenport*, 6 Port. (Ala.) 319; *Kent v. Armstrong*, 6 N. J. Eq. 648; *Mengel's Appeal*, 61 Pa. St. 248.

3. **Rule Yields to Intention.** — *Gallagher v. Rhode Island Hospital Trust Co.*, 22 R. I. 141; *Bailey v. Brown*, 19 R. I. 669; *Tingley v. Harris*, 20 R. I. 517; *Homer v. Shelton*, 2 Met. (Mass.) 199; *Eichelberger v. Barnett*, 17 S. & R. (Pa.) 293.

4. **Construction of Words "Issue" and "Children" as Words of Limitation Not Favored in Bequests.** — *Gawler v. Cadby*, Jac. 346; *Crawford v. Trotter*, 4 Madd. 361; *Malcolm v. Taylor*, 2 Russ. & M. 416; *Stone v. Maule*, 2 Sim. 490.

5. See the title **ISSUE (DESCENDANTS)**, vol. 17, p. 561.

6. See *infra*, this subsection, *Effect of Particular Limitations* — *Gift to A and His Children*.

7. See the title **SHELLEY'S CASE (RULE IN)**, vol. 25, p. 650.

8. **Gift to A and His Executors or Representatives.** — *Lugar v. Harman*, 1 Cox Ch. 250; *Taylor v. Beverley*, 1 Coll. Ch. Cas. 108; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Price v. Strange*, 6 Madd. 159. See also *Topping v. Howard*, 4

*De G. & Sm.* 268; *Brent v. Washington*, 18 Gratt. (Va.) 529.

9. **Representatives, etc., Meaning Executors and Administrators.** — *In re Crawford*, 2 Drew. 230; *Hinchliffe v. Westwood*, 2 De G. & Sm. 216; *Dixon v. Dixon*, 24 Beav. 129; *Re Turner*, 2 Drew. & Sm. 501; *Smith v. Barneby*, 2 Coll. Ch. Cas. 728; *Re Wyndham*, L. R. 1 Eq. 290; *Alger v. Parrott*, L. R. 3 Eq. 328; *In re Best*, L. R. 18 Eq. 686; *Atherton v. Crowther*, 19 Beav. 448; *Chapman v. Chapman*, 33 Beav. 556; *Cox v. Curwen*, 118 Mass. 198.

10. **Gift to A for Life, then to His Personal Representatives.** — *Atty.-Gen. v. Malkin*, 2 Phil. 64; *Saberton v. Skeels*, 1 Russ. & M. 587; *Alger v. Parrott*, L. R. 3 Eq. 328; *Avern v. Lloyd*, L. R. 5 Eq. 383; *Wing v. Wing*, 24 W. R. 878.

11. **When Representatives Take Beneficially.** — *Sanders v. Franks*, 2 Madd. 147; *Wallis v. Taylor*, 8 Sim. 241. See also *Stocks v. Dodsley*, 1 Keen 325.

**Gift to Executor in Default of Appointment.** — Where there is a bequest of personality in trust for the legatee for life, with remainder in trust for the appointees by will, or, in default of appointment, to her executors and administrators, the legatee takes the fund absolutely. *Devall v. Dickens*, 9 Jur. 550; *Page v. Soper*, 11 Hare 321.

when the words in which the gift is made disclose such an intention.<sup>1</sup> Thus, in a substitutional gift, as to A or his legal representatives, "and if he die before me, to his representatives," "representatives" will be construed, *prima facie*, to mean the next of kin of A;<sup>2</sup> or if the gift is to several collateral relations or their respective representatives, "representatives" will be construed to mean descendants.<sup>3</sup> Likewise, such expressions as "to and amongst" and "share and share alike" may be taken as indicating that each individual of each class is to take beneficially and as repelling the presumption that the words "personal representatives" are used in their strict literal and primary sense for executors and administrators;<sup>4</sup> and distinct provisions in the will in regard to executors and administrators,<sup>5</sup> or the association with the word "representatives" of other expressions importing consanguinity, as "personal representatives and next of kin" and similar expressions, may be taken as indicating that "representatives" is not employed in the usual meaning of that term.<sup>6</sup>

(b) **Gift to A and the Heirs of His Body.**—A gift to A and the heirs of his body, being the form of limitation to create an estate tail, passes to A an absolute interest in personal property.<sup>7</sup>

(c) **Gift to A and His Children**—**Rule in Wild's Case.**—It seems to be the better opinion that the rule in Wild's case does not apply to gifts of personal property.<sup>8</sup>

(d) **Gift in Terms of "Issue."**—The effect of a gift of personal property to A

**1. Indication of Intention that Representatives Take Beneficially.**—*Cotton v. Cotton*, 2 Beav. 67; *Smith v. Palmer*, 7 Hare 225; *Holloway v. Radcliffe*, 23 Beav. 163; *King v. Cleaveland*, 20 Beav. 166, 4 De G. & J. 477.

**2. Substitutional Gift.**—*Bridge v. Abbott*, 3 Bro. C. C. 224; *Cotton v. Cotton*, 2 Beav. 67. See also *Hewitson v. Todhunter*, 22 L. J. Ch. 76.

**3. Gift to Collateral Relations or Their Respective Representatives.**—*Styth v. Monro*, 6 Sim. 49; *Horsepool v. Watson*, 3 Ves. Jr. 383; *Atherton v. Crowther*, 19 Beav. 448; *In re Booth*, W. N. (1877) 129.

**The Rule as to Substitutional Gifts Inapplicable.**—The rule as to substitutional gifts does not apply where there is a previous life estate. *In re Crawford*, 2 Drew. 242; *Re Henderson*, 28 Beav. 656; *Hinchliffe v. Westwood*, 2 De G. & Sm. 216; *Chapman v. Chapman*, 33 Beav. 556; *Re Turner*, 2 Drew. & Sm. 501; *Corbyn v. French*, 4 Ves. Jr. 418.

**Rule Not Applicable if Time of Payment Postponed.**—*Thompson v. Whitlock*, 4 De G. & J. 490.

**4. Effect of Expressions "to and Amongst," and "Share and Share Alike."**—*King v. Cleaveland*, 4 De G. & J. 477; *Baines v. Ottey*, 1 Myl. & K. 465; *Smith v. Palmer*, 7 Hare 225; *Thompson v. Young*, 25 Md. 450.

**5. Distinct Provisions as to Executors and Administrators.**—*Jennings v. Gallimore*, 3 Ves. Jr. 146; *King v. Cleaveland*, 4 De G. & J. 477; *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Camden*, 16 Sim. 329; *Briggs v. Upton*, L. R. 7 Ch. 376; *Robinson v. Smith*, 6 Sim. 47; *Walter v. Makin*, 6 Sim. 148.

**6. Associated Expressions Denoting Consanguinity.**—*Philps v. Evans*, 4 De G. & Sm. 188; *In re Grylls*, L. R. 6 Eq. 580; *Robinson v. Evans*, 22 W. R. 199, 43 L. J. Ch. 82; *Long v. Blackall*, 3 Ves. Jr. 486; *Booth v. Vicars*, 1 Coll. Ch. Cas. 6; *Stockdale v. Nicholson*, L. R. 4

Eq. 359. Compare *Johnson v. Johnstone*, 12 Rich. Eq. (S. Car.) 260.

**Gift per Stirpes.**—Under a bequest to "personal representatives" of children, to take *per stirpes*, it was held that their executors and administrators were not entitled, but that it was intended that the descendants of the children should take. *Atherton v. Crowther*, 19 Beav. 448.

**7. See supra**, this subsection, *Passing of Absolute Interest Favored—Effect upon Personality of Words Creating Estate Tail in Realty*.

**8. Rule in Wild's Case Not Applicable to Personality.**—*Audsley v. Horne*, 26 Beav. 195; *Re Wilmot*, 76 L. T. N. S. 415. In the former case Lord Campbell said: "In my opinion, Wild's Case [6 Coke 17] does not apply to personal property. The general rule that words in a will which create an estate tail in realty will give an absolute interest in personality is founded upon the desire to give effect to the intention of the testator as far as the rules of law will permit. But the rule ought not to prevail where it would entirely defeat the intention of the testator, and where, without any violation of the rules of law, the intention of the testator may be carried into effect. The resolution in Wild's case as to realty entirely depends upon the desire to benefit the children as the testator intended, because an estate tail in the parent is the only medium by which they can take; and were it not for the power of cutting off the entail (which in construing wills is disregarded), the children must take. But as to personality, for the purpose of benefiting the children, the application of the rule is wholly unnecessary, and the application of it would entirely defeat the intention of the testator, for it would deprive the children of all right to any benefit under the will. With respect to personality, there are no technical rules arising from the feudal law

and his issue, or to A with a limitation over on failure of issue, is fully treated elsewhere in this work.<sup>1</sup>

(3) *Bequests of Annuities, Income, and Necessary Support.* — Where the bequest is of a specified sum monthly or annually, the legatee takes nothing more nor less than the amount named, and this amount is a charge upon the entire property devised, and if necessary the estate will be sold to produce it.<sup>2</sup> Where the bequest is of income solely, however, and not an annuity, nothing more than such income as the estate furnishes is to be taken, and the principal cannot be resorted to.<sup>3</sup> And a bequest of necessary support does not give the legatee an unlimited discretion to use the principal or to consume any more thereof than is required for actual and necessary expenses,<sup>4</sup> unless a larger discretion in the use of the principal be expressly conferred.<sup>5</sup>

*Interest of Life Tenant in Income.* — The general rule undoubtedly is that one holding a life estate is entitled to the income of the property, but if a different intention clearly appears from the will, the rule of law must give way to such intention.<sup>6</sup>

(4) *Conditions and Restrictions* — (a) *In General.* — After an absolute gift of personality, restrictions sought to be imposed upon the incidents of ownership are ineffective,<sup>7</sup> and limitations over cannot take effect.<sup>8</sup>

(b) *Gift for a Particular Purpose.* — If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.<sup>9</sup> So, also, where a will contains an absolute appointment to objects of a power with a superadded direction in excess of the power for the benefit of persons who are not objects of the power, the superadded direction is invalid and will be disregarded.<sup>10</sup> But if there be an absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it.<sup>11</sup> In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the

to prevent the intention of the testator being literally carried into effect."

1. See the title *ISSUE (DESCENDANTS)*, vol. 17, p. 542.

2. *Gillespie v. Boisseau*, (Ky. 1901) 64 S. W. Rep. 730.

*Gift of Interest on a Specified Sum* without designating any particular fund for its payment, is an annuity. *Matter of Dewey*, 82 Hun (N. Y.) 426.

*The Unconsumed Portion of the Fund* out of which the annuity is to be paid goes to the testator's personal representative. *In re Howard*, (1901) 1 Ch. 412, 84 L. T. N. S. 296. In this case the testator directed his executor to set aside £200 and thereout to pay to the testator's wife £3 monthly so long as she remained unmarried. Upon the death of the wife unmarried the unexpended portion of the £200 went to the testator's executor.

3. *Gift of Income Solely.* — *Hooper v. Smith*, 88 Md. 577; *Eldred v. Shaw*, 112 Mich. 237; *Bentley v. Bentley*, (N. J. 1897) 38 Atl. Rep. 286; *Matter of Von Keller*, 47 N. Y. App. Div. 625, 62 N. Y. Supp. 1150.

4. *Gift for Necessary Support.* — *Wentworth v. Fernald*, 92 Md. 282; *Godshalk v. Akey*, 109 Mich. 350; *La Bar's Estate*, 181 Pa. St. 1.

*Compare Re McDonald*, 35 Nova Scotia 500.

5. *Shapleigh v. Shapleigh*, 69 N. H. 577.

6. *Bramell v. Cole*, 136 Mo. 201.

7. *Restrictions on Absolute Gift Ineffective.* — *Harrison v. Brophy*, 59 Kan. 1; *Congregational Unitarian Soc. v. Haje*, 29 N. Y. App. Div. 396; *Heck's Estate*, 170 Pa. St. 232; *Rozell v. Thomas*, (Tenn. Ch. 1896) 39 S. W. Rep. 350.

8. See *supra*, this section, 15. *a. Considerations Common to Realty and Personality — Effect of Particular Provisions.*

9. *Absolute Gift Prevails After Failure of Restriction.* — *Lassence v. Tierney*, 1 Macn. & G. 551; *Norman v. Kynaston*, 3 De G. F. & J. 29; *Watkins v. Weston*, 3 De G. J. & S. 434; *In re Mercer*, 4 Ch. D. 188; *Whittel v. Dudin*, 2 Jac. & W. 279; *Mayer v. Townsend*, 3 Beav. 443; *Simonson v. Waller*, 9 N. Y. App. Div. 503.

10. *Invalid Restriction in Excess of Power.* — *Stephens v. Gadsden*, 20 Beav. 463; *Gerrard v. Butler*, 20 Beav. 541; *Churchill v. Churchill*, L. R. 5 Eq. 44; *Webb v. Sadler*, L. R. 14 Eq. 533, L. R. 8 Ch. 419.

11. *Where There Is Not Absolute Gift.* — *Lassence v. Tierney*, 1 Macn. & G. 551; *Savage v. Tyers*, L. R. 7 Ch. 356.



property of the legatee.<sup>1</sup> The vital question in these cases is whether the words import a separate absolute gift modified only by certain restrictions so that the first absolute gift may have its full effect in every event to which the restrictions are applicable,<sup>2</sup> or whether the original gift is qualified by the words in which it is given so as not to be affected or enlarged by any failure of the subsequent conditions.<sup>3</sup>

**16. Vested and Contingent Interests** — *a. SCOPE OF SECTION.* — As there has been given in a preceding article in this work an exhaustive discussion of the general principles applicable to vested and contingent interests and of the distinguishing characteristics of each, as also of the rules for determining whether an interest in realty is to be construed as vested or contingent,<sup>4</sup> further treatment of these questions is deemed unnecessary here. This section will, therefore, be confined as far as possible to a discussion of the application of the principles governing the vesting of legacies.

**Statutory Provisions.** — In some jurisdictions it is expressly provided by statute as to when an estate shall be considered vested or contingent.<sup>5</sup> In *New York* the statutory rule is made applicable to personal property as well as to realty.<sup>6</sup>

*b. LEGACIES PAYABLE OUT OF PERSONALTY* — (1) *Controlling Principles* — (a) *In General.* — The ecclesiastical courts having had jurisdiction, in common with courts of equity, of the recovery of legacies and distributive shares of personal estate,<sup>7</sup> the rules for determining whether legacies are vested or contingent have, in some measure, been influenced by the civil law.<sup>8</sup> But generally the principles which apply to and control the vesting of devises of real property are equally applicable to bequests of personal property.<sup>9</sup>

**Nature of Gift Controlling.** — When a legacy is given of which the enjoyment is postponed, the leading inquiry upon which the question as to whether or not it is vested depends is whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future or contingent, depending upon the beneficiary arriving at a certain age, or surviving some other person, or the like.<sup>10</sup> The difficulty in such cases is to determine whether there is a substantive gift and a direction to pay, or whether the only gift is in the

1. *Lassence v. Tierney*, 1 Macn. & G. 551.

2. **Separate Gift with Superadded Direction.** — *Scawin v. Watson*, 10 Beav. 200; *Campbell v. Brownrigg*, 1 Phil. 301; *Whittell v. Dudin*, 2 Jac. & W. 279; *Winckworth v. Winckworth*, 8 Beav. 576; *Mayer v. Townsend*, 3 Beav. 443; *M'Tear v. M'Dowell*, 11 Ir. Ch. R. 338; *Welply v. Cormick*, 16 Ir. Ch. 74; *Kellett v. Kellett*, L. R. 3 H. L. 160.

3. **Gift Restricted by Words in Which Given.** — *Scawin v. Watson*, 10 Beav. 200; *Gompertz v. Gompertz*, 2 Phil. 107; *Harris v. Newton*, 25 W. R. 228, 46 L. J. Ch. 268.

4. See the title **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 374 *et seq.* See also the title **LEGACIES AND DEVISES**, vol. 18, p. 704.

5. See the various statutes. See also the title **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, pp. 388, 400.

6. **New York.** — *Roosa v. Harrington* (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 529; *Rudd v. Cornell*, 58 N. Y. App. Div. 207; *Ogden v. Ogden*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473; *Matter of Ryder*, (Surrogate Ct.) 43 Misc. (N. Y.) 476.

7. See 1 *Jarman on Wills* (6th Am. ed.) 791.

8. *Leeming v. Sherratt*, 2 Hare 14; *Roberts v. Brinker*, 4 Dana (Ky.) 570; *Dohn v. Dohn*, 110 Ky. 884.

9. **Principles Controlling Devises Applicable to Bequests.** — *Knight v. Pottgieser*, 176 Ill. 368; *Clark v. Shawen*, 190 Ill. 47. See also 1 *Jarman on Wills* (6th Am. ed.) 791, and the title **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 374 *et seq.*

**"Vested" Applies Equally to Personality.** — "The term 'vested' has come to be applied with almost the same meaning in reference to the ownership of both real and personal property, especially when applied to future limitations of equitable estates. The ownership, original or derivative, may be said to be vested when it has an abiding place, temporary or permanent, in an ascertained owner vested in interest, when he has the fixed right of future enjoyment; also vested in possession when he has the present right of enjoyment. It may be and is used with reference to the question of remoteness. It is also used in the sense of an ownership capable of transmission to another. See *Gray, Perp.*, § 118; *Hawk. Wills* 222, 223; *Challis, Real Prop.*, p. 56 *et seq.*; *Fearne, Rem.* 218. But it is not in all cases the opposite of contingency." *Carney v. Kain*, 40 W. Va. 758.

10. **Nature of Gift Controlling.** — *Farnam v. Farnam*, 53 Conn. 261; *Everitt v. Everitt*, 29 N. Y. 67; *Goebel v. Wolf*, 113 N. Y. 405.

direction to pay.<sup>1</sup>

**Certainty of Enjoyment or Defeasibility of Possession Immaterial.** — Whether a legacy is vested or contingent is not to be tested by the certainty or uncertainty of obtaining the actual enjoyment; for that would make the character of the estate depend, not upon the terms of its creation, but on the form of the result. Neither does it depend upon the defeasibility or indefeasibility of the right of possession; for many estates are vested, without possession as well as with, which are yet defeasible. If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate. An unpossessed estate is vested if it is certain to take effect in possession by enduring longer than the precedent estate. Any additional contingency destroys its vested character.<sup>2</sup>

**Certainty of Amount Immaterial.** — A remainder limited upon a life estate with a power of disposal added is not made contingent by the fact of its being uncertain whether the power will be actually exercised or not. Contingency is not dependent upon uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by an uncertainty as to the persons who are to take.<sup>3</sup>

**1. Ascertaining Nature of Gift—England.** — *Shum v. Hobbs*, 3 Drew. 93; *Chaffers v. Abell*, 3 Jur. 577; *Williams v. Clark*, 4 De G. & Sm. 472; *Merry v. Hill*, L. R. 8 Eq. 619.

**United States.** — *Atmore v. Walker*, 46 Fed. Rep. 429.

**Alabama.** — *Foster v. Holland*, 56 Ala. 474.

**Illinois.** — *Scofield v. Olcott*, 120 Ill. 363.

**Massachusetts.** — *Furness v. Fox*, 1 Cush. (Mass.) 134.

**New York.** — *Mumford v. Rochester*, 4 Redf. (N. Y.) 451; *Bushnell v. Carpenter*, 92 N. Y. 270; *Van Camp v. Fowler*, 59 Hun (N. Y.) 311.

**Oregon.** — *Warren v. Hembree*, 8 Oregon 123.

**Pennsylvania.** — *McClure's Appeal*, 72 Pa. St. 414; *Schwartz's Appeal*, 119 Pa. St. 337.

**Virginia.** — *Major v. Major*, 32 Gratt. (Va.) 810.

In *Theobald on Wills* (2d ed.) 410 it is said: "Of course, when there is a clear gift, a direction to accumulate the interest and to pay the principal and accumulations at twenty-one will not effect the vesting. *Stretch v. Watkins*, 1 Madd. 253; *Blease v. Burgh*, 2 Beav. 226; *Breedon v. Tugman*, 3 Myl. & K. 289."

**Construction by Reference to Other Limitations.** — "In doubtful cases the construction may be assisted by reference to other limitations; thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining twenty-five, and if but one child, the whole to become the property of such only child, upon his attaining twenty-five, and be transmissible to his heirs, executors, or administrators, none of the children took vested interests before twenty-five, the gift, in the event of there being an only child, being clearly contingent. *Judd v. Judd*, 3 Sim. 525. See *Hunter v. Judd*, 4 Sim. 455; *Merry v. Hill*, L. R. 8 Eq. 619. Similarly, if the interest of an only child is clearly vested, this may show that a gift to all the children at twenty-one was meant to be vested, too. *King v. Isaacson*, 1 Smale & G.

371. And it may appear from the context that the words 'to be paid' were meant to refer to vesting and not to payment. *Martineau v. Rogers*, 8 De G. M. & G. 328." *Theobald on Wills* (2d ed.) 410.

**2. Carstensen's Estate**, 196 Pa. St. 325.

"The remainder is certain to vest at some time and a certain definite class is designated to take. Under these circumstances the law presumes that the testator intended that the remainder should vest presently. There is a present right of future enjoyment whenever the possession becomes vacant; and that right, coupled with the fact that the time for the enjoyment must come, clearly shows a vested interest." *Farnam v. Farnam*, 53 Conn. 261.

**3. Certainty of Amount Immaterial—Connecticut.** — *Bates v. Spooner*, 75 Conn. 501.

**Illinois.** — *Ducker v. Burnham*, 146 Ill. 9; *Harvard College v. Balch*, 171 Ill. 275; *Lehnard v. Specht*, 180 Ill. 208.

**Indiana.** — *Heilman v. Heilman*, 129 Ind. 59.

**Maine.** — *Stuart v. Walker*, 72 Me. 145;

*Woodman v. Woodman*, 89 Me. 128.

**Massachusetts.** — *Welsh v. Woodbury*, 144 Mass. 542; *Bancroft v. Fitch*, 164 Mass. 401.

**New Hampshire.** — *Burleigh v. Clough*, 52 N. H. 267.

**Pennsylvania.** — *Weeter's Estate*, 21 Pa. Super. Ct. 241.

**Vermont.** — *Hare v. Congregational Soc.*, (Vt. 1904) 57 Atl. Rep. 964.

See also generally the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 389.

In *Woodman v. Woodman*, 89 Me. 128, the court said: "In *Welsh v. Woodbury*, 144 Mass. 542, \* \* \* it is said: 'The objection to the uncertainty of what will be the subject of the limitation over, which was once thought to be a further ground for the doctrine of *Kelley v. Meins* [135 Mass. 231], as applied to personal property, seems to be discredited by the later English decisions cited in that case, and never has been applied to a life estate coupled with a power.' From which it appears

(b) **Intention of Testator Controlling.** — As has been stated in a preceding part of this section, the intention of the testator, as ascertained from the will, governs the construction thereof;<sup>1</sup> and this is true in construing a will with a view to determining whether a legacy is vested or contingent.<sup>2</sup> Thus, where there is an express direction as to the time of vesting, all questions of construction are out of the case.<sup>3</sup> Likewise, the rule that the law favors the vesting of legacies must give way to the intention of the testator as expressed in the will.<sup>4</sup> But a legacy will be held to be vested unless the contrary intention on

not improbable that, when the question arises, the Massachusetts court will hold that a remainder does not become contingent because of the uncertainty as to what will be the subject of the limitation over, notwithstanding the dicta in the former cases." Compare *Johnson v. Bar-telle*, 125 Mass. 453; *Bamforth v. Bamforth*, 123 Mass. 280; *Taft v. Taft*, 130 Mass. 461.

**Effect of Power of Sale.** — "The presence in a will of an imperative power of sale given to the executors to be exercised at a future time does not necessarily prevent a vesting, especially when it is apparent from the other provisions of the will that it was intended that the estate should vest presently." *Matter of Brown*, 154 N. Y. 313.

1. See *supra*, this section, *General Rules of Interpretation—Intention of Testator*.

2. **Vesting Dependent on Intention.** — *Harding v. Harding*, 174 Mass. 268; *Parker v. Ross*, 69 N. H. 213; *Clark v. Cammann*, 160 N. Y. 315; *Matter of Boyce*, (Surrogate Ct.) 37 Misc. (N. Y.) 146; *Smith v. Smith*, 116 Wis. 570. See also *Van Giesen v. White*, 53 N. J. Eq. 1.

3. **Express Direction.** — *Mercer v. Hopkins*, 88 Md. 202; *Biddle's Appeal*, 99 Pa. St. 525; *Hinton v. Milburn*, 23 W. Va. 166; 1 Jarm. on Wills (5th ed.) \*839; *Theobald on Wills* (2d ed.) 408.

**Direction that Legacy Shall "Vest."** — "In many cases, however, 'vested' has been used as equivalent to indefeasible or payable. Thus, if the shares of members of a class are directed to be vested at a certain time, and there is a gift over to the other members of the class of the shares of those dying before that time, without issue, vested will mean payable. *Taylor v. Frobisher*, 5 De G. & Sm. 191. So, too, if legatees are treated as taking vested shares before the time fixed for vesting, vested must mean payable. This will be the case if a time is appointed for vesting, and maintenance is given, if any child entitled on the death of the tenant for life to a vested or presumptive share should be under the age appointed for vesting, where the word presumptive refers to the possibility of accruer. *Berkeley v. Swinburne*, 16 Sim. 275; *Re Baxter*, 10 Jur. N. S. 845, 4 N. R. 131. Similarly if, in the event of any child dying before the time of vesting, leaving children, there is a gift of the share such child would have had, if living, to his issue, the direction as to vesting will be referred to payment. *In re Edmondson*, L. R. 5 Eq. 389; *Poole v. Bott*, 11 Hare 33. Or, again, it may appear that the testator has used the terms 'vested' and 'paid' interchangeably. *In re Edmondson*, L. R. 5 Eq. 389; *Williams v. Haythorne*, L. R. 6 Ch. 782; *In re Parr*, 41 L. J. Ch. 170. And when there is a direction to pay legacies at the death of the tenant for life,

a subsequent direction as to vesting at twenty-one will be referred to indefeasible vesting or possession. *Barnet v. Barnet*, 29 Beav. 239; *Simpson v. Peach*, L. R. 16 Eq. 209. When there is a gift to children who survive their parent, a direction as to vesting will not make the gift vest in any who do not survive their parent. *In re Payne*, 25 Beav. 556; *Williams v. Haythorne*, L. R. 6 Ch. 782. See *Draycott v. Wood*, 5 W. R. 158. If, however, the proviso as to vesting is intended to introduce a new gift, evidenced by the fact, for instance, that it applies to prior legatees who die leaving issue, and not merely to such of them as survive the tenant for life, it will override the previous contingency of surviving the tenants for life. *Williams v. Russell*, 10 Jur. N. S. 168. A direction that legatees are to be beneficially interested at a certain period refers only to vesting in possession. *M'Lachlan v. Taitt*, 28 Beav. 407, 2 De G. F. & J. 449." *Theobald on Wills* (2d ed.) 408.

4. **Expressed Intention Governs** — *Connecticut*. — *Bates v. Spooner*, 75 Conn. 501.

*Kentucky*. — *Evans v. Henderson*, (Ky. 1902) 68 S. W. Rep. 640.

*Maryland*. — *Von der Horst v. Von der Horst*, 88 Md. 127.

*New Hampshire*. — *Parker v. Ross*, 69 N. H. 213.

*New York*. — *Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Seaman*, 147 N. Y. 69; *Hersec v. Simpson*, 154 N. Y. 496; *Clark v. Cammann*, 160 N. Y. 315; *Matter of Merriman*, 91 Hun (N. Y.) 120; *Carr v. Smith*, 25 N. Y. App. Div. 214; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345; *Ackerman v. Ackerman*, 63 N. Y. App. Div. 370; *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348; *Matter of Conger*, (Surrogate Ct.) 40 Misc. (N. Y.) 157.

*Pennsylvania*. — *Phillips's Estate*, 205 Pa. St. 504.

**Rule Stated.** — "The inquiry should always be, what is the intention of the testator? If, then, it is clear from the whole will that the testator intended that the estate should vest in his children at the death of the life tenant, then the will should be so construed, although there is a tendency of the courts to hold that survivorship should, as a general rule, be referred to the period of the testator's death." *Evans v. Henderson*, (Ky. 1902) 68 S. W. Rep. 640.

"There is no doubt, speaking generally, that the law favors the early vesting of estates; and when there are, by the terms of the will, two periods to which the vesting may with equal propriety be referred, and the testator has left it in doubt which of the two he intended to be the period of vesting, the law will presume



the part of the testator is clearly manifested,<sup>1</sup> and the intent that it shall be contingent will not be presumed,<sup>2</sup> unless it is necessary in order to carry out the other provisions or implications of the will.<sup>3</sup>

(c) **Construction of Legacies as Vested Favored.** — As in the case of devises of realty,<sup>4</sup> so, in regard to bequests of personalty, is that construction favored which regards interests derived under a will as vested rather than contingent; and legacies, therefore, will always be held to be vested unless the intention of the testator to the contrary clearly appears.<sup>5</sup> Upon the same principle, an

that he designed the earlier one. He may, however, if he so chooses, fix a remote instead of an early period for the vesting of a legacy, provided, of course, he does not so far postpone the time of vesting as to infringe or trench on some settled and unyielding rule of law; and his intention, if capable of being carried out, will be given effect. There are, as is well understood, no formal, fixed, or technical words that must or need be used or employed to give expression to such an intention; and, precisely because this is so, great diversity is to be found in adjudged cases where similar questions have been discussed. But, though a legacy may vest at once, the possession of the legacy may be deferred to some time in the future. There may, therefore, be either an immediate vesting and a deferred possession, or a coincident vesting and possession." Von der Horst *v.* Von der Horst, 88 Md. 127.

**1. Clear Manifestation of Intent to Make Legacy Contingent Necessary** — *United States*. — McArthur *v.* Scott, 113 U. S. 340.

*Connecticut*. — Marcy *v.* Marcy, 32 Conn. 308; Johnes *v.* Beers, 57 Conn. 295; Mitchell *v.* Mitchell, 73 Conn. 303.

*District of Columbia*. — Hauptman *v.* Carpenter, 16 App. Cas. (D. C.) 524.

*Illinois*. — Kellett *v.* Shepard, 139 Ill. 433; McConnell *v.* Stewart, 169 Ill. 374; Harvard College *v.* Balch, 171 Ill. 275; Clark *v.* Shawen, 190 Ill. 47.

*Massachusetts*. — Abbott *v.* Bradstreet, 3 Allen (Mass.) 587.

*New York*. — Corley *v.* McElmeel, 149 N. Y. 228; Ogden *v.* Ogden, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473.

*Ohio*. — Bolton *v.* Ohio Nat. Bank, 50 Ohio St. 290.

*Vermont*. — *Re* Tucker, 63 Vt. 104; Jones *v.* Knappen, 63 Vt. 391.

*Virginia*. — Chapman *v.* Chapman, 90 Va. 411; Lantz *v.* Massie, 99 Va. 709.

"**The Question Is One of Substance** and not of form. The question in all cases has been whether the testator intended it as a condition precedent that the legatee should survive the time appointed by him for the payment of their legacies, and the answer to this question has been sought for out of the whole will, and not in particular expressions." Leeming *v.* Sherratt, 2 Hare 14." Raleigh's Estate, 206 Pa. St. 451.

**2. Intent to Make Legacy Contingent Not Presumed.** — Travis *v.* Morrison, 28 Ala. 408; Foster *v.* Holland, 56 Ala. 474; Bethea *v.* Bethea, 116 Ala. 265; Campbell *v.* Weakley, 121 Ala. 64; McLaughlin *v.* Penney, 65 Kan. 523.

**3.** *Re* Tucker, 63 Vt. 104.

**4.** See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 385 *et seq.*

**5. Vesting of Legacies Favored** — *England*. — Hickling *v.* Fair, (1899) A. C. 15.

*United States*. — McArthur *v.* Scott, 113 U. S. 340.

*Alabama*. — Travis *v.* Morrison, 28 Ala. 408; High *v.* Worley, 32 Ala. 709; Foster *v.* Holland, 56 Ala. 474; Bethea *v.* Bethea, 116 Ala. 265; Campbell *v.* Weakley, 121 Ala. 64.

*Connecticut*. — Marcy *v.* Marcy, 32 Conn. 308; Farnam *v.* Farnam, 53 Conn. 261; Johnes *v.* Beers, 57 Conn. 295; Mitchell *v.* Mitchell, 73 Conn. 303.

*District of Columbia*. — Hauptman *v.* Carpenter, 16 App. Cas. (D. C.) 524.

*Illinois*. — Kellett *v.* Shepard, 139 Ill. 433; Grimmer *v.* Friederich, 164 Ill. 245; McConnell *v.* Stewart, 169 Ill. 374; Harvard College *v.* Balch, 171 Ill. 275; Clark *v.* Shawen, 190 Ill. 47.

*Indiana*. — Amos *v.* Amos, 117 Ind. 37; Tindall *v.* Miller, 143 Ind. 337; Moore *v.* Gary, 149 Ind. 51.

*Iowa*. — Taylor *v.* Taylor, 118 Iowa 407.

*Kansas*. — McLaughlin *v.* Penney, 65 Kan. 523.

*Kentucky*. — Evans *v.* Henderson, (Ky. 1902) 68 S. W. Rep. 640; Moore *v.* Sleet, 113 Ky. 600.

*Maine*. — Robinson *v.* Palmer, 90 Me. 246.

*Maryland*. — Von der Horst *v.* Von der Horst, 88 Md. 127; Webb *v.* Webb, 92 Md. 101.

*Massachusetts*. — Abbott *v.* Bradstreet, 3 Allen (Mass.) 587.

*New York*. — Ogden *v.* Ogden, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473; Jaudon *v.* Hayes, 79 Hun (N. Y.) 453; Thomson *v.* Hill, 87 Hun (N. Y.) 111; Smith *v.* Edwards, 88 N. Y. 92; Nelson *v.* Russell, 135 N. Y. 137; Bowditch *v.* Ayrault, 138 N. Y. 222; Matter of Seaman, 147 N. Y. 69; Corley *v.* McElmeel, 149 N. Y. 228; Hersee *v.* Simpson, 154 N. Y. 500; Clark *v.* Cammann, 160 N. Y. 315; Connelly *v.* O'Brien, 166 N. Y. 406; Matter of Merri-man, 91 Hun (N. Y.) 120; Carr *v.* Smith, 25 N. Y. App. Div. 214; Clark *v.* Clark, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; Canfield *v.* Fallon, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345; Morrow *v.* McMahon, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348; Ackerman *v.* Ackerman, 63 N. Y. App. Div. 370; Arnot *v.* Arnot, 75 N. Y. App. Div. 230; Matter of Conger, 81 N. Y. App. Div. 493, (Surrogate Ct.) 40 Misc. (N. Y.) 157.

*Ohio*. — Bolton *v.* Ohio Nat. Bank, 50 Ohio St. 290.

*Pennsylvania*. — Snyder's Estate, 180 Pa. St. 70; Hubbert's Estate, 6 Pa. Dist. 96; Menoher's Estate, 18 Pa. Super. Ct. 335.

*Vermont*. — *Re* Tucker, 63 Vt. 104.

*Virginia*. — Corbin *v.* Mills, 19 Gratt. (Va.) 472; Chapman *v.* Chapman, 90 Va. 411; Crews

estate once given will not be defeated by subsequent provisions of the same instrument, unless the intention of the testator as shown in his will, fairly construed, so requires.<sup>1</sup>

(d) **Time of Vesting.**—In accordance with the rule which favors the vesting of legacies, a legacy which is not to be enjoyed in possession until some future period or event will where no special intent to the contrary is manifested by the testator, be construed as vesting in interest immediately on the death of the testator, rather than at the period of payment or distribution.<sup>2</sup>

*v. Hatcher*, 91 Va. 381; *McComb v. McComb*, 96 Va. 779; *Lantz v. Massie*, 99 Va. 709; *Neilson v. Brett*, 99 Va. 673.

**Legacy to Class.**—"The postponement of a gift until the expiration of a prior estate does not imply a condition that the legatee shall survive the first taker, or that his interest shall not vest in the meantime with a mere deferring of the right of possession; estates will be held to vest, subject to opening in order to let in others of the requisite class, as soon as there is one in being who can take." *Snyder's Estate*, 180 Pa. St. 70.

**Interest Subject to Destruction or Divestiture.**—"A remainder will be considered as vested, although the instrument by which it is created gives to a trustee a power whose exercise may destroy the interest, and although the contingency that is to cause the divestiture is within control of the particular tenant." *Lantz v. Massie*, 99 Va. 709.

1. *Moore v. Sleet*, 113 Ky. 600. See also *infra*, this section, *Divesting Clauses*.

2. **Time of Vesting—United States.**—*McArthur v. Scott*, 113 U. S. 340.

*Connecticut.*—*Marcy v. Marcy*, 32 Conn. 308; *Johnes v. Beers*, 57 Conn. 295; *Mitchell v. Mitchell*, 73 Conn. 303.

*District of Columbia.*—*Hauptman v. Carpenter*, 16 App. Cas. (D. C.) 524.

*Illinois.*—*Kellett v. Shepard*, 139 Ill. 433; *Grimmer v. Friederich*, 164 Ill. 245; *McConnell v. Stewart*, 169 Ill. 374; *Clark v. Shawen*, 190 Ill. 47.

*Indiana.*—*Amos v. Amos*, 117 Ind. 37; *Tindall v. Miller*, 143 Ind. 337.

*Kentucky.*—*Evans v. Henderson*, (Ky. 1902) 68 S. W. Rep. 640.

*Maryland.*—*Lark v. Linstead*, 2 Md. 420; *Spence v. Robins*, 6 Gill & J. (Md.) 507; *Tayloe v. Mosher*, 29 Md. 443; *Fairfax v. Brown*, 60 Md. 50; *Crisp v. Crisp*, 61 Md. 149; *Dulany v. Middleton*, 72 Md. 75; *Von der Horst v. Von der Horst*, 88 Md. 129; *Webb v. Webb*, 92 Md. 101.

*Massachusetts.*—*Abbott v. Bradstreet*, 3 Allen (Mass.) 587.

*New York.*—*Ogden v. Ogden*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473; *Thomson v. Hill*, 87 Hun (N. Y.) 111; *Nelson v. Russell*, 135 N. Y. 137; *Bowditch v. Ayrault*, 138 N. Y. 222; *Corley v. McElmeel*, 149 N. Y. 228; *Connelly v. O'Brien*, 166 N. Y. 406; *Matter of Merriman*, 91 Hun (N. Y.) 120; *Shangle v. Hallock*, 6 N. Y. App. Div. 55; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345; *Ackerman v. Ackerman*, 63 N. Y. App. Div. 370; *Matter of Conger*, (Surrogate Ct.) 40 Misc. (N. Y.) 157.

*Ohio.*—*Bolton v. Ohio Nat. Bank*, 50 Ohio St. 290.

*Pennsylvania.*—*Snyder's Estate*, 180 Pa. St. 70; *Hubbert's Estate*, 6 Pa. Dist. 96.

*Vermont.*—*Jones v. Knappen*, 63 Vt. 391.

*Virginia.*—*Corbin v. Mills*, 19 Gratt. (Va.) 472; *Chapman v. Chapman*, 90 Va. 411; *Crews v. Hatcher*, 91 Va. 378; *McComb v. McComb*, 96 Va. 779; *Lantz v. Massie*, 99 Va. 709; *Neilson v. Brett*, 99 Va. 673.

**Rule Stated.**—"The law not only favors the vesting of remainders, but presumes that the words postponing the enjoyment of the estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of such estate." *Amos v. Amos*, 117 Ind. 37; *Tindall v. Miller*, 143 Ind. 337; *Moore v. Gary*, 149 Ind. 51.

**Adverbs of Time**, therefore, such as when, then, after, from and after, etc., in a devise of a remainder limited upon a life estate, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest. The law favors such a construction as will avoid the disinheritance of remaindermen who may happen to die before the determination of the precedent estate. *Connelly v. O'Brien*, 166 N. Y. 406; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345; *Ackerman v. Ackerman*, 63 N. Y. App. Div. 370.

**Words of Survivorship and Gifts Over** on the death of the primary beneficiary are to be construed, unless a contrary intention appears, as relating to the death of the testator. *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345.

**Under New York Statute.**—"The authorities in this state favor the theory of immediate vesting, both as to real and personal property, although the statutes relating to the kinds of property differ. The statute relating to real estate forbids the suspension of the absolute power of alienation for more than two lives, while the statute relating to personal property forbids the suspension of the absolute ownership for more than two lives. But the statutory period is the same in both cases. It consists of two lives in being. As to both kinds of property, the authorities in this state favor the theory of immediate vesting, and the courts are always willing to shape their decisions in doubtful cases with reference to these authorities. Indeed, it may be said that, even where there are no words implying an immediate gift, and the title is nominally conveyed to trustees for the purposes of the trust, if the courts, from the will as a whole, can spell out a tenancy in common, they will do so for the purpose of declaring a direct vesting, and avoiding a forfeiture." *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

"Where the apparent intention of the testa-

(2) *Ascertainment of Nature of Interest from Words of Gift* — (a) *Gift Distinct from Direction to Pay* — *aa. IN GENERAL.* — Where there is a clear gift, distinct from the direction to pay, the time of payment being merely postponed and not annexed to the substance of the gift, the legacy vests immediately, unless the time of payment appears to have been fixed by the testator as absolutely necessary to have arrived before the vesting of the legacy. The gift is considered as *debitum in præsentì, solvendum in futuro*.<sup>1</sup>

tor is that remainders shall vest in persons as to whom there is no uncertainty, subject to the life estate or estates created by the will (as, that they shall vest in his grandchildren, and there are grandchildren in being at his death, and there is nothing in the will making such provision dependent upon survivorship to the time of distribution), the disposition relates back to the time of the testator's death, and the vesting is of that date." *Matter of Brown*, 154 N. Y. 313.

"The general rule of construction applicable is that where a testamentary gift is simply to one or more persons, and, in case of the death of any one of them without issue, to survivors, the death referred to means a death in the lifetime of the testator, and the prior legatee surviving takes absolutely. 2 Jarm. Wills 752. This rule is qualified in so far that if, in the language of the gift or in the other provisions of the will, a contrary intent is apparent, the contrary intention should be sustained. The fact of a precedent estate is not important." *Ackerman v. Ackerman*, 63 N. Y. App. Div. 370.

A provision in a will giving to the widow of one of the testator's children a certain sum, to be paid to her "if then alive," vests her right to that sum at the time of the death of her husband. *Koezly v. Koezly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 397.

A devise in a will of an estate to the widow for life and upon the decease of the widow to the six children of the testator who are named "to be divided among them, share and share alike, within one year after the youngest child shall have arrived at the age of twenty-one," vests an estate in the children upon the testator's death. Such estate is liable to be defeated in the case of each child by his death without issue during the continuance of the life estate, or thereafter during the minority of the youngest child, or, if he leaves issue, by their death during the same period. That this was the testator's intention is manifested by the words following the devise, that "in making such division" the share of any child "deceased and leaving no issue" should merge into the estate, and that the share of any child deceased and leaving issue surviving should go into a trust for such issue during their minority. These words of death and survivorship have reference, not to the time of the death of the testator, but to the time appointed for the division, namely, at the death of the life tenant, or thereafter at the termination of the youngest child's minority. *Galway v. Bryce*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 255.

**Vesting Not Postponed until Distribution.** — Where the testator directs his executors to convert his estate and thereupon divide the aggregate into as many equal shares or parts as there shall then be living children, or the issue

of deceased children, the issue of each deceased child to represent one share of such division, the interest of the children vests immediately upon the death of the testator and is not postponed until after the division is made by the executors. This is especially true where the testator shows his intention that the interest should vest immediately, by providing for the creation of trusts of the share of any child or distributee who might be under the age of twenty-one years at the time of the testator's death, and also by providing for the support and maintenance out of the share so held in trust of the infant to whom such share belongs. *Brown v. Brown*, 27 N. Y. App. Div. 45.

**Where Legacy Is to Vest upon One of Two Contingencies.** — "The postponement of the vesting of the estate until the death of the widow or the arrival of the youngest child at twenty-five years of age, whichever should happen last, does not fix a definite time in the future for the vesting of the estate, so as to create a perpetuity, as the arrival at twenty-five years of age of the youngest child means the arrival at the age of such child of the testator as shall then be his youngest living child, and not the time at which the youngest child now living would reach that age if he should live until that time." *Dohn v. Dohn*, 110 Ky. 884.

**1. Gift Distinct from Direction to Pay** — *England.* — *Maher v. Maher*, L. R. 1 Ir. 22; *Matter of Bartholemew*, 1 Macn. & G. 354; *Lister v. Bradley*, 1 Hare 12; *Leeming v. Sherratt*, 2 Hare 14; *Leake v. Robinson*, 2 Meriv. 363; *Pulsford v. Hunter*, 3 Bro. C. C. 416; *May v. Wood*, 3 Bro. C. C. 473; *Fonereau v. Fonereau*, 3 Atk. 645; *Shrimpton v. Shrimpton*, 31 Beav. 425.

*United States.* — *Jones v. Habersham*, 107 U. S. 174.

*Alabama.* — *Marr v. McCullough*, 6 Port. (Ala.) 507; *McLeod v. McDonnell*, 6 Ala. 236; *Bethea v. Bethea*, 116 Ala. 265; *High v. Worley*, 32 Ala. 709; *Johnson v. Terry*, 139 Ala. 614; *Wynne v. Walthall*, 37 Ala. 42; *Higgins v. Waller*, 57 Ala. 400; *Phinizy v. Foster*, 90 Ala. 262; *Andrews v. Russell*, 127 Ala. 195.

*Arkansas.* — *Blackburn v. Hawkins*, 6 Ark. 58.

*Connecticut.* — *Colt v. Hubbard*, 33 Conn. 281; *Farnam v. Farnam*, 53 Conn. 261; *Nelson v. Pomeroy*, 64 Conn. 257.

*Delaware.* — *In re Journey*, 7 Del. Ch. 1.

*Florida.* — *Young v. McKinnic*, 5 Fla. 542.

*Illinois.* — *Scofield v. Olcott*, 120 Ill. 363; *Ducker v. Burnham*, 146 Ill. 9; *Carper v. Crow*, 149 Ill. 465; *Knight v. Pottgieser*, 176 Ill. 368; *Clark v. Shawen*, 190 Ill. 47.

*Indiana.* — *Dyson v. Repp*, 29 Ind. 482.

*Iowa.* — *Taylor v. Taylor*, 118 Iowa 407.

*Kentucky.* — *Caldwell v. Kinkead*, 1 B. Mon. (Ky.) 331.

*Maine.* — *Willis v. Roberts*, 48 Me. 257;



**bb. WORDS OF PRESENT GIFT.**—The use of words of present gift, or language which has the same import or effect, is expressly or impliedly recognized as

*Snow v. Snow*, 49 Me. 164; *Verrill v. Weymouth*, 68 Me. 318.

*Maryland*.—*Webb v. Webb*, 92 Md. 101.

*Massachusetts*.—*Furness v. Fox*, 1 Cush. (Mass.) 134; *Shattuck v. Stedman*, 2 Pick. (Mass.) 468; *Wardwell v. Hale*, 161 Mass. 396.

*Mississippi*.—*Lowe v. Barnett*, 38 Miss. 329; *Hancock v. Titus*, 39 Miss. 224.

*Missouri*.—*Owen v. Eaton*, 56 Mo. App. 563.

*New Hampshire*.—*Brown v. Brown*, 44 N. H. 281.

*New Jersey*.—*Gifford v. Thorne*, 9 N. J. Eq. 702; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Post v. Herbert*, 27 N. J. Eq. 540; *Dusenberry v. Johnson*, 59 N. J. Eq. 336; *Burroughs v. Jamieson*, 62 N. J. Eq. 651.

*New York*.—*Ex p. Turk*, 1 Bradf. (N. Y.) 110; *Van Wyck v. Bloodgood*, 1 Bradf. (N. Y.) 154; *Tucker v. Ball*, 1 Barb. (N. Y.) 94; *Rathbone v. Dyckman*, 3 Paige (N. Y.) 10; *Wood v. Cone*, 7 Paige (N. Y.) 471; *Shannon v. Pentz*, 1 N. Y. App. Div. 331; *Matter of Ball*, (Surrogate Ct.) 11 Misc. (N. Y.) 433; *Savage v. Burnham*, 17 N. Y. 561; *Traver v. Schell*, 20 N. Y. 89; *Moore v. Lyons*, 25 Wend. (N. Y.) 143; *Everitt v. Everitt*, 29 N. Y. 39; *Cruikshank v. Cruikshank*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 401; *Manice v. Manice*, 43 N. Y. 369; *Loder v. Hatfield*, 71 N. Y. 92; *Warner v. Durant*, 76 N. Y. 133; *Nathan v. Hendricks*, 87 Hun (N. Y.) 483, *affirmed* 147 N. Y. 348; *Smith v. Edwards*, 88 N. Y. 103; *Bushnell v. Carpenter*, 92 N. Y. 273; *Matter of Mahan*, 98 N. Y. 372; *Goebel v. Wolf*, 113 N. Y. 405; *Bowditch v. Ayrault*, 138 N. Y. 229; *Miller v. Gilbert*, 144 N. Y. 73; *Matter of Young*, 145 N. Y. 535; *Smith v. Parsons*, 146 N. Y. 116; *Clark v. Cammann*, 160 N. Y. 315; *Matter of Crane*, 164 N. Y. 71; *Matter of Merriman*, 91 Hun (N. Y.) 120; *Matter of Lehman*, 2 N. Y. App. Div. 531; *Matter of Embree*, 9 N. Y. App. Div. 602; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345; *Matter of Elliott*, (Surrogate Ct.) 27 Misc. (N. Y.) 258; *Matter of Conger*, 81 N. Y. App. Div. 493.

*North Carolina*.—*Hathaway v. Leary*, 2 Jones Eq. (55 N. Car.) 264; *Perry v. Rhodes*, 2 Murph. (6 N. Car.) 140; *Green v. Green*, 86 N. Car. 546.

*Oregon*.—*Warren v. Hembree*, 8 Oregon 123.

*Pennsylvania*.—*Menoher's Estate*, 18 Pa. Sup. Ct. 335; *Magoffin v. Patton*, 4 Rawle (Pa.) 113; *Bayard v. Atkins*, 10 Pa. St. 18; *Bowman's Appeal*, 34 Pa. St. 19; *McClure's Appeal*, 72 Pa. St. 414; *Pennock v. Eagles*, 102 Pa. St. 290; *Muhlenberg's Appeal*, 103 Pa. St. 592; *Reed's Appeal*, 118 Pa. St. 215; *Schwartz's Appeal*, 119 Pa. St. 337; *Lightner v. Lightner*, 127 Pa. St. 468; *Engles's Estate*, 167 Pa. St. 463.

*Tennessee*.—*McReynolds v. Graham*, (Tenn. Ch. 1897) 43 S. W. Rep. 138.

*Virginia*.—*Major v. Major*, 32 Gratt. (Va.) 819.

**Rule Stated.**—"Courts of equity, in the construction of wills relating to personal estate, follow the rules of the civil law. By that law,

when a legacy is given absolutely, and the payment is postponed to a future definite period, the court considers the time as annexed to the payment, and not to the gift of the legacy, and treats the legacy as *debitum in presenti solvendum in futuro*. This rule being established, a question was made whether, in the simple case of a direction to pay a legacy at a future period, without any gift of the legacy independently of that direction, the legacy would be transmissible to the representatives of the legatee dying before the time of payment; and the court, in that simple case, has sometimes considered the time of payment as annexed to the legacy itself, and not merely to the payment of it. But the court, in so deciding, has not, I conceive, intended to decide that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, was less favorable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event, but in fact has intended only to assimilate those cases to each other, and to distinguish both from the class of cases to which I first referred, in which there has been a gift of the legacy, and also a direction to pay at a future definite time distinct from that gift." *Leeming v. Sherratt*, 2 Hare 14.

"It is a general rule, that a postponement of the time of payment will not, of itself, make a legacy contingent, unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened." *Loder v. Hatfield*, 71 N. Y. 92.

**Suspensive Provision Attached to Enjoyment.**—"A devise or legacy, appearing to depend upon an event that is sure to happen, is vested, if the happening of the event does not form a part of the description of the devisee, and if the suspensive provisions can, consistently with, or by the aid of other parts of the will, be probably interpreted as referring, not to the vesting of the title, but to the vesting of the enjoyment." *Menoher's Estate*, 18 Pa. Super. Ct. 335.

**Time Attached to Payment.**—"In the clause of the will we construe, time of division or payment of the legacies is not of the substance of the gift. It is mentioned only as a qualifying clause of the payment or division,—the gift being absolute as to the classes named, at a certain time in the future,—the whole of the intermediate interest having been given, first to the widow of the testator during life, and to his said three sons for life after her death. The estate, thus given to said classes, *per stirpes*, was not limited upon a dubious and uncertain person, or upon the happening of a dubious and uncertain event. It was absolute in form, to definite classes at a certain time. By all the tests, the legacies were vested." *Bethea v. Bethea*, 116 Ala. 265.

Where the legacy is given at a future time it is contingent, but where it is given to be paid at a future time it is vested; the time being considered in the latter instance annexed,

operating, in the absence of other controlling circumstances, to create a vested interest in the beneficiary.<sup>1</sup>

not to the gift of the legacy, but to the payment of it. *Hixon v. Oliver*, 13 Ves. Jr. 113; *Magoffin v. Patton*, 4 Rawle (Pa.) 113.

**Effect of Postponement of Possession.**—"Inasmuch as, as a general proposition, absolute ownership implies the right of possession, it has frequently been urged that a postponement of possession must necessarily involve a suspension of the absolute ownership of personal property. But this is not the law of New York." *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

**Remainder After Life Estate with Power of Sale.**—Where a provision of the will disposing of the remainder of an estate after a life estate contains nothing indicating an intention that the vesting shall be postponed, and futurity is not annexed to and not of the essence of the gift of the principal over, the remaindermen take at the death of the testator a vested remainder in fee in the *corpus* of such trust. The vesting is not affected by the fact that the life estate is coupled with a power of sale, but the interests of remaindermen are subject to the life estate, and to the execution of the power of sale. *Cruikshank v. Cruikshank*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 401.

**1. Words of Present Gift.**—*Ross v. Roberts*, 2 Hun (N. Y.) 90, *affirmed* 63 N. Y. 652; *Wells v. Seeley*, 47 Hun (N. Y.) 109; *Loder v. Hatfield*, 71 N. Y. 99; *Warner v. Durant*, 76 N. Y. 136; *Delaney v. McCormack*, 88 N. Y. 174; *Smith v. Edwards*, 88 N. Y. 92; *Matter of Mahan*, 98 N. Y. 372; *Shipman v. Rollins*, 98 N. Y. 311; *Delafield v. Shipman*, 103 N. Y. 468; *Goebel v. Wolf*, 113 N. Y. 405; *Matter of Gardner*, 140 N. Y. 122; *Miller v. Gilbert*, 144 N. Y. 68; *Matter of Young*, 145 N. Y. 535; *Matter of Baer*, 147 N. Y. 354; *Geisse v. Bunce*, 23 N. Y. App. Div. 292; *Matter of Elliott*, (Surrogate Ct.) 27 Misc. (N. Y.) 258.

**"Give, Devise, and Bequeath."**—The words "I do hereby give and bequeath" have been held to create a vested interest. *Matter of Elliott*, (Surrogate Ct.) 27 Misc. (N. Y.) 258.

"The words 'I give, devise, and bequeath' import a present interest unless other provisions in the will clearly manifest a different intention." *Farnam v. Farnam*, 53 Conn. 261.

"If the testator had said, 'I give, devise, and bequeath unto the legatees named certain shares of stock, such bequest to take effect in enjoyment after the death of my life tenants,' there could be no question about the meaning or validity of the clause. We think it requires no particular straining to hold that when he said, 'after the death' of said life tenants 'I give, devise, and bequeath' unto the same persons, he meant the same thing, namely, a present, immediate bequest and gift of the property, subject only to delay in payment and enjoyment until after the death of those who had a prior right to enjoyment as life tenants. The vesting of title was to take effect immediately; the actual division and delivery of the certificates of stock was to occur in the future." *Matter of Conger*, 81 N. Y. App. Div. 493.

"The following language in a will, 'I give, devise, and bequeath, to such of my wife's children as are alive at the time of my death, all money or moneys deposited in my name in any bank or banks in the province of British Columbia, said money to be divided between each of said children share and share alike when they shall attain the age of twenty-one years; until such time the said money and interest as aforesaid is to remain untouched except as hereinafter provided,' created a vested interest in the children payable on their respectively attaining twenty-one years of age." *Matter of Baillie*, 3 British Columbia 350.

**"Pay."**—*In re Roosa v. Harrington*, 171 N. Y. 341, there was a direction to "pay," and the question of present or future gift arose. The court found the words "go and belong to" used in the will, and there stated that those words, used in connection with the word "pay," had the effect of enlarging the meaning of "pay" so that it became equivalent to the direct bequest contained in the other language.

**"Go and Belong to."**—"In order to bring this will within the rule of construction claimed by the comptroller to apply to it he has argued that the words 'go to and belong to' have the same meaning as the words 'pay and divide.' In the will the words 'go to and belong to' or 'go to "or" belong to' are used ten times, and in the codicil the same number of times, with several times the addition of the words 'be paid to.' The use of these particular words so many times in one instrument must necessarily convey to the mind a well-defined meaning in their use which might not obtain if they were used but once or twice. That meaning thus conveyed seems to differ from the meaning of 'divide and pay,' a physical cutting up and handing over then for the first time undertaken—by suggesting the fact that something has already been done by which the 'going and belonging to' is the complement." *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485.

**"Upon" or "After Decease" of Life Tenant.**—In *Matter of Seaman*, 147 N. Y. 69, the testator gave, devised, and bequeathed the residue of his estate for the life benefit of S., and "upon her decease" he gave, devised, and bequeathed the same to the children living at the time of her death. The court held that there were words of present gift.

Where the testator gives and bequeaths the use or interest of one-third of his property to a daughter and her husband, and adds, "after their death I give said one-third to the children," etc., the mere expression "after their death" relates to the termination of the life estate, and does not affect the vested character of the estate. *Matter of Watts*, 68 N. Y. App. Div. 357.

**"Share and Share Alike."**—The words "it being my intention to give each of my said children share and share alike," are equivalent to the creation of a gift by present words. They are as effective as if the decedent had said in so many words, "I do hereby give to

**... DIRECTION TO PAY AT SPECIFIED TIME.** — A legacy to be paid at a specified time in the future which is sure to arrive eventually, as one to be paid at a fixed period after the death of the life tenant, will be deemed as vesting in the legatees on the death of the testator.<sup>1</sup>

**... ADDED WORDS DIRECTING DISTRIBUTION.** — Where the gift standing alone would be sufficient to vest the legacy immediately, the fact that words directing distribution or division are added thereto, postponing the distribution until a future time, is not sufficient to render the gift contingent.<sup>2</sup>

each of my said children an equal share in my estate." *Matter of Brown*, (Surrogate Ct.) 28 Misc. (N. Y.) 273.

**"Share" and "Portion" Not Sufficient.** — "In *Smith v. Edwards*, 88 N. Y. 92, \* \* \* the will provided that in case any legatee should die before final distribution, his 'share' or 'portion' should go to his issue; or in default thereof to the survivors. It was urged that the word 'share' or 'portion' indicated a gift already made. The court said, not so, for the testator intended to give it over in such event; besides, the words 'share' and 'portion' are equivocal, and may mean immediate gifts, or be merely descriptive of gifts to be made in the future." *Dougherty v. Thompson*, 167 N. Y. 472.

**"As His Share."** — In *Kerr v. Smith*, 27 Ont. 409, there was a devise of land to executors and trustees upon trust to allow the testator's wife to use and occupy it during her life and after her death to sell and pay, among other legacies, a moiety of the purchase money to his son, with a provision that if any of the legatees died before their shares should be paid over, the share of the person so dying should be paid to his "legal personal representative." It was held that the legacy vested in the son, by being given in the event of his death "as his share" to his executor and administrator as "legal personal representative."

**"Words or Phrases Denoting Time,** such as when, then, and 'from and after,' in a devise of a remainder, limited upon a particular estate determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting." *Hersee v. Simpson*, 154 N. Y. 496. See also *Hauptman v. Carpenter*, 16 App. Cas. (D. C.) 524.

"It is quite manifest that the testator, in the use of the words 'then to be divided,' intended to indicate the time when the right of possession should begin, to wit, at the close of the antecedent life estate. *Vanderzee v. Slingerland*, 103 N. Y. 47; *Van Axte v. Fisher*, 117 N. Y. 401; *Bedell v. Guyon*, 12 Hun (N. Y.) 396; *Wilson v. White*, 109 N. Y. 59; *Embury v. Sheldon*, 68 N. Y. 235." *Sage v. Wheeler*, 3 N. Y. App. Div. 38.

**Meaning Determined from Context.** — Where the testator uses the word "divide" with the intention of passing a vested interest in one subdivision of a clause of a will, it will be inferred that the word was used with the same intention in other subdivisions of the clause in which it appears in the same connection. *Carr v. Smith*, 25 N. Y. App. Div. 214, affirmed 161 N. Y. 636.

The fact that the words of the will provide that no estate shall "vest" until a certain time

is not alone sufficient to render the interest contingent where it appears from the context and the other provisions of the will that the word was used in the sense of "payable" or "vesting in possession," and not in its technical sense. *Phillips's Estate*, 205 Pa. St. 504.

**Enumeration of Legatees.** — "The testator, upon the death of his wife, whom he made the beneficiary of a trust embracing all his residuary estate, gave, devised, and bequeathed the same to his four nephews, naming them, share and share alike. This disposition in favor of the nephews is made in terms importing a present and immediate gift, the donees have been individually designated and described by name, and the shares which the testator intended they should take indefinitely indicated. Under these circumstances, the surviving nephews of the testator would take an indefeasible vested interest in the property disposed of." *Matter of Riches*, (Surrogate Ct.) 37 Misc. (N. Y.) 464, citing *Matter of Elliott*, (Surrogate Ct.) 27 Misc. (N. Y.) 258; *Matter of Kimberly*, 150 N. Y. 90; *Hoppock v. Tucker*, 59 N. Y. 208; *Moffett v. Elmendorf*, 152 N. Y. 485, 57 Am. St. Rep. 529.

**1. Direction to Pay at a Specified Time.** — *Blamire v. Geldart*, 16 Ves. Jr. 314; *Leeming v. Sherratt*, 2 Hare 14; *High v. Worley*, 32 Ala. 709; *Mallory v. Mallory*, 72 Conn. 494; *Brookhouse v. Pray*, (Minn. 1904) 100 N. W. Rep. 235; *Van Wyck v. Bloodgood*, 1 Bradf. (N. Y.) 167; *Warner v. Durant*, 15 Hun (N. Y.) 450; *Barkman v. Hain*, 5 Ohio Dec. 474; *Little's Appeal*, 117 Pa. St. 14; *Pond v. Allen*, 15 R. I. 171.

In *McDowell v. Stiger*, 58 N. J. Eq. 125, there was a devise of a farm, with a charge upon the devisee to pay to Jane, a daughter of the testator, or her legal representatives, \$1,000 in one year after the death of the testator and of his wife. In a subsequent item the testator directed that, in case "my daughter Jane die, and leave no issue, that the aforesaid legacy to her revert, after her decease, to my estate, and be distributed to my heirs according to the laws of descent." Jane died more than one year after the death of the testator and the death of the widow, leaving no issue. It was held that upon arrival of the time fixed for payment the legacy became Jane's absolutely.

**2. Added Words of Distribution — England.** — *May v. Wood*, 3 Bro. C. C. 471.

**Canada.** — *Butler v. Butler*, 29 Nova Scotia 145.

**Arkansas.** — *Watkins v. Quarles*, 23 Ark. 179.

**California.** — *Matter of Walkerly*, 108 Cal.

627.

**Connecticut.** — *Dale v. White*, 33 Conn. 295.

**New York.** — *Loder v. Hatfield*, 71 N. Y. 92;



(b) **Gift Contained in Direction to Pay or Divide.** — As a general rule, where there are no words importing a gift other than a direction to the executors or trustees to divide or pay at a future time, the legacy is contingent and does not vest until that time arrives.<sup>1</sup> Or, in other words, as legacies payable

*Matter of Murphy*, 144 N. Y. 557; *Matter of Seaman*, 147 N. Y. 69; *Weinstein v. Weber*, 178 N. Y. 94, *affirming* 78 N. Y. App. Div. 645; *Carr v. Smith*, 25 N. Y. App. Div. 214; *Zartman v. Ditmars*, 37 N. Y. App. Div. 173; *Patterson v. Ellis*, 11 Wend. (N. Y.) 260; *Marsh v. Wheeler*, 2 Edw. (N. Y.) 158.

In *Manice v. Manice*, 43 N. Y. 303, it was held that when shares in real or personal property are disposed of by a will, and such shares are to be ascertained by a division, the interest of every legatee in the property passing under the will and to be divided, is a vested interest before the conversion or division, although it is not to take effect in actual enjoyment until the time appointed for the division arrives.

**Direction as to Manner of Division.** — Where a will grants a life estate to the testator's widow as long as she continues unmarried and directs that upon her death the property shall be sold and the proceeds divided among the testator's four children, the fee passes to the sons at the testator's death, and the direction to sell and divide cannot be regarded as a gift to take effect at the death of the widow, but is rather a suggestive mode of division in lieu of legal proceedings. *Miller v. Gilbert*, 144 N. Y. 68.

**1. Gift Contained in Direction to Pay** — *England.* — *Boughton v. James*, 1 Coll. Ch. Cas. 26; *Leake v. Robinson*, 2 Meriv. 363; *Mair v. Quilter*, 2 Y. & C. Ch. 465; *May v. Wood*, 3 Bro. C. C. 472; *Murray v. Tancred*, 10 Sim. 465; *Walker v. Mower*, 16 Beav. 365; *Gardiner v. Slater*, 25 Beav. 509.

*Canada.* — *Butler v. Butler*, 29 Nova Scotia 145.

*United States.* — *In re Hoadley*, 101 Fed. Rep. 233.

*Alabama.* — *Marr v. McCullough*, 6 Port. (Ala.) 507; *McLeod v. McDonnell*, 6 Ala. 236; *Travis v. Morrison*, 28 Ala. 494; *High v. Worley*, 32 Ala. 709; *Wynne v. Walthall*, 37 Ala. 42; *Phinizz v. Foster*, 90 Ala. 262; *Bethea v. Bethea*, 116 Ala. 265; *Andrews v. Russell*, 127 Ala. 195; *Johnson v. Terry*, 139 Ala. 614.

*Connecticut.* — *Farnam v. Farnam*, 53 Conn. 361.

*Illinois.* — *Scofield v. Olcott*, 120 Ill. 363; *Ducker v. Burnham*, 146 Ill. 9; *Carper v. Crowl*, 149 Ill. 465; *Knight v. Pottgieser*, 176 Ill. 368; *Clark v. Shawen*, 190 Ill. 47; *Thompson v. Adams*, 205 Ill. 552.

*Iowa.* — *Taylor v. Taylor*, 118 Iowa 407.

*Kentucky.* — *Roberts v. Brinker*, 4 Dana (Ky.) 570; *Willett v. Rutter*, 84 Ky. 319; *Wedekind v. Hallenberg*, 88 Ky. 114; *Dohn v. Dohn*, 110 Ky. 884.

*Massachusetts.* — *Eager v. Whitney*, 163 Mass. 463; *Hale v. Hobson*, 167 Mass. 397.

*Missouri.* — *Owen v. Eaton*, 56 Mo. App. 563.

*New York.* — *Traver v. Schell*, 20 N. Y. 89; *Phelps v. Phelps*, 28 Barb. (N. Y.) 121; *Everitt v. Everitt*, 29 N. Y. 39; *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485; *Manice v. Manice*, 43 N. Y. 303; *Warner*

*v. Durant*, 76 N. Y. 133; *Nathan v. Hendricks*, 87 Hun (N. Y.) 483, *affirmed* 147 N. Y. 348; *Delaney v. McCormack*, 88 N. Y. 174; *Smith v. Edwards*, 88 N. Y. 103; *Shipman v. Rollins*, 98 N. Y. 311; *Delafield v. Shipman*, 103 N. Y. 463; *Goebel v. Wolf*, 113 N. Y. 405; *Greenland v. Waddell*, 116 N. Y. 234; *Hillyer v. Vandewater*, 121 N. Y. 681; *Matter of Tienken*, 131 N. Y. 391; *Bowditch v. Ayrault*, 138 N. Y. 222; *Miller v. Gilbert*, 144 N. Y. 73; *Matter of Young*, 145 N. Y. 535; *Matter of Baer*, 147 N. Y. 348; *Matter of Allen*, 151 N. Y. 243; *Matter of Brown*, 154 N. Y. 313; *Clark v. Cammann*, 160 N. Y. 315; *Matter of Crane*, 164 N. Y. 71; *Dougherty v. Thompson*, 167 N. Y. 472; *Roosa v. Harrington*, 171 N. Y. 341; *Rudd v. Cornell*, 171 N. Y. 115; *Matter of Merriman*, 91 Hun (N. Y.) 120; *Matter of Embree*, 9 N. Y. App. Div. 602; *Karstens v. Karstens*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 247; *Carr v. Smith*, 25 N. Y. App. Div. 214; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Matter of Traver*, 30 N. Y. App. Div. 261; *Cogan v. McCabe*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 739; *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345; *Matter of Elliott*, (Surrogate Ct.) 27 Misc. (N. Y.) 258; *Matter of Brown*, (Surrogate Ct.) 28 Misc. (N. Y.) 273; *Aldridge v. Aldridge*, 43 N. Y. App. Div. 411; *Matter of Hogarty*, 62 N. Y. App. Div. 79; *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348; *Matter of Watts*, 68 N. Y. App. Div. 357; *Matter of Conger*, 81 N. Y. App. Div. 493; *Shangle v. Hallock*, 6 N. Y. App. Div. 55; *Zartman v. Ditmars*, 37 N. Y. App. Div. 173; *Rudd v. Cornell*, 58 N. Y. App. Div. 207; *Hafner v. Hafner*, 62 N. Y. App. Div. 316.

*North Carolina.* — *Green v. Green*, 86 N. Car. 546.

*Ohio.* — *Union Sav., etc., Co. v. Darr*, 10 Ohio Cir. Dec. 554.

*Pennsylvania.* — *Lamb v. Lamb*, 8 Watts (Pa.) 184; *Moore v. Smith*, 9 Watts (Pa.) 403; *Gorgas's Appeal*, (Pa. 1888) 12 Atl. Rep. 418; *Seibert's Appeal*, 13 Pa. St. 503; *Bowman's Appeal*, 34 Pa. St. 19; *Burd v. Burd*, 40 Pa. St. 185; *McClure's Appeal*, 72 Pa. St. 414; *Chess's Appeal*, 87 Pa. St. 362; *Pleasanton's Appeal*, 99 Pa. St. 363; *Bartholomew's Estate*, 155 Pa. St. 314; *Ritter's Estate*, 190 Pa. St. 102; *Allen's Estate*, 192 Pa. St. 170.

*Tennessee.* — *Fulkerson v. Bullard*, 3 Sneed (Tenn.) 260; *Perkins v. Clack*, 3 Head (Tenn.) 734.

See also 1 Jarm. on Wills (5th ed.) 840.

**Reason for Rule.** — "In *Dougherty v. Thompson*, 167 N. Y. 472, cited by the appellant, the court uses language which one may well adopt. It says, *per* Landon, J.: 'One of the subordinate rules is that when the only gift is found in the direction to pay or distribute at a future time, the gift is future, and not immediate; contingent, but not vested. Its reason is plain. The direction has no reference to the present, and can be executed only in

after the death of the testator are either vested or contingent, when the testator annexes time to the payment only, the legacy will be vested; but if he annexes time to the gift itself, the legacy will be contingent.<sup>1</sup> It has been said that the point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent;<sup>2</sup> and if it appears that the testator intended it as a condition precedent, upon which the legacy must take effect, then, if the condition or

the future, and if in the meantime the donee indicated shall die, the direction cannot be executed at all. If the testator should say, "I give to be delivered later," or use equivalent words, the delivery only is postponed. The gift is complete at the testator's death, and if the donee shall die before delivery, delivery can be made to his representative or assignee." *Matter of Watts*, 68 N. Y. App. Div. 357.

**Application of Rule.** — "The correct application of this rule requires us to find a will in which the distribution is provided for by a direction to pay or divide without reference to the present, and which can be executed only in the future and in the presence of the original donee. It is not surprising that if there can be found in any part of the will an intention to make a present gift, this rule of construction yields to such intent; and so the courts search the four corners of each will and often find the intent to make a present gift in the general scheme of the will or in single expressions of collective phrases." *Matter of Hitchens*, (Surrogate Ct.) 43 Misc. (N. Y.) 485.

"Where the courts have held that the vesting is postponed, there is not only an absence of language importing an immediate gift, but other circumstances are usually present which are largely determinative in bringing about the decision. Indeed, the courts have gone so far as to refuse to apply the rule in question, even where the direction to divide is made most imperative. Thus, in the case of *Matter of Hedger*, 1 Connolly (N. Y.) 524, affirmed (Supm. Ct. Gen. T.) 9 N. Y. Supp. 347, the testator, after creating a life estate in his wife, gave the remainder to certain named beneficiaries, and directed that 'such devises and bequests are to take effect, and such division of my estate is to be had, after the decease of my said wife.' It was held that the intention here was well defined, that the gifts were certain as to quantity and as to the objects of the testator's bounty, and that the remainders were, therefore, vested, and not contingent. See also *Ross v. Roberts*, 2 Hun (N. Y.) 90, affirmed 63 N. Y. 652." *Matter of Brown*, (Surrogate Ct.) 28 Misc. (N. Y.) 273.

**Time of Essence of Gift.** — "It is to be observed that the will contains no words of gift to the children or grandchildren, either of the income or of the principal. The income the trustees are directed to apply to the use of the testator's wife, children, or grandchildren, while at the termination of the trust the body of the estate is to be divided among his wife, children, and grandchildren if the wife shall be living, if not, between the children and grandchildren. Thus, it is obvious that it was the intent of the testator that both income and principal should be applied and divided

among persons living at the time when such application or division was to be made, and that the condition of survivorship which was annexed to the rights of children was intended to be annexed to the rights of grandchildren. Obviously the gift was in future and not present, and, hence, falls within the rule that where the only gift is in the direction to pay or divide at a future time, the case is not to be ranked with those in which the payment or division only is deferred, but is one in which time is the essence of the gift." *Rudd v. Cornell*, 171 N. Y. 115.

"Where there is no substantive gift of the legacy until the time when it is payable, it does not vest until then, unless, perhaps, such time must inevitably arrive. In such case there is no gift until payment. It is not a gift *in presenti* with a time fixed for payment afterwards. *Lamb v. Lamb*, 8 Watts (Pa.) 184. The rule is stated in *Moore v. Smith*, 9 Watts (Pa.) 403, and in *Bowman's Appeal*, 34 Pa. St. 19, that where there is no antecedent gift or bequest independent of the period fixed for payment, then it is not vested, but contingent." *Owen v. Eaton*, 56 Mo. App. 563.

**Gift Contained in Direction for Conversion and Distribution.** — Where there is no gift and no language importing such a gift except in the direction for conversion and then for distribution, the gift is held to be contingent. *Delaney v. McCormack*, 88 N. Y. 174; *Dougherty v. Thompson*, 167 N. Y. 472.

**Vesting of Property in Trustees During Life Estate.** — Where the will creates an express trust in the executors, and vests title in them during the life of the widow to all of the property of the estate for certain purposes, and directs that upon the death of the wife the property shall be conveyed to the testator's children, share and share alike, the issue of any such child who has died upon the death of the wife to take *per stirpes* the share that its parent would have taken if living, the interest of the children does not vest until the widow's death, and a child and her issue who died before the widow's death take nothing thereunder. *Lese v. Miller*, 71 N. Y. App. Div. 195.

Also where the testator gives all of his estate to his executors in trust for the life of his wife, making no direct gift of the principal, but merely providing that upon her death the estate shall be divided, the interests of those taking after the wife are governed by the provisions of this rule, as under the provisions of the will time is the essence of the gift. *Matter of Crane*, 164 N. Y. 71.

1. *High v. Worley*, 32 Ala. 709; *Johnson v. Terry*, 139 Ala. 614.

2. *Taylor v. Taylor*, 118 Iowa 407; *Matter of Boyce*, (Surrogate Ct.) 37 Misc. (N. Y.) 146.

contingency does not happen, the gift never arises.<sup>1</sup>

**Gift to Legatees by Name.** — The rule has been most generally applied in cases where the gift is to children or grandchildren as a class, and the beneficiaries, as to their identity and number, can only be definitely ascertained at a future time. The courts will hesitate to apply the rule where the gift is to legatees by name.<sup>2</sup>

**Postponement of Distribution until After Life Interest.** — The fact that under the provisions of the will the time for distribution is placed at the termination of a life estate is not alone sufficient to render the legacy contingent, but it must further appear that futurity is annexed to the substance of the gift and not to the time of payment only.<sup>3</sup>

**Rule Not Inflexible.** — This rule of construction under which the legacy is held to be contingent in the absence of any other gift than a direction to divide or pay at a future time, has been repeatedly stated to be not an inflexible or arbitrary rule, but one subordinated to the primary rule of construction that the intent of the testator as deducible from the whole will, shall govern. In some instances evidence of a very slight character has been taken by the courts as expressive or indicative of such intention.<sup>4</sup>

1. *May v. Wood*, 3 Bro. C. C. 473.

2. **Gift to Legatees by Name.** — *Roosa v. Harrington*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 529. See also *Shangle v. Hallock*, 6 N. Y. App. Div. 55; *Carr v. Smith*, 25 N. Y. App. Div. 214.

3. **Gift After Life Estate.** — *Scofield v. Olcott*, 120 Ill. 362; *Clark v. Shawen*, 190 Ill. 47; *Clark v. Cammann*, 160 N. Y. 315. See also *infra*, this subsection, (5) *When Payment of Legacy Postponed*.

“Words Such as ‘upon the Decease,’ or ‘from and After the Decease’ of a Life Tenant, when used in wills in devising a remainder following a life estate, do not afford sufficient grounds in themselves for adjudging that the remainder is contingent, and not vested, and, unless their meaning is enlarged by the context, they are regarded as defining the time of enjoyment only, and not of vesting the title. Words of survivorship and gifts over on the death of the primary beneficiary are construed, unless a contrary intention appears, as relating to the death of the testator. *Nelson v. Russell*, 135 N. Y. 137. The use of the word ‘immediately’ preceding the words ‘after the death of my said wife’ does not take the present case out of the rule, and, if it did, there is no other devise of the remainder intermediate the death of the testator and that of the life tenant, and, in default of such devise, the remainder would vest in the children as in case of intestacy, as being the heirs at law or next of kin.” *In re Lange*, (Surrogate Ct.) 55 N. Y. Supp. 750.

The “Words ‘At’ or ‘After’ the Death of a particular person have been held not to denote a condition that the legatee shall survive such person, but only to mark the time at which the legacy shall take effect in possession; that possession being deferred on account of some interest in the subject being given to the person on whose death the gift is to take effect. In *Medlicot v. Bowes*, 1 Ves. 207; *Barnes v. Allen*, 1 Bro. C. C. 181; *Monkhouse v. Holme*, 1 Bro. C. C. 298; *Benyon v. Maddison*, 2 Bro. C. C. 75; *Atty.-Gen. v. Crispin*, 1 Bro. C. C. 386, and many others, the time might be said to be annexed to the substance of the gift just

as much as in the present case; but the purpose being to give interests to different persons in succession, it was held that each gift was alike immediate, though the second taker could not have the benefit until after the death of the first.” *Blamire v. Geldart*, 16 Ves. Jr. 114.

“The Use of the Words ‘Shall Go,’ or ‘Descend,’ or of the adverbs ‘when,’ etc., and ‘then,’ etc., does not import a contingency, or ‘make anything necessary to precede the vesting of a remainder, but only express the time when a remainder shall take effect in possession, not when it shall become vested.’ *Williams v. Williams*, 91 Ky. 555; *Williamson v. Williamson*, 18 B. Mon. (Ky.) 375. Such words relate merely to the time of the enjoyment of the estate.” *Middleton v. Middleton*, (Ky. 1897) 43 S. W. Rep. 677.

4. **Rule Not Inflexible** — *England*. — *Leake v. Robinson*, 2 Meriv. 363.

*Alabama*. — *Travis v. Morrison*, 28 Ala. 494.  
*Kentucky*. — *Wedekind v. Hallenberg*, 88 Ky. 114; *Dohn v. Dohn*, 110 Ky. 884.

*New York*. — *Matter of Ball*, (Surrogate Ct.) 11 Misc. (N. Y.) 433; *Smith v. Edwards*, 88 N. Y. 104; *Goebel v. Wolf*, 113 N. Y. 405; *Hillyer v. Vandewater*, 121 N. Y. 681; *Matter of Tienken*, 131 N. Y. 391; *Bowditch v. Ayrault*, 138 N. Y. 222; *Campbell v. Stokes*, 142 N. Y. 29; *Miller v. Gilbert*, 144 N. Y. 68; *Matter of Young*, 145 N. Y. 535; *Matter of Brown*, 154 N. Y. 313; *Matter of Crane*, 164 N. Y. 71; *Roosa v. Harrington*, 171 N. Y. 341; *Matter of Merriman*, 91 Hun (N. Y.) 120; *Shangle v. Hallock*, 6 N. Y. App. Div. 55; *Matter of Embree*, 9 N. Y. App. Div. 602; *Carr v. Smith*, 25 N. Y. App. Div. 214; *Matter of Traver*, 30 N. Y. App. Div. 261; *Matter of Elliott*, (Surrogate Ct.) 27 Misc. (N. Y.) 258; *Matter of Brown*, (Surrogate Ct.) 28 Misc. (N. Y.) 273; *Aldridge v. Aldridge*, 43 N. Y. App. Div. 411; *Roosa v. Harrington*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 529; *Matter of Hogarty*, 62 N. Y. App. Div. 79; *Fargo v. Squiers*, 6 N. Y. App. Div. 485; *Zartman v. Ditmars*, 37 N. Y. App. Div. 173.

*Pennsylvania*. — *McClure's Appeal*, 72 Pa. St.



(3) *When Legacy to Take Effect upon Happening of Contingency*—(a) **Certainty of Happening of Event.**—Where a legacy is to take effect upon the happening of a contingency, the legacy cannot be considered as vested unless the event is sure to happen.<sup>1</sup>

418; Chess's Appeal, 87 Pa. St. 362; Ritter's Estate, 190 Pa. St. 102.

**Intention of Testator.**—"In determining the intention of the testator, the leading inquiry, of course, is whether the gift itself is immediate, the time of payment or enjoyment only being postponed, or whether the gift itself is future and contingent, depending upon the beneficiary arriving at age, surviving some other person, or the like. In the latter case futurity is said to be annexed to the substance of the gift; and, as a general proposition, this is the case where the only gift is found in a direction to divide at a future date. But the general rule that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, is not controlling, but is subordinate to the primary canon that the construction shall follow the intent to be collected from the whole will. Goebel v. Wolf, 113 N. Y. 405." Canfield v. Fallon, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345. See also *supra*, this subsection, (1) *Controlling Principles*.

"Of course, if there is in other parts of the will an indication of an intent to make a present gift, the indication which the rule as to a direction for future delivery supposes is weakened, and the rule itself yields to clearer evidence of the contrary intent. In many reported cases the search for clearer evidence has resulted in finding it, sometimes in single expressions and sometimes in the collective phrases of the will." Dougherty v. Thompson, 167 N. Y. 472.

"We have heretofore said that the rule of construction founded upon a gift flowing only from a direction to divide has many exceptions, and is to be used as an aid to ascertain the intention and not as a force to pervert it. I have observed in general that where it has prevailed it has been where no contrary intention was fairly indicated, and where its own force was somewhat strengthened and its indication corroborated by further facts." Matter of Tienken, 131 N. Y. 391.

"This rule was referred to in the case of Smith v. Edwards, 88 N. Y. 105, and it was there said that 'It does not control where the language of the will, while not expressly saying "I give and bequeath," does yet plainly import a present gift, intended to vest immediately without reference to the clause of distribution.'" Zartman v. Ditmars, 37 N. Y. App. Div. 173.

**An Apparent Intention** in a will that an estate shall vest immediately upon the testator's death in remaindermen who are then living must control and supplant the rule which is applicable where there is merely a direction to divide at a future time among a class to be then ascertained, since the intention is the paramount rule of construction. Roosa v. Harrington, 171 N. Y. 341.

**Absence of Indication of Intention.**—"It is undoubtedly the rule that where the testator plainly makes no gift to his beneficiaries, but

provides for their enjoyment of a portion of his estate on the happening of a contingency, such beneficiaries do not take a vested interest upon the death of the testator. Shipman v. Rollins, 98 N. Y. 311; Smith v. Edwards, 88 N. Y. 92. But this is a rule to which resort must necessarily be had in the absence of any significance of a contrary intent indicated by the testator; and where such a different intent is manifest from the will the vesting takes place at once upon the death of the testator, however long the enjoyment is postponed. Matter of Young, 145 N. Y. 535; Goebel v. Wolf, 113 N. Y. 405; Warner v. Durant, 76 N. Y. 133." Karstens v. Karstens, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 247.

**Evidence of Intention.**—Where the personality which is to be distributed consists not only of the residue but of the accumulated income, this tends to show that the vesting of the whole was intended to be postponed until the arrival of the event on which the distribution is made to depend. Cronan v. Adams, 185 Mass. 436.

**1. Certainty of Happening of Event.**—Farnam v. Farnam, 53 Conn. 261; Taylor v. Taylor, 118 Iowa 407; Meyer v. Eisler, 29 Md. 32; Small v. Small, 90 Md. 550; Matter of Merriman, 91 Hun (N. Y.) 120; Hennessy v. Patterson, 85 N. Y. 98; Matter of Young, 145 N. Y. 535.

In Beatty v. Montgomery, 21 N. J. Eq. 324, it was declared that whether a legacy is vested or contingent depends upon the event, and not on the time. If the event is uncertain, the legacy is contingent, though the time is fixed; and if certain, the legacy is vested, although the time is uncertain.

**Must Be Only a Question of Time.**—"If the day is certain it is vested, but where uncertain, the question will be whether it is in the nature of a condition; for if it is conditional, then, in the very nature of the thing, the time is annexed to the substance of the gift, as in the case of marriage, of puberty, or of any other situation in life, when the arrival of the time is a condition, without which the testator would not have made the gift." Monkhouse v. Holme, 1 Bro. C. C. 298. But compare Jones v. Habersham, 107 U. S. 174 (where payment was postponed until the completion of a writing); Schwartz's Appeal, 119 Pa. St. 337 (where payment was to be delayed until the legatee was worth \$8,000.00); Loder v. Hatfield, 71 N. Y. 92 (where payment was to be made one year after the legatee married or left a household). See also Willett v. Rutter, 84 Ky. 317; Pennock v. Eagles, 102 Pa. St. 294; Snow v. Snow, 49 Me. 159.

**Death.**—"Where a remainder is bequeathed, the enjoyment of which is postponed, time enters into the substance of the gift, when its existence depends upon a contingency that may or may not happen; but where the only contingency is a death certain to occur, and the legacies are known and fixed, a postponing clause should be regarded as relating only to the period of actual enjoyment. Matter of Young,

**Legacy upon Death or Remarriage of Life Tenant.** — Hence, a legacy to take effect upon the decease or remarriage of the life tenant is vested,<sup>1</sup> but a remainder which is to take effect upon the remarriage of the widow is contingent, as its vesting is dependent upon a dubious and uncertain event which may never happen.<sup>2</sup> And where there are other conditions attached to the vesting, the fact that the gift is limited upon the death or remarriage of the life tenant does not render it vested.<sup>3</sup>

**Impossibility of Happening of Contingency.** — Where the contingency upon which the legacy is to take effect cannot happen, the legacy cannot vest. Thus, where the testator, after creating a trust for his son, gives a certain amount to the wife of the son in case the son dies without issue, and the wife dies before the son and the son dies without issue, the legacy to the wife is contingent, and on her death is disposed of in accordance with the other provisions

145 N. Y. 539; *Bowditch v. Ayrault*, 138 N. Y. 230; *Moore v. Lyons*, 25 Wend. (N. Y.) 144." Matter of Merriman, 91 Hun (N. Y.) 120. See also *Hickling v. Fair*, (1899) A. C. 15.

Thus where under the provisions of a will the prior estate is bound to end with the death of the survivor of three devisees, the remainder is vested; and this is true though the estate may be determined before by the marriage of all of the devisees. *Hauptman v. Carpenter*, 16 App. Cas. (D. C.) 524.

**Death Without Surviving Children.** — Where by the terms of the will the estate of the remaindermen is dependent upon the life tenant dying without children, this being an uncertain event, they take a contingent interest which vests not at the death of the testator, but at the death of the life tenant without children then living. *Crawford v. Clark*, 110 Ga. 729.

**Recovery of Sanity.** — A bequest of a specified sum to a daughter who is confined in a hospital, the amount to be paid her on the recovery of her sanity, "provided that if she does not recover her reason or dies, then the amount is to be divided equally between her three children now living," is a contingent bequest to the daughter, which vests in case she recovers her sanity, and her children are only entitled to the bequest in case the mother dies before recovering reason. Until the possibility of her recovery is extinguished by death, the children cannot maintain an action to enforce a payment of the bequest to themselves. *Mingo v. Huntington*, (Minn. 1904) 99 N. W. Rep. 45.

**1. Death or Remarriage.** — *Thrasher v. Ingram*, 32 Ala. 646; *Scofield v. Olcott*, 120 Ill. 362; *Maxwell v. McCreery*, 57 N. J. Eq. 287; *Williams v. Freeman*, 98 N. Y. 577; Matter of Elliott, (Surrogate Ct.) 27 Misc. (N. Y.) 258; Matter of Brown, (Surrogate Ct.) 28 Misc. (N. Y.) 273.

**Specific Instances.** — "A vested as distinguished from a contingent remainder, is created by a will which bequeaths the income of the residue to the testator's wife for her life or until her remarriage, and after her remarriage or death devises and bequeaths the property to the persons who would succeed to and inherit the same if the testator had died intestate, and to their heirs, executors, administrators, and assigns forever." *Smith v. Allen*, 161 N. Y. 478.

A gift of property to the testator's wife for life or as long as she remains unmarried, and

then to his daughter for life with remainder over to her issue surviving her, failing issue to the testator's nephew, creates a vested remainder in the nephew subject to be divested by issue surviving the daughter. This remainder vests upon the testator's death, and the heirs of the nephew take upon the death of the daughter without issue surviving, even though the nephew dies before the daughter. *Hennessy v. Patterson*, 85 N. Y. 91.

A gift to the testator's wife for life or during widowhood and on her death the property to be divided equally between the testator's children, and in case any of the children should die without leaving issue the estate to be divided equally between the other children, gives to the children a vested remainder subject to be divested by their dying during the life tenancy without leaving a child surviving. The share of a child dying during the life tenancy and leaving issue surviving becomes indefeasible upon the death of the life tenant. *Sumpter v. Carter*, 115 Ga. 893.

**2. Thompson v. Adams**, 205 Ill. 552.

In *McKensy v. McKensy*, (Ky. 1894) 28 S. W. Rep. 782, a testator left his estate to his widow during widowhood, providing that in case of her remarriage she was to have one-third and the remainder was to go to his child. The widow never remarried and the child died during her lifetime without children. It was held that the interest of the child vested on the testator's death subject to the devise of one-third to his mother on the contingency of her remarriage.

**3. Remainder to Children Surviving.** — A devise to an executor in trust for the use of the testator's widow so long as she shall live and remain unmarried, with remainder to such of his children as are alive at the time of the widow's death or remarriage, or to the lawful issue of such of them as may be dead leaving such issue, devises to the children a contingent remainder, as a child could not take unless he or she were alive at the time of the death or remarriage of the widow. *Haward v. Peavey*, 128 Ill. 430; *Thompson v. Adams*, 205 Ill. 552.

A gift of the testator's property to his wife during her life and while she remains a widow, and after her death to his children who may be living or the legal heirs of those who may die, gives to the children a contingent remainder the vesting of which is dependent upon their surviving their mother. *Loeb v. Struck*, (Ky. 1897) 42 S. W. Rep. 401.

of the will.<sup>1</sup>

(b) **Attainment of Specified Age.** — If there is an antecedent gift, a direction postponing the payment until the legatee shall have attained a specified age does not postpone the vesting.<sup>2</sup> So where the legacy is given, payable or to be paid when the legatee attains a specified age, the legacy vests immediately upon the death of the testator.<sup>3</sup>

**When Attainment of Given Age Condition Precedent.** — But if it is clear, from the language of the will, that the attainment of the specified age is a condition precedent to the vesting, the legacy will be contingent, notwithstanding the gift is distinct from the direction to pay. Thus, a gift to A, to be paid in case he reaches the age specified and not otherwise, is contingent.<sup>4</sup> And

1. *Matter of Boyce*, (Surrogate Ct.) 37 Misc. (N. Y.) 146.

2. **Gift upon Attainment of Specified Age.** — *Leake v. Robinson*, 2 Meriv. 363; *Butler v. Butler*, 29 Nova Scotia 145; *Burrill v. Shiel*, 2 Barb. (N. Y.) 457; *Matter of Murphy*, 144 N. Y. 557; *Carr v. Smith*, 25 N. Y. App. Div. 214; *Smith's Estate*, 7 Pa. Dist. 236.

**Rule Stated.** — The rule is clearly and aptly stated by Justice Green in *Gifford v. Thorn*, 9 N. J. Eq. 702, as follows: "The general rule applicable to this question, adopted both in the ecclesiastical courts and courts of equity, is well settled. Where the time specified in the bequest is annexed to the payment only, as where the legacy is given, payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift. The time of payment only is postponed. But where the time is annexed not to the payment only, but to the gift itself, as when the legacy is given to the legatee at twenty-one, or 'if' or 'when' he attains the age of twenty-one, the legacy does not vest until the legatee attains that age. The gift is upon the condition that the legatee shall attain the age specified. His attaining that age is a condition precedent; and if the condition be not fulfilled, the legacy never vests. The cases upon this subject are very numerous, and with few exceptions the rule will be found to have been for more than a century inflexibly maintained."

**Illustrations.** — Under a will giving to the testator's daughter the income of one-half of his estate and to her son the income of the other half, until he shall reach the age of thirty-five, when he shall receive the principal, and should his mother die before his reaching the age of thirty-five, he shall receive the whole income until he reaches that age, and then take the whole of the estate, the property to go to his heirs in case of his death before reaching that age, a child of the son takes a vested estate although the son dies before attaining the specified age. *In re Smith*, 189 Pa. St. 587.

A gift by a testator to grandsons to whom he had stood *in loco parentis* of the sum of \$5,000 each, his executors being directed to pay to the grandsons or the survivors of them at such time as the executors may find convenient, and in accordance with their best judgment, but in no case before the grandsons, or either of them, shall have reached the age of twenty-one years, gives to the grandsons vested legacies, the direction as to the time of payment relating to the

enjoyment and not to the vesting. *Webb v. Webb*, 92 Md. 101.

3. **Legacy Payable at Stated Age — England.** — *Booth v. Booth*, 4 Ves. Jr. 399.

*Canada.* — *Butler v. Butler*, 29 Nova Scotia 145.

*Kentucky.* — *Wallingford v. De Bell*, 15 B. Mon. (Ky.) 551.

*Massachusetts.* — *Furness v. Fox*, 1 Cush. (Mass.) 134.

*New Jersey.* — *Gifford v. Thorn*, 9 N. J. Eq. 702; *Dusenberry v. Johnson*, 59 N. J. Eq. 336.

*New York.* — *Matter of Murphy*, 144 N. Y. 557; *Smith v. Parsons*, 146 N. Y. 116; *Carr v. Smith*, 25 N. Y. App. Div. 214; *Burrill v. Shiel*, 2 Barb. (N. Y.) 457.

*Pennsylvania.* — *Magoffin v. Patton*, 4 Rawle (Pa.) 113; *Smith's Estate*, 7 Pa. Dist. 236.

**Illustrations.** — "Again, it has been held that a devise to A when (but not if) he attains a given age, and meantime to B, gives to A a vested estate and to B a term. *Boraston's Case*, 3 Coke 21; *Winslow v. Goodwin*, 7 Met. (Mass.) 363." *Smith's Estate*, 7 Pa. Dist. 236.

A testator, by his will, ordered as follows: "I give and bequeath to S. the sum of \$10,000, to be paid her on her reaching the age of sixteen years." It was held that the legatee took a vested interest in the legacy, liable to be defeated by her death before reaching the age of sixteen years. *Kearney v. Kearney*, 17 N. J. Eq. 59.

A gift by the testator to the sons and daughters begotten by his son during such son's natural life, the legacies to be payable on their arriving at the age of twenty-one years, respectively, without interest, vests in the legatees living at the death of the testator, and in those born after his death. *Parker v. Leach*, 66 N. H. 416.

Where a testator directed by his will, "All the residue of my property of every description, to be sold, at such time as my executor shall think most advantageous, the whole to be equally divided among my eight grandchildren as they come to lawful age, to wit, G., M., etc.," it was held that the legacy vested in the grandchildren upon the decease of the testator, and became payable on their arriving at full age. *Haywood v. Rogers*, 8 Ired. Eq. (43 N. Car.) 278.

4. **Gift Conditioned on Attainment of Specified Age.** — *Hickling v. Fair*, (1899) A.C. 15; *Lister v. Bradley*, 1 Hare 10; *Heath v. Perry*, 3 Atk. 101; *Hunter v. Judd*, 4 Sim. 455; *Knight v. Cameron*, 14 Ves. Jr. 389; *Nixon v. Robbins*, 24 Ala. 663; *Moore v. Smith*, 9 Watts (Pa.)



where the gift is in the form of a bequest to the legatee, at or if, or as and when, he shall attain twenty-one, or from and after attaining twenty-one, time is regarded as annexed to the substance of the gift as distinguished from the payment, and the gift will not vest until the given age is attained.<sup>1</sup>

(c) **Legacy to Be Paid upon Marriage.** — Where a testator gives a legacy to be paid at the time of the marriage of the legatee, the legacy is contingent and only vests when the legatee complies with the conditions upon which it is given. A legacy of this nature is distinct from legacies payable upon the attainment of a specified age, in that in the case of the latter there is a certain time fixed for payment which must necessarily arrive, whereas in case of legacies on marriage the time annexed to the payment is merely eventual and may or may not come.<sup>2</sup> But a legacy which is payable upon the event of

403; Seibert's Appeal, 13 Pa. St. 501; Bowman's Appeal, 34 Pa. St. 19; Yost's Estate, 134 Pa. St. 426.

"It was said by Lord Hardwicke, in *Heath v. Perry*, 3 Atk. 102: 'Some things are certain in these cases; for, if a legacy is given generally at marriage or at twenty-one, then the vesting and the time of payment are the same, and the legacy shall not vest until marriage or twenty-one.' " *Von der Horst v. Von der Horst*, 88 Md. 127.

**Intention to Postpone Vesting Presumed.** — "Thus, where the right is made conditional on a contingency personal to the legatee, such as marriage, or arrival at majority, events or dates uncertain which may never have place, there is a presumption, though not insuperable, that a vesting or right to take was intended to be suspended until the occurrence of the contingency should be ascertained." *Hickling v. Fair*, (1899) A. C. 15; *Carlton v. Thompson*, L. R. 1 H. L. Sc. 241.

**Illustrations.** — A gift in remainder to the testator's children, after the termination of a life estate given his wife, "and the issue of any of them who may have previously died," upon their attaining the age of twenty-one, refers to the children dying before the death of his wife and grants a remainder to the testator's children contingent on their severally attaining twenty-one. *In re Wintle*, (1896) 2 Ch. 711.

A gift by a testatrix of a specified sum to each of the grandsons, children of a certain child, who may live to reach the age of twenty-one years, gives to the grandsons contingent legacies, the title to which vests on each legatee arriving at the given age. *Webb v. Webb*, 92 Md. 101.

So a gift to the testator's sister for life and upon her death a legacy to each of her grandchildren when they shall respectively attain the age of nineteen years, and in case either of them shall die before attaining that age his legacy to go to the survivor, and in case of the death of both before attaining that age, then upon the death of the survivor the legacies to go to their father and mother in equal shares, gives to such grandchildren contingent interests. *Engles's Estate*, 167 Pa. St. 463.

In *Snow v. Snow*, 49 Me. 159, a legacy to A to come into possession when he should arrive at twenty-one years, or at the death or marriage of the testator's widow, was held contingent.

**1. Legacy at Twenty-one — England.** — *In re Wrangham*, 1 Drew. & Sm. 358; *Smell v. Dee*, 2 Salk. 415; *Leake v. Robinson*, 2 Meriv. 363; *Cruse v. Barley*, 3 P. Wms. 20; *Fonereau v. Fonereau*, 3 Atk. 645; *Locke v. Lamb*, L. R. 4 Eq. 372; *Hanson v. Graham*, 6 Ves. Jr. 239; *Bruce v. Charlton*, 13 Sim. 65.

*Canada.* — *Butler v. Butler*, 29 Nova Scotia 145.

*Kentucky.* — *Roberts v. Brinker*, 4 Dana (Ky.) 570; *Dohn v. Dohn*, 110 Ky. 884.

*Maine.* — *Snow v. Snow*, 49 Me. 159.

*Massachusetts.* — *Winslow v. Goodwin*, 7 Met. (Mass.) 363. Compare *Furness v. Fox*, 1 Cush. (Mass.) 134.

*New Jersey.* — *Gifford v. Thorn*, 9 N. J. Eq. 702; *Post v. Herbert*, 27 N. J. Eq. 540; *Clayton v. Somers*, 27 N. J. Eq. 230; *Dusenberry v. Johnson*, 59 N. J. Eq. 336.

*New York.* — *Delafield v. Shipman*, 103 N. Y. 468; *Matter of Murphy*, 144 N. Y. 557.

*North Carolina.* — *Haywood v. Rogers*, 8 Ired. Eq. (43 N. Car.) 278; *Green v. Green*, 86 N. Car. 546.

*Pennsylvania.* — *Smith's Estate*, 7 Pa. Dist. 236; *Yost's Estate*, 134 Pa. St. 426.

**"Die Before Attaining" Age of Twenty-one.** — Where the words of the will are "that in the event either of my said children die before attaining the age of twenty-one years, \* \* \* then the share of my estate of such deceased shall be divided in equal parts between the survivors" and there are no words in the will indicating that time is mentioned only as a qualifying clause of the payment or division, and not of the substance of the gift, it will be considered that it is the intention of the testator that the remainder shall be contingent. *Johnson v. Terry*, 139 Ala. 614.

**2. Gifts on Marriage Contingent.** — *Atkins v. Hiccocks*, 1 Atk. 500; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Malcolm v. O'Callaghan*, 2 Madd. 347; *Taylor v. Lambert*, 2 Ch. D. 177; *Morgan v. Morgan*, 4 De G. & Sm. 164; *Booth v. Booth*, 4 Ves. Jr. 399; *Corr v. Corr*, 7 Ir. Eq. 397; *In re Cantillon*, 16 Ir. Ch. 301. Compare *Boone v. Sinkler*, 1 Bay (S. Car.) 369.

**Distinguished from Gift at Twenty-one.** — "The cases of *Atkins v. Hiccocks*, 1 Atk. 500, and *Elton v. Elton*, 3 Atk. 504, are clear authorities that a mere gift to a person on marriage is contingent, and not vested. Lord Hardwicke, in *Atkins v. Hiccocks*, 1 Atk. 500, expresses himself most distinctly upon the point. He says it is not a vested legacy, and puts the event of

marriage may nevertheless be deemed a vested legacy if, upon the whole instrument, it appears that it was the intention of the testator that the legacy should be vested.<sup>1</sup>

**Effect of Gift of Intermediate Interest.** — Thus, where there is the gift of a legacy with direction to pay the interest therefrom until the marriage of the legatee, and at the time of his marriage to pay over to him the principal, the gift of the interest dispenses with the contingency and the legacy vests at the testator's death.<sup>2</sup>

**Gift of Residue on Marriage.** — It seems that where the gift is not of a legacy, but of the residue of the estate, the fact that the time of payment is fixed on the marriage of the residuary legatee does not operate to prevent the gift from vesting at the time of the testator's death.<sup>3</sup>

(4) *When Legacy Payable to Persons Living at Specified Time.* — Where the persons who are to take under the will must be living at a certain time, the gift is contingent, because, until the time arrives, the persons who will answer the description cannot be ascertained.<sup>4</sup> Thus, a gift after a life estate is

marriage in contradistinction to the common case of a legacy, to be paid at twenty-one, and unquestionably there is a very intelligible difference between the two cases; for if I give my son £5,000 at twenty-one, my meaning is, that if my son live until that age, payment is to be made to him. I postpone payment solely during his minority; but I know the time at which my son, had he lived, would have attained that age, and become entitled to his legacy; but it is different with a condition like marriage; you cannot predicate of it, as you can of the other event; you cannot say that had he lived, he would have married. All the cases cited on the other side are cases of payment to be made on marriage or twenty-one, (except the case of *Booth v. Booth*, 4 Ves. Jr. 399, 4 Rev. Rep. 235); they are easily distinguishable from *Atkins v. Hiccocks*, 1 Atk. 500, and *Elton v. Elton*, 3 Atk. 504, and from the present. In those cases one certain alternative exists, which enables the court to measure the gift." *Vize v. Stoney*, 1 Dr. & War. 349.

1. *Vize v. Stoney*, 1 Dr. & War. 337.

2. **Gift of Intermediate Interest.** — *Vize v. Stoney*, 2 Dr. & Wal. 659; *Booth v. Booth*, 4 Ves. Jr. 399; *In re Wrey*, 30 Ch. D. 507.

3. *Booth v. Booth*, 4 Ves. Jr. 399.

4. **Legacy to Persons Living at Specified Time.** — *Dohn v. Dohn*, 110 Ky. 884; *Lee v. Welch*, 163 Mass. 312; *Hitchcock v. Peaslee*, 89 Hun (N. Y.) 506; *Reichard's Appeal*, 116 Pa. St. 232; *In re Rudy*, 185 Pa. St. 359; *Allen's Estate*, 192 Pa. St. 170; *Raleigh's Estate*, 206 Pa. St. 451.

**Illustrations.** — A devise of real estate to two daughters during their joint natural lives, and providing that "upon the death of either of my said daughters, the portion of my real estate, so devised to her for life, shall go to the children of such deceased daughter, and the same shall be used for their benefit until the death of the survivor of my two daughters, when all the real estate, so devised, shall be sold and the proceeds divided equally among my grandchildren, share and share alike, and if any of my grandchildren shall die, leaving issue them surviving, such issue shall take the portion their parents would have been entitled to had they been living," does not constitute

a present gift to the grandchildren but a contingent future gift of money arising from the sale to be made after the death of the testator's daughters. The gift is only to the grandchildren or their issue who shall survive the daughters, and excludes those who neither survive nor leave issue surviving them. *In re Gardner*, 106 Fed. Rep. 670.

Under a will creating a trust in a certain sum for a daughter of the testator for life, and further directing that if she left four or more children surviving her, the corpus, upon her death, should be equally divided among them, but that if less than four children should survive her, then each surviving child should receive a certain sum, and the residue and the securities in which it was invested should be equally divided among all the grandchildren of the testator then living, the fund was held not to vest absolutely until the death of the daughter, which event fixed the period of distribution and the right of the grandchildren to take. *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566.

"The case of *Townshend v. Frommer*, 125 N. Y. 446, chiefly relied on by the counsel for the children of Catharine Elizabeth, is not in point. That was the case of a trust deed made for the benefit of the grantor during life, and upon the further trust at her death to convey the lands to the grantor's children living at her decease, and the surviving children of such of them as may then be dead. The court held that no present estate passed to the children. It said (page 460): 'It is the uncertainty here as to the precise persons in whom would exist the right to enforce the execution of the power in trust, if, upon Mrs. Curtis's death, any estate remained to be conveyed, that introduces the element of contingency.'" *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345.

Where a grant was to A for life, and at her death to vest in fee simple in her children then living, and the representatives of such as might be dead, the words "then living" were held to fix the time of vesting at the date of the death of the life tenant. "And so where the devise is to one for life, and at the death of the life tenant to her children sur-

contingent where it is to such of the testator's children "as might then be living;"<sup>1</sup> or to A for life and after her death "to all her children then

viving her, or to her children, 'the survivors or survivor.'" *Middleton v. Middleton*, (Ky. 1897) 43 S. W. Rep. 677, citing *White v. White*, 86 Ky. 602; *Ormsby v. Dumesnil*, 91 Ky. 601.

A will giving all of testatrix's property, both real and personal, to two specified great-grandchildren, share and share alike, and providing that in case of the death of either without "heir or heirs" the share of the deceased great-grandchild shall go to the survivor, does not refer to a death in the lifetime of the testatrix so that the beneficiaries if they survive her take an absolute estate which upon their deaths will pass to their heirs at law and next of kin, but the property vests contingently in them on the death of the testatrix, subject to the death of one or the other, in which event the share of the deceased beneficiary, if she die without heir or heirs of her body, is divested and vests absolutely in the survivor. *Matter of Cramer*, 170 N. Y. 271.

Where the testator leaves the residue of his estate, after making certain legacies, to his wife, during the term of her natural life, and after her decease, to his sister and brother, "who shall then be living, jointly, share and share alike," the brother and sister take remainders contingent upon their surviving at the time of the death of the life tenant. *Matter of Walker*, (Surrogate Ct.) 39 Misc. (N. Y.) 680.

**Gift to Survivor.**—Where a testator gave all his estate to his wife for life, and directed that all remaining after her death should be divided, by his executors, equally amongst his children, or the survivors of them, and after his decease one of the children died before the death of the testator's widow, leaving a child, it was held that no interest vested in the deceased child under the will, and that the grandchild of the testator was not entitled to share in the estate as one of the "children" or "survivors" to whom it was to be distributed. *Sinton v. Boyd*, 19 Ohio St. 30.

After making specific bequests the testator devised to his executors the residue of his estate in trust, with direction that during the lives of two of his children and the survivor of them, one-third of the income should be applied to the use of his wife, during the term of her natural life, and the residue thereof, after the decease of his wife, to the use of all of his children, naming them, and that in case either of the children should die before the death of the survivor of the two children first mentioned, leaving lawful issue, then the share of the one so dying to be paid over to the issue, but if the one so dying should leave no lawful issue surviving, then such share to be paid to the survivors, and upon the death of the survivor of the two children first mentioned, then the executors should divide the estate and pay one-third thereof to the testator's wife, if she should then be living, and one-third of the residue thereof (and of the whole, if the wife should have died) to each one of the children who should then be living,

and to the issue of such of them who should have died leaving lawful issue surviving, such issue to take the share of the parent. It was held that upon the death of one of the children for whose lives the trust was created, before the death of the testator's widow, the issue of such child dying before the distribution did not take a vested interest, but, under the terms of the will, the right of the issue was dependent upon survivorship at the end of the trust period, there being no word of present gift to such issue. *Rudd v. Cornell*, 58 N. Y. App. Div. 207.

A direction in a will creating a trust estate, the income from the estate to be divided among three, and upon the death of one the income to go to those surviving, and upon the death of two the trust to cease and the whole of the estate to go to the survivor, for his sole use, creates a contingent remainder. *Thall v. Dreyfus*, 84 N. Y. App. Div. 569.

**Survivorship in Gift to Class.**—"Where final division and distribution are directed to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the time when the distribution or division is directed to be made." The title vests, and is contingent, upon survivorship. 'Futurity is annexed to the substance of the gift.' This principle has been enunciated in a line of authorities in this state, the latest of which are *Matter of Baer*, 147 N. Y. 354, and *Matter of Allen*, 151 N. Y. 243." *Sanson v. Bushnell*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 268.

Where the testator gave to his wife a life estate and provided that at her death the residue should be apportioned equally among his children, naming them, if they should be living, the portion of any child who had died before the death of the wife to descend to his or her children, it was held that the testator's children took a contingent remainder and that the share of a child dying before the termination of the life tenancy without leaving issue was defeated. *Robinson v. Palmer*, 90 Me. 246.

Where under the will the income of the testator's estate is to be equally divided among his children during life and on their death the *corpus* of the property is to go to their issue surviving them, the interest of such issue is contingent and does not vest until the death of the surviving child of the testator. *Bell's Estate*, 5 Pa. Dist. 312.

1. *McBride v. Smyth*, 54 Pa. St. 245. See also *Paget v. Melcher*, 156 N. Y. 399.

**Gift to Living Issue.**—A gift to a daughter of the testator for life and at her death to her living issue, *per stirpes*, and if she die without issue living at her death, to the heirs at law of the testator, does not give to the children of the daughter an interest which vests at the death of the testator, but the vesting is dependent upon their surviving the daughter. *Cole v. Edwards*, (Tenn. Ch. 1900) 62 S. W. Rep. 641.

Where the will leaves the estate to the



living."<sup>1</sup> Also a devise of a remainder to the daughters surviving at the death of the life tenant is contingent, as the title of the daughters is conditional upon their survival of the parent, and the remainder is therefore to dubious and uncertain persons.<sup>2</sup>

**Gift After Life Interest.** — Where the only bequest is that contained in the direction to pay on the termination of the life estate, the payment being dependent upon the legatee surviving the life tenant, the legacy is contingent.<sup>3</sup> Also when the donees under a will are to take through the medium of a power in trust, there being no words either of direct or immediate gift, but only a direction that the trustees shall convey at a future time on a certain contingency, the case is controlled by the principle that where a future interest is devised not directly to a given person, but indirectly, through the exercise of a power conferred upon trustees, the devise is contingent, and survivorship at the time of distribution is essential.<sup>4</sup> And when words of present gift are omitted, and provision is made that the control of the residue and remainder is to be in the executors and trustees and their successors, and the residue is unascertainable until the time for distribution arrives, it will be considered that it was the intention of the testator to postpone not only possession but also the acquisition of an absolute interest.<sup>5</sup>

**Express Provision for Death of Legatee Before Distribution.** — Under a provision in a will that if any of the devisees die before payment is made to them, without leaving children or grandchildren, then such bequest shall wholly fail, the grandchildren take a contingent interest which is dependent upon their living until the distribution of the estate.<sup>6</sup>

(5) *When Payment of Legacy Postponed* — Postponement for Convenience of Estate.

testator's children for life, and "at their decease, should they leave issue, to descend in fee to such issue," the remainder to the grandchildren does not vest until the termination of the life estate. *Gardiner v. Savage*, 182 Mass. 521.

1. *Wilhelm v. Calder*, 102 Iowa 342; *Buzby's Appeal*, 61 Pa. St. 111; *Delbert's Appeal*, 83 Pa. St. 462. See also *Matter of Hogarty*, 62 N. Y. App. Div. 79. Compare *Crawford v. Ford*, 7 W. N. C. (Pa.) 532; *Laguerrenne's Estate*, 12 W. N. C. (Pa.) 110.

In *Ross v. Nettleton*, 24 R. I. 124, it was held that under a will giving a life estate to the testator's granddaughter, and after her death to her children and the legal representatives of any child who is dead and their heirs, and if the granddaughter shall die without any child or its legal representatives living at the time of her death, the estate to go to others, the interest of the children of the granddaughter does not vest until the death of the granddaughter.

2. *Thompson v. Adams*, 205 Ill. 552.

3. *Owen v. Eaton*, 56 Mo. App. 563.

So where there are no words importing a present and direct gift of the principal of a trust estate created by the use, but the direction is to divide upon the death of the testator's widow, the estate is contingent, and survival to the period fixed for distribution is necessary to enable the remaindermen to take. *Matter of Crane*, 164 N. Y. 71.

**The Omission from the Will of Words Bequeathing Property** to any of the descendants of the testator, except words directing distribution to them upon the remarriage or death of the widow, indicates that the testator did not in-

tend the title to the property and remainder to vest until the death or remarriage of the widow. *Thompson v. Adams*, 205 Ill. 552.

4. *Matter of Baer*, 147 N. Y. 348.

In *Adams's Estate*, 208 Pa. St. 500, the testator gave a portion of his estate to trustees in trust for a son G. for life and after his death "remainder to go and be equally divided among all the children of my said son G. then living, and the issue of any of them then dead, yet so however that the issue of any such deceased child shall take if but one solely, and if more than one then equally among them such part and share only as his or their deceased parent would have taken if living. But if my said son shall die leaving no child or children, nor issue of any such him surviving, then the part of share of my residuary estate that under the above devise would have gone to his descendants, shall go and be equally divided between my daughter M. and my son T." It was held that the period of vesting was fixed as of the death of G., the life tenant, and that no estate vested in a granddaughter of G. who died before the grandfather.

**Weight of Rule.** — "When the gift is found only in a direction to the trustees to pay over to the sons, on the death of their mother, time is of the essence of the gift. It is true that the rule has many exceptions and is seldom alone relied upon. It is, however, recognized by the courts as an aid in the determination of the meaning of wills, and in a proper case should be given reasonable weight." *Clark v. Cammann*, 160 N. Y. 315.

5. *Hale v. Hobson*, 167 Mass. 397.

6. *Brookhouse v. Pray*, (Minn. 1904) 100 N. W. Rep. 235.

— If, upon the whole will, the payment or distribution appears to be postponed on account of the position of the property or for the convenience of the estate, the vesting will not be deferred even though the only gift is to be found in the direction to pay at a future time.<sup>1</sup> Thus, if the direction be to distribute after payment of debts, vesting will not be deferred until that is done.<sup>2</sup>

**Postponement to Let in Other Interest.** — And under a gift to A for life, with a direction afterwards to pay and transfer to his children or the children of someone else, the interests of the children vest on the testator's death.<sup>3</sup>

**1. Postponement for Convenience of Estate —** *England.* — Dawson v. Killet, 1 Bro. C. C. 124; Strother v. Dutton, 1 De G. & J. 675; Pinbury v. Elkin, 1 P. Wms. 563; Leeming v. Sherratt, 2 Hare 14; Goulbourn v. Brooks, 2 Y. & C. Exch. 539; Matter of Bennett, 3 Kay & J. 280; Packham v. Gregory, 4 Hare 396; Halifax v. Wilson, 16 Ves. Jr. 171.

*Canada.* — Hamel v. Proteau, 15 Quebec Super. Ct. 619; Kirby v. Bangs, 27 Ont. App. 17.

*United States.* — Cropley v. Cooper, 19 Wall. (U. S.) 167; McArthur v. Scott, 113 U. S. 378; Sherman v. American Cong. Assoc., (C. C. A.) 113 Fed. Rep. 609.

*Arkansas.* — Scott v. Logan, 23 Ark. 351; Watkins v. Quarles, 23 Ark. 179.

*Georgia.* — Everett v. Mount, 22 Ga. 323.

*Illinois.* — Scofield v. Olcott, 120 Ill. 363; Harvard College v. Balch, 171 Ill. 275.

*Kansas.* — McLaughlin v. Penney, 65 Kan. 523.

*Kentucky.* — Arnold v. Arnold, 11 B. Mon. (Ky.) 81; Wedekind v. Hallenberg, 88 Ky. 114; Dohn v. Dohn, 110 Ky. 884.

*Maryland.* — Tayloe v. Mosher, 29 Md. 444.

*Massachusetts.* — Fuller v. Winthrop, 3 Allen (Mass.) 51; Bowker v. Bowker, 9 Cush. (Mass.) 519.

*Missouri.* — Bredell v. Collier, 40 Mo. 325.

*New Jersey.* — Cook v. McDowell, 52 N. J. Eq. 351.

*New York.* — Birdsall v. Hewlett, 1 Paige (N. Y.) 32; Harris v. Fly, 7 Paige (N. Y.) 421; Marsh v. Wheeler, 2 Edw. (N. Y.) 163; Loder v. Hatfield, 71 N. Y. 92; Bushnell v. Carpenter, 92 N. Y. 270; Matter of Young, 145 N. Y. 535; Matter of Embree, 154 N. Y. 778; Matter of Crane, 164 N. Y. 71; Miller v. Von Schwarzenstein, 51 N. Y. App. Div. 18; Roosa v. Harrington, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 529; Matter of Hogarty, 62 N. Y. App. Div. 79; Kunhardt v. Bradish, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 103; Matter of Embree, 9 N. Y. App. Div. 602; Chanler v. New York El. R. Co., 34 N. Y. App. Div. 395.

*Ohio.* — Weymouth v. Irwin, 7 Ohio Dec. 91, 5 Ohio N. P. 248; Thompson v. O'Dell, 12 Ohio Cir. Dec. 396, 22 Ohio Cir. Ct. 200; Linton v. Laycock, 33 Ohio St. 128; Collier v. Grimesey, 36 Ohio St. 22.

*Pennsylvania.* — McClure's Appeal, 72 Pa. St. 414; Little's Appeal, 117 Pa. St. 27; Engle's Estate, 3 Pa. Dist. 805, affirmed in 167 Pa. St. 463.

*Wisconsin.* — Scott v. West, 63 Wis. 565; Baker v. McLeod, 79 Wis. 541.

See also 1 Jarm. on Wills (5th ed.) \*841;

Theobald on Wills (2d ed.) 412; Hawkins on Wills \*232.

**This Rule Does Not Apply** to a will where the postponement of the payment or distribution is upon any contingency. Matter of Embree, 9 N. Y. App. Div. 602.

**For Conversion of Estate.** — "In Robert v. Corning, 89 N. Y. 225, it was said: "The postponement of the distribution, which was contemplated, was for the convenience of the estate to enable the executors advantageously to convert the property, and the rents, income, and profits which might accrue between the time of the testator's death and the time of distribution were given to the several legatees to be paid semi-annually, in proportion to their interests in the corpus of the fund. These circumstances are regarded as rebutting the presumption against the vesting of legacies arising from the fact that there is no direct gift but only a direction to pay over at a future time. The postponement of the payment, where it is made for the convenience of the estate, is consistent with the vesting of the legacies, and the gift of the intermediate income indicates an intention to vest the corpus from which the income is to be derived." Chanler v. New York El. R. Co., 34 N. Y. App. Div. 395.

2. Theobald on Wills (2d ed.) 412; McClure's Appeal, 72 Pa. St. 415; Little's Appeal, 117 Pa. St. 27.

**3. Postponement to Let in Other Interest —** *England.* — Leeming v. Sherratt, 2 Hare 14; Selby v. Whittaker, 6 Ch. D. 246; Salmon v. Green, 11 Beav. 453; Halifax v. Wilson, 16 Ves. Jr. 171; M'Lachlan v. Taitt, 28 Beav. 407.

*California.* — Matter of Reith, 144 Cal. 314.

*Illinois.* — Hinrichsen v. Hinrichsen, 172 Ill. 462; Kratz v. Kratz, 189 Ill. 276.

*Indiana.* — Allen v. Mayfield, 20 Ind. 293.

*Kentucky.* — Middleton v. Middleton, (Ky. 1897) 43 S. W. Rep. 677; Evans v. Henderson, (Ky. 1902) 68 S. W. Rep. 640.

*Maryland.* — Hopper v. Smyser, 90 Md. 363.

*New Jersey.* — Miller v. Worrall, 59 N. J. Eq. 134; Howell v. Gifford, 64 N. J. Eq. 180.

*New York.* — Matter of Seebeck, 140 N. Y. 241; Matter of Young, 145 N. Y. 535; Karstens v. Karstens, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 247; In re Lange, (Surrogate Ct.) 55 N. Y. Supp. 750.

*Pennsylvania.* — King v. King, 1 W. & S. (Pa.) 205; McClure's Appeal, 72 Pa. St. 415.

*Virginia.* — Stanley v. Stanley, 92 Va. 534; McComb v. McComb, 96 Va. 779; Allison v. Allison, 101 Va. 537.

See also the cases cited in the two preceding notes.

(6) *Gift of Interest to A for Life, and at His Death the Principal to B.* — A gift of the interest of a fund to one for life, and at his death, of the principal to another, gives the latter a vested interest, transmissible to his representatives in case he dies before the life tenant. Under such a limitation the distinction between time annexed to the gift and time annexed to the payment is unimportant, as all the interests vest together. The same principle obviously applies to any number of life estates.<sup>1</sup>

**Rule Stated.** — "The general rule is subject to an exception so well established and universally recognized as to practically constitute another general rule, which is: Though a gift arises wholly out of directions to pay or distribute *in futuro*, yet if such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject-matter of the legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed but will vest at once, the right of enjoyment only being deferred." *Knight v. Pottgieser*, 176 Ill. 368.

"The reason for the rule is that where it is plain that the testator intended successive gifts to persons named by him, or ascertainable at the time of his death, the last gift is just as direct as the first. In determining whether the future gift to a class is postponed to let in the intermediate estate, or in order ultimately to bestow the *corpus* or remainder upon persons who shall then be living to enjoy it, and cannot be ascertained at the testator's death, the testator's intention is as decisive as it is in other questions of construction. If the postponement is simply for the benefit or convenience of the estate, that indicates that the gift itself is not intended to be postponed, but that it is not presently payable, and it will be more convenient to pay it after an intermediate or trust estate has expired. *Robert v. Corning*, 89 N. Y. 225. But if it is postponed for the benefit of a legatee as if he is an infant, and payment is to be made to him at his majority, then the gift is future and conditional. *Sweet v. Chase*, 2 N. Y. 75." *Dougherty v. Thompson*, 167 N. Y. 472.

**Rule Applied.** — The gift of the income to the testator's widow for life, with provision that at her death the estate is to be divided equally among his children, gives to the children a vested remainder. The fact that it is further provided that in case of the death of either child without legal heirs the estate shall be inherited by the other does not render the remainder contingent. *Hinrichsen v. Hinrichsen*, 172 Ill. 462.

"In *Matter of Embree*, 9 N. Y. App. Div. 602, *affirmed* 154 N. Y. 778, the testator gave all his property to his executors in trust, first to pay the net income to his wife, and upon her death to any children of the testator, if any, and, if he died without issue, to transfer all the property to the children of his brother. The testator died without issue, and it was held that upon his death his brother's children living at that time became vested with the estate, and that distribution was postponed merely to let in the life estate of the widow. Substantially the same rule is laid down in *Van Axt* *v.*

*Fisher*, 117 N. Y. 401; *Matter of Gardner*, 140 N. Y. 122; *Vanderpoel v. Loew*, 112 N. Y. 167; *Goebel v. Wolf*, 113 N. Y. 405; *Matter of Brown*, 154 N. Y. 313; *Canfield v. Fallon*, 43 N. Y. App. Div. 561, 26 Misc. (N. Y.) 345." *Miller v. Von Schwarzenstein*, 51 N. Y. App. Div. 18.

"While the gift is made solely by a direction to divide at a future date, the main purpose of the testator in establishing the trust seems to have been to provide an income for the support of his father as long as his father should live, and to postpone the distribution of the estate until his father should be dead and his grandson should have attained his majority. This postponement, chiefly for the benefit of the father of the testator, to enable the estate to meet the burden of the provision made in his behalf, did not operate to prevent the legacies over from vesting. *Coit v. Rolston*, 44 Hun (N. Y.) 548; *Matter of Young*, 78 Hun (N. Y.) 521, *affirmed* in 145 N. Y. 535. Nor did the intervention of the trust have such effect." *Murtha v. Wilcox*, 47 N. Y. App. Div. 526.

**1. Interest to One for Life, then Principal to Another** — *England*. — *Hickling v. Fair*, (1899) A. C. 15; *Carlton v. Thompson*, L. R. 1 H. L. Sc. 241; *Blamire v. Geldart*, 16 Ves. Jr. 314.

*Connecticut*. — *Angus v. Noble*, 73 Conn. 56. *Delaware*. — *In re Journey*, 7 Del. Ch. 1.

*Illinois*. — *McConnell v. Stewart*, 169 Ill. 374; *Clark v. Shaven*, 190 Ill. 47.

*Maine*. — *Leighton v. Leighton*, 58 Me. 63; *Woodman v. Woodman*, 89 Me. 128.

*Maryland*. — *Daughters v. Lynch*, 93 Md. 305. *Massachusetts*. — *Fay v. Sylvester*, 2 Gray (Mass.) 171; *Barton v. Bigelow*, 4 Gray (Mass.) 353; *Gibbens v. Gibbens*, 140 Mass. 102.

*New Hampshire*. — *Vandewalker v. Rollins*, 63 N. H. 460; *Thyng v. Lane*, 69 N. H. 403.

*New Jersey*. — *Thomas v. Anderson*, 21 N. J. Eq. 22; *In re Vreeland*, (N. J. 1904) 57 Atl. Rep. 903; *Chambers v. Sharp*, 61 N. J. Eq. 253.

*New York*. — *Barker v. Woods*, 1 Sandf. Ch. (N. Y.) 129; *Van Wyck v. Bloodgood*, 1 Bradf. (N. Y.) 154; *Stuart v. Spaulding*, 30 Hun (N. Y.) 21; *Matter of Merriman*, 91 Hun (N. Y.) 120; *Matter of Tompkins*, 154 N. Y. 634; *Matter of Tienken*, 60 Hun (N. Y.) 417, 27 Abb. N. Cas. (N. Y.) 151; *Matter of Embree*, 9 N. Y. App. Div. 602; *Matter of Heinze*, (Surrogate Ct.) 20 Misc. (N. Y.) 371; *Carr v. Smith*, 25 N. Y. App. Div. 214, *affirmed* 161 N. Y. 636, 57 N. E. Rep. 1106; *Hamlin v. Stevens*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 434; *Aldridge v. Aldridge*, 43 N. Y. App. Div. 411.

*North Carolina*. — *Jervis v. Lewellyn*, 130 N. Car. 616.

*Pennsylvania*. — *King v. King*, 1 W. & S. (Pa.) 205; *Tees's Estate*, 5 Pa. Dist. 361; *Pat-*



(7) *Effect of Gift Over upon Vesting*—(a) *In General*.—The better opinion is

terson *v.* Hawthorne, 12 S. & R. (Pa.) 112; Little's Appeal, 117 Pa. St. 27; Provenchere's Appeal, 67 Pa. St. 463; McClure's Appeal, 72 Pa. St. 415; Muhlenberg's Appeal, 103 Pa. St. 587; Snyder's Estate, 180 Pa. St. 70; Bruch's Estate, 185 Pa. St. 194; Carstensen's Estate, 196 Pa. St. 325.

*Rhode Island*.—Staples *v.* D'Wolf, 8 R. I. 118; Caswell *v.* Robinson, 21 R. I. 193; Ross *v.* Nettleton, 24 R. I. 124.

*South Carolina*.—Bunch *v.* Hurst, 3 Desaus. (S. Car.) 286; Shuler *v.* Bull, 15 S. Car. 421.

*Vermont*.—Burton *v.* Provost, 75 Vt. 199.

*Virginia*.—Neilson *v.* Brett, 99 Va. 673.

**Rule Stated.**—The ordinary rule is that when a bequest is to A, and in case of his death to B, if A survives the testator he takes absolutely, the period of death being limited to the lifetime of the testator. But a different rule of construction obtains where there is an intervening life estate, and the words are considered as extending to the event of the legatee dying in the interval between the testator's death and the period of vesting in possession. In such case he takes a vested remainder expectant on the life estate. *In re* Finlayson, 5 British Columbia 517.

"In the case of *Carlton v. Thompson*, L. R. 1 H. L. Sc. 241, in 1867, Lord Colonsay, who gave the judgment of the court, said: 'The general rule of law as to bequests is that the right of fee given vests *a morte testatoris*. That rule holds, although a right of life rent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of a life rentrix does not suspend the vesting; nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed, the creation of a trust is a very usual mode of securing the interest of a life renter, where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined.' *Hickling v. Fair*, (1899) A. C. 15.

"Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. Yet if the estate is limited over to another in the event of the death of the first remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately changed into a vested remainder." *Moore v. Lyons*, 25 Wend. (N. Y.) 143; *Blanchard v. Blanchard*, 1 Allen (Mass.) 227; *Parker v. Ross*, 69 N. H. 213.

In *Van Wyck v. Bloodgood*, 1 Bradf. (N. Y.)

167, where the authorities are reviewed, Bradford, Surrogate, said: "There is a large class of cases to which no exception exists, where, by the terms of the gift, the time is connected with some event to happen to the donee, such as marriage or puberty, so as to make a description of the person who is to take, and necessarily to imply that if the legatee does not sustain the character the legacy will fail. (*Dawson v. Killet*, 1 Bro. C. C. 119.) Death in such a case before the event occurs, in removing the legatee, prevents the happening of the event and the completion or fulfilment of the description. Such legacies are palpably conditional from the very nature of the case, because the life of the beneficiary is involved and included in the very contingency specified; so that the contingency does not transpire because the legatee dies. But where the time is not connected with an act to be done by or an event to happen to the legatee, but, on the contrary, with some independent occurrence, such as the death of another person, that being a thing which must happen, and the time, therefore, being in that sense certain, there would seem to be nothing in the mere specification of such a future time which in itself implies a condition."

**Remainder to Children.**—In *Gibbens v. Gibbens*, 140 Mass. 102, in which the will read, "at the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent," the court held that the children of the testator took vested interests, and that the provision that the issue of a deceased child should stand in the place of the parent did not affect the question as to whether the remainder was vested or contingent.

"Where a devise is to the mother for life, and then to her children, the right to the remainder vests in the children as they are born; and if any of them die before the determination of the life estate, their interest vests in their heirs." *Phillips v. Johnson*, 14 B. Mon. (Ky.) 140; *Middleton v. Middleton*, (Ky. 1897) 43 S. W. Rep. 677. See also *Bowling v. Dobyns*, 5 Dana (Ky.) 438.

Where the gift is to the testator's wife during her natural life and at her death the estate is to be equally divided between his children, naming them, and should any child die leaving a child such grandchild to have the parents' part of the estate, each of the testator's children takes a vested remainder, defeasible by their death without children before the time fixed in the will when the devise should take effect. *Lewis v. Shropshire*, (Ky. 1902) 68 S. W. Rep. 426; *Howell v. Gifford*, 64 N. J. Eq. 180.

**Gift in Trust.**—"Where an estate is devised in trust to provide an income for life beneficiaries and at their death to divide among remaindermen as to whom there is no uncertainty, the trust estate vests in the trustees not absolutely, but subject to the remainder over on the termination of the trust, and the remainder does not vest in the trustees at all." *Matter of Brown*, 154 N. Y. 313.

Where the will directs that the executors shall at the death of the testator's daughter

that a gift over in case of the legatee's death before the period of distribution,<sup>1</sup> or without issue, will not affect the vesting thereof;<sup>2</sup> but a gift over upon death under twenty-one and without issue creates a vested legacy.<sup>3</sup> The circumstance of a limitation over in case of the death of a legatee, whether single or one of a class, before the time appointed for the enjoyment, is held to be explanatory of the sense in which the testator intended the legatee's interest in the fund to depend on his surviving the period of distribution, namely, that at that period it should become absolute and indefeasible, and

close a trust setting apart the income of the residue of his estate for her benefit, by conveying and transferring the trust property to such of his grandchildren as should then be living, equally, share and share alike, and that if any of the grandchildren shall die before the death of the daughter leaving issue surviving, such issue to take the share to which their parent would have been entitled if living, the provision creates a vested remainder in the grandchildren, the interest of any grandchild being subject to be divested by his death before the death of the daughter, and to be taken by the surviving grandchildren unless such deceased grandchild left issue, in which event his interest will go to his issue. *Cochrane v. Kip*, 19 N. Y. App. Div. 72, affirmed 157 N. Y. 710.

A will creating a trust estate from the residuary estate of the testator, with direction to pay the income to his wife during her life, and on the wife's death the estate to go to her daughter, and providing that in case of the daughter's death without leaving surviving issue the estate is to go to the testator's nieces, vests an estate in the daughter on the death of the testator, subject, however, to be divested in case of her death before her mother's without leaving issue surviving her. *Pfister v. Writer*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 701.

**1. Death Before Period of Distribution.**—*Theobald on Wills* (4th ed.) 467; *Shrimpton v. Shrimpton*, 31 Beav. 425; *In re Baxter*, 10 Jur. N. S. 845, 4 N. R. 131; *Malcolm v. O'Callaghan*, 2 Madd. 347; *In re Payne*, 25 Beav. 556. Compare *Ridgway v. Ridgway*, 4 De G. & Sm. 271; *Bland v. Williams*, 3 Myl. & K. 411.

**Clause of Accruer.**—A clause of accruer following a gift to a class at twenty-one, giving the interest of those dying under twenty-one to the other members of the class, is a strong indication of the testator's intent that the gift should be vested. *In re Edmondson*, L. R. 5 Eq. 389.

**2. Death Without Issue.**—*Barker v. Lea*, T. & R. 413. See *Matter of Rhoades*, 39 N. Y. App. Div. 12.

**3. Death under Twenty-one Without Issue—England.**—*Murkin v. Phillipson*, 3 Myl. & K. 257; *Bland v. Williams*, 3 Myl. & K. 411; *In re Thomson*, L. R. 11 Eq. 146; *Harrison v. Grimwood*, 12 Beav. 192.

*Maryland.*—*In re Bank*, 87 Md. 425.

*Massachusetts.*—*Shaw v. Eckley*, 169 Mass. 110.

*New York.*—*Matter of Murphy*, 144 N. Y. 557; *Galway v. Bryce*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 255; *Shangle v. Hallock*, 6

N. Y. App. Div. 55; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Kessler v. Friede*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 187.

*Pennsylvania.*—*Carstensen's Estate*, 196 Pa. St. 325.

*Tennessee.*—*Redmond v. Coles*, (Tenn. Ch. 1899) 52 S. W. Rep. 660.

**Rule Stated.**—"Lastly, and the controlling consideration with us, is the gift over in case of any child dying without issue before the youngest child shall have arrived at twenty-one years. The general doctrine is that 'where a devise standing alone would be contingent, yet, if it be followed by a limitation over in case he died under age, \* \* \* the interest in question is construed to vest instant.' 1 Jarm. Wills 810. The same rule applies to bequests of personalty. 1 Jarm. Wills 857." *Shangle v. Hallock*, 6 N. Y. App. Div. 55.

**Rule Applied.**—Where the will provides that in case of the death or marriage of the testator's widow before his child shall arrive at the age of twenty-one the whole of the property shall go to the child, and that the estate shall go elsewhere in case of the death of the child before the age of twenty-one, the estate vests in the child, subject, however, to be divested in case of its death before arriving at the age of twenty-one. *Herriot v. Prime*, 155 N. Y. 5.

A gift of legacies to certain grandchildren, the legacies to be paid to them as they respectively arrive at the age of majority, with provision that should one or more of them die before arriving at the age of majority, the share to which such child would have been entitled if living to go to the residue of the estate, gives to the grandchildren vested legacies defeasible as to each one upon his death before attaining the age specified. *Von der Horst v. Von der Horst*, 88 Md. 127.

**Death Without Issue or Under Twenty-one.**—In *Calvin v. Springer*, 28 Ind. App. 443, the testatrix gave certain property to her daughter, and directed that in case the daughter died without issue or before arriving at twenty-one years of age the estate should be equally divided between testatrix's mother and two sisters. The daughter died without issue at sixteen years of age, and one of the sisters died after testatrix, but before the death of the daughter. It was held that the interest of the daughter was not absolute, but a conditional or determinable bequest, subject to be divested by the death of devisee, and that the sister, being alive at the death of testatrix, took under said will a contingent bequest or executory devise, which was a vested interest, transmissible from her to her legal heirs.

always in such case it vests immediately.<sup>1</sup>

(b) **Where Gift Is Absolute.** — It is a well-settled rule that where there is a legacy to a person absolutely, and in case of his death without issue to another, the contingency referred to is his death in the lifetime of the testator.<sup>2</sup> This rule does not, however, apply when a point of time other than the death of the testator is mentioned to which the contingency can be referred, or where another provision of the will is such as to give a fair and reasonable ground for a different construction. In such a case effect will be given to the language according to its natural import, as referring to the death happening either before or after the death of the testator.<sup>3</sup> The rule does not apply where the first legatee takes a life estate, but is only applicable when the prior gift is absolute and unrestricted.<sup>4</sup> So a provision of the will for the payment of a specified sum to a legatee after the death of the testator's wife vests the title to the legacy in the legatee at the testator's death, and it is not divested by the death of the legatee before the death of the wife.<sup>5</sup> A gift of a legacy to each of the children of a deceased son who may live to reach the age of twenty-one years is contingent as being given upon the condition that each legatee must arrive at the specified age to entitle him to take.<sup>6</sup> Under a will creating a trust estate with direction to pay over one-half of the income therefrom to the testator's sister, and upon such sister's death to pay over, distribute, and divide one-half of the estate among such sister's children, share and share alike, the estate of the children is contingent and can only vest in those who constitute the class at the date when the distribution is to be made.<sup>7</sup>

(c) **Conditional Limitations.** — Where under the terms of the will there is a present gift of a legacy, with a limitation over in case of the death of the legatee, the fact that it is subject to be divested by the death of the legatee before the termination of the life estate does not render the legacy contingent. In such a case the legatee takes a vested remainder subject to be divested upon a condition subsequent.<sup>8</sup> So where a testator, after giving to his wife all of the income of his real and personal property during her natural life, gives to certain of his children, naming them, all the property which may be left at the death of his wife, to be divided equally among them, and provides that

1. *McCall's Appeal*, 86 Pa. St. 363; *Carstensen's Estate*, 196 Pa. St. 325.

2. **Death in Lifetime of Testator.** — *Engel v. State*, 65 Md. 544; *Stokes v. Weston*, 142 N. Y. 433; *Miller v. Gilbert*, 144 N. Y. 68; *Matter of Ryder*, (Surrogate Ct.) 43 Misc. (N. Y.) 476; *Pfister v. Writer*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 701.

3. **When Rule Inapplicable.** — *Engel v. State*, 65 Md. 544; *Wager v. Wager*, 96 N. Y. 164; *Vanderzee v. Slingerland*, 103 N. Y. 47; *Mead v. Mayben*, 131 N. Y. 255; *Matter of Denton*, 137 N. Y. 433; *Matter of Baer*, 147 N. Y. 348; *Matter of Ryder*, (Surrogate Ct.) 43 Misc. (N. Y.) 476; *Flanagan v. Staples*, 28 N. Y. App. Div. 319; *Pfister v. Writer*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 701.

4. *Matter of Gordon*, 82 N. Y. App. Div. 439.

**Residue After Death of Annuitants.** — A provision directing the payment of the residue to the youngest of the issue of a certain person whose descent is wholly in the male line from that person, after the death of all the annuitants for whom provision is also made in the will, is intended to vest the legacy in the person fulfilling the conditions of the will at the death of the last annuitant and not in that one who fulfils the conditions at the time

of the testator's death. *Cronan v. Adams*, 185 Mass. 436.

5. *Owens v. Owens*, 64 N. Y. App. Div. 212.

**"Then Be Alive."** — Where a testator gives his property to his widow during her life, and then to such of his children "as may then be alive," the provision has reference to the time of the testator's death and not to the death of the widow, and therefore a daughter surviving him takes a vested share though she dies before the widow. *Connelly v. O'Brien*, 166 N. Y. 406.

6. *Webb v. Webb*, 92 Md. 101.

7. *Matter of Hogarty*, 62 N. Y. App. Div. 79.

8. **Limitation Over on Death of Legatee.** — *Bromfield v. Crowder*, 1 B. & P. N. R. 313; *Doe v. Nowell*, 1 M. & S. 327; *Smither v. Willock*, 9 Ves. Jr. 233; *Doe v. Moore*, 14 East 601; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Ray v. Enslin*, 2 Mass. 554. See generally the title **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 374.

"Under a devise to A for life, remainder to his children if any he has, and, if he has none, to B, B takes a vested remainder, subject to be divested by the birth of a child to A. *Vandewalker v. Rollins*, 63 N. H. 460; *Cole v. American Baptist Home Mission Soc.*, 64 N. H. 457; *Parker v. Ross*, 69 N. H. 213." *Dana v. Sanborn*, 70 N. H. 152.



if any of the children die before the wife, then the property shall be divided equally among the survivors, each of the children named takes a vested remainder in the fee, subject to be divested upon a condition subsequent with a limitation over upon the happening of that condition.<sup>1</sup> Where by the terms of the will a vested legacy is given to the legatees with the provision that the issue of any legatee dying before the termination of the life estate shall succeed to the parent's portion, the death of a legatee before the termination of the life estate, leaving issue, divests his share in the legacy.<sup>2</sup>

(8) *Gift of Intermediate Interest* — (a) *In General*. — A gift of the whole *interim* interest upon the legacy, or upon the legatee's presumptive share, vests the principal.<sup>3</sup> It is immaterial that the interest may open and let in

1. *Blanchard v. Blanchard*, 1 Allen (Mass.) 223.

2. *Gift to Issue on Death of Legatee*. — *Parker Ross*, 69 N. H. 213; *People's Trust Co. v. Flynn*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 6; *Matter of Seaman*, 147 N. Y. 69; *Flanagan v. Staples*, 28 N. Y. App. Div. 319; *Ackerman v. Ackerman*, 63 N. Y. App. Div. 370; *Doppler v. Clouewetter*, 11 Ohio Cir. Dec. 374; *Carstensen's Estate*, 196 Pa. St. 325.

"Thus a remainder vests subject to be divested if such is its tenure; and the condition subsequently occurring upon which the divesting depends the remainder is thereby divested. The same rule must be applicable to future limitations of personal property, especially when the property is held in trust to await the result of conditions subsequent." *Dougherty v. Thompson*, 167 N. Y. 472.

In *Blanchard v. Blanchard*, 1 Allen (Mass.) 223, it was said: "*Smither v. Willock*, 9 Ves. Jr. 233, was the case of a bequest of personal estate to the testator's wife for life, and from and after her death to be divided between his brothers and sisters in equal shares; but, in the case of the death of any of them in the lifetime of the wife, the shares of him or her so dying to be divided between all and every his, her, or their children. Sir William Grant decided that the shares vested in the brothers and sisters, subject only to be divested in the event of death in the life of the testator's widow, leaving children."

*Death Without Lawful Issue*. — A vested remainder created in B by a devise to A during her natural life and after her death to B, and to his heirs and assigns if he shall survive the testator, but in case he shall die without lawful issue before the death of the testator then to A, her heirs and assigns forever, is defeasible only in the event of the death of B before the testator without issue. *Bunyan v. Pearson*, 8 N. Y. App. Div. 84.

*Failure of Issue*. — Where the residue of the testator's estate is given to a trustee with direction to convert the realty into money and as fast as practicable to divide a certain portion of it among the nieces and nephews of the testator who may be living at the time of his death, provision being made for the substitution of the descendants of those children who may be deceased at the time of the distribution of any part of the estate, the gift to the nieces and nephews vests at the testator's death, subject to be divested by the death of any child before distribution and the substitution of his

or her descendants if any are left. If there are no such descendants the property remains vested in the child, and upon his death forms part of his estate. *Bowditch v. Ayrault*, 138 N. Y. 222.

Where the will provides that a bequest of a certain amount shall be invested and the interest applied to the use of a niece for her natural life, and upon her death the principal be divided among her children share and share alike, the issue of any such child who may then be dead to take his deceased parent's share, and no issue of these children are in being at the death of the testator, the remainder is contingent and not vested, as the persons to whom or the event upon which the estate is limited to take effect remain uncertain until the termination of the life estate. *Clark v. Cammann*, 160 N. Y. 315.

3. *Gift of Intermediate Interest — England*. — *Vawdry v. Geddes*, 1 Russ. & M. 203; *Hardcastle v. Hardcastle*, 1 Hem. & M. 405; *In re Gossling*, (1903) 1 Ch. 448; *In re Turney*, (1899) 2 Ch. 739; *In re Wintle*, (1896) 2 Ch. 711; *Bell v. Cade*, 2 Johns. & H. 122; *Leake v. Robinson*, 2 Meriv. 363; *Saunders v. Vautier*, Cr. & Ph. 240; *Matter of Hart*, 3 De G. & J. 195; *Booth v. Booth*, 4 Ves. Jr. 399; *Watson v. Hayes*, 5 Myl. & C. 125; *Hanson v. Graham*, 6 Ves. Jr. 239; *Josselyn v. Josselyn*, 9 Sim. 64; *In re Parker*, 16 Ch. D. 44; *In re Bunn*, 16 Ch. D. 47; *Fox v. Fox*, L. R. 19 Eq. 286; *Bolding v. Strugnell*, 24 W. R. 339; *In re Jacob*, 29 Beav. 402; *In re Wrey*, 30 Ch. D. 507.

Canada. — *Butler v. Butler*, 29 Nova Scotia 145.

Alabama. — *Foster v. Holland*, 56 Ala. 474.

Connecticut. — *Newberry v. Hinman*, 49 Conn. 130.

Delaware. — *Reybold v. Reybold*, 7 Del. Ch. 29; *Frost v. McCaulley*, 7 Del. Ch. 162.

Kentucky. — *Field v. Burbridge*, (Ky. 1897) 42 S. W. Rep. 912.

Maryland. — *Plaenker v. Smith*, 95 Md. 389. Massachusetts. — *Fuller v. Winthrop*, 3 Allen (Mass.) 51; *Buswell v. Newcomb*, 183 Mass. 111. See also *Eldridge v. Eldridge*, 9 Cush. (Mass.) 516.

Missouri. — *Harris v. Cook*, 98 Mo. App. 38. New Jersey. — *Gifford v. Thorn*, 9 N. J. Eq. 702; *Dusenberry v. Johnson*, 59 N. J. Eq. 336.

New York. — *Burrill v. Sheil*, 2 Barb. (N. Y.) 457; *Chanler v. New York, El. R. Co.*, 34 App. Div. 305; *Matter of Ball*, (Surrogate Ct.) 11 Misc. (N. Y.) 433; *Ogden v. Ogden*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473; *Bronson*

after-born children, or that the present right to the future possession may be defeated by some future event.<sup>1</sup>

**Testator's Intention Controls.** — The fact that there is a gift of the interest does not, however, render the legacy vested where it appears from the will that the intention of the testator is that it shall be contingent.<sup>2</sup>

*v. Bronson*, (Supm. Ct. Spec. T.) 48 How. Pr. (N. Y.) 481; *Loder v. Hatfield*, 71 N. Y. 92; *Warner v. Durant*, 76 N. Y. 133; *Clark v. Cammann*, 160 N. Y. 315; *Matter of Lehman*, 2 N. Y. App. Div. 531; *Matter of Conger*, 81 N. Y. App. Div. 493; *Hendricks v. Hendricks*, 3 N. Y. App. Div. 604; *Zartman v. Ditmars*, 37 N. Y. App. Div. 173.

*North Carolina.* — *Green v. Green*, 86 N. Car. 549.

*Pennsylvania.* — *Smith's Estate*, 7 Pa. Dist. 236; *Peterson's Appeal*, 88 Pa. St. 397; *Pleasanton's Appeal*, 99 Pa. St. 362; *Reed's Appeal*, 118 Pa. St. 215; *Kelly's Estate*, 193 Pa. St. 45; *Safe Deposit, etc., Co. v. Wood*, 201 Pa. St. 420; *Lewis's Estate*, 203 Pa. St. 219.

*Wisconsin.* — *Scott v. West*, 63 Wis. 529.

In *Theobald on Wills* (4th ed.) 464, it is said: "It makes no difference whether the interest is first given up to a given time and then the principal, or *vice versa*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier. *Wadley v. North*, 3 Ves. Jr. 364; *Westwood v. Southey*, 2 Sim. N. S. 192; *Bird v. Maybury*, 33 Beav. 351; *Pearman v. Pearman*, 33 Beav. 394; *Pearson v. Dolman*, L. R. 3 Eq. 315. It seems doubtful whether *Spencer v. Wilson*, L. R. 16 Eq. 501, is in harmony with the general current of authority, or even with the views expressed in *In re Peek*, L. R. 16 Eq. 225. On the other hand, if the interest is given up to a very advanced age, and the principal not till then, it is more doubtful whether the bequest would be vested. *Batsford v. Kebbell*, 3 Ves. Jr. 363. See *In re Bunn*, 16 Ch. D. 47."

**Illustrations.** — Where a will provides for a legacy from which the legatee is to receive the income semi-annually for ten years and after that to receive the principal absolutely, the gift is vested. It seems, however, that had the gift been of the principal, to be paid at the expiration of ten years, without the gift of the income during that time, the legacy would have been contingent. *Frost v. McCaulley*, 7 Del. Ch. 162.

A gift of half of the income to the testator's son until he attains the age of thirty-five and then the principal, or should his mother die before his attaining the age of thirty-five the whole of the income until that period and then the whole of the estate to him, gives to the son a vested legacy. *Smith's Estate*, 7 Pa. Dist. 236, *affirmed* 181 Pa. St. 109, 189 Pa. St. 587.

**The Identity of Shares Given** at the termination of the trust term with those from which the income is to issue during the trust term is a strong corroborative circumstance of the intention of the testator that the interest shall vest immediately. *Ogden v. Ogden*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473.

**Severance and Gift of Interest.** — "Where the gift is to be severed instantan from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, this is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed." *Matter of Conger*, 81 N. Y. App. Div. 493; *Warner v. Durant*, 76 N. Y. 133. See also *infra*, this subsection, (9) *Effect of Severance*.

"Where the gift is only found in a direction to pay at a future time, time will be deemed to be of the essence of the gift; but if the amount of the gift is to be severed instantan from the general estate for the benefit of the legatee, and the interest thereon paid him until the period of distribution, a mere direction to pay at such a period will constitute a present gift." *Clark v. Cammann*, 160 N. Y. 315.

**Gift Operates as Description of Time.** — "Another principle laid down by Lord Mansfield is, that where an absolute property is given, and a particular interest given in the meantime, as until the devisee shall come of age, etc., and when he shall come of age, etc., then to him, etc., the rule is that it shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession." *Booth v. Booth*, 4 Ves. Jr. 399.

"A Gift of Income Indefinitely, with no disposition over of principal, is an absolute gift of the entire estate. This, of course, is subject to the qualification that nothing in the context of the will shall disclose a contrary purpose." *Kelly's Estate*, 193 Pa. St. 45.

**Effect of Gift Over.** — A gift of a sum of money to be paid the legatee when she arrives at the age of twenty-one years, with interest, to be computed from the day of the testator's death, vests upon the death of the testator, the provision as to the time of payment being merely to postpone the period of enjoyment in possession; and the fact that the will provides for a gift over in case of the death of the legatee during minority does not suspend the vesting *ab initio*. *Matter of Lehman*, 2 N. Y. App. Div. 531.

1. *Safe Deposit, etc., Co. v. Wood*, 201 Pa. St. 420.

2. **Intention Controls.** — "In *Dougherty v. Thompson*, 54 N. Y. App. Div. 456, it was held that a present bequest of income, coupled with a severable interest therein upon the legatees arriving at the age of twenty-one years, did not vest in the person so taking either a vested right in income during the trust period or any vested interest in the corpus of the estate." *Rudd v. Cornell*, 58 N. Y. App. Div. 207.

Where a will creates a trust of the testator's property for the benefit of his children and grandchildren, naming them, and provides that after the decease of one of the children her share of the interest and income shall become

**Interest Subject to Annuities.** — This rule applies although the interest is given subject to charges or annuities,<sup>1</sup> or expressly given for maintenance.<sup>2</sup>

(b) **Gift by Way of Maintenance.** — Where there is a gift of the interest the fact that there is a direction that it shall be applied for maintenance does not take the legacy out of the general rule applicable to gifts of interest, nor is it material that the direction is that part of the income shall be applied for maintenance.<sup>3</sup> When the gift of interest or maintenance is distinct and the direction is to transfer or pay the principal sum at a specified age, or upon the condition named, the vesting of the legacy remains unaffected thereby. So a bequest of dividends, or an annuity for the life of the legatee, has been held to be an exception to the general rule.<sup>4</sup> This is true also where the sum

a part of the trust, and after the decease of the other the interest and income are to be paid to the grandchildren, each grandchild to receive a specified proportion of the principal on attaining the age of twenty-five years, or if a grandchild dies before the distribution, his lawful children to take his share, the interest of the grandchildren is contingent. *In re Ehle*, 109 Fed. Rep. 625.

In *Lewis's Estate*, 203 Pa. St. 219, the testatrix gave a portion of her estate to her executor "to put and place the same out at interest in manner aforesaid, and pay and apply such interest share and share alike among my grandchildren (naming them), children of my deceased daughter, E., or the survivor or survivors of them, for their support and maintenance until each one attains the age of twenty-one years, and to pay over unto my said grandchildren (naming them), children of my deceased child, E., or the survivor or survivors of them, share and share alike, when and as each shall severally arrive at the age of twenty-one years, his or her share of the principal aforesaid together with any accumulation of interest thereon." It was held that if a grandchild died in his or her minority, his or her share should go to the surviving brothers and sisters. See also *supra*, this section, 16. b. (1) *Controlling Principles — Intention of Testator Controlling*.

**1. Interest Subject to Charges or Annuities.** — *Jones v. Mackilwain*, 1 Russ. 220; *Lane v. Goudge*, 9 Ves. Jr. 225; *Potts v. Atherton*, 28 L. J. Ch. 486.

**2. Gift for Maintenance.** — *Matter of Hart*, 3 De G. & J. 195; *In re Bunn*, 16 Ch. D. 47. See also *infra*, this subsection, (8) (b) *Gift by Way of Maintenance*.

**3. Gift for Maintenance.** — *Reybold v. Reybold*, 7 Del. Ch. 29; *Young v. McKinnie*, 5 Fla. 542; *Field v. Burbridge*, (Ky. 1897) 42 S. W. Rep. 912; *Plaenker v. Smith*, 95 Md. 389; *Smith's Estate*, 7 Pa. Dist. 236; *Peterson's Appeal*, 88 Pa. St. 397; *Reed's Appeal*, 118 Pa. St. 215; *Safe Deposit, etc., Co. v. Wood*, 201 Pa. St. 420; *Butler v. Butler*, 29 Nova Scotia 145.

In *Young v. McKinnie*, 5 Fla. 542, it was held that when a testator directs the whole of his property to be kept together for the use and benefit of his wife and children, until the happening of certain events, making no other provision for their support and maintenance, such circumstances are indicative of an intention on the part of the testator to give the principal, and will have the effect to vest the legacy.

**Illustrations.** — Where a sum is vested in

trustees with the direction that the income shall be applied for the benefit of the testator's son until he shall have arrived at the age of twenty-eight, at which time the sum and its accumulation shall be paid over, and further provides that the son may make a will disposing of the fund when he arrives at the age of twenty-one, the son takes a vested interest in the legacy. *Butler v. Butler*, 29 Nova Scotia 145.

Where a portion of the testator's estate is to be held in trust until the youngest child comes of age, for the benefit of the testator's children, such portion of the income as is necessary being applied to the support and education of the children and the remainder being added to the principal, the children take a vested interest at the testator's death. *Plaenker v. Smith*, 95 Md. 389.

A gift in trust for the benefit of the testator's grandchildren, the income to be applied to their education, it being provided that in case all the grandchildren shall die under age and without issue the property shall go elsewhere, gives to such grandchildren a vested estate subject to be divested in favor of the survivors or survivor upon the death of any of them under age and unmarried, or in favor of the remaindermen in case of the death of all under age or without issue. *Reybold v. Reybold*, 7 Del. Ch. 29.

A gift of realty in trust with direction that the income be used for the education of the testator's nieces and nephews, and when the income is exhausted that the realty be sold and the proceeds devoted to the same purpose, the portion of a child dying to be proportionately divided among the remaining children, and the mother of the children, in case of her widowhood, to receive the rents from the property until the children reach the age of fifteen years, gives to the children a vested interest subject only to the proper use thereof by the trustee in their education, and anything remaining over must be paid to them upon their severally arriving at the age of twenty-one years. *Field v. Burbridge*, (Ky. 1897) 42 S. W. Rep. 912.

**"Maintenance" and "Interest" Distinct.** — In *Pulsford v. Hunter*, 3 Bro. C. C. 416, it was held that "maintenance" was not equivalent to "interest" for the purpose of vesting a legacy.

**4. Bequest of Dividends or Annuity.** — *Batsford v. Kebbell*, 3 Ves. Jr. 363; *King v. King*, 1 W. & S. (Pa.) 207; *Pleasanton's Appeal*, 99 Pa. St. 362. *Compare Spencer v. Wilson*, L. R. 16 Eq. 512; *Bolding v. Strugnell*, 24 W. R. 339; *Peterson's Appeal*, 88 Pa. St. 402.



given by way of maintenance is less than the interest on the legacy.<sup>1</sup>

**Gift Must Be of Interest as Such.**—An annual allowance for maintenance (although equal in amount to the interest) will not, unless given as interest upon the legacy, make the legacy a vested one. The gifts are perfectly distinct, and the title to the annual allowance actually given cannot be affected by the interest on the legacy not amounting to so large a sum.<sup>2</sup> But the fact that the gift is not of interest *co nomine* is not material where the direction is for the payment semi-annually of the exact sum to which the interest on the principal legacy would amount, and that this payment shall cease when the principal sum is paid, as such a gift is substantially to the same effect as if the interest had been specifically given as interest.<sup>3</sup>

The English Decisions do not seem to be entirely harmonious as to the effect of a provision in the will authorizing the trustees in their discretion to apply the whole or part of the interest to the maintenance of the legatees. The better opinion seems to be that the bequest under such circumstances is vested, though there are decisions which would seem to indicate the contrary view.<sup>4</sup> But a discretion either to apply the interest to maintenance or to accumulate it will not vest the legacies,<sup>5</sup> nor will the gift of a fixed sum for maintenance, though it may be equivalent to the interest of the legacy.<sup>6</sup> And the gift of a sum for maintenance out of the personal estate, not exceed-

1. *Colt v. Hubbard*, 33 Conn. 286.

In *In re Wintle*, (1896) 2 Ch. 711, it was said: "If all the income is given it will make that vest immediately which but for the direction as to income would not have vested till a later date, and a direction that the income shall be applied for maintenance would not make any difference, nor would a direction that part of the income shall be applied for maintenance make any difference, if that is part of income the whole of which is given. On the other hand, supposing legacies are given payable at a future date, and something is given out of income for maintenance, not necessarily exhausting the income, it seems to me that, in accordance with *Watson v. Hayes*, 5 Myl. & C. 125, the gift of maintenance out of income is not sufficient to make the legacies vest."

2. *Roberts v. Brinker*, 4 Dana (Ky.) 570; *Dohn v. Dohn*, 110 Ky. 884.

3. *Fuller v. Winthrop*, 3 Allen (Mass.) 51.

4. **English Rule.**—*In re Gossling*, (1903) 1 Ch. 448; *Eccles v. Birkett*, 4 De G. & Sm. 105; *Matter of Rouse*, 9 Hare 649; *Parrott v. Davies*, 38 L. T. N. S. 52.

**Decisions Reviewed.**—In *Watson v. Hayes*, 5 Myl. & C. 133, Lord Cottenham says: "It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which effects the vesting of the legacy. Such was the opinion of Sir W. Grant in *Hanson v. Graham*, 6 Ves. Jr. 239, and *Leake v. Robinson*, 2 Meriv. 363, and recognized by Sir J. Leach in *Vawdry v. Geddes*, 1 Russ. & M. 203. It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest;

and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy." See also *In re Wintle*, (1896) 2 Ch. 711; *Fox v. Fox*, L. R. 19 Eq. 286.

A gift contained in a direction to pay to legatees on attaining a certain age, with the further direction to apply from time to time the income of the presumptive share of each legatee, or so much thereof as the trustees for the time being shall think fit, for the maintenance and education of the legatee, grants to such legatee a vested interest. *In re Turney*, (1899) 2 Ch. 739, approving *Fox v. Fox*, L. R. 19 Eq. 286.

On the other hand it has been held that where the trust of a settlement is, after the death of the survivor of husband and wife, to apply the income of the settled fund or of so much thereof as the trustees shall think proper to the maintenance and education of their child or children during their minorities, and upon their attaining the age of twenty-one years to pay and divide the principal sum with the accumulation thereof equally among such child or children, the shares of the children do not vest until they attain the age of twenty-one. *In re Grimshaw*, 11 Ch. D. 406.

Also where the will gave a share of residuary personal estate to such of the four grandchildren of the testatrix, naming them, as should be living at the death of A, and directed that in case any of them should die in the life of A, leaving issue, the share of such of them dying should be transferred to the issue in equal shares and proportions, "on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the meantime to be applied in or towards their maintenance and education," it was held that the interests of such of the issue of a grandchild as died under twenty-one did not vest at the death of the grandchild. *In re Ashmore*, L. R. 9 Eq. 99.

5. *Vawdry v. Geddes*, 1 Russ. & M. 203

6. **Gift of Fixed Sum for Maintenance.**—*Boughton v. Boughton*, 1 H. L. Cas. 406; *Livesey v.*

ing the income of the legacies, will have no effect upon the vesting.<sup>1</sup> Nor, perhaps, will the legacy be deemed vested where the trustees are authorized in their discretion to apply the whole or a part of the interest, not exceeding a fixed sum, to maintenance,<sup>2</sup> or to exclude any one or more of the legatees in applying the income.<sup>3</sup>

**Time for Which Given.** A gift of the interest for maintenance during minority<sup>4</sup> is, perhaps, not sufficient without more to render the legacy vested, where the time fixed for the payment of the legacy is postponed beyond the minority of the legatee.<sup>4</sup> It is otherwise, however, where it appears to be the intention of the testator that the term of minority shall be considered as extending up to the time of payment.<sup>5</sup>

**Gift to Class.** — A gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is discretion conferred on the trustees to apply less than the whole income for that purpose.<sup>6</sup> But where the gift is of an aggregate fund to a class as they respectively attain the age of twenty-one, with a direction that the whole interest is to be applied for their maintenance in the meantime, the legacies will not vest before twenty-one, as the fund is to be kept together and the whole interest applied for maintenance.<sup>7</sup> It would seem that the rule as to immediate vesting does not apply where there is not an explicit appropriation of the income of each legatee's share to the maintenance of that particular legatee, but is indiscriminate in respect to all the shares.<sup>8</sup>

(9) *Effect of Severance.* — If the subject-matter of the bequest is to be at once separated from the rest of the estate and vested in trustees for the benefit of the legatee, to accumulate until the time of payment for the benefit of the legatee, the gift vests at once.<sup>9</sup>

Livesey, 3 Russ. 287; *Watson v. Hayes*, 5 Myl. & C. 125.

1. *Rudge v. Winnall*, 12 Beav. 357.

2. *Merry v. Hill*, L. R. 8 Eq. 619.

3. *In re Barnshaw*, 15 W. R. 378.

4. See *Pearson v. Dolman*, L. R. 3 Eq. 315; *In re Hunter*, L. R. 1 Eq. 295.

5. *Milroy v. Milroy*, 14 Sim. 48; *Maddison v. Chapman*, 3 De G. & J. 536; *Fraser v. Fraser*, 1 N. R. 430.

6. *Fox v. Fox*, L. R. 19 Eq. 286.

In *Harrison v. Grimwood*, 12 Beav. 192, the legacy was given to a class, followed by a direction, during the minority of the members of the class, to apply the interest, "or a competent portion thereof," for maintenance, and the court held that the legacy was vested.

7. *Barker v. Lea*, T. & R. 413; *In re Wintle*, (1896) 2 Ch. 711; *Pulsford v. Hunter*, 3 Bro. C. C. 416; *In re Ashmore*, L. R. 9 Eq. 99.

In *In re Parker*, 16 Ch. D. 44, the master of the rolls said: "It appears to me that this case is different from that of *Fox v. Fox*, L. R. 19 Eq. 286. In my opinion, when a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.' But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the

meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age."

In *In re Wintle*, (1896) 2 Ch. 711, it was said: "There is a later case of *Dewar v. Brooke*, 14 Ch. D. 529, also before Hall, V. C., in which it seems to me he did dissent from *Fox v. Fox*, L. R. 19 Eq. 286. In that case there was a trust of a fund for children of a testator, who should being sons attain twenty-five, or being daughters attain twenty-one or marry, to be divided on the youngest attaining twenty-one. The testator empowered his trustees to apply 'the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child.' There were two children, the elder a son under twenty-five, the younger a daughter who had attained twenty-one. It was held that the interest of the son was contingent on his attaining twenty-five."

8. *In re Gossling*, (1903) 1 Ch. 448.

9. *Effect of Severance of Bequest*—*England*. — *Saunders v. Vautier*, Cr. & Ph. 240; *Lister v. Bradley*, 1 Hare 10; *Oddie v. Brown*, 4 De G. & J. 179; *Love v. L'Estrange*, 5 Bro. P. C. (Toml. ed.) 59; *Greet v. Greet*, 5 Beav. 123; *Branstrom v. Wilkinson*, 7 Ves. Jr. 421; *Ingram v. Suckling*, 7 W. R. 386.

*Minnesota*. — *Fox v. Hicks*, 81 Minn. 197.

*New Jersey*. — *Fisher v. Johnson*, 38 N. J. Eq. 46.

*New York*. — *Smith v. Parsons*, 146 N. Y. 116. See also *Goebel v. Wolf*, 113 N. Y. 405.

In *Ogden v. Ogden*, (Supm. Ct. Spec. T.)

**Where Gifts of Interest and Principal Are Distinct.** — Vesting will not be presumed though the amount is set apart, where the income is the subject of one gift and the capital of another and there is no gift of capital except to those attaining a specific age.<sup>1</sup>

(10) *Gifts to Classes.* — A legacy given to a class will be held to vest at the death of the testator unless it clearly appears from the terms of the instrument by which it is given that the legacy is contingent;<sup>2</sup> but the vested estate will open to let in the members of the class who may be born during the continuance of the preceding estate.<sup>3</sup> The mere fact that it is uncertain which, if any, of the constituents of the class will survive to enjoy the legacy, is not alone sufficient to postpone its vesting.<sup>4</sup>

40 Misc. (N. Y.) 473, the court said: "Where a testator devises and bequeaths his residuary estate, for two lives, to trustees, orders them to deem the *corpus* divided into a certain number of shares, directs them to collect the income and distribute it annually among named beneficiaries of these shares, and, after the lapse of the two lives, devises and bequeaths the *corpus* among the beneficiaries in such manner that the parties, theretofore receiving the income only, shall receive and become vested with the estate and property out of which such income arose, in the same relative shares and proportions in which they were entitled to such income, and there is an absence in the will of any gifts over, words of survivorship, gifts to a class or to issue or to legal representatives, a beneficiary takes a vested interest in the principal of his share upon the death of the testator, which he may devise before the expiration of the trust term."

**Gift of Interest in Meantime.** — Thus where the will provides that the legacy shall be severed from the general estate and be held by trustees for a specified time for the benefit of the legatee, and then be paid over to him, he receiving the interest therefrom in the meantime, it will be held that it was the intent of the testator that the legatee shall take a vested legacy. *Warner v. Durant*, 76 N. Y. 133.

1. *Spencer v. Wilson*, L. R. 16 Eq. 501.

2. **Vesting of Gift to Class.** — See *supra*, this section, *Construction of Gifts to Classes*. See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, pp. 382, 394, and the following cases:

*Alabama.* — *Bethea v. Bethea*, 116 Ala. 265.

*Connecticut.* — *Security Co. v. Cone*, 64 Conn. 579.

*Kentucky.* — *Middleton v. Middleton*, (Ky. 1897) 43 S. W. Rep. 677.

*New Hampshire.* — *Parker v. Ross*, 69 N. H. 213.

*New Jersey.* — *Haggerty v. Hockenberry*, 52 N. J. Eq. 354.

*New York.* — *Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Seaman*, 147 N. Y. 69; *Matter of Brown*, 154 N. Y. 313; *Flanagan v. Staples*, 28 N. Y. App. Div. 319; *Miller v. Von Schwarzenstein*, 51 N. Y. App. Div. 18; *Matter of Watts*, 68 N. Y. App. Div. 357.

*Ohio.* — *Doppler v. Clouewetter*, 11 Ohio Cir. Dec. 374.

*Pennsylvania.* — *King v. King*, 1 W. & S. (Pa.) 205; *Chew's Appeal*, 37 Pa. St. 28; *Ross v. Drake*, 37 Pa. St. 376; *Carstensen's Estate*, 196 Pa. St. 325.

**Time of Vesting.** — A will provided that certain realty of the testator should be held in trust for a period not exceeding the term of ten years after his death, and authorized the trustees within that period, in their discretion, to sell the realty and pay over the proceeds to the testator's children, share and share alike. It was further provided that in the event of the death of any of the children before the sale, the share of such child should go to his children, and failing surviving issue the share was to be divided equally between the surviving children of the testator at the time of such sale. It was held that the sale referred to was the one authorized within the ten-year limit and that the interest of the children living at the time that limit expired vested and was not divested by death before the actual sale. *Baldwin v. Trowbridge*, 62 N. J. Eq. 468.

But where a testator gave his estate in trust with power to the trustees to control and manage in their discretion all of the estate and to sell and reinvest the proceeds thereof, the trust being for the benefit of his wife during her life; and directed that after the death of his wife the estate should be divided equally among his children, naming them, the survivors of them, and the heirs of any of them who may meanwhile have died, the children of any one of them taking the parent's portion, it was held that the interest of the testator's children did not vest until the time of distribution. *Small v. Small*, 90 Md. 550.

**Gift to Destitute Relatives.** — The provision in a will, after certain bequests, that the income of the residue, for the term of ten years, shall be applied for the relief of the most destitute of the testator's relatives, not to extend beyond a certain degree of kinship, and then the principal to be equally divided between them, gives to the individuals described as classes, the legacy vesting in the survivors of the classes immediately upon the testator's decease. *Snow v. Durgin*, 70 N. H. 121.

3. **Vested Estate Opens.** — *Security Co. v. Cone*, 64 Conn. 579; *Crawford v. Clark*, 110 Ga. 720; *Middleton v. Middleton*, (Ky. 1897) 43 S. W. Rep. 677; *Haggerty v. Hockenberry*, 52 N. J. Eq. 354; *Matter of Seaman*, 147 N. Y. 69.

4. *Carstensen's Estate*, 196 Pa. St. 325.

**Rule Stated.** — "Although the bequest may be dependent on a contingency, this will not necessarily prevent the vesting. The time at which the contingency happens in a bequest to a class does not determine the vesting in the individuals composing the class. If the



**Who Included.** — The benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made,<sup>1</sup> and in such cases the gift is, as to the respective members of the class, contingent upon survivorship, subject, if it vests at all before the date of distribution, to be divested by the death before that time of a person presumptively entitled to share in the distribution.<sup>2</sup>

**A Gift to Children Who Attain Twenty-one,** or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which, in a gift to a class upon a contingency, as, for instance, to children at twenty-one, might have the effect of vesting the bequest.<sup>3</sup> But where the gift is to the children which a son of the testator "now has or may hereafter have," in equal shares, the legacy to be held in trust and the respective share of each child to be paid as he arrives at the age of twenty-one years, the children living at the death of the testator take vested legacies.<sup>4</sup> Under a gift to a class when the youngest attains twenty-one, all who attain twenty-one take

contingency should apply to the individual and relate to his capacity to take, as, for example, a bequest left subject to the condition that the legatee should attain the age of twenty-one years, there can be no vesting till he or she shall reach that age; but where the contingency applies to a class, and not as a condition of the capacity of the legatee to take, the contingency is not to be imported into the constitution of the trust so as to suspend vesting till death of the life renter." *Hickling v. Fair*, (1899) A. C. 15.

"Where the validity of a will with respect to the suspension of the power of alienation depends upon the vesting of interests, or where the nature and extent of the interests depend upon the determination of the class which is to take, the will may be held to be conformable to the statutes, and the rights of the class adjusted, even although the vesting is subject to be subsequently defeated." *Thall v. Dreyfus*, 84 N. Y. App. Div. 569.

**1. Who Included.**—*Teed v. Morton*, 60 N. Y. 506; *Goebel v. Wolf*, 113 N. Y. 405; *Matter of Smith*, 131 N. Y. 239; *Bisson v. West Shore R. Co.*, 143 N. Y. 125; *Clark v. Cammann*, 14 N. Y. App. Div. 127. See *supra*, this section, *Construction of Gifts to Classes*.

**2.** *Matter of Baer*, 147 N. Y. 348; *Rudd v. Cornell*, 171 N. Y. 115; *Clark v. Cammann*, 14 N. Y. App. Div. 127.

**3. Gift to Children Attaining Twenty-one.**—*Bull v. Pritchard*, 1 Russ. 213; *Bree v. Perfect*, 1 Coll. Ch. Cas. 128; *Leake v. Robinson*, 2 Meriv. 363; *Stead v. Platt*, 18 Beav. 50; *Williams v. Haythorne*, L. R. 6 Ch. 782; *Dewar v. Brooke*, 14 Ch. D. 529; *Thomas v. Wilberforce*, 31 Beav. 299; *Lloyd v. Lloyd*, 3 Kay & J. 20. See *Taylor v. Meador*, 66 Ga. 230; *McCartney v. Osburn*, 118 Ill. 403; *Shattuck v. Stedman*, 2 Pick. (Mass.) 468.

This distinction is analogous to that existing in the case of devises of real estate. See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, pp. 382, 394.

In *Matter of Murphy*, 144 N. Y. 557, a will provided that the residue of the estate after the payment of certain bequests should be divided equally between the testator's wife and children, the principal of each child not to be

paid until they should respectively arrive at the age of thirty and the interest thereon to be accumulated on each share until the child should reach the age of twenty-one. It was held that this provision was intended solely for the benefit of the children and that the postponement of payment was for their benefit and not that of the estate, and that therefore, upon the death of a grandchild who took the share of one of the children under her will, the share belonging to her immediately passed to her next of kin or her legatees under her will.

**Effect of Words "or Their Heirs."**—Where the testator devises property to his executors in trust to hold until the son attains the age of twenty-one years, then the property to be sold, and the proceeds to be divided among the surviving children or their heirs, share and share alike, the estate vests immediately upon the testator's death and the mere direction for the payment of the legacies at a future time does not prevent its vesting. While, as a general rule, bequests to a class mean the persons in existence at the time of the testator's death, the addition of the words "or their heirs" indicates that the testator contemplated the contingency of some of the children dying between his death and the period of distribution, and a provision that in such event their heirs should take is evidence of his intention that the estate should vest upon his death. *Matter of Radford*, (Surrogate Ct.) 37 Misc. (N. Y.) 241.

**4.** *Haggerty v. Hockenberry*, 52 N. J. Eq. 354.

Under a will which provides that the widow shall have a life estate and that after her death the property shall be equally divided and held in trust for the two daughters of the testator during their lives, and that upon the death of a daughter, the share held in trust for her is to be divided equally among her heirs as they shall attain the age of twenty-one years each, if any shall be minors at the time of her death, the children of the daughters take vested interests upon the testator's death, and the death of such a child before the distribution does not divest her interest. *Canfield v. Fallon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345.

vested interests.<sup>1</sup> And if there is a clear gift to the class, a direction that the fund is to be divided when the youngest child attains twenty-one will not postpone vesting.<sup>2</sup> If the income is given to the class till the youngest attains twenty-one, and then the principal, they all take vested interests.<sup>3</sup> It is said to be a rule of construction that any provision in regard to a particular member of a class affecting or defining the time of vesting, or tending to determine whether the estate was intended to be vested or contingent, should be applied to all the members of the class, although the rule is not of universal application.<sup>4</sup>

(11) *Residuary Bequests.* — The fact that the gift is residuary strengthens the presumption in favor of vesting, since intestacy may be the consequence of holding it contingent.<sup>5</sup>

*c. LEGACIES CHARGED UPON BOTH REAL AND PERSONAL ESTATE.* — It would seem that where the legacy is charged upon both real and personal estate, the personal estate is the primary fund for payment, and so far as it extends, the vesting is governed by the rules applicable to personal estate. But the real estate, though only an auxiliary fund to the personal, is not subject to the rules applicable to the vesting of personalty, but is controlled by the same rules which determine the vesting of realty.<sup>6</sup>

*d. LEGACIES CHARGED ON LAND.* — The vesting of legacies charged on

**1. When Youngest Attains Twenty-one.** — *Leeming v. Sherratt*, 2 Hare 14; *Parker v. Sowerby*, 1 Drew. 488, 4 De G. M. & G. 321. See *In re Smith*, 20 Beav. 197; *Sansbury v. Read*, 12 Ves. Jr. 75; *Ford v. Rawlins*, 1 Sim. & St. 329; *In re Hunter*, L. R. 1 Eq. 295. But compare *McCartney v. Osburn*, 118 Ill. 405; *Kingman v. Harmon*, 131 Ill. 176.

Where the testator sets apart one-half of his residuary estate to be held in trust for the joint lives of the son and his son's wife, and upon the death of the survivor of these two the trust is to continue until the youngest of their children who may survive them shall have attained the age of thirty years, when each of said surviving children is to receive an equal portion of the principal of the trust fund, the estate so created vests upon the testator's death in the children of the son then living, subject to the life interests of their parents, and subject to be defeated as to any such child by death without issue, during the running of the life estate. *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

**Gift to Individuals.** — If the gift were to individuals and not to a class, they would take vested interests. *Cooper v. Cooper*, 29 Beav. 229. See *McCartney v. Osburn*, 118 Ill. 404; *Goebel v. Wolf*, 113 N. Y. 405.

**2. Direction for Division When Youngest Attains Twenty-one.** — *Knox v. Wells*, 2 Hem. & M. 674. See *Blasson v. Blasson*, 2 De G. J. & S. 665; *Hilliard v. Fulford*, 28 L. T. N. S. 892; *Male v. Williams*, 48 N. J. Eq. 33.

**Illustration.** — Where a will gives to the testator's wife a life estate in certain realty and provides that when his youngest child shall attain the age of twenty-one years, provided his wife shall then be dead, the property shall be sold and the proceeds divided among his children, the girls receiving \$100 more than the boys, and the shares of the girls to be held by a trustee for their support, the interest and a small portion of the principal being paid to them annually, and at their death the balance

remaining to be paid to their children, the testator's children receive legacies which vest at the death of the testator. *Redmond v. Coles*, (Tenn. Ch. 1899) 52 S. W. Rep. 660.

**3. *Re Grove***, 3 Giff. 575. See *Boulton v. Pilcher*, 29 Beav. 633; *Dale v. White*, 33 Conn. 295.

*In Schuld't's Estate*, 199 Pa. St. 58, it was held that where a fund is given by will to a trustee in trust to pay the income to the testator's widow during her life, and at her decease in trust for grandchildren named, "the interest thereof to be paid to them semi-annually until they have reached the age of twenty-one years, when the said principal sum shall be equally divided amongst my surviving grandchildren, share and share alike," the intent of the testator is that the fund shall vest in such of his surviving grandchildren only as shall attain the age of twenty-one years. In such a case it vests indefeasibly in the class when one of them attains the required age.

**4. *Talloe v. Mosher***, 29 Md. 455.

**5. Gift of Residue.** — 1 Jarm. on Wills (5th ed.) 851; *Booth v. Booth*, 4 Ves. Jr. 399. See *West v. West*, 4 Giff. 198; *Jones v. Mackilwain*, 1 Russ. 220; *Dodson v. Hay*, 3 Bro. C. C. 405; *Stretch v. Watkins*, 1 Madd. 253; *Brocklebank v. Johnson*, 20 Beav. 205; *Talloe v. Mosher*, 29 Md. 451; *Miller v. Von Schwarzenstein*, 51 N. Y. App. Div. 18. See also *McDowell's Estate*, 8 Pa. Dist. 370.

**6. Legacies from Realty and Personalty.** — *In re Hudsons*, Drury t. Sug. 6; *Prowse v. Abington*, 1 Atk. 482; *Van v. Clark*, 1 Atk. 510; *Chandos v. Talbot*, 2 P. Wms. 601. See also *Fuller v. Winthrop*, 3 Allen (Mass.) 59.

**Vesting of Mixed Funds.** — "These rules as to legacies, however, which were borrowed from the civil law, do not altogether apply to devises of mixed realty; and in a case like the present of a mixed gift of realty and personalty, the rules relating to devises control. *Bredell v. Collier*, 40 Mo. 287; *Raney v. Heath*, 2 Patt. & H. (Va.) 207." *Sellers v. Reed*, 88 Va. 377.



land is governed by principles derived from the common law, and the distinction between a clear gift distinct from the direction to pay, and a gift contained in the direction to pay or divide, does not exist. It was formerly the rule that such legacies, whether given at twenty-one, or payable at twenty-one or other future time, did not vest until the time appointed for payment.<sup>1</sup> According to this rule a legacy charged on real estate and payable at a future day sank as to the real estate by the death of the legatee before the time of payment,<sup>2</sup> and this was true even though interest was given in the meantime.<sup>3</sup> The rule also applied to a legacy charged on land to be purchased with the residue of a personal estate.<sup>4</sup> So a legacy given to a child, payable at twenty-one, did not vest where the child died before that age.<sup>5</sup>

**Modification of Rule.**—This rule, however, has been modified, and a legacy charged upon land is deemed to be vested where it appears that it was the intention of the testator that the legacy should vest,<sup>6</sup> or where payment of the legacy or portion is not postponed from any consideration personal to the legatee, but for the convenience of the estate. In such a case the legacy will vest even though the legatee dies before the time fixed for payment.<sup>7</sup>

### 1. Former Rule as to Legacies Charged on Land

—*England*.—*Poulet v. Poulet*, 1 Vern. 204; *Davies v. Huguenin*, 1 Hem. & M. 730; *Parker v. Hodgson*, 1 Drew. & Sm. 568; *Hall v. Terry*, 1 Atk. 502; *Gawler v. Standerwick*, 2 Cox Ch. 15; *Brown v. Wooler*, 2 Y. & C. Ch. 134; *Chandos v. Talbot*, 2 P. Wms. 601; *Remnant v. Hood*, 2 De G. F. & J. 396; *Phipps v. Mulgrave*, 3 Ves. Jr. 614.

*Georgia*.—*Cogburn v. Ogleby*, 18 Ga. 56.

*Indiana*.—*Roberts v. Malin*, 5 Ind. 21.

*Maryland*.—*Spence v. Robins*, 6 Gill & J. (Md.) 507.

*New York*.—*Birdsall v. Hewlett*, 1 Paige (N. Y.) 34; *Phelps v. Phelps*, 28 Barb. (N. Y.) 121; *Delavergne v. Dean*, (Supm. Ct. Gen. T.) 45 How. Pr. (N. Y.) 209.

*North Carolina*.—*Smith v. Wiseman*, 6 Ired. Eq. (41 N. Car.) 540.

*Pennsylvania*.—*Donner's Appeal*, 2 W. & S. (Pa.) 372; *Stone v. Massey*, 2 Yeates (Pa.) 369; *Patterson v. Hawthorne*, 12 S. & R. (Pa.) 114.

*Vermont*.—*Lyman v. Vanderspiegel*, 1 Aik. (Vt.) 275.

In *Pennock v. Eagles*, 102 Pa. St. 294, the distinction between time annexed to the gift and the time annexed to the payment merely, was applied to a legacy charged on land. See also *Loder v. Hatfield*, 71 N. Y. 92.

**2. Death of Legatee.**—*Boycot v. Cotton*, 1 Atk. 555; *Hall v. Terry*, 1 Atk. 502; *Gawler v. Standerwick*, 2 Cox Ch. 15; *Pearce v. Loman*, 3 Ves. Jr. 135; *Little v. Daniel*, 12 Jur. 167.

**3.** *Gawler v. Standerwick*, 2 Cox Ch. 15; *Parker v. Hodgson*, 7 Jur. N. S. 750; *Boycot v. Cotton*, 1 Atk. 555.

**4.** *Harrison v. Naylor*, 3 Bro. C. C. 108.

**5.** *Smith v. Smith*, 2 Vern. 92; *Yates v. Phipps*, 2 Vern. 416; *Carter v. Bletsoe*, 2 Vern. 617; *Parker v. Hodgson*, 7 Jur. N. S. 750.

**6. Intention of Testator to Govern.**—*Brown v. Wooler*, 2 Y. & C. Ch. 134; *Lowther v. Condon*, 2 Atk. 127; *Remnant v. Hood*, 2 De G. F. & J. 396; *Watkins v. Cheek*, 2 Sim. & St. 199; *Stone v. Massey*, 2 Yeates (Pa.) 363.

**7. Payment Postponed for Convenience of Estate**

—*England*.—*Evans v. Scott*, 1 H. L. Cas. 43; *Goulbourn v. Brooks*, 2 Y. & C. Exch. 539; *Remnant v. Hood*, 2 De G. F. & J. 411; *Poole v. Terry*, 4 Sim. 294; *In re Neary*, L. R. 7 Ir. 311.

*Arkansas*.—*Watkins v. Quarles*, 23 Ark. 179.

*Georgia*.—*Everett v. Mount*, 22 Ga. 323.

*Maryland*.—*O'Byrne v. O'Byrne*, 9 Md. 512.

*Massachusetts*.—*Fuller v. Winthrop*, 3 Allen (Mass.) 51; *Bowker v. Bowker*, 9 Cush. (Mass.) 519.

*New Jersey*.—*Herbert v. Post*, 26 N. J. Eq. 278, 27 N. J. Eq. 540.

*New York*.—*Birdsall v. Hewlett*, 1 Paige (N. Y.) 32; *Tucker v. Ball*, 1 Barb. (N. Y.) 94; *Marsh v. Wheeler*, 2 Edw. (N. Y.) 163; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Williams v. Conrad*, 30 Barb. (N. Y.) 524; *Loder v. Hatfield*, 71 N. Y. 99.

*North Carolina*.—*Ford v. Whedbee*, 1 Dev. & B. Eq. (21 N. Car.) 20; *Culbertson v. Frost*, 1 Jones Eq. (54 N. Car.) 281.

*Pennsylvania*.—*Donner's Appeal*, 2 W. & S. (Pa.) 372; *Maxwell v. McClintock*, 10 Pa. St. 239; *Young v. Stoner*, 37 Pa. St. 108.

*Rhode Island*.—*Pond v. Allen*, 15 R. I. 171.

*Virginia*.—*Chapman v. Chapman*, 90 Va. 409.

See also *supra*, this subsection, *When Payment of Legacy Postponed*.

In *Young v. McKinnie*, 5 Fla. 542, testator devised as follows: "It is my will and desire that my property, including lands, tenements, negroes, horses, and stock of every kind, and everything of value that I may die seized and possessed of, shall be equally divided between my wife, E., my daughter, E. W., and my son, R." It was held that this clause of the will conveyed a present gift to the legatees, and was not controlled by the next clause, in which the testator used the following language: "It is my will and desire that all my property be kept together for the use and benefit of my said wife and children, unless my wife should marry, or my children become of age, in which event or events I wish the property divided as above;" the sole effect of the latter clause being merely to postpone the division, which



**e. LEGACIES CHARGED ON PROCEEDS OF CONVERTED LAND.** — The vesting of legacies charged upon the proceeds of land which is directed to be converted is governed by the rules peculiar to legacies payable out of the personal estate.<sup>1</sup> But the character of the property will remain unchanged as to all beyond what the purpose for which the conversion was directed requires,<sup>2</sup> and where the purposes of the conversion have totally failed, the property will devolve according to its original character.<sup>3</sup>

**f. WHETHER CONTINGENCY AFFECTING ONE OF SERIES OF LIMITATIONS AFFECTS ALL.** — When a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, if the ulterior limitations are immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate in contradistinction to the others, the contingency will be deemed to apply to the whole series of limitations.<sup>4</sup> Likewise where, after an interest is given, and then, in a certain event, a different interest is given with limitation over, the contingency applies to all the subsequent limitations.<sup>5</sup>

**Contingency Limited to Particular Estate.** — But where an intention or purpose is expressed with reference to the particular estate, in contradistinction to the others,<sup>6</sup> or where the ulterior limitations assume the form of substantive, inde-

postponement was for the convenience of the estate.

**1. Legacies from Converted Land — England.** — *Matter of Hart*, 3 De G. & J. 195.

*Arkansas.* — *Loftis v. Glass*, 15 Ark. 680.

*Delaware.* — *In re Journey*, 7 Del. Ch. 1.

*District of Columbia.* — *Hauptman v. Carpenter*, 16 App. Cas. (D. C.) 524.

*Illinois.* — *Banta v. Boyd*, 118 Ill. 186; *Shepherd v. Clark*, 38 Ill. App. 66.

*Kentucky.* — *Roberts v. Brinker*, 4 Dana (Ky.) 571.

*New York.* — *Kessler v. Friede*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 187.

*Pennsylvania.* — *Jones v. Caldwell*, 97 Pa. St. 42; *Weeter's Estate*, 21 Pa. Super. Ct. 241; *Abel's Estate*, 23 Pa. Super. Ct. 531.

*Wisconsin.* — *In re Albiston*, 117 Wis. 272.

**2. Character of Property Remains Unchanged.** — *Craig v. Leslie*, 3 Wheat. (U. S.) 581; *Rudy's Estate*, 6 Pa. Dist. 246; *Worsley's Estate*, 36 W. N. C. (Pa.) 247; *King v. King*, 13 R. I. 501.

**3. Rudy's Estate**, 6 Pa. Dist. 246.

"In the famous argument of Mr. Scott, afterwards Lord Eldon, which was adopted by the chancellor in *Ackroyd v. Smithson*, 1 Bro. C. C. 503, it was shown that, in order to oust the heir, there must be not only an intention to convert the real estate for the purposes of the will, but also to give the product of the sale as personalty, at all events and whether the purpose takes effect or not. In that case the testator ordered his real and personal estate to be sold, and he gave the net proceeds to legatees, two of whom died in his lifetime. The lapsed shares, so far as they consisted of personalty, went to the next of kin, and, so far as they were constituted of realty, went to the heirs at law." *Rudy's Estate*, 6 Pa. Dist. 246.

**4. Contingency Applicable to Whole Series.** — *Doe v. Shippard*, 1 Dougl. 75; *Toldervy v. Colt*, 1 Y. & C. Exch. 621; *Davis v. Norton*, 2 P. Wms. 390; *Fitzhenry v. Bonner*, 2 Drew. 36; *Doe v. Ford*, 2 El. & Bl. 970, 75 E. C. L. 970; *Gray v. Golding*, 6 Jur. N. S. 474; *Lett v.*

*Randall*, 10 Sim. 112; *Cattley v. Vincent*, 15 Beav. 198; *Moody v. Walters*, 16 Ves. Jr. 283; *Robison v. Female Orphan Asylum*, 123 U. S. 706. See also 1 Jarm. on Wills (6th ed.) 787; *Theobald on Wills* (4th ed.) 524.

**5. Gray v. Golding**, 6 Jur. N. S. 474; *Lett v. Randall*, 10 Sim. 112; *Cattley v. Vincent*, 15 Beav. 198; *Findon v. Findon*, 24 Beav. 83; *Paylor v. Pegg*, 24 Beav. 105.

**6. Limited to Particular Estate — England.**

*Horton v. Whittaker*, 1 T. R. 346; *Napper v. Sanders*, Hutton 119; *Bradford v. Foley*, 1 Dougl. 63; *Eaton v. Hewitt*, 2 Drew. & Sm. 184; *Doe v. Ford*, 2 El. & Bl. 970, 75 E. C. L. 970; *Douty v. Laver*, 14 Jur. 188; *Darby v. Darby*, 18 Beav. 412.

*United States.* — *Robison v. Female Orphan Asylum*, 123 U. S. 706.

*Delaware.* — *Ingram v. Roe*, 1 Houst. (Del.) 276.

*Kentucky.* — *Birney v. Richardson*, 5 Dana (Ky.) 429; *Harris v. Berry*, 7 Bush (Ky.) 114.

*North Carolina.* — *Spruill v. Moore*, 5 Ired. Eq. (40 N. Car.) 284.

*Virginia.* — *Dickinson v. Hoomes*, 1 Gratt. (Va.) 302.

In *Horton v. Whittaker*, 1 T. R. 346, A., by his will, declared his desire to provide for his sisters; but considering that his sister M., wife of W., was already well provided for during the life of her husband, and therefore would not, unless she happened to survive him, want any assistance to enable her to live in the world, he devised his estate to trustees, in trust during the life of M., to pay the rent to his (the testator's) sisters T. and B.; and after the decease of W., in case his (the testator's) sister M. should be then living, in trust as to one-third, to the use of the said M. for life; and as to the other two-thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the

pendent gifts, the contingency is restricted to the particular estate with which it is associated.<sup>1</sup>

**17. Divesting Clauses** — *a. STRICT CONSTRUCTION.* — When legacies have once vested they will not be divested by any doubtful implication. Conditions which defeat estates are looked upon with disfavor, and when the meaning is not clear, a construction as nearly as possible in conformity with the general rules of inheritance will be adopted.<sup>2</sup> When, by clear and unambiguous words, an absolute gift is made, and a contingency provided in which the gift is to be defeated, it will not cease until that contingency occurs. There can be no inference or implication that it shall be divested in any other event or in any other contingency.<sup>3</sup>

*b. WHERE GIFT OVER CANNOT TAKE EFFECT.* — The remainder is divested upon the happening of the specified event even though the gift over is void or the legatee to take under the gift over has died before the testator.<sup>4</sup>

remainders did not fail by this event; but it was held that the contingency affected her own life estate only, and did not extend to the ulterior limitations.

**1. Limitations Constituting Independent Gifts** — *England.* — *Doe v. Wilkinson*, 2 T. R. 209; *Sheffield v. Coventry*, 2 De G. M. & G. 551; *Pearson v. Rutter*, 3 De G. M. & G. 398; *Boosey v. Gardener*, 5 De G. M. & G. 122; *Lethieullier v. Tracy*, 3 Atk. 774; *Grey v. Pearson*, 6 H. L. Cas. 103; *Aislabie v. Rice*, 8 Taunt. 459; *Quicke v. Leach*, 13 M. & W. 218; *In re Blight*, 13 Ch. D. 858; *Doutty v. Laver*, 14 Jur. 188; *Partridge v. Foster*, 35 Beav. 545.

*United States.* — *Robison v. Female Orphan Asylum*, 123 U. S. 706.

*Texas.* — *Yeatman v. Haney*, 79 Tex. 67.

See also 1 Jarm. on Wills (5th ed.) \*831.

**"Item" or "Likewise."** — When the word "item" or "likewise" is used, the effect is to make a *prima facie* case for disconnection from the previously expressed contingency, which the context may either maintain or refute. *Lethieullier v. Tracy*, 3 Atk. 774; *Paylor v. Pegg*, 24 Beav. 105.

**2. Divesting Clause Strictly Construed.** — *Snyder's Estate*, 180 Pa. St. 70; *Magoffin v. Patton*, 4 Rawle (Pa.) 113.

In *In re Roberts*, (1903) 2 Ch. 200, testator gave a share of his residuary estate to each of his two daughters for their respective lives, and after their deaths their respective shares "to be equally divided between their respective children or legal representatives." It was held that "representatives" meant the representatives of the tenants for life and not those of the children; that the addition to the gift to the children of the words "or legal representatives" did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child that took a vested interest; and consequently that all children of the daughters who survived the testator, or were born after his death, took vested interests notwithstanding that they might not have survived their respective mothers.

**A Remainder Is None the Less Vested** because it is liable to be divested. *Lantz v. Massie*, 99 Va. 709.

**Divestiture of Remainder Created under Statute.** — While a vested remainder by the rules of

the common law is not subject to be divested at all, not so a vested estate in the statutory sense. That may be divested upon condition subsequent in whatever way or manner the creator thereof in creating the same may provide or authorize. *In re Moran*, 118 Wis. 177.

**3. Drew v. Drew**, 66 Ala. 455.

So where there is a bequest to A for life and after her death to B and C in equal shares, and in case of the death of either of them living at her decease, B and C have vested interests as tenants in common which are not divested by their death during the life of the life tenant. *In re Pickworth*, (1899) 1 Ch. 642; *Harrison v. Foreman*, 5 Ves. Jr. 207.

**Illustrations.** — Where there was a bequest to A for life, and afterwards to B, but if he should be then dead, to C and D in equal shares, or the whole to the survivor of them, and B died in the life of the tenant for life, as did also C and D, it was held that the gift to C and D was a vested interest in them as tenants in common, subject to be divested if one only should survive the tenant for life. *Browne v. Kenyon*, 3 Madd. 410.

In *White v. Baker*, 2 De G. F. & J. 55, a testator bequeathed a legacy upon trust for his widow for life, and after her death upon trust for A and B in equal shares, "and in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund unto the survivor of them the said A and B, his executors, administrators, or assigns." A died in the lifetime of the widow. It was held that upon his death B acquired an indefeasible vested interest in the whole fund.

Where there is a devise of a fee to A after the termination of a life estate to B and C, with provision that the fee shall be divested in case of the death of A without heir before the death of B and C, if A dies after the death of B or before the death of C his estate is defeated, and the fee vests elsewhere in accordance with the terms of the will. *Hinckley v. Mayborne*, 92 Hun (N. Y.) 473. See also *Shangle v. Hallock*, 6 N. Y. App. Div. 55.

**4. Failure of Gift Over.** — *Doe v. Eyre*, 5 C. B. 713, 57 E. C. L. 713; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Hurst v. Hurst*, 21 Ch. D. 278; *Robinson v. Wood*, 27 L. J. Ch. 726.

The original devise remains in force, however, where there is no person living at the time of the happening of the contingency who can take under the gift over, if the contingency of there being a person *in esse* to take at that time can be considered as a part of the event upon which the gift over is to take effect.<sup>1</sup> Thus, if a devise is made to A, to be divested on a given event in favor of persons unborn or unascertained, it will not be affected by the happening of the event described, unless the object of the substituted gift comes *in esse* and answers the qualifications which the testator has annexed thereto.<sup>2</sup> The original gift also remains, where it is in the nature of a substitutional gift to several persons, or to such of them as may survive the life tenant, if one of them survive the life tenant.<sup>3</sup>

*c. INTEREST TO BE CONSTRUED AS ABSOLUTE RATHER THAN DEFEASIBLE.* — In doubtful cases an interest whether vested or contingent ought, if possible, to be construed as absolute or indefeasible, in the first instance, rather than as defeasible; but if it cannot be construed to be an absolute interest in the first instance, at all events, such a construction ought to be put upon the conditional expressions which render it defeasible, as to confine their operation to as short a period as possible, so that it may become an absolute interest as soon as it can fairly be so considered.<sup>4</sup>

*d. VESTING OF SUBSTITUTED INTEREST.* — In accordance with this rule of strict construction, an estate once vested will not be divested unless all of the events which are to precede the vesting of the substituted devise happen.<sup>5</sup> And this applies as well in regard to events which respect the personal qualifications of the substituted devisee, as those which are collateral to them.<sup>6</sup>

*e. CONTINGENT INTERESTS SUBJECT TO CONDITION SUBSEQUENT.* — A contingent interest may be subject to a condition subsequent.<sup>7</sup>

**18. Conditional Devises and Bequests** — *a. BY WHAT WORDS CREATED.* — Although the court is never astute to construe a testator's words as importing a condition, if a different meaning can be fairly given them,<sup>8</sup> yet no precise

1. *Crozier v. Crozier*, L. R. 15 Eq. 282.

Where the gift is to the testator's two sons and daughter in equal shares, with the gift over of the daughter's share, if she should die without issue, to the survivors or survivor of the sons, the daughter, upon surviving the sons, takes absolutely. *Jones v. Davies*, 28 W. R. 455.

2. *Carstensen's Estate*, 196 Pa. St. 325.

3. *In re Sanders*, L. R. 1 Eq. 675; *Wagstaff v. Crosby*, 2 Coll. Ch. Cas. 746; *Sturgess v. Pearson*, 4 Madd. 411.

4. **Construction of Interest as Absolute.** — *Weakley v. Rugg*, 7 T. R. 322; *Campbell v. Weakley*, 121 Ala. 64; *Sumpter v. Carter*, 115 Ga. 897; *In re Whittemore*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 453; *Hilliard v. Kearney*, Busb. Eq. (45 N. Car.) 221; *Davis v. Parker*, 69 N. Car. 275; *Galloway v. Carter*, 100 N. Car. 112; *Smith's Appeal*, 23 Pa. St. 9; *Burnham v. Burnham*, 79 Wis. 557.

5. **When Substituted Devise Takes Effect** — *England.* — *In re Cobbold*, (1903) 2 Ch. 299; *Doe v. Rawding*, 2 B. & Ald. 441; *Vuliamy v. Huskisson*, 3 Y. & C. Exch. 80; *Doe v. Cooke*, 7 East 269; *Doe v. Jessop*, 12 East 288; *Wall v. Tomlinson*, 16 Ves. Jr. 413; *Littlejohn v. Household*, 21 Beav. 29; *Page v. May*, 24 Beav. 323.

*Canada.* — *Re Metcalfe*, 32 Ont. 103.

*Alabama.* — *Sherrod v. Sherrod*, 38 Ala. 537; *Drew v. Drew*, 66 Ala. 455; *Grimball v. Patton*, 70 Ala. 626; *Acree v. Dabney*, 133 Ala. 437.

*Delaware.* — *Reybold v. Reybold*, 7 Del. Ch. 29.

*Georgia.* — *Sumpter v. Carter*, 115 Ga. 897.

*Illinois.* — *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 317.

*Kentucky.* — *Bedford v. Bedford*, 99 Ky. 273.

*New Jersey.* — *Burroughs v. Jamieson*, (N. J. 1902) 53 Atl. Rep. 688.

*New York.* — *Jenkins v. Van Schaak*, 3 Paige (N. Y.) 242; *Clason v. Clason*, 6 Paige (N. Y.) 541; *Hinckley v. Mayborne*, 92 Hun (N. Y.) 473.

*North Carolina.* — *Turner v. Whitted*, 2 Hawks (9 N. Car.) 613; *Den v. Jacocks*, 3 Murph. (7 N. Car.) 558; *Black v. McAulay*, 5 Jones L. (50 N. Car.) 375.

*Oregon.* — *Shadden v. Hembree*, 17 Oregon 15.

*Pennsylvania.* — *Cheesman v. Wilt*, 1 Yeates (Pa.) 411; *Chew's Appeal*, 45 Pa. St. 228; *Carstensen's Estate*, 196 Pa. St. 325.

**Impossibility of Performance of Condition Subsequent.** — Where a condition subsequent attached to a remainder becomes impossible of performance the estate of the remaindermen is not thereby divested. *Loucks's Estate*, 203 Pa. St. 278.

6. *Carstensen's Estate*, 196 Pa. St. 325.

7. *Egerton v. Brownlow*, 4 H. L. Cas. 1.

8. **Court Not Eager to Discover Conditions** — *England.* — *Edgeworth v. Edgeworth*, L. R. 4 H. L. 38; *Yates v. University College*, L. R. 7 H. L. 438; *Ward v. Little*, 79 L. T. N. S. 261.



form of words is necessary to create a condition in a will, and any expression which clearly manifests such an intention will be sufficient.<sup>1</sup>

**Trust or Charge Distinguished from Condition.** — A condition for the benefit of a person, without any expressed intention that its breach shall work a forfeiture of the estate, should be regarded as creating a trust or charge upon the land in such person's favor, to be enforced as other trusts and charges, and not as a limitation upon the estate devised. This is the doctrine announced in many cases.<sup>2</sup>

*United States.* — See *Tarver v. Tarver*, 9 Pet. (U. S.) 174.

*Alabama.* — See *Bonner v. Young*, 68 Ala. 35.

*Delaware.* — *Lambden v. West*, 7 Del. Ch. 266.

*Kentucky.* — *Pearcy v. Greenwell*, 80 Ky. 616; *Likefield v. Likefield*, 82 Ky. 589.

*Maryland.* — See *Wood v. Conrey*, 62 Md. 542.

*Massachusetts.* — *McElwain v. Holyoke First Cong. Soc.*, 153 Mass. 238.

*Missouri.* — *Roberts v. Crume*, 173 Mo. 572.

*New Hampshire.* — *Newell v. Hancock*, 67 N. H. 244. See *Brown v. Concord*, 33 N. H. 285.

*New Jersey.* — *Casper v. Walker*, 33 N. J. Eq. 35.

*New York.* — *Cunningham v. Parker*, 146 N. Y. 29. See *Leslie v. Marshall*, 31 Barb. (N. Y.) 560; *Newell v. Nichols*, 75 N. Y. 78.

*Pennsylvania.* — *McCalla's Estate*, 16 Pa. Super. Ct. 202. See *Sheets's Estate*, 52 Pa. St. 257; *Urich v. Merkel*, 81 Pa. St. 332; *Haly's Estate*, 18 Pa. Co. Ct. 124.

*Vermont.* — See *Casey v. Casey*, 55 Vt. 518.

*Virginia.* — See *Skipwith v. Cabell*, 19 Gratt. (Va.) 758.

**A Devise upon Condition that the Devisee Makes Certain Payments Within a Given Time** will, as a rule, be construed as a trust, and not as a condition. *Young v. Grove*, 4 C. B. 668, 56 E. C. L. 668; *Wright v. Wilkin*, 10 W. R. 403; *Atty.-Gen. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1; *Merchant Taylors' Co. v. Atty.-Gen.*, L. R. 6 Ch. 512. And see *Bird v. Harris*, L. R. 9 Eq. 204; *Foot v. Cuninghame*, 11 Ir. Eq. 306.

**Condition Read as Part of Original Limitation.** — "In some cases a condition apparently precedent has been read as forming part of the original limitation. Thus, a devise to M. and the heirs of her body, on condition that she marry and have issue male by S., was held to give an estate in special tail to M. *Page v. Hayward*, 2 Salk. 570.

"Similarly, an estate to arise upon a condition which cuts down a previous estate will, if possible, be construed as a remainder by looking upon the condition as forming part of the limitation of the previous estate. Thus, a devise to A for life if she should not marry again, but if she did, to B, will be construed as a devise to A for life or till marriage. *Luxford v. Cheeke*, 3 Lev. 125; *Fry's Case*, 1 Vent. 203; *Gordon v. Adolphus*, 3 Bro. P. C. (Toml. ed.) 306.

"So, too, if the gift for life is made 'subject to the proviso hereinafter contained,' the proviso is incorporated into the original limitation. *Webb v. Grace*, 2 Phil. 701.

"And a bequest to A for life, if she should so long remain unmarried, will be construed in

the same way. *Heath v. Lewis*, 3 De G. M. & G. 954.

"On the other hand, if the condition is so penned that it cannot be connected with the previous limitation for life, it must take effect as a condition. *Sheffield v. Orrery*, 3 Atk. 282. See *Allen v. Jackson*, 1 Ch. D. 399.

"In such a case, however, it may appear that the original estate was only meant to last till the condition takes effect; if, for instance, the rents are directed to be paid to a woman, which could only be done till her marriage, the estate not being given to her separate use. *Meeds v. Wood*, 19 Beav. 215.

"Upon the same principle, the ordinary limitation to trustees to preserve contingent remainders is a vested remainder, the prior estate being looked upon as lasting till forfeiture by the prior taker. *Smith v. Parkhurst*, 3 Atk. 135, 6 Bro. P. C. (Toml. ed.) 353, 18 Vin. Abr. 413." *Theobald on Wills* (2d ed.) 398.

**1. No Precise Form of Words Necessary** — *England.* — *Tattersall v. Howell*, 2 Meriv. 26; *Maud v. Maud*, 27 Beav. 615.

*United States.* — *Finlay v. King*, 3 Pet. (U. S.) 346.

*Alabama.* — *Huckabee v. Swoope*, 20 Ala. 491.

*Connecticut.* — *Wheeler v. Walker*, 2 Conn. 196.

*District of Columbia.* — *Eaton v. Brown*, 20 App. Cas. (D. C.) 453.

*Indiana.* — *Lindsey v. Lindsey*, 45 Ind. 552.

*Maine.* — *Buck v. Paine*, 75 Me. 582.

*Massachusetts.* — *Hapgood v. Houghton*, 22 Pick. (Mass.) 480.

*Michigan.* — *Plant v. Weeks*, 39 Mich. 117.

*New Hampshire.* — *Brown v. Concord*, 33 N. H. 285.

*New York.* — *Dustan v. Dustan*, 1 Paige (N. Y.) 509; *Morgan v. Darden*, 3 Dem. (N. Y.) 203; *Rushmore v. Rushmore*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 776; *Fox v. Phelps*, 17 Wend. (N. Y.) 393; *Brown v. Evans*, 34 Barb. (N. Y.) 594; *Matter of Hohman*, 37 Hun (N. Y.) 250; *Booth v. Baptist Church of Christ*, 126 N. Y. 242.

*North Carolina.* — *Sims v. Smith*, 6 Jones Eq. (59 N. Car.) 347; *Tilley v. King*, 109 N. Car. 461.

*Ohio.* — *Worman v. Teagarden*, 2 Ohio St. 380.

*Pennsylvania.* — *Tower's Appropriation*, 9 W. & S. (Pa.) 103.

*Virginia.* — *Vanmeter v. Vanmeter*, 3 Gratt. (Va.) 148; *Crawford v. Patterson*, 11 Gratt. (Va.) 364.

*Wisconsin.* — *In re Moran*, 118 Wis. 177. See also the title **CONDITIONS**, vol. 6, p. 501.

**2. Trust or Charge Distinguished from Condition**

Volume XXX.

**Gifts to Executors.** — In *England* a general or specific legacy given by a testator to his executors, whether under the title of executor or not, is *prima facie* given to them in that character, and, therefore, they are not entitled to it if they decline or are incapable of undertaking the office.<sup>1</sup> In the *United States* the rule has been recognized, although the force of the presumption is weakened by the fact that the executor is entitled to commissions.<sup>2</sup>

**Gifts to Testamentary Trustees.** — The principles applicable to gifts to an executor apply as well to gifts to testamentary trustees.<sup>3</sup>

**Conditional Limitation.** — By the common law, a condition annexed to real estate could be reserved only to the grantor or devisee and his heirs. Upon a breach of the condition, the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the devisee, who alone had the right to take advantage of a breach. Hence arose the distinction between a condition and a conditional limitation. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it, is termed a conditional limitation.<sup>4</sup>

**b. CONDITIONS PRECEDENT AND SUBSEQUENT DISTINGUISHED.** — A

— *United States*. — *Sands v. Champlin*, 1 Story (U. S.) 376.

*Illinois*. — *Jennings v. Jennings*, 27 Ill. 518.

*Iowa*. — *Woodward v. Walling*, 31 Iowa 533.

*Maryland*. — *Lockett v. White*, 10 Gill & J. (Md.) 480.

*Massachusetts*. — *Ward v. Ward*, 15 Pick. (Mass.) 511; *Sheldon v. Purple*, 15 Pick. (Mass.) 528.

*New Hampshire*. — *Veazey v. Whitehouse*, 10 N. H. 409.

*New York*. — *Fox v. Phelps*, 17 Wend. (N. Y.) 393. Compare *Hogeboom v. Hall*, 24 Wend. (N. Y.) 146.

*North Carolina*. — *Woods v. Woods*, Busb. L. (44 N. Car.) 290.

*Pennsylvania*. — *Hanna's Appeal*, 31 Pa. St. 53.

Compare *Lindsey v. Lindsey*, 45 Ind. 552, *Hogbeom v. Hall*, 24 Wend. (N. Y.) 146.

**1. English Rule.** — *Reed v. Devaynes*, 2 Cox Ch. 285; *Calvert v. Sebbon*, 4 Beav. 222; *Hanbury v. Spooner*, 5 Beav. 630; *Re Hawkin*, 33 Beav. 570; *Piggott v. Green*, 6 Sim. 72; *Slaney v. Watney*, L. R. 2 Eq. 418.

**To Entitle the Executor to Take the Legacy**, it is sufficient if he either prove the will, which he may do at any time before the estate is fully administered, or act as executor. *Harrison v. Rowley*, 4 Ves. Jr. 212; *Hollingsworth v. Grasett*, 15 Sim. 52; *Angermann v. Ford*, 29 Beav. 349; *Lewis v. Mathews*, L. R. 8 Eq. 277.

In the last case it was said: "As a general rule, there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will."

It seems, however, that if the legacy is directed to be paid within twelve months, and there is nothing to show that the executor refuses to act, he is entitled to his legacy if he survives the twelve months. *Brydges v. Wotton*, 1 Ves. & B. 134. But if the executor acts fraudulently, the mere taking out probate will not entitle him to his legacy. *Harford v. Brown*, 1 Cox Ch. 302.

**How Presumption Rebutted.** — "The presump-

tion that a legacy to an executor is given to him in that character for his trouble may be rebutted: 1. If some other motive is expressed, as if the gift is to 'my friend and executor.' *Matter of Denby*, 3 De G. F. & J. 350; *Dix v. Reed*, 1 Sim. & St. 237; *Burgess v. Burgess*, 1 Coll. Ch. Cas. 367; *Bubb v. Yelverton*, L. R. 13 Eq. 131.

"2. If the gifts to the executors are unequal in amount, or a legacy is given to one and not the other. *Cockerell v. Barber*, 2 Russ. 585; *Jewis v. Lawrence*, L. R. 8 Eq. 345; *Wildes v. Davies*, 1 Smale & G. 475.

"3. If the gift is after a life interest. *In re Reeve*, 4 Ch. D. 841.

"4. If there is a direction that in the event of the executor's death before the testator his legacy is to go to his next of kin. *In re Bunsbury*, Ir. 10 Eq. 408.

"5. The presumption does not arise if the gift is of residue. *Parsons v. Saffery*, 9 Price 578; *Griffiths v. Pruen*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264." *Theobald on Wills* (2d ed.) 287, 288.

**2. Rule in United States.** — *Billingslea v. Moore*, 14 Ga. 370; *Morris v. Kent*, 2 Edw. (N. Y.) 175; *Rothmahler v. Myers*, 4 Desaus. (S. Car.) 215. See *Kirkland v. Narramore*, 105 Mass. 31.

**3. Hollingsworth v. Grasett**, 15 Sim. 52.

**But the Legacy Does Not Vest** if the testamentary trustee dies after probate without doing any act to accept the trust, although before the executor had settled the estate. *Kirkland v. Narramore*, 105 Mass. 31.

**4. Conditional Limitation.** — *Brattle Square Church v. Grant*, 3 Gray (Mass.) 146. See also *Woodward v. Walling*, 31 Iowa 535; *Bangor v. Warren*, 34 Me. 324; *Hooper v. Cummings*, 45 Me. 359; *Den v. Hance*, 11 N. J. L. 244; *Newell v. Nichols*, 75 N. Y. 78. And see the title **CONDITIONS**, vol. 6, p. 514.

**The Words "in the Event of Its Becoming Necessary"** have been held to show that a conditional bequest and not a limitation was intended by the testator. *Mackay v. Moore*, Dudley (Ga.) 94.

condition precedent is one which must be performed before the interest affected by it can vest. A condition subsequent is one by which an interest already vested may be divested,<sup>1</sup> or a contingent interest defeated before vesting.<sup>2</sup>

**Question of Construction.** — Whether a condition is precedent or subsequent is a question of construction, in regard to which very little help can be derived from decided cases. However, the fact that the condition requires something to be done which may take time is a circumstance in favor of construing it as a condition subsequent.<sup>3</sup> On the other hand, the fact that the condition involves something in the nature of a consideration, is a circumstance in favor of construing it as a condition precedent.<sup>4</sup>

**1. Conditions Precedent and Subsequent Distinguished** — *England*. — Woodcock v. Woodcock, Cro. Eliz. 795; Popham v. Bampfild, 1 Vern. 79; Davis v. Angel, 31 Beav. 223, 4 De G. F. & J. 524.

*United States*. — Finlay v. King, 3 Pet. (U. S.) 346.

*Connecticut*. — Tappan's Appeal, 52 Conn. 412.

*Florida*. — Jenkins v. Merritt, 17 Fla. 304.

*Illinois*. — Nevius v. Gourley, 95 Ill. 206, 97 Ill. 365; Nevitt v. Woodburn, 190 Ill. 283, reversing 82 Ill. App. 649; Goff v. Pensenhafer, 190 Ill. 200.

*Indiana*. — Cox v. Bird, 65 Ind. 281.

*Kentucky*. — Irvine v. Irvine, (Ky. 1891) 15 S. W. Rep. 511.

*Maine*. — Marwick v. Andrews, 25 Me. 525; Birmingham v. Lesan, 77 Me. 494.

*Maryland*. — Hammond v. Hammond, 55 Md. 575.

*New York*. — Rushmore v. Rushmore, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 776; *In re* Whittemore, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 453.

*North Carolina*. — Whitehead v. Thompson, 70 N. Car. 450; Wellons v. Jordon, 83 N. Car. 371; Misenheimer v. Sifford, 94 N. Car. 592; Tilley v. King, 109 N. Car. 461.

*Wisconsin*. — Webster v. Morris, 66 Wis. 366.

See also the title CONDITIONS, vol. 6, p. 503.

**Equity Will Relieve Against Conditions Precedent.** — Where there is no gift over, and the parties can be placed in the same situation as if the condition had been performed, equity will relieve against even a condition precedent. Otherwise if there is a gift over or the parties cannot be placed *in statu quo*. *Hollinrake v. Lister*, 1 Russ. 508; *Taylor v. Popham*, 1 Bro. C. C. 168.

**2.** *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Goff v. Pensenhafer*, 190 Ill. 200.

**3. Conditions Requiring Acts Which May Take Time.** — *Popham v. Bampfild*, 1 Vern. 79; *Peyton v. Bury*, 2 P. Wms. 626; *Duddy v. Gresham*, L. R. 2 Ir. 443; *Cannon v. Apperson*, 14 Lea (Tenn.) 553. See also *Jenkins v. Merritt*, 17 Fla. 304; *Marwick v. Andrews*, 25 Me. 525; *Hammond v. Hammond*, 55 Md. 575; *Merrill v. Emery*, 10 Pick. (Mass.) 507.

**4. Conditions Involving Consideration** — *England*. — *Acherley v. Vernon*, Willes 153; *In re* *Welstead*, 25 Beav. 612.

*United States*. — *Finlay v. King*, 3 Pet. (U. S.) 346; *Yale College v. Runkle*, 10 Biss. (U. S.) 300.

*Alabama*. — *Kirkman v. Mason*, 17 Ala. 134; *Vaughan v. Vaughan*, 30 Ala. 329.

*Connecticut*. — *Platt v. Platt*, 42 Conn. 330; *Tappan's Appeal*, 52 Conn. 412; *Seeley v. Hincks*, 65 Conn. 1.

*Georgia*. — *Bowman v. Long*, 23 Ga. 247.

*Illinois*. — *Jennings v. Jennings*, 27 Ill. 518; *Nevius v. Gourley*, 95 Ill. 206.

*Indiana*. — *Stone v. Huxford*, 8 Blackf. (Ind.) 452; *Cross v. Carson*, 8 Blackf. (Ind.) 138; *Petro v. Cassidy*, 13 Ind. 289; *Lindsey v. Lindsey*, 45 Ind. 552.

*Iowa*. — *Woodward v. Walling*, 31 Iowa 533.

*Maine*. — *Stark v. Smiley*, 25 Me. 201; *Marston v. Marston*, 47 Me. 495; *Robbins v. Gleason*, 47 Me. 259; *Birmingham v. Lesan*, 77 Me. 494.

*Maryland*. — *West v. Biscoe*, 6 Har. & J. (Md.) 468; *Cresswell v. Lawson*, 7 Gill & J. (Md.) 240; *Maddox v. Price*, 17 Md. 413; *Meakin v. Duval*, 43 Md. 372. But see *Hammond v. Hammond*, 55 Md. 575.

*Massachusetts*. — *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Minot v. Prescott*, 14 Mass. 496; *Ward v. Ward*, 15 Pick. (Mass.) 511; *Bradstreet v. Clark*, 21 Pick. (Mass.) 389; *Brennan v. Brennan*, 185 Mass. 560.

*Michigan*. — *Conrad v. Long*, 33 Mich. 78; *Calkins v. Smith*, 41 Mich. 409; *Johnson v. Warren*, 74 Mich. 491.

*Mississippi*. — *Burnett v. Strong*, 26 Miss. 116; *Cheairs v. Smith*, 37 Miss. 646.

*New Hampshire*. — *Veazey v. Whitehouse*, 10 N. H. 409; *Smith v. Jewett*, 40 N. H. 530.

*New Jersey*. — *Jackson v. Kip*, 8 N. J. L. 241; *Ely v. Ely*, 20 N. J. Eq. 43; *Reynolds v. Denman*, 20 N. J. Eq. 218.

*New York*. — *Barruso v. Madan*, 2 Johns. (N. Y.) 145; *Booth v. Baptist Church of Christ*, 126 N. Y. 242.

*North Carolina*. — *Tilley v. King*, 109 N. Car. 461.

*Pennsylvania*. — *Campbell v. McDonald*, 10 Watts (Pa.) 179.

*Rhode Island*. — *Clapp v. Clapp*, 6 R. I. 129; *Sammis v. Sammis*, 14 R. I. 124.

*South Carolina*. — *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217; *Moore v. Perry*, 42 S. Car. 369.

*Tennessee*. — *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

*Vermont*. — *Dunbar v. Dunbar*, 3 Vt. 472; *Casey v. Casey*, 55 Vt. 518.

*Virginia*. — *Rhett v. Mason*, 18 Gratt. (Va.) 541.

*Wisconsin*. — *Merrill v. Wisconsin Female College*, 74 Wis. 417.



c. TIME OF PERFORMANCE. — Conditions, whether precedent or subsequent, must be performed within a reasonable time.<sup>1</sup>

**Ignorance of Condition as Excuse for Nonperformance.** — A condition subsequent not performed, owing to the ignorance of the devisee or legatee of its existence, nevertheless works a forfeiture where the property is given over, both in the case of real and personal estate,<sup>2</sup> unless the devisee is also the heir, who has a title independent of the will.<sup>3</sup> So, the nonperformance of a condition precedent which must be performed during the life of the testator, is not excused by the fact that the legatee was not informed that a legacy would be given upon the condition.<sup>4</sup> Upon the same principle, a legacy not claimed within the time specified by the will is subject to a clause of forfeiture, although the legatee received no notice of the legacy or of the death of the testator.<sup>5</sup> However, if there is no gift over and the parties can be placed in the same situation as if the condition has been strictly performed, equity will grant relief.<sup>6</sup>

d. IMPOSSIBLE, IMPOLITIC, IMMORAL, OR ILLEGAL CONDITIONS — **Realty.** — As regards realty, if the condition upon which a devise depends is impossible, impolitic, immoral, or illegal, in its creation, or afterwards so becomes, otherwise than by the act of the testator, the devise is itself void;<sup>7</sup> if it becomes impossible by the act of the testator, the condition is itself discharged,<sup>8</sup> unless such condition is to be performed by the testator himself, in which case the rule does not apply.<sup>9</sup>

**Personalty.** — As regards personalty, by the rule of the civil law which has been adopted by courts of equity, where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by act of God, or where it is illegal, as involving *malum in se*, both gift and condition are void.<sup>10</sup>

1. **Time of Performance.** — *Ross v. Tremain*, 2 Met. (Mass.) 495; *Carter v. Carter*, 14 Pick. (Mass.) 424; *Ward v. Patterson*, 46 Pa. St. 372. See also the titles **CONDITIONS**, vol. 6, p. 505; **LEGACIES AND DEVISES**, vol. 18, p. 734. And see *infra*, this subsection, *Conditions in Restraint of Marriage — Performance and Waiver*.

A Condition that a Farm Shall Be Improved in a good and husbandlike manner, etc., during the continuance of the devisee's life tenancy, need not be complied with while such life tenant is only a tenant of the administrator and before the property has been delivered to him. *Pendleton v. Kinney*, 65 Conn. 222.

2. **Ignorance of Condition Subsequent.** — *Fry's Case*, 1 Vent. 199; *Burgess v. Robinson*, 3 Meriv. 7; *Carter v. Carter*, 3 Kay & J. 618; *In re Hodges*, L. R. 16 Eq. 92; *Astley v. Essex*, L. R. 18 Eq. 290.

3. **Nonperformance by Devisee Who Is Also Heir.** — *Doe v. Beauclerk*, 11 East 667; *Doe v. Crisp*, 8 Ad. & El. 779, 35 E. C. L. 522; *Brennan v. Brennan*, 185 Mass. 560; *Martin v. Ballou*, 13 Barb. (N. Y.) 119.

4. **Ignorance of Condition Precedent.** — *Brennan v. Brennan*, 185 Mass. 560; *Merrill v. Wisconsin Female College*, 74 Wis. 415. See also *Johnson v. Warren*, 74 Mich. 494.

5. **Legacy Not Claimed Within Time Specified.** — *Burgess v. Robinson*, 3 Meriv. 7; *Tulk v. Houlditch*, 1 Ves. & B. 248; *Powell v. Rawle*, L. R. 18 Eq. 243. See *Stover's Appeal*, 77 Pa. St. 282.

**Filing a Bill for Administration** has been held equivalent to a claim by the residuary legatee. *Tolner v. Marriott*, 4 Sim. 19.

6. *Hollinrake v. Lister*, 1 Russ. 508.

7. **Impossible, Impolitic, Immoral, or Illegal Conditions as Regards Realty.** — *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Boyce v. Boyce*, 16 Sim. 476; *Caldwell v. Cresswell*, L. R. 6 Ch. 278; *Lillie v. Willis*, 31 Ont. 198; *Carter v. Carter*, 39 Ala. 579; *McCloskey's Succession*, 52 La. Ann. 1122; *Matter of Haight*, 51 N. Y. App. Div. 310; *Johnson v. Clarkson*, 3 Rich. Eq. (S. Car.) 305; *Stark v. Conde*, 100 Wis. 633. But see *Shuman v. Heldman*, 63 S. Car. 474. See also the titles **CONDITIONS**, vol. 6, p. 506; **LEGACIES AND DEVISES**, vol. 18, p. 734.

Where a Person Interested Wrongfully Prevents the Performance of a condition precedent, he will not be allowed to take advantage of his own wrong. *Harris v. Wright*, 118 N. Car. 422.

8. **Impossibility Caused by Testator.** — See *Gath v. Burton*, 1 Beav. 478; *Darley v. Langworthy*, 3 Bro. P. C. (Toml. ed.) 359.

9. **Condition to Be Performed by Testator.** — *Gath v. Burton*, 1 Beav. 478; *Darley v. Langworthy*, 3 Bro. P. C. (Toml. ed.) 359; *Goff v. Pensenhauer*, 190 Ill. 200.

10. **Impossible or Illegal Conditions as Regards Personalty — England.** — *Brown v. Peck*, 1 Eden 140; *Wren v. Bradley*, 2 De G. & Sm. 49; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; *Priestley v. Holgate*, 3 Kay & J. 286.

**Legacies Charged on Land** are governed by the rules peculiar to realty.<sup>1</sup>

**Legacies Charged on Both Real and Personal Property** will, so far as they are payable out of each species of property, be governed by the rules applicable to that species.<sup>2</sup>

**Conditions Subsequent Are Considered Liberally**, in order to save, if possible, the vested estate or interest, and if such condition proves illegal as against good morals, or is impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect.<sup>3</sup>

**c. CONDITIONS IN RESTRAINT OF MARRIAGE** — (1) *As to Real Estate*. — It seems to be the better opinion that, as the principles governing real property are derived from the common law, a condition subsequent in reasonable restraint of marriage, annexed to an estate for life or in fee, is valid.<sup>4</sup> Such is undoubtedly the case where the restraint is partial only, as where the condition requires marriage with consent,<sup>5</sup> or forbids marriage under age or with persons of a particular family or nationality.<sup>6</sup> As the doctrine of conditions

*United States*. — *Sherman v. American Cong. Assoc.*, 98 Fed. Rep. 495.

*Alabama*. — *Carter v. Carter*, 39 Ala. 579.

*Georgia*. — *Smith v. Dunwoody*, 19 Ga. 237; *Pinckard v. McCoy*, 22 Ga. 28.

*Mississippi*. — *Lusk v. Lewis*, 32 Miss. 297.

*New York*. — *Cooper v. Clason*, 3 Johns. Ch. (N. Y.) 521; *Five Points House of Industry v. Amerman*, 11 Hun (N. Y.) 161; *Cruger v. Phelps*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 252; *Matter of Dempsey*, (Surrogate Ct.) 25 Misc. (N. Y.) 257.

*Pennsylvania*. — *Culin's Appeal* 20 Pa. St. 243; *Stover's Appeal*, 77 Pa. St. 282.

See also the titles **CONDITIONS**, vol. 6, p. 506;

**LEGACIES AND DEVISES**, vol. 18, p. 734.

1. 2 Jarm. on Wills (5th ed.) 9.

2. **Legacies Charged on Both Real and Personal Property**. — *Reynish v. Martin*, 3 Atk. 335.

3. **Conditions Subsequent Considered Liberally**. — 4 Kent's Com. 125; 1 *Rop. Leg.* 783; *Theobald on Wills* (2d ed.) 450; *Co. Litt.* 206a; 2 *Bl. Com.* 156.

*England*. — *Thomas v. Howell*, 1 Salk. 170; *In re Greenwood*, (1903) 1 Ch. 749, 88 L. T. N. S. 212; *Walker v. Walker*, 2 De G. F. & J. 255; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; *Collett v. Collett*, 35 Beav. 312.

*Canada*. — *Jordon v. Dunn*, 13 Ont. 267.

*United States*. — *Davis v. Gray*, 16 Wall. (U. S.) 230; *Jones v. Habersham*, 3 Woods (U. S.) 443; *Sherman v. American Cong. Assoc.*, 98 Fed. Rep. 495.

*Georgia*. — *Harrison v. Harrison*, 105 Ga. 517.

*Illinois*. — *Jones v. Doe*, 2 Ill. 276.

*Indiana*. — *Hoss v. Hoss*, 140 Ind. 552.

*Maine*. — *Morse v. Hayden*, 82 Me. 227.

*Maryland*. — *Hammond v. Hammond*, 55 Md. 575; *Ellicott v. Ellicott*, 90 Md. 321.

*Massachusetts*. — *Merrill v. Emery*, 10 Pick. (Mass.) 507; *Parker v. Parker*, 123 Mass. 584.

*Michigan*. — *Conrad v. Long*, 33 Mich. 78.

*Missouri*. — *Witherspoon v. Brokaw*, 85 Mo. App. 169.

*New Hampshire*. — *George v. George*, 47 N. H. 27.

*New York*. — *Potter v. McAlpine*, 3 Dem. (N. Y.) 108; *McLachlan v. McLachlan*, 9 Paige (N. Y.) 534; *O'Brien v. Barkley*, (Supm.

Ct. Gen. T.) 60 N. Y. St. Rep. 520; *Merriam v. Wolcott*, (Supm. Ct.) 61 How. Pr. (N. Y.) 377.

*Pennsylvania*. — *Hutchins's Estate*, 9 Phila. (Pa.) 300, 29 Leg. Int. (Pa.) 141; *Culin's Appeal*, 20 Pa. St. 243.

*South Carolina*. — *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217.

*Virginia*. — *Burdis v. Burdis*, 96 Va. 81.

*Wisconsin*. — *Burnham v. Burnham*, 79 Wis. 557.

See also the titles **CONDITIONS**, vol. 6, p. 506; **LEGACIES AND DEVISES**, vol. 18, p. 734.

**A Gift on Condition that the Legatees Support and Care for A** becomes absolute if A refuse the legatees' offer of support. *Livingston v. Gordon*, 84 N. Y. 136. And the better opinion is that such is the case even where there is a gift over. *Collett v. Collett*, 35 Beav. 312; *Sutcliffe v. Richardson*, L. R. 13 Eq. 606. See also *Livingston v. Gordon*, 84 N. Y. 136.

**Void Conditions Subsequent**. — Upon the same principle, if the condition subsequent be void the original gift becomes absolute. *Jones v. Habersham*, 3 Woods (U. S.) 443. In this case *Bradley, Cir. J.*, in considering the terms of a devise containing conditions subsequent, said: "This gift is objected to on account of the condition against alienation. \* \* \* The condition is nothing but a condition subsequent, and, if void, does not vitiate the gift."

**Condition Not to Resume Custody of Child**. — A condition subsequent is void when it is apparent from the face thereof that the object of the testator is that a father shall not resume his relations as custodian of his child. *Witherspoon v. Brokaw*, 85 Mo. App. 169.

4. **Condition Annexed to Estate for Life or in Fee**. — *Haughton v. Haughton*, 1 Molloy 611; *Jones v. Jones*, 1 Q. B. D. 279; *Bellairs v. Bellairs*, L. R. 18 Eq. 510; *Phillips v. Medbury*, 7 Conn. 573; *Com. v. Stauffer*, 10 Pa. St. 354. See also the title **CONDITIONS**, vol. 6, p. 512.

5. **Condition Requiring Consent to Marriage**. — *Sutton v. Fewke*, 2 Ch. Rep. 95; *Hogan v. Curtin*, 88 N. Y. 171.

6. **Condition Forbidding Marriage under Age or with Particular Persons**. — *Haughton v. Haughton*, 1 Molloy 611; *Stackpole v. Beaumont*, 3



*in terrorem* does not apply to realty, a condition is good even though there is no gift over.<sup>1</sup> But with regard to conditions in general restraint of marriage, annexed to devises of realty, authorities differ. On the one hand it is said that the invalidity of such conditions in regard to personality is due to principles derived from the civil law, introduced into the administration of personality by ecclesiastics, and not recognized by the common law in regard to realty. In fact, the rules derived from the civil law were merely rules of construction, as appears from the fact that the testator could evade the rule by throwing the sentence into the form of a limitation, which would be impossible if the rule were really founded upon any broad principle of public policy.<sup>2</sup> On the other hand, many authorities hold that conditions in general restraint of marriage are void upon the broad ground of public policy, applicable alike to real and personal property, since to give either man or woman property subject to such a condition is to encourage illicit connections.<sup>3</sup> Such a condition, if imposed upon a tenant in tail, is void as repugnant to the nature of the estate.<sup>4</sup>

(2) *As to Personality*—*Condition Subsequent*.—In the case of personality, a condition subsequent in general restraint of marriage is void.<sup>5</sup> The rule is derived from the civil law, by which all conditions in restraint of marriage were absolutely void, and marriage simply was a sufficient compliance with a condition requiring marriage with consent or with a particular individual, or any other restrictive circumstance.<sup>6</sup> By the *English* law, however, the principle has been so far modified that a condition subsequent in partial restraint of marriage, as conditions not to marry a particular person,<sup>7</sup> or not to marry under twenty-one or other reasonable age,<sup>8</sup> or without consent, are sustained if there is a gift over;<sup>9</sup> but without a gift over, such conditions are held merely *in terrorem* and void.<sup>10</sup> Such partial restriction, however, must not be unreasonable or of such character as to amount to a total prohibition.

Ves. Jr. 89; *Perrin v. Lyon*, 9 East 170; *Duggan v. Kelly*, 10 Ir. Eq. 295; *Hodgson v. Halford*, 11 Ch. D. 959; *Jenner v. Turner*, 29 W. R. 99; *Phillips v. Ferguson*, 85 Va. 509.

1. *Haughton v. Haughton*, 1 Molloy 611.

See also *Kennedy v. Alexander*, 21 App. Cas. (D. C.) 424, holding that where the literal effect of a conditional limitation or restriction is to cut down and defeat a pre-existing estate for life or in fee, and make it determinable upon the event of marriage, the condition or restriction is regarded as merely *in terrorem*, and therefore should not be allowed to operate a forfeiture of the estate devised or bequeathed.

2. *Bellairs v. Bellairs*, L. R. 18 Eq. 516.

3. *Conditions in General Restraint of Marriage Void*.—*Perrin v. Lyon*, 9 East 170; *Jones v. Jones*, 1 Q. B. D. 279. See also *Randall v. Marble*, 69 Me. 310; *Waters v. Tazewell*, 9 Md. 291; *Otis v. Prince*, 10 Gray (Mass.) 581; *Williams v. Cowden*, 13 Mo. 211; *Hogan v. Curtin*, 88 N. Y. 171; *Maddox v. Maddox*, 11 Gratt. (Va.) 804; *Phillips v. Ferguson*, 85 Va. 511.

If the Condition Be Precedent, a breach prevents vesting, even though the condition be in general restraint of marriage. *Phillips v. Ferguson*, 85 Va. 511.

4. *Condition in General Restraint of Marriage Imposed upon Tenant in Tail*.—*Haughton v. Haughton*, 1 Molloy 611; *Morley v. Rennoldson*, (1805) 1 Ch. 449. See *Hogan v. Curtin*, 88 N. Y. 172.

5. *Morley v. Rennoldson*, 2 Hare 570.

6. *Derivation of Rule*.—*Stackpole v. Beaumont*, 3 Ves. Jr. 96.

7. *Condition Not to Marry Particular Person*.—*Jarvis v. Duke*, 1 Vern. 19. See also *Randal v. Payne*, 1 Bro. C. C. 55; *Davis v. Angel*, 4 De G. F. & J. 524; *Finlay v. King*, 3 Pet. (U. S.) 346; *Graydon v. Graydon*, 23 N. J. Eq. 230.

*Conditions Not to Marry a Man of a Particular Religion or Nationality* fall within the same class. *Perrin v. Lyon*, 9 East 170; *Duggan v. Kelly*, 10 Ir. Eq. 295; *Hodgson v. Halford*, 11 Ch. D. 959.

*English Rule One Merely of Construction*.—*Bellairs v. Bellairs*, L. R. 18 Eq. 516.

8. *Condition Not to Marry under Certain Age*.—*Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Younge v. Furse*, 8 De G. M. & G. 756. See also *Shackelford v. Hall*, 19 Ill. 212.

9. *Condition Not to Marry Without Consent*.—*Scott v. Tyler*, 2 Bro. C. C. 488; *Sutton v. Fewke*, 2 Ch. Rep. 95; *Ashton v. Ashton*, Prec. Ch. 226; *Chauncy v. Graydon*, 2 Atk. 616; *Hemmings v. Munkley*, 1 Bro. C. C. 303; *Creagh v. Wilson*, 2 Vern. 573; *Dashwood v. Bulkeley*, 10 Ves. Jr. 230; *Cleaver v. Spurling*, 2 P. Wms. 526; *Charlton v. Coombes*, 11 W. R. 1038; *Tricker v. Kingsbury*, 7 W. R. 652. See also *Collier v. Slaughter*, 20 Ala. 263; *Gough v. Manning*, 26 Md. 347; *Hogan v. Curtin*, 88 N. Y. 171.

10. *Gift Over Essential*.—*Marples v. Bainbridge*, 1 Madd. 589; *Wheeler v. Bingham*, 1 Wils. C. Pl. 135; *Reynish v. Martin*, 3 Atk. 330; *Stackpole v. Beaumont*, 3 Ves. Jr. 89;



Thus, conditions not to marry a man of a particular profession, or not seized of an estate in fee, have been held void.<sup>1</sup>

**Conditions Precedent.** — With regard to conditions precedent, it has been held that a bequest to A if he marries B only takes effect in that event, and the fact that he married C in the testator's lifetime, and with his approval, is immaterial.<sup>2</sup> A condition precedent requiring consent to marriage generally, without limitation of age, is good, if there is a gift over;<sup>3</sup> but if not, it is considered *in terrorem* merely and void.<sup>4</sup> A condition precedent in partial restraint of marriage, as not to marry under a certain age, or requiring consent to marriage if under a certain age, is good, even though there is no gift over.<sup>5</sup> The doctrine may be evaded by expressing the restriction in the form of a limitation, it being presumed in such case that the intention is to provide for the person while he remains unmarried and not to prevent him from marrying again,<sup>6</sup> and a gift over is not required to make the restriction in this form effectual.<sup>7</sup>

(3) *Legacies Charged on Land.* — The validity of conditions in restraint of marriage, annexed to legacies charged on land, is governed by the rules applicable to real estate.<sup>8</sup>

(4) *Legacies Charged on Proceeds of Converted Land.* — The validity of conditions annexed to legacies charged upon the proceeds of converted lands,<sup>9</sup> or upon mixed funds arising from the proceeds of the sale of realty and personalty, is governed by the rules applicable to personalty,<sup>10</sup> unless in the case of a legacy charged upon both real and personal property the personalty is exhausted, in which case the validity of the condition is governed by the rules

Shackelford v. Hall, 19 Ill. 212; Gough v. Manning, 26 Md. 347; Hogan v. Curtin, 88 N. Y. 171.

1. **Partial Restrictions Must Be Reasonable.** — Keily v. Monk, 3 Ridg. P. C. 245; 1 Eq. Cas. Abr. 110, pl. 1, note.

2. Davis v. Angel, 4 De G. F. & J. 524. But see Smith v. Cowdery, 2 Sim. & St. 358.

**When Consent in Testator's Life Satisfies Condition.** — "But where the condition is marriage with consent, whether precedent or subsequent, the consent of the testator to a marriage in his lifetime satisfies the condition. Parnell v. Lyon, 1 Ves. & B. 479; Wheeler v. Warner, 1 Sim. & St. 304; Clarke v. Berkeley, 2 Vern. 720; Tweedale v. Tweedale, 7 Ch. D. 633. See Violet v. Brookman, 5 W. R. 342.

"And the condition does not apply to a subsequent marriage. Hutcheson v. Hammond, 3 Bro. C. C. 128; Crommelin v. Crommelin, 3 Ves. Jr. 227.

"But in such a case the consent of a testator to a marriage to take place after his death does not obviate the necessity for the consent of the persons named in the will. Lowry v. Patterson, 1r. R. 8 Eq. 372.

"And where the gift is till marriage the consent of the testator to a marriage does not extend the gift. Bullock v. Bennett, 7 De G. M. & G. 283. See also Cooper v. Cooper, 6 Ir. Ch. 217." Theobald on Wills (2d ed.) 456.

3. **Condition Requiring Consent to Marriage Generally.** — Malcolm v. O'Callaghan, 2 Madd. 347; Gardiner v. Slater, 25 Beav. 509; Gough v. Manning, 26 Md. 347. But see 1 Story Eq. Jur., § 290; Phillips v. Ferguson, 85 Va. 512.

A Gift to a Son in Any Event with a larger gift in the event of his marrying with consent is valid. *In re Nourse*, (1899) 1 Ch. 63, 79 L.

T. N. S. 376. See also Stark v. Conde, 100 Wis. 633; Howe v. Gregg, 52 S. Car. 88; Newell v. Hancock, 67 N. H. 244; Madigan v. Burns, 67 N. H. 319.

4. **Gift Over Essential.** — Reynish v. Martin, 3 Atk. 330; Reves v. Herne, 5 Vin. Abr. 344; Gough v. Manning, 26 Md. 347. See 1 Story Eq. Jur., § 290; Clarke v. Parker, 19 Ves. Jr. 1; Phillips v. Ferguson, 85 Va. 512.

5. **Condition Precedent in Partial Restraint of Marriage.** — Stackpole v. Beaumont, 3 Ves. Jr. 89; Younge v. Furse, 8 De G. M. & G. 756; Phillips v. Ferguson, 85 Va. 512.

In England it was held in an early case that where a personal legacy is given to a child on condition of her marrying with consent, this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem*. Reynish v. Martin, 3 Atk. 331.

6. **Restriction Expressed in Form of Limitation.** — Morley v. Rennoldson, 2 Hare 580; Potter v. Richards, 24 L. J. Ch. 488; Heath v. Lewis, 3 De G. M. & G. 954. See also Webb v. Grace, 2 Phil. 701; Evans v. Rosser, 2 Hem. & M. 190; Bullock v. Bennett, 7 De G. M. & G. 283; Morgan v. Morgan, 41 N. J. Eq. 235; Bruch's Estate, 185 Pa. St. 194; Selden v. Keen, 27 Gratt. (Va.) 576.

7. Heath v. Lewis, 3 De G. M. & G. 954.

8. **Legacies Charged on Land.** — Stackpole v. Beaumont, 3 Ves. Jr. 89; Bellairs v. Bellairs, L. R. 18 Eq. 516; Reynish v. Martin, 3 Atk. 331; Smythe v. Smythe, 90 Va. 638.

9. **Legacies Charged on Proceeds of Converted Lands.** — Bellairs v. Bellairs, L. R. 18 Eq. 510; Matter of Hart, 3 De G. & J. 195.

10. **Legacies Charged upon Mixed Funds.** — Lloyd v. Lloyd, 2 Sim. N. S. 266; Bellairs v. Bellairs, L. R. 18 Eq. 510; *Re Hamilton*, 1 Ont. L. Rep. 10.

applicable to realty.<sup>1</sup>

(5) *Restraints upon Second Marriage*. — Conditions restraining a widow from second marriage constituted an exception to the rule of the civil law,<sup>2</sup> and consequently they are valid in respect to personal property, if there is a gift over; and in respect to real property, they are valid either with or without a gift over.<sup>3</sup> In some cases the doctrine just set forth has been extended to the remarriage of widowers.<sup>4</sup>

(6) *Performance and Waiver*. — Where there is a gift upon marriage with consent, the legatee has her whole life to perform the condition, and the legacy is not forfeited by first marriage without consent,<sup>5</sup> unless the will contains an express provision for her in such event.<sup>6</sup> If the condition require the consent of several persons, who are executors or trustees, the consent of those who renounce is unnecessary,<sup>7</sup> unless the executor who renounces is the sole executor.<sup>8</sup> So a condition requiring the consent of several persons is performed by obtaining the consent of the survivors.<sup>9</sup> Subsequent approbation by the executors of a marriage without consent is not a performance of the condition.<sup>10</sup> The condition does not apply to a second marriage.<sup>11</sup>

1. *Hogan v. Curtin*, 88 N. Y. 173.

2. 2 Jarm. on Wills (5th ed.) 44. See also the title CONDITIONS, vol. 6, p. 514.

3. **Validity of Restraints upon Second Marriage — England.** — *Jones v. Rowland*, 86 L. T. N. S. 78; *Evans v. Rosser*, 2 Hem. & M. 190; *Newton v. Marsden*, 2 Johns. & H. 356; *Allen v. Jackson*, 1 Ch. D. 399.

*United States.* — *Giles v. Little*, 104 U. S. 295.

*Alabama.* — *Vaughn v. Lovejoy*, 34 Ala. 437.

*Connecticut.* — *Chappel v. Avery*, 6 Conn. 31; *Phillips v. Medbury*, 7 Conn. 568; *Bennett v. Packer*, 70 Conn. 357; *Chapin v. Cooke*, 73 Conn. 72.

*Georgia.* — *Snider v. Newsom*, 24 Ga. 139.

*Iowa.* — *Shaw v. Shaw*, 115 Iowa 193.

*Kentucky.* — *Vance v. Campbell*, 1 Dana (Ky.) 230; *Collins v. Burge*, (Ky. 1898) 47 S. W. Rep. 444; *Chenault v. Scott*, (Ky. 1902) 66 S. W. Rep. 759.

*Maine.* — *Randall v. Marble*, 69 Me. 310; *Nash v. Simpson*, 78 Me. 142.

*Maryland.* — *Gough v. Manning*, 26 Md. 347; *Clark v. Tennison*, 33 Md. 85; *Bostick v. Blades*, 59 Md. 231; *O'Neale v. Ward*, 3 Har. & M. (Md.) 93. But see *Binnerman v. Weaver*, 8 Md. 517.

*Massachusetts.* — *Bates v. Webb*, 8 Mass. 458; *Knight v. Mahoney*, 152 Mass. 525.

*Mississippi.* — *Pringle v. Dunkley*, 22 Miss. 16.

*Missouri.* — *Walsh v. Mathews*, 11 Mo. 131; *Dumey v. Schoeffler*, 24 Mo. 170; *Dumey v. Sasse*, 24 Mo. 177; *Boyer v. Allen*, 76 Mo. 498; *Gaven v. Allen*, 100 Mo. 297.

*Nebraska.* — *Little v. Giles*, 25 Neb. 320.

*New York.* — *Chapin v. Marvin*, 12 Wend. (N. Y.) 538.

*North Carolina.* — *McKrow v. Painter*, 89 N. Car. 437.

*Ohio.* — *Luigart v. Ripley*, 19 Ohio St. 24.

*Pennsylvania.* — *McIlvaine v. Gethen*, 3 Whart. (Pa.) 575; *Lancaster v. Flowers*, 9 Pa. Dist. 241; *Kromer's Estate*, 22 Pa. Co. Ct. 327; *Cornell v. Lovett*, 35 Pa. St. 100; *Redding v. Rice*, 171 Pa. St. 301.

*Tennessee.* — *Hughes v. Boyd*, 2 Sneed

(Tenn.) 512; *Duncan v. Philips*, 3 Head (Tenn.) 415; *Lane v. Crutchfield*, 3 Head (Tenn.) 452; *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31; *Herd v. Catron*, 97 Tenn. 662; *Overton v. Lea*, 108 Tenn. 505; *Wooten v. House*, (Tenn. Ch. 1895) 36 S. W. Rep. 932.

*Texas.* — *Little v. Birdwell*, 21 Tex. 597.

*Vermont.* — *McCloskey v. Gleason*, 56 Vt. 264.

*Virginia.* — *Selden v. Keen*, 27 Gratt. (Va.) 576.

In *Indiana* it is expressly provided by statute that a devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void. But the statute does not apply to a mere limitation. *Stilwell v. Knapper*, 69 Ind. 562; *Coon v. Bean*, 69 Ind. 474; *Hibbits v. Jack*, 97 Ind. 570; *Levengood v. Hoople*, 124 Ind. 28.

4. **Restraints upon Remarriage of Widowers.** — *Allen v. Jackson*, 1 Ch. D. 399. *Contra*, *Waters v. Tazewell*, 9 Md. 292.

5. **Time of Performance of Condition of Marriage with Consent.** — *Randal v. Payne*, 1 Bro. C. C. 55; *Beaumont v. Squire*, 17 Q. B. 905, 79 E. C. L. 905. But see *Clifford v. Beaumont*, 4 Russ. 325; *Duddy v. Gresham*, L. R. 2 Ir. 443; *Hogan v. Curtin*, 88 N. Y. 163.

6. *Lowe v. Manners*, 5 B. & Ald. 917, 7 E. C. L. 301.

7. **Consent of Acting Executors or Trustees Only Necessary.** — *Worthington v. Evans*, 1 Sim. & St. 165; *Ewens v. Addison*, 4 Jur. N. S. 1034; *Boyce v. Corbally*, L. & G. t. Plunk. 102; *White v. M'Dermot*, Ir. 7 C. L. 1. See *Clarke v. Parker*, 19 Ves. Jr. 1.

8. *Graydon v. Hicks*, 2 Atk. 16.

9. **Consent of Survivors Sufficient.** — *Ewing v. Anderson*, 7 W. R. 23; *Dawson v. Oliver-Massey*, 2 Ch. D. 753. See further *Graydon v. Hicks*, 2 Atk. 18; *Peyton v. Bury*, 2 P. Wms. 626; *Aislabie v. Rice*, 3 Madd. 256; *Collett v. Collett*, 12 Jur. N. S. 180.

10. **Subsequent Approbation Not Sufficient.** — *Long v. Ricketts*, 2 Sim. & St. 179; *Reynish v. Martin*, 3 Atk. 331; *Clarke v. Parker*, 19 Ves. Jr. 21. See also *Burleton v. Humphrey*, Amb. 256; *Malcolm v. O'Callaghan*, 2 Madd. 347.

11. **Second Marriage Not Included in Condition.**



The consent of the testator to a marriage in his lifetime satisfies the condition,<sup>1</sup> but his consent to a marriage to take place after his death does not obviate the necessity for the consent of the persons named in the will.<sup>2</sup> A gift till marriage fails if the legatee marries in testator's lifetime, even with his consent.<sup>3</sup>

*f.* **CONDITION NOT TO CONTEST WILL.** — A condition not to contest the will is valid as regards realty, with or without a gift over upon breach.<sup>4</sup> As regards personalty, it is valid if there is a gift over; if not, it is considered *in terrorem* and void.<sup>5</sup>

*g.* **CONDITION THAT LEGATEE ASSUME TESTATOR'S NAME.** — A condition that the legatee assume the testator's name is valid,<sup>6</sup> and the legatee need not change his name by act of assembly.<sup>7</sup>

*h.* **CONDITION AS TO RESIDENCE OF DEVISEE.** — The weight of authority sustains the validity of a condition requiring the devisee to reside on the premises.<sup>8</sup>

*i.* **REPUGNANT CONDITIONS.** — Conditions repugnant to the nature of the estate or interest previously given are void, such as a total restraint upon alienation after a fee simple in realty,<sup>9</sup> or an absolute interest in

— *Hutcheson v. Hammond*, 3 Bro. C. C. 128; *Crommelin v. Crommelin*, 3 Ves. Jr. 227.

**1. Consent of Testator to Marriage in His Lifetime Sufficient.** — *Clarke v. Berkeley*, 2 Vern. 720.

Otherwise of a condition that the legatee marry a particular person. *Davis v. Angel*, 31 Beav. 223, 4 De G. F. & J. 524; *Smith v. Cowdery*, 2 Sim. & St. 358.

**2.** *Lowry v. Patterson*, Ir. R. 8 Eq. 372.

**3.** *Bullock v. Bennett*, 7 De G. M. & G. 283. See *Cooper v. Cooper*, 6 Ir. Ch. 217.

**4. Condition Not to Contest Will — Realty.** — *Cooke v. Turner*, 15 M. & W. 727; *Bradford v. Bradford*, 19 Ohio St. 546; *Thompson v. Gaut*, 14 Lea (Tenn.) 310. But see *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 12; *Hoit v. Hoit*, 42 N. J. Eq. 388. See also the title **CONDITIONS**, vol. 6, p. 512.

**5. Condition Not to Contest Will — Personalty.** — *Morris v. Burroughs*, 1 Atk. 399; *Powell v. Morgan*, 2 Vern. 90; *Cleaver v. Spurling*, 2 P. Wms. 528; *Cage v. Russel*, 2 Vent. 352; *Loyd v. Spillet*, 3 P. Wms. 344; *Stevenson v. Abington*, 11 W. R. 935; *Donegan v. Wade*, 70 Ala. 501; *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 12; *Fifield v. Van Wyck*, 94 Va. 557. See also *Chew's Appeal*, 45 Pa. St. 232. And compare *Bradford v. Bradford*, 19 Ohio St. 546; *Thompson v. Gaut*, 14 Lea (Tenn.) 315.

**One Who Aids and Advises in a suit instituted by another forfeits his interests under such a condition.** *Donegan v. Wade*, 70 Ala. 501.

**6. Assumption of Testator's Name.** — *In re Greenwood*, (1902) 2 Ch. 198, 86 L. T. N. S. 500; *Anonymous*, 1 Dall. (Pa.) 20; *Taylor v. Mason*, 9 Wheat. (U. S.) 328; *Webster v. Cooper*, 14 How. (U. S.) 500; *Smith v. Smith*, 64 Neb. 563. See also *Halsey v. Goddard*, 86 Fed. Rep. 25.

**7. Change of Name by Act of Legislature Not Essential.** — *Davies v. Lowndes*, 1 Bing. N. Cas. 597, 27 E. C. L. 504.

**8. Condition as to Residence on Premises.** — *Dale v. Atkinson*, 3 Jur. N. S. 41; *Woods v. Townley*, 11 Hare 314; *Lowe v. Cloud*, 45 Ga. 481; *Irvine v. Irvine*, (Ky. 1891) 15 S. W. Rep. 511; *Marston v. Marston*, 47 Me. 495.

But see *Newkerk v. Newkerk*, 2 Cai. (N. Y.) 345; *Pardue v. Givens*, 1 Jones Eq. (54 N. Car.) 306; *Harrison v. Foote*, 9 Tex. Civ. App. 576; *Keeler v. Keeler*, 39 Vt. 550.

**Such Conditions Must Be Expressed with Clearness**, so as to avoid uncertainty. *Fillingham v. Bromley*, T. & R. 530; *Clavering v. Ellison*, 3 Drew. 451, 7 H. L. Cas. 707; *Shuman v. Heldman*, 63 S. Car. 474. See also *Matter of Woods*, (Surrogate Ct.) 33 Misc. (N. Y.) 12.

**Sufficient Performance of Condition.** — *Walcot v. Botfield*, Kay 550; *Astley v. Essex*, L. R. 18 Eq. 295; *Doe v. Steward*, 1 Ad. & El. 300, 28 E. C. L. 89; *Doe v. Hawke*, 2 East 481; *Sutcliffe v. Richardson*, L. R. 13 Eq. 606; *Partridge v. Partridge*, (1894) 1 Ch. 351; *Jenkins v. Merritt*, 17 Fla. 304; *Irvine v. Irvine*, (Ky. 1891) 15 S. W. Rep. 511; *Jenkins v. Horwitz*, 92 Md. 34; *Barnett v. Dickinson*, 93 Md. 258; *Casper v. Walker*, 33 N. J. Eq. 35; *Harrison v. Foote*, 9 Tex. Civ. App. 576.

**A Condition that a Married Woman Should Not Reside at S.**, where her husband lived, was held void, as obliging her to live separate. *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604. See *Born v. Horstmann*, 80 Cal. 452; *Conrad v. Long*, 33 Mich. 78.

**9. Total Restraint on Alienation After Fee Simple.** — *Litt. 222 b*, § 630.

*England.* — *Hood v. Oglander*, 34 Beav. 513. *United States.* — *Stanley v. Colt*, 5 Wall. (U. S.) 119.

*Georgia.* — *Doe v. Roe*, 30 Ga. 453; *Freeman v. Phillips*, 113 Ga. 589; *Crumpler v. Barfield*, etc., Co., 114 Ga. 570.

*Illinois.* — *Muhlke v. Tiedemann*, 177 Ill. 606. *Maine.* — *Deering v. Tucker*, 55 Me. 284.

*Maryland.* — *Smith v. Clark*, 10 Md. 186.

*Massachusetts.* — *Gleason v. Fayerweather*, 4 Gray (Mass.) 348; *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 42.

*Michigan.* — *Bennett v. Chapin*, 77 Mich. 527. *New Jersey.* — *Feit v. Richards*, 64 N. J. Eq. 16.

*New York.* — *Oxley v. Lane*, 35 N. Y. 346.

*North Carolina.* — *Newland v. Newland*, 1 Jones L. (46 N. Car.) 463.

*Pennsylvania.* — *McCullough v. Gilmore*, 11



personalty,<sup>1</sup> or a condition that the tenant in tail shall not marry<sup>2</sup> or shall not bar the entail.<sup>3</sup> Upon the same principle a gift over, if the devisee or legatee does not dispose of his interest, or dies intestate, has been held void both as regards realty and personalty.<sup>4</sup> But a gift over in the event of a previous gift being void at law or in equity is good.<sup>5</sup> A life interest, subject to a conditional limitation over on bankruptcy, insolvency, or alienation, may be sustained, although one cannot be permitted to retain property exempt from the claims of creditors.<sup>6</sup>

Pa. St. 370; *Yard's Appeal*, 64 Pa. St. 95; *Kaufman v. Burgert*, 195 Pa. St. 274.

*South Carolina*.—*Moore v. Sanders*, 15 S. Car. 440.

*Compare* *Cross v. Robinson*, 21 Conn. 379. See also the title **CONDITIONS**, vol. 6, p. 504.

**A Restriction of an Estate in Fee for a Limited Time**, whether by way of condition or of devise over or against alienation, is likewise void, as repugnant to the estate devised to the first taken, by depriving him during that time of the inherent power of alienation. *Smith v. Kenny*, 89 Ill. App. 293; *Becker v. Becker*, 206 Ill. 53; *Jones v. Port Huron Engine, etc., Co.*, 171 Ill. 502; *Feit v. Richards*, 64 N. J. Eq. 16; *Overton v. Lea*, 108 Tenn. 505; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586; *Zillmer v. Landguth*, 94 Wis. 607. But see *Wallace v. Smith*, 113 Ky. 263.

**Qualities Inseparable from an Estate Previously Given**, as alienability from a fee, may define the estate given and show that what might be a fee was intended to be a less estate. *Sheets's Estate*, 52 Pa. St. 257; *Urich v. Merkel*, 81 Pa. St. 332.

**When an Estate for Life Is Devised** without any qualification or limitation, any restriction upon the power of alienation is repugnant to the estate vested and absolutely void. *Hunt v. Hawes*, 181 Ill. 343.

**Conditions Restraining Petitioning** are void. *Wuest v. Wuest*, 11 Ohio Dec. 147, 8 Ohio N. P. 298.

**Partial Restrictions**.—"But a limited restriction upon alienation is good. Thus, a condition not to sell except to a certain class of persons is good. *Litt. 223a*, § 361; *Doe v. Pearson*, 6 East 173; *In re Macleay*, L. R. 20 Eq. 186. See *Ludlow v. Bunbury*, 35 Beav. 36; *Billing v. Welch*, Ir. R. 6 C. L. 88.

"But a condition not to sell except to one person is bad, since a person might be selected who would be certain not to purchase. *Knight v. Bluet*, J. Bridg. 137; *Attwater v. Attwater*, 18 Beav. 330.

"In the same way, conditions restraining alienation by any particular form of conveyance, as by charge or mortgage, are bad. *Willis v. Hiscox*, 4 Myl. & C. 201; *Ware v. Cann*, 10 B. & C. 433, 21 E. C. L. 104.

"Thus a gift over of so much land as an absolute owner charges or incumbers would be bad. *Willis v. Hiscox*, 4 Myl. & C. 201.

"Directions that the rents upon property devised are not to be raised have been held invalid. *Atty.-Gen. v. Catharine Hall*, Jac. 395; *Atty.-Gen. v. Greenhill*, 33 Beav. 193.

"And a gift over upon alienation by a tenant for life, with a power of disposition by deed or will, is invalid. *In re Wolstenhome*, 43 L. T. N. S. 752.

"A restraint upon alienation limited in time, not followed by a gift over, is ineffectual. *Renaud v. Tourangeau*, L. R. 2 P. C. 4.

"Possibly a gift over upon alienation before a certain time, not having reference to the period of possession, would be valid. See *Large's Case*, 2 Leon. 82; 2 Jarm. on Wills 17; *Churchill v. Marks*, 1 Coll. Ch. Cas. 445; *Kiallmark v. Kiallmark*, 26 L. J. Ch. 1.

"It is, however, clear that absolute interests may be given over upon alienation before the period of possession. *Kearsley v. Woodcock*, 3 Hare 185; *In re Payne*, 25 Beav. 556; *Pearson v. Dolman*, L. R. 3 Eq. 315.

"These rules apply to personalty, so that if an absolute interest is given, a gift over, if the legatee disposes of his interest, is void. *Bradley v. Peixoto*, 3 Ves. Jr. 324; *In re Jones*, 23 L. T. N. S. 211." *Theobald on Wills* (2d ed.) 459.

See also the following cases: *Langdon v. Ingram*, 28 Ind. 360; *Stewart v. Barrow*, 7 Bush (Ky.) 368; *Simonds v. Simonds*, 3 Met. (Mass.) 562; *Claffin v. Claffin*, 149 Mass. 19; *Mandlebaum v. McDonell*, 29 Mich. 78; *Bennett v. Chapin*, 77 Mich. 527; *Jackson v. Schutz*, 18 Johns. (N. Y.) 184; *Oxley v. Lane*, 35 N. Y. 346; *Anderson v. Cary*, 36 Ohio St. 506; *M'Williams v. Nisly*, 2 S. & R. (Pa.) 513; *Overton v. Lea*, 108 Tenn. 505; *Fowlkes v. Wagoner*, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

**1. After Absolute Interest in Personalty**.—*Bradley v. Peixoto*, 3 Ves. Jr. 324; *In re Jones*, 23 L. T. N. S. 211.

**2. Condition that Tenant in Tail Shall Not Marry**.—*Arundel's Case*, 3 Dyer 342b.

**3. Condition that Tenant in Tail Shall Not Bar Entail**.—*Dawkins v. Penrhyn*, 4 App. Cas. 51; *Yard's Appeal*, 64 Pa. St. 95. See also the titles **REMAINDERS**, **REVERSIONS**, AND **EXECUTORY INTERESTS**, vol. 24, p. 444; **RESTRAINTS ON ALIENATION**, vol. 24, p. 863.

**4. Gift Over upon Failure to Dispose of Interest**.—*Moore v. Sanders*, 15 S. Car. 440. See also *Friedman v. Steiner*, 107 Ill. 125; *Jones v. Bacon*, 68 Me. 34; *Karker's Appeal*, 60 Pa. St. 141. And see the title **REMAINDERS**, **REVERSIONS**, AND **EXECUTORY INTERESTS**, vol. 24, p. 445.

**5. Gift Over in Event of Previous Gift Being Void**.—*De Themmines v. De Bonneval*, 5 Russ. 288.

**6. Conditional Limitation Over on Bankruptcy, Insolvency, or Alienation**.—*Rochford v. Hackman*, 9 Hare 475; *Brooke v. Pearson*, 5 Jur. N. S. 781; *Knight v. Browne*, 7 Jur. N. S. 894; *Brandon v. Robinson*, 18 Ves. Jr. 433; *Freeman v. Bowen*, 35 Beav. 17; *Re Muggeridge*, Johns. Ch. (Eng.) 625; *De Tastet v. Le Tavernier*, 1 Keen 161; *Billson v. Crofts*, L. R. 15 Eq. 314; *Nichols v. Eaton*, 91 U. S. 716; *Blackstone*

**19. Survivorship** — *a.* WORDS OF SURVIVORSHIP — TO WHAT PERIOD REFERRED — (1) *Immediate Gift*. — Where the gift is to take effect in possession immediately upon the testator's decease, words of survivorship are regarded as intended to provide against the death of the objects of the gift in the lifetime of a testator, and *prima facie* refer to his death.<sup>1</sup>

(2) *Gift After Precedent Interest* — (a) **Words Referred to Death of Testator**. — Early cases in *England* extended the rule just laid down to cases in which the gift was to take effect after a preceding limitation,<sup>2</sup> and the same doctrine has been upheld in many jurisdictions in the *United States*.<sup>3</sup> But other cases, while recognizing the authority of the decisions just cited, refuse to follow them, and under the pretext of finding a different intention on the part of the testator, reach a decision more in accordance with principle and authority.<sup>4</sup>

*Bank v. Davis*, 21 Pick. (Mass.) 42; *Pace v. Pace*, 73 N. Car. 119; *Keyser's Appeal*, 57 Pa. St. 236. See also the title **CONDITIONS**, vol. 6, p. 515.

**Insolvency** has no technical meaning, but means inability to pay debts. See the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 636. See also *De Tastet v. Le Tavernier*, 1 Keen 161; *Billson v. Crofts*, L. R. 15 Eq. 314; *Freeman v. Bowen*, 35 Beav. 17; *Re Muggeridge*, Johns. Ch. (Eng.) 625.

**Alienation** means voluntary alienation, and the gift over does not take effect on hostile bankruptcy. *Lear v. Leggett*, 1 Russ. & M. 690; *Pym v. Lockyer*, 12 Sim. 394; *Graham v. Lee*, 23 Beav. 388. But see *Cooper v. Wyatt*, 5 Madd. 482; *Roffey v. Bent*, L. R. 3 Eq. 759; *Ex p. Eyston*, 7 Ch. D. 145. See also the title **ALIENATE, ALIENATION, ETC.**, vol. 2, p. 60.

**Spendthrift Trusts**. — See the title **SPENDTHRIFTS AND SPENDTHRIFT TRUSTS**, vol. 26, p. 137. See also *Easterly v. Keney*, 36 Conn. 18; *Williams v. Thorn*, 70 N. Y. 270; *Rife v. Geyer*, 59 Pa. St. 393; *Huber's Appeal*, 80 Pa. St. 348; *Nickell v. Handly*, 10 Gratt. (Va.) 336.

**1. Death of Testator** — *England*. — *Bindon v. Suffolk*, 1 P. Wms. 96; *Bass v. Russell*, Tamlyn 18; *Clarke v. Lubbock*, 1 Y. & C. Ch. 492; *Smith v. Horlock*, 7 Taunt. 129, 2 E. C. L. 129; *Ashford v. Haines*, 21 L. J. Ch. 496; *Lill v. Lill*, 23 Beav. 446. See also *Roebuck v. Dean*, 2 Ves. Jr. 265; *Russell v. Long*, 4 Ves. Jr. 554. And compare *Barker v. Giles*, 2 P. Wms. 280; *Blisset v. Cranwell*, 1 Salk. 226; *Doe v. Abey*, 1 M. & S. 428.

*Kentucky*. — *Carpenter v. Hazelrigg*, 103 Ky. 538.

*Michigan*. — *Eberts v. Eberts*, 42 Mich. 404. *New Jersey*. — *Prendergast v. Walsh*, 58 N. J. Eq. 149.

*New York*. — *Willets v. Willets*, 35 Hun (N. Y.) 401; *In re Herrick*, (Surrogate Ct.) 12 N. Y. Supp. 105. See also *Davis v. Davis*, 118 N. Y. 411.

*North Carolina*. — *Cox v. Hogg*, 2 Dev. Eq. (17 N. Car.) 121.

*South Carolina*. — *Hamilton v. Boyles*, 1 Brev. (S. Car.) 414.

In *Brimmer v. Sohier*, 1 Cush. (Mass.) 118, it was held that where a testator, by a residuary clause, devised the residue of his real and personal property "to the survivors of his brothers and sisters," designating them, this was a devise of an estate in common to all the devisees who should survive the testator, with the right of possession immediately after his

decease, and not a devise upon a contingency to the two out of the three persons named who might survive the third.

On the other hand, a devise to "the surviving children of my sister A, not knowing all their names," was referred to the date of the will. *Morse v. Mason*, 11 Allen (Mass.) 36. See also *supra*, this section, *Period Referred to* — *Words Importing Death*.

**2. Early Rule in England**. — *Stringer v. Phillips*, 1 Eq. Cas. Abr. 293, par. 11; *Rose v. Hill*, 3 Burr. 1881; *Wilson v. Bayly*, 3 Bro. P. C. (Toml. ed.) 195; *Roebuck v. Dean*, 2 Ves. Jr. 265; *Perry v. Woods*, 3 Ves. Jr. 204; *Maberly v. Strode*, 3 Ves. Jr. 450; *Brown v. Bigg*, 7 Ves. Jr. 279; *Garland v. Thomas*, 1 B. & P. N. R. 82; *Edwards v. Symonds*, 6 Taunt. 213, 1 E. C. L. 361; *Doe v. Prigg*, 8 B. & C. 231, 15 E. C. L. 206.

In *Russell v. Long*, 4 Ves. Jr. 551, the opinion was intimated that words of survivorship might be referred to the death of the tenant for life.

**3. Jurisdictions Following Early English Doctrine** — *Georgia*. — *Vickers v. Stone*, 4 Ga. 462; *Clanton v. Estes*, 77 Ga. 352.

*Illinois*. — *Hempstead v. Dickson*, 20 Ill. 193. But see *Illinois* cases cited *infra*.

*Indiana*. — *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 498; *Burke v. Barrett*, 31 Ind. App. 635.

*Maryland*. — See *Branson v. Hill*, 31 Md. 188.

*Michigan*. — *Eberts v. Eberts*, 42 Mich. 404; *Rood v. Hovey*, 50 Mich. 395; *Porter v. Porter*, 50 Mich. 456.

*New York*. — *Matter of Mahan*, 32 Hun (N. Y.) 73; *Mowatt v. Carow*, 7 Paige (N. Y.) 328; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Embury v. Sheldon*, 68 N. Y. 227; *Stevenson v. Lesley*, 70 N. Y. 515. *Contra*, *Teed v. Morton*, 60 N. Y. 506. See also *Byrnes v. Stillwell*, 103 N. Y. 453; *Simonson v. Waller*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 95.

*Pennsylvania*. — *Johnson v. Morton*, 10 Pa. St. 245; *Passmore's Appeal*, 23 Pa. St. 381; *Ross v. Drake*, 37 Pa. St. 376; *Hubbert's Estate*, 6 Pa. Dist. 96; *Miller's Estate*, 19 Pa. Co. Ct. 129.

*Virginia*. — *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Martin v. Kirby*, 11 Gratt. (Va.) 71.

**4. Contrary Intention of Testator**. — *Branson v. Hill*, 31 Md. 181; *Kelso v. Lorrillard*, 85 N. Y. 177; *Wylie v. Lockwood*, 86 N. Y. 291; *Simonson v. Waller*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 95; *Woelpper's Appeal*, 126 Pa.

And such was the practice in England until the law was finally settled on its present firm basis.<sup>1</sup>

(b) **Words Referred to Period of Distribution.** — The later English cases have abandoned this position entirely, and have adopted the rule that whether the gift be immediate or postponed, and whether the property be real or personal, words of survivorship *prima facie* refer to the period of division. If there is no previous interest given, the period of division is the death of the testator, and survivors at his death take the whole; but if a previous life estate be given, then the period of division is the death of the life tenant, and survivors at such death take the whole.<sup>2</sup> To the same effect is the weight of authority in the *United States*.<sup>3</sup> But the object in each case is to give effect to the intention of the testator, and where the tenant for life dies in the lifetime of the testator, the death of the latter fixes the period of distribution, and those surviving at the time will take.<sup>4</sup> Where the gift is after several life estates those only are entitled who survive the last life tenant,<sup>5</sup> and where A and B are successive life tenants, and B dies before A, the death of A becomes the period of distribution.<sup>6</sup> The rule is the same where the gift, though not subsequent to a prior gift, is yet postponed in time. Thus, where the gift is to all the children of A born during the life of A or within nine months thereafter, with benefit of survivorship, those only can take who survive A and

St. 562; *Steinmetz's Estate*, 15 Montg. Co. Rep. (Pa.) 117; *Jameson v. Jameson*, 86 Va. 51.

1. **Exception to Early Rule in England.** — *Hoghton v. Whitgreave*, 1 Jac. & W. 146; *Wordsworth v. Wood*, 2 Beav. 25, 1 H. L. Cas. 129; *Brograve v. Winder*, 2 Ves. Jr. 634; *Daniell v. Daniell*, 6 Ves. Jr. 297; *Gibbs v. Tait*, 8 Sim. 132; *Newton v. Ayscough*, 19 Ves. Jr. 534.

2. **Modern Doctrine in England.** — *Taylor v. Beverley*, 1 Coll. Ch. Cas. 108; *Williams v. Tarrt*, 2 Coll. Ch. Cas. 85; *Eaton v. Barker*, 2 Coll. Ch. Cas. 124; *In re Pickworth*, (1899) 1 Ch. 642; *Young v. Davies*, 2 Drew. & Sm. 167; *Neathway v. Reed*, 3 De G. M. & G. 18; *Matter of Pritchard*, 3 Drew. 163; *Hearn v. Baker*, 2 Kay & J. 383; *Pope v. Whitcombe*, 3 Russ. 124; *Buckle v. Fawcett*, 4 Hare 536; *Young v. Robertson*, 4 Macq. H. L. Cas. 314; *Cripps v. Wolcott*, 4 Madd. 12; *Vorley v. Richardson*, 8 De G. M. & G. 126; *Whiton v. Field*, 9 Beav. 368; *Blewitt v. Roberts*, 10 Sim. 491; *Huffam v. Hubbard*, 16 Beav. 579; *Hesketh v. Magennis*, 27 Beav. 395; *Thompson v. Thompson*, 29 Beav. 654; *Naylor v. Robson*, 34 Beav. 571; *Re Soules*, 30 Ont. 140.

3. **Prevailing Rule in United States** — *California*. — *Matter of Winter*, 114 Cal. 186.

*Illinois*. — *Ridgeway v. Underwood*, 67 Ill. 419; *Blatchford v. Newberry*, 99 Ill. 11. See also *Nicoll v. Scott*, 99 Ill. 529; *Cheney v. Teese*, 108 Ill. 482. *Contra*, *Arnold v. Alden*, 173 Ill. 229, not citing previous cases.

*Kentucky*. — *Wren v. Hynes*, 2 Met. (Ky.) 130; *Hughes v. Hughes*, 12 B. Mon. (Ky.) 116.

*Massachusetts*. — *Olney v. Hull*, 21 Pick. (Mass.) 311; *Denny v. Kettell*, 135 Mass. 138; *Coveny v. McLaughlin*, 148 Mass. 576; *Lawrence v. Phillips*, (Mass. 1904) 71 N. E. Rep. 541. See also *Hurlburt v. Emerson*, 16 Mass. 241.

*New Hampshire*. — *Hill v. Rockingham Bank*, 45 N. H. 270; *O'Brien v. O'Leary*, 64 N. H. 332; *Hall v. Blodgett*, 70 N. H. 437.

*New Jersey*. — *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32; *Williamson v. Chamberlain*, 10 N. J. Eq. 373; *Slack v. Bird*, 23 N. J. Eq. 240; *Holcomb v. Lake*, 24 N. J. L. 686; *Dutton v. Pugh*, 45 N. J. Eq. 426; *Ashhurst v. Potter*, 53 N. J. Eq. 608. See also *Seddel v. Wills*, 20 N. J. L. 223.

*North Carolina*. — *Biddle v. Hoyt*, 1 Jones Eq. (54 N. Car.) 159; *Vass v. Freeman*, 3 Jones Eq. (56 N. Car.) 221. See also *Hilliard v. Kearney*, Busb. Eq. (45 N. Car. 221.

*Ohio*. — *Sinton v. Boyd*, 19 Ohio St. 30.

*South Carolina*. — *Evans v. Godbold*, 6 Rich. Eq. (S. Car.) 26; *Schoppert v. Gillam*, 6 Rich. Eq. (S. Car.) 83; *Roundtree v. Roundtree*, 26 S. Car. 450; *Simpson v. Cherry*, 34 S. Car. 68; *Selman v. Robertson*, 46 S. Car. 262. See also *Cochran v. Cochran*, 3 Desaus. (S. Car.) 186. But see *Drayton v. Drayton*, 1 Desaus. (S. Car.) 324.

*Wisconsin*. — *In re Moran*, 118 Wis. 177. See also *Slingluff v. Johns*, 87 Md. 273.

**Gift in Direction to Divide.** — It is immaterial whether the only gift is in the direction for payment, or whether there is a prior gift distinct from such direction. *Hearn v. Baker*, 2 Kay & J. 383. *Contra*, *Nicoll v. Scott*, 99 Ill. 529. Compare opinion of Rigby, L. J., in *In re Pickworth*, (1899) 1 Ch. 642.

4. **Death of Life Tenant in Lifetime of Testator.** — *Spurrell v. Spurrell*, 11 Hare 54.

5. *Stevenson v. Gullan*, 18 Beav. 590.

6. **Second Life Tenant Dying First.** — *Knight v. Poole*, 32 Beav. 548; *Re Fox*, 35 Beav. 163; *Howard v. Collins*, L. R. 5 Eq. 349. See also *Sumpter v. Carter*, 115 Ga. 893. But compare *Drakeford v. Drakeford*, 33 Beav. 43, where the words were, after a life estate to the widow and then to a brother for life, "at whose death the principal to be divided amongst his surviving children." It was held that this could refer only to those living at the death of the brother, although he died before the widow.



the nine months period.<sup>1</sup>

**Rule Applicable to Realty.** — Although it was at first doubtful whether the rule was applicable to realty as well as to personality,<sup>2</sup> it was soon pointed out that such a distinction was without merit,<sup>3</sup> and it is now settled that it makes no difference whether real or personal property is involved.<sup>4</sup>

**Construction Modified by Language of Will.** — Of course, if the language of the will expressly or impliedly fixes the time to which survivorship is to be referred, the rule is excluded.<sup>5</sup> Thus, where after a gift to A and then to the surviving children of B the testator adds, "should either of said children die without issue, his or her share to be divided among the survivors," the only possible construction is to refer the words of survivorship to the death of the testator, for otherwise the added clause would be meaningless.<sup>6</sup> And the same is true where, after the gift to survivors, is added the phrase "or their heirs and assigns."<sup>7</sup>

**b. "SURVIVORS," WHEN READ "OTHERS."** — Scarcely any other word has caused so much trouble to the courts and has been so fruitful of litigation as the word "survivors." A literal construction of the word too often results in cutting off those who might naturally be expected to be recipients of the testator's bounty, but to change the word into "others" is to make a new will for the testator. At various stages of the development of the law of testamentary construction, judges have attempted to lay down rules as to when "survivors" may be read "others," but these rules have never found favor. The most recent decision of a court of last resort is to the effect that it is an absolute impossibility to lay down any general rules. "Survivors" will be taken in its literal meaning unless there is something in the context to indicate that such is not the testator's intention. What context will justify such a construction it is impossible to say in the present state of the authorities. Each case must depend on its own circumstances.<sup>8</sup> In the note below are given instances in which the courts have construed "survivors" literally, or have adopted a more liberal construction.<sup>9</sup>

**c. WHETHER ACCRUED SHARES PASS BY WORDS OF SURVIVORSHIP —**  
(1) *In General.* — Clauses disposing of the shares of the devisees and legatees dying before a given period or event, do not, without a positive and distinct indication of intention, extend to shares accruing under those clauses so as to pass them a second time. Thus, where a man gives a sum of money to be

1. **Direct Gift Postponed in Time.** — *Hodson v. Micklethwaite*, 2 Drew. 294.

2. **Doctrine Confined to Personality.** — *Doe v. Prigg*, 8 B. & C. 231, 15 E. C. L. 206. See also *Garland v. Thomas*, 1 B. & P. N. R. 82; *Edwards v. Symonds*, 6 Taunt. 213, 1 E. C. L. 361.

3. **Distinction Criticised.** — *Buckle v. Fawcett*, 4 Hare 536. See also *Wordsworth v. Wood*, 1 H. L. Cas. 129.

4. **Rule Applicable to Both Realty and Personality.** — *Matter of Gregson*, 2 De G. J. & S. 428; *In re Belfast Town Council*, L. R. 13 Ir. 169; *Selman v. Robertson*, 46 S. Car. 262. See also *Marriott v. Abell*, L. R. 7 Eq. 482.

5. **When Contrary Intention Manifest.** — *Blackmore v. Snee*, 1 De G. & J. 455; *Re Hopkins*, 2 H. & M. 411; *Rogers v. Towsey*, 9 Jur. 575; *Evans v. Evans*, 25 Beav. 81; *Drakeford v. Drakeford*, 33 Beav. 43; *Goodwin v. McDonald*, 153 Mass. 481.

6. *Evans v. Evans*, 25 Beav. 81.

7. **Addition of "or Heirs."** — *Re Hopkins*, 2 Hem. & M. 411.

**Addition of "and Their Heirs."** — *Grimmer v. Friederich*, 164 Ill. 245.

8. **No General Rule Possible.** — *Inderwick v. Tatchell*, (1901) 2 Ch. 738, affirmed (1903) A. C. 120. See *SURVIVE* — *SURVIVING* — *SURVIVOR*, vol. 27, p. 557.

9. **"Survivors" Read Literally — England.** — *Harrison v. Harrison*, (1901) 2 Ch. 136; *Ferguson v. Dunbar*, 3 Bro. C. C. 469, note; *Mann v. Thompson*, Kay 638; *Taylor v. Beverley*, 1 Coll. Ch. Cas. 108; *Ranelagh v. Ranelagh*, 2 Myl. & K. 441; *Re Rubbins*, 79 L. T. N. S. 313; *Taaffe v. Conmee*, 10 H. L. Cas. 64; *Blundell v. Chapman*, 10 Jur. N. S. 332.

*Kentucky.* — *Bayless v. Prescott*, 79 Ky. 252.

*Maryland.* — *Wilson v. Bull*, 97 Md. 128.

*Missouri.* — *Dodge v. Sherwood*, 176 Mo. 33.

*New Jersey.* — *Ashurst v. Potter*, 53 N. J. Eq. 608; *Matter of Wilcox*, 64 N. J. Eq. 322.

*Pennsylvania.* — *Hauer's Estate*, 16 Pa. Super. Ct. 257.

**"Survivors" Read "Others."** — *Holland v. Allsop*, 29 Beav. 498; *Graves v. Spurr*, 97 Ky. 651; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Bailey v. Brown*, 19 R. I. 669. See also *Winterton v. Crawford*, 1 Russ. & M. 407; *Hendricks v. Hendricks*, 177 N. Y. 402; *Dickinson v. Hoomes*, 1 Gratt. (Va.) 302.

divided among four persons as tenants in common, and declares that if one of them dies before twenty-one or marriage it shall survive to the others, if one dies and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainder but the second person's original share, for the accruing share is as a new legacy, and there is no further survivorship.<sup>1</sup>

(2) *What Language Sufficient to Pass Accrued Shares.* — It was held in an early case that the word "share" was sufficient to pass accrued shares,<sup>2</sup> but the contrary is now well established.<sup>3</sup> But it seems that "share and interest" would be enough.<sup>4</sup> A gift to several, with benefit of survivorship, has been held sufficient to pass accrued shares.<sup>5</sup> Where the will speaks of legacy and legacies, or bequest and bequests, the accrued shares will pass by these words of plurality.<sup>6</sup>

**Intention to Keep Fund Together.** — Where it appears that it was the testator's intention to keep the whole fund together as an aggregate mass, the general rule does not apply, and accrued shares will pass together with the original.<sup>7</sup>

**20. Substitution** — *a.* **DEFINITION AND OPERATION.** — Every executory limitation intended to take effect on the termination of a preceding interest is in the widest sense substitutional, and the term is so used in the civil law;<sup>8</sup> but at common law, the term "substitution" is generally applied to limitations intended to provide for the death of prior devisees or legatees before the period of distribution, or in other words, to prevent a lapse. It is in this sense that the term is used in this section. Thus, a direct gift to A, with a substi-

**1. When Accrued Shares Will Not Pass** — *England.* — *Woodward v. Glassbrook*, 2 Vern. 388; *Pain v. Benson*, 3 Atk. 78; *Rudge v. Barker*, Cas. t. Talb. 124; *Ex p. West*, 1 Bro. C. C. 575; *Crowder v. Stone*, 3 Russ. 217; *Perkins v. Micklethwaite*, 1 P. Wms. 274; *Douglas v. Andrews*, 14 Beav. 347; *Bardon v. Bardon*, 16 Ir. Ch. 415; *Cambridge v. Rous*, 25 Beav. 409.

*Kentucky.* — See *Richardson v. Young*, 108 Ky. 42.

*Maryland.* — *Hoxton v. Archer*, 3 Gill & J. (Md.) 199.

*New York.* — *Everitt v. Everitt*, 29 N. Y. 39; *Matter of Clark*, (Surrogate Ct.) 38 Misc. (N. Y.) 617. See also *Clason v. Clason*, 18 Wend. (N. Y.) 369.

*North Carolina.* — *Owen v. Owen*, Busb. Eq. (45 N. Car.) 121; *M'Kay v. Hendon*, 3 Murph. (7 N. Car.) 21.

*Pennsylvania.* — *Masden's Estate*, 4 Whart. (Pa.) 427; *Theological Seminary v. Wall*, 44 Pa. St. 353.

*South Carolina.* — *Hill v. Hill*, 1 Strobb. Eq. (S. Car.) 1; *McGee v. Hall*, 26 S. Car. 179.

*Tennessee.* — *Lewis v. Claiborne*, 5 Yerg. (Tenn.) 369; *Henley v. Robb*, 86 Tenn. 474.

*Virginia.* — *Brooke v. Croxton*, 2 Gratt. (Va.) 506; *Armistead v. Hartt*, 97 Va. 316.

In *Taylor v. Foster*, 17 Ohio St. 166, an opposite decision was reached, but the point does not appear to have been argued.

**2.** *Pain v. Benson*, 3 Atk. 78.

**3. "Share" Not Sufficient to Pass Accrued Shares.** — *Evans v. Evans*, 25 Beav. 81; *Goodwin v. Finlayson*, 25 Beav. 65; *Crowder v. Stone*, 3 Russ. 217; *Sillick v. Booth*, 1 Y. & C. Ch. 121; *Rickett v. Guillemand*, 12 Sim. 88; *Glover v. Conell*, 163 Ill. 566.

**Part — Portion.** — The rule applies where the word "part" or "portion" is used instead of share. *Bright v. Rowe*, 3 Myl. & K. 316.

**Prevention of Intestacy.** — Where the gift is of residue the court may pass the accrued shares so as to prevent an intestacy. *Goodman v. Goodman*, 1 De G. & Sm. 695. See also *Milson v. Awdry*, 5 Ves. Jr. 465.

**4.** *Douglas v. Andrews*, 14 Beav. 347.

**5. "Benefit of Survivorship."** — *Matter of Crawhall*, 8 De G. M. & G. 480.

**6. Words of Plurality Enough.** — *In re Chaston*, 18 Ch. D. 218; *Clifton v. Crawford*, 27 Ont. App. 315.

**7. Intention to Keep Fund Together.** — *Worlidge v. Churchill*, 3 Bro. C. C. 465; *Eyre v. Marsden*, 2 Keen 564, *affirmed* 4 Myl. & C. 231; *Sillick v. Booth*, 1 Y. & C. Ch. 121; *Barker v. Lea*, T. & R. 413; *Douglas v. Andrews*, 14 Beav. 347; *Duton v. Crowdy*, 33 Beav. 272; *Lombard v. Witbeck*, 173 Ill. 396; *Turner v. Withers*, 23 Md. 18; *Spruill v. Moore*, 5 Ired. Eq. (40 N. Car.) 284. See also *Doe v. Birkhead*, 4 Exch. 110.

**Gift Over of Whole Is Sufficient Evidence of Such Intention.** — *Douglas v. Andrews*, 14 Beav. 347; *Lombard v. Witbeck*, 173 Ill. 396; *Turner v. Withers*, 23 Md. 18.

**Calling Fund "Trust Money" Sufficient.** — *Worlidge v. Churchill*, 3 Bro. C. C. 465.

**"Whole" to Go to Survivor.** — Where the gift was in case of death of children, the share or shares of him, her, or them so dying to be divided among survivors and survivor of them in equal shares, if more than one, and if but one then the "whole to and for the use and benefit of such survivor," it was held that the use of the word "whole" indicated an intention to pass accrued shares. *Sillick v. Booth*, 1 Y. & C. Ch. 121. See also *Spruill v. Moore*, 5 Ired. Eq. (40 N. Car.) 284.

**8. Substitution in Civil Law.** — See *Bouv. Law Dict.*; *Black's Law Dict.*; *Green's Encyc. of Scots Law*, vol. 12, p. 34.

tutional gift to his children, goes to A if he survives the testator, and to his children if he does not.<sup>1</sup> So, if the gift be preceded by a life interest, the substitutional gift takes effect if A dies in the lifetime of the tenant for life.<sup>2</sup> If it be clear that an alternative bequest is intended to be substitutional, it will take effect notwithstanding the death of the original legatee in the lifetime of the testator.<sup>3</sup>

**b. WHAT GIFTS ARE SUBSTITUTIONAL**—(1) *In General*.—The simplest form of a substitutional gift is effected by the use of the word "or," which is usually construed as implying substitution.<sup>4</sup> But "or" may be alternative instead of substitutional, and its construction depends on the intention of the testator as gathered from the will. Thus, a bequest to the "A" society, "or some one or more kindred institutions," has been held alternative;<sup>5</sup> so, a gift to A or B, as C shall appoint, is not substitutional, and in default of appointment the appointees share equally;<sup>6</sup> and a legacy of one hundred dollars apiece to each of A's children, grandchildren, or other direct descendants is not substitutional, but all direct descendants are entitled to the legacy.<sup>7</sup> On the other hand, the gift may be construed as substitutional even though the word "and" is used instead of "or," if such seems to be the intention of the testator.<sup>8</sup> But in order for a gift to be substitutional, the legatees seeking to put themselves in the place of the deceased legatee must show that they take by purchase, and not by descent.<sup>9</sup>

**1. Immediate Gift.**—*Montagu v. Nucella*, 1 Russ. 165; *Gittings v. M'Dermott*, 2 Myl. & K. 69; *Salisbury v. Petty*, 3 Hare 86; *Turner v. Moor*, 6 Ves. Jr. 557; *Whitcher v. Penley*, 9 Beav. 477; *O'Rourke v. Beard*, 151 Mass. 9.

**Gift of Income Only.**—Where a will gave a life estate to children, providing that on the death of any child or children his share of income should be given to said child or children, and a child died leaving a son and daughter, it was held that on the death of this grandson leaving issue, his share of the income went to his sister and not to the great-grandchildren. *Bragg v. Carter*, 171 Mass. 324.

**2. Death Before Tenant for Life.**—*Girdlestone v. Doe*, 2 Sim. 225; *Ebey v. Adams*, 135 Ill. 80; *Shaw v. Eckley*, 169 Mass. 119; *Hutchinson v. Exton*, 53 N. J. Eq. 688.

**Substituted Legatees Take as Purchasers.**—A gift, after a life estate, to children or their descendants, share and share alike, the descendants of any deceased child taking the share its parent would have taken if living, is a substitutional gift to the descendants, and consequently if a child of the testator mortgages his interest and dies before the life tenant his interest passes to his children free and clear of the mortgage. *Weymann v. Weymann*, 82 N. Y. App. Div. 342. See also *Lusby v. Taylor*, (Ky. 1895) 30 S. W. Rep. 396.

**Contrary Intention Effectuated.**—A direction to divide property among children living at the death of the tenant for life "or such others as would have been entitled to it at the death of their parents," does not include a grandchild whose father died after the testator but before the life tenant. *Miller v. Chapman*, 24 L. J. Ch. 409.

**3. Death in Testator's Lifetime.**—*Ive v. King*, 16 Beav. 54; *Hannam v. Sims*, 2 De G. & J. 151; *Hodgson v. Smithson*, 21 Beav. 354; *Corbyn v. French*, 4 Ves. Jr. 418; *Matter of Porter*, 4 Kay & J. 188; *Goddard v. May*, 109 Mass. 471; *Denlinger's Estate*, 170 Pa. St. 104. See

also the title **LEGACIES AND DEVISES**, vol. 18, p. 752.

**Applicable to Both Realty and Personality.**—As ordinarily stated, the rule seems applicable only to personality. But upon both principle and authority it seems to apply to both realty and personality. *Hannam v. Sims*, 2 De G. & J. 151; *State v. Lyons*, 5 Harr. (Del.) 196. See *Goodall v. McLean*, 2 Bradf. (N. Y.) 306.

**4. "Or" Usually Substitutional.**—*Carey v. Carey*, 6 Ir. Ch. 255; *Congreve v. Palmer*, 16 Beav. 435; *Atkinson v. Barthrum*, 28 Beav. 219; *Blundell v. Chapman*, 10 Jur. N. S. 332; *Ebey v. Adams*, 135 Ill. 80; *Reiff v. Strite*, 54 Md. 298; *Lee v. Welch*, 163 Mass. 312; *Stevenson v. Evans*, 10 Ohio St. 307; *Simpson v. Cherry*, 34 S. Car. 68. See also *In Goods of Bradford*, 72 L. T. N. S. 267; *Matter of Paton*, 111 N. Y. 480. And see the title **LEGACIES AND DEVISES**, vol. 18, p. 754.

**5. "Or" as Alternative.**—*In re Delmar Charitable Trust*, (1897) 2 Ch. 163. See also *Maude v. Maude*, 22 Beav. 290.

**6. Gift to A or B by Appointment.**—*Penny v. Turner*, 2 Phil. 493; *Re White*, Johns. Ch. (Eng.) 656; *Drake v. Drake*, 134 N. Y. 220.

**7. "Or" as Conjunctive.**—*Solly v. Solly*, 5 Jur. N. S. 36.

**8. "And" Read as "Or."**—*Loomer v. Loomer*, 76 Conn. 522. See also *Matter of Stafford*, (Surrogate Ct.) 11 Misc. (N. Y.) 436. See **AND**, vol. 2, p. 333, and *supra*, this section, **Changing Words**.

In *Vaughan v. Dickens*, 2 Dev. & B. Eq. (22 N. Car.) 52, a gift "to six brothers and sisters and to their respective heirs of their body, but no further, and these must be living" at the time of distribution, was held to be a gift to brothers and sisters, with a substitutional gift to their children.

**9. Substituted Legatees Must Take as Purchasers.**—A clause providing that in case any legatee named "shall not survive to receive his or her portion, and shall leave no child to inherit it,"



(2) *Gifts Over to Executors, Administrators, or Representatives.* — A simple bequest to A, his executors or administrators, merely gives A the absolute interest, and will lapse by his death, although the gift be immediate; <sup>1</sup> but it is clear that if the testator declares it to be his wish that no legacy shall lapse and then gives a legacy to "A and his executors," the legacy will not lapse though A dies before the testator. <sup>2</sup> Where there is a bequest to A for life and after his decease to B "or his personal representatives," or to B "or his executors," <sup>3</sup> or a bequest to B, to be paid so many months after the testator's decease to him "or to his personal representatives," <sup>4</sup> this is simply another way of giving a vested interest to B upon the testator's own death, and if B dies before the testator the bequest will lapse. But if the words used can be construed to mean those entitled to take under the statutes of distribution, the contrary is true. Thus, the use of the word "heirs" shows an intention on the part of the testator that the persons he designates as "heirs" are to be taken as *personæ designatæ*, and hence by way of substitution, whenever B may die, and the bequest will not lapse although B may die in the lifetime of the testator. <sup>5</sup> So, where the bequest is to B and his representatives "according to the statute of distributions," <sup>6</sup> or "according to the common law," <sup>7</sup> the legacy will not lapse.

(3) *Whether Substitutional or Original.* — It often becomes necessary in construing gifts to classes to ascertain whether a gift over in case of death before the period of distribution is a gift by way of substitution, or whether the second set of legatees take an original and substantive gift. In determining this question, it should be remembered that a gift to issue is substitutional when the share which the issue are to take is by a prior clause expressly given to the parent of such issue, and original if not so given. <sup>8</sup> There is nothing to warrant the conclusion sometimes stated, that every gift which is preceded by the word "and" is an original gift. <sup>9</sup> In the note below are given various examples of gifts held to be substitutional or original. <sup>10</sup>

such share shall revert to the estate, is not a clause of substitution, for, if the children take, it must be by inheritance. *Hoopes's Estate*, 185 Pa. St. 172.

1. See the title LEGACIES AND DEVISES, vol. 18, p. 754.

2. **Contrary Intention Manifest.** — *Sibley v. Cook*, 3 Atk. 572; *Darrel v. Molesworth*, 2 Vern. 378. And see remarks of Alexander, L. C. B., in *Bone v. Cook*, M'Clel. 168.

3. **Gift to B "or Executors."** — *Bone v. Cook*, M'Clel. 168; *Corbyn v. French*, 4 Ves. Jr. 434.

4. **Bequest to Be Paid to B "or Personal Representatives."** — *Tidwell v. Ariel*, 3 Madd. 403; *Matter of Porter*, 4 Kay & J. 195; *Thompson v. Whitelock*, 4 De G. & J. 490.

5. *Matter of Porter*, 4 Kay & J. 188.

6. *Brent v. Washington*, 18 Gratt. (Va.) 526.

7. **According to Common Law.** — *Ware v. Fisher*, 2 Yeates (Pa.) 578.

8. *Lanphier v. Buck*, 2 Drew. & Sm. 484; *Attwood v. Alford*, L. R. 2 Eq. 479; *Martin v. Holgate*, L. R. 1 H. L. 181. See also *Vaughan v. Dickens*, 2 Dev. & B. Eq. (22 N. Car.) 56.

9. **Gift Preceded by "and" Not Necessarily Original.** — *Hurry v. Hurry*, L. R. 10 Eq. 346.

10. **Gifts Held Substitutional.** — To children of A and B "which shall be living at the time of my decease," but if any child "shall happen to die in my lifetime and leave issue," then the legacies intended for such children to go to their issue. *Christopherson v. Naylor*, 1 Meriv. 320.

Among sons *nominatim*, but in case any of

them "should be then dead," to their children. *Re Turner*, 2 Drew. & Sm. 501.

"Amongst my daughters and their children." *Parker v. Tootal*, 11 H. L. Cas. 143.

Gift to cousins, and "I give the shares of those of my cousins who may die in my lifetime to the children of my cousins who may so die in my lifetime." *In re Hotchkiss*, L. R. 8 Eq. 643.

To brothers and sisters of E. and "in case any or either of them shall be dead" at decease of E., having issue, then such issue to stand in the place of their parents. *Gray v. Garman*, 2 Hare 268.

"To all the children of M. H. M., or in event of decease to their descendants share and share alike." *In re Webster*, 23 Ch. D. 737.

**Gifts Held Original.** — To sisters "then living or the lawful issue of any or either then dead." *Attwood v. Alford*, L. R. 2 Eq. 479.

To children who shall be living at a certain time, or to the issue of such of them as may be then dead, such issue to be entitled to its parent's share only. *Lanphier v. Buck*, 2 Drew. & Sm. 484.

To nephews and nieces who shall be living at death of tenant for life, and "if any or either of them should then be dead, leaving issue," such issue to take parent's share. *Martin v. Holgate*, L. R. 1 H. L. 175.

Among such one or more of the child or children of R. T. who shall be living at the time of his death, and the "issue of such of

**C. WHETHER ISSUE OF LEGATEE DEAD AT DATE OF WILL CAN TAKE** — (1) *Gifts to Individuals*. — Where a legacy is given to a designated individual, with a substitutional gift in case of his death, the gift over will take effect even though he be in fact dead at the date of the will, the presumption being that the testator was ignorant of the fact.<sup>1</sup>

(2) *Gifts to Classes* — (a) **Substitutional Gifts** — *aa. IN GENERAL*. — Substitutional gifts of the shares of members of a class differ from substitutional gifts of bequests to individuals named in the will, the principle of distinction being that, to determine whether such gifts are to take effect, the test in the case of a bequest to a class must necessarily be this: Was the deceased, whose supposed share is claimed, or was he not, ever a member of the class? in other words, was he, or was he not, ever an object of the gift? If not, there can be no substitution.<sup>2</sup> Thus, if a testator gives a legacy to a class of persons, as to the children of A, and goes on to provide that in case of the death of any one of the children of A before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take unless the parent might have taken; and consequently, if a child of A be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything.<sup>3</sup> And so where the testator provides that if any of the class are dead at the time fixed for distribution, the share of the member so dying is to go to his issue, he must be supposed to have in mind living persons, subject to the contingency of such persons continuing to live up to the time of distribution, and the class is ascertained at the date of the will. Therefore, the issue of those who die after the date of the will take by substitution, to the exclusion of the issue of those who died before such date.<sup>4</sup>

them as shall be then dead leaving issue," such issue to take the share which their parents "would have been entitled to if then living." *Tytherleigh v. Harbin*, 6 Sim. 329.

To all and every the children of J. B., deceased, to be divided equally amongst them "and the issue of such of them as shall be deceased, share and share alike, such issue being entitled to the share his, her, or their deceased parents, etc." *Bebb v. Beckwith*, 2 Beav. 308.

To all and every the children who shall be living at death of tenant for life, provided always that if any child shall die, etc., leaving issue, then to such issue. *In re Woolrich*, 11 Ch. D. 663.

To sons and daughters of brothers and sisters, equally, and to the heirs of their bodies respectively. *Wheeler v. Allen*, 54 Me. 232.

**1. Legatee Dead at Date of Will.** — *Matter of Sheppard*, 1 Kay & J. 269; *Hannam v. Sims*, 2 De G. & J. 151; *Ive v. King*, 16 Beav. 46.

**2.** *Matter of Porter*, 4 Kay & J. 192, *per Wood*, V. C. See also *Coulthurst v. Carter*, 15 Beav. 421; *In re Musther*, 43 Ch. D. 569.

**3. Issue Cannot Take Unless Parent Might Have Taken.** — *Ive v. King*, 16 Beav. 53, *citing* *Waugh v. Waugh*, 2 Myl. & K. 41; *Peel v. Catlow*, 9 Sim. 372; *Christopherson v. Naylor*, 1 Meriv. 320. See also *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252; *Appleton v. Fuller*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 353; *Matter of Crawford*, 113 N. Y. 366; *Outcalt v. Outcalt*, 42 N. J. Eq. 500; *Roundtree v. Roundtree*, 26 S. Car. 450.

**4. Issue of Legatee Dead at Date of Will Excluded** — *England*. — *Christopherson v. Naylor*, 1 Meriv. 320; *In re Hotchkiss*, L. R. 8 Eq. 643; *Gray v. Garman*, 2 Hare 268; *In re*

*Musther*, 43 Ch. D. 569; *In re Chinery*, 39 Ch. D. 614; *In re Webster*, 23 Ch. D. 737; *West v. Orr*, 8 Ch. D. 60; *Congreve v. Palmer*, 16 Beav. 435; *Offiler v. Offiler*, 83 L. T. N. S. 758; *Butter v. Ommancey*, 4 Russ. 73; *In re Wood*, (1894) 3 Ch. 381, 63 L. J. Ch. 790; *Habergham v. Ridehalgh*, L. R. 9 Eq. 395; *Waugh v. Waugh*, 2 Myl. & K. 41.

*Illinois*. — *Ruddell v. Wren*, 208 Ill. 508.

*New Jersey*. — See *Buzby v. Roberts*, 53 N. J. Eq. 566.

*New York*. — *Wescott v. Higgins*, 42 N. Y. App. Div. 69. See also *Matter of Crawford*, 113 N. Y. 366; *Palmer v. Dunham*, 125 N. Y. 68.

**Contrary Decisions.** — *In re Potter*, L. R. 8 Eq. 52, and in *Adams v. Adams*, L. R. 14 Eq. 246, *Malins, V. C.*, said that in all cases of this kind the children should take what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will. But in each of these cases the gift seems to have been independent. See *Outcalt v. Outcalt*, 42 N. J. Eq. 500; *In re Hotchkiss*, L. R. 8 Eq. 643.

The rule was also disapproved of by *Jessel, M. R.*, in *In re Smith*, 5 Ch. D. 497, note, and by *Stuart, V. C.*, in *Phillips v. Phillips*, 10 Jur. N. S. 1173, and *Parsons v. Gulliford*, 10 Jur. N. S. 231, but it nevertheless must be taken to be firmly established. See *In re Webster*, 23 Ch. D. 737; *In re Musther*, 43 Ch. D. 569; *In re Chinery*, 39 Ch. D. 614; *Wescott v. Higgins*, 42 N. Y. App. Div. 69.

In *Pennsylvania* it seems that this distinction has been ignored, the rule being that in gifts to classes, the alternative gift takes effect if the first legatee be one who would have

**Use of Words "Shall Die."** — It is important to observe that in reaching the above conclusions the courts have not assigned any importance to the use of the words "shall die" in a substitutional gift. In all such cases the tendency is to read such words merely as "shall be then dead," and to look elsewhere for reasons for excluding the issue of those dead at the date of the will.<sup>1</sup>

*bb. TESTATOR'S INTENTION MANIFEST*—(*aa*) *Intention to Exclude.*—The determination of the question is sometimes made easy by language which clearly excludes the issue of those dead at the date of the will, as where the testator says he has a "number of nephews living," and leaves a legacy to each, with a substitutional clause "in case any of them die" before him.<sup>2</sup> So, where the testator provides that if "any legatee shall die in my lifetime" leaving issue, the legacy shall not lapse, this excludes children of parents dead before the date of the will, since such parents could not come under the term "legatee."<sup>3</sup>

(*bb*) *Intention to Include.*—The testator's language may, however, show that he intended the issue of persons dead at the date of the will, who would have been members of the class if alive, to take their parent's share, and in such case the intent will be given effect.<sup>4</sup> Thus, where the testator directs the residue of his estate to be divided among his "brothers and sisters or their heirs," and at the date of the will he has one or no brothers living, but has had others who are dead leaving issue, it will be presumed that he intended to include such issue, as otherwise the plural "brothers" would be meaningless.<sup>5</sup> So, where the gift is to "my eleven children," and in case of the death of any of my children, to their issue, the issue of a child dead at the date of the will take, it appearing that only ten were, to the testator's knowledge, alive at that period.<sup>6</sup>

*cc. EFFECT OF STATUTORY PROVISIONS.*—It is sometimes provided by statute that where a bequest is made to a child or relative, and such person is dead at the date of the will, his issue shall take. Such statutes are generally construed as extending to cases of bequests to classes, with a substitutional gift to issue.<sup>7</sup>

(*b*) *Original and Substantive Gifts.*—If the gift to issue, instead of being strictly substitutional, can be construed as an original and substantive gift, the reason of the rule fails, and such issue take, even though their parents were dead at the date of the will.<sup>8</sup> Thus, if the gift is to the members of a class "then living, or their issue," it is construed to mean "those then living and the

taken as a member of the class had he lived to the period of distribution. *May's Appeal*, 41 Pa. St. 512; *Long v. Labor*, 8 Pa. St. 229.

In *New Jersey* a like decision has been reached. *Baldwin v. Tucker*, 61 N. J. Eq. 412, affirmed 64 N. J. Eq. 333, wherein the case of *Buzby v. Roberts*, 53 N. J. Eq. 566, was apparently overlooked.

See also *Dehaven v. Oglesby*, (Ky. 1896) 38 S. W. Rep. 145.

**1. Effect of Words "Shall Die."**—*Christopherson v. Naylor*, 1 Meriv. 320; *Loring v. Thomas*, 1 Drew. & Sm. 497; *In re Chapman*, 32 Beav. 382; *In re Woolrich*, 11 Ch. D. 663.

**2. Gift to Living Nephews.**—*Morrison's Estate*, 139 Pa. St. 306.

**3. Gift Over in Case of Death of "Legatee."**—*Hunter v. Cheshire*, L. R. 8 Ch. 751. Compare *Matter of Thompson*, 5 De G. M. & G. 280.

**4. Intent to Include Issue of Those Dead at Date of Will.**—*In re Jordan*, 2 N. R. 57; *Giles v. Giles*, 8 Sim. 360; *Jarvis v. Pond*, 9 Sim. 549; *In re Sibley*, 5 Ch. D. 491; *Phillips v. Phillips*, 10 Jur. N. S. 1173; *Richey v. Johnson*, 30 Ohio St. 288.

**5. Use of Plural Designation.**—*Gowling v.*

*Thompson*, L. R. 11 Eq. 366, note; *Barnaby v. Tassell*, L. R. 11 Eq. 363; *Fuller v. Martin*, 96 Ky. 500; *Huntress v. Place*, 137 Mass. 409.

**6.** *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

**7. Statutory Provisions.**—*Chenault v. Chenault*, 88 Ky. 83; *Dehaven v. Oglesby*, (Ky. 1896) 38 S. W. Rep. 145; *Mather v. Copeland*, 7 Ohio Dec. 257, 5 Ohio N. P. 151; *Shumaker v. Pearson*, 67 Ohio St. 330. See also the title LEGACIES AND DEVISES, vol. 18, p. 758.

**8. Original Gift**—*England.*—*Attwood v. Alford*, L. R. 2 Eq. 479; *In re Potter*, L. R. 8 Eq. 52; *Bebb v. Beckwith*, 2 Beav. 308; *Coulthurst v. Carter*, 15 Beav. 421; *Re Faulding*, 26 Beav. 263; *Tytherleigh v. Harbin*, 6 Sim. 329; *Clay v. Pennington*, 7 Sim. 370; *Smith v. Smith*, 8 Sim. 353; *Rust v. Baker*, 8 Sim. 443; *In re Woolrich*, 11 Ch. D. 663.

*Maine.*—*Wheeler v. Allen*, 54 Me. 232.

*New Jersey.*—*Outcalt v. Outcalt*, 42 N. J. Eq. 500.

*New York.*—*Teed v. Morton*, 60 N. Y. 502; *Matter of Crawford*, 113 N. Y. 366.

*Pennsylvania.*—*May's Appeal*, 41 Pa. St. 512.

As to whether a gift is substitutional or



issue of those then dead," thereby including the issue of those dead at the date of the will, since such issue take original shares.<sup>1</sup> So, also, where there is a gift to the children of A and then a gift to the issue of any child who may be dead, of the share which the parent would have taken if living, this is really a gift to the issue of the share which the parent of the issue would have taken if living at the death of the testator, and may include the issue of a parent dead at the date of the will, under the principle just stated.<sup>2</sup> But if the words are if "any of the said children shall die," this seems to confine "children" to such as have already been designated as legatees, thus excluding those dead at the date of the will.<sup>3</sup>

*d. WHETHER CONTINGENCY OF ORIGINAL GIFT ATTACHES TO SUBSTITUTED GIFT.* — If the gift to issue is original, it is not necessary for them to survive their own parent in order to take;<sup>4</sup> but if the gift is substitutional, then such survivorship is necessary, as otherwise there would be a substitution of dead persons for living ones.<sup>5</sup> But in order to take vested shares it is not necessary for issue to survive the period of distribution, whether the gift be original<sup>6</sup> or substitutional.<sup>7</sup>

original, see *supra*, this subsection, *What Gifts Are Substitutional — Whether Substitutional or Original*.

**1. Construction of Meaningless Phrase.** — *In re Philps*, L. R. 7 Eq. 151; *Burt v. Hellyar*, L. R. 14 Eq. 160; *Wingfield v. Wingfield*, 9 Ch. D. 658.

**2. Share Which Parent Would Have Taken if Living.** — *Loring v. Thomas*, 1 Drew. & Sm. 497; *In re Chapman*, 32 Beav. 382. See also *In re Luca*, 17 Ch. D. 788; *In re Webster*, 23 Ch. D. 737.

**3. Effect of Word "Said."** — *Matter of Thompson*, 5 De G. M. & G. 280.

**4. Necessity of Surviving Parent.** — *Lanphier v. Buck*, 2 Drew. & Sm. 484, better reported 34 L. J. Ch. N. S. 657; *In re Smith*, 7 Ch. D. 665; *Harcourt v. Harcourt*, 26 L. J. Ch. 536. The previous contrary decision of *Kindersley, V. C.*, in *Humfrey v. Humfrey*, 2 Drew. & Sm. 49, must be considered as overruled by *Lanphier v. Buck*, 2 Drew. & Sm. 484.

**Gift to Issue of Legatees Who Die Leaving Issue.** — In concluding his remarks upon original and substitutional wills, in *Lanphier v. Buck*, 2 Drew. & Sm. 499, *Kindersley, V. C.*, said: "There are cases where, although the gift to the issue (or children) is an original gift, the testator has, by his language, precluded children from taking who did not survive their parent. Thus, if the gift had been to such of the nephews and nieces as should be living at the happening of a certain event, and to the issue of such of the nephews and nieces as should have previously died leaving issue, those words would be a sufficient indication of the testator's intention that such children only as were left by their parent, that is, as survived their parent, should take."

In *Thompson v. Clive*, 23 Beav. 282, *Romilly, M. R.*, so held as to the effect of the word "leaving." But in *In re Smith*, 7 Ch. D. 665, *Hall, V. C.*, held otherwise. See also *Martin v. Holgate*, L. R. 1 H. L. 175.

**5. Survivorship Necessary if Gift Substitutional.** — *In re Merricks*, L. R. 1 Eq. 551; *Crause v. Cooker*, 1 Johns. & H. 207; *Re Turner*, 2 Drew. & Sm. 501; *Lanphier v. Buck*, 2 Drew. & Sm. 484, better reported 34 L. J. Ch. N. S. 657;

*Matter of Bennett*, 3 Kay & J. 280; *Hurry v. Hurry*, L. R. 10 Eq. 346. See also *Haszard v. Haszard*, 19 R. I. 374.

**6. Original Gift.** — *Martin v. Holgate*, L. R. 1 H. L. 175; *In re Orton*, L. R. 3 Eq. 375; *Lanphier v. Buck*, 2 Drew. & Sm. 484; *Barker v. Barker*, 5 De G. & Sm. 753; *Austin v. Bristol*, 40 Conn. 120; *Jameson v. Jameson*, 86 Va. 51. See also *Burt v. Hellyar*, L. R. 14 Eq. 160; *Johnson v. Webber*, 65 Conn. 501.

**7. Substitutional Gift.** — *In re Merricks*, L. R. 1 Eq. 551; *In re Battersby*, (1896) 1 Ir. 600; *Re Turner*, 2 Drew. & Sm. 501; *Matter of Pell*, 3 De G. F. & J. 291; *Matter of Bennett*, 3 Kay & J. 280; *Hodgson v. Smithson*, 21 Beav. 354; *Post v. Horning*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 716; *Brent v. Washington*, 18 Gratt. (Va.) 526. See also *Crause v. Cooper*, 1 Johns. & H. 207; *Lanphier v. Buck*, 2 Drew. & Sm. 498; *Buckle v. Fawcett*, 4 Hare 545; *Masters v. Scales*, 13 Beav. 60.

Under a gift to A for life and then to brothers and sisters, or such of them as shall be then living, and in case any shall then be dead, leaving a child, then to such child, all the children of the deceased brothers and sisters take whether or not they survive the tenant for life. *Masters v. Scales*, 13 Beav. 60.

**Contrary Intent Manifested.** — *Rudd v. Cornell*, 58 N. Y. App. Div. 207.

**Effect of Statute Substituting Issue of Legatee Deceased Before Testator.** — In *Brookhouse v. Pray*, (Minn. 1904) 100 N. W. Rep. 235, there was a gift to D. B., on condition that he claimed the bequest before the time for distribution. A subsequent clause provided that if any legatees died before payment to them without leaving issue, then such bequest should go to F. P. B. was dead at the date of the will and his children all died without issue before the period of distribution. A statute provided that in case of the death of a legatee before the testator, his issue should take in the same manner as the legatee would have taken. It was held that the children of D. B. took under the statute as legatees subject to the same contingencies as the other legatees, and hence having died without issue before the time for distribution, the legacy went to P.

**21. Successive and Concurrent Interests** — *a.* DEVISE TO PERSONS IN TAIL. — In the construction of clauses in wills which devise or bequeath the same property to several persons, the question has sometimes arisen whether such persons take successive or concurrent interests in the property. Thus, in the case of a devise to the sons of a person in tail, it has been held that *prima facie* the sons take concurrent interests as tenants in common.<sup>1</sup>

*b.* GIFT TO PARENT AND CHILDREN. — Where a testator gives property to a parent and his children, *simpliciter*, and there are children then in existence, the children and the parent take the property together, either as joint tenants or as tenants in common, according to the words of the will; but if there be any superadded words, which import a desire that the property should be settled, the court will lay hold of the words, and will infer a gift to the parent for life with remainder to the children.<sup>2</sup> Thus, a gift to a parent for life, with remainder to the children, has been inferred in the following instances: where the gift is to A and his children as tenants in common, if more than one;<sup>3</sup> where the gift is to A and his children and the heirs of the children;<sup>4</sup> and where there is a gift to a father and his children and a desire is expressed that the whole fund should be settled or secured.<sup>5</sup>

**Gift to Testator's Wife in Trust for Herself and Children.** — It has been held that the fact that the gift is to the testator's wife, in trust for herself and children, does not necessarily show that they are not to take concurrently,<sup>6</sup> unless there is a general intention manifest to keep the estates together in a single line of enjoyment, in which case the members of the class take successive interests.<sup>7</sup>

**22. Interests Undisposed of** — *a.* IN GENERAL. — Interests undisposed of in realty and personalty pass, as a rule, to the heir at law or next of kin as the case may be, who can only be excluded by express words or by plain and necessary implication.<sup>8</sup>

**1. Concurrent Interests Taken.** — *De Windt v. De Windt*, L. R. 1 H. L. 87; *Surtees v. Surtees*, L. R. 12 Eq. 400.

**2. Gift to Parent and Children** — *England.* — *Mason v. Clarke*, 17 Beav. 131; *Wilson v. Maddison*, 2 Y. & C. Ch. 372; *Beales v. Crisford*, 13 Sim. 592.

*Georgia.* — *Gillespie v. Schuman*, 62 Ga. 252.

*Indiana.* — *Biggs v. McCarty*, 86 Ind. 352.

*Kentucky.* — *Frank v. Unz*, 91 Ky. 621.

*Massachusetts.* — *Rich v. Rogers*, 14 Gray (Mass.) 174.

*Mississippi.* — *Brabham v. Day*, 75 Miss. 928.

*Pennsylvania.* — *Oyster v. Oyster*, 100 Pa. St. 538. *Compare Green's Estate*, 140 Pa. St. 253.

*South Carolina.* — *Feemster v. Good*, 12 S. Car. 573.

*Tennessee.* — *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

**3. Gift to A and His Children as Tenants in Common if More than One.** — *Doe v. Burnsall*, 6 T. R. 30, 1 B. & P. 215. See *Doe v. Elvey*, 4 East 313.

**4. Gift to A and His Children and the Heirs of the Children.** — *Jeffery v. Honywood*, 4 Madd. 398.

**5. Desire Expressed that Whole Fund Should Be Settled or Secured.** — *Vaughan v. Headfort*, 10 Sim. 639; *Combe v. Hughes*, L. R. 14 Eq. 415.

**6. Gift to Testator's Wife in Trust for Herself and Children.** — *Newill v. Newill*, L. R. 7 Ch. 253.

**7. Successive Interests Taken.** — *Cradock v.*

*Cradock*, 4 Jur. N. S. 626; *Allgood v. Blake*, L. R. 7 Exch. 339, L. R. 8 Exch. 160.

**8. Property Undisposed of** — *England.* — *Randall v. Bookey*, 2 Vern. 425; *Halliday v. Hudson*, 3 Ves. Jr. 210; *Rogers v. Rogers*, 3 P. Wms. 193; *Ramsay v. Sheldermine*, L. R. 1 Eq. 129.

*Alabama.* — *Wheat v. Wheat*, 24 Ala. 429; *Denson v. Mitchell*, 26 Ala. 360.

*Connecticut.* — *Bulkley v. Bulkley*, 1 Root (Conn.) 78.

*Florida.* — *McDougald v. Gilchrist*, 20 Fla. 573.

*Georgia.* — *Haralson v. Redd*, 15 Ga. 148.

*Illinois.* — *Godfrey v. Wingert*, 110 Ill. App. 563.

*Indiana.* — *Cunningham v. Dungan* 83 Ind. 572.

*Kentucky.* — *Todd v. Gentry*, 109 Ky. 707.

*Massachusetts.* — *Boston Safe Deposit, etc., Co. v. Buffum*, (Mass. 1904) 71 N. E. Rep. 549.

*Mississippi.* — *Luckey v. Dykes*, 2 Smed. & M. (Miss.) 60.

*Missouri.* — *Peugnet v. Berthold*, (Mo. 1904) 81 S. W. Rep. 874.

*New Jersey.* — *Miller v. Worrall*, 62 N. J. L. 776.

*New York.* — *Jackson v. Schaubert*, 7 Cow. (N. Y.) 189; *Wood v. Keyes*, 8 Paige (N. Y.) 265; *Reed v. Underhill*, 12 Barb. (N. Y.) 113; *Catton v. Taylor*, 42 Barb. (N. Y.) 578; *Jackson v. Burr*, 9 Johns. (N. Y.) 104; *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 324.

*North Carolina.* — *Winston v. Webb*, Phil. Eq. (62 N. Car.) 1; *Hastings v. Earp*, Phil.

**Directions Excluding Heirs from Share in Testator's Property.** — Directions in a will excluding heirs at law and next of kin from any share in the testator's property will, as a general rule, be taken to have been inserted only for the purpose of the dispositions made by the will, and will not exclude them from taking property undisposed of.<sup>1</sup>

**b. PROPERTY GIVEN FOR PARTICULAR PURPOSE.** — Where property is given by will for the purpose of satisfying certain trusts, and these trusts do not in their execution use up all the property, what remains belongs to the heirs of the testator, unless it appears that the testator intended the trustees to have any surplus which might remain.<sup>2</sup>

**c. LAPSED LEGACIES AND DEVISES.** — A consideration of the question of the disposition of lapsed or void legacies and devises will be found elsewhere in this work.<sup>3</sup>

## WIND. — See note 4.

Eq. (62 N. Car.) 5; *Miller v. London*, Winst. Eq. (60 N. Car.) 81; *Hardie v. Cotton*, 1 Ired. Eq. (36 N. Car.) 61; *Morrison v. Kennedy*, 2 Ired. Eq. (37 N. Car.) 379; *Feimster v. Tucker*, 5 Jones Eq. (58 N. Car.) 69; *Phifer v. Phifer*, 6 Ired. Eq. (41 N. Car.) 155; *Alexander v. Alexander*, 6 Ired. Eq. (41 N. Car.) 229.

*Ohio.* — *Crane v. Doty*, 1 Ohio St. 279.

*Pennsylvania.* — *Hitchcock v. Hitchcock*, 35 Pa. St. 393; *Hoffner v. Wynkoop*, 97 Pa. St. 130; *McDevitt's Appeal*, 113 Pa. St. 103; *Bruckman's Estate*, 195 Pa. St. 363; *Duffield v. Morris*, 8 W. & S. (Pa.) 348.

*South Carolina.* — *Thomas v. Benton*, 4 Desaus. (S. Car.) 17; *Pulliam v. Byrd*, 2 Strobb. Eq. (S. Car.) 134; *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291; *Rosborough v. Hemphill*, 5 Rich. Eq. (S. Car.) 95. *Compare Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274.

*Texas.* — *Philleo v. Holliday*, 24 Tex. 38.

*Virginia.* — *Henderson v. Peachy*, 3 Leigh (Va.) 64.

**Illustration.** — In *Pickering v. Langdon*, 22 Me. 413, testatrix made a will, wherein, after giving several legacies, she used these words: "The residue of my property, after paying my just debts, I give and bequeath to M. and D., constituting them residuary legatees to all my property not otherwise disposed of, whether real or personal, for their use and benefit, and after the death of D., what remains of her part to be put at interest for the benefit of P. and R." She afterwards made a codicil, wherein she said: "First. The one moiety or half of my estate, which in said will I devised to A. I do, by this codicil, devise jointly to said A. and his wife E., as a life estate, to hold, possess, and enjoy by them, or either of them who may survive the other, during his or her natural life. Second. The moiety which, etc., I devised to B., by this codicil my will is, that after the decease of said B., said moiety is to descend to C. and D. and F. equally." It was held that, as to the one moiety, M. and D. took but a life estate in the real estate, and the income only of the personal estate, and that the reversionary interest was to be regarded as undevise property of the testatrix, and was to be distributed to her next of kin by the statute of distributions.

**1. Directions Excluding Heirs from Share in Property.** — *Johnson v. Johnson*, 4 Beav. 318; *Sykes v. Sykes*, L. R. 3 Ch. 301; *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129; *Gould v. Gould*, 32 Beav. 391; *Tavernor v. Grindley*, 32 L. T. N. S. 424; *Mills v. Newberry*, 112 Ill. 123; *Rauchfuss v. Rauchfuss*, 2 Dem. (N. Y.) 271; *Crane v. Doty*, 1 Ohio St. 279; *Hitchcock v. Hitchcock*, 35 Pa. St. 393; *Coffman v. Coffman*, 85 Va. 459. See *Zimmerman v. Hafer*, 81 Md. 347.

**A Gift to Testator's Widow in Lieu of All Claim upon His Estate** or in lieu of thirds does not deprive her of a share in property undisposed of. *Pickering v. Stamford*, 2 Ves. Jr. 272, 3 Ves. Jr. 332; *Johnson v. Johnson*, 4 Beav. 318; *Tavernor v. Grindley*, 32 L. T. N. S. 424; *Lett v. Randall*, 3 Smale & G. 83.

**A Gift to a Child of "Ten Shillings and No More"** has been held, however, to bar the child's right as next of kin where no disposition was attempted to be made by the will. *Vachell v. Breton*, 5 Bro. P. C. (Toml. ed.) 51, 11 Vin. Abr. 185.

**2. Property Given for Particular Purpose Undisposed of.** — *King v. Denison*, 1 Ves. & B. 272; *Wych v. Packington*, 3 Bro. P. C. (Toml. ed.) 44; *Hobart v. Suffolk*, 2 Vern. 644; *Watson v. Hayes*, 5 Myl. & C. 125; *Collis v. Robins*, 1 De G. & Sm. 131; *Wills v. Wills*, 1 Dr. & War. 439; *Bird v. Harris*, L. R. 9 Eq. 204; *Hill v. London*, 1 Atk. 618; *Rogers v. Rogers*, 3 P. Wms. 193; *Dawson v. Clark*, 15 Ves. Jr. 409.

**3.** See the title LEGACIES AND DEVISES, vol. 18, p. 760.

**4. "Before the Wind" Distinguished from "Going Off Large."** (See also the title SHIPS AND SHIPPING, vol. 25, p. 953.) — There is, in nautical technicality, a difference between "going off large" and "going before the wind." "Going off large" is when the wind blows from some point abaft the beam, or over the quarter of the ship. "Going before the wind" is when the wind is free, comes over the stern, and the ship's yards are braced square across. *Hall v. The Propeller Buffalo*, Newb. Adm. 115, 11 Fed. Cas. No. 5,927. Notwithstanding the technical distinction, the court said that the statute as to the exhibition of lights by sailing craft made no distinction between a vessel "going off large" and "going before the wind."



# WINDING UP AND REORGANIZATION OF CORPORATIONS.

BY JOHN C. MYERS.

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### CROSS-REFERENCES.

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- As to Consolidation and Merger of Corporations*, see the title *CONSOLIDATION OF CORPORATIONS*, vol. 6, p. 800.
- As to Dissolution of Corporations*, see the title *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 614.
- As to matters relating to Mortgages and their Foreclosure*, see the titles *EQUITABLE MORTGAGES*, vol. 11, p. 122; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 776; *MORTGAGES*, vol. 20, p. 888; *PURCHASE-MONEY MORTGAGES*, vol. 23, p. 466; *RAILROAD SECURITIES*, vol. 23, p. 795; *TRUST DEEDS AND POWER OF SALE MORTGAGES*, vol. 28, p. 743.
- As to Reorganization of National Banks*, see the title *NATIONAL BANKS*, vol. 21, p. 319.
- For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject*, see the following titles in this work: *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DE FACTO CORPORATIONS*, vol. 8, p. 747; *EMINENT DOMAIN*, vol. 10, p. 1043; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 834; *FOREIGN CORPORATIONS*, vol. 13, p. 834; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1030; *LIENS*, vol. 19, p. 3;



*OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 833; *PROMOTERS*, vol. 23, p. 232; *PURCHASERS FOR VALUE AND WITHOUT NOTICE*, vol. 23, p. 472; *RAILROADS*, vol. 23, p. 667; *RECEIVERS*, vol. 23, p. 992; *RECEIVERS OF RAILROADS*, vol. 24, p. 1; *STOCK AND STOCKHOLDERS*, vol. 26, p. 808; *TAXATION*, vol. 27, p. 567; *TAXATION (CORPORATE)*, vol. 27, p. 920; *TRUSTS AND TRUSTEES*, vol. 28, p. 848; *ULTRA VIRES*, vol. 29, p. 40; *VENDOR AND PURCHASER*, vol. 29, p. 584; *VENDOR'S LIEN*, vol. 29, p. 732; *VOTING TRUSTS*, vol. 29, p. 1027.

**I. DEFINITION AND SCOPE OF TITLE — 1. Reorganization Defined.** — Broadly speaking, the reorganization of a corporation takes place whenever it is organized anew. Thus, it is a reorganization for the corporators to take out a new charter after the expiration of the original charter, or after forfeiture, or after dissolution of the original corporation, or for any other purpose whatsoever. It may even be said that any substantial amendment of the charter amounts to a reorganization of the corporation. But reorganization has come to have a specific meaning quite distinct from the general meaning given above. In this sense reorganization of a corporation means the proceedings whereby the corporation's mortgages are foreclosed and a new corporation is formed by the foreclosure purchasers, which is clothed with the same rights and powers as the old corporation, but relieved of liability for its debts. The word is now generally used in this sense, and is invariably so used in this article, except where a different meaning is expressly given to it. Reorganization is highly analogous to the English "reconstruction," probably the chief difference being that in *England* the rights of even secured creditors may be cut off by a reconstruction without foreclosure.

**2. Scope of Title.** — Reorganization must be carefully distinguished from consolidation or merger; from the authorized sale by a corporation of its property and franchises to another corporation, and from a corporation's lease of its entire property. The purpose of this article is to discuss reorganization after foreclosure, pursuant to a plan formulated by the parties in interest. It has been found necessary, however, to give some attention to reorganizations attempted without foreclosure or other judicial sale.

**II. EFFECT OF REORGANIZATION ON OLD CORPORATION — 1. As to Identity of Old and Reorganized Corporation — a. IDENTITY QUESTION OF INTENT.** — The question whether a reorganization results in the formation of a new and distinct corporation or in a mere continuance of the old one depends upon the legislative intent as gathered from the enactment under which the reorganization is effected.<sup>1</sup>

**b. REORGANIZATION BY FORECLOSURE PURCHASERS — (1) In General.** — A corporation formed by the purchasers under foreclosure proceedings of the property and franchises of an insolvent corporation is a separate and distinct corporation and not a mere continuation of the old one, even though it is vested with the rights, privileges, and powers of the old corporation and subject to the same duties,<sup>2</sup> and notwithstanding the fact that it is termed a

**1. Identity of Old and New Corporation Question of Intention.** — *Hopkins v. St. Paul, etc., R. Co.*, 2 Dill. (U. S.) 396; *Bellows v. Hollowell, etc., Bank*, 2 Mason (U. S.) 31; *Huff v. Winona, etc., R. Co.*, 11 Minn. 180; *Hilbert v. Winona, etc., R. Co.*, 11 Minn. 246; *Fitz v. Minnesota Cent. R. Co.*, 11 Minn. 414; *Miller v. English*, 21 N. J. L. 317; *Irving First Soc. v. Brownell*, 5 Hun (N. Y.) 464.

**Presumption as to Identity.** — "Every charter must be taken to be a grant of a new corporation, unless it be granted to an existing cor-

poration." *Bellows v. Hollowell, etc., Bank*, 2 Mason (U. S.) 31.

**2. Corporation Formed by Foreclosure Purchasers Is New Corporation — United States.** — *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667; *Hopkins v. St. Paul, etc., R. Co.*, 2 Dill. (U. S.) 396; *Venner v. Farmers' L. & T. Co.*, (C. C. A.) 90 Fed. Rep. 348.

*Arkansas.* — *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436.

"reorganization" in the statute authorizing its formation.<sup>1</sup>

(2) *When New Corporation Retains Old Name.* — Unless forbidden by the statute, the new corporation may retain the name of the old one and exist as a separate and distinct corporation under such name.<sup>2</sup>

c. REORGANIZATION TO PROLONG EXISTENCE — (1) *When Statute Extends Life of Charter.* — When the legislature extends the existence of a corporation whose charter is about to expire by limitation, the effect is not to create a new corporation, but to keep the original corporation alive without affecting its rights, powers, duties, or obligations.<sup>3</sup>

(2) *When Corporators Procure New Charter.* — If, before the expiration of their charter, the corporators procure a new charter for the purpose of conducting the same business, the corporation thus formed may be technically a new one, but substantially it is a continuation of the old corporation, with the same property, the same rights, and the same liabilities.<sup>4</sup>

*Maine.* — *State v. Maine Cent. R. Co.*, 66 Me. 488.

*Minnesota.* — *Huff v. Winona, etc.*, R. Co., 11 Minn. 180; *Hilbert v. Winona, etc.*, R. Co., 11 Minn. 246; *Fitz v. Minnesota Cent. R. Co.*, 11 Minn. 414.

*New York.* — *People v. Cook*, 110 N. Y. 448, affirmed *People v. Cook*, 148 U. S. 397; *Frank v. New York, etc.*, R. Co., 122 N. Y. 197, 46 Am. & Eng. R. Cas. 356.

*North Carolina.* — *Marshall v. Western North Carolina R. Co.*, 92 N. Car. 322.

*Wisconsin.* — *Vilas v. Milwaukee, etc.*, R. Co., 17 Wis. 497; *Smith v. Chicago, etc.*, R. Co., 18 Wis. 17; *Neff v. Wolf River Boom Co.*, 50 Wis. 585; *National Foundry, etc., Works v. Oconto City Water Supply Co.*, 105 Wis. 48.

*Compare Vicksburg, etc., R. Co. v. Elmore*, 46 La. Ann. 1237, holding that the effect of a reorganization under the *Louisiana* statute is the continuance of an existing corporation under a new name and not the creation of a new corporation. *Compare also Gulf, etc., R. Co. v. Morris*, 67 Tex. 692, which holds that when the property and franchises of a corporation are sold under judicial proceedings to pay its indebtedness, the corporation continues and the purchasers become in effect new stockholders; the property purchased by them, however, being free from liability for debts not constituting a lien prior to the incumbrance under which sale was made.

**Identity of Directors.** — "The fact that the directors of the new corporation are the same persons as the directors of the old has no tendency to prove the identity of the corporations, where, as here, each is conceded to be separately organized at widely different dates, with different stockholders and with different stock, under laws which, when complied with, create a distinct legal body, having rights and duties conferred and imposed upon it by its separate charter." *Armour v. Bement*, (C. C. A.) 123 Fed. Rep. 56.

**The New Corporation Is a "Successor"** of the old corporation within the meaning of a decree against the old corporation, "its successors, assignees, grantees, and lessees," even though it was incorporated after such decree was entered. *State v. Iowa Central R. Co.*, 83 Iowa 720. But it is neither a "successor" nor an "assignee" of the old corporation within the meaning of a provision in a contract that it shall be binding

upon the old corporation, its "successors and assignees." *Menasha v. Milwaukee, etc.*, R. Co., 52 Wis. 414, 5 Am. & Eng. R. Cas. 300.

**1. Effect of Use of Term "Reorganization."** — *Stewart's Appeal*, 72 Pa. St. 291; *Neff v. Wolf River Boom Co.*, 50 Wis. 585. See also *Marshall v. Western North Carolina R. Co.*, 92 N. Car. 322, 20 Am. & Eng. R. Cas. 578; *National Foundry, etc., Works v. Oconto City Water Supply Co.*, 105 Wis. 48.

**2. Distinct Corporations May Have Same Name.** — *Hyde v. Doe*, 4 Sawy. (U. S.) 133; *Bellows v. Hollowell, etc.*, Bank, 2 Mason (U. S.) 31; *Marshall v. Western North Carolina R. Co.*, 92 N. Car. 322, 20 Am. & Eng. R. Cas. 578; *Prince's Metallic Paint Co.*, 5 Pa. Co. Ct. 194; *Denison, etc., R. Co. v. St. Louis Southwestern R. Co.*, 30 Tex. Civ. App. 474, affirmed 96 Tex. 233. See also *Hatcher v. Toledo, etc.*, R. Co., 62 Ill. 477.

**Identity of Name.** — A new corporation formed by the purchasers at foreclosure sale may transact business under the name of the old corporation, as no change of name is required by the *Texas* statute. *Acres v. Moyne*, 59 Tex. 623.

**Similarity Not Establishing Identity.** — The similarity of name, of officers, of members, or even of objects, cannot *per se* establish the identity of corporations created at different times by different charters. *Bellows v. Hollowell, etc.*, Bank, 2 Mason (U. S.) 31.

**Where an Action on a Debt of the Old Corporation** was commenced by the service of process upon a person who was president of both corporations, it was held that the new corporation was entitled to an injunction restraining the creditor from prosecuting his action until he should disclose which company he sought to hold liable, and restricting him to prosecuting the action against the old corporation, the new one not being liable for the debt in question. *Central R. Co. v. Bunn*, 11 N. J. Eq. 336.

**3. Extension by Legislative Enactment.** — *Frostburg Min. Co. v. Cumberland, etc.*, R. Co., 81 Md. 28.

**4. New Corporation Substantially Same as Old One.** — *Canal, etc.*, R. Co. v. *St. Charles St. R. Co.*, 44 La. Ann. 1069; *Cushman v. Shepard*, 4 Barb. (N. Y.) 113; *St. Philips' Church v. Zion Presb. Church*, 23 S. Car. 297. *Compare Western Union Tel. Co. v. Baltimore, etc.*, R.



**2. Upon Existence of Old Corporation.** — Unless it is so provided by statute,<sup>1</sup> the foreclosure sale of the property and franchises of a corporation and the formation by the foreclosure purchasers of a new corporation to conduct the same business, do not, of themselves, work a dissolution of the mortgagor corporation. The existence of the mortgagor corporation continues until it is terminated in the manner provided by the law of the sovereignty by which it was created.<sup>2</sup>

**III. REORGANIZATION BY FORECLOSURE PURCHASERS — 1. Statutes Authorizing Reorganization — a. IN GENERAL.** — In most if not all of the *United States*, statutes exist authorizing the purchasers of the property and franchises of a corporation sold under foreclosure proceedings to form a new corporation for the purpose of carrying on the same business, clothed with the same powers and subject to the same duties as the old corporation, but free from all its indebtedness, except such as is secured by a lien prior to that of the mortgage under which the sale is made.<sup>3</sup>

**b. PURPOSE OF STATUTES.** — The purpose of legislation permitting a corporation to mortgage its franchises and property and authorizing the purchasers at the foreclosure sale thereof to organize a new corporation, is to facilitate the borrowing of money by the original corporation and to add to the value of its property, as security, the incident of the right to form a successor corporation having the same franchises, rights, and powers as its predecessor, but free from all of its liabilities which were not, under the prior corporate ownership, superior to the lien forming the basis of the new title.<sup>4</sup>

**c. STATUTES PERMISSIVE, NOT PROHIBITORY.** — Statutes authorizing reorganization by foreclosure purchasers are permissive and not prohibitory.<sup>5</sup>

Co., 20 Fed. Rep. 572; *Latrobe v. Western Tel. Co.*, 74 Md. 232.

**1. A Fraudulent and Illegal Sale** does not work a dissolution of a corporation, even though it is provided by statute that a corporation shall be dissolved by a mortgage sale of its property and franchises. *White Mountains R. Co. v. White Mountains R. Co.*, 50 N. H. 50.

**2. Mortgage Sale Does Not Dissolve Corporation — Delaware.** — *Wilmington, etc., R. Co. v. Downward*, (Del. 1888) 14 Atl. Rep. 720.

*Illinois.* — *Bruffett v. Great Western R. Co.*, 25 Ill. 353.

*Kentucky.* — *Smith v. Gower*, 2 Duv. (Ky.) 17.

*Ohio.* — *Atkinson v. Marietta, etc., R. Co.*, 15 Ohio St. 21.

*Texas.* — *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692.

See also *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506. Compare *Ford v. Delta, etc., Land Co.*, 43 Fed. Rep. 181; *King v. Atlantic, etc., R. Co.*, 12 Ohio Cir. Dec. 551; *Rogersville, etc., R. Co. v. Kyle*, 9 Lea (Tenn.) 691.

**3. Statutes Authorizing Reorganization by Foreclosure Purchasers — Alabama.** — *Meyer v. Johnston*, 53 Ala. 257.

*Georgia.* — *Thomas v. Milledgeville R. Co.*, 99 Ga. 714.

*Indiana.* — *State v. Hare*, 121 Ind. 308.

*Louisiana.* — *Vicksburg, etc., R. Co. v. Elmore*, 46 La. Ann. 1237.

*Michigan.* — *Detroit v. Mutual Gas Co.*, 43 Mich. 594; *Dexter v. Ross*, 85 Mich. 370.

*New York.* — *In re Brooklyn El. R. Co.*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 161, affirmed 125 N. Y. 434.

*Pennsylvania.* — *Com. v. Keystone Electric*

*Light, etc., Co.*, 193 Pa. St. 245; *Gas, etc., Co. v. Downingtown*, 193 Pa. St. 255; *Prince's Metallic Paint Co.*, 5 Pa. Co. Ct. 194.

*Texas.* — *Acres v. Moyne*, 59 Tex. 623.

**Purchaser at Execution Sale.** — When the property, franchises, and right of way of a railroad corporation are mortgaged, an execution sale thereof pursuant to a judgment recovered by a bondholder upon unpaid interest coupons will not pass the title thereto to the purchaser at such sale. The legal title is in the trustee under the mortgage, and the execution sale passes nothing more than the equity of redemption. If the trustee fails or refuses to act when it is his duty to do so, a bondholder who wishes to subject the security to the satisfaction of the mortgage debt, must proceed not for his own separate benefit, but in behalf of all the bondholders as a class. *Com. v. Susquehanna, etc., R. Co.*, 122 Pa. St. 306.

**A Trust Is Not a Corporation** within the meaning of statutes regulating the reorganization of corporations. *Cameron v. Havemeyer*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 438.

**4. Purpose of Reorganization Statutes.** — *Vilas v. Milwaukee, etc., R. Co.*, 17 Wis. 497; *National Foundry, etc., Works v. Oconto Water Supply Co.*, 105 Wis. 48. See also *Neff v. Wolf River Boom Co.*, 50 Wis. 585, holding that the purpose of the *Wisconsin* statute was to secure to purchasers at foreclosure sales the right to use and enjoy the franchises conveyed to them and thus to remove any doubt as to whether the right to a franchise can be sold and conveyed under a judgment or decree.

**5. Statutes Authorizing Reorganization Are Permissive, Not Prohibitory.** — *Moore v. State*, 71 Ind. 478.



Hence, such statutes cannot so operate as to prevent purchasers from selling to an existing corporation instead of organizing a new one.<sup>1</sup> And it has been held that failure to reorganize within the time prescribed by the statute neither operates as a forfeiture of the property purchased nor forbids the purchasers to organize a corporation similar to the one authorized after the expiration of such time.<sup>2</sup>

*d. CONSTITUTIONALITY OF STATUTES* — (1) *Authorizing Majority Bondholders to Reorganize*. — Most of such reorganizations are of railroad corporations, and much of the legislation referred to has been framed with direct reference to such corporations. It has been held that a statute authorizing the holders of a majority of a railroad company's bonds to foreclose and reorganize against the will of the minority does not violate the constitutional prohibition against legislation impairing the obligations of contracts.<sup>3</sup>

(2) *Imposing Restrictions on Right to Reorganize*. — An amendment to legislation authorizing reorganization, withdrawing from purchasing bondholders the right to form a new corporation except on condition of submitting to statutory regulation of transportation rates, is not void as an impairment of the property rights of bondholders claiming under a mortgage existing at the time of the passage of the amendment, for the reason that authority to incorporate is not a property right, but is a privilege granted by the state, which may be withdrawn at pleasure.<sup>4</sup>

**2. Attitude of Courts Towards Reorganization Schemes** — *a. WHEN SCHEMES ARE FAIR AND FREE FROM FRAUD*. — In the *United States* the courts will not formulate plans of reorganization and compel the persons affected thereby to accept them against their will, for the reason that it is the function of the courts to enforce, and not to make, contracts.<sup>5</sup> However, courts of equity are disposed to regard reorganizations with favor,<sup>6</sup> and when they are fair and

**1. Purchasers May Sell to Existing Corporation.** — *Julian v. Central Trust Co.*, 193 U. S. 93; *People v. Brooklyn, etc.*, R. Co., 89 N. Y. 75.

**Foreign Corporation May Purchase** unless forbidden by statute. *Julian v. Central Trust Co.*, 193 U. S. 93. *Contra, James v. Western North Carolina R. Co.*, 121 N. Car. 523.

**2.** *Moore v. State*, 71 Ind. 478.

**3. Obligation of Contract Not Impaired by Reorganization Statute.** — After holding that the state had authority to pass legislation authorizing the majority of the bondholders of a railroad corporation to effect a reorganization over the objection of the minority bondholders, the court said: "The large sovereign powers given by the state to railroad corporations are granted and exercised only upon the theory that its public rights are to be used to promote the general welfare. Having exercised this power, the corporation has no right against the will of the state to abandon the enterprise, tear up its track, and sell its rolling stock and other property, and divide the proceeds among the stockholders. \* \* \* Upon principle it would seem plain that railroad property once devoted and essential to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occasion and created by the exercise by a private person of the powers of the state, is superior to the property rights of corporations, stockholders, and bondholders. \* \* \* The necessary conclusion is that the state has a right to enforce the continuous exercise of the corporate

powers and franchises for public use to the exhaustion of the value of such property and franchises; and this is true no matter what private right may embrace the title of the property." *Gates v. Boston, etc., Air Line R. Co.*, 53 Conn. 333.

**4. Authority to Reorganize Is Privilege, Not Right.** — *Railroad Com'rs v. Grand Rapids, etc.*, R. Co., 130 Mich. 248. See also *Columbia, etc., R. Co. v. Gibbes*, 24 S. Car. 70.

**5. Courts Will Not Formulate Reorganization Plans.** — *Wabash, etc., R. Co. v. Central Trust Co.*, 22 Fed. Rep. 138; *Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. Rep. 846; *Paton v. Northern Pac. R. Co.*, 85 Fed. Rep. 838; *Lake St. El. R. Co. v. Ziegler, (C. C. A.)* 99 Fed. Rep. 114.

"It would be more than doubtful if power were conferred upon a court to make a contract for the parties, whether it could make as fair and just and equitable a contract as could the parties themselves." *Paton v. Northern Pac. R. Co.*, 85 Fed. Rep. 838.

**6. Reorganization Favored by Courts.** — *Sage v. Central R. Co.*, 99 U. S. 343; *Shaw v. Little Rock, etc., R. Co.*, 100 U. S. 605; *Robinson v. Philadelphia, etc., R. Co.*, 28 Fed. Rep. 340; *Mackintosh v. Flint, etc., R. Co.*, 34 Fed. Rep. 582; *Central Trust Co. v. U. S. Rolling-Stock Co.*, 56 Fed. Rep. 5; *Platt v. Philadelphia, etc., R. Co.*, 65 Fed. Rep. 872; *Paton v. Northern Pac. R. Co.*, 85 Fed. Rep. 838; *Reed v. Schmidt*, 115 Ky. 67.

"The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money

just and are favored by the majority in interest, will sanction their adoption, notwithstanding the opposition of a dissentient minority,<sup>1</sup> after making due provision for the protection of the rights of the minority.<sup>2</sup>

to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be, that is to say, reorganize the enterprise on the basis of existing mortgages as stock or something which is equivalent, and by a new mortgage with a lien superior to the old, raise the money which is required, without asking the courts to engage in the business of railroad building. The result, so far as encumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution." *Shaw v. Little Rock, etc., R. Co.*, 100 U. S. 605.

*Compare Walker v. Montclair, etc., R. Co.*, 30 N. J. Eq. 525, wherein Chancellor Runyon said: "It will not be out of place to remark that while such agreements may be regarded as having the merit of protecting the bondholders by preventing a sacrifice of the property, yet in most cases they operate to the advantage of rich bondholders and to the exclusion, practically, of the poorer and helpless ones from the benefit of the mortgaged premises. \* \* \* Nor can the court fail to remember that the effect of such agreements is not to excite or encourage competition, but just the reverse."

**Protection Against Premature Inquiry.**—The court should not permit anything that would tend to defeat the objects of a sale by discouraging a proposed reorganization. Thus the court refused to grant an order compelling answers to interrogatories respecting the number of bonds deposited under a proposed scheme of reorganization, the plan of such reorganization, its membership, etc., on the ground that these questions were irrelevant and that the right of creditors to have the property sold under the mortgage could not be affected by the combination of a number of persons for the purpose of purchasing the property, and that pursuing such a line of inquiry would tend to defeat the object of the sale. *Robinson v. Philadelphia, etc., R. Co.*, 28 Fed. Rep. 340.

**1. Approval of Plan Favored by Majority.**—*Shaw v. Little Rock, etc., R. Co.*, 100 U. S. 605; *Pollitz v. Farmers' L. & T. Co.*, 53 Fed. Rep. 210; *Central Trust Co. v. U. S. Rolling-Stock Co.*, 56 Fed. Rep. 5; *Fidelity Ins., etc., Co. v. Roanoke St. R. Co.*, 98 Fed. Rep. 475. See also *Washington City, etc., R. Co. v. Southern Maryland R. Co.*, 55 Md. 153, 6 Am. & Eng. R. Cas. 603.

**Plan Opposed by Substantial Minority.**—The bonds issued under a five and a half million dollar railroad mortgage were held in nearly equal proportion by English and Dutch bondholders. The trustees of the mortgage instituted foreclosure proceedings and approved a reorganization plan which was favored by the English holders of about two millions of the bonds but was opposed by the Dutch holders of another two millions, the holders of the remaining million and a half taking no part

whatever in the proceedings. The Dutch bondholders through a representative committee filed a petition praying to be made formal parties of record, in order that they might take part in the proceedings, alleging that the trustees were carrying on the suit in furtherance of the plans of the English bondholders without reference to those of the Dutch bondholders. The court denied the petition on the ground that the trustees were the representatives of all the bondholders, whether English or Dutch, and that they should be allowed to conduct the suit in behalf of the bondholders until it was shown that by reason of negligence, fraud, or incompetency, they were unfit to do so. The court gave the petitioners leave, however, to oppose any proceedings in the cause which they deemed hostile to their interests, and stated that any petition alleging misconduct or incompetency on the part of the trustees would be given proper consideration. *Sidddy v. Atlantic, etc., R. Co.*, 3 Hughes (U. S.) 341, Hughes, J., dissenting.

**Creation of Monopoly.**—Where a reorganization committee appointed by the stockholders of an insolvent corporation make an application for the sale of the property to them, the court will not refrain from ordering the sale, merely on the ground that the reorganized company purposes to attempt to create a trust or monopoly in the conduct of its business, as the court cannot assume that the purchasers will make improper use of the property, nor can the court undertake to control the use of the property after it has been sold and conveyed by the receiver. *Olmstead v. Distilling, etc., Co.*, 73 Fed. Rep. 44.

**2. Protection of Minority's Rights.**—"An overwhelming majority wished the plan of reorganization adopted without delay. A very small minority had not assented to this plan. The court, while feeling constrained to respect the wishes of the majority, fully recognized the rights of the minority by providing that the railroad company should execute and deliver a bond of indemnity with approved sureties in a sum equal to double the face value of such outstanding bonds, conditioned that if the said railroad company 'shall well and truly pay, or cause to be paid, whatever amounts may be due upon any of the said ninety-two first mortgage bonds, when and as the same shall have been duly and properly presented for payment, then the said obligation to be void, otherwise to remain in full force and effect.' It might have been wiser had the decree directed a sum to be deposited in the registry of the court from which the clerk was to pay the bonds on presentation. But the substitution of an indemnity bond was within the discretion of the court and, in any view, it was a pardonable mistake. Certainly nothing is shown of which to predicate fraud. The court, undoubtedly, was of the opinion that if the nonconforming bondholders were placed in a position where they could not lose a farthing they would have no reason to complain. The



**3. WHEN SCHEMES ARE FRAUDULENT OR OPPRESSIVE.** — As a matter of course, the courts will not enforce a plan which is fraudulent and oppressive as to the minority, even though it be favored by a large majority, but will, on the contrary, prevent the consummation of such a plan.<sup>1</sup>

**4. SCHEME FAVORED BY RECEIVER.** — While the receiver should not, in his official character, favor a particular interest at the expense or to the detriment of other interests equally entitled to the protection of the court and its officers, it is not improper for him to advise, aid, and encourage a reorganization scheme which offers the prospect of securing the largest measure of protection to the various interests connected with, or concerned in, the trust estate which he is administering.<sup>2</sup>

interests of ninety-nine per cent. demanded that the decree be promptly granted. The interests of one per cent. demanded that whatever was owing to them should be paid. They could ask nothing more. The decree was granted with all rights reserved to the minority. The complainant has no just ground for complaint. The decree was just and proper and it protected all interests." *Pollitz v. Farmers' L. & T. Co.*, 53 Fed. Rep. 210.

**Extension of Time for Participation.** — "Looking at the difficulties which beset the subject on every side, we think that if we allow the non-subscribing bondholders to participate in the purchase of the property, should it be made in behalf of the reorganizing combination, on an equal footing with those who have joined it, that we shall have done all that we can do under the circumstances to protect their interests. The parties representing the reconstruction scheme, through their counsel, have offered to allow them to come in, and to extend the time for doing so until the first of August. We suggest that this time should be extended to the day of sale of the property. We perceive that the trustees have the power to do this — and keep the agreement on foot by extending the time sixty days at a time. We have, therefore, proposed an additional proviso to the decree to carry out this view. We hope that it will be acceded to by the counsel for the complainants and those representing the reconstruction scheme. We do not wish to dictate these terms to the parties who propose to purchase, but suggest that, in our judgment, the interest of all parties would be subserved by an arrangement of this sort." *Duncan v. Mobile, etc., R. Co.*, 3 Woods (U. S.) 597.

**1. Fraudulent or Oppressive Plan Will Not Be Enforced.** — *Lake St. El. R. Co. v. Ziegler*, (C. C. A.) 99 Fed. Rep. 114, where the essence of the reorganization scheme was an attempt upon the part of the stockholders to compel the bondholders to scale their bonds without making any sacrifice on their own part.

**2. Receiver May Promote Fair Reorganization Plan.** — *Clark v. Central R., etc., Co.*, 66 Fed. Rep. 16. *Compare Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. Rep. 846, holding that a receiver has no right to promote any proposed plan of reorganization, as the question is one to be left for the determination of the persons interested therein, without interference in any way by the court or its officers.

**Receivers' Petition for Reorganization.** — Where the receivers of two insolvent corporations petitioned the court for leave to enter into an

agreement for a readjustment of the affairs of the two companies and the petition was opposed by certain of the bondholders and by the representatives of other committees, but there was no question of a rival plan of reorganization, nor was there any pending scheme to avoid the impending foreclosure, the court approved the order of the master granting the petition and said that the entering of the order did not approve the proposed plan of reorganization, and that neither approval nor disapproval thereof could be implied from the order. The court said further that the question of the wisdom and expediency of adopting any proposed scheme of reorganization was for the solution and determination of the persons in interest, and that no attempt to coerce their judgment or control their actions should be made either by the court or by the receivers, and that the court would not pass upon the comparative merits of rival schemes of reorganization. *Platt v. Philadelphia, etc., R. Co.*, 65 Fed. Rep. 872.

**Payment of Reorganization Expenses by Receiver.** — The trustees under the general mortgage of a railway company, which was in the hands of receivers, petitioned the court for an order on the receivers to pay the expenses of certain negotiations between the general mortgage and collateral trust bondholders of such railway company, having for their object the sale of the mortgaged property to the best advantage, and a reorganization of the said company. Their petition showed that negotiations had resulted in an agreement which had been signed or assented to by the holders of a majority of the general mortgage bonds and by the holders of substantially all of the collateral bonds, and that the expenses in question had been incurred by a purchasing committee for advertising and printing and for engraving certificates to be delivered to the bondholders who were parties to the agreement. The court denied the petition, saying: "I doubt not that if this arrangement which is contemplated, shall be carried out, and the sale and purchase made in pursuance thereof, these expenses will be a proper charge against the property, and to be paid out of the proceeds of the sale. If there was any surplus money in the hands of the receivers, perhaps there would be no impropriety in advancing the money for them; but as there is no surplus money, and as, also, there is no absolute certainty that these negotiations will be carried into effect and the sale and purchase made in pursuance thereof, I do not think it proper for us at present to make



**3. Reorganization or Purchasing Committees** — *a. DEFINITION.* — A reorganization committee or purchasing committee is a committee appointed by an association of the bondholders, creditors, or stockholders of an insolvent corporation for the purpose of carrying out a plan upon which they have agreed for the reorganization of the corporation. The reorganization plan usually contemplates the foreclosure of the corporation's mortgage or mortgages, the purchase of the property by the committee at the foreclosure sale, and the transfer of the property to a new corporation formed by the parties to the agreement (and such others as they choose to admit to participation therein) to carry on the business of the old corporation.<sup>1</sup>

*b. POWERS, DUTIES, AND LIABILITIES* — (1) *Power to Modify or Depart from Reorganization Agreement* — (a) *In General.* — The powers and duties of a reorganization committee are defined and limited by the agreement appointing it.<sup>2</sup> The committee has no power to modify or change the plan of reorganization without the consent of the appointing power, unless it is authorized so to do by such agreement.<sup>3</sup> Since it occupies a relation of trust towards those appointing it to represent their interests,<sup>4</sup> the members may be held liable individually for an unauthorized modification or change resulting in financial loss to their *cestuis que trustent*.<sup>5</sup>

(b) *When Invested with Wide Discretion* — *aa. IN GENERAL.* — On the other hand, the order requested." *Central Trust Co. v. Wabash, etc., R. Co.*, 25 Fed. Rep. 70.

But the court gave the receivers permission to enter into an agreement for the adjustment of the affairs of their trust property, where the agreement provided that the syndicate which undertook the reorganization should receive from the receivers a commission of two and one-half per cent. upon the money advanced by the syndicate for the purchase of overdue coupons and interest, in the event the plan of reorganization proved successful, the master having reported that the provision for commissions was only an element of the net price to be obtained for the assets disposed of and did not impair the obligations of the income mortgages. *Platt v. Philadelphia, etc., R. Co.*, 65 Fed. Rep. 872.

**1. Reorganization Plan Usually Contemplates Foreclosure.** — "It rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about." *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527.

**Purchasing Committee Need Not Disclose Principals.** — Where the mortgagor corporation and other persons in interest objected to the sale on the ground that the master's report did not show who were the principals for whom the purchasing committee acted, and did not state what interest each of the parties interested in the purchase had, the court overruled the objection on the ground that all that could be required of the committee was that they should comply with the terms of the sale. *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380.

**2. Powers of Committee Defined and Limited by Agreement.** — *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260; *Cox v. Stokes*, 156 N. Y. 491, *reversing* 78 Hun (N. Y.) 331; *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, *reversing* 29 N. Y. App. Div. 630; *Post v. Simmons*, (Supm.

Ct. Gen. T.) 16 N. Y. St. Rep. 246. See also *Miller v. Rutland, etc., R. Co.*, 40 Vt. 399.

**3. Committee Cannot Modify Plan.** — *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260; *Cox v. Stokes*, 156 N. Y. 491, *reversing* 78 Hun (N. Y.) 331; *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, *reversing* 29 N. Y. App. Div. 630.

**Permitting Outsiders to Participate in Reorganization.** — Where the committee of the bondholders purchases the property of a corporation sold under foreclosure proceedings and the agreement under which the committee acts in making such purchase provides that it shall be for the benefit of the bondholders alone, the committee has no authority to incorporate into the reorganization agreement a provision permitting certain of the stockholders of the old corporation to participate in the benefits of the reorganization. *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, *reversing* 29 N. Y. App. Div. 630.

**Ratification of Modification.** — It will not be considered that bondholders have ratified a modification of a reorganization agreement made by the reorganization committee, where there is no evidence that the bondholders intended to forego any advantage or to surrender any right, and nothing was done by them inconsistent with the existence of the rights secured by the original agreement or with their intention to rely upon those rights, and there is no consideration, intent, misleading conduct, change of position, or mutual understanding, from which a waiver or estoppel can be properly inferred. *Cox v. Stokes*, 156 N. Y. 491.

**4. Committee Trustees for Parties to Agreement.** — *Fuller v. Venable*, (C. C. A.) 118 Fed. Rep. 543; *Cox v. Stokes*, 156 N. Y. 491, *reversing* 78 Hun (N. Y.) 331; *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, *reversing* 29 N. Y. App. Div. 630.

**5. Laches of Bondholder.** — A court of equity will deny relief to a bondholder when he fails to commence proceedings to protect or assert his rights within a reasonable time after be-

since a reorganization committee is charged with grave responsibilities, and the proper discharge of its duties involves the exercise of a high degree of skill, care, and ability, it is usually invested nowadays with wide discretion,<sup>1</sup> and for the same reasons the courts are inclined to construe the agreements liberally in favor of the committees<sup>2</sup> and to hold them liable only for malfeasance, misfeasance, or gross negligence.<sup>3</sup>

*bb. MODIFICATION IN MATTER OF DETAIL.* — Thus, reorganization agreements usually give the committees authority to modify the plans in any particular not substantial,<sup>4</sup> and sometimes empower them to decide conclusively whether or not a proposed change is substantial.<sup>5</sup> And where the committees act in good faith, they will not be held liable for their mistakes, even though they allowed themselves to be overreached by the persons with whom they were dealing.<sup>6</sup>

coming cognizant of the acts of the committee of which he complains, even if the time elapsed without suit is less than that prescribed by the statute of limitations, where the doing of justice between the parties requires the exercise of this inherent power of equity. *Alsop v. Riker*, 155 U. S. 448, reversing 27 Fed. Rep. 251.

But seasonable suit by one of a class, in behalf of all, relieves all from the imputation of laches. *Cox v. Stokes*, 156 N. Y. 491.

**1. Examples of Agreements Conferring Wide Discretion.** — *McHenry v. New York, etc., R. Co.*, 25 Fed. Rep. 65; *Central Trust Co. v. Cincinnati, etc., R. Co.*, 58 Fed. Rep. 500; *Central Trust Co. v. Carter*, (C. C. A.) 78 Fed. Rep. 225; *Mercantile Trust, etc., Co. v. Low*, (C. C. A.) 87 Fed. Rep. 241; *White v. Wood*, 129 N. Y. 527; *Olcott v. Powers*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 263; *Industrial, etc., Trust v. Tod*, 93 N. Y. App. Div. 263.

**Settlement of Doubtful Claims.** — Where the reorganization committee was invested with practically unlimited authority in reference to all matters concerning the settlement of claims against the old corporation and perfecting the scheme of reorganization, it was held that the parties to the agreement were bound by the action of the committee in compromising claims of doubtful validity, there being no charge of fraud or bad faith on the part of either the committee or the claimants; and inasmuch as the committee failed to issue to the claimants as agreed, certain negotiable certificates, payable in cash and secured by the bonds deposited with the committee, it was held that the agreement should be enforced as a mortgage on the bonds, and that the claimants were entitled to be paid out of the proceeds of sale the amounts for which they should have received certificates. *Central Trust Co. v. Carter*, (C. C. A.) 78 Fed. Rep. 225.

**Extension of Time for Assenting.** — Where the committee is vested with discretionary power to extend the time within which stockholders may signify their intention to participate in the reorganization, and authorized "to delegate any necessary authority as well as discretion" to agents, any member of the committee may extend the time by the consent of the committee. *Raleigh v. Earle*, 5 Pa. Dist. 111.

**2. Agreements Construed Liberally in Favor of Committee.** — *Venner v. Fitzgerald*, 91 Fed. Rep. 335. Compare *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, reversing

29 N. Y. App. Div. 630, which holds that where the members of the committee of the bondholders notify the bondholders to become parties to an agreement which they (the committee) have prepared and tendered, they solicit the trust and confidence of the bondholders, and such agreement should be construed strictly as against the committee and in favor of the *cestuis que trustent*.

**3. Committee Liable for Malfeasance, Misfeasance, or Gross Negligence.** — *Van Siclen v. Bartol*, 95 Fed. Rep. 793; *White v. Wood*, 129 N. Y. 527; *Industrial, etc., Trust v. Tod*, 93 N. Y. App. Div. 263.

**4. Authority of Committee to Modify Plan.** — *Post v. Simmons*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 246, 48 Hun (N. Y.) 620.

**Mode of Making Modification.** — When the reorganization agreement, after authorizing the committee to alter or modify the plan, designates the method by which this power to alter or modify shall be exercised, the committee must follow the method so designated, and a modification made in any other manner is not binding on the parties to the agreement. *Post v. Simmons*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 246, 48 Hun (N. Y.) 620.

**What Is Matter of Detail.** — When the reorganization agreement appoints a "committee of detail" to whom is committed the regulation and direction of any "matter of detail" which may in their judgment, or that of the majority of them, be necessary or expedient for carrying out the plan proposed by the agreement, the term "matters of detail" means not merely such matters as affect the formal execution of the provisions of the agreement, but also such alterations in the terms of the agreement itself (not changing the plan) as may be deemed necessary or advisable to effect the object. Thus, when the agreement contemplates reorganization without foreclosure and provides for the issuance of income bonds, payable in thirty years from the date of the issue, the committee have the power to modify the plan, by giving the company the option to pay the bonds before the expiration of thirty years from the date of the issue. *Lehigh Coal, etc., Co. v. Central R. Co.*, 34 N. J. Eq. 88.

**5. Power to Construe Agreement.** — *White v. Wood*, 129 N. Y. 527; *Barnard v. Fitzgerald*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 181.

**6. Liability of Committee for Mistakes.** — *Van Siclen v. Bartol*, 95 Fed. Rep. 793.



*cc. DISREGARD OF POSITIVE INSTRUCTIONS.* — But this discretion does not permit a committee either to disregard positive instructions or requirements of the agreements,<sup>1</sup> or to formulate a substantially different plan under the guise of preparing the details of a plan as authorized by the agreement.<sup>2</sup> In no event can the committee make a change which is for the benefit of its members and not for the benefit of their *cestuis que trustent*.<sup>3</sup>

(2) *Power to Bind Bondholders by Contract.* — When the committee enters into a contract which is within the scope of the authority conferred upon it by the bondholders, the latter are not entitled to have such contract declared null and void unless they can show that the persons with whom the committee made the contract were guilty of fraud, either against the committee or in collusion with it, notwithstanding the fact that the members of the committee have been guilty of conduct amounting to a violation of their trust duties towards the bondholders.<sup>4</sup>

(3) *Power of Mortgage Trustee to Purchase at Foreclosure Sale.* — If the mortgage confers authority on the trustee to foreclose, but does not authorize him to purchase the property for the benefit of all the bondholders, the court cannot order him to so purchase over the objection of a bondholder the payment of whose bonds has been guaranteed by the other bondholders.<sup>5</sup>

(4) *Duty to Inform Bondholders of Terms of Proposed Reorganization.* — When a reorganization agreement empowers the committee appointed thereunder to prepare and adopt a plan which shall be binding upon parties to the agreement, who fail to dissent therefrom within a specified time, it usually requires the committee to file a copy of such plan with a designated depository and to give due notice thereof to the signers of the agreement. Hence, it is the duty of the reorganization committee to inform the bondholders of the terms of the plan of reorganization which it proposes to carry out, and equity will relieve against its failure or refusal to observe this duty.<sup>6</sup> But if the agreement authorizes the committee to reorganize with or without foreclosure, its failure to file a copy of the plan before the sale does not render it liable for

**1. Committee Cannot Disregard Positive Instructions.** — *Cox v. Stokes*, 156 N. Y. 491, *reversing* 78 Hun (N. Y.) 331.

**2. Formulation of Substantially Different Plan.** — *United Waterworks Co. v. Stone*, 127 Fed. Rep. 587; *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, *reversing* 29 N. Y. App. Div. 630.

**Modification of Principle.** — Where the reorganization agreement provided that the committee might "perfect, modify, and carry out such details of the principles of such organization as in the judgment of such committee" might be advisable, it was held that it was clear that the powers thus conferred were nothing more than to carry out the plan of reorganization proposed, with only a power of modification in detail and not in principle. *Post v. Simmons*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 246, 48 Hun (N. Y.) 620.

**3. Change Beneficial to Committee, but Injurious to Bondholders.** — *Fuller v. Venable*, (C. C. A.) 118 Fed. Rep. 543; *United Waterworks Co. v. Stone*, 127 Fed. Rep. 587; *Hoopes v. Corbin*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 212.

**4. Committee's Contract Binds Bondholders.** — *Brooks v. Dick*, 135 N. Y. 652, *affirming* 62 Hun (N. Y.) 622.

**5. Purchase by Trustee Over Objection of Bondholder.** — The reason for the rule stated in the text is that such a purchase might have the effect of impairing the security of the bond-

holder to whom the guaranty was given, as the foreclosure sale under such a decree for the full amount of the bonded indebtedness would extinguish any liability of the guarantors, no matter how much the bondholder to whom the guaranty was given might lose on the property purchased for him by the trustee. *Sanxey v. Iowa City Glass Co.*, 63 Iowa 707.

**Enforcement of Guaranty After Sale.** — Where a bondholder claimed that the foreclosure sale was a nullity as to him because of the fact that the old corporation had guaranteed but not paid certain bonds owned by him, it was held that his cause of action was purely a legal one against the old corporation, and that he could not maintain a suit in equity against the new corporation until after recovery of judgment against the old one, when upon return of his execution unsatisfied he might be in a position to pursue the old corporation's property into the hands of the new corporation. *Sawyer v. Atchison, etc., R. Co.*, (C. C. A.) 129 Fed. Rep. 100, 119 Fed. Rep. 252.

**6. Notice of Terms of Reorganization.** — *Midland R. Co. v. Hitchcock*, 34 N. J. Eq. 278, *affirming* 33 N. J. Eq. 86. But the court will not compel the committee to make a premature disclosure of the progress being made in the carrying out of the reorganization plan, if the effect of such disclosure would tend to defeat the objects of the sale by discouraging the re-



an action for breach of contract, in the absence of an express provision of the agreement requiring the plan to be filed before sale.<sup>1</sup>

(5) *Duty in Regard to Securities Held in Trust.* — Usually, if not invariably, the reorganization agreement provides that the subscribers thereto shall deposit with the reorganization committee, the bonds, certificates of stock, and other securities (issued by the corporation which is to be reorganized) which they own, in order that the committee may be enabled to carry out successfully the plan contemplated by the agreement. In such case the committee is bound to deal with and dispose of the securities so deposited in the manner directed by the agreement, and it holds the securities impressed with a trust, express or implied, for the performance of the duties imposed by the agreement. The new corporation comes into being as the result of the reorganization agreement, and is bound to issue such securities to the parties thereto as are provided for by the agreement, and to carry out in every respect the plan lawfully formulated under the agreement. Any or all of the *cestuis que trustent* are entitled to insist upon a complete performance, by the committee and by the new corporation, of the duties imposed by the reorganization agreement and the resulting plan or scheme.<sup>2</sup>

(6) *Duty in Regard to Property Purchased* — (a) *In General.* — When the trustees of a mortgage executed by a corporation, acting under the authority conferred on them by the mortgage, purchase the mortgaged property under foreclosure proceedings, they hold it in trust for the benefit of all the bondholders who comply with the conditions entitling them to participate in the purchase; and the trustees are bound to convey the property to a new corporation formed by the bondholders for the purpose of taking it, or to make such other disposition of it as is directed by the mortgage.<sup>3</sup> In like manner, when the purchase is made by a reorganization committee, the purchasers hold the property in trust for the benefit of all the parties to the reorganization agreement, and subject to the terms of the agreement.<sup>4</sup>

(b) *When Authorized Only to Convey to New Corporation.* — If the mortgage only

organization. *Robinson v. Philadelphia, etc., R. Co.*, 28 Fed. Rep. 340.

1. *Failure to File Plan Before Sale.* — *Industrial, etc., Trust v. Tod*, 93 N. Y. App. Div. 263.

2. *Committee and New Corporation Must Carry Out Agreement.* — These principles were applied where the agreement provided that the bonds to be issued by the new corporation were to be, or become, in the hands of the holders, absolute first-mortgage bonds, unincumbered by any prior lien, and that certain securities should be deposited with the committee by the new corporation as a pledge to insure the extinguishment of liens prior to that of the new bonds. The new corporation sought to compel the return of the securities so deposited by it with the committee and to extend the time for the payment of the prior liens instead of extinguishing them. The court denied the relief sought, and held that the holders of the new bonds were entitled to insist that the committee retain the securities until the agreement was fully executed by the complete extinguishment of all prior liens. *Peoria, etc., R. Co. v. Custer*, 97 Fed. Rep. 519.

3. *Purchasing Trustees Hold in Trust for Bondholders.* — *Thayer v. Wathen*, 17 Tex. Civ. App. 382.

*Bondholders Tenants in Common.* — The bondholders or other persons for whom the reorganization committee or mortgage trustees purchase

the property of an insolvent corporation are equitable tenants in common of the property purchased. *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616.

*An Action for Removal Lies Against a Trustee* who wrongfully refuses to execute a conveyance of the property purchased by him at the foreclosure sale. *Harrison v. Union Trust Co.*, 144 N. Y. 326, *affirming* 80 Hun (N. Y.) 463.

*Majority Must Authorize Conveyance.* — Where, after the sale, motions were made for an order upon the trustee under the mortgage to convey the property purchased to each of three competing companies, the court denied all of the motions on the ground that there was no evidence before it that the holders of a majority of the outstanding bonds secured by the mortgage had in writing requested or directed or assented to the articles of incorporation of either of said new companies as required in the mortgage as a prerequisite to conveyance. *Farmers' L. & T. Co. v. Central R. Co.*, 4 Dill. (U. S.) 536.

4. *Committee Trustees for Parties to Agreement.* — *Cushman v. Bonfield*, 139 Ill. 219, *affirming* 36 Ill. App. 436; *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260; *Grace v. Noel Mill Co.*, (Tenn. Ch. 1901) 63 S. W. Rep. 246. But the committee are not trustees for bondholders who fail to join in the reorganization agreement within the time al-

authorizes the trustees to organize a new corporation for the benefit of the bondholders, and to reconvey the property purchased to such new corporation, the trustees have no right to expose the property for sale at public auction, even though requested so to do by the holders of a majority of the bonds.<sup>1</sup>

(c) **When Bondholders Fail to Comply with Agreement** — *aa. IN GENERAL.* — When the holders of a majority of the bonds fail to pay the assessment made upon them for their respective proportions of the costs of the foreclosure sale and reorganization, the committee has the right to abandon the sale and to refuse to complete it; and in such event the property remains subject to the lien of the bondholders and may be resold under the decree.<sup>2</sup>

*bb. LIABILITY TO COMPLYING BONDHOLDERS.* — But if, after the failure of the holders of a majority of the bonds to pay the required assessment, the trustees, instead of renouncing their trust, furnish the necessary money and complete the sale, they take the property subject to a trust in favor of such of the parties to the agreement as comply with the terms thereof.<sup>3</sup>

(7) **Liability of Committee** — (a) **To Parties to Reorganization Agreement** — *aa. FOR BREACH OF TRUST.* — If the purchasing trustees or committee make an unauthorized disposition of the purchased property, they are accountable to their *cestuis que trustent* for their breach of trust.<sup>4</sup>

*bb. FOR BREACH OF CONTRACT.* — If the reorganization trustees commit a breach of contract by failing to perform some of the duties required of them by the agreement under which they act, the bondholders or certificate holders may maintain an action therefor only when they have been actually damaged thereby.<sup>5</sup>

*cc. FOR CONVERSION OF SECURITIES.* — When the reorganization agreement confers broad powers on the reorganization committee, and exempts its members from any liability except for wilful misconduct, their failure, while acting within the scope of their authority, to perform a duty imposed on them by

lowed for so doing. *Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49.

**1. Trustee Authorized Only to Convey, Cannot Sell.** — Where the mortgage only empowered the trustee to convey the property to a new corporation formed for that purpose, the court held that the written request of the holders of a majority of the bonds conferred on the trustee no authority to resell the property at public auction, so long as a single bondholder dissented and insisted upon the performance of the trust according to its terms. And although the mortgage provided that the new corporation was to be organized "upon such terms, conditions, and limitations, and in such manner, as the holders of a majority of said outstanding bonds" should direct or request in writing, the trustee was not excused by the fact that execution of the trust in the manner prescribed by the mortgage was rendered impossible by the action of the majority in requesting a resale, as he should have sought the direction of the court before acting. It was also held that the corporation which purchased from the trustee was not substantially the organization provided for in the mortgage, though a majority of the bondholders went into it and determined that it was "for their use and benefit" that the mortgaged property should be transferred to it. *James v. Cowing*, 82 N. Y. 449.

**2. Abandonment of Purchase.** — *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260; *Grace v. Noel Mill Co.*, (Tenn. Ch. 1901) 63 S. W. Rep. 246.

**Estoppel to Claim Performance.** — Where

through the failure of the parties to the reorganization agreement to comply with its requirements, the committee was obliged to abandon the plan contemplated by the agreement, and subsequently the committee, at the direction of a majority of the parties, proceeded to carry out a different plan, it was held that one of those who made it impossible to carry out the original agreement was not entitled to insist upon its specific performance. *Froment v. Lessig*, 174 Pa. St. 487.

**3. Unauthorized Completion by Purchasing Committee.** — *Cushman v. Bonfield*, 139 Ill. 219, *affirming* 36 Ill. App. 436; *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260. See also *Grace v. Noel Mill Co.*, (Tenn. Ch. 1901) 63 S. W. Rep. 246.

**4. Liability of Trustees for Breach of Trust.** — *Cushman v. Bonfield*, 139 Ill. 219, *affirming* 36 Ill. App. 436; *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260. See also *Zebble v. Farmers' L. & T. Co.*, 139 N. Y. 461, *reversing* 63 Hun (N. Y.) 541.

**Measure of Damages.** — In an action by a bondholder against the mortgage trustee for breach of trust in selling the purchased property instead of conveying it to a new corporation, the measure of damages is the value of the plaintiff's proportionate part of the property wrongfully sold and not his proportionate part of the sum realized at the wrongful sale. *James v. Cowing*, 82 N. Y. 449.

**5. Failure to File Plan.** — *Industrial, etc., Trust v. Tod*, 93 N. Y. App. Div. 263.



the agreement may render them liable for breach of contract, but does not constitute a conversion of the bonds intrusted to them under the agreement.<sup>1</sup>

(b) **To New Corporation.** — Negligence or misfeasance on the part of the committee is not a breach of contract with the new corporation, but is a breach of contract with the bondholders, and an abuse of their trust and confidence, for which they, and not the new corporation, may hold the committee responsible.<sup>2</sup>

(c) **To Third Persons** — *aa.* **FOR BREACH OF CONTRACT.** — When a reorganization committee, representing the first bondholders, promises to admit the second mortgage bondholders to participation in the reorganization, but fails to do so, the members of the committee may be liable for breach of contract, but the second mortgage bondholders are not entitled either to rescission of the sale made under the first mortgage or to have a trust in their favor impressed upon the property in the hands of the corporation formed by the foreclosure purchasers, if the sale was free from fraud.<sup>3</sup> Nor can a stockholder who was not a party to the agreement, but to whom the committee agreed to deliver stock in the new corporation, hold the new corporation liable for breach of the contract, his only recourse being against the committee.<sup>4</sup>

*bb.* **FOR ACTS COMMITTED IN MANAGEMENT OF PROPERTY PURCHASED.** — When the trustees under the mortgage of the property of a railroad corporation purchase such property at the foreclosure sale, and proceed to operate the railroad for the benefit of the bondholders whom they represent, pending the transfer of the property to the new corporation which is to be formed to acquire it, such trustees sustain to the public the relation of owners of the property and must be held liable as common carriers for contracts which they have made.<sup>5</sup>

(8) **Liability of New Corporation for Committee's Acts** — (a) **Liability to Bondholders for Breach of Trust.** — When the trustees, after purchasing the property at the foreclosure sale, make an unauthorized sale of it, purchasers with notice of the trust with which the property is burdened take it subject to such trust, and the *cestuis que trustent* may follow the property into the hands of such purchasers.<sup>6</sup>

**1. Liability for Conversion.** — Industrial, etc., *Trust v. Tod*, 170 N. Y. 233.

**2. The Committee's Failure to Account for Part of the Proceeds** of the property of the old corporation that came into its hands as purchasers in behalf of the bondholders gives a right of action to the bondholders and not to the corporation, as the latter is not a party to the trust. *Dunning v. Bates*, (Mass. 1904) 71 N. E. Rep. 309.

**Laches Cannot Be Charged Against a Bondholder** who made a written demand upon the committee for an accounting immediately after learning of the matters complained of, and within a short time thereafter brought suit against its members for an accounting. *Dunning v. Bates*, (Mass. 1904) 71 N. E. Rep. 309.

**3.** *Robinson v. Iron R. Co.*, 135 U. S. 532.

**4. New Corporation Not Liable under Committee's Contract.** — *Thornton v. Wabash R. Co.*, 81 N. Y. 462.

**Laches Barring Action.** — Where the purchaser of a railroad published an offer to exchange shares in the new corporation for all shares in the old deposited with a designated trust company within a certain time, and a stockholder presented his certificate seasonably to the trust company, which refused to accept it because of lack of proof of the genuineness of a signature to a transfer indorsed thereon, and the stockholder failed to take further action before

the expiration of the time limit, it was held that he could not maintain an action against the purchaser for breach of contract, and that his laches was not excused either by his inability to comprehend the trust company's objection to receiving the certificate, or by the fact that he allowed the time to expire under the belief that the purchaser was in some way responsible for the trust company's action. *Schorestene v. Iselin*, 69 Hun (N. Y.) 250.

**5. Individual Purchasers Liable as Common Carriers.** — *Rogers v. Wheeler*, 43 N. Y. 598. See also *Watson v. Albany, etc., R. Co.*, 111 Ga. 10.

*Compare* *Stratton v. European, etc., R. Co.*, 74 Me. 422, holding that trustees who purchase under authority of a statute which limits their liability to malfeasance or fraud are not liable under the terms of a statute providing that "when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury," as they are subject only to the liability imposed upon them by statute.

**6. Purchasers with Notice Take Subject to Trust.** — *Cushman v. Bonfield*, 139 Ill. 219, affirming 36 Ill. App. 436; *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, affirming 54 Ill. App. 260.

**The Knowledge of the President** of a railroad corporation that the property purchased by it is burdened with a trust must be regarded as



(b) **Liability to Third Persons for Management of Property Purchased.** — And it has been held that the trustees and the new corporation are jointly liable for a personal injury occurring at a time when the new corporation (which has agreed to indemnify the trustees against liability arising from their operation) is operating the railroad under its contract of purchase from the trustees, but the trustees are in nominal control for the purpose of insuring the performance by the new corporation of the stipulations of the contract of purchase.<sup>1</sup>

(9) **Vacating Sale for Committee's Fraud.** — Under some circumstances the sale may be set aside at the instance of a party to the reorganization agreement for a violation thereof or for fraud in the purchase. But it is within the discretion of the court to refuse to vacate the sale, and to leave the complaining party to his remedy against the reorganization committee and the purchasers for breach of contract or breach of trust, particularly when he delays application for the relief until after the intervention of the rights of third persons, and fails to show that the property will bring a larger price on the resale than it did at the original sale.<sup>2</sup>

**4. Rights and Duties of Bondholders in Regard to Reorganization** — *a. RELATIONS EXISTING BETWEEN BONDHOLDERS* — (1) *Bondholders as Quasi-stockholders.* — Mortgages executed by railroad and other quasi-public corporations are of a peculiar character, and each bondholder under them enters, by fair implication, into certain contractual relations with his associates.<sup>3</sup> Such bondholders are not, like stockholders, necessarily bound by the will of the majority in the absence of fraud or undue influence, but they occupy to some extent an analogous position towards each other.<sup>4</sup>

(2) *As Affected by Terms of Mortgage.* — Sometimes the mortgage contains provisions giving the holders of a majority of the bonds broad powers in the matter of binding the minority; and in the absence of fraud or oppression the minority will not be heard to complain of any act done by the majority within the scope of the authority thus conferred, as the entire body of bondholders, by taking their bonds under such a mortgage, consent to place their interests to a certain extent under the control of the majority.<sup>5</sup> This doctrine

actual notice to the corporation itself. *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260.

**A Money Decree** for the value of the bonds may be had against a railroad corporation which purchased property burdened with a trust and failed to obey an interlocutory decree requiring it to issue bonds to the beneficiaries in discharge of the trust. *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616, *affirming* 54 Ill. App. 260.

**1. Joint Liability of Trustees and New Corporation.** — *Lockhart v. Little Rock, etc., R. Co.*, 40 Fed. Rep. 631.

**2. Vacating Sale for Breach of Agreement.** — *Farmers' L. & T. Co. v. Bankers, etc., Tel. Co.*, 119 N. Y. 15.

**3. Bondholders Sustain Contractual Relations to Each Other.** — *Gilfillan v. Union Canal Co.*, 109 U. S. 401.

"So, too, in relation to the other bondholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified by the same existent right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security." *Gates*

*v. Boston, etc., Air Line R. Co.*, 53 Conn. 333, 24 Am. & Eng. R. Cas. 143.

**4. Bondholders Analogous to Stockholders.** — *Gilfillan v. Union Canal Co.*, 109 U. S. 401.

"To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." *Shaw v. Little Rock, etc., R. Co.*, 100 U. S. 605, *approved in* *Gates v. Boston, etc., Air Line R. Co.*, 53 Conn. 333, 24 Am. & Eng. R. Cas. 143.

**5. Minority Bound under Terms of Mortgage.** — *Sage v. Central R. Co.*, 99 U. S. 334.

But the minority are bound only when the majority act in good faith. Thus, a consent to

has been carried so far as to hold the minority bound by the terms of a mortgage authorizing the mortgage trustees to purchase at the foreclosure sale in behalf of the bondholders upon the request of the holders of a majority of the bonds, and providing that no bondholder shall have any claim to the property or the proceeds thereof except for his *pro rata* share as represented in a new company or corporation to be formed for the use and benefit of the bondholders.<sup>1</sup>

(3) *Duties of Bondholders to Each Other.* — Bondholders having a common security owe certain duties to each other. Ordinarily the mortgage provides the mode of procedure in case of default in payment of principal or interest and contains provisions designed to afford equal protection to all the bondholders. But independently of such provisions, a court of equity will not permit bondholders, whether they be the majority or minority in interest, so to use their security as injuriously to affect the interests of their associates; and a collusive sale at a grossly inadequate price, procured secretly by a bondholder in a colorable enforcement of his claim against the mortgaged property, will be set aside as a fraud on the other bondholders, even after the property has passed into the hands of a new corporation organized by the purchasers.<sup>2</sup>

b. RIGHT TO COMBINE FOR PURCHASE AND REORGANIZATION. — The

postpone payment of the principal and interest of the bonds, made collusively by the majority for the purpose of depreciating the market value of the securities and thereby enabling the majority to purchase them at a low figure, is not an exercise of the honest discretion contemplated by a provision of the mortgage authorizing the majority to bind the minority in the general interest, and therefore is void as to the minority. *Hackettstown Nat. Bank v. D. G. Yuengling Brewing Co.*, (C. C. A.) 74 Fed. Rep. 110.

1. *Waiver of Claim to Proceeds of Sale.* — Where the mortgage provided that in case of a purchase by the trustee, no bondholder should have any claim to the property or the proceeds thereof except for his *pro rata* share of the proceeds as represented in the new corporation to be formed by the trustees for the use and benefit of the bondholders secured by the mortgage under which foreclosure was had, such new corporation to be organized upon such terms, conditions, and limitations, and in such manner, as the majority should in writing request or direct, the court held that the agreement, although unusual, was a reasonable one, as, while it prevented a small minority of the bondholders from forcing unreasonable and inequitable concessions from the majority, it did not empower that majority to crush out the rights of the minority or subject them to any disadvantage, but only authorized such arrangement as would inure equally to the benefit alike of the majority and the minority. And this, too, in spite of the fact that the plan formulated by the majority in the exercise of the discretion vested in them by the mortgage, conceded an interest in the new corporation to junior lien creditors and to the stockholders of the former corporation, as the interest so conceded, being subordinate to that of the holders of the bonds under which foreclosure was had, did not postpone the rights of any of the minority bondholders to those of other creditors. *Sage v. Central R. Co.*, 99 U. S. 334.

2. *Duties of Bondholders to Each Other.* — *Jackson v. Ludeling*, 21 Wall. (U. S.) 616. See

also *Walker v. Whelen*, 4 Phila. (Pa.) 389, 18 Leg. Int. (Pa.) 236.

*Bondholder Cannot Employ Security to Injury of Other Bondholders.* — The principles laid down in the text were applied where the holder of four thousand dollars of the bonds of a railroad corporation (on which there were unpaid past due interest coupons amounting to seven hundred and twenty dollars), out of a total issue of seven hundred and sixty-one thousand dollars, procured an order of sale under the mortgage on a petition of which no notice was given to any of the other bondholders, and the sale was made as secretly and speedily as possible in a remote village, after a fraudulent appraisal fixing a nominal value on the property, and the property, on which nearly two million dollars had been spent, was bought for fifty thousand dollars by the petitioning bondholder and certain officers and directors of the mortgagor corporation, in pursuance of a collusive agreement previously made by them. The court, in setting aside the sale, after the property had been transferred by the purchasers to a new corporation which they organized, held that the sale was void not only because of the petitioning bondholder's violation of the duty he owed to the other bondholders, but also because of the participation of the officers and directors of the mortgagor corporation, who, in addition to being the trustees of the stockholders, were also the trustees to a considerable degree of the bondholders, and had no right to participate in a combination the object of which was to divest the company of its property and obtain it for themselves at the lowest price possible. *Jackson v. Ludeling*, 21 Wall. (U. S.) 616. See also *Drury v. Cross*, 7 Wall. (U. S.) 299.

*Fraud of Mortgage Trustee.* — Where the trustee of the mortgage, upon whom rested the duty of protecting the interests of the bondholders, and the temporary receivers of the mortgaged property of a corporation, entered into an agreement with a third person, which provided that the foreclosure sale should be conducted as secretly as possible and advertised in such a manner as to create the least possible pub-



bondholders and other creditors of an insolvent corporation undoubtedly have the right to form a combination for the purchase of its property, when sold under foreclosure proceedings, and the formation of a new corporation to carry on the same business, as other persons are not thereby deprived of the right to bid at the sale.<sup>1</sup> But they can neither exclude from the combination nor discriminate against other bondholders or creditors having equal equities; the arrangement must be fair and equitable, and ample notice of its terms and full opportunity to participate in the benefits of the reorganization must be given to all persons in interest whose rights are equal to those of the persons promoting the reorganization.<sup>2</sup> They have the right to buy the property as cheaply

licitly consistent with an observance of the requirements of the law, in order that competition might be stifled, and that such third person should purchase the property at the sale and form a new corporation of which the parties to the agreement should become stockholders and bondholders, it was held that the sale was void. *Atkins v. Judson*, 33 N. Y. App. Div. 42.

Where, after the bringing of a foreclosure suit in the federal court, a trustee was appointed, who took possession of the road under an arrangement entered into by the parties, and subsequently the trustee, acting in connection with certain bondholders but without permission of the court, filed a bill in the state court to foreclose the same mortgages sought to be foreclosed in the original suit, and a sale was had in the proceedings in the state court, it was held that the sale was unauthorized and should be set aside, notwithstanding the fact that the property had passed into the hands of a new corporation formed by the purchasers. *Bill v. New Albany, etc.*, R. Co., 2 Biss. (U. S.) 390.

And where a combination of the bondholders bribed the mortgage trustee to act for their interest at the sale, and he did so act, selling the property to them for much less than its real value, the sale was set aside, notwithstanding the fact that it had been confirmed by an act of the legislature. *White Mountains R. Co. v. White Mountains R. Co.*, 50 N. H. 50.

**1. Bondholders May Combine for Purchase and Reorganization.**—*Ketchum v. Duncan*, 96 U. S. 659; *Kropholler v. St. Paul, etc.*, R. Co., 2 Fed. Rep. 302; *Wetmore v. St. Paul, etc.*, R. Co., 3 Fed. Rep. 177; *Terbell v. Lee*, 40 Fed. Rep. 40; *Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49; *Fidelity Ins., etc., Co. v. Roanoke St. R. Co.*, 98 Fed. Rep. 475; *Kitchen v. St. Louis, etc.*, R. Co., 69 Mo. 224; *Taylor v. Atlantic, etc.*, R. Co., (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 26; *Cornell v. Utica, etc.*, R. Co., 61 How. Pr. (N. Y.) 184, *affirmed* 25 Hun (N. Y.) 563; *De Betz's Petition*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 246.

**Public Policy Is Not Contravened** by such an agreement. The interests of the parties are in harmony, and therefore the agreement is not open to the objection that it results in the formation of a combination to suppress bidding at a judicial sale. *Cornell v. Utica, etc.*, R. Co., 61 How. Pr. (N. Y.) 184, *affirmed* 25 Hun (N. Y.) 563.

The Statute of Frauds does not apply to a reorganization agreement made by two of the bond-

holders of a corporation, whereby one of them parts with his interest in and claim to the property, in consideration of a promise that he shall be repaid after the purchase by the other bondholder of the mortgaged property at the foreclosure sale. *Cornell v. Utica, etc.*, R. Co., 61 How. Pr. (N. Y.) 184, *affirmed* 25 Hun (N. Y.) 563.

**Purchase by Trustees.**—Where the trustees under a deed of trust which was being foreclosed became members of the association formed for the purchase of the property, the holdings of such trustees being a very small proportion of the total number of bonds owned by the members of the association, it was held that the sale, while voidable, was not void, but was good for all purposes, subject only to the right of the mortgagor to redeem, and that such right must be exercised within a reasonable time and before the intervention of the equities of third persons. *Kitchen v. St. Louis, etc.*, R. Co., 69 Mo. 224.

**Scheme Fraudulent as to Unsecured Creditors.**—Where the bondholders, after bringing foreclosure proceedings and combining to purchase, stopped the sale and disposed of the mortgaged property by a perpetual lease to another corporation, under an arrangement by which they received the bonds of the lessee company in lieu of the bonds of the lessor company, but no provision was made for the unsecured creditors, it was held that such unsecured creditors were entitled to have their claims established as equitable liens on the leased property and made paramount to the lien of the mortgage. *Farmers' L. & T. Co. v. Missouri, etc.*, R. Co., 21 Fed. Rep. 264.

**2. Plan Must Be Free from Fraud or Discrimination.**—*Sahlgard v. Kennedy*, 2 Fed. Rep. 295; *Reed v. Schmidt*, 115 Ky. 67; *De Betz's Petition*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 246; *Walker v. Whelen*, 4 Phila. (Pa.) 389, 18 Leg. Int. (Pa.) 236. See also *Jackson v. Ludeling*, 21 Wall. (U. S.) 616.

"While there is no doubt that creditors may combine to purchase the property of their debtor, and such action is proper and will be sustained, yet if a trustee, holding the property for the benefit of all the creditors, combines with a part to aid them in purchasing it to the exclusion of the other creditors, and the trustee also has in his possession, as agent, the evidence of debt belonging to the creditors with whom he has combined, and the property, by the act of the trustee, passes into the possession of those creditors at a price much less than its value, it can hardly be claimed that the purchase thus consummated is not in



as possible, providing they cheat or hinder no one.<sup>1</sup> But they cannot go to the length of stifling competition.<sup>2</sup>

equitable." *Sahlgard v. Kennedy*, 2 Fed. Rep. 295.

**Opportunity Must Be Given All.**—Where certain holders of the first mortgage bonds of an insolvent railroad corporation made an agreement to purchase the mortgaged property at a judicial sale "for the benefit of the first mortgage bondholders" and to form a new corporation, etc., and the agreement specified no time within which bondholders desiring to participate should signify their intention of doing so, it was held that all the first mortgage bondholders were entitled to share in the benefit of the purchase and not merely those who had signed the power of attorney given to the agent who made the purchase in trust. *Walker v. Whelen*, 4 Phila. (Pa.) 389, 18 Leg. Int. (Pa.) 236.

**Secret Advantage to Creditor.**—An agreement between a reorganization committee and a bondholder whereby the committee undertakes to influence the new corporation to give the bondholder preference over other bondholders in the payment of the coupons on his bonds, in consideration of his services in inducing the other bondholders to fund the interest due on their bonds, is void and unenforceable against the new corporation, not only because it seeks to give one creditor a secret advantage over others uniting with him, but also because it is beyond the power of the committee to bind the new corporation by such a contract. *Bliss v. Matton*, 45 N. Y. 22.

**After the Failure of a Reorganization Scheme,** where one of the members of the reorganization committee entered into a contract with the other members, agreeing to purchase from them at a specified price all of the bonds that they then held as agents or otherwise, and all that they might thereafter obtain by the acceptance on the part of the bondholders of an option given in the contract to sell, it was held that the purchasing member of the committee only obligated himself to purchase such bonds as were offered through the other members and could not be compelled to accept those offered in person by individual bondholders who were not parties to the contract. *Johnson v. Morgan*, 68 N. Y. 494.

**What Is Sufficient Notice.**—Where the committee advertised in such a manner as to give the fullest public notice of the terms of the reorganization, and especially of the fact that by its terms the committee was acting solely for the benefit of such bondholders only as should deposit their bonds, and all the benefits were to be restricted to those who did so deposit and who assented to the agreement, and it did not appear that there was any attempt to do anything in an unfair or secret manner, it was held that a bondholder who did not see the advertisement of the notice of the committee until about sixteen months after the reorganization was not entitled to participate in the benefits of the reorganization. *Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49.

**Statutory Regulations.**—It is expressly provided by statute in some states that whenever the purchase is made by a committee of bond-

holders, all other holders of the same class of securities shall have the right to participate in the reorganization upon complying with the terms of the agreement providing therefor. *Reed v. Schmidt*, 115 Ky. 67.

**1. Bondholders May Buy Cheaply.**—*Wetmore v. St. Paul, etc.*, R. Co., 3 Fed. Rep. 177.

**2. Agreement Stifling Competition Is Void.**—*Kitchen v. St. Louis, etc.*, R. Co., 69 Mo. 224; *Atkins v. Judson*, 33 N. Y. App. Div. 42. See also *James v. Milwaukee, etc.*, R. Co., 6 Wall. (U. S.) 752; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616.

**Overstatement of Amount of Debt.**—Where the notice of sale stated that the mortgage debt was two million dollars and that seventy thousand dollars of interest were due, but as a matter of fact there were outstanding in the hands of *bona fide* holders less than two hundred thousand dollars of bonds, the court set the sale aside on the ground that the deceptive notice was calculated to destroy all competition amongst the bidders and to exclude from the purchase every one except those engaged in the perpetration of the fraud. *James v. Milwaukee, etc.*, R. Co., 6 Wall. (U. S.) 752.

**Legitimate Agreement as to Bidding.**—A resale of the property of an insolvent railroad corporation was ordered because of the failure of the purchasers at the original sale to comply with the terms thereof. An association of the bondholders was formed for the purpose of bidding in the property unless it brought as much as it had on the original sale. The committee representing the bondholders was approached before the resale by a syndicate, who stated that under no circumstances would they become bidders or purchasers at the sale, but that they would be willing to buy the property from the association of bondholders in case it was purchased by the latter. The bondholders bought the property for four hundred thousand dollars and resold it to the syndicate for four hundred and eighty-six thousand dollars. The evidence showed that before the resale the nonbidding syndicate made an agreement with a bondholder, who was not a member of the bondholders' association, that if he would refrain from bidding he would be permitted to purchase an interest in the property in the event the syndicate acquired it, on the basis of the price paid therefor. The court held (1) that it was entirely competent for the bondholders to combine for the protection of their interest; (2) that it was equally competent for them to make an arrangement in advance by which in case they bought the property they should dispose of it at a profit; (3) that the arrangement with the syndicate could have had no influence upon the bidding at the resale, because the syndicate would not have bid under any circumstances; (4) that it was apparent that the individual bondholder referred to would not have bid more than was bid by the association of bondholders; (5) and that there was nothing to justify the inference that anybody else would have bid more. (Although it is not expressly so stated, it would seem that the decision is

c. RIGHT TO PARTICIPATE IN REORGANIZATION — (1) *Effect of Failure to Assent to or Dissent from Reorganization Plan* — (a) **Failure to Assent Within Time Limited.** — When the reorganization agreement provides that all bondholders who wish to participate in the reorganization must signify their assent to the plan within a specified time, the giving of such assent within the time named is a condition precedent to the right of participation, and a bondholder who fails to fulfil the condition forfeits such right, his only right in such case being to his proportionate share of the proceeds of the sale,<sup>1</sup> unless the time limitation was fraudulently fixed by the committee without authority, and for the purpose of enabling its members to derive individual benefit by means of defrauding the other bondholders.<sup>2</sup>

(b) **Failure to Dissent** — aa. **ASSENT NOT GENERALLY IMPLIED.** — Unless the agreement contains a provision to the contrary, the assent of a bondholder to a plan of reorganization cannot be implied from his failure to dissent therefrom; and when a reorganization is had without foreclosure, a nonassenting bondholder is entitled to hold the corporation liable for the bonds originally issued by it.<sup>3</sup>

bb. **WHEN AGREEMENT PROVIDES THAT ASSENT SHALL BE IMPLIED** — (aa) *In General.* — On the other hand, a provision that bondholders failing to dissent within a specified time will be deemed to have assented, is valid and binds a non-

based partially upon the fact that the association of bondholders was not a party to the agreement by which the syndicate, to whom they subsequently sold the property, prevented the individual bondholder from bidding at the re-sale.) *Terbell v. Lee*, 40 Fed. Rep. 40.

**Statement of Amount Committee Will Bid.** — Where, on the day before the sale, the attorney of the committee, while in conversation with others interested in the foreclosure, stated that he was prepared to bid up to a sum sufficient to pay the first mortgage bonds in full, it was held that such statement was not open to the objection that it chilled competition and discouraged bidders, as it was a fact which the attorney was under no obligation to conceal, and the disclosure of it enabled all persons in interest to know what they might expect, and to prepare themselves accordingly. *Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49.

1. **Nonparticipating Bondholder Can Only Claim Share of Proceeds of Sale.** — *Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49; *Landis v. Western Pennsylvania R. Co.*, 133 Pa. St. 579. See also *Mowry v. Farmers' L. & T. Co.*, (C. C. A.) 76 Fed. Rep. 38; *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 213.

**Application After Formation of New Corporation.** — Where the property of an insolvent corporation was sold under foreclosure, and the trustee, who purchased for certain of the bondholders, conveyed the property to a new corporation composed of the bondholders "free and discharged from all and every trust and trusts whatsoever," it was held that the new corporation was not bound to issue stock to a bondholder who made no application therefor until after the trustee's conveyance. *Landis v. Western Pennsylvania R. Co.*, 133 Pa. St. 579.

**Participation After Forfeiture of Right.** — Where an assenting bondholder sought to set aside the reorganization on the ground that the committee had admitted to participation

therein bondholders who had come in after the expiration of the time limit, the court denied the relief asked, saying that the extension of the advantages of the reorganization of all the bondholders on equitable terms could not be looked upon by a court of equity with disfavor, but on the contrary would be regarded with complacency. *Walker v. Montclair, etc., R. Co.*, 30 N. J. Eq. 535.

2. **Fraudulent Time Limitation Not Binding.** — It was held that bondholders were not bound by a time limitation fixed by the reorganization committee without authority, where it was fixed for the purpose of enabling the individual members of the committee to profit personally by purchasing the outstanding bonds at a greatly reduced price, and issuing to themselves the new securities in lieu thereof. *Hoopes v. Corbin*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 212.

3. **Assent Not Implied from Failure to Dissent.** — *Philadelphia, etc., R. Co. v. Love*, 125 Pa. St. 488, wherein it was held that a bondholder, who was also a member of the board of managers of the corporation and who opposed the plan of reorganization which was approved by the majority of the board, was not estopped by his failure to indicate his dissent from any of the publications or communications in approval of the plan, addressed by the board to the security holders affected by the reorganization. See also *Lennig v. Choctaw, etc., R. Co.*, 15 Pa. Super. Ct. 510.

*Compare Buckley v. Union Canal Co.*, 3 Phila. (Pa.) 152, 15 Leg. Int. (Pa.) 212, wherein it was held that where the minority bondholders of a corporation stood by and saw the great body of the creditors and bondholders bind themselves to a plan for the reorganization of the corporation without foreclosure which promised best for all the parties in interest, such minority bondholders were not bound by the action of the majority, but nevertheless they were not entitled to an injunction restraining the carrying out of the arrangement,



dissenting bondholder to approval of the plan, provided he had full notice of the terms thereof and ample opportunity to file his dissent.<sup>1</sup>

(bb) *When Committee Makes Unauthorized Changes.*—But when the reorganization committee formulates a detailed plan containing changes which it has no authority to make, such plan may be repudiated by bondholders who fail to dissent, even though they were parties to the original agreement appointing the committee and authorizing it to frame and submit to the bondholders a detailed plan which should be binding upon holders failing to dissent.<sup>2</sup>

(2) *Participation After Sale.*—For the purpose of conserving the interests of the minority bondholders, it is customary to insert a clause in the decree of sale permitting them to come in after the purchase, within a limited time, on equal terms with the purchasing bondholders; but the discretion of the court in passing a decree which does not contain such a clause will not be revised, in the absence of a showing that there were no adequate reasons for the omission.<sup>3</sup>

d. RIGHT OF MINORITY BONDHOLDER TO OBJECT TO PLAN—(1) *When Plan Provides for Payment of His Bonds.*—A minority bondholder cannot object to a plan of reorganization favored by the majority which provides for the payment of his bonds.<sup>4</sup>

(2) *When No Substantial Right Is Impaired.*—When the holders of an overwhelming majority of the bonds of an insolvent railroad corporation approve of a plan of reorganization which contemplates the execution of a new mortgage to take the place of the old, in order to avoid foreclosure, the carrying out of such plan will not be enjoined at the instance of a bondholder who owns only a very small number of the bonds, unless he can show that some substantial legal right which he has acquired by reason of his ownership of the bonds in question has been, or will be, infringed or impaired by the proposed reorganization.<sup>5</sup>

e. RIGHT TO REFUSE TO PARTICIPATE.—A scheme of reorganization can be made effective in only one of two ways—by the consent of all the bondholders or by a foreclosure cutting off their lien, thereby enabling the new corporation to issue its own bonds or its own stock in lieu of the bonds of the old corporation held by the bondholders participating in the reorganization.<sup>6</sup> Hence, when a reorganization without foreclosure is attempted, a bondholder who does not consent to participate therein has the right to stand upon his contract, and cannot be compelled to surrender his old bonds

but must rely on their remedies at law under the mortgage.

1. **Assent Implied from Failure to Dissent.**—*Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Industrial, etc., Trust v. Tod*, 93 N. Y. App. Div. 263; *Union Canal Co. v. Gilfillan*, 93 Pa. St. 95. And a statute providing that a bondholder failing to dissent will be deemed to have assented does not impair the obligation of a contract, as the principle involved is similar to that invoked in statutes of limitation. *Gilfillan v. Union Canal Co.*, 109 U. S. 401.

2. **Assent Not Implied from Failure to Dissent.**—*United Waterworks Co. v. Stone*, 127 Fed. Rep. 587; *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, reversing 29 N. Y. App. Div. 630.

3. **Decree Not Providing for Participation After Sale.**—*Sahlgaard v. Kennedy*, 13 Fed. Rep. 242. See also *Huntington v. Little Rock, etc., R. Co.*, 16 Fed. Rep. 906, 3 McCrary (U. S.) 581.

4. **Objections to Plan by Bondholders Whose Bonds Are Paid.**—*Pollitz v. Farmers' L. & T. Co.*, 53 Fed. Rep. 210. See also *Crawshaw v.*

*Souter*, 6 Wall. (U. S.) 739, holding that a participating bondholder who was appointed a members of the reorganization committee, and who afterwards became involved in certain differences with the other members of the committee, could not object to the confirmation of a decree of sale which provided for the prepayment of his bonds, principal and interest.

**Indemnity Bond Instead of Cash Payment.**—Where the decree provided for an indemnity bond to insure the payment of the minority bonds, instead of requiring the money to be paid into court, it was held that the minority bondholders would not be heard to complain thereof, as, while the provision might be a mistake, the matter was within the discretion of the court. It was also held, however, that the minority bondholders were entitled to interest from the date of the giving of the indemnity bond to the date of the payment of their bonds. *Pollitz v. Farmers' L. & T. Co.*, 53 Fed. Rep. 210.

5. *Emery v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 310.

6. *Hollister v. Stewart* 111 N. Y. 644.



and accept in lieu thereof bonds issued under a new mortgage executed in pursuance of the reorganization scheme.<sup>1</sup> And when the reorganization is had after foreclosure, a dissenting bondholder cannot be forced to embark in the new venture, but is entitled to stand upon his right to share in the proceeds of the sale.<sup>2</sup>

*f. BINDING EFFECT OF AGREEMENT ON ASSENTING BONDHOLDERS—*

(1) *In General.*—A bondholder who becomes a party to a reorganization agreement is bound by its terms.<sup>3</sup> He cannot thereafter object to a reorganization made in accordance with the plan to which he agreed.<sup>4</sup> Nor is he entitled to participate in the reorganization unless he fulfils the conditions required of him by the agreement.<sup>5</sup> Thus, when the agreement so provides, he is bound to deliver his bonds to the committee whenever requested to do so.<sup>6</sup> And when the committee is invested with unrestricted power over the bonds delivered it, the holders thereof are not entitled to recover possession of bonds so delivered.<sup>7</sup>

**1. Bondholder Entitled to Stand upon Original Contract.**

—*Hollister v. Stewart*, 111 N. Y. 644, which holds also that the new mortgage was void as to a dissenting bondholder. The trustees under the mortgage admitted that the dissenting bondholder was entitled to his due proportion of principal and interest upon his bond out of the proceeds of property which had been sold after diversion from its place as security for the original mortgage, but they sought to reduce that due proportion by a prior application of some of the proceeds of such sale to claims which they considered preferred. They contended that since the scheme of reorganization was tantamount to, and took the place of, a distribution after foreclosure, and on such distribution a court of equity would prefer certain debts over the mortgage bonds, they (the trustees) were justified in giving similar preference. To this contention the court replied: "The trustees are not a court of equity and have no right to award preferences, least of all to anticipate what such a court, with the facts all before it, would or would not do." See also *Taylor v. Atlantic, etc., R. Co.*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 275; *Reinach v. Meyer*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 283, holding that the holders of a majority of the bonds cannot bind the minority by an agreement to postpone the maturity of the bonds and change the rate of interest.

**2. Dissenting Bondholder May Refuse Stock in New Corporation.**

—*Landis v. Western Pennsylvania R. Co.*, 133 Pa. St. 579.

Where the new corporation was formed after a decree of strict foreclosure which vested the legal title to the property in the mortgagees, it was held that a bondholder could not be compelled to exchange his bonds for stock in the new corporation, but if he chose might retain his bonds and receive a share of the net earnings *pro rata* with the stockholders. And when a bondholder declines to exchange his bonds for stock, the new corporation thereby loses the right to issue stock to the extent of the bonds held by such bondholder. *Somerset R. Co. v. Pierce*, 88 Me. 86.

**3. Parties to Agreement Bound by Its Terms.**

—*Olcott v. Powers* (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 551.

**4. Parties Cannot Object to Reorganization Conforming to Plan.**

—*Crawshaw v. Souter*, 6 Wall.

(U. S.) 739; *Vose v. Cowdrey*, 49 N. Y. 336.

**Rescission of the Reorganization Agreement** will not be granted at the instance of parties thereto, when the plan is carried out in the manner contemplated by the agreement, and where there is neither a definite charge of legal fraud nor evidence to show that fraud was practised on the complaining parties to induce them to join in the plan for reorganization. *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177.

**That the Committee Stifled Competition** by purchasing the bonds of a rival bidder after the adjournment of the sale from the day originally set, is no ground for objection to the consummation of the reorganization on the part of a bondholder who signed the agreement appointing the committee. *Walker v. Montclair, etc., R. Co.*, 30 N. J. Eq. 525.

**5. Participant Must Fulfil Conditions of Agreement.**

—*Fuller v. Venable*, (C. C. A.) 118 Fed. Rep. 543; *Carpenter v. Catlin*, 44 Barb. (N. Y.) 75, 29 How. Pr. (N. Y.) 423.

**Partial Fulfilment Insufficient.**

—*Fuller v. Venable*, (C. C. A.) 118 Fed. Rep. 543.

**6. Participating Bondholders Bound to Deliver Bonds to Committee.**

—*Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49; *Chattanooga First Nat. Bank v. Radford Trust Co.*, (C. C. A.) 80 Fed. Rep. 569; *Carpenter v. Catlin*, 44 Barb. (N. Y.) 75, 29 How. Pr. (N. Y.) 423. See also *Barnes v. Chicago, etc., R. Co.*, 122 U. S. 1.

**Delivery of Bonds Before Foreclosure Sale.**

—Bondholders who sign a reorganization agreement are bound to deliver their old bonds to the committee on demand, and are not entitled to new bonds until after the formation of the new corporation. Hence, when the demand is made before the foreclosure sale, participating bondholders cannot refuse to comply on the ground that they are entitled to receive new bonds immediately upon the surrender of the old ones. *Carpenter v. Catlin*, 44 Barb. (N. Y.) 75, 29 How. Pr. (N. Y.) 423.

**7. When Committee Invested with Control of Bonds.**

—Where a number of the bondholders signed a reorganization agreement which did not give the committee full control of the bonds, and after depositing their bonds and receiving certificates therefor, which were

**Deposit of Bonds with Committee.** — When the reorganization agreement provides that assenting bondholders shall deposit their bonds with a designated trust company, the deposit of his bonds with the reorganization committee instead of with the designated depository entitles a bondholder to participate in the reorganization, as the depository is merely the agent of the committee.<sup>1</sup>

(2) *When Modified After Giving of Assent.* — A provision in a reorganization agreement that it may be modified or altered by a vote of the majority in interest of the signers is valid, and a modification made with the assent of such majority is binding on nonassenting signers of the original agreement.<sup>2</sup> But if the agreement contains no such provision and the committee is empowered to modify in matters of detail only, a modification in principle is not binding on signers not assenting thereto, even though it is approved by an overwhelming majority of the signers.<sup>3</sup>

**g. RIGHT TO PAY BID IN BONDS** — (1) *In General.* — Usually the decree ordering the foreclosure sale of the property of an insolvent corporation requires the purchasers to pay a certain amount in cash, and permits them to pay the balance of their bid in the bonds secured by the mortgage or mortgages under which foreclosure is had to the extent that the bonds are sufficient to pay such balance. It is well settled that a decree is not rendered invalid by the fact that it authorizes the payment of part of the bid in bonds.<sup>4</sup>

transferable by delivery, many of the bondholders signed a new agreement giving to the committee full and unrestricted power over the bonds of the signers, it was held that the purchaser of the certificates of a signer of the second agreement, who had knowledge of the terms thereof and of the fact that many of the bondholders had signed the agreement, was not entitled to recover possession of the bonds represented by such certificates, even though he did not actually know that the certificate holder from whom he purchased had signed the second agreement. *Mercantile Trust, etc., Co. v. Low*, (C. C. A.) 87 Fed. Rep. 241.

**1. Deposit of Bonds with Committee Instead of with Designated Depository.** — *Hitchcock v. Midland R. Co.*, 33 N. J. Eq. 86, *affirmed* 34 N. J. Eq. 278, where the trust company designated as depository refused for some reason to accept the bonds and referred the bondholder to the committee, the secretary of which accepted the bonds, gave a receipt therefor, and deposited the bonds with the trust company, taking the certificate in his own name. See also *Midland R. Co. v. Hitchcock*, 37 N. J. Eq. 549, holding that the acceptance of the bonds by the president and secretary of the reorganization committee was binding on the new corporation, as the committee was its agent for the purposes of reorganization.

**2. Modification by Majority of Signers.** — This principle was applied where the reorganization agreement contemplated the foreclosure of the mortgage, but conferred the power to modify or alter on the majority in interest of the signers. In pursuance of the consent duly given by such majority, the committee, instead of foreclosing, sold the bonds; and in an action to determine the ownership of the bonds of a signer not assenting to the sale thereof, it was held that he was bound by the action of the committee. In deciding the question involved, the court said: "It is clear that it was the intention of these parties that the subscribers to the agreement should be bound by

its terms and conditions, that there should be no power of revocation, and that the majority should control, in reference to the methods of realizing upon their bonds in case the scheme contemplated in the agreement should be found inoperative. The whole basis of the agreement would necessarily fall if there was a power of revocation." *Olcott v. Powers*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 551, 15 N. Y. Supp. 263. See also *Froment v. Lessig*, 174 Pa. St. 487, where the agreement contained no provision for modification by a majority, but a party was held to have waived his right to object to the modification by his action in rendering performance of the original contract impossible.

**3. Minority Not Bound by Unauthorized Change.** — *Post v. Simmons*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 246, 48 Hun (N. Y.) 620. And see *United Waterworks Co. v. Stone*, 127 Fed. Rep. 587; *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, *reversing* 29 N. Y. App. Div. 630.

**4. Decree May Authorize Payment in Bonds.** — *Ketchum v. Duncan*, 96 U. S. 659; *Sage v. Central R. Co.*, 99 U. S. 334; *Duncan v. Mobile, etc., R. Co.*, 3 Woods (U. S.) 597; *Kropf-holler v. St. Paul, etc., R. Co.*, 2 Fed. Rep. 302, 1 McCrary (U. S.) 299; *Farmers' L. & T. Co. v. Green Bay, etc., R. Co.*, 6 Fed. Rep. 100, 10 Biss. (U. S.) 203; *American Waterworks Co. v. Farmers' L. & T. Co.*, (C. C. A.) 73 Fed. Rep. 956. See also *Landis v. Western Pennsylvania R. Co.*, 133 Pa. St. 579; *Reed v. Schmidt*, 115 Ky. 67.

**Rule, Though Unfavorable to Minority, Is Not Inequitable.** — "It is said this (permission to pay in bonds) enables those who have subscribed to that agreement, and who are a large majority of the bondholders, to purchase on paying a much less sum in money than would be required of other bondholders who have not signed the agreement. This is true; but we do not perceive that it is inequitable. After all, it makes no distinction against the minority



(2) *As Affected by Provisions of Mortgage.* — It has been held, on the other hand, that the court is not bound by the provisions of the mortgage in regard to the receipt of the bonds in payment of the purchase price, but may, in the exercise of its discretion, either disregard such provisions partially or require the payment of the entire bid in cash, unless so to do would work an injustice on the holders of the bonds secured by the mortgage which is being foreclosed.<sup>1</sup> It would seem, however, that this view is only partially correct, as bondholders who purchase the entire property have an equitable right, after satisfying the costs and charges of the litigation and of the trust, to pay the balance of their bid in bonds, so far as their own proportion of such balance extends, for the reason that such proportion is to come to them, and it is therefore immaterial whether it is paid in bonds or in cash.<sup>2</sup>

(3) *Not Limited to Particular Bondholder.* — As a matter of course, the right to make payment in bonds should not be limited to a particular bondholder, but should be extended to all bondholders on the same terms.<sup>3</sup> But it is not erroneous for the decree to require persons other than bondholders, if they become purchasers at the sale, to pay at once in cash a part of their bid as earnest money, without making a similar requirement of the bondholders in the event of purchase by them.<sup>4</sup>

which they have not themselves made by failing to secure a majority of the bonds. They are as much entitled to use their bonds in payment as any other bondholders are. It is their misfortune if they have not as many bonds as others have. They have no equity to cast their misfortune upon those who own more bonds than they do. Permission to bondholders who are mortgagees to purchase at a sale of the mortgaged property and to pay by their bonds is not only usual, but it is highly advantageous to all persons who have an interest. It tends to enhance the price which may be obtained, and thus benefits other creditors as well as the mortgagor. That large bondholders have an advantage over small ones, in that they are required to pay less in money, may be true; but it is an advantage they purchased when they obtained their bonds, of which it would be inequitable to deprive them." *Per Strong, J., in Ketchum v. Duncan*, 96 U. S. 659, followed in *Kropholler v. St. Paul, etc., R. Co.*, 2 Fed. Rep. 302, 1 McCrary (U. S.) 299.

Compare *Duncan v. Mobile, etc., R. Co.*, 3 Woods (U. S.) 597, wherein Bradley, Circuit Justice, after recognizing the right of purchasing bondholders to pay their bid in bonds, said: "But it is evident that those who singly, or in combination, hold a large portion of the bonds, have a great advantage over the minority; for they can pay their own proportion of the purchase money, which is much the largest, in bonds, and have only a small amount of cash to pay, whilst the minority can only pay a small proportion in bonds, and have a large amount to pay in cash, which, as a generality, they are totally unable to pay. This practically puts it in the power of the majority to get the property at a large sacrifice, and turn the minority off with a mere pittance. This is inequitable, and to be avoided if possible. Perhaps the most equitable mode of disposing of the property (when practicable), when it cannot be sold for cash to an amount sufficient to pay the bondholders, is to decree a strict foreclosure, in which all will participate

alike, or to make a sale for the equal benefit of all the bondholders who choose to come in and participate. A strict foreclosure may be attended with difficulties in those states where a mortgage is a mere security, and does not give a legal title, besides which it places the property in the hands of a vast number of beneficiaries, whose consent may be very difficult to obtain in perfecting a new organization for conducting the business. A sale for the benefit of all is attended with the difficulty of determining who shall make the bid. The court has sometimes authorized the trustees of the mortgage to bid for the bondholders. In this case, it is obvious that one class or the other of the bondholders would be dissatisfied with any selection of trustees which the court might make. To decree that all the bondholders shall be allowed to participate in any sale that may be made, would practically nullify an auction sale. Who would bid on such terms?"

**1. Court May Disregard Provisions of Mortgage as to Payment in Bonds.** — *Farmers' L. & T. Co. v. Green Bay, etc., R. Co.*, 6 Fed. Rep. 100, 10 Biss. (U. S.) 203, 1 Am. & Eng. R. Cas. 622.

**2. Purchasing Bondholders Have Equitable Right to Pay in Bonds.** — *Duncan v. Mobile, etc., R. Co.*, 3 Woods (U. S.) 597.

**3. All Bondholders Must Have Equal Opportunity.** — *American Waterworks Co. v. Farmers' L. & T. Co.*, (C. C. A.) 73 Fed. Rep. 956.

**4. Discrimination as to Payment of Earnest Money.** — "We see no error in the decree, so far as it required any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to pay at once in cash a part of his bid as earnest money. Such other purchaser, of course, must be a cash purchaser, at least to the extent of the sum due on the first mortgage. It was, therefore, no hardship to require an immediate payment by him of a part of his bid, and the order that he should make such payment was a protection against false or unreal bids. That the same requirement was not made of the trustee was very proper, for the reason that a purchase by



(4) *Value at Which Bonds Will Be Received.*—Bonds should not be received from any purchaser in payment of his bid except for such proportion of the sum bid as the purchaser on a distribution of the purchase money would be entitled to receive out of the purchase price on account of the bonds held by him and tendered in payment of his bid. In other words, bonds should not be received at par in payment of a bid, unless the purchase price is adequate to pay the value of all the outstanding bonds secured by the mortgage under which foreclosure is had.<sup>1</sup> But the court will not, in the decree of foreclosure, fix the value at which the bonds shall be accepted in payment of bids, for the obvious reason that such value is wholly dependent upon the price realized for the property at the sale.<sup>2</sup>

h. *EFFECT OF FAILURE TO COMPLETE BID.*—When the bondholders, after the purchase, through the medium of a reorganization committee, of the property of an insolvent corporation sold under foreclosure proceedings, fail to complete their bid, not from want of funds, but because they conclude that the price which they contracted to pay was too high, they are not entitled to have returned to them a cash deposit made by the committee in partial compliance with the terms of the sale, but, on the contrary, if the price realized at the resale made necessary by their failure to comply is less than that realized at the original sale, and if there are any creditors of the old corporation whose claims have not been paid, such creditors are entitled to an order on the reorganization committee, or on the new corporation formed by the bondholders, requiring the payment into court of the deficiency caused by the resale.<sup>3</sup>

i. *RIGHTS OF NON-ASSENTING BONDHOLDERS IN PROPERTY PURCHASED*—(1) *When Title Vests in Mortgagees.*—When the statute provides

the trustee required no payment of money, beyond a sum sufficient for costs, unless the bid exceeded the sum due on the first mortgage, the purchase being made for the first-mortgage bondholders." *Sage v. Central R. Co.*, 99 U. S. 334.

1. *Value at Which Bonds Will Be Received.*—*American Waterworks Co. v. Farmers' L. & T. Co.*, (C. C. A.) 73 Fed. Rep. 956.

2. *Fixing Value at Which Bonds May Be Received.*—"It is alleged in the petition, as one of the grounds on which the court should allow a bill of review to be filed, that the decree does not establish the percentage value of the bonds or coupons secured by either of the mortgages; that in order to secure just and equitable bidding at the sale, the value of the bonds should be ascertained by proof, on reference to a master before the sale, and that without such previous ascertainment of value no bidder can know what amount of bonds or coupons he can pay on his bid. In the first place it may be remarked that the provision in question in the decree is similar to that inserted in railroad mortgage foreclosure decrees in this circuit, as I am advised by the circuit judge, whom, for certainty of information, I have consulted on the point. Obviously, the value of the bonds and coupons must depend on the value of the mortgaged property, and that value is best ascertainable by sale of the property. I do not see, therefore, how it would be possible, or at least practicable, to determine the value of the bonds, or to determine what percentage of value should be applied on the bid, before the sale transpires. There may be prior liens to be paid in the shape of inter-

vening claims, and I cannot perceive how a proper and effectual sale can be made,—if bonds are to be applied on the bid,—unless the court is permitted to fix the rate after the sale is reported, at which bonds shall be received. And it would seem that an attempted ascertainment of value of the bonds, before the sale, for the purpose of fixing the rate at which they may be applied on the bid, would be more likely to involve injustice, especially to small holders, than an ascertainment made subsequently, because before sale the only value susceptible of proof might be one merely nominal, while after the sale the value would be actually represented by a realized price. \* \* \* Every bondholder or other person is at liberty to bid at the sale. He may bid what he thinks the property is worth. He knows that the price for which the property may be sold will represent the value of the property, and will fix the value of the bonds. He knows that the proceeds of the sale must be used to pay bonds, and that they must be applied *pro rata* upon bonds. He knows, also, that the percentage so to be applied will depend upon the amount for which the property sells, and the amount of the bonds; and knowing further that if the sale is properly conducted and if he is the highest bidder he will get the property, he is left to freely and fairly exercise his judgment as to the sum he will bid." *Farmers' L. & T. Co. v. Green Bay, etc.*, R. Co., 6 Fed. Rep. 100, 10 Biss. (U. S.) 203, 1 Am. & Eng. R. Cas. 622.

3. *Non-complying Purchasers Liable for Deficiency in Resale.*—*Central Trust Co. v. Cincinnati, etc.*, R. Co., 58 Fed. Rep. 500.

that upon foreclosure of a mortgage on the property of a railroad corporation the legal title to the mortgaged premises shall vest in the mortgagees, and that the holders of a majority of the bonds may form themselves into a new corporation for the purpose of operating such railroad, a bondholder who does not participate in the formation of the new corporation has the rights of a tenant in common with the new corporation as to the estate and property acquired by the foreclosure, subject to the right of that corporation, as between them, to the possession of the property and to receive the income for itself and as trustee for its cotenants.<sup>1</sup>

(2) *When Title Vests in Purchasing Trustee.* — A different rule applies when the property is sold under foreclosure proceedings and the title thereto is vested in a trustee who purchases in behalf of the bondholders. In such case non-participating bondholders have no interest whatever in the property, their only right being to share in the proceeds of the sale.<sup>2</sup>

j. *RIGHT TO STOCK OF NEW CORPORATION* — (1) *Proportion of Stock to Which Bondholders Are Entitled* — (a) *In General.* — When the reorganization committee purchases the property of an insolvent railroad corporation, at the foreclosure sale, in behalf of the bondholders, and in the exercise of the discretion vested in it by the agreement decides to organize a new corporation and to issue stock therein to the bondholders in lieu of the bonds of the old corporation held by them, each bondholder is entitled to the same proportion of the stock issued to represent the property purchased as his bonds bear to the amount of the bonds secured by the mortgage foreclosed and held by the bondholders participating in the purchase.<sup>3</sup>

(b) *When Part of Stock Is Sold for Corporate Purposes.* — And if the capitalization of the new corporation is fixed at an amount that not only includes the value of the property purchased, as represented by the total amount of the mortgage bonds, but also provides for the completion of the railroad, the bondholders are entitled to share only in that portion of the stock which represents the value of the property purchased; and, if the committee acts in good faith, they cannot complain of the sale of the remainder of the stock to a third person, even though the stock so sold amounts to more than half of the total capitalization of the new corporation.<sup>4</sup>

(2) *Right to Distribution of Stock Held by Voting Trustees.* — It has been held that the parties are bound by a reorganization agreement providing for the creation of a voting trust for a limited term of years, with discretion in

1. *Non-participating Bondholder as Tenant in Common with New Corporation.* — *Brooks v. Vermont Cent. R. Co.*, 22 Fed. Rep. 211. See also *Somerset R. Co. v. Pierce*, 88 Me. 86.

2. *When Non-participating Bondholder Not Tenant in Common.* — *Landis v. Western Pennsylvania R. Co.*, 133 Pa. St. 579. And see *supra*, this subsection, *Right to Participate in Reorganization* — *Effect of Failure to Assent to or Dissent from Reorganization Plan.*

3. *Basis for Apportioning Stock in New Corporation.* — *Lincoln Nat. Bank v. Portland*, 82 Me. 99, 43 Am. & Eng. R. Cas. 463; *White v. Wood*, 129 N. Y. 527. See also *Somerset R. Co. v. Pierce*, 88 Me. 86.

Stock Issued for "Bonds Outstanding." — Where the reorganization agreement provided that stock in the new corporation should be issued for bonds of the old corporation actually issued and outstanding, and furthermore specifically enumerated such bonds, it was held that one to whom the old corporation was under obligation to issue bonds, but to whom no bonds were

actually issued, could not require the new company to issue stock to him. *Vose v. Cowdrey*, 49 N. Y. 336.

"Securities" Means Bonds, Not Stock. — Where the agreement provided that upon reorganization there should be a distribution amongst the bondholders of "the securities of the reorganization concern," it was held that the securities intended to be distributed were the mortgage bonds of the new company, and not its stock. *Thayer v. Wathen*, 17 Tex. Civ. App. 382.

Right of Bondholder to Vote Without Receiving Stock. — Where the reorganization agreement provided for the payment of certain of the old corporation's bonds, and that the owners thereof should be entitled to vote on questions connected with the reorganization, the bondholders were held entitled to vote, without any affirmative action on the part of the new corporation giving them such right. *State v. McDaniel*, 22 Ohio St. 354.

4. *Stock Sold to Complete Railroad.* — *White v. Wood*, 129 N. Y. 527.



the trustees to distribute the stock before the expiration of such term; and that in the absence of a showing that the trustees have abused their discretion, they will not be compelled to distribute the stock before the natural termination of the trust.<sup>1</sup>

(3) *Right of Holders of Detached Coupons.* — Where the bondholders, after foreclosure, form a new corporation in pursuance of a provision of the mortgage authorizing them to organize themselves into a corporation with a capital stock equal to the outstanding mortgage debt, the capital must be fixed at the total amount of the principal sum of the bonded indebtedness, without reference to unpaid overdue interest.<sup>2</sup>

*k. RIGHT UNDER OLD BONDS AFTER SURRENDER* — (1) *In General.* — A bondholder or other creditor of the old corporation who accepts the bonds or stock of the new corporation in lieu of his obligation against the old one thereby surrenders all of his rights in respect thereto against the old corporation, its property, and the proceeds of the sale.<sup>3</sup> The same rule applies

1. *Voting Trust.* — *Haines v. Kinderhook*, etc., R. Co., 33 N. Y. App. Div. 154, affirming 23 Misc. (N. Y.) 605, 52 N. Y. Supp. 1061, which holds also that the voting trustees may vote the trust stock and act as directors after they have disposed of their individual holdings. And see the title *VOTING TRUSTS*, vol. 29, p. 1027.

2. *Capital Covers Principal but Not Interest.* — Where the capital is to equal the "outstanding mortgage debt," the new corporation "is required only to issue certificates to the amount of the principal sum of the bonds, whether the interest warrants have been detached or not. But a more difficult question is whether in cases where the interest warrants have been detached, the corporation should issue the certificates solely to the holders of the bonds, or in part to them and in part to the holders of the detached interest warrants, in proportion to their interests in the whole mortgage debt, principal and interest. In an ordinary case of a bond with interest warrants detached, secured by a mortgage, if the holder of the bond should sell the interest warrants it may be that when such holder realized the proceeds of the mortgage by a foreclosure or otherwise, he would hold them for the joint benefit of himself and the owner of the interest warrants, upon the ground that the mortgage is security for the whole debt, interest as well as principal; and it may be that if upon foreclosure the proceeds are not sufficient to pay both, it would be equitable that they should be divided *pro rata* between all who are secured by the mortgage." But a corporation holding interest warrants by virtue of payment made under its guaranty of payment is not entitled to share with the holders of the bonds in the distribution of the certificates of stock, as it acquired the warrants under its obligation to pay them in case of the default of the principal debtor. "Having made the payments in pursuance of this obligation, it is not entitled to be substituted to the rights of the plaintiffs [holders of bonds] in regard to those warrants, because such subrogation would defeat or impair the security of the plaintiffs for their debt, violate the spirit of the contract of guaranty, and would be inequitable and unjust." *Child v. New York*, etc., R. Co., 129 Mass. 170.

3. *Old Bonds Extinguished by New Bonds or Stock* — *Chattanooga First Nat. Bank v. Radford Trust Co.*, (C. C. A.) 80 Fed. Rep. 569; *Venner v. Farmers' L. & T. Co.*, (C. C. A.) 90 Fed. Rep. 348; *Columbus*, etc., R. Co.'s Appeal, (C. C. A.) 109 Fed. Rep. 177. See also *Crawshaw v. Souter*, 6 Wall. (U. S.) 739.

*Estoppel of Creditor to Allege Fraud.* — Where the reorganization agreement provided that the creditors should accept stock in the new corporation in payment of their demands, and one of the creditors was induced to become a party to the reorganization agreement, by a secret agreement with two of the directors, whereby they bound themselves to buy his new stock at a stipulated price and agreed that he should retain possession of the old corporation's note until they executed the agreement to purchase his stock, and the action of such creditor in signing the reorganization agreement induced other creditors and stockholders to become parties thereto, it was held that although the signature of such creditor was procured by the fraud of the two directors, he was estopped from claiming that his debt against the old corporation remained unpaid, for the reason that he himself was guilty of fraud against the other creditors and stockholders of the old corporation. *Hardy v. Swigart*, 25 Colo. 136.

*What Constitutes Acceptance.* — Where the reorganization plan contemplated the surrender of the bonds of the old company and the acceptance of bonds of the new company in lieu thereof, and certain of the bondholders agreed to accept such new bonds upon condition that all the other bondholders should agree to the same plan, and the new bonds were delivered to such bondholders and accepted by them under an agreement that the old bonds should be retained until all the other bondholders had agreed to accept the new security and the old mortgage had been canceled and at least one of the bondholders refused to accept the new bonds, but the bondholders who made conditional acceptance joined with the other bondholders in a request to the trustee to institute foreclosure proceedings under the new mortgage, it was held that the bondholders so joining in such request were not entitled to maintain a bill for the exclusive



to bondholders or creditors who assent to a reorganization agreement which is successfully carried out; pending the execution of the plan contemplated by the agreement, the bonds or claims are not extinguished, but payment results immediately upon the successful conclusion of the plan, provided such was the intention of the agreement.<sup>1</sup>

(2) *When Intention of Agreement Was to Preserve Lien.* — If reorganization without sale is attempted, and it is apparent from the terms of the agreement that it was not the intention of the parties that the bonds deposited thereunder should be extinguished, the assenting bondholders will, on a subsequent foreclosure of the original mortgage, be entitled to share equally with the non-assenting bondholders in the distribution of the proceeds of the sale.<sup>2</sup> And if the bonds are scaled on the reorganization, a bondholder who receives new bonds for all of his old ones except a portion thereof which is too small to entitle him to have a new bond issued therefor has a lien for such unpaid portion of equal dignity to that of other mortgage creditors, and he is entitled to have such unpaid balance paid out of the proceeds of the sale.<sup>3</sup>

(3) *When Intention of Agreement Was to Extinguish Lien.* — But if, in a reorganization without sale, it appears from the agreement that it was clearly the intention of the parties to accept bonds or stock in extinguishment of their claims against the old corporation, a participating creditor cannot enforce payment of his demand in cash.<sup>4</sup>

**7. MODIFICATION OF AGREEMENT AFTER FORMATION OF NEW CORPORATION.** — A reorganization agreement which authorizes the holders of a majority of the certificates issued thereunder to modify, amend, or change the plan of reorganization does not authorize such majority to make an alteration therein after the formation of the new corporation and the conveyance to it of the property purchased.<sup>5</sup>

**5. Rights of Stockholders in Regard to Reorganization** — *a. COMBINATION OF STOCKHOLDERS AND BONDHOLDERS FOR PURCHASE AND REORGANIZATION* — (1) *In General.* — It is not *per se* fraudulent for the stockholders of an insolvent corporation to combine with the bondholders thereof for the purpose of purchasing its property under foreclosure proceedings and organizing

benefit of such holders of the old bonds as had not elected to accept the new bonds, for the reason that their action in calling upon the trustee to foreclose the new mortgage was an election to accept the new bonds in lieu of the old, and deprived them of their right to claim thereafter the security of the old mortgage. *Chattanooga First Nat. Bank v. Radford Trust Co.*, (C. C. A.) 80 Fed. Rep. 569.

**Surrender of Evidences of Indebtedness.** — Where the reorganization agreement provided that the claims of the creditors of the old corporation should be paid partly in the stock of the new corporation and partly in notes to be issued by it, it was held that the surrender of the evidences of indebtedness was not a condition precedent to the consummation of the agreement and that the issuance of the stock and notes in pursuance of the agreement constituted payment of the old indebtedness. *Kildare Lumber Co. v. National Bank of Commerce*, (C. C. A.) 69 Fed. Rep. 2.

**1. Extinguishment of Bonds by Acceptance of Agreement.** — *Barnes v. Chicago, etc.*, R. Co., 122 U. S. 1; *Central Trust Co. v. Cincinnati, etc.*, R. Co., 58 Fed. Rep. 500.

If the participating bondholders assent to what is done in pursuance of the reorganization agreement they become in law purchasers at the foreclosure sale, and, as such, stock-

holders in the corporation organized in their behalf to take the property from their purchasing trustee; and that too without any formal surrender of their bonds. *Barnes v. Chicago, etc.*, R. Co., 122 U. S. 1.

**Time Limit for Delivery of Bonds.** — A provision of a reorganization agreement that the new corporation's bonds shall be delivered to judgment creditors of the old corporation within six months from the date of the foreclosure sale means six months from the date of the completion of the sale, and not merely from the date of the auction. *Houston, etc.*, R. Co. v. Keller, 90 Tex. 214.

**2. Bonds Not Extinguished Unless Agreement So Intended.** — *Mowry v. Farmers' L. & T. Co.*, (C. C. A.) 76 Fed. Rep. 38.

**3.** *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 524.

**4.** *Glens Falls Paper Mill Co. v. Trask*, 29 N. Y. App. Div. 449, affirmed 164 N. Y. 604, 58 N. E. Rep. 1087.

**5. Modification After Formation of New Corporation.** — *Dutenhofer v. Adirondack R. Co.*, 60 Hun (N. Y.) 578, 14 N. Y. Supp. 558, wherein it was held that the action of the majority of the certificate holders, after conveyance of the property to the new corporation, in providing for the issuance by the new corporation of one series of bonds instead of

a new corporation to carry on the same business.<sup>1</sup>

(2) *Agreement Free from Fraud.* — When such a combination is not for the purpose of securing to the stockholders that which should go to the creditors, and the corporation formed in pursuance thereof is not a mere continuation of the old one under a different name, but is a new and entirely distinct corporation, unsecured creditors have no right to complain, notwithstanding the fact that the effect of the reorganization is to compel them to accept stock in the new company in lieu of their cash demands against the old,<sup>2</sup> or entirely to cut off their rights against the property of the old company purchased by the new, without giving them anything in place thereof.<sup>3</sup>

(3) *Agreement Fraudulent as to Unsecured Creditors.* — When the bondholders and stockholders enter into an agreement to preserve the rights of both and destroy the interests of unsecured creditors by a foreclosure sale of the corporation's property and the formation of a new corporation, such a collusive agreement is fraudulent as to the unsecured creditors and they are entitled to prevent the sale until their interests have been preserved.<sup>4</sup> Even after the consummation of the sale if they take seasonable steps to preserve their rights they may pursue the property of the old company into the hands of the new, upon a proper showing that the sale was collusive and fraudulent as to them.<sup>5</sup> However, if they are guilty of laches and fail to take the necessary steps at the proper time to assert their rights, they will be denied relief upon an application made long after the completion of the reorganization

two, was not binding upon a certificate holder who failed or refused to assent thereto.

**1. Combination of Stockholders and Bondholders Not Fraudulent Per Se.** — *Wenger v. Chicago, etc., R. Co., (C. C. A.) 114 Fed. Rep. 34; Marie v. Garrison, 83 N. Y. 14, reversing 45 N. Y. Super. Ct. 158.*

The fact that the stockholders and bondholders combine to purchase may be indicative of fraud, but is not a fraud *per se*. *Wenger v. Chicago, etc., R. Co., (C. C. A.) 114 Fed. Rep. 34.*

**Foreclosure Purchasers Not Trustees.** — The purchasers under foreclosure proceedings of the property of an insolvent corporation are in no sense trustees of its creditors, where there is no collusion or fraud between the purchasers and the stockholders of the old corporation. *Stewart's Appeal, 72 Pa. St. 291.*

**Purchase by Mortgagor's Attorney.** — The purchase of the property at the foreclosure sale by the attorney of the mortgagor corporation is not necessarily in and of itself invalid. Such a transaction will be scrutinized closely, and slight circumstances may impeach it, but until impeached it must stand. Such a purchase will not be set aside where it appears that the attorney made it for the benefit of the bondholders, and he was used to hold the title to the property until the bondholders could organize and take it, there being no speculation by the attorney in the purchase and no charge of actual wrong. *Pacific R. Co. v. Ketchum, 101 U. S. 289.*

**2. Payment of Creditors in Stock of New Company.** — *Hancock v. Toledo, etc., R. Co., 11 Biss. (U. S.) 148, 9 Fed. Rep. 738; Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576; Smith v. Chicago, etc., R. Co., 18 Wis. 17.*

**When Arrangement Subordinates Stockholders to Creditors.** — Where it appeared that some of

the unsecured creditors were parties to the reorganization agreement, which provided that the unsecured creditors should receive income bonds to the full amount of their claims, whereas the stockholders should receive only a percentage of their holdings of old stock in stock of the new corporation, it was held that unsecured creditors were not entitled to have the stockholders' stock sold and subjected to the payment of their debts, inasmuch as the stockholders were placed behind the creditors in the reorganization. *Hancock v. Toledo, etc., R. Co., 11 Biss. (U. S.) 148, 9 Fed. Rep. 738.*

**3. When Unsecured Creditors Do Not Participate.** — *Paton v. Northern Pac. R. Co., 85 Fed. Rep. 838; Farmers' L. & T. Co. v. Louisville, etc., R. Co., 103 Fed. Rep. 110; Wenger v. Chicago, etc., R. Co., (C. C. A.) 114 Fed. Rep. 34; Kurtz v. Philadelphia, etc., R. Co., 187 Pa. St. 59.*

**4. Fraudulent Combination of Bondholders and Stockholders.** — *Louisville Trust Co. v. Louisville, etc., R. Co., 174 U. S. 674.* And this is true even though the property of the old corporation is mortgaged for a sum greater than its value. *Chicago, etc., R. Co. v. Howard, 7 Wall. (U. S.) 392.*

**5. Creditors May Pursue Property into Hands of Purchasers.** — *Central of Georgia R. Co. v. Paul, (C. C. A.) 93 Fed. Rep. 878; St. Louis Trust Co. v. Des Moines, etc., R. Co., 101 Fed. Rep. 632.*

**Combination by Stockholders Alone.** — The rules governing fraudulent combinations by bondholders and stockholders for the purpose of destroying the rights of unsecured creditors of the corporation apply with equal, if not greater, force to combinations by stockholders alone for such purpose. *Goddard v. Fishel-Schlichten Importing Co., 9 Colo. App. 306.*

and the distribution of the securities of the new corporation.<sup>1</sup>

*b. PARTICIPATION BY STOCKHOLDERS AFTER SALE.* — When the bondholders of an insolvent corporation purchase its property at a foreclosure sale, the fact that they subsequently permit the stockholders of the old corporation to acquire stock in the new without paying therefor does not constitute a fraud upon unsecured creditors of the old corporation.<sup>2</sup> If the new stock is sold to the old stockholders, the proceeds of such sale cannot be reached by the unsecured creditors of the old company, even though the stock was sold to them at less than its real value.<sup>3</sup>

*c. COMBINATION OF STOCKHOLDERS ALONE FOR PURCHASE.* — There would seem to be no good reason why the stockholders alone should not have the right to combine for the purpose of purchasing the mortgaged property of their corporation at the foreclosure sale, provided there is no fraud in the transaction and the corporation's condition is such that it cannot hope to continue doing business.<sup>4</sup>

*d. SALE PROCURED BY DIRECTORS* — (1) *Bona Fide Sale.* — Indeed, it has been held that the directors of an insolvent corporation who have endeavored to induce the stockholders to relieve the company from debt by making advances in proportion to their holdings of stock, have the right to purchase the mortgaged property at the foreclosure sale, as they are under no moral or legal obligation to advance their own means, pay the debts, and preserve the property for the use of the other shareholders, who declined to assist them in their effort to save the company.<sup>5</sup> But if the directors purchase property sold at their direction which is more than sufficient to pay the bonded indebtedness of the old corporation, the sale is void as to such excess.<sup>6</sup>

(2) *Fraudulent Sale.* — Even if the directors fraudulently and collusively procure or consent to the foreclosure of a mortgage of the corporation's property, it is within the discretion of the court to refuse to set the sale aside at the instance of a stockholder who has been guilty of laches and has unreasonably delayed his application for relief, especially if it appears that the granting of the relief sought would probably result in no advantage to the complaining stockholder.<sup>7</sup>

(3) *Sale Technically Wrong.* — If the action of the majority stockholders of a hopelessly insolvent corporation, in procuring the foreclosure of its

1. *Laches of Unsecured Creditors.* — *Wenger v. Chicago, etc., R. Co.*, 105 Fed. Rep. 796.

2. *Participation of Stockholders by Permission of Bondholders.* — *Stewart's Appeal*, 72 Pa. St. 291, *distinguishing Chicago, etc., R. Co. v. Howard*, 7 Wall. (U. S.) 392.

*Right of Bondholders to Object.* — If the reorganization agreement contained no provision for the issuance or sale of stock in the new corporation to stockholders of the old company, bondholders who were parties to the agreement may restrain the new corporation from issuing or selling such stock in pursuance of an unauthorized modification of the agreement made by the reorganization committee. *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41.

3. *Proceeds of New Stock Sold to Stockholders.* — *Ferguson v. Ann Arbor R. Co.*, 17 N. Y. App. Div. 336.

4. *Stockholders Alone May Combine.* — *Armour v. Bement*, (C. C. A.) 123 Fed. Rep. 56.

5. *Directors May Purchase.* — *Harts v. Brown*, 77 Ill. 226. See also *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Harpending v. Munson*, 91 N. Y. 651; *Huston's Appeal*, 127 Pa. St. 620.

6. *Purchase of Excess Over Bonded Indebtedness Void.* — *Harts v. Brown*, 77 Ill. 226, wherein it was held also that inasmuch as the directors had paid out large sums of money in the satisfaction of the unsecured indebtedness of the old corporation, they should be subrogated to the rights of the creditors whose debts they had paid, and should, in the final settlement and accounting with the stockholders, have a credit for the sums thus paid.

7. *Laches May Bar Stockholder's Right to Relief.* — *Foster v. Mansfield, etc., R. Co.*, 146 U. S. 88, wherein the court in refusing to set aside the sale after the expiration of ten years, because of the laches of the complainant and the probability that inasmuch as the corporation was hopelessly insolvent there would probably be another foreclosure sale for a sum insufficient to pay the corporation's indebtedness without leaving anything whatever for the stockholders, said: "A court of equity is not called upon to do a vain thing; it will not entertain a bill simply to vindicate an abstract principle of justice or to compel the defendants to buy their peace, and if it appear that the parties really in interest are content that the decree shall stand, it should not be set



mortgage and forming a new corporation, is only technically wrong, the court may refuse to set aside the sale, but permit minority stockholders, who are sufficiently diligent in the assertion of their rights, to participate in the reorganization upon payment of their *pro rata* share of moneys expended by the majority in the preservation of the property after foreclosure.<sup>1</sup>

*c. RIGHT TO PARTICIPATE IN REORGANIZATION* — (1) *Under Authority of Statute*. — When a statute provides that stockholders of the old corporation shall have the right to assent to the reorganization plan within a certain specified time, after the foreclosure sale or after the organization of the new company, and that by complying with the terms and conditions of such plan they shall be entitled to have their *pro rata* benefit therein according to its terms, the giving of such assent within the time specified is a condition precedent to their right to share in the benefits of the reorganization.<sup>2</sup>

(2) *Under Agreement with Bondholders* — (a) *Necessity of Complying with Terms of Agreement*. — In the absence of a statute to the contrary, when the property of an insolvent corporation is sold under foreclosure proceedings, the rights of its stockholders in such property are thereby cut off absolutely, and their claim to stock in the new corporation formed by the purchasers is wholly dependent upon the terms of the reorganization agreement.<sup>3</sup> Hence, when the agreement provides that all stockholders of the old corporation who surrender their stock within a given time and pay a specified sum per share shall be entitled to stock in the new corporation, a stockholder who fails to surrender his old stock and pay the assessment within the prescribed time forfeits his right to the new stock.<sup>4</sup>

aside at the suit of one who could not possibly obtain a benefit from such action."

**1. When Sale Technically Wrong.** — *Cutting v. Baltimore, etc., R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 616, *affirmed* 65 N. Y. App. Div. 414.

**2. Stockholders Must Assent Within Statutory Limitation.** — *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49. See also *Van Alstyne v. Houston, etc., R. Co.*, 56 Tex. 373.

**Notice of Time Limit Unnecessary.** — Where the statute did not require the giving of notice to the stockholders of the old company, and the foreclosure was of the mortgage upon a well-known railroad, after proceedings lasting for several years, and the sale was made after due notice, and the terms of the plan were embodied in the articles filed for the organization of the new company, it was held that it was unnecessary for the reorganization committee to give the stockholders of the old company notice of the plan of reorganization, as they must be charged with knowledge of the law securing to them the right to assent to the plan within six months, and also with knowledge of the terms of the plan as embodied in the articles filed for the organization of the new company. *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49, *reversing* 31 Hun (N. Y.) 316, and 11 Abb. N. Cas. (N. Y.) 133, which *followed* 9 Abb. N. Cas. (N. Y.) 271.

**The New York Statute** (c. 502, Laws 1853) permitting any stockholder of a railroad company to share in the benefit of the purchase upon payment within six months of his proportionate share of the price paid by the purchaser at the foreclosure sale, was repealed by chapter 282 of the Laws of 1854, and chapter 430 of the Laws of 1874. *Pratt v. Munson*, 84 N. Y. 582.

**3. Foreclosure Cuts Off Stockholders' Rights.** — *Thornton v. Wabash R. Co.*, 81 N. Y. 462; *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49; *Dow v. Iowa Cent. R. Co.*, 144 N. Y. 426, *affirming* 70 Hun (N. Y.) 186.

**Lien of Stockholders.** — Where the reorganization agreement provided that the stockholders of the old corporation should receive preferred stock in the new corporation, and the certificates issued by the reorganization committee to stockholders depositing their stock under the agreement, stated that the preferred stock was "to be and remain a first claim upon the property of the corporation after its indebtedness," it was held that the indebtedness referred to included not only the then subsisting indebtedness, but also such indebtedness as might be a valid lien against the property of the corporation, although created afterwards, and that therefore the claim of such stockholders against the property of the new corporation was subordinate to the lien of mortgages subsequently executed by the new corporation. *King v. Ohio, etc., R. Co.*, 9 Biss. (U. S.) 278.

**4. Stockholder Must Assent Within Time Limited.** — *Thornton v. Wabash R. Co.*, 81 N. Y. 462; *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49. See also *Schorestene v. Iselin*, 69 Hun (N. Y.) 250.

**Partial Payment Within Time Specified.** — A reorganization agreement provided that the stockholders in the old corporation should receive stock in the new upon payment of a specified assessment and surrender of their old stock within a given time. One of the old stockholders, after paying the first assessment, died, and his estate passed into the hands of the public administrator, who, with full knowledge of the subsequent assessments made by

(b) **Enforcement of Right.** — When the foreclosing bondholders make a valid agreement for a good consideration that in the event of their purchasing the mortgaged property at the foreclosure sale they will form a new corporation and issue certain shares of stock therein to stockholders of the old corporation, the agreement is binding on the bondholders, and if the stockholders perform their part of the contract, they may compel the new corporation to issue the stock,<sup>1</sup> or may maintain an action against the bondholders for breach of the contract.<sup>2</sup>

**f. RIGHT TO OBJECT TO REORGANIZATION** — (1) *Participating Stockholders* — (a) **In General.** — A stockholder of an insolvent corporation who participates in a plan for its reorganization is bound by his action in so doing.<sup>3</sup> Hence, such a stockholder is not entitled to enforce against the new corporation a judgment recovered against the old one for accrued dividends on his stock therein;<sup>4</sup> and a stockholder who participates as to some of his stock cannot attack the reorganization as the owner of stock subsequently acquired.<sup>5</sup>

(b) **Upon Modification of Plan.** — When the bondholders, as a matter of grace, offer the stockholders of the old corporation an opportunity to participate in the reorganization, no contractual relation is created by the stockholders' acceptance of the offer; hence, the stockholders are not entitled to have the plan of reorganization modified or re-formed, even though it varies from the

the reorganization committee, made default in payment thereof. After the lapsing of the time within which the stock could be surrendered and assessments paid, the public administrator sold the stock at public auction for a nominal sum. The purchaser made a tender of the amount due for unpaid assessments and interest, and upon refusal of the committee to deliver the new stock, sought to compel such delivery through the courts, but was denied relief on the ground that he stood in no better position than did the legal representative of the original stockholder. *Dow v. Iowa Cent. R. Co.*, 144 N. Y. 426, affirming 70 Hun (N. Y.) 186.

1. **Enforcement of Right to Participate.** — *Mackintosh v. Flint, etc.*, R. Co., 34 Fed. Rep. 582.

2. **Breach of Contract to Issue Stock.** — The bondholders of a railroad corporation brought a suit to foreclose their mortgage, and foreclosure was resisted by certain of the stockholders, who contended that the bonds were of doubtful validity. Thereupon the bondholders agreed that in consideration of the relinquishment by the complaining stockholders of all further opposition to the foreclosure suit, the bondholders would, in the event they purchased the property at the foreclosure sale, convey it to a successor corporation to be organized by the stockholders upon payment to the bondholders of certain specified expenses and disbursements. Subsequently the stockholders consented to a modification of the terms of the agreement, and the agreement as modified provided that the bondholders would purchase the property at the foreclosure sale and would thereupon organize a successor corporation to which they would convey the property purchased and would cause such successor corporation to issue to the stockholders with whom the agreement was made, shares of stock in the new corporation in exchange for their shares in the old corporation. The bondholders

made the purchase and formed the new corporation as contemplated, but refused to carry out that part of the agreement which provided for the issuance of new stock to the old stockholders. In an action brought by such stockholders against the bondholders to recover damages for breach of contract, it was held that the agreement of the stockholders to withdraw their opposition to the foreclosure proceedings was a good consideration for the original contract, as it was not a collusive arrangement between the parties to establish a fraudulent and invalid debt and procure a sale of the property of the corporation to the prejudice of their stockholders and creditors, it not appearing that the bonds were in fact invalid; that the surrender of the original contract was a good consideration for the new one; and that the stockholders had a good cause of action against the bondholders for breach of the contract. *Marie v. Garrison*, 83 N. Y. 14, reversing 45 N. Y. Super. Ct. 158.

3. **Stockholders Bound by Agreement.** — *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830; *Farmers' L. & T. Co. v. Central R., etc., Co.*, 120 Fed. Rep. 1006.

A Stockholder Cannot Partially Accept the plan, but must either take it as tendered or reject it entirely. *Miller v. Dodge*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 640.

A Purchaser from a Participating Stockholder cannot attack as *ultra vires* a reorganization plan for which his vendor voted, in the absence of a showing that there is something in the plan that is expressly prohibited by statute or that is *per se* illegal. *Hollins v. St. Paul, etc., R. Co.*, (Supm. Ct. Spec. T.) 9 N. Y. Supp. 909.

4. **Enforcement of Judgment Against Old Company for Dividends.** — *Farmers' L. & T. Co. v. Central R., etc., Co.*, 120 Fed. Rep. 1006.

5. **Participating Stockholders Bound as to All Their Stock.** — *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830.



plan contemplated at the time the offer of participation was made.<sup>1</sup>

(c) *Upon Adoption of Different Plan Excluding Stockholders.* — In the absence of a showing that the agreement resulted in the realization of a lower price for the property than would have been realized otherwise, a stockholder will not be heard to oppose the confirmation of the sale on the ground that the committee, after formulating a plan of reorganization which contemplated the participation of the stockholders, purchased the property in pursuance of an agreement with a rival committee which excluded the stockholders from participation.<sup>2</sup>

(2) *Nonparticipating Stockholders.* — A reorganization scheme favored by the various bondholders, which provides for the foreclosure of all the outstanding mortgages of a corporation, those not due as well as those in default, and which permits the participation of the stockholders, will not be enjoined at the instance of complaining stockholders, especially when it appears that the arrangement is to the advantage of the stockholders as well as the bondholders.<sup>3</sup> And even if the directors and majority stockholders commit a fraud on the minority stockholders by their failure to set up a valid defense to the foreclosure suit, the minority stockholders may lose their right to have the sale set aside where they delay unreasonably in taking proper steps to assert their rights in the matter, and the rights of third persons have intervened.<sup>4</sup>

**6. Expenses of Reorganization** — *a. LIABILITY OF PARTICIPANTS* — (1) *In General.* — A reorganization agreement is not rendered invalid by the fact that it provides that all those who join in the scheme shall contribute ratably to the expenses necessary to carry out the plan of reorganization, as it is only proper that none shall share in the benefits of a plan except those who bear the expense thereof.<sup>5</sup>

(2) *When Plan Is Modified.* — But when the agreement provides that in case of modification of the original plan by the committee, bondholders who assented to the original plan may withdraw their bonds upon payment of their

**1. Stockholders Not Entitled to Modification.** — *Miller v. Dodge*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 640.

**2. Stockholder Cannot Object to Reorganization under Different Plan.** — *Central Trust Co. v. Peoria, etc., R. Co.*, (C. C. A.) 118 Fed. Rep. 30, where the court, after stating that the complaining stockholder did not even allege that he accepted the offer to participate contained in the plan formulated by the first committee, held that even if he had alleged and proven the fact, it might have shown a cause of action for damages against the committee and the bondholders whom they represented, but it certainly would furnish no reason for the court to retake and resell the property.

**3. Right of Stockholder to Enjoin Reorganization.** — *Carey v. Houston, etc., R. Co.*, 45 Fed. Rep. 438. See also 52 Fed. Rep. 671.

**Scheme Promoted by Officers.** — The action of the president and trustees of a corporation in consenting to the entry of a decree of foreclosure, in pursuance of a reorganization plan which provided for the participation of the stockholders, was held not to be constructively fraudulent as to the stockholders of the old corporation, where the alternative of such a reorganization was a foreclosure which would entirely cut off all the rights of the stockholders. It was held also that the failure of the trustees to levy an assessment did not tend to establish any fraud, conspiracy, or wilful neglect of duty on their part which would

authorize the court to set aside the decree of foreclosure, and that the proceedings were not rendered fraudulent by the fact that the president earned a large fee by his services in promoting the reorganization. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830.

**4. Lacher of Stockholder.** — *Foster v. Mansfield, etc., R. Co.*, 36 Fed. Rep. 627, 36 Am. & Eng. R. Cas. 281. See also *Harwood v. Cincinnati, etc., Air Line R. Co.*, 17 Wall. (U. S.) 78.

**5. Participants Must Share in Expenses.** — *Barnes v. Chicago, etc., R. Co.*, 122 U. S. 1; *Hancock v. Toledo, etc., R. Co.*, 9 Fed. Rep. 738, 11 Biss. (U. S.) 148; *Bound v. South Carolina R. Co.*, (C. C. A.) 78 Fed. Rep. 49; *Gernsheim v. Olcott*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 872, reversed on other grounds in (Supm. Ct. Gen. T.) 10 N. Y. Supp. 438; *Catawissa R. Co. v. Titus*, 49 Pa. St. 277.

**Agreement for Reimbursement of Contributors.**

— Where a stockholders' agreement for reorganization provided that those contributing to the expenses thereof should be repaid by the new corporation the amounts of their respective contributions, it was held that a contributor did not forfeit his right to reimbursement by disposing of his stock in the new corporation, as the right was not an incident to the ownership of the stock, but to his contribution under an agreement that he should be reimbursed. *Crown Coal, etc., Co. v. Thomas*, 177 Ill. 534, affirming 73 Ill. App. 679.



share of the expenses incurred, a bondholder who dissents from the modification and wishes to withdraw is chargeable only with his ratable share of the expenses incurred in furtherance of the original plan.<sup>1</sup>

(3) *Expenses of Prior Unsuccessful Plan.* — Bondholders participating in the expenses of reorganizing an insolvent corporation are not chargeable with any part of the expenses incurred in furtherance of a prior unsuccessful plan in which they did not participate.<sup>2</sup>

(4) *Payment Condition Precedent of Right to Participate.* — Bondholders participating in a reorganization, whereby they are to receive bonds of the new corporation in lieu of their old bonds, cannot demand the delivery of the new bonds until they repay the committee for expenses incurred and advances made in the execution of the trust.<sup>3</sup>

*b. JUDGMENT OF COMMITTEE AS TO AMOUNT OF ASSESSMENT.* — The judgment of the committee as to the amount to be paid by the stockholders of the old corporation for the privilege of acquiring stock in the new corporation, will not be revised by the court on the application of a stockholder who claims that the assessment is excessive, in the absence of a showing that the committee acted arbitrarily or fraudulently in fixing the amount of the assessment.<sup>4</sup>

*c. DUTY OF COMMITTEE TO RENDER ACCOUNT.* — But it is the duty of the committee to furnish the stockholders a full account of the items of expense and indebtedness which they considered as chargeable to the stockholders in fixing the assessments, in order that the stockholders may determine whether or not the assessment is reasonable and proper.<sup>5</sup>

*d. IMPLIED AGREEMENT AS TO EXPENSES.* — If the reorganization agreement makes no provision for division of the expenses, one will be implied, and parties to the agreement who refuse to pay their proportion, forfeit their right to share in the benefits of the purchase.<sup>6</sup>

**7. Rights, Powers, Duties, and Liabilities of New Corporation** — *a. SUCCESSION TO FRANCHISES, PRIVILEGES, AND DUTIES OF OLD CORPORATION* — (1) *Succession to Franchises and Duties* — (a) *Franchises Included in Mortgage* — *aa. IN GENERAL.* — When legislation empowers a corporation to mortgage its franchises and authorizes the purchasers thereof under foreclosure proceedings to form

**1. Expenses When Plan Modified.** — *Kennedy v. Kennedy, 70 Hun (N. Y.) 257.*

**2. Expenses of Prior Unsuccessful Plan.** — *Van Sieten v. Bartol, 95 Fed. Rep. 793.*

**3. Coppell v. Hollins, 91 Hun (N. Y.) 570, affirmed 159 N. Y. 551, 54 N. E. Rep. 1089.**

**Lien for Expenses.** — When the reorganization agreement provides that the bondholders shall receive stock in the new corporation, in lieu of their bonds, they are not entitled to receive the certificates of stock until they surrender their bonds and pay their proportion of the expenses of the reorganization; and a lien attaches to their shares of stock to secure the payment of such proportion of the expenses. *Barnes v. Chicago, etc., R. Co., 122 U. S. 1.*

**4. Discretion of Committee in Fixing Assessment.** — *Gernsheim v. Olcott, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 438, reversing (Supm. Ct. Spec. T.) 7 N. Y. Supp. 872; Gernsheim v. Central Trust Co., (Supm. Ct. Gen. T.) 16 N. Y. Supp. 127.*

**What Expense Is Allowable.** — Where the reorganization agreement provided that the expenses of carrying it out, printing new bonds, etc., should be borne by the new company, it was held that the words "printing new bonds, etc.," did not restrict the agreement to expenses

of that character only, but that the new company was liable for all reasonable and necessary expenses incurred in carrying out the agreement. *Catawissa R. Co. v. Titus, 49 Pa. St. 277.*

**5. Committee Must Furnish Account of Items.** — *Gernsheim v. Olcott, (Supm. St. Spec. T.) 7 N. Y. Supp. 872, reversed on other grounds in (Supm. Ct. Gen. T.) 10 N. Y. Supp. 438; Gernsheim v. Central Trust Co., (Supm. Ct. Gen. T.) 16 N. Y. Supp. 127.*

**Hearing as to Amount of Assessment.** — Where the stockholders objected to the assessment on the ground that the trust company fixed it without giving them an opportunity to be heard, the court held that inasmuch as there was nothing in the agreement rendering such a hearing necessary, it was entirely competent for the trust company to proceed *ex parte* in acquiring information of the indebtedness upon which the assessment was based. The court said that if the stockholders wished to be heard, it was for them to demand the right, and if that were refused by the trust company, the court upon good reason shown might be called upon to act. *Gernsheim v. Central Trust Co., (Supm. Ct. Gen. T.) 16 N. Y. Supp. 127.*

**6. Implied Agreement to Divide Expenses.** — *Fidelity Ins., etc., Co.'s Appeal, 106 Pa. St. 144.*

a new corporation with the same franchises as the old, the new corporation takes the franchises which the old corporation was authorized to, and did, mortgage;<sup>1</sup> and takes them subject to the restrictions as to their use and subject to the public duties imposed upon the corporation which mortgaged them.<sup>2</sup>

*bb. FRANCHISES NECESSARY TO BENEFICIAL USE OF PROPERTY ACQUIRED.* — But the franchises to which the new corporation succeeds are only those which are necessary to the beneficial use of the property acquired by the purchaser, and do not include the franchise to be a corporation.<sup>3</sup> Hence, the purchasers do not *ipso facto* become a corporation, but merely acquire the right to form a new corporation.<sup>4</sup>

*cc. FRANCHISE TO BE A CORPORATION.* — Some statutes instead of authorizing the

**1. New Corporation Succeeds to Mortgaged Franchises** — *United States.* — Memphis, etc., R. Co. v. Railroad Com'rs, 112 U. S. 609.

*Alabama.* — Mobile, etc., R. Co. v. Steiner, 61 Ala. 559.

*Connecticut.* — Gates v. Boston, etc., Air Line R. Co., 53 Conn. 333.

*Maine.* — Kennebec, etc., R. Co. v. Portland, etc., R. Co., 59 Me. 9.

*Michigan.* — Cook v. Detroit, etc., R. Co., 43 Mich. 349; Detroit v. Mutual Gas Co., 43 Mich. 594.

*Texas.* — Denison, etc., R. Co. v. St. Louis Southwestern R. Co., 30 Tex. Civ. App. 474, affirmed 96 Tex. 233.

**Purchaser at Sale in Bankruptcy** succeeds to the franchises of the bankrupt corporation. New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501.

**Enforcement of Judgment Lien.** — Where all the property of a railroad corporation was sold in satisfaction of a judgment which was a lien on the property sold, it was held that the purchasers acquired title to the franchise to operate the road, it being inseparable from the ownership of the road and the road itself being of no value without it. Gunnison v. Chicago, etc., R. Co., 117 Fed. Rep. 629.

**Railroad's Right to Fix Tolls.** — A right granted by statute to a railroad to charge a specified rate for the carriage of passengers is a privilege or franchise in the nature of property, which vests in the corporation to which it is granted, and until repealed it is entitled to the same protection from invasion as any other species of property. Therefore it is not affected by a subsequent statute fixing a lower rate as a maximum charge by railroads generally for similar service. It is alienable or transferable by mortgage and passes with the property of the corporation to the purchaser under foreclosure proceedings. Parker v. Elmira, etc., R. Co., 165 N. Y. 274.

**2. Succession to Public Duties and Restrictions on Use of Franchises** — *Alabama.* — Mobile, etc., R. Co. v. Steiner, 61 Ala. 559.

*Connecticut.* — Gates v. Boston, etc., Air Line R. Co., 53 Conn. 334.

*Massachusetts.* — Hampshire County Com'rs, Petitioners, 143 Mass. 424.

*Michigan.* — Detroit v. Mutual Gas Co., 43 Mich. 594; Gage v. Pontiac, etc., R. Co., 105 Mich. 335.

*New Hampshire.* — Pierce v. Emery, 32 N. H. 512.

*New Jersey.* — Montclair v. New York, etc.,

R. Co., 45 N. J. Eq. 436; New York, etc., R. Co. v. State, 50 N. J. L. 303, affirmed 53 N. J. L. 244.

*Ohio.* — Campbell v. Marietta, etc., R. Co., 23 Ohio St. 168.

*Tennessee.* — Dyer County v. Chesapeake, etc., R. Co., 87 Tenn. 712.

*Virginia.* — Sherwood v. Atlantic, etc., R. Co., 94 Va. 291.

See also State v. Central Iowa R. Co., 71 Iowa 410.

**Where the Franchise Is Sold under an Execution** by virtue of a statute authorizing such sale, the purchaser is charged with the duties and obligations to the public imposed upon the original corporation. Gulf, etc., R. Co. v. Newell, 73 Tex. 334, 38 Am. & Eng. R. Cas. 503.

**3. Franchise to Be Corporation Not Included** — *United States.* — Memphis, etc., R. Co. v. Railroad Com'rs, 112 U. S. 609; Willamette Mfg. Co. v. British Columbia Bank, 119 U. S. 191; Julian v. Central Trust Co., 193 U. S. 93; New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501.

*Alabama.* — Meyer v. Johnston, 53 Ala. 237.

*Arkansas.* — Memphis, etc., R. Co. v. Berry,

41 Ark. 436.

*Illinois.* — Snell v. Chicago, 133 Ill. 413.

*Massachusetts.* — Com. v. Smith, 10 Allen (Mass.) 448.

*New Hampshire.* — Pierce v. Emery, 32 N. H. 484.

*New York.* — Metz v. Buffalo, etc., R. Co., 58 N. Y. 61; People v. Cook, 110 N. Y. 443, affirmed 148 U. S. 397.

*Ohio.* — Atkinson v. Marietta, etc., R. Co., 15 Ohio St. 21.

*Tennessee.* — Ragan v. Aiken, 9 Lea (Tenn.) 609, 9 Am. & Eng. R. Cas. 201; Memphis Water Co. v. Magens, 15 Lea (Tenn.) 37.

**An Execution Sale** of the property and franchises of a railroad corporation made under a statute authorizing such sale, does not pass the title to the franchise of being a corporation. Gulf, etc., R. Co. v. Newell, 73 Tex. 334, 38 Am. & Eng. R. Cas. 503.

**4. Purchasers Do Not Become Corporation Ipso Facto** — *United States.* — Memphis, etc., R. Co. v. Railroad Com'rs, 112 U. S. 609; Norfolk, etc., R. Co. v. Pendleton, 156 U. S. 667.

*Arkansas.* — Memphis, etc., R. Co. v. Berry, 41 Ark. 436.

*Georgia.* — Watson v. Albany, etc., R. Co., 111 Ga. 10.

*New York.* — Metz v. Buffalo, etc., R. Co., 58 N. Y. 61; People v. Cook, 110 N. Y. 443, affirmed 148 U. S. 397.

purchasers to form a new corporation provide that they shall become a corporation by virtue of their purchase;<sup>1</sup> and it has been said that the effect of such legislation is to allow the purchasers to acquire by purchase the right of being a corporation.<sup>2</sup> It would seem that this view is incorrect, because aside from the question whether or not it involves the delegation of a legislative function to private persons, the franchise to be a corporation is vested in the incorporators and not in the corporation itself, and therefore cannot be alienated by the latter.<sup>3</sup> The real effect of such legislation is to work a dissolution of the old corporation and to grant a new charter to the purchasers, to be a separate and distinct corporation with the same franchises that were enjoyed by the old one.<sup>4</sup>

*dd.* RIGHT OF EMINENT DOMAIN. — A new corporation which (being duly authorized thereto) purchases under judicial proceedings all of the franchises, rights, privileges, immunities, and property of an insolvent railroad corporation, whose line of road is not completed, acquires the right to prosecute the unfinished work to completion as originally contemplated, in the same manner and by the use of the same means as its predecessor could have employed; and for the accomplishment of such purpose the new corporation has the right to condemn lands, or a right of way over them, subject only to such restrictions upon the exercise of the right as may be imposed by the terms of its

*Pennsylvania.* — Wellsborough, etc., Plank-Road Co. *v.* Griffin, 57 Pa. St. 417.

*Tennessee.* — Ragan *v.* Aiken, 9 Lea (Tenn.) 609; Memphis Water Co. *v.* Magens, 15 Lea (Tenn.) 37.

And see Snell *v.* Chicago, 133 Ill. 413; State *v.* Morgan, 28 La. Ann. 482; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

1. **Statutes Constituting Purchasers Corporation.** — Holland *v.* Lee, 71 Md. 338; Boylan *v.* Kelly, 36 N. J. Eq. 331; State *v.* Sherman, 22 Ohio St. 411; Com. *v.* Central Pass. R. Co., 52 Pa. St. 506; Acres *v.* Moyne, 59 Tex. 623.

2. **Purchase of Franchise to Be Corporation.** — First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297; State *v.* Sherman, 22 Ohio St. 428.

3. **Franchise to Be Corporation Belongs to Corporators.** — Memphis, etc., R. Co. *v.* Railroad Com'rs, 112 U. S. 609; Meyer *v.* Johnston, 53 Ala. 237; Fietsam *v.* Hay, 122 Ill. 293; Snell *v.* Chicago, 133 Ill. 413; Pierce *v.* Emery, 32 N. H. 484; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372.

**Franchise to Be Corporation Inalienable.** — A corporation cannot alienate, mortgage, or assign the franchise of being a corporation, in the absence of a statute expressly authorizing the transfer and providing the mode in which it may be made.

*United States.* — Memphis, etc., R. Co. *v.* Railroad Com'rs, 112 U. S. 609; Branch *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 481.

*Alabama.* — Meyer *v.* Johnston, 53 Ala. 237.  
*Illinois.* — Bruffett *v.* Great Western R. Co., 25 Ill. 353; Fietsam *v.* Hay, 122 Ill. 293; Snell *v.* Chicago, 133 Ill. 413.

*Kansas.* — State *v.* Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166.

*Kentucky.* — Bardstown, etc., R. Co. *v.* Metcalfe, 4 Met. (Ky.) 190.

*Louisiana.* — New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225.

*Maryland.* — Butler *v.* Rahm, 46 Md. 551.

*Massachusetts.* — Com. *v.* Smith, 10 Allen (Mass.) 448.

*Ohio.* — Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372.

*Vermont.* — Eldridge *v.* Smith, 34 Vt. 484.

*Wisconsin.* — Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344.

See also Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 172.

*Compare* Pierce *v.* Emery, 32 N. H. 484, holding that the franchise to be a railroad corporation belongs to the corporators of the corporation, but that the sale of all the franchises and property owned by the corporation would in substance transfer the road and the corporation itself to the purchasers. *Compare* also First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297, where it was held that the franchise to be a corporation passed under a foreclosure sale.

4. **New Corporation Is Distinct from Old.** — Memphis, etc., R. Co. *v.* Railroad Com'rs, 112 U. S. 609; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176; Holland *v.* Lee, 71 Md. 338; State *v.* Sherman, 22 Ohio St. 411; Com. *v.* Central Pass. R. Co., 52 Pa. St. 506. See also Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9; Pierce *v.* Emery, 32 N. H. 509; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Acres *v.* Moyne, 59 Tex. 623.

**What Are Not Conditions of Being.** — Where a statute provided that the purchasers should be constituted a corporation, and that thereafter they should proceed to organize by adopting a corporate name, a common seal, and so forth, it was held that they became a new corporation upon making the purchase; that such new corporation became seized of all the rights, powers, privileges, and franchises of the old corporation; that the directions in regard to subsequent reorganization were not conditions of being, as would be the case in an original organization of a corporation; and that failure to follow those directions did not entitle the commonwealth to a judgment that the franchise to be a corporation had no existence, but could do no more than to work a forfeiture and en-



charter or by controlling legislation in effect at the time its charter was granted.<sup>1</sup>

*cc. RESTRICTION UPON RIGHT OF SUCCESSION.*—The statutory right of the new corporation to succeed to and enjoy the franchises of the old corporation is not entirely unrestricted. It has been held that inasmuch as the corporation formed by foreclosure purchasers under statutory authority springs into existence by virtue of a grant *de novo* from the state and is entirely distinct from the old corporation, the state has the power to regulate the terms and prescribe the conditions upon which it will grant the new charter.<sup>2</sup> The right of the state to impose such terms and conditions is based on the theory that the statutory provision for the formation of a corporation *in futuro* cannot become a contract within the meaning of the constitutional prohibition against legislation impairing its obligations, until it has become vested as a right by an actual organization of the corporation under the statute, and then it takes effect as of the date of the organization and subject to such laws as may be then in force.<sup>3</sup> But while the principle is thus broadly laid down, it is believed that, as a matter of actual practice, its application has never been extended beyond those *quasi* franchises which do not inhere in the property of the corporation, but instead are nothing more than mere personal privileges of the corporation to which they were granted.

(b) *Franchises Not Included in Mortgage.*—When the mortgage of the property of a corporation does not include its franchises, the purchasers of the property under a foreclosure of the mortgage acquire no title to such franchises.<sup>4</sup>

(c) *Purchase of Franchises by Natural Person.*—Irrespective of the question as to whether or not natural persons may exercise the franchises which the state has conferred upon a railroad corporation, there is no reason why they may not be the conduit for transmitting them to another corporation in the manner provided by law. They may bid in the property (including the franchises) at the foreclosure sale, and hold it and transmit it intact to a corporation authorized by law to exercise the franchises.<sup>5</sup>

(d) *Succession to Duties to Public.*—The new corporation's duties to the public in regard to the completion of a partially constructed railroad and the operation of the entire line of the railroad purchased are exactly the same as those of

able the commonwealth to retake the franchise. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

1. *Succession to Right of Eminent Domain.*—North Carolina, etc., *R. Co. v. Carolina Cent. R. Co.*, 83 N. Car. 489. See also *Hendrick v. Carolina Cent. R. Co.*, 101 N. Car. 617.

*Compare* *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518, wherein it was held that while the delegation to a private corporation of the right of eminent domain is not the grant of a franchise, and while such delegation cannot be made the subject of grant or of sale, the legislature would be bound in good faith to afford even individuals purchasing the property and franchises of a railroad corporation sold under a valid mortgage, the usual and necessary means to render the grant made under its authority effectual for the purpose intended. In discussing this question further, the court said: "In this respect they would stand, in point of legal right, upon like footing as the original constructors of the road; neither having strictly the right which, as against the action of the legislature, could be enforced—one relying upon the faith of the legislature that the mode existing would be continued, and the other that a proper mode would be adopted."

2. *State May Regulate Mode of Reorganization.*

—*Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Railroad Com'r v. Grand Rapids, etc., R. Co.*, 130 Mich. 248; *Minor v. Erie R. Co.*, 171 N. Y. 566, rehearing denied 172 N. Y. 648. *Compare* *Daniels v. St. Louis, etc., R. Co.*, 62 Mo. 43.

3. *Reorganization Subject to Existing Laws.*—*Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667. See also *Railroad Com'r v. Grand Rapids, etc., R. Co.*, 130 Mich. 248; *Columbia, etc., R. Co. v. Gibbs*, 24 S. Car. 60; *Norfolk, etc., R. Co. v. Pendleton*, 86 Va. 1004. *Compare* *Daniels v. St. Louis, etc., R. Co.*, 62 Mo. 43.

4. *Franchises Not Included in Mortgage.*—*Wilmington, etc., R. Co. v. Downward*, (Del. 1888) 14 Atl. Rep. 720.

5. *Natural Persons May Purchase Railroad's Franchises.*—*Watson v. Albany, etc., R. Co.*, 111 Ga. 10; *Parker v. Elmira, etc., R. Co.*, 165 N. Y. 274.

*The Individual Purchasers May Exercise the Franchises* purchased, through the medium of a partnership, an association, or a joint-stock company, but their action in electing directors and officers in conformity with the old charter neither revives the old corporation nor creates a new one. *Memphis Water Co. v. Magens*, 15 Lea (Tenn.) 37.

the old corporation to whose franchises and public duties it has succeeded.<sup>1</sup>

(2) *Succession to Personal Privileges*. — (a) When Grant Not Made in Apt Language — aa. IN GENERAL. — The purchasers under foreclosure proceedings of the property and franchises of a corporation authorized by statute to mortgage its franchises, do not succeed to a mere personal privilege enjoyed by the old corporation, but not inhering in its property, unless the statute granting the privilege or authorizing the mortgage of the corporation's franchises clearly and unmistakably provides that such privilege shall vest in the purchasers of the corporate franchises.<sup>2</sup> And this is true notwithstanding the fact that the statute declares in general terms that the new corporation formed by the purchasers shall succeed to all the franchises, rights, and privileges of the old corporation, but makes no reference by apt words to the privilege in question, as the grant of a privilege or exemption in derogation of the common right

1. *New Corporation's Duties Same as Old Corporation's*. — *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

*Failure to Operate Portion of Line*. — Where the state railway commissioners brought an action to enforce their order requiring the old corporation to operate a certain portion of its railroad line and a decree was entered requiring the corporation, "its successors, assigns, grantees, and lessees" to forever maintain and operate such portion of the railroad line, it was held that a new corporation thereafter formed by the purchasers under foreclosure proceedings of the property of the old corporation, was the "successor" of the old corporation, and as such bound to obey the decree, notwithstanding the fact that the new corporation was not in existence at the time the decree was entered. *State v. Iowa Cent. R. Co.*, 83 Iowa 720.

*Duty as to Completion of Road*. — Where a statute authorizing a railroad corporation to mortgage its property and franchises, provided that the purchasers should be vested with all the rights and franchises of the corporation, but was silent as to whether or not the purchasers would come under the obligation to complete the road, it was held that the franchises to which the purchasers succeeded were limited to so much of the road as had been mortgaged and sold; that the purchasers were under no obligation to complete the road, and that therefore one subscribing to stock in the new corporation formed by the purchasers could not set up as a defense to an action by the new corporation to recover an unpaid balance upon his subscription, the failure of the new corporation to construct the road to the termini contemplated by the charter granted to the original corporation. *Chartiers R. Co. v. Hodgins*, 85 Pa. St. 501. *Compare Chartiers R. Co. v. Hodgins*, 77 Pa. St. 187.

Under the provisions of c. 236 of the *New York Laws* of 1889, amending c. 430 of the *Laws* of 1874, the new corporation was not compelled to complete the road as originally projected, provided the board of railroad commissioners certified that, in their opinion, the public interests under all the circumstances did not require such extension; and such certificate was a bar to an action brought by the state to declare the charter of the new company forfeited for failure to so complete the road. And inasmuch as the amendment had the effect of

abolishing the penalty imposed by the Act of 1874 without saving pending transactions or existing rights from the effect of the amendment, it was held that in accordance with settled rules regarding the abolition of penalties, all actions in which judgment had not been obtained at the time of the passage of the amendment were subject to the rule created thereby, and were barred by the filing of the certificates provided by the amendment. *People v. Ulster, etc., R. Co.*, 128 N. Y. 240.

*The Purchasing Corporation Is Not Burdened with Any Additional or Higher Duties than rested on the mortgagor corporation*. Therefore, a statute providing for the organization of a new corporation by the purchasers at the foreclosure sale, and for its succession to the property, franchises, rights, privileges, and duties of an insolvent railroad corporation, will not be construed as imposing on the new corporation duties which at no time attached to the old, unless it clearly appears that it was the intention of the legislature to impose such additional duties. And a mere permissive clause in the charter of the mortgagor corporation as to the building and operation of a branch line of railroad does not become mandatory as against the purchasing corporation. *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

2. *Purchase of Franchises Does Not Include Personal Privileges*. — *United States*. — *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244; *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667; *Covington, etc., Turnpike Road Co. v. Sandford*, 161 U. S. 578, *affirming* (Ky. 1893) 20 S. W. Rep. 1631.

*Arkansas*. — *Little Rock, etc., R. Co. v. McGehee*, 41 Ark. 202; *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436; *Dow v. Beidelman*, 49 Ark. 325.

*Kentucky*. — *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661.

*Louisiana*. — *State v. Morgan*, 28 La. Ann. 482.

*Missouri*. — *State v. Chicago, etc., R. Co.*, 89 Mo. 523.

*Compare Knoxville, etc., R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442, *criticising Morgan v. Louisiana*, 93 U. S. 217.



will not be extended or enlarged by implication or intendment.<sup>1</sup>

**EXEMPTION FROM TAXATION, ETC.** — These rules have been applied to exemption from taxation,<sup>2</sup> and, in the case of railroad corporations, to exemption from statutory regulation of transportation rates.<sup>3</sup> They have also been applied to the right of a railroad corporation to have the damages for appropriation of land to its uses assessed in a particular mode.<sup>4</sup>

**1. Privileges Pass Only by Apt Words.** — In the following cases the personal privileges of the mortgagor corporation were held not to pass to the foreclosure purchasers. The words of grant held insufficient in each case follow the citation: *Railroad Cos. v. Gaines*, 97 U. S. 697 ("powers, rights, and privileges"); *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609 ("charter"); *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176 ("franchises, rights, and privileges"); *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637 ("rights, powers, and privileges"); *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, *affirming* (Ky. 1893) 20 S. W. Rep. 1031 ("rights, powers, and capacities"); *Evansville, etc., R. Co. v. Com.*, 9 Bush (Ky.) 439 ("franchises and rights"); *Com. v. Masonic Temple Co.*, 87 Ky. 349 ("corporate rights"); *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661 ("powers privileges, rights, immunities, and franchises"); *State v. Morgan*, 28 La. Ann. 482 ("rights and franchises"); *Wilson v. Gaines*, 9 Baxt. (Tenn.) 546 ("rights and privileges"); *East Tennessee, etc., R. Co. v. Hamblin County*, and *Mississippi, etc., R. Co. v. State*, *cited in Wilson v. Gaines*, 9 Baxt. (Tenn.) 546 ("privileges").

**Contra.** — *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637, where, in construing a statute authorizing the sale of all the "rights, franchises, and privileges" of a railroad corporation, the court said: "A right of exemption from taxation can be passed under the general language of 'all the rights' as well as any other right. We can see no difference. In all cases the language must be clear to create such an exemption as is here claimed, but it is going too far to hold that each right must be enumerated in order to pass it. The term 'all rights' embraces each right, and there is no room for the least doubt on the subject."

*Compare* *East Tennessee, etc., R. Co. v. Hamblen County*, 102 U. S. 273, holding that an exemption from taxation did not pass under a transfer of the "property and franchises" of a corporation, but intimating that it would pass under a grant of the "privileges" of the corporation. And see *Humphrey v. Pegues*, 16 Wall. (U. S.) 244.

**2. Purchasers Do Not Succeed to Exemption from Taxation** — *United States*. — *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Cos. v. Gaines*, 97 U. S. 697; *East Tennessee, etc., R. Co. v. Hamblen County*, 102 U. S. 273; *Wilson v. Gaines*, 103 U. S. 417; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244; *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176; *Picard v. East Tennessee, etc., R. Co.*, 130 U. S. 637; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, *affirming* (Ky. 1893) 20 S. W. Rep. 1031.

*Arkansas*. — *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17.

*Kentucky*. — *Evansville, etc., R. Co. v. Com.*, 9 Bush (Ky.) 439; *Com. v. Masonic Temple Co.*, 87 Ky. 349; *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661.

*Louisiana*. — *State v. Morgan*, 28 La. Ann. 482.

*Maine*. — *State v. Maine Cent. R. Co.*, 66 Me. 488.

*Missouri*. — *State v. Chicago, etc., R. Co.*, 89 Mo. 523.

*Tennessee*. — *Wilson v. Gaines*, 9 Baxt. (Tenn.) 546; *East Tennessee, etc., R. Co. v. Hamblin County*, and *Mississippi, etc., R. Co. v. State*, *cited in Wilson v. Gaines*, 9 Baxt. (Tenn.) 546.

**Contra.** — *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637.

*Compare* *Knoxville, etc., R. Co. v. Hicks*, *cited in Wilson v. Gaines*, 9 Baxt. (Tenn.) 551, *criticising* *Morgan v. Louisiana*, 93 U. S. 217.

*Compare* also *Hand v. Savannah, etc., R. Co.*, 17 S. Car. 280, where the charter of the new company also contained a provision exempting the property from taxation indefinitely, but the court said: "We do not think that a statutory exemption from taxation under which, as a contract, rights have vested, is a mere personal privilege which ends with the ownership of the first taker, if the property, although in other hands, is continued in the same use on account of which the exemption was granted."

**The Fact that Entire Exemption Is Not Claimed**, but only exemption from the mode provided by law for the assessment and taxation of the property of similar corporations, makes no difference. *Kentucky Cent. R. Co. v. Com.*, 87 Ky. 661.

**An Exemption Until the Completion of a Railroad** operates to exempt the purchaser from the payment of taxes until the road is completed, as it must be considered as having been an inducement to the purchaser to bid at the sale. *Com. v. Owensboro, etc., R. Co.*, 81 Ky. 572.

**3. Regulation of Exemption from Transportation Rates.** — *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, *affirming* (Ky. 1893) 20 S. W. Rep. 1031; *Dow v. Beidelman*, 49 Ark. 325; *Railroad Com'r v. Grand Rapids, etc., R. Co.*, 130 Mich. 248; *Norfolk, etc., R. Co. v. Pendleton*, 86 Va. 1004. *Compare* *Parker v. Elmira, etc., R. Co.*, 165 N. Y. 274, holding that the right to charge a specified rate for the carriage of passengers is a franchise which is unaffected by subsequent legislation fixing a lower rate as the maximum charge by railroads generally for similar services, and which passes to the purchaser under the sale of the property and franchises of the old corporation.

**4. Particular Mode of Assessing Damages for**



(b) **When Grant Made in Apt Language.** On the other hand, the word "immunities" used in a statute authorizing the formation of a new corporation by the purchasers of an insolvent corporation under foreclosure proceedings will pass to such new corporation an exemption from taxation enjoyed by the old when it is evident that it was the intention of the legislature that the new corporation should be vested with such exemption;<sup>1</sup> and it would seem that in some cases the mere use of the word "immunities" has been considered sufficient of itself to indicate unmistakably the legislative intent that the exemption should pass.<sup>2</sup>

(c) **Rule in Minnesota and Florida.**—These principles, however, are not fully accepted in all jurisdictions. Thus, it is well settled in Minnesota that a grant to a railroad corporation of exemption from taxation in consideration of its undertaking to pay a certain percentage of its earnings to the state, such a grant being made for the purpose of encouraging railroad construction, is not a mere personal privilege, but is a contract right appurtenant to the property of the railroad corporation, and passes to purchasers under foreclosure proceedings who assume the operation of the railroad and the performance of all the duties which the original company owed to the public.<sup>3</sup> And in Florida it has been held that a grant similar in all respects to the foregoing, except that it imposes no burden of alternative payment upon the railroad corporation, passes as an incident to the transfer of the property exempted.<sup>4</sup>

(d) **When Original Grant Was to Corporation and Its "Successors."**—A new corporation formed by the purchasers of the property of a railroad corporation, sold under foreclosure proceedings, is a "successor" within the meaning of a statute granting an exemption from taxation and providing that it shall apply to property owned by a railroad corporation and its "successors."<sup>5</sup>

b. **SUCCESSION TO PROPERTY**—(1) *Property Included in Mortgage.*—The purchasers at the foreclosure sale of the mortgaged property of a corporation acquire no title to property owned by the mortgagor but not embraced in the mortgage or deed of trust under which the sale is made.<sup>6</sup> Thus, the

**Appropriation of Land.**—Little Rock, etc., R. Co. v. McGehee, 41 Ark. 202.

1. **Grant of "Immunities" May Pass Exemption from Taxation.**—Nichols v. New Haven, etc., Co., 42 Conn. 103.

2. **Use of "Immunities" Indicates Intention that Exemption Should Pass.**—Louisville, etc., R. Co. v. Palmes, 109 U. S. 244; Com. v. Owensboro, etc., R. Co., 81 Ky. 572; State v. Maine Cent. R. Co., 66 Me. 488; Knoxville, etc., R. Co. v. Hicks, cited in Wilson v. Gaines, 9 Baxt. (Tenn.) 551; State v. Nashville, etc., R. Co., 12 Lea (Tenn.) 583. *Contra*, Kentucky Cent. R. Co. v. Com., 87 Ky. 666.

3. **Rule in Minnesota.**—First Division St. Paul, etc., R. Co. v. Parcher, 14 Minn. 297; State v. Winona, etc., R. Co., 21 Minn. 315; Chicago, etc., R. Co. v. Pfaender, 23 Minn. 217; Stevens County v. St. Paul, etc., R. Co., 36 Minn. 467, 29 Am. & Eng. R. Cas. 225; Traverse County v. St. Paul, etc., R. Co., 73 Minn. 417.

4. **Rule in Florida.**—Gonzales v. Sullivan, 16 Fla. 791.

5. **"Successor" Succeeds to Exemption.**—International, etc., R. Co. v. Smith County, 65 Tex. 21, following International, etc., R. Co. v. Anderson County, 50 Tex. 654.

6. **Only Property Covered by Mortgage Passes.**—Wilmington, etc., R. Co. v. Downward, (Del. 1888) 14 Atl. Rep. 720; Morgan County v. Thomas, 76 Ill. 120; St. Louis Bridge Co. v.

Curtis, 103 Ill. 410; Aldridge v. Pardee, 24 Tex. Civ. App. 254.

**Contract Rights.**—The purchaser cannot succeed to a contract to which the mortgagor corporation was a party, when neither the mortgage nor the decree of sale contains any terms of description sufficient to pass the interest of the original company in the contract. St. Paul, etc., R. Co. v. U. S., 112 U. S. 733.

**Right to Enforcement of Covenant of Deed.**—Where a corporation formed by the foreclosure purchasers sought to enforce performance of the covenants of a deed, in which its predecessor was the covenantee, and the mortgage purported to cover all "causes of action, demands, and choses in action of whatsoever nature" owned by the mortgagor corporation or in which it might be interested, the court held that even assuming that causes of action were proper subjects of a chattel mortgage, the description of the property in the mortgage was too indefinite to pass the right in question. And the court also held that conceding that the description of the mortgage was sufficient to pass the title to the right of action, it was necessary for the purchasers to show that the trustee so advertised and sold the property as to enable bidders to identify the right of action as being included in the sale. Milwaukee, etc., R. Co. v. Milwaukee, etc., R. Co., 20 Wis. 174.

**After-acquired Property.**—Where a deed of trust executed by a railroad corporation de-

tangible property of a corporation does not pass as an incident on the sale of its franchises.<sup>1</sup>

(2) *Property Included in Decree of Sale.*—The purchaser buys only the property which the decree directed to be sold, even though it does not include some of the property covered by the mortgage under which the sale is made.<sup>2</sup>

scribed the land conveyed, not by metes and bounds, but as such land as was "purchased and to be purchased for the construction and equipment of said road," and such as was "acquired or which may be acquired in the state of Texas, used for and pertaining to the operation of said railroad," it was held that the purchaser at the foreclosure sale acquired no title to land acquired by the mortgagor after the execution of the deed of trust, which was not used or employed for the operation or maintenance of its railroad—such, for instance, as land purchased by the mortgagor for the purpose of reselling to its employees. *Aldridge v. Pardee*, 24 Tex. Civ. App. 254.

**Right to Municipal Aid.**—Where a county subscribed to the capital stock of a railroad corporation and issued its bonds in payment therefor, and subsequently the railroad executed a mortgage on its franchises and railroad and all of its property connected therewith, but the mortgage did not mention, either in terms or by necessary implication, the bonds of the county, it was held that the new corporation formed by the foreclosure purchasers acquired no claim to the county bonds. *Morgan v. Thomas*, 76 Ill. 120.

And where the county voted to take stock in the mortgagor corporation for the purpose of aiding it, it was held that the corporation formed by the foreclosure purchasers was not entitled to the money voted to the old corporation, as it could not fulfil the condition of issuing in consideration thereof the stock of the old corporation. It was also held that until the mortgagor railway corporation occupied a position which would enable it to enforce in some way whatever right or interest it might have in an appropriation voted in its favor, such voted appropriation was not a chose in action which it could mortgage. *Hamilton County v. State*, 115 Ind. 64.

**Purchase of Personal Property — Guarantee of Debts.**—Where the purchasers at foreclosure sale took possession of all the assets of the old corporation, agreeing to pay a certain amount for the personal property, and to account for the book debts which they should collect, but there was no agreement to guarantee the collection of such debts, it was held that the new corporation could not be held liable for debts which they were unable to collect. And where after the value of the personal property had been fixed by appraisement, it developed that certain articles which were included in the appraisement as tools were in fact fixtures covered by the mortgage, the new company was held entitled to have the value thereof deducted from the amount of the appraisement. *Huston v. Clark*, 162 Pa. St. 435.

**Judgment Obtained by Old Corporation.**—*Wilmington, etc., R. Co. v. Downward*, (Del. 1888) 14 Atl. Rep. 720.

**Land Purchased by Railroad Without Authority** does not pass to the purchasers at the fore-

closure sale even though the mortgage purports to cover all the property and franchises of the mortgagor corporation. *Youngman v. Elmira, etc., R. Co.*, 65 Pa. St. 278.

**Land Not Necessary to Operation of Railroad.**—When a deed of trust executed by a railroad corporation contains a recital that the conveyance includes only so much of the mortgagor's land as is or may be actually covered by the depots or other structures of the railroad or as may be necessarily occupied in the convenient operation of the railroad, the purchasers acquire no title to land not coming within such description. *Everett v. Galveston, etc., R. Co.*, 28 Tex. Civ. App. 528, following *Shirley v. Waco Tap R. Co.*, 78 Tex. 131.

But "the term 'necessary' may be used with several significations and limitations; \* \* \* any piece of land that may be considered reasonably necessary for the present operations of the road, or contemplated and prospective extensions or improvements, and held for that purpose, may, within the scope of the decisions, be held to appertain to a railroad." *Knevals v. Florida Cent., etc., R. Co.*, (C. C. A.) 66 Fed. Rep. 224, *certiorari denied* 159 U. S. 257.

**The Title to All the Property Not Transferred** by the foreclosure sale vests in the directors of the old corporation as trustees for the benefit of its creditors, where the old corporation is dissolved by the sale of its franchises and property. *Aldridge v. Pardee*, 24 Tex. Civ. App. 254.

**1. Grant of Franchise Does Not Carry Tangible Property.**—This principle was applied where a certain lot of land owned by a bridge company was not embraced in the description of the mortgaged property in a deed of trust executed by such company, and the purchasers contended that the sale of the bridge carried with it, as an incident, the lot in question. The court held that the sale of the corporation's franchises did not pass the title to any of the corporation's tangible property. It also held that the land did not pass as an easement or as appurtenant to the bridge, for the reason that a thing corporeal cannot be appurtenant to a thing corporeal. *St. Louis Bridge Co. v. Curtis*, 103 Ill. 470.

But land reasonably necessary to the operation of a railroad may pass as appurtenant to the railroad. *Knevals v. Florida Cent., etc., R. Co.*, (C. C. A.) 66 Fed. Rep. 224, *certiorari denied* 159 U. S. 257.

**2. Only Property Covered by Decree Passes.**—*Osterberg v. Union Trust Co.*, 93 U. S. 424; *Frank v. New York, etc., R. Co.*, 122 N. Y. 197, 46 Am. & Eng. R. Cas. 356. See also *Morgan County v. Thomas*, 76 Ill. 120.

**Property Passing under Sale of "Railroad."**—Where one section of the decree of foreclosure declared that the complainants had a first lien upon "the railroad and all property, rights and franchises thereto appertaining," and a subsequent section of the decree ordering the sale



If the deed to the purchaser from the receiver or from the master or commissioner who conducted the sale is broad enough in its language to cover property which the decree did not authorize to be sold, it is to that extent void.<sup>1</sup>

(3) *Money Arising from Receiver's Earnings.* — Money in the hands of the receiver at the time of the sale, arising from the earnings of the mortgaged property during the receivership, is not the property of the mortgagor, and therefore the title thereto does not pass to the purchasers at the foreclosure sale.<sup>2</sup> Nor are the purchasers entitled to the earnings of the receivership after sale where the receiver is continued in possession of the property, either because of the failure of the purchasers to comply with their bid,<sup>3</sup> or because of the indulgence of the court in extending the time for compliance.<sup>4</sup>

(4) *Property Purchased by Receiver.* — But when the mortgage foreclosed covers the present and after-acquired real and personal property of a railroad corporation, the purchasers are entitled to the rolling stock and other property purchased by the receiver, for the purpose of preserving the mortgaged property and keeping it in efficient working condition.<sup>5</sup>

(5) *Right of Way of Old Corporation* — (a) *In General.* — A corporation which is formed by the purchasers of the property and franchises of a railroad corporation sold under foreclosure proceedings, acquires the title to the right of way of the old corporation, which was included in the mortgage and in the decree of foreclosure;<sup>6</sup> and this rule applies to the right of way over its streets

only mentioned the railroad, and ordered that that alone be sold, it was held that the term "railroad" should be construed to cover the entire property of the mortgagor company, connected with the uses and purposes of the road, and that the order to sell extended to and covered all the property on which the lien was declared. *Knevals v. Florida Cent., etc., R. Co., (C. C. A.) 66 Fed. Rep. 224, certiorari denied 159 U. S. 257.*

**The Burden of Proving that Property Did Not Pass** by the sale is upon one so asserting, where the sale was general and purported to convey all the property, rights, and franchises of the mortgagor corporation. *Knevals v. Florida Cent., etc., R. Co., (C. C. A.) 66 Fed. Rep. 224, certiorari denied 159 U. S. 257.*

**Estoppel to Assert that Property Did Not Pass.** — One who, after the entry of the decree of foreclosure but before the sale, became the owner of nearly all of the stock of the mortgagor corporation, and at the sale purchased the property as sold, and in the organization of the new corporation recited in the articles of association that he and those associated with him had purchased all the franchises, rights, privileges, and property, of every description whatever, belonging to the mortgagor corporation, is estopped from thereafter asserting that he only purchased at the sale a part of the property of the old corporation, and that a very valuable portion of it yet remained the property of its stockholders. Subsequent purchasers of his stock in the old corporation are likewise estopped from making such assertion. *Knevals v. Florida Cent., etc., R. Co., (C. C. A.) 66 Fed. Rep. 224, certiorari denied 159 U. S. 257.*

**1. Deed Broader than Decree Is Void as to Excess.** — *Osterberg v. Union Trust Co., 93 U. S. 424.*

**2. Money Earned During Receivership.** — Where the decree of sale specified as the property to be sold "the railroad, franchises, and im-

munities of the company, all its property, including roadbed, right of way, depots, shops, tools, rolling stock, real estate, and all other property, real, personal, and mixed," the court held that the title to money earned by the receiver in his management of the mortgaged property did not pass to the purchaser at the foreclosure sale, not only because the money was not the property of the mortgagor, but also because, even if it had been, it was not fairly included in the description of the property ordered to be sold. *Strang v. Montgomery, etc., R. Co., 3 Woods (U. S.) 613.*

And where the purchaser at the foreclosure sale of the property of a railroad corporation took it subject to a prior mortgage which covered the net income of the railroad after default of interest, and subsequently proceedings were instituted for the foreclosure of the prior mortgage, which resulted in the sale of the mortgaged property to the first purchaser, it was held that the purchaser was not entitled to the net earnings during the second receivership. *Downs v. Farmers' L. & T. Co., (C. C. A.) 79 Fed. Rep. 215.*

**3. Earnings During Delay in Completing Bid.** — *Boyle v. Farmers' L. & T. Co. (C. C. A.) 88 Fed. Rep. 930.*

**4. Earnings During Extension of Time for Compliance.** — *Osterberg v. Union Trust Co., 93 U. S. 424.*

**5. Property Purchased for Preservation or Repairs.** — *Strang v. Montgomery, etc., R. Co., 3 Woods (U. S.) 613.*

**6. Succession to Right of Way.** — *United States v. Secombe v. Milwaukee, etc., R. Co., 2 Dill. (U. S.) 469, affirmed 23 Wall. (U. S.) 108.*

*Alabama.* — *Pollard v. Maddox, 28 Ala. 321.*

*Indiana.* — *Logan v. Vernon, etc., R. Co., 90 Ind. 552, 14 Am. & Eng. R. Cas. 43; Columbus, etc., R. Co. v. Braden, 110 Ind. 558; Harshbarger v. Midland R. Co., 131 Ind. 177.*

*Iowa.* — *Barlow v. Chicago, etc., R. Co., 29 Iowa 276.*



granted by a municipal corporation to the mortgagor railroad corporation.<sup>1</sup>

(b) **New Condemnation Unnecessary.** — Hence, the new corporation is not required to surrender the right of way which it has acquired by its purchase, and to reacquire the same by the exercise of the right of eminent domain conferred upon it by its charter.<sup>2</sup>

(c) **Burdens Coupled with Succession** — *aa. NECESSITY OF COMPENSATING UNPAID LANDOWNER.* — Except where the old corporation acquired the right of way by contract, and not by virtue of its right of eminent domain, the new corporation takes the right of way subject to the claims of unpaid landowners for compensation.<sup>3</sup>

*bb. NECESSITY OF PERFORMING OLD CORPORATION'S COVENANTS.* — And where the right of way was originally acquired by contract, the new corporation is bound to perform the covenants made by the mortgagor corporation to the landowners at the time of the purchase.<sup>4</sup>

*Kentucky.* — *Harrison v. Lexington, etc., R. Co.*, 9 B. Mon. (Ky.) 470.

*North Carolina.* — *Hendrick v. Carolina Cent. R. Co.*, 101 N. Car. 617.

*Texas.* — *Denison, etc., R. Co. v. St. Louis Southwestern R. Co.*, 30 Tex. Civ. App. 474, affirmed 96 Tex. 233.

**Exercise of Option of Forming New Corporation.** — Where the statute gave the purchasers the option of continuing business in the name of the old corporation, or of organizing a new corporation for the purpose of carrying on the same business, it was held that the election of the purchasers to pursue the latter course did not have the effect of destroying the title to the right of way which they acquired by their purchase. *Denison, etc., R. Co. v. St. Louis Southwestern R. Co.*, 30 Tex. Civ. App. 474, affirmed 96 Tex. 233.

**The Fact that the Mortgagor Corporation Had Made Itself Liable to Forfeiture** of its franchises cannot be taken advantage of in collateral proceedings. Hence, a landowner cannot maintain an action of trespass against the purchasing corporation, on the ground that it acquired no title to the right of way because of the failure of the mortgagor corporation to exercise its franchises. *Logan v. Vernon, etc., R. Co.*, 90 Ind. 552, 14 Am. & Eng. R. Cas. 43.

**1. Right of Way Over Streets.** — *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501.

**Title to Fee in Street.** — Foreclosure purchasers of the property of a railroad corporation are not justified in claiming that they acquire title to the fee in a street, by the mere fact that a map filed with the mortgage shows that the railroad is laid on such street, when they have knowledge of the fact that the record title to the fee is in abutting owners and the mortgage shows the title acquired or claimed by the mortgagor corporation. *Syracuse Solar Salt Co. v. Rome, etc., R. Co.*, 67 Hun (N. Y.) 153.

**2. New Taking Not Necessary.** — *Denison, etc., R. Co. v. St. Louis Southwestern R. Co.*, 30 Tex. Civ. App. 474, affirmed 96 Tex. 233.

**3.** See *infra*, this section, *g. Liability to Unpaid Landowner for Right of Way.*

**4. Covenants Binding upon Purchasers.** — The purchaser cannot claim and occupy the right of way upon any other conditions than those fixed by the agreement of the landowner and the original grantee of the right of way of which the purchaser had notice. In holding that the

purchasing corporation was bound to maintain a passageway over its right of way, notwithstanding the fact that the agreement as to the passageway was merely oral and was not secured by deed, the court said: "We may assume that defendant's position, to the effect that the crossing is not secured by the deeds, is correct; yet it cannot, as a purchaser at a judicial sale, claim and occupy the right of way upon any other conditions than those fixed by the agreement of plaintiff and the company building the road, of which defendant had notice. Plaintiff was in the occupancy of the crossing, and defendant was charged thereby with notice of plaintiff's claim and rights thereto. It would be a very harsh rule that, when a railroad is sold at judicial sale under a mortgage foreclosure, all rights of persons granting the right of way by oral contract are cut off. Indeed, it would seem that the rights to the crossing and the like attach to the railroad itself, and purchasers at judicial sale acquire the road subject thereto. Crossings are necessary for the public and for individuals, and railroads cannot be built without them. They become a part of the road itself, to which individuals and the public have rights that cannot be defeated by the change of ownership of the railroad, by judicial sale or otherwise. They are in the nature of easements which go with the land, unaffected with the change of title." *Swan v. Burlington, etc., R. Co.*, 72 Iowa 650.

A landowner granted a right of way to a railroad corporation, and by a contract which was not recorded, used two passageways under the right of way for the purpose of connecting land on each side of the road to which he retained title. It was held that the purchasing company was bound by the agreement of the mortgagor company concerning the maintenance and use of these passageways, notwithstanding the fact that such agreement was not recorded, for the reason that the landowner had visible and exclusive possession and use thereof at the time of the purchase, and the passageways were so fenced as to put the purchaser upon inquiry as to the rights and title by and under which they were used. *Rock Island, etc., R. Co. v. Dimick*, 144 Ill. 628.

Where a person conveyed to a railroad corporation for its purposes a strip of land across his farm including a highway, and the deed contained a clause binding the railway to re-

*cc. STATUTORY REGULATIONS AS TO MAINTENANCE.* — In like manner the new corporation takes and holds the right of way subject to existing statutes regulating its maintenance, even though the mortgagor corporation held the right of way free from the operation of such statutes.<sup>1</sup>

(d) *Right of Way to Which Title Defective.* — A statute which vests the new corporation with all of the "faculties, powers, authorities, immunities, privileges, and franchises" of the mortgagor corporation, does not have any retroactive effect for the purpose of validating titles to right of way, nor does it affect the local law in regard to the mode of acquiring such titles.<sup>2</sup>

*c. LIABILITY FOR DEBTS AND TORTS OF RECEIVER — (1) In Absence of Express Imposition or Assumption of Liability — (a) Liability for Debts and Obligations Generally.* — In the absence of a statute imposing on the foreclosure purchasers liability for the debts and obligations incurred by the receiver during his possession and before the passing of the title to the purchasers, and unless such liability is expressly imposed by the decree of sale or assumed by the purchasers, they take the property free and clear of all such debts and obligations.<sup>3</sup>

construct and restore the highway and to construct a good and convenient crossing over the railway's premises to the highway as reconstructed, it was held that a purchaser of the property of the old corporation under foreclosure proceedings, upon becoming vested with the right of way became subject to and bound by the covenant in respect to the restoration of the highway and building of the crossing, and that for the nonperformance thereof it was liable in damages from the date when it obtained title but not prior thereto. *Post v. West Shore R. Co.*, 123 N. Y. 580, *affirming* 50 Hun (N. Y.) 301.

*Agreement by Railroad to Fence.* — When the right of way is conveyed for a certain sum and the deed contains a provision also that the grantee shall fence the right of way, the agreement to fence is part of the consideration. Such an agreement is binding upon a new corporation which acquires the property and franchises of the grantee, and for its breach the new corporation may be held liable in damages. *Hull v. Chicago, etc.*, R. Co., 65 Iowa 713, 20 Am. & Eng. R. Cas. 341.

A judgment recovered against the grantee for breach of the agreement to fence becomes a lien upon that portion of the road built on the land covered by the contract; and the purchasing corporation takes the property subject to the burden of such lien. *Varner v. St. Louis, etc.*, R. Co., 55 Iowa 677, *followed in* *Davies v. St. Louis, etc.*, R. Co., 56 Iowa 192, *distinguished in* *Close v. Burlington, etc.*, R. Co., 64 Iowa 149, 17 Am. & Eng. R. Cas. 33.

Where the landowner after the execution of the deed settled his claim for damages by a verbal agreement with the old corporation to maintain a five-board fence, such agreement was not binding on the purchasing corporation, as it was an attempt on the part of the landowner to obtain payment of his claims for damages by placing an additional and permanent burden upon the owner of the right of way which would be in the nature of a covenant running with the land. This burden was not required for the proper construction and operation of the road and was not authorized by the deed of trust through which the purchasing corporation de-

rived its title, and therefore the purchasing corporation assumed no obligation in regard to the agreement. The court held, however, that inasmuch as the landowner had been in rightful enjoyment of the five-board fence and was not a party to the foreclosure proceedings, the purchaser could not lawfully remove such fence. *Hunter v. Burlington, etc.*, R. Co., 76 Iowa 490.

An agreement which provides for the erection of a "good and lawful fence" is satisfied by the building of a fence which will properly come within that description even though it is not such a fence as was contemplated by the landowner at the time of the making of the deed. Thus, the landowner cannot insist on the maintenance of a "five-board fence" on the ground that those words were omitted from the deed by fraud or mistake, and the words "good and lawful fence" inserted in lieu thereof. *Hunter v. Burlington, etc.*, R. Co., 76 Iowa 490.

Upon another trial the court, after holding that the landowner's action of damages for the removal of the fence was barred by limitation, decided that the new corporation was under no obligation to perpetually maintain a five-board fence, and that it was not estopped from refusing to do so by the fact that the fence which it removed was one which it erected after acquiring possession of the property, in renewal of a five-board fence erected by the mortgagor corporation. *Hunter v. Burlington, etc.*, R. Co., 84 Iowa 605.

*1. Liability to Statutory Regulation.* — *Alabama, etc.*, R. Co. v. *Odeneal*, 73 Miss. 34.

*2. Pittsburg, etc.*, R. Co. v. *Reich*, 101 Ill. 157.

*3. Purchasers Not Liable for Receiver's Debts.* — *Columbus, etc.*, R. Co.'s Appeal, (C. C. A.) 109 Fed. Rep. 177; *Atchison, etc.*, R. Co. v. *Young*, 3 Indian Ter. 60.

*Receivers' Certificates Not Lien on Property.* — Where the decree authorizing the issuance of receivers' certificates provided that they should be payable out of the earnings of the receivership or out of the proceeds of the sale of the property, and should constitute a prior lien on the mortgaged property, but the decree of sale plainly contemplated a sale of the property free



(b) **Liability for Torts** — *aa. COMMITTED BY RECEIVER BEFORE SALE.* — And in the absence of express imposition or assumption of liability therefor, the purchasers are not liable for torts committed by the receiver or his employees, during his possession and before the passing of the title to them.<sup>1</sup>

*bb. COMMITTED BY RECEIVER AFTER SALE* — (*aa*) *In General.* — This is true notwithstanding the fact that the tort was committed after the sale but before conveyance,<sup>2</sup> or before confirmation of sale,<sup>3</sup> as the purchasers, having neither title nor control, cannot be held responsible for the receiver's acts.

(*bb*) *When Receiver Was Retained at Purchasers' Request.* — This rule, however, is subject to the modification that when the receiver is retained at the request and for the convenience of the purchasers, he holds and operates the road as their agent, and they are liable to the same extent that they would be if they were operating the road directly.<sup>4</sup>

(*cc*) *When Receiver Makes Permanent Improvements.* — If the receiver makes permanent improvements with the funds in his hands during his possession after sale, the new corporation is liable, in a sum not exceeding the value of such improvements, for torts committed by the receiver or his agents during such possession,<sup>5</sup> provided the fund out of which the improvements are made constitutes the earnings during his possession after sale.<sup>6</sup>

*cc. CONTINUANCE OF NUISANCE CREATED BY RECEIVER.* — Although the new corporation is not liable for damages caused by a nuisance during the receivership, if, with knowledge of a nuisance created by the receiver, it continues the existence of such nuisance, it is liable for damages caused by such continuance.<sup>7</sup>

(2) *Under Terms of Statute or Decree* — (*a*) *Under Terms of Statute.* — It is sometimes provided by statute that all judgments rendered against a receiver for causes of action arising during the receivership shall constitute liens upon the property in his hands superior to the mortgage liens. But the lien of a judgment under such a statute has no priority over that of a mortgage executed before the passage of the statute.<sup>8</sup>

(b) *Under Terms of Decree* — *aa. DECREE AS MEASURE OF PURCHASER'S RIGHTS AND LIABILITIES.* — The familiar principle that a purchaser at a judicial sale looks to the judgment or decree for the measure of his rights and liabilities, applies with full force to the purchaser at the foreclosure sale of the mortgaged property of a corporation. The decree is his muniment of title; and when he purchases and pays, he has the right to say that it is his contract with the court.

from liens, it was held that the property in the hands of the purchaser could not be charged with a lien for certificates issued after the sale, as the effect of the sale was the transfer of the lien from the property to the proceeds of the sale. *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177.

**1. Purchasers Not Liable for Receiver's Torts.** — *Wabash R. Co. v. Stewart*, 41 Ill. App. 640; *White v. Keokuk, etc., R. Co.*, 52 Iowa 97; *Hicks v. International, etc., R. Co.*, 62 Tex. 38; *Howe v. St. Clair*, 8 Tex. Civ. App. 101. And see *Stratton v. European, etc., R. Co.*, 74 Me. 422, wherein it was held that the new corporation was not liable for injuries to property occurring while the trustees under the mortgage were in possession, after breach of condition of the mortgage but before foreclosure.

**2. Tort Committed After Sale but Before Conveyance.** — *White v. Keokuk, etc., R. Co.*, 52 Iowa 97; *Crawford v. Houston, etc., R. Co.*, 89 Tex. 89.

**3. Tort Committed After Sale but Before Confirmation.** — *Metz v. Buffalo, etc., R. Co.*, 58 N. Y. 61.

**4. Receiver as Purchasers' Agent.** — *Houston, etc., R. Co. v. Bath*, 17 Tex. Civ. App. 697.

**5. Liability When Receiver Has Made Betterments.** — *Houston, etc., R. Co. v. Crawford*, 88 Tex. 277, 53 Am. St. Rep. 752; *Crawford v. Houston, etc., R. Co.*, 89 Tex. 89; *Houston, etc., R. Co. v. Strycharski*, (Tex. Civ. App. 1896) 35 S. W. Rep. 851; *Houston, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1896) 35 S. W. Rep. 878.

**Betterments Made Before Sale.** — The new corporation cannot be held liable when the evidence fails to show whether the betterments were made before or after the sale and there is no evidence tending to show that the new corporation had any interest in the property or any control over it when the injury occurred. *Houston Electric St. R. Co. v. Bell*, (Tex. Civ. App. 1897) 42 S. W. Rep. 772.

**6. Crawford v. Houston, etc., R. Co.**, 89 Tex. 89.

**7. Continuance of Nuisance Created by Receiver.** — *George v. Wabash Western R. Co.*, 40 Mo. App. 433.

**8. Fordyce v. Du Bose**, 87 Tex. 78.



which cannot be changed without his consent.<sup>1</sup>

*bb. WHEN DECREE EXEMPTS PURCHASER FROM LIABILITY — (aa) In General.* — Hence, when the decree of sale provides that the purchaser shall take the property free from all claims against the receiver and free from all liens arising from such claims, the court cannot compel a purchaser who has fully complied with the terms of sale and paid his bid, to pay a judgment recovered against the receiver after sale, for personal injuries incurred during the receivership.<sup>2</sup>

*(bb) Disputed Claims Established After Sale.* — But if the upset price fixed in the decree of sale is sufficiently large to cover all valid claims against the receiver, and the purchasers are allowed to take possession of the property and withhold a portion of the purchase money pending a contest as to the validity of certain claims against the receiver, the purchasers may thereafter be required to pay into court a sum of money sufficient to cover such disputed claims as are subsequently established as valid obligations of the receiver.<sup>3</sup>

*cc. WHEN DECREE IMPOSES LIABILITY — (aa) Liability for Receiver's Debts and Contracts — aaa. In General.* — If the decree orders the sale subject to liens established or to be established, or subject to debts or liabilities incurred by the receiver in the management of the property, the purchaser at the sale takes the property *cum onere*, and liability for the claims so reserved by the decree follows the property into the hands of the purchaser or his assignee.<sup>4</sup>

*bbb. Contracts Not Binding on Receiver.* — If the decree of sale or conveyance to the purchasers provides that they shall be liable for the indebtedness, liabilities, and obligations incurred by the receiver, one who claims under a contract made with the old corporation cannot hold the new corporation liable, unless he shows that his contract became binding upon the receiver.<sup>5</sup>

*(bb) Liability for Receiver's Torts.* — When the sale is made subject to the receiver's debts and obligations the purchasers are liable not only for the debts incurred by the receiver, but also for torts committed by him, provided it appears that it was the intention of the decree of sale to impose such

**1. Decree Measures Purchaser's Rights and Liabilities.** — *Central Trust Co. v. Wabash, etc.*, R. Co., 30 Fed. Rep. 332.

**2. Imposition of Additional Burden on Purchaser.** — *Chicago, etc., R. Co. v. McCammon*, (C. C. A.) 61 Fed. Rep. 772.

**3. Claims Declared Valid After Sale.** — *Continental Trust Co. v. American Surety Co.*, (C. C. A.) 80 Fed. Rep. 180, *certiorari denied* 168 U. S. 708.

**4. Purchaser's Liability for Obligations Imposed by Decree.** — *Chicago, etc., R. Co. v. McCammon* (C. C. A.) 61 Fed. Rep. 772; *Evansville, etc., R. Co. v. Frank*, 3 Ind. App. 96.

**Contract Imposed Conditionally by Decree.** — Where after sale, but before confirmation, the state intervened in the foreclosure proceedings and sought to have declared binding on the purchaser a contract made by the receiver, and the sale was confirmed by a decree which provided that the confirmation was made subject to whatever rights the state might have upon the hearing of their petition of intervention, and the purchaser completed his bid without objection to the decree of confirmation, it was held that by so doing he elected to take the property subject to the obligation of the contract, provided it should be subsequently declared by the court to be a valid obligation. *State v. Quintard*, (C. C. A.) 80 Fed. Rep. 829.

**An Agreement by the Reorganization Committee** that a third person should have a lien on the property purchased, pursuant to a contract

made with the receiver, is binding on the new corporation. *Vilas v. Page*, 106 N. Y. 439.

**Waiver of Right to Payment.** — Where the decree of sale provided that the purchasers should pay a specified sum in cash and the balance of their bid in bonds, it was held that creditors who failed to object to the payment of claims which were not properly chargeable against the fund in court could not subsequently demand that the purchasers pay an additional amount of cash in lieu of bonds, in order that their claims might be paid in full. *Central Trust Co. v. Cincinnati, etc., R. Co.*, 58 Fed. Rep. 500.

**Priority of Claims.** — When the decree unconditionally subjects the purchasers to the receiver's liabilities they cannot raise any question as to the respective rights of different classes of creditors to priority. *Anderson v. Condict*, (C. C. A.) 94 Fed. Rep. 716, *denying rehearing* (C. C. A.) 93 Fed. Rep. 349.

**Wages Due Servant or Employee.** — The secretary of a railroad company is an officer thereof, and is not a servant or an employee within the meaning of the *Minnesota* statute providing that the decree foreclosing a railroad mortgage shall impose on the purchaser liability for all sums due and owing by the mortgagor company to "any servant or employee of such company." *Wells v. Southern Minnesota R. Co.*, 1 Fed. Rep. 270, 1 McCrary (U. S.) 18.

**Rental of Leased Line** operated by receiver. *Central R., etc., Co. v. Farmers' L. & T. Co.*, 79 Fed. Rep. 158.

**5. Contract Must Be Binding on Receiver.** —

liability.<sup>1</sup> In the notes will be found cases giving instances of language which has been held sufficient to show such an intention.<sup>2</sup>

(cc) *Claims Not Presented Within Time Limited.* — It being the duty of the court to protect the purchasers against unjust demands, it may insert a provision in the decree of sale requiring the creditors to present their claims to the court for allowance within a specified time; and when the decree contains such a provision, all claims not so presented are barred.<sup>3</sup> It has been held, however, that when the purchaser's liability is not dependent solely on the terms of the decree, but also on the fact that the receiver made betterments during his possession after sale, an action may be maintained in the state court by one who failed to present his claim to the federal court which decreed the sale.<sup>4</sup>

(dd) *Contesting Validity and Amount of Certificates.* — When the receiver under authority of the court issues certificates which are secured by a first lien on the property in his possession, and the final decree in the cause provides that the property shall be sold subject to the payment of the unpaid principal and interest of such certificates, the purchasers are estopped from contesting the validity of the certificates or questioning the amount for which they were declared to be a lien upon the property purchased.<sup>5</sup>

*Keeler v. Atchison, etc., R. Co., (C. C. A.) 92 Fed. Rep. 545.*

**1. Liability in Absence of Judgment Against Receiver.** — Where it was provided by the terms of a consent decree that the purchaser should "pay, satisfy, and fully discharge all debts and liabilities of such receivership, of every kind, now remaining unpaid," it was held that one who sustained a personal injury caused by the receiver's negligence, could maintain an action against the purchaser. *Wabash R. Co. v. Stewart, 41 Ill. App. 640.*

**Jurisdiction to Enforce Claim.** — The obligations assumed by the purchasers under the terms of the decree are enforceable in any court of competent jurisdiction, and it is not necessary for the claimant to resort to the court which decreed the foreclosure, notwithstanding the fact that the decree reserved the right to retake and resell the property for the purpose of enforcing the payment of the obligations imposed thereby. *Atchison, etc., R. Co. v. Cunningham, 59 Kan. 722.* See also *Wabash R. Co. v. Stewart, 41 Ill. App. 640.*

**Liability of Purchasers' Mortgagee.** — When a decree confirming the foreclosure sale of the property of a railroad corporation directs the purchasers to pay the outstanding debts and liabilities of the receiver, the trustee under a mortgage, subsequently executed by the new corporation, is charged with knowledge that the title of the new corporation was based on the decree, and he accepts the mortgage subject to such debts and liabilities as the court ordering the sale had fixed as a paramount lien on the property. *Central Trust Co. v. Sloan, 65 Iowa 655.*

**2. Liability for Receiver's Torts.** — The purchasers were held liable for torts committed by the receiver where the decrees of sale in providing that the sales should be made subject to the obligations of the receiver, used the following language:

"All claims, debts, and liabilities," *Farmers' L. & T. Co. v. Central R. Co., 7 Fed. Rep. 537, 2 McCrary (U. S.) 181; Sloan v. Central Iowa R. Co., 62 Iowa 728.*

"All debts and liabilities," *Farmers' L. & T. Co. v. Central R. Co., 17 Fed. Rep. 758, 5 McCrary (U. S.) 421; Wabash R. Co. v. Stewart, 41 Ill. App. 640; Schmid v. New York, etc., R. Co., 32 Hun (N. Y.) 335; Ryan v. Hays, 62 Tex. 42.*

"All debts, claims, and demands" of whatsoever nature, *St. Louis Southwestern R. Co. v. Holbrook, (C. C. A.) 73 Fed. Rep. 112.*

"All indebtedness, obligations, or liabilities," *Atchison, etc., R. Co. v. Cunningham, 59 Kan. 722.*

"All liabilities," *Brown v. Wabash R. Co., 96 Ill. 297.*

**3. Claim Must Be Presented Within Time Limited.** — *Jesup v. Wabash, etc., R. Co., 44 Fed. Rep. 663,* which holds also that if a claim is not so presented to the court for allowance within the time specified, it may restrain suit thereon in another court.

**Waiver of Limitation.** — Where the decree of sale provided that all claims not presented within six months after the confirmation of the sale should be barred, but the decree of confirmation simply provided that the purchasers should assume all unpaid liabilities incurred by the receiver, without specifying any time within which claims should be presented, and the purchasers failed to object to the latter decree, it was held that it was within the discretion of the court to abrogate the six months limitation and to compel the purchasers to pay claims presented after the expiration of six months. *Olcott v. Headrick, 141 U. S. 543.*

**4. When Receiver Made Betterments After Sale.** — *Houston, etc., R. Co. v. Crawford, 88 Tex. 277, 53 Am. St. Rep. 752, followed in San Antonio, etc., R. Co. v. Bowles, 88 Tex. 634.*

**5. Purchasers Cannot Contest Certificates.** — *Central Nat. Bank v. Hazard, 30 Fed. Rep. 484.* See also *St. Louis South Western R. Co. v. Stark, (C. C. A.) 55 Fed. Rep. 758.*

**Estoppel to Allege Fraud.** — When the decree of sale expressly provides that the sale is made subject to the payment of "all valid and outstanding receivers' certificates," without reserving to the purchaser the right to appear and

*dd. RIGHT OF PURCHASERS TO SHARE IN PROCEEDS OF SALE AFTER PAYMENT OF CLAIMS —*  
*(aa) When Decree Imposes Liability.* — When the decree of sale provides that the purchasers shall assume the liabilities of the receiver, the payment thereof constitutes part of the consideration moving from the purchasers,<sup>1</sup> and therefore they are not entitled to be subrogated to the rights of the creditors whose claims they pay.<sup>2</sup>

*(bb) When Decree Does Not Impose Liability — aaa. Payment under Authority of Court.* — The payment by the new corporation, under authority of the court, of claims against the receiver for which it is not liable, entitles it to share in the distribution of the proceeds of sale.<sup>3</sup>

*bbb. Unauthorized Payment.* — But an unauthorized payment made after the termination of the receivership, not as a loan to the receiver but for the purpose of clearing the title to the property purchased, does not entitle the purchasing corporation to share in the distribution.<sup>4</sup>

*d. LIABILITY FOR DEBTS AND OTHER CONTRACTS OF OLD CORPORATION —*  
*(1) Liability for Debts — (a) Debts Not Assumed by Purchasers — aa. IN GENERAL.* — The effect of the foreclosure sale of the mortgaged property of a corporation is to cut off the rights of all creditors not secured by lien paramount to the lien of the mortgage under which the foreclosure sale is made, and the new corporation formed by the purchasers at the foreclosure sale is a new and independent entity and not a mere continuance of the old corporation. Hence, such new corporation is not liable for the debts of the old corporation which are not prior liens upon the property purchased, unless it expressly undertakes to pay such debts or unless their payment is imposed by statute or by the decree of foreclosure.<sup>5</sup>

contest the validity of such certificates, the purchaser cannot, after confirmation, allege that certain of the certificates were fraudulent, if the total amount of outstanding certificates is within the aggregate sum stated in the master's report, as all certificates must be deemed valid so far as purchasers are concerned, if within the aggregate amount so limited. *Swann v. Wright*, 110 U. S. 590, 17 Am. & Eng. R. Cas. 345.

**1. Payment of Claims Part of Consideration.** — *Jesup v. Wabash, etc., R. Co.*, 44 Fed. Rep. 663; *Morgan's Louisiana, etc., R., etc., Co. v. Moran*, (C. C. A.) 91 Fed. Rep. 22; *Thompson v. Northern Pac. R. Co.*, (C. C. A.) 93 Fed. Rep. 384.

**2. Purchasers Not Subrogated to Rights of Creditors.** — *Morgan's Louisiana, etc., R., etc., Co. v. Moran*, (C. C. A.) 91 Fed. Rep. 22; *Thompson v. Northern Pac. R. Co.*, (C. C. A.) 93 Fed. Rep. 384.

**3. Payment under Authority of Court.** — *Central Trust Co. v. Cincinnati, etc., R. Co.*, 53 Fed. Rep. 500.

**4. Unauthorized Payment.** — *Central Trust Co. v. Cincinnati, etc., R. Co.*, 58 Fed. Rep. 500.

**5. New Corporation Not Liable for Debts of Old Corporation — United States.** — *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806; *Hoard v. Chesapeake, etc., R. Co.*, 123 U. S. 222; *Belkows v. Hallowell, etc., Bank*, 2 Mason (U. S.) 31; *Keller v. Atchison, etc., R. Co.*, (C. C. A.) 92 Fed. Rep. 554; *Armour v. Bement*, (C. C. A.) 123 Fed. Rep. 56.

*Illinois.* — *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *Hatcher v. Toledo, etc., R. Co.*, 62 Ill. 477; *Morgan County v. Thomas*, 76 Ill. 120; *Desmond v. St. Louis, etc., R. Co.*, 77 Ill. 631.

*Indiana.* — *Lake Erie, etc., R. Co. v. Griffin*,

92 Ind. 487; *Lake Erie, etc., R. Co. v. Griffin*, 107 Ind. 464; *Moyer v. Ft. Wayne, etc., R. Co.*, 132 Ind. 88.

*Indian Territory.* — *Atchison, etc., R. Co. v. Young*, 3 Indian Ter. 60.

*Kansas.* — *Atchison, etc., R. Co. v. Cunningham*, 59 Kan. 742.

*Maine.* — *Stratton v. European, etc., R. Co.*, 74 Me. 422.

*Michigan.* — *Cook v. Detroit, etc., R. Co.*, 43 Mich. 349.

*Minnesota.* — *Huff v. Winona, etc., R. Co.*, 11 Minn. 180; *Hilbert v. Winona, etc., R. Co.*, 11 Minn. 246; *Fitz v. Minnesota Cent. R. Co.*, 11 Minn. 414.

*Missouri.* — *Helton v. St. Louis, etc., R. Co.*, 25 Mo. App. 322.

*New Jersey.* — *Central R. Co. v. Bunn*, 11 N. J. Eq. 336.

*North Carolina.* — *Marshall v. Western North Carolina R. Co.*, 92 N. Car. 322.

*Pennsylvania.* — *Stewart's Appeal*, 72 Pa. St. 291.

*Tennessee.* — *Memphis Water Co. v. Magens*, 15 Lea (Tenn.) 37.

*Texas.* — *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125; *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 38 Am. & Eng. R. Cas. 503.

*Wisconsin.* — *Vilas v. Milwaukee, etc., R. Co.*, 17 Wis. 497; *Smith v. Chicago, etc., R. Co.*, 18 Wis. 17; *National Foundry, etc., Works v. Oconto Water Supply Co.*, 105 Wis. 48.

**Voluntary Partial Payment.** — Where the new corporation became the purchaser, under foreclosure sale, of fairgrounds owned by the old corporation, it was held that the fact that it voluntarily paid a portion of the premiums offered by the old corporation, and some claims



*AS AFFECTED BY SUCCESSION TO RIGHTS AND LIABILITIES* — (aa) *Succession to Rights and Powers of Old Corporation.* — The new corporation is not rendered liable for the unsecured indebtedness of the old corporation by the fact that the statute authorizing its formation gives it all the rights and powers of the old corporation, as the proceeding does not continue the old corporation under a new name, but creates a new and entirely different corporation.<sup>1</sup>

(bb) *Succession to Duties and Liabilities.* — Nor does a provision of an act of incorporation that in case of foreclosure the purchasers shall be subject to all the "duties and liabilities" of the corporation whose mortgaged property is sold under foreclosure render such purchasers liable for the unsecured indebtedness of the corporation.<sup>2</sup>

cc. *EFFECT OF SUBSEQUENT LEGISLATION IMPOSING LIABILITY.* — When the foreclosure purchasers acquire a valid title to the property purchased, free from any liability for debts of the mortgagor corporation which were not a prior lien on the property, the rights which they thus acquire cannot be taken away or impaired by subsequent legislation.<sup>3</sup>

(b) *Debts Assumed by Purchasers or Imposed by Decree or Statute* — aa. *IN GENERAL.* — The new corporation formed by the purchasers at the foreclosure sale is liable for such debts of the old corporation as it expressly assumed at the time of the purchase or as were provided for in the reorganization agreement or imposed by the decree of foreclosure or by the statute under which the reorganization took place.<sup>4</sup>

of newspapers for advertising, in order to secure its own success, did not render it liable for other debts of the old corporation. *Texas State Fair, etc., Exposition Assoc. v. Caruthers*, 8 Tex. Civ. App. 474.

*Purchaser of Equity of Redemption.* — By the terms of the *Virginia Code* of 1849, c. 61, it was provided that the purchasers of all the works and property of a railroad corporation, sold under lien, might become a new corporation, not subject to any debts or liabilities of the old corporation, except such as they assumed at the time of the purchase. Where a street railway corporation was created under an act of assembly expressly excepting it from the operation of chapter 61 of the Act of 1849, it was held that purchasers of the equity of redemption at a sale made under a deed of trust executed by such corporation took the property subject to the debts and liabilities of the old company, including liability for personal injuries caused by the operation of the street railway prior to the sale. The corporation conducted by the purchasers was a continuation of the old one and not a separate and distinct corporation. *Langhorne v. Richmond City R. Co.*, (Va. 1894) 19 S. E. Rep. 122. See also concurring opinion of Dorman, J., in *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 624.

*Liability for Trust Fund.* — Where the decree of sale required the purchaser to pay all liabilities incurred by the old corporation which were prior in lien to the mortgage under which the foreclosure was had, it was held that the *cestui que trust* was entitled to recover from the new corporation such portion of a trust fund held by the old corporation as he could trace into the hands of the receiver, but that he could not recover such portion of the original trust fund as could not be so traced. *Mercantile Trust Co. v. St. Louis, etc., R. Co.*, 99 Fed. Rep. 485.

1. *Succession to Rights and Powers.* — *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125; *Vilas v. Milwaukee, etc., R. Co.*, 17 Wis. 497; *Smith v. Chicago, etc., R. Co.*, 18 Wis. 17.

2. *"Duties" and "Liabilities" Distinguished.* — The act of incorporation provided "that the purchasers under the foreclosure sale shall be 'vested with all the powers and privileges, and be subject to all the duties and liabilities, of said company.' The plain meaning of this provision is that while, under the sale of the property and franchises of the corporation, the purchasers are clothed with the powers and privileges of the charter for the purposes specified therein, they must equally be subject to the duties and liabilities or burdens and obligations imposed by the charter." *Memphis Water Co. v. Magens*, 15 Lea (Tenn.) 37.

3. *Liability Cannot Be Imposed by Statute After Sale.* — This principle was applied where the corporation after reorganization consolidated with another corporation, and it was sought to hold the consolidated corporation liable for the debts of the predecessor of the reorganized corporation, under a statute passed after the foreclosure sale, providing that in case of the consolidation of two or more corporations the consolidated corporation should be liable for the debts of each company entering into the consolidation. *Hatcher v. Toledo, etc., R. Co.*, 62 Ill. 477.

4. *Liability for Debts Assumed or Imposed.* — *Blair v. St. Louis, etc., R. Co.*, 22 Fed. Rep. 36; *Blair v. St. Louis, etc., R. Co.*, 24 Fed. Rep. 148; *Wood v. Dubuque, etc., R. Co.*, 28 Fed. Rep. 910; *Chattanooga First Nat. Bank v. Radford Trust Co.*, (C. C. A.) 80 Fed. Rep. 569; *American Cent. R. Co. v. Miles*, 52 Ill. 174; *Welsh v. First Division St. Paul, etc., R. Co.*, 25 Minn. 314; *State v. McDaniel*, 22 Ohio St. 354.

*Assumption Question of Intention.* — The question whether or not the new corporation in-

*bb. LIABILITY OF INDIVIDUAL PURCHASERS AS PARTNERS.* — And if the purchase is made by individuals who take no steps to form a new corporation, they are liable as partners for the debts of the old corporation which they assume.<sup>1</sup>

*cc. PROVISION OF SPECIFIED SUM FOR PAYMENT OF INDEBTEDNESS* — (*aa*) *Right of Purchasers to Contest Validity of Claims.* — If the agreement provides that a certain sum shall be applied to liquidating the indebtedness of the old company, it does not bind the new company to expend the whole of such sum, irrespective of the justice of the claims presented, but simply authorizes the directors to apply so much money, not exceeding the sum named, as may be necessary to satisfy the just demands against the old company.<sup>2</sup>

(*bb*) *Effect of Partial Payment by Old Company After Execution of Agreement.* — On the other hand, such a provision does not limit the amount to be paid to the sum named, so as to entitle the new company to diminish the amount to the extent of debts paid by the old company after the execution of the agreement and

tended to pay the old corporation's indebtedness should be determined by an inquiry as to the intention of the parties, derived not only from the language of the resolution and the assumption clause in the bill of sale, but also from all the surrounding circumstances. *Fernschild v. Yuengling Brewing Co.*, 154 N. Y. 667.

**What Constitutes New Promise.** — "To prove a new promise, it would be necessary to show some action on the part of the directors from which the promise, or their liability, can be clearly inferred. The mere certificate of their secretary that the amount was due on specified items would be insufficient to prove a new promise or to bind the company, unless it were shown that he had been empowered to adjust such claims generally, or this one particularly." *American Cent. R. Co. v. Miles*, 52 Ill. 174.

**Obligation Assumed by Intermediate Purchaser.** — Where one of the stockholders of a corporation purchased its assets for the purpose of transferring them to a new corporation which he intended to organize, it was held that the new corporation was bound by an agreement made by such stockholder before the purchase that he would cause it to issue its notes to another stockholder in consideration of the transfer of certain stock and the rendition of certain services in regard to the reorganization. *Lyle v. Addicks*, 62 N. J. Eq. 123.

**Liability for Old Corporation's Warranty of Title.** — Where the decree of foreclosure provided that the old corporation's indebtedness should be assumed by the new corporation, which should issue its stock in payment thereof, it was held that the new corporation was liable for breach of the old corporation's covenant warranting the title to land sold by it. It was also held that the statement in the decree that "only such persons as consent to come in under the provisions of this decree shall be entitled to receive stock in said last-named company, for any claim or demand" against the old corporation, did not mean that persons having claims should engage counsel, obtain permission to intervene in the foreclosure suit and procure a decree or order from the court, but simply meant that all persons demanding and receiving stock in the new company for claims against the old should be deemed to have consented to the provisions of the decree by which the entire property was conveyed to the new

company. *Wood v. Dubuque, etc., R. Co.*, 28 Fed. Rep. 910.

**Trust in Favor of Old Creditors.** — Where a plan for the reorganization of a corporation which had made a general assignment for the benefit of its creditors provided that the new company was to get the property of the old and issue its bonds in payment of its liabilities, and the assignee, upon the supposition that all of the creditors would assent to the plan, turned over the property of the old company to the new without requiring the payment of the purchase money, and without any other consideration than the supposed consent of all concerned, it was held that the property thus transferred constituted a trust fund for the benefit of such of the creditors unsecured by the general assignment as did not accept the bonds of the new corporation in payment of their claims against the old; and that, inasmuch as the property had been disposed of, the proceeds of the sale stood in the place of the property assigned and were properly distributed amongst such creditors. *Chattanooga First Nat. Bank v. Radford Trust Co.*, (C. C. A.) 80 Fed. Rep. 569.

**Liability of New Stockholders for Unpaid Subscriptions.** — Where the new corporation bought in the old corporation's property at a sale under the deed of trust, pursuant to an agreement with the old creditors that it would give its notes in payment of their debts, it was held that such creditors were entitled to compel the new stockholders to pay up their subscriptions, notwithstanding the fact that the transaction was devised by the officers of the old corporation to saddle the debts thereof on unsuspecting subscribers to the stock of the new company. *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

**Conditional Assumption.** — Where the contract provided that the new corporation should pay the creditors of the old corporation out of the profits made by it, it was held that the assumption of indebtedness was conditional, and that inasmuch as there were no profits out of which payment should be made, the new corporation was not liable for the old debts. *J. B. Wheeler Banking Co. v. Holden*, 11 Colo. App. 292.

**1. Individual Purchasers Liable as Partners.** — *Forbes v. Whittemore*, 62 Ark. 229.

**2. Right to Contest Validity of Claims.** — *Moyer v. Ft. Wayne, etc., R. Co.*, 132 Ind. 88.

before delivery of the property.<sup>1</sup>

(cc) *Sum Provided Is Trust Fund.* — The sum provided by the agreement for the payment of the debts of the old corporation is a trust fund in the hands of the new corporation, and if the latter unreasonably resists payment of a claim justly entitled to be paid out of such fund it is chargeable with the legal rate of interest upon such claim from the date when it should have been paid to the date when payment is enforced.<sup>2</sup>

dd. *AGREEMENT TO ISSUE STOCK TO OLD CREDITORS.* — When the new corporation agrees to issue stock to all creditors of the old corporation who present their claims within a reasonable time, creditors who desire to take advantage of the arrangement must present their claims in due season; and under no circumstances can they demand that they be paid in money, as a promise to pay in money cannot be inferred from the agreement to issue stock.<sup>3</sup>

ee. *VENDOR'S LIEN FOR DEBTS ASSUMED.* — In the absence of a specific agreement to the contrary, the assumption of the old corporation's debts does not create a vendor's lien or a lien in the nature of a vendor's lien in favor of the creditors whose debts are thus assumed; and this is true whether the assumption is voluntary or whether it constitutes part of the consideration paid for the property purchased.<sup>4</sup>

(c) *Under Old Corporation's Promise that New Corporation Will Pay Debts.* — The new corporation is not bound by a promise made by the old corporation to its creditors that the new corporation will pay their claims or in lieu thereof issue them stock.<sup>5</sup>

(d) *Remedies of Old Creditors Against New Corporation* — aa. *WHEN PAYMENT OF DEBTS IMPOSED BY STATUTE.* — Where the payment of the old corporation's debts is made by statute a condition precedent to the creation of the new corporation, a creditor of the old company may maintain an action against the new one for his debt,<sup>6</sup> even though the state might institute forfeiture proceedings

1. *Effect of Partial Payment by Old Company.* — Davidson v. Mexican Nat. R. Co., 58 Fed. Rep. 653.

But where the old company had agreed that in the event the indorser of its notes to the extent of forty thousand dollars was compelled to pay such notes, it would deliver to him eight thousand shares of its stock or pay him ten dollars per share therefor (being eighty thousand dollars), and a short time before the execution of the reorganization agreement the indorser paid the notes, but did not demand the stock until after the execution of the agreement, it was held that the fund provided for the payment of the old debts was chargeable with forty thousand dollars and not eighty thousand dollars. The court said that the further liability could be satisfied by the delivery of the stock of the old corporation, which, as it was insolvent, would have no actual value, and that under these circumstances the excess beyond the forty thousand dollars of original indebtedness did not seem to be such an actual indebtedness as to bring it within the terms of the provision for the liquidation of indebtedness, but rather seemed to be a penalty for non-payment of the notes. Davidson v. Mexican Nat. R. Co., 58 Fed. Rep. 653; Davidson v. Mexican Nat. R. Co., 11 N. Y. App. Div. 28.

2. *Interest Chargeable for Unjust Refusal to Pay.* — Davidson v. Mexican Nat. R. Co., 11 N. Y. App. Div. 28.

3. *Assumption of Indebtedness Not Implied.* — American Cent. R. Co. v. Miles, 52 Ill. 174.

*Waiver of Right to Pay in Stock.* — Where the new corporation was bound by the terms of the decree to issue its common stock to unsecured creditors of the old corporation, and pending litigation as to the title of land sold by the old corporation, the new corporation assured the grantee that if her title failed it would repay her the purchase money with interest, it was held that it thereby waived its right to pay such claim in stock upon failure of the title, and that it was bound to satisfy the grantee's demand in money. Dubuque, etc., R. Co. v. Pierson, (C. C. A.) 70 Fed. Rep. 303, rehearing denied (C. C. A.) 71 Fed. Rep. 268.

4. *Vendor's Lien for Debts Assumed.* — Columbus, etc., R. Co.'s Appeal, (C. C. A.) 109 Fed. Rep. 177.

5. *New Company Not Bound by Old Company's Promise.* — Providence Albortype v. Kent, etc., Co., 19 R. I. 561.

6. *Old Creditor May Sue New Corporation.* — St. Louis, etc., R. Co. v. Miller, 43 Ill. 199; Welsh v. First Division St. Paul, etc., R. Co., 25 Minn. 314. Compare Johnson v. Marine Hospital, 2 Cal. 319. But in order to hold the new corporation liable, it must be shown that it purchased the property of the old corporation. Desmond v. St. Louis, etc., R. Co., 77 Ill. 631.

*What Is Condition Precedent.* — When the purchaser agrees to form a new organization which shall assume the liabilities of the old corporation, and the proceedings organizing the new corporation are legalized by subse-



for nonperformance of the condition.<sup>1</sup>

*bb. FOR FRAUD IN SALE OR REORGANIZATION.* — Where payment of the old corporation's debts was neither imposed by statute or decree nor assumed by the purchasers, old creditors who seek relief against the new company because of fraud in the sale or in the reorganization must proceed in equity and not at law, their only remedy being against the property received by the new company.<sup>2</sup> And the same rule applies where the creditor's right to relief is based on the fact that the new company received property not covered by the mortgage.<sup>3</sup>

(2) *Liability to Perform Old Corporation's Contracts* — (a) *Mere Personal Contracts.* — The general rule is that the new corporation formed by the purchaser under foreclosure proceedings of the property and franchises of an insolvent corporation is not bound to perform the obligations of mere personal contracts made by the old corporation, unless the performance of such contracts was imposed upon the purchasers by statute or by the terms of the decree of sale, or unless the purchasers expressly assumed the contracts at the time of making the purchase.<sup>4</sup>

quent legislation, the stipulations of the agreement are not to be regarded in the light of mere private stipulations between the respective parties to the agreement, affecting them and their privies alone, but they must be treated and construed as charter provisions binding and obligatory upon the new corporation as an inseparable part of the law of its being. *Welsh v. First Division St. Paul, etc., R. Co.*, 25 Minn. 314.

1. *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199.

2. *Creditor's Remedy for Fraud Is in Equity.* — *Hopkins v. St. Paul, etc., R. Co.*, 2 Dill. (U. S.) 396; *Armour v. Bement*, (C. C. A.) 123 Fed. Rep. 56. See also *Wenger v. Chicago, etc., R. Co.*, 105 Fed. Rep. 796.

3. *Cook v. Detroit, etc., R. Co.*, 43 Mich. 349.

4. *New Corporation Not Bound by Personal Contracts* — *United States.* — *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806; *Hoard v. Chesapeake, etc., R. Co.*, 123 U. S. 222; *Peninsular Iron Co. v. Eells*, (C. C. A.) 68 Fed. Rep. 24. *Iowa.* — *Amsden v. Dubuque, etc., R. Co.*, 13 Iowa 132.

*Missouri.* — *Helton v. St. Louis, etc., R. Co.*, 25 Mo. App. 322.

*New York.* — *People v. Rome, etc., R. Co.*, 103 N. Y. 95.

*Virginia.* — *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

*Wisconsin.* — *Menasha v. Milwaukee, etc., R. Co.*, 52 Wis. 414, 5 Am. & Eng. R. Cas. 300. See also *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673.

*Illustrations.* — In conformity with the principles laid down in the text, the purchasers have been held not bound to perform the following contracts made by corporations whose property they purchased under foreclosure proceedings:

*Contract to Maintain a Permanent Railroad Depot in a Town.* — *People v. Rome, etc., R. Co.*, 103 N. Y. 95; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 38 Am. & Eng. R. Cas. 503. See also *Close v. Burlington, etc., R. Co.*, 64 Iowa 140.

*Contract of Employment.* — *Keller v. Atchi-*

*son, etc., R. Co.*, (C. C. A.) 92 Fed. Rep. 545.

*Obligation of Old Corporation to Issue Its Bonds to Creditors.* — *Vose v. Cowdrey*, 49 N. Y. 336.

*Railroad's Contract to Set Cars on Warehouseman's Sidetrack for Purpose of Receiving and Discharging Freight.* — *Amsden v. Dubuque, etc., R. Co.*, 13 Iowa 132.

*Contract by Railroad with City Not to Build Line Through City to Connect with Another Railroad.* — *Menasha v. Milwaukee, etc., R. Co.*, 52 Wis. 414, 5 Am. & Eng. R. Cas. 300.

*Contract to Deliver Pass.* — Where a person conveyed to a railroad corporation a right of way over certain land in consideration of a sum of money and an agreement on the part of the railroad company to furnish him with an annual pass over the company's railroad during the period of his natural life, it was held that a new corporation formed by the purchasers under foreclosure proceedings was not liable in damages as for a breach of contract for its failure and refusal to deliver the pass. The court said, however, that the plaintiff possibly had a remedy in equity either by the enforcement of an equitable lien on the land in the nature of a vendor's lien or by an injunction restraining the defendant from the further use of the land until the performance of the condition. *Helton v. St. Louis, etc., R. Co.*, 25 Mo. App. 322. See also *Missouri Pac. R. Co. v. Henrie*, 5 Kan. App. 614, which holds that the purchasers were not liable to pay the value of a life pass which the original company agreed to give to the landowner in consideration of a parol license to build and operate a road over his premises, where the purchasers had no knowledge of the parol contract at the time of their purchase or while using such premises, and where they had in no manner ratified such contract or assumed its obligations.

*Contracts Which Do Not Constitute Liens*, and liens which are subordinate to that of the mortgage under which foreclosure is had, cease to have any binding force or obligation upon the purchaser at the foreclosure sale, and such purchaser takes the property free from and discharged of all such liens and

(b) **Contracts Disclaimed under Authority of Decree.** — Nor are the purchasers bound to perform a contract which they have disclaimed in pursuance of permission so to do given them in the decree of foreclosure,<sup>1</sup> unless they subsequently accept and ratify such contract.<sup>2</sup>

(c) **Contracts Secured by Superior Liens.** — But the purchasers are liable under contracts the performance of which is secured by liens on the property purchased superior to the lien of the mortgage under which foreclosure is had.<sup>3</sup>

(d) **Covenants Running with Land Included in Purchase.** — In like manner they are bound by covenants running with the land included in the purchase.<sup>4</sup>

contracts. *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

**Contract Not Imposed by Decree.** — A decree vesting title to the property purchased, which provides that it shall be held subject to "the same rights and obligations and upon the same terms and conditions" as it was held by the mortgagor company, does not obligate the purchasing company to carry out a contract to set freight cars on a warehouseman's side-track. *Amsden v. Dubuque, etc., R. Co.*, 13 Iowa 132.

**1. Purchasers Not Bound by Contract Disclaimed.** — *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 44 Fed. Rep. 653; *Chicago, etc., R. Co. v. Towle*, 10 Ind. App. 540. See also *Frank v. New York, etc., R. Co.*, 122 N. Y. 197, 46 Am. & Eng. R. Cas. 356.

**2. What Is Not Acceptance.** — Where the contract disclaimed by the purchasing company is between the mortgaging company and the manufacturers, and provides for the use of a private track leading to the manufacturers' factories, in consideration of which a greatly reduced freight rate between certain points is made to the manufacturers, the fact that the purchasing company uses the track in common with other railroad companies for the purpose of delivering freight, though without claiming any right thereto under the contract, but on the contrary at all times demanding the current freight rate, which is largely in excess of the contract rate, does not amount to such an acceptance of the contract as binds the purchasing company to the rate fixed therein. *Chicago, etc., R. Co. v. Towle*, 10 Ind. App. 540.

Where the foreclosure decree gave the purchasers the right to disclaim a lease of part of its railroad line, made by the mortgagor company during the pendency of the foreclosure proceedings, it was held that the purchasers' right to disclaim was not affected by the fact that the receiver ratified and confirmed the lease and received rent thereunder. It was also held that the disclaimer made by the purchasing company, which gave notice to the lessee that he would not be permitted to use the leased property after the expiration of thirty days, was not waived by the action of the purchasing company in accepting rental for such period of thirty days, where the receipt given for the rental expressly stated that it was without prejudice to the rights of the purchasing company under its notice of disclaimer and the purchasing company consistently asserted its intention to abide by the disclaimer. *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 44 Fed. Rep. 653.

**3. An Equitable Lien in the Nature of a Vendor's Lien** exists in favor of a landowner who conveyed to the old corporation an easement over his land but retained the legal title to the land; and the lien attaches not only for the unpaid purchase money but also for damages for failure of the old railroad corporation to carry out its agreement in regard to the construction of its road. *Dayton, etc., R. Co. v. Lewton*, 20 Ohio St. 401.

**4. Covenant Running with Land.** — *Frank v. New York, etc., R. Co.*, 122 N. Y. 197, 46 Am. & Eng. R. Cas. 356. See also *Rome, etc., R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

**Covenant Not Running with Land.** — Where a ferry company granted an easement over its land to a railroad company in consideration of the railroad company's covenant always to employ the ferry company for the purpose of transporting persons and property across a certain river, it was held that the covenant was not one running with the land and that therefore the ferry company could not maintain an action for breach of the covenant against a new corporation formed by the purchasers of the franchises and property of the railroad company. *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 94 Ill. 83.

Where the deed for land conveyed to a railroad corporation recited that it was made in consideration of one dollar "and the permanent location of a depot on the ground conveyed," it was held that there was no covenant which created an obligation on the part of the grantee to build the depot, and that its utmost liability for failure to build and maintain the depot was to forfeit the estate conveyed for breach of a condition subsequent. In a suit against the purchasing corporation to compel specific performance of the contract or the payment of damages in lieu thereof, the court refused the relief sought but directed the corporation to execute a formal release of the land, inasmuch as it had forfeited its right thereto. *Close v. Burlington, etc., R. Co.*, 64 Iowa 149, 17 Am. & Eng. R. Cas. 33.

**Covenant Binding on Purchaser.** — A covenant that a railroad corporation to which a municipal corporation has granted a right of way over its land shall permit other railroads to use such right of way, under such reasonable regulations and terms as may be agreed upon, creates an easement for the benefit of the public which may be used and enjoyed by other railroads with the consent of the public authorities properly expressed; and when the property of the grantee of the right of way

(e) **Agreements in Consideration of Municipal Aid Received.** — In some cases they are held bound to carry out agreements made by the mortgagor corporation to do certain things in consideration of aid received from a municipality,<sup>1</sup> their liability to perform such agreements being analogous to that of the purchasers of the franchises of a corporation to perform public duties imposed upon the original grantees of the franchises as a condition annexed to the grant.<sup>2</sup>

(f) **Contracts Adopted by Purchasers.** — In any event the purchasers will be held to the performance of a contract which they have adopted, as they will not be permitted to take the benefits accruing to them under such a contract without assuming the burdens thereof;<sup>3</sup> and an express adoption is not necessary, it being sufficient if the purchasers, with knowledge of the contract, pursue a line of conduct which is consistent only with its adoption.<sup>4</sup>

**Use of Property Leased.** — Thus, if a reorganized railroad corporation continues to use property leased by the old corporation, it is bound by the terms of the lease and must pay the rental stipulated therein.<sup>5</sup>

is sold under foreclosure proceedings, the new corporation formed by the purchasers is bound by such covenant, whether or not it is strictly a covenant running with the land. *Joy v. St. Louis*, 138 U. S. 1, affirming *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 546.

1. **A Railroad Which Avails Itself of Public Aid from Taxation** possibly enters into no contractual relation with the public, but it assumes a relation to them of a higher and more sacred character than that of a mere contract between private individuals, and it cannot violate its obligations to the public incurred by reason of the aid thus received. Thus, a railroad corporation which constructs its line to a town, after having had a tax in its aid voted by such town, cannot thereafter cease to operate the portion of its line reaching the town. If the property and franchises of the railroad are sold under foreclosure proceedings the purchasers succeed to the obligation to operate the road. This obligation stands upon a different footing from a debt; it inheres in the franchise, as it were, and passes to the purchasers as a burden or limitation upon the right to operate the road. *State v. Central Iowa R. Co.*, 71 Iowa 410, Seevers, J., dissenting. See also *State v. Iowa Cent. R. Co.*, 83 Iowa 720.

*Compare* *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291, wherein it was held that the purchasers took the property free from the obligations of a contract entered into after the execution of the mortgage, whereby the mortgagor railroad corporation, in consideration of the stock subscription made by the city, undertook to contract and maintain a certain line of railroad and certain terminal facilities in such city. *Compare* also *Menasha v. Milwaukee, etc., R. Co.*, 52 Wis. 414, 5 Am. & Eng. R. Cas. 300.

2. See *supra*, this section, 7. a. **Succession to Franchises, Privileges, and Duties of Old Corporation — Succession to Franchises and Duties.**

3. **Contracts Adopted by Purchasers — United States.** — *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. (U. S.) 367; *Sloss Iron, etc., Co. v. South Carolina, etc., R. Co.*, (C. C. A.) 85 Fed. Rep. 133.

*Indiana.* — *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487, 107 Ind. 464; *Chicago, etc., R. Co. v. Hall*, 135 Ind. 91.

*New York.* — *Davidson v. Mexican Nat. R. Co.*, 11 N. Y. App. Div. 28.

*Ohio.* — *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201, 7 Ohio Dec. (Reprint) 284, 2 Cinc. L. Bul. 74.

*South Carolina.* — *Walker v. Wilmington, etc., R. Co.*, 26 S. Car. 80.

**Evidence of Terms of Original Agreement Competent.** — *Walker v. Wilmington, etc., R. Co.*, 26 S. Car. 80.

**Contract Imposing Obligation of Alternative Payment.** — Where the mortgagor railway company constructed upon its right of way a switch for the use of one of its customers, who paid the cost of its construction under an agreement that if the railway company, its successors or assigns, desired to abrogate the arrangement and take possession of the switch its cost should be repaid him, it was held that the new company formed by the purchasers at the foreclosure sale of the company making the agreement could not take possession of the switch without making the compensation stipulated in the agreement. *Kansas City Northwestern R. Co. v. Frohwerk*, (Kan. 1904) 74 Pac. Rep. 1124.

**What Is Not Adoption.** — Where the receiver of a railroad company made a contract with a coal company for a supply of coal for one year, and the contract gave the coal company the option of renewing it at expiration, it was held that foreclosure purchasers who had knowledge of the contract and of the date of its termination, but not of the option clause, did not bind themselves to renew the contract by their action in receiving coal under it until notified by the coal company of its intention to renew at the expiration of the original term. *Sloss Iron, etc., Co. v. South Carolina, etc., R. Co.*, (C. C. A.) 85 Fed. Rep. 133.

4. **Express Adoption Not Necessary.** — *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396. See also *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Ohio Dec. 163, 1 Cinc. L. Bul. 201; *Walker v. Wilmington, etc., R. Co.*, 26 S. Car. 80.

5. **Use of Property Leased by Old Corporation.** — *St. Joseph Union Depot Co. v. Chicago, etc., R. Co.*, (C. C. A.) 89 Fed. Rep. 648; *Jacksonville, etc., R. Co. v. Louisville, etc., R. Co.*,



(g) **Contracts Made After Execution of Mortgage.** — When the purchasers are otherwise bound to perform a contract made by the old corporation, they are not relieved of liability by the mere fact that the contract was made after the execution of the mortgage which is the basis of their title.<sup>1</sup>

*e. LIABILITY FOR OLD CORPORATION'S TORTS* — (1) *In General.* — It may be laid down broadly as a general rule that the new corporation formed by the foreclosure purchasers is not liable for torts committed by the mortgagor corporation;<sup>2</sup> or by the receiver;<sup>3</sup> or by individual purchasers after the purchase and before the formation of the new corporation;<sup>4</sup> except in so far as liability therefor is imposed by statute.

(2) *Continuance of Nuisance Created by Old Corporation* — (a) *In General.* — If the new corporation knowingly continues the existence of a nuisance created by the old corporation, it is liable for the damages arising from such continuance,<sup>5</sup> but not for damages accruing prior to its possession of the property.<sup>6</sup>

(b) *Nuisance Authorized by Municipality.* — Where a corporation formed by the foreclosure purchasers of the property of a railroad corporation continues a nuisance created by the mortgagor corporation, consisting of the complete obstruction of a city street, it cannot escape liability for such continuance, to a private person who suffers an injury not shared by the public generally, by the fact that the old corporation obtained the consent of the city to appropriate the street for its use; and an abutting landowner who is cut off from all access to the street from his property by such obstruction is entitled to recover damages as for a permanent appropriation, notwithstanding the fact

150 Ill. 480, affirming 47 Ill. App. 414; St. Louis, etc., R. Co. v. East St. Louis, etc., R. Co., 39 Ill. App. 354, affirmed 139 Ill. 401; St. Joseph Union Depot Co. v. Chicago, etc., R. Co., 131 Mo. 291; Barr v. New York, etc., R. Co., 125 N. Y. 263.

*Compare* Frank v. New York, etc., R. Co., 122 N. Y. 197, 46 Am. & Eng. R. Cas. 356, holding that where the leasehold was not included in the conveyance from the receiver to the purchasers, the new corporation was to be regarded as assignee of the lease during the time that it occupied the leasehold estate, and as such liable for the rent accruing subsequent to the date of its entry, but that it might escape this liability at any time by assigning the lease and abandoning possession of the property, even if such action was taken for the express purpose of avoiding further payment of rent.

**Lease Voidable but Not Void.** — A railroad line was leased by the corporation owning it to another corporation, which had practically the same directors, at an exorbitant rental. This contract of lease was not void but was voidable, because of the fact that the directors of the lessee company abused their trust. Subsequently the lessee corporation was reorganized. The new corporation continued to operate the leased line, which it considered valuable. Upon an action brought by minority stockholders of the lessor company against the new corporation to compel the payment of the rental stipulated, it was held that the lease having been voidable only, and not void, it had been adopted and acquiesced in by the new company, and the new company could not hold the leased line and refuse to pay the whole rental agreed upon for its use. Barr v. New York, etc., R. Co., 125 N. Y. 263.

#### 1. Contract Made After Execution of Mortgage.

— St. Joseph Union Depot Co. v. Chicago, etc., R. Co., (C. C. A.) 89 Fed. Rep. 648; Rome, etc., R. Co. v. Ontario Southern R. Co., 16 Hun (N. Y.) 445; South Carolina R. Co. v. Wilmington, etc., R. Co., 7 S. Car. 410.

**2. Liability for Old Corporation's Torts.** — Hull v. Chicago, etc., R. Co., 65 Iowa 713, 20 Am. & Eng. R. Cas. 341; Ft. Scott, etc., R. Co. v. Fox, 42 Kan. 490; Louisville, etc., R. Co. v. Orr, 91 Ky. 109; Neff v. Wolf River Boom Co., 50 Wis. 585.

**3.** See *supra*, this section, c. (1) *Liability for Debts and Torts of Receiver* — *In Absence of Express Imposition or Assumption of Liability.*

**4. Liability for Torts of Individual Purchasers.** — Watson v. Albany, etc., R. Co., 111 Ga. 10. See also Pittsburgh v. Fierst, 96 Pa. St. 144.

**5. Liability for Continuance of Nuisance Created by Old Corporation.** — Ft. Scott, etc., R. Co. v. Fox, 42 Kan. 490; Neff v. Wolf River Boom Co., 50 Wis. 585. See also Louisville, etc., R. Co. v. Orr, 91 Ky. 109.

*Compare* Hammond v. Port Royal, etc., R. Co., 16 S. Car. 567, holding that the duty of the new corporation is simply passive and not active. Thus the new corporation would not be liable for damages caused by its failure to remove obstructions to drainage, caused by the acts of the former company, but would be liable for an increase of the obstructions caused by its own acts.

**Liability Dependent upon Knowledge.** — Neff v. Wolf River Boom Co., 50 Wis. 585.

**6. Damages Accruing Prior to Purchase.** — Ft. Scott, etc., R. Co. v. Fox, 42 Kan. 490; Hammond v. Port Royal, etc., R. Co., 15 S. Car. 10. See also Louisville, etc., R. Co. v. Orr, 91 Ky. 109.

that his premises extend to another street.<sup>1</sup>

(3) *Liability for Judgment Against Old Corporation for Permanent Nuisance.* — It has been held that where a mortgagor railroad corporation occupies a city street without authority, an injured abutting owner who recovers damages from such corporation as for a permanent appropriation, is entitled to an injunction restraining the purchasing corporation from using such street until the judgment is paid, as the effect of such injunction is not to hold the new corporation liable for the judgment obtained against the old, but is to give it the choice of abandoning the street or of securing the right to occupy it in consideration of the payment of the judgment.<sup>2</sup>

f. *LIABILITY FOR LIENS ON PROPERTY PURCHASED* — (1) *Lien of Senior Mortgage* — (a) *In General.* — When a foreclosure sale is made under a junior mortgage, the corporation formed by the purchasers takes the property burdened with the lien of the senior mortgage, which may be enforced against the property in case of default.<sup>3</sup> But the new corporation does not become liable for the payment of such mortgage debt or any part thereof, unless it expressly assumes such liability.<sup>4</sup> If it does assume such liability, it thereby becomes the debtor of the mortgagee, who may enforce payment of the mortgage debt.<sup>5</sup> By the assumption of such indebtedness the new corporation becomes the principal debtor and not a mere guarantor or surety.<sup>6</sup>

(b) *Right of Purchasers to Contest Validity.* — When the mortgaged property is sold under judicial proceedings "subject to all legal liens and incumbrances thereon," the new corporation formed by the purchasers is not estopped from contesting the validity of a prior mortgage which is not expressly stated by apt words to be a specific lien upon the property sold, as an invalid mortgage is not a legal lien or incumbrance.<sup>7</sup>

(2) *Vendor's Lien* — (a) *For Unpaid Portion of Bid.* — When the purchasers of the property of an insolvent railroad corporation, sold under foreclosure proceedings, do not pay the entire amount of their bid in cash, a vendor's lien for the balance attaches to the property purchased and a new corporation formed by the purchasers takes the property subject to such lien.<sup>8</sup> Ordinarily,

1. *Liability for Nuisance Authorized by Municipality.* — *Ft. Scott, etc., R. Co. v. Fox*, 42 Kan. 490.

2. *Restraining Nuisance until Payment of Judgment Against Old Corporation.* — *Harbach v. Des Moines, etc., R. Co.*, 80 Iowa 593, which holds also that the new corporation is estopped from setting up a parol consent given by the abutting owner, by the failure of the old corporation to set up such consent as a defense to the original action of damages against it.

3. *Purchasers Take Subject to Senior Mortgage.* — *Wabash, etc., R. Co. v. Central Trust Co.*, 22 Fed. Rep. 138; *Holmes v. Northern Pac. R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 266, affirmed 71 N. Y. App. Div. 618, 76 N. Y. Supp. 1016, 175 N. Y. 480.

*Equitable Mortgage.* — *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10.

4. *Personal Liability for Senior Mortgage.* — *Central Trust Co. v. Wabash, etc., R. Co.*, 30 Fed. Rep. 332; *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10; *Holmes v. Northern Pac. R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 266, affirmed 71 N. Y. App. Div. 618, 76 N. Y. Supp. 1016, 175 N. Y. 480.

And a bondholder seeking to hold a new corporation liable must show not only that it expressly agreed to pay the mortgage debt, but also that its grantor was personally liable for the debt. *Holmes v. Northern Pac. R.*

*Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 266, affirmed 71 N. Y. App. Div. 618, 76 N. Y. Supp. 1016, 175 N. Y. 480.

5. *Mortgagor May Enforce Promise to Pay.* — *In the Matter of Simpson*, 36 N. Y. App. Div. 562, affirmed 158 N. Y. 720, 53 N. E. Rep. 1132.

6. *In the Matter of Simpson*, 36 N. Y. App. Div. 562, affirmed 158 N. Y. 720, 53 N. E. Rep. 1132.

7. *Right to Contest Validity of Prior Mortgage.* — *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548.

8. *Vendor's Lien for Purchase Money.* — *Western Div. Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691.

*Lien for Unpaid Debts of Receiver.* — The property of an insolvent railroad corporation was sold free and clear of all claims and liens whatsoever, as the upset price fixed by the decree was sufficient to cover all valid claims against the receiver. Inasmuch as some of the claims against the receiver were disputed by the bondholders, the court did not require the purchasers to make immediate payment into court of a large sum of money to be held for the payment of claims which might or might not be established, but only required the payment of so much of the purchase price as should be necessary to discharge the claims when and as they should be determined and adjusted. By the



though an express lien is not reserved and the court does not retain jurisdiction to retake and resell the property for default in the payment of the deferred purchase money, an implied lien in the nature of a vendor's lien arises, and the inherent powers of a court of general equitable jurisdiction authorize it to enforce such implied lien by proper proceedings in the cause in which the sale was made.<sup>1</sup> However, when the circumstances show that the lien which would ordinarily arise was intentionally relinquished, the purchasers take the property free therefrom.<sup>2</sup>

(b) **In Favor of Mortgagor's Vendor.** — If the property purchased at the foreclosure sale includes property burdened with a lien for purchase money in favor of the old corporation's vendor, which is superior to the lien of the mortgage under which foreclosure is had, the purchasers take the property subject to such vendor's lien.<sup>3</sup> And the vendor's lien on property acquired by the mortgagor corporation after the execution of its mortgage is superior to the lien of the mortgage, notwithstanding the fact that the mortgage, by its terms, covers after-acquired property.<sup>4</sup>

terms of the decree the purchasers were to be let into possession, subject to the conditions of the decree, which reserved full power and jurisdiction over the property, with the right upon default by the purchaser respecting any order for the payment of the purchase money to retake possession of the road and to resell the same. It was held that this was tantamount to the reservation of a lien by the court upon the property for the purchase money, and that this reserved lien was of as great dignity as a purchase-money mortgage executed by the purchasers, and that the purchasers and their grantees held the property purchased subject to the lien imposed upon it by the decree of sale, and that the court could enforce such lien for the satisfaction of debts which were subsequently established as valid claims against the receiver under the terms of the decree of sale. *Continental Trust Co. v. American Surety Co.*, (C. C. A.) 80 Fed. Rep. 180, *certiorari denied* 168 U. S. 708.

1. **Implied Vendor's Lien.** — *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177.

2. **Relinquishment of Lien.** — Where the court ordered a deed vesting the title in fee simple and that the purchasers should go at once into possession, and that for the purpose of protecting the title acquired at the sale, the purchasers should be subrogated to the titles and liens of the lienholders before the court, and in addition thereto, the court, for the purpose of protecting such creditors as should be found entitled to preference over the mortgage, required the purchasers to give security for the payment of so much of the purchase money as then seemed sufficient to discharge such preferential debts, it was held that there was a clear intention that the lien should be relinquished and that therefore the purchaser took the property free from any implied lien. *Columbus, etc., R. Co.'s Appeal*, (C. C. A.) 109 Fed. Rep. 177.

*Compare Holland v. Lee*, 71 Md. 338, which holds that where the decree directed that the purchasers should give their individual bonds for the deferred payments, and that such bonds should be secured by lien enforceable against the purchasers or whoever might be in possession of the property, the individual purchasers were liable for the payment of such bonds, but

the corporation to which they conveyed the property was not.

3. **Vendor's Equitable Lien.** — When the organizers of a railroad corporation undertake, as part of the consideration moving from them, to pay a debt due to a third person by their vendor, such obligation becomes an equitable vendor's lien upon the property of the railroad corporation, superior to a mortgage executed by it, and therefore a new corporation thereafter formed by purchasers under the foreclosure of such mortgage takes the property subject to such superior lien. *Hatry v. Painesville, etc., R. Co.*, 1 Ohio Cir. Dec. 238, 1 Ohio Cir. Rep. 426.

4. **Vendor's Lien on After-acquired Property.** — *U. S. v. New Orleans, etc., R. Co.*, 12 Wall. (U. S.) 362; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Southwestern Car Co.*, 99 U. S. 256.

And the priority of the vendor's lien is not affected by his failure to register the purchase-money mortgage, as the registry laws are intended for the protection of subsequent, not prior, purchasers and creditors. *U. S. v. New Orleans, etc., R. Co.*, 12 Wall. (U. S.) 362.

*Compare Westinghouse Electric, etc., Co. v. New Paltz, etc., Traction Co.*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 132, which holds that the vendor of railroad equipment loses his lien as against the purchaser at the foreclosure sale by his failure to acknowledge and record the contract reserving the lien, as required by the *New York Lien Law* (c. 418 of the Laws of 1897) which provides that a contract retaining title to any railroad equipment or rolling stock sold to a railroad company shall be invalid as to any subsequent creditor or purchaser for value without notice, unless such contract is in writing and acknowledged and recorded, as though it were a real-estate mortgage, in the county in which is located the place of business or principal office of the vendee.

**Under a Mortgage Covering After-acquired Property,** the lien of the mortgage upon land subsequently purchased by the mortgagor is subordinate to the vendor's lien for unpaid purchase money, and as to such land the mortgagee is not a purchaser for value. And where the vendor of such land obtains from the federal court in which the foreclosure proceedings are pending leave to enforce his lien in a state



(3) *Judgment Liens*. — Sometimes it is provided by statute that a judgment against a railroad company for any injury to person or property shall be a lien on the company's property superior to that of any prior mortgage, and in such case the purchaser, under proceedings foreclosing such mortgage, takes the property subject to the lien of all judgments for such injuries;<sup>1</sup> but the lien does not attach until rendition of judgment, and the property acquired by the purchaser cannot be subjected to the satisfaction of a judgment recovered after the sale for injuries occurring prior thereto,<sup>2</sup> even though an action therefor was pending at the time of the sale.<sup>3</sup>

(4) *Subsequent Liens* — (a) *In General*. — In the absence of a statute, decree, or agreement to the contrary, the purchaser of the property of an insolvent corporation under foreclosure proceedings acquires a title to the property free and clear of all liens subsequent to that of the mortgage under which the sale is made.<sup>4</sup> An exception to this rule obtains in the case of a lien for taxes, which is not displaced by a sale under a pre-existing mortgage, unless it is so provided by statute.<sup>5</sup>

court, the purchasers at the foreclosure sale take the land subject to the establishment of a prior lien in favor of such vendor. *Loomis v. Davenport, etc.*, R. Co., 17 Fed. Rep. 301. See also *Venner v. Farmers' L. & T. Co.*, (C. C. A.) 90 Fed. Rep. 348.

*Compare* *Hall v. Mobile, etc.*, R. Co., 58 Ala. 10, holding that where the vendor in his deed to the old corporation expressly reserved what was called therein "a vendor's lien" upon the property to secure the payment of the purchase-money notes and also took back from such corporation its irrevocable letter of attorney, authorizing him to sell so much of the property as should be necessary to pay the purchase-money notes, the vendor acquired an equitable mortgage, and that while the new corporation formed by the purchasers of the property of the old corporation under foreclosure proceedings was a purchaser for value, it took the land in question subject to the prior lien of such equitable mortgage.

**1. Purchaser Takes Subject to Judgment Lien.** — *Southern R. Co. v. Bouknight*, (C. C. A.) 70 Fed. Rep. 442, *affirming* *Central Trust Co. v. Charlotte, etc.*, R. Co., 65 Fed. Rep. 257; *Burlington, etc.*, R. Co. *v. Verry*, 48 Iowa 458; *Atchison, etc.*, R. Co. *v. Cunningham*, 59 Kan. 722; *King v. Atlantic, etc.*, R. Co., 12 Ohio Cir. Dec. 551; *Frazier v. East Tennessee, etc.*, R. Co., 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358. See also *Stewart v. Wheeling, etc.*, R. Co., 53 Ohio St. 151.

**Date When Lien Attaches.** — A provision in the statute that upon recovery of judgment the lien created thereby shall relate back to the date of the injury operates only to settle the priority between conflicting liens of the same nature, and does not have the effect of subordinating a judgment lien to that of a pre-existing mortgage executed after the passage of the statute under which the judgment lien is created. *Southern R. Co. v. Bouknight*, (C. C. A.) 70 Fed. Rep. 442, *affirming* *Central Trust Co. v. Charlotte, etc.*, R. Co., 65 Fed. Rep. 267.

**Contract for Employment of Injured Person.** — Where an employee of the old corporation was injured in its service and he thereafter entered into a contract with the corporation whereby it agreed to pay him a stated sum of money each month for five years, and he on his part agreed

to do such work for the company as he should be called upon to do, and which he might be physically able to do, it was held that the claim of such person was one for personal injuries and not for breach of contract, for the reason that the sum agreed to be paid under the contract was in liquidation of the injured person's claim for personal injuries and that his undertaking to render services if called upon was a mere incident of the settlement. *Frazier v. East Tennessee, etc.*, R. Co., 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

**A Lienholder Not Party to the Foreclosure** of the mortgage is in no manner bound by the proceedings therein and his lien is not affected thereby. *King v. Atlantic, etc.*, R. Co., 12 Ohio Cir. Dec. 551.

**2. No Lien for Judgment Recovered After Sale.** — *Jeffrey v. Moran*, 101 U. S. 285; *Julian v. Central Trust Co.*, 193 U. S. 93; *Baltimore Trust, etc., Co. v. Hofstetter*, (C. C. A.) 85 Fed. Rep. 75; *Burlington, etc.*, R. Co. *v. Verry*, 48 Iowa 458.

And this is true even though the property did not pass out of the receiver's hands until after judgment and he turned over to the new corporation a large sum of money, more than sufficient to pay the amount of the judgment. *Brockert v. Iowa Cent. R. Co.*, 93 Iowa 132.

**3. Action Pending at Time of Sale.** — *Burlington, etc.*, R. Co. *v. Verry*, 48 Iowa 458.

**4. Purchasers Take Property Free from Junior Liens.** — *Cooper v. Corbin*, 105 Ill. 224; *Bell v. Chicago, etc.*, R. Co., 34 La. Ann. 785; *National Foundry, etc., Works v. Oconto City Water Supply Co.*, 105 Wis. 48.

When the mortgage is foreclosed the title of the purchasers for the purpose of cutting off subsequent liens relates back to the date of the recording of the mortgage. *Cooper v. Corbin*, 105 Ill. 224. These principles have been applied to mechanics' or materialmen's liens. *National Foundry, etc., Works v. Oconto City Water Supply Co.*, 105 Wis. 48. See also *Andrews v. National Foundry, etc., Works*, (C. C. A.) 76 Fed. Rep. 166, 77 Fed. Rep. 774.

**5. Lien for Taxes Is Paramount.** — *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Terre Haute, etc.*, R. Co. *v. Harrison*, (C. C. A.) 96 Fed. Rep. 907; *State v. Montclair, etc.*, R. Co., 43 N. J. L. 524.

(b) **Right of Junior Mortgagee to Redeem** — *aa. WHEN NOT PARTY TO FORECLOSURE PROCEEDINGS.* — When the property is sold under a senior mortgage, the purchasers, in the absence of a statute to the contrary, take it subject to the equity of redemption of a junior mortgagee who was not made a party to the foreclosure proceedings;<sup>1</sup> but in such case the junior mortgagee may lose the right to redeem by limitation or by laches.<sup>2</sup>

*bb. WHEN PARTY TO FORECLOSURE PROCEEDINGS.* — And if the decree orders a sale under the senior mortgage, the junior mortgagee, though a party to the suit, does not ordinarily lose the right to redeem unless the decree contains an order expressly cutting off such right;<sup>3</sup> but such an order is not substantially or even formally necessary where the junior mortgagee is a party to the foreclosure suit, there is a prayer in the foreclosure bill that he be decreed to redeem, the priority of the senior mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, as in such case the junior mortgagee must be deemed in equity to have waived the right to redeem by standing by without objection while the sale is made and confirmed.<sup>4</sup>

*cc. WHEN RIGHT PRESERVED BY DECREE.* — Even if the decree uses language indicating an intention to preserve the right of the junior mortgagee to redeem, he will lose such right and will be deemed to have acquiesced in the title of the purchasers when he delays an unreasonable length of time and until after the intervention of the rights of third persons, before attempting to assert his right.<sup>5</sup>

**Lien for Taxes on Personalty.** — Where a lien for taxes on the personal property of a railroad company attached after the execution and recording of a valid mortgage, it was held that it reached only the equity of redemption and that the purchasers under foreclosure of the mortgage acquired a title to the property free from such tax lien, the equity of redemption having been cut off by the foreclosure. The court said, however, that if the taxes had been upon real estate a different rule would have prevailed, as such a tax would have become a charge upon the land itself. *Cooper v. Corbin*, 105 Ill. 224, Walker, J., *dissenting*. See also *Binkert v. Wabash R. Co.*, 98 Ill. 205, Walker, J., *dissenting*.

**1. Junior Mortgagee's Right of Redemption.** — *Memphis, etc., R. Co. v. State*, 37 Ark. 632.

**2. Forfeiture of Right to Redeem.** — A judgment was recovered in *Wisconsin* against a railroad corporation and by statute became a lien on the corporation's property. Subsequently the corporation, which had mortgages outstanding at the time of the judgment, executed another mortgage. At a later date the judgment creditor brought a suit in equity for the enforcement of his judgment lien and obtained a decree which resulted in the sale to a new corporation of the property and franchises of the old corporation. The junior mortgages were not made parties to the suit. After the confirmation of the sale the purchasers went into possession of the property and paid out several millions of dollars in discharging the liens of prior judgments and senior mortgages, of which facts the junior mortgagees had knowledge. After a delay of more than thirty years, the junior mortgagees filed a bill for the foreclosure of their mortgage and to have it declared a lien on the property and franchises in the possession of the new corporation. The court denied the relief sought on the following grounds:

(1) That the purchasers acquired a good title to the entire property and franchises of the mortgagor corporation, subject only to the liens of prior judgments and the senior mortgages; (2) that the junior mortgagees were barred by limitation under Rev. Stat. Wis., 1898, § 4211, which provides that "where the occupant or those under whom he claims entered into the possession of any premises under claim of title, exclusive of any other right founding such claim upon some written instrument as being a conveyance of the premises in question, or upon the judgment of some competent court, and there has been continual occupation and possession of the premises included in such instrument or judgment under such claim for ten years, the premises shall be deemed to have been held adversely;" (3) that the gross laches of the junior mortgagees in not pressing their claim sooner, after full knowledge that the new corporation had gone into possession of the property under claim of title that was adverse to their interest, and had made large and valuable improvements and paid off several million dollars of prior liens, was such as to render unjust and inequitable a foreclosure sought at such a late date. *Gunnison v. Chicago, etc., R. Co.*, 117 Fed. Rep. 629.

**3. Decree Not Cutting Off Right of Redemption.** — *Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278. See also *Simmons v. Taylor*, 23 Fed. Rep. 849, 38 Fed. Rep. 682.

**4. Waiver of Right of Redemption.** — *Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278. *Contra, Simmons v. Taylor*, 23 Fed. Rep. 849, 38 Fed. Rep. 682, Shiras, J., *dissenting*.

**5. Right of Redemption Lost by Laches.** — *Simmons v. Burlington, etc., R. Co.*, 159 U. S. 278, *followed in Gunnison v. Chicago, etc., R. Co.*, 117 Fed. Rep. 629. *Compare Simmons v. Taylor*, 23 Fed. Rep. 849, 38 Fed. Rep. 682.



g. **LIABILITY TO UNPAID LANDOWNER FOR RIGHT OF WAY** — (1) *Land Acquired by Right of Eminent Domain* — (a) **Adoption of Appropriation by New Corporation.** — The principles which render the purchasers liable under a contract which they adopt apply with peculiar force to the adoption of an appropriation of land for public purposes; and in such case the new corporation must, as a condition precedent to its use and enjoyment of the right of way acquired by its purchase, pay to the unpaid landowner the compensation which was agreed on by the original parties after condemnation or fixed by judicial proceedings.<sup>1</sup> It has even been held that the purchasing corporation cannot, after adopting the appropriation, escape payment for the value of the land appropriated by merely abandoning its use and occupancy and ceasing to exclude the former owner from the use and enjoyment of the land.<sup>2</sup>

(b) **Grounds upon Which New Corporation Liable.** — In some jurisdictions the liability of the new corporation arises from a statutory lien in favor of the unpaid landowner,<sup>3</sup> and in others it is said to spring from the landowner's constitutional right to compensation for property taken without his consent.<sup>4</sup>

1. **Liability to Unpaid Landowner** — *Arkansas.* — *Organ v. Memphis, etc., R. Co.,* 51 Ark. 235, 39 Am. & Eng. R. Cas. 75.

*Indiana.* — *Lake Erie, etc., R. Co. v. Griffin,* 92 Ind. 487, 107 Ind. 464; *Chicago, etc., R. Co. v. Galey, (Ind. 1895)* 3 Am. & Eng. R. Cas. N. S. 234; *New York, etc., R. Co. v. Hammond,* 132 Ind. 475; *Chicago, etc., R. Co. v. Hall,* 135 Ind. 91.

*Kansas.* — *Missouri Pac. R. Co. v. Henrie,* 5 Kan. App. 614, 6 Am. & Eng. R. Cas. N. S. 790.

*Massachusetts.* — *Drury v. Midland R. Co.,* 127 Mass. 571.

*New Jersey.* — *New York, etc., R. Co. v. Stanley,* 35 N. J. Eq. 283, affirming 34 N. J. Eq. 55.

*North Carolina.* — *Hendrick v. Carolina Cent. R. Co.,* 101 N. Car. 617.

*Pennsylvania.* — *Western Pennsylvania R. Co. v. Johnston,* 59 Pa. St. 290; *Wheeling, etc., R. Co.'s Appeal,* 1 Penny. (Pa.) 360.

*South Carolina.* — *Gillison v. Savannah, etc., R. Co.,* 7 S. Car. 173.

*Wisconsin.* — *Pfeifer v. Sheboygan, etc., R. Co.,* 18 Wis. 155; *Gilman v. Sheboygan, etc., R. Co.,* 40 Wis. 653.

See also *Rio Grande, etc., R. Co. v. Ortiz,* 75 Tex. 602, 44 Am. & Eng. R. Cas. 67; *Gilman v. Sheboygan, etc., R. Co.,* 37 Wis. 317.

**Right to Recover Not Dependent on Lien.** — The right of a landowner to recover compensation from the new corporation for land taken by the old is not dependent on a lien, hence his right of action is not prejudiced by the action of the court which has jurisdiction of the foreclosure proceedings in refusing to declare his judgment against the old corporation a lien on the mortgaged property. *Rio Grande, etc., R. Co. v. Ortiz,* 75 Tex. 602, 44 Am. & Eng. R. Cas. 67.

**Enforcement of Executory Contract.** — A railroad which acquires land in the exercise of its right of eminent domain holds it as a purchaser under a contract for the sale of the land. This contract arises by operation of law, but its incidents are the same, as affecting parties, as if it resulted from the voluntary act and consent of the parties. The contract is executory until the landowner is compensated in the man-

ner prescribed by statute. And the landowner has a lien in the nature of an equitable mortgage on the land as security for the payment of the compensation to which he is entitled. When the property and franchises of a railroad corporation are sold under foreclosure proceedings, the new corporation formed by the purchasers is not as to an unpaid landowner a purchaser for value without notice of the landowner's lien. Hence, the landowner may maintain a bill in equity to compel the new corporation to complete the contract of purchase by paying the valuation fixed upon the land or else restore the land. *Gillison v. Savannah, etc., R. Co.,* 7 S. Car. 173.

**Laches of the Landowner** — such as failure to assert his rights for a period of nearly ten years — when taken in connection with circumstances tending to show that he acquiesced in the taking of his land, and released all damages for a valuable consideration, ought to preclude him from relief against a purchaser at the foreclosure sale. *Cory v. Chicago, etc., R. Co.,* 100 Mo. 282, 44 Am. & Eng. R. Cas. 183.

2. **Abandonment of Occupancy.** — *Lake Erie, etc., R. Co. v. Griffin,* 107 Ind. 464.

3. **Statutory Lien of Unpaid Landowner.** — *Bridgman v. St. Johnsbury, etc., R. Co.,* 58 Vt. 198, 23 Am. & Eng. R. Cas. 30. See also *Drury v. Midland R. Co.,* 127 Mass. 571.

4. **The Landowner's Constitutional Right to Compensation** for land taken for public purposes can be extinguished only by payment, release, or limitation. His lien is paramount to that of a mortgage given by the corporation which appropriated his property. *Organ v. Memphis, etc., R. Co.,* 51 Ark. 235, 39 Am. & Eng. R. Cas. 75; *Western Pennsylvania R. Co. v. Johnston,* 59 Pa. St. 290; *Buffalo, etc., R. Co. v. Harvey,* 107 Pa. St. 319. See also *Kit-tell v. Missisquoi R. Co.,* 56 Vt. 96; *Adams v. St. Johnsbury, etc., R. Co.,* 57 Vt. 240. Compare *Campbell v. Pittsburgh, etc., R. Co.,* 137 Pa. St. 594, holding that where the claim is in the shape of a general judgment against the old corporation for damages by trespass, it is in no legal sense a claim for land taken or right of way acquired, but is merely a general debt of the old corporation for which the new corporation is not liable.



(c) **Effect of Judgment Against Old Corporation.** — In any event, the fact that the former landowner has a judgment against the mortgagor corporation does not affect the liability of the purchasing corporation, as its liability is based solely upon the adoption of the original appropriation or upon the landowner's right to compensation for his land;<sup>1</sup> but a court of equity will regard such judgment as conclusive on the question of the value of the land appropriated.<sup>2</sup>

(d) **Remedies of Unpaid Landowner.** — It seems that under some circumstances the unpaid landowner may maintain an action at law against the new corporation,<sup>3</sup> but as a rule he must proceed in equity by a bill to restrain the new corporation from using the land until it compensates him.<sup>4</sup>

(e) **Measure of Damages.** — The general rule is that the measure of the new corporation's liability is the value of the land at the time it was originally taken,<sup>5</sup> and all damages sustained by reason of the taking,<sup>6</sup> together with interest on the value of the land and on the damages from the time of the taking.<sup>7</sup>

**1. Judgment Against Old Corporation Does Not Affect Liability of New.** — *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487; *Lake Erie, etc., R. Co. v. Griffin*, 107 Ind. 464; *Gilman v. Sheboygan, etc., R. Co.*, 37 Wis. 317. Compare *Pfeifer v. Sheboygan, etc., R. Co.*, 18 Wis. 155.

**Judgment Does Not Preclude Recovery.** — The fact that the landowner recovered judgment against the old corporation does not preclude him from claiming compensation from the new corporation. *Rio Grande, etc., R. Co. v. Ortiz*, 75 Tex. 602, 44 Am. & Eng. R. Cas. 67.

**Judgment Against Old Corporation Does Not Destroy Statutory Lien.** — *Bridgman v. St. Johnsbury, etc., R. Co.*, 58 Vt. 198, 23 Am. & Eng. R. Cas. 30.

**2. Judgment Conclusive as to Value.** — *Lake Erie, etc., R. Co. v. Griffin*, 107 Ind. 464; *New York, etc., R. Co. v. Hammond*, 132 Ind. 475; *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183; *Rio Grande, etc., R. Co. v. Ortiz*, 75 Tex. 602, 44 Am. & Eng. R. Cas. 67; *Bridgman v. St. Johnsbury, etc., R. Co.*, 58 Vt. 198, 23 Am. & Eng. R. Cas. 30. See also *Chicago, etc., R. Co. v. Galey*, (Ind. 1895) 3 Am. & Eng. R. Cas. N. S. 234.

**3. Action at Law Against New Corporation.** — *Pfeifer v. Sheboygan, etc., R. Co.*, 18 Wis. 155.

**4. Injunction Suit Usual Remedy.** — *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75; *Gillison v. Savannah, etc., R. Co.*, 7 S. Car. 173; *Kendall v. Missisquoi, etc., R. Co.*, 55 Vt. 438, 14 Am. & Eng. R. Cas. 423; *Kittell v. Missisquoi R. Co.*, 56 Vt. 96; *Gilman v. Sheboygan, etc., R. Co.*, 40 Wis. 653, *distinguishing Pfeifer v. Sheboygan, etc., R. Co.*, 18 Wis. 155. See also *Chicago, etc., R. Co. v. Hall*, 135 Ind. 91; *Gilman v. Sheboygan, etc., R. Co.*, 37 Wis. 317.

**Statute of Limitations.** — A suit in equity against a new corporation formed by the purchasers of the property of a railroad corporation sold under foreclosure proceedings, to restrain the defendant from using or occupying land appropriated by the old corporation, is an action for equitable relief founded upon the title to real estate, and under the provisions of Stat. Wis., c. 138, § 3, is not barred if brought within twenty years from the time the right of action accrues. *Gilman v. Sheboygan, etc., R. Co.*, 40 Wis. 653.

**5. The Value at the Time of the Original Taking**

by the old corporation, and not the value at the time the new corporation takes possession, furnishes the rule of compensation. *New York, etc., R. Co. v. Stanley*, 35 N. J. Eq. 283, *affirming* 34 N. J. Eq. 55. See also *Drury v. Midland R. Co.*, 127 Mass. 571. And see *supra*, this subsection, *Effect of Judgment Against Old Corporation*. Compare *Adams v. St. Johnsbury, etc., R. Co.*, 57 Vt. 240.

**There Being No Privity of Contract Between the Mortgagor Corporation and the one formed by the purchasers of its property under foreclosure proceedings, the new corporation is not bound by an agreement as to compensation made by the mortgagor corporation, and its liability is for the value of the land at the time it acquired possession of it.** *Adams v. St. Johnsbury, etc., R. Co.*, 57 Vt. 240; *Sennott v. St. Johnsbury, etc., R. Co.*, 59 Vt. 226, 30 Am. & Eng. R. Cas. 349.

**When Mortgagee Not Bound by Contract.** — Where the owner of land on which there was a mortgage which had not been foreclosed, although the condition thereof was broken, made an agreement as to compensation with the corporation taking the land, it was held that such agreement was not binding upon the mortgagee, inasmuch as his title to the mortgaged property became perfect upon breach of the condition, subject only to the mortgagor's right of redemption; and that inasmuch as the mortgagee would not be bound by an agreement to accept an amount less than the actual damages, he could not take advantage of such agreement for the purpose of recovering a sum greater than the actual damages from the new corporation succeeding to the property and franchises of the corporation which originally took the property. *Adams v. St. Johnsbury, etc., R. Co.* 57 Vt. 240.

**6. Damages Sustained by Landowner.** — *New York, etc., R. Co. v. Stanley*, 35 N. J. Eq. 283, *affirming* 34 N. J. Eq. 55.

**7. Interest Recoverable from Date of Original Taking.** — *Drury v. Midland R. Co.*, 127 Mass. 571; *New York, etc., R. Co. v. Stanley*, 35 N. J. Eq. 283, *affirming* 34 N. J. Eq. 55.

Compare *Adams v. St. Johnsbury, etc., R. Co.*, 57 Vt. 240; *Sennott v. St. Johnsbury, etc., R. Co.*, 59 Vt. 226, 30 Am. & Eng. R. Cas. 349, holding that inasmuch as the new corporation may take the land *de novo* in the exercise of

(2) *Land Acquired by Contract* — (a) *In General.* — The foregoing principles apply only to land acquired by the mortgagor corporation in the exercise of its right of eminent domain. If the owner of the land conveyed his title thereto to the mortgagor corporation, in consideration of its promise to pay, without reserving a lien, he became merely a general unsecured creditor and cannot, after the foreclosure of the mortgage, hold the new corporation formed by the purchasers liable for the payment of his debt.<sup>1</sup>

(b) *When New Corporation Deviates from Right of Way Granted.* — But if the purchasing corporation deviates from the right of way granted to the mortgagor corporation, it cannot escape liability for the taking resulting from such deviation by the fact that the landowner received compensation from the original corporation for the original grant.<sup>2</sup>

h. *TAX UPON REINCORPORATION* — (1) *Liability of New Corporation.* — The reorganized corporation is liable for a tax upon incorporation when it is a new and distinct corporation,<sup>3</sup> but not when it is merely a continuation of the old corporation.<sup>4</sup>

(2) *Validity of Statute Requiring Payment.* — A statute in force at the time of the execution of a mortgage on the property and franchises of a corporation, authorizing the purchasers at the foreclosure sale to organize a new corporation, is not a contract, and therefore a subsequent statute requiring the payment of an incorporation tax as a condition precedent to such purchasers becoming a corporation is not invalid as impairing the obligation of a contract.<sup>5</sup>

i. *OVERISSUE OF STOCK* — (1) *When Void.* — It is sometimes provided by statute that no corporation shall issue stock or bonds except for an equivalent in money paid or labor done or property actually received and applied to the purposes for which such corporation was created. It has been held that such a statute renders void a subsequent contract whereby the stockholders of an existing corporation agree with promoters to issue to them for

its right of eminent domain, it should be liable for interest only from the date of its possession.

**Interest Allowable on Value and Damages.** — *Drury v. Midland R. Co.*, 127 Mass. 571; *New York, etc., R. Co. v. Stanley*, 35 N. J. Eq. 283, affirming 34 N. J. Eq. 55.

**Interest Is Compensation.** — Paying interest on the value of the land and damages from the date of the original entry is not paying a debt of the old corporation; it is making a recompense to which the landowner is equitably entitled. *New York, etc., R. Co. v. Stanley*, 35 N. J. Eq. 283, affirming 34 N. J. Eq. 55.

**Long Delay in Bringing to Trial** a proceeding brought within the time limited by statute does not affect the right of the landowner to interest. *Drury v. Midland R. Co.*, 127 Mass. 571.

1. **Land Acquired by Old Corporation by Contract.** — *Vilas v. Milwaukee, etc., R. Co.*, 17 Wis. 499, distinguished in *Pfeifer v. Sheboygan, etc., R. Co.*, 18 Wis. 155. See also *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183. Compare *Dayton, etc., R. Co. v. Lewton*, 20 Ohio St. 401, wherein it was held that a landowner who conveyed an easement to the mortgagor company but retained the legal title to the land itself had an equitable lien on the land.

**An Action of Assumpsit Cannot Be Maintained** against the new corporation on a judgment recovered by a landowner against the old corporation for trespass in wrongfully entering upon his land. This is particularly true where, after recovery of judgment and before the fore-

closure sale, the landowner granted a right of way to the old corporation, even though he did not release the damages for the previous trespass. *Campbell v. Pittsburgh, etc., R. Co.*, 137 Pa. St. 575, 46 Am. & Eng. R. Cas. 353.

**A Constitutional Provision Authorizing Taking upon Giving a Bond** has the effect of vesting in the corporation making the appropriation the title to the right of way upon giving the required security. Hence, the purchasing corporation acquires a clear title to the right of way, and a landowner cannot hold it liable on a judgment for damages recovered against the old corporation, but must fall back on his remedy under the bond given him by the old corporation. *Fries v. Southern Pennsylvania R., etc., Co.*, 85 Pa. St. 73.

2. **Deviation from Right of Way Granted.** — *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455, where the mortgagor corporation failed to construct the line as contemplated in the agreement with the landowner, and the purchasing corporation followed the old line for a short part of the distance, but occupied a totally different location for the remainder of the distance.

3. **New Corporation Taxable.** — *People v. Cook*, 110 N. Y. 443, affirmed 148 U. S. 397; *In re New York, etc., Invest. Co.*, (Supm. Ct. Spec. T.) 16 N. Y. Supp. 213.

4. **Continuation of Old Corporation Not Taxable.** — *Matter of Kansas City Smelting Co.*, 13 N. Y. App. Div. 50.

5. *People v. Cook*, 148 U. S. 397, affirming 110 N. Y. 443, 47 Hun (N. Y.) 467.



their services in the reorganization of the corporation bonds and stocks of the new corporation in excess of the cash market value of such services.<sup>1</sup>

(2) *When Valid.* — But this statutory provision does not apply to an issuance by a new corporation (without requiring payment of money) of fully paid stock to the foreclosure purchasers from whom it has purchased the property acquired at the foreclosure sale, and to whom it has issued new bonds in lieu of the old ones, as the foreclosure purchasers have the right to fix the terms upon which they will surrender the property to the corporation of which they are to be the sole stockholders.<sup>2</sup>

**IV. REORGANIZATION WITHOUT FORECLOSURE — 1. Rights of Stockholders —**  
*a. REORGANIZATION OR SALE BY MAJORITY STOCKHOLDERS — (1) Sale Fraudulent as to Minority Stockholders.* — The majority stockholders of a corporation have no power to exclude the minority stockholders therefrom by the subterfuge of organizing a new corporation and selling, or otherwise transferring, all the property and good will of the old corporation to the new, without the consent of the minority stockholders.<sup>3</sup> Such a sale or transfer when made without authority of statute will be set aside at the instance of dissident minority stockholders who take seasonable steps to protect their interests.<sup>4</sup> However, if the minority stockholders delay taking action until the rights of third persons have intervened by the purchase of stock in the new corporation, the court may refuse to set the sale aside, and may remit the complaining stockholders to their remedy against the officers and directors of the old corporation for their breach of duty in making the fraudulent sale.<sup>5</sup>

(2) *Right of Minority Stockholders to Participate in Reorganization.* — A stockholder who wishes to participate in a plan for the reorganization of a corporation without foreclosure or sale is entitled to do so only when he performs the conditions imposed by the reorganization agreement; and a participating stockholder is bound by the terms of such agreement.<sup>6</sup> A stockholder who fails or refuses to participate in such a reorganization of an insol-

**1. Excessive Issue of Stock to Promoters.** — *Altenberg v. Grant*, (C. C. A.) 85 Fed. Rep. 345, *affirming* (C. C. A.) 83 Fed. Rep. 980.

**2. Does Not Apply to Reorganization of Corporation.** — *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287, *following* *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187; *Memphis, etc., R. Co. v. Dow*, 19 Fed. Rep. 388. See also *Cushman v. Bonfield*, 36 Ill. App. 436, *affirmed* 139 Ill. 219.

**3. Sale Fraudulent as to Minority Stockholders.** — *Price v. Holcomb*, 89 Iowa 123; *Smith v. Smith*, 125 Mich. 234; *McLeod v. Lincoln Medical College*, (Neb. 1904) 98 N. W. Rep. 672; *Hinds v. Fishkill, etc., Equitable Gas Co.*, 96 N. Y. App. Div. 14. See also *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320.

**A Sale by Directors to a Corporation Which They Control** is voidable, but not absolutely void. *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38. *Compare* *Banks v. Judah*, 8 Conn. 145.

**4. Fraudulent Sale May Be Rescinded.** — *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Hinds v. Fishkill, etc., Equitable Gas Co.*, 96 N. Y. App. Div. 14.

**5. Laches of Minority Precluding Relief.** — *Hinds v. Fishkill, etc., Equitable Gas Co.*, 96 N. Y. App. Div. 14. See also *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38. *Compare* *Banks v. Judah*, 8 Conn. 145, where a stockholder who had knowledge of the sale which was constructively fraudulent as to him, but not actually so, and who waited eight years

before bringing a suit, was denied relief in equity and left to assert such legal rights as he might have in regard to the transaction.

**The Directors Should Be Held Liable Only for Losses Sustained by the Old Corporation** by reason of the price received for the property sold. If the property sold for more than it was worth, the old corporation and its stockholders are gainers and not losers by the transaction, and therefore cannot recover damages from the directors and officers of the old corporation for their action in making the sale. *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38.

**6. Payment of Stockholder's Indebtedness to Old Corporation.** — A reorganization agreement which provides that no stockholder who is indebted to the old corporation shall receive stock under the reorganization until the debt is fully paid, that stockholders shall be allowed to surrender their old shares of stock at par in payment of such indebtedness, and that in cases where the debt of a stockholder to the corporation remains unpaid for a period of sixty days after the procuring of a new charter, the board of directors is authorized to apply so much of the old stock of the indebted stockholder at par as will extinguish the debt and issue any balance of stock to him, is a reasonable provision, and stockholders who wish to participate in the reorganization must comply with the terms of the agreement. *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282.



vent corporation and to pay the assessments levied upon the participating stockholders cannot, after the lapse of several years, claim the right to acquire stock in the corporation as reorganized, but may be entitled to compensation in money for any damages sustained by the action of the majority in carrying out the reorganization.<sup>1</sup>

(3) *Estoppel of Minority Stockholders to Object.* — The surrender of his stock in the old corporation and the acceptance in lieu thereof of stock in the new corporation preclude a stockholder from thereafter insisting upon payment in cash for his interest in the old corporation.<sup>2</sup>

(4) *When Old Corporation Unable to Continue Business.* — If the affairs of a purely private corporation are in such a condition that it is impracticable or unprofitable for it to continue doing business, a sale of its assets made in good faith for the purpose of winding up its affairs is valid as against dissenting minority stockholders, even though the sale is made to a new corporation formed by the directors and majority stockholders of the old corporation.<sup>3</sup> But absolute good faith is indispensable to the validity of such a transaction, and if the old corporation's embarrassment is used as a pretext to enable the directors to obtain a fraudulent advantage over the other stockholders, the directors who participate in the organization of the new corporation will be liable to nonparticipating stockholders for violation of their trust.<sup>4</sup>

(5) *Formation of New Corporation After Dissolution of Old.* — The contractual relations which exist between a corporation and its stockholders and

**1. Right to Participation Lost by Laches.** — *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52.

**Laches of Old Stockholder's Purchaser.** — Where the stockholders of a corporation decided to reorganize it, appropriate the assets of the old concern to the payment of its debts so far as they would go, cancel the old stock, and give to each stockholder the privilege of subscribing to the new stock in proportion to his holdings in the old company, for which new stock he was to pay cash in full, it was held that a person who purchased stock in the old company from a director thereof, shortly after the stockholders' meeting, and to whom the new corporation refused to issue new stock on the ground that the old stock had been canceled, was not entitled, after waiting nearly seven years before seeking relief, to compel the new corporation to issue new stock to him, even though there was some question as to the legality of its action in canceling the old stock. *Stoddard v. Decatur Cracker Co.*, 184 Ill. 53, affirming 84 Ill. App. 374.

**2. Estoppel of Stockholder.** — This principle was applied where the old corporation at the time of the transfer had a surplus which was carried over to the new corporation and the stockholders accepted in the new corporation the same number of shares as they held in the old corporation without demanding a division of the surplus or the issuance to them of new shares of stock in lieu thereof. *Boyn-ton v. Roe*, 114 Mich. 401.

**3. Sale in Good Faith for Winding up Corporation Is Valid.** — *Hayden v. Official Hotel Red-Book, etc., Co.*, 42 Fed. Rep. 875; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393. See also *Price v. Holcomb*, 89 Iowa 123; *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38.

*Compare Banks v. Judah*, 8 Conn. 145,

where such a sale was declared to be invalid as against a nonassenting stockholder, but the stockholder was denied relief in equity because, though having knowledge of the sale (which was constructively but not actually fraudulent) and of the fact that he would be permitted to participate in the reorganization upon equal terms with the assenting stockholders, he waited eight years before attempting to assert his rights in regard to the transaction, and by his delay avoided the risk shared by those stockholders who contributed to the fund for purchasing the old corporation's property and forming the new corporation.

**Though Sale Is for Stock in New Corporation.** — *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393.

**4. Liability of Directors for Fraudulent Sale.** — Where the directors arranged for the sale of the assets of their corporation on the ground that it was a failing business and that it was imperatively necessary that some change should be made, and the purchase was made by a creditor who subsequently formed a new corporation in association with two of the directors of the old corporation, to whom he gave stock in the new corporation without consideration, it was held that the transaction amounted to a fraudulent arrangement for the purpose of "freezing out" the minority stockholders, and that a creditor of a stockholder in the old corporation who held stock as collateral was entitled to a personal judgment against the purchasing creditor and against the directors of the old corporation who participated in the organization of the new one. It was also held that the par value of the stock in the new corporation issued to the directors of the old corporation should be treated as assets of the old corporation and as such distributed amongst the minority stockholders, who were defrauded by the sale. *Smith v. Smith*, 125 Mich. 234.

between the stockholders themselves do not authorize a majority of the stockholders to force dissenting minority stockholders into contractual relations with another corporation.<sup>1</sup> Hence, when a corporation is dissolved the stockholders are entitled to have all its property sold for the highest price which it will bring and to have a *pro rata* distribution of the proceeds of the sale;<sup>2</sup> and the majority cannot compel the minority either to accept their *pro rata* share of a valuation arbitrarily fixed by the majority,<sup>3</sup> or in lieu thereof to take shares of stock in the new corporation to which the property of the dissolved corporation is to be transferred at such valuation.<sup>4</sup>

*b. WHEN SALE AUTHORIZED BY STATUTE.* — It is sometimes provided by statute that a corporation may, with the consent of the holders of the majority of its stock, sell its property and franchises to another corporation engaged in a business of the same general character. A sale under such a statute is valid only when made in good faith, and will be rescinded if fraudulent — as where the property is sold at a grossly inadequate price to a new corporation organized and controlled by the officers, directors, and majority stockholders of the old corporation.<sup>5</sup>

**2. Liability of New Corporation for Debts and Contracts of Old** — *a. IN GENERAL.* — A corporation cannot evade the payment of its debts by the artifice of voluntarily transferring its property to a new corporation organized for the purpose of carrying on the old business.<sup>6</sup>

*b. DEBTS EXPRESSLY ASSUMED.* — If the new corporation expressly assumes the debts, obligations, and other contracts of the old corporation, the receipt of the property constitutes a good consideration for the promise, which is enforceable against the new corporation at law or in equity, according to which is the more appropriate forum.<sup>7</sup> Sometimes the assumption of

**1. Minority Cannot Be Forced into New Corporation.** — *Post v. Beacon Vacuum Pump, etc., Co., (C. C. A.) 84 Fed. Rep. 371, modified on rehearing (C. C. A.) 89 Fed. Rep. 1.* See also *Bank of China, etc., v. Morse, 168 N. Y. 459, affirming 44 N. Y. App. Div. 435.*

**An Equitable Estoppel** was held to have been created against a stockholder who subscribed to his proportion of the stock of the new corporation and did not file his bill in equity for relief against the reorganization until eighteen months after the transfer of the assets to the new corporation. *Post v. Beacon Vacuum Pump, etc., Co., (C. C. A.) 84 Fed. Rep. 371, modified on rehearing (C. C. A.) 89 Fed. Rep. 1.*

**2. Minority Entitled to Distribution of Proceeds.** — *Mason v. Pewabic Min. Co., 133 U. S. 50.*

**3. Minority Not Bound by Valuation Fixed by Majority.** — *Mason v. Pewabic Min. Co., 133 U. S. 50; Post v. Beacon Vacuum Pump, etc., Co., (C. C. A.) 84 Fed. Rep. 371, modified on rehearing (C. C. A.) 89 Fed. Rep. 1.*

**4. Minority Cannot Be Compelled to Accept New Corporation Shares.** — *Mason v. Pewabic Min. Co., 133 U. S. 50; Frothingham v. Barney, 6 Hun (N. Y.) 366; Taylor v. Earle, 8 Hun (N. Y.) 1.* Compare dictum in *Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393*, to the effect that when the sale is made fairly and without collusion, minority stockholders can make no valid objection to being paid in stock in lieu of money.

**Sale of Property for Stock in New Corporation.** — Where a large majority of the stockholders voted to sell all of the property of a corporation organized under the laws of New York to a Vermont corporation, and to take in payment for

such property shares of stock in the Vermont corporation, it was held that the whole scheme of the transfer and its execution was illegal, on the ground that it was an effort to convert the New York corporation into a Vermont one, for the purpose of escaping the scrutiny into the affairs of the company permitted by the New York law to the stockholders. *Taylor v. Earle, 8 Hun (N. Y.) 1.*

**5. The Old Corporation May Rescind the Sale,** and either require a reconveyance of the property or hold the directors who thus violated their trust responsible for the damage caused to the old corporation by reason of their fraudulent disposition of its property. *Hinds v. Fishkill, etc., Equitable Gas Co., 96 N. Y. App. Div. 14.*

**6. Fraudulent Transfer of Property.** — *Blair v. St. Louis, etc., R. Co., 22 Fed. Rep. 36, 24 Fed. Rep. 148; Montgomery, etc., R. Co. v. Branch, 59 Ala. 139; Jones v. Arkansas Agricultural, etc., Co., 38 Ark. 17; Hancock v. Holbrook, 40 La. Ann. 53; Berthold v. Holaday-Klotz Land, etc., Co., 91 Mo. App. 233.*

**An Action May be Maintained Against the Old Corporation** by one of its stockholders to whom it is indebted, as its corporate existence is not terminated by its cessation of business. The fact that the creditor is also a stockholder does not deprive him of the right to bring an action, as the case differs from a simple partnership. *Cary v. Schoharie Valley Mach. Co., 2 Hun (N. Y.) 110.*

**7. Assumption of Indebtedness.** — *Central Electric Co. v. Sprague Electric Co., (C. C. A.) 120 Fed. Rep. 925; Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155; Rehberg v. Tontine Surety Co., 131 Mich. 135;*



liability is implied from the circumstances surrounding the formation of the new company and the transfer of the property to it.<sup>1</sup>

c. **IN ABSENCE OF EXPRESS ASSUMPTION.**—Even in the absence of a promise to pay the old company's debts the new company takes the property subject to such debts and may be held liable therefor to the extent of the property received.<sup>2</sup> In such case, if the new corporation is separate and dis-

Greene *v.* Middlesborough Town, etc., Co., (Ky. 1901) 61 S. W. Rep. 288; Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420; Island City Sav. Bank *v.* Wales, 3 Tex. App. Civ. Cas., § 246. See also Barker *v.* Harpster, 42 Kan. 511.

**Liability for Old Corporation's Contract.**—The assumption by the new corporation of all the liabilities, debts, and obligations of the old corporation does not obligate the new corporation to deliver shares of its stock to one to whom the old corporation agreed to deliver some of its shares in consideration of his services in obtaining for it certain leases and privileges. Conant *v.* National Ice Co., 40 N. Y. Super. Ct. 83.

**Mortgage Bondholders** of the old corporation are creditors of the new corporation which assumes the indebtedness of the old, but they have no equitable lien which can be enforced against the assets of the new corporation as against its other creditors, except their lien upon the property pledged for the payment of the mortgage debt. Blake *v.* Domestic Mfg. Co., 64 N. J. Eq. 480.

**Old Creditors Have No Priority.**—The creditors before and after the reorganization stand upon the same footing and the unsecured creditors of the old corporation have no lien or preferred claim upon the old assets acquired by the new corporation. The only way in which one creditor can obtain an advantage over the others is by the exercise of superior diligence in the prosecution of his claim to judgment and the fixing of a judgment or execution lien on the property. Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155.

**What Constitutes Assumption.**—In the absence of proof of his authority to bind the corporation, the mere statement of the president that the new company will pay the indebtedness of the old is insufficient to establish the assumption of such indebtedness, as a corporation can be bound only by its corporate act, and not by the declaration of its officer. Central Electric Co. *v.* Sprague Electric Co., (C. C. A.) 120 Fed. Rep. 925.

**A Contract to Pay Money** or in lieu thereof to deliver stock to a person in consideration of his agreement to relinquish a contract with the old corporation is within an undertaking on the part of the new corporation to assume the "obligations and liabilities" of the old. Reynolds *v.* Myers, 51 Vt. 444.

**A Judgment Subsequently Recovered** in an action pending at the time of the transfer is enforceable against the new company under its undertaking to pay the "debts" of the old corporation. Noll *v.* Chattanooga Land, etc., R. Co., (Tenn. Ch. 1896) 38 S. W. Rep. 287.

1. **Implied Assumption of Indebtedness.**—

Friedenwald Co. *v.* Asheville Tobacco Works, 117 N. Car. 544.

2. **Creditor May Follow Property into Hands of New Corporation After Fraudulent Transfer.**—*United States.*—Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 13 Fed. Rep. 516; Brum *v.* Merchants' *v.* Mut. Ins. Co., 16 Fed. Rep. 140; Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 36, 24 Fed. Rep. 148; McVicker *v.* American Opera Co., 40 Fed. Rep. 861.

*Alabama.*—Montgomery, etc., R. Co. *v.* Branch, 59 Ala. 139.

*California.*—San Francisco, etc., R. Co. *v.* Bee, 48 Cal. 398; Blanc *v.* Paymaster Min. Co., 95 Cal. 524; Higgins *v.* California Petroleum, etc., Co., 122 Cal. 373.

*District of Columbia.*—Weightman *v.* Washington Critic Co., 4 App. Cas. (D. C.) 136.

*Louisiana.*—Hancock *v.* Holbrook, 40 La. Ann. 53.

*Massachusetts.*—Ewing *v.* Composite Brake Shoe Co., 169 Mass. 72.

*Missouri.*—Slattery *v.* St. Louis, etc., Transp. Co., 91 Mo. 217; Berthold *v.* Holladay-Klotz Land, etc., Co., 91 Mo. App. 233.

*New York.*—Clokey *v.* International Rubber Clothing, etc., Co., (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 326.

*Pennsylvania.*—Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585, 19 Am. St. Rep. 663.

*Virginia.*—Barksdale *v.* Finney, 14 Gratt. (Va.) 338.

**A Domestic Corporation Succeeding a Foreign Corporation** is subject to the operation of the same rule. Clokey *v.* International Rubber Clothing, etc., Co., (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 326.

**Purchase by Director.**—The assets of an incorporated company constitute a trust fund for the payment of its debts and may be followed into the hands of any person having notice of the trust. A director of such a company who purchases its assets is not a *bona fide* purchaser without notice of the trust, and a new corporation to which he transfers the property without consideration takes it charged with a trust in favor of the creditors of the old corporation. Jones *v.* Arkansas Agricultural, etc., Co., 38 Ark. 17.

**Liability of Stockholders as Trustees.**—Stockholders who take an active part in the transfer of the assets of their corporation to a new corporation, and who receive the proceeds of sale in new stock or otherwise, are liable as trustees to unpaid creditors of the old corporation, for breach of trust in fraudulently disposing of the assets to the injury of such creditors. Hill *v.* Gruell, 42 Ill. App. 411.

**When an Individual Purchases** the property of a mining company, the sale of which was procured by fraud, and such individual holds the property in his own name for the secret benefit of the stockholders of the old company,



inct from the old, the creditor's remedy is not an action at law against the new corporation, but a suit in equity to subject the transferred property or its proceeds to the satisfaction of his claim.<sup>1</sup> These principles apply even though the stockholders of the two corporations are not precisely identical.<sup>2</sup> If the new corporation is a mere continuance of the old under a different name, an action at law may be maintained against it by a creditor of the old company.<sup>3</sup>

**Sale of Part of Assets.** — It has been held, however, that the purchase of part of the assets of a corporation by a new corporation organized by the members of the old for the purpose of carrying on the same business does not raise a conclusive presumption that the new corporation assumes and becomes liable for the debts of the old.<sup>4</sup>

**d. WHEN STATUTE EXEMPTS FROM LIABILITY.** — A state legislature has no power to impair the obligations of contracts by releasing or discharging a corporation from debts or other obligations which it has legally contracted. Hence, a statute which creates a new corporation and purports to invest it with all the "privileges, powers, rights, and franchises" of the old corporation is ineffectual to transfer anything to the new corporation or to relieve the old corporation from liability for its debts.<sup>5</sup>

**V. LIABILITY OF DE JURE FOR DEBTS OF DE FACTO CORPORATION.** — When a *de facto* corporation is converted into a *de jure* one by the filing of proper articles of incorporation, an agreement by which the latter takes the property of the former and agrees to pay its debts is valid, and the creditors of the *de facto* corporation may hold the *de jure* corporation liable under its promise

the sale is void, and creditors of the old company may levy on ore mined by the purchaser. *State v. McBride*, 105 Mo. 265.

**A Compromise of Some of the Debts by the new company should not be taken into consideration.** Thus, if the assets of the old company taken by the new are insufficient to pay the old debts in full, such assets will be treated as a fund for the payment of all the debts of the old company, *pro rata*, and noncompromising creditors can derive no benefit from the fact that the new company has settled with certain creditors for amounts less than their respective *pro rata* shares of the fund. *Bank v. Chattanooga Pulley Co.*, 97 Tenn. 308.

**Corporations Held Not Identical.** — Where a corporation leased its mining properties to an individual under an agreement that he should form a new corporation to which his rights under the lease should be transferred, and further stipulating that the shares of stock in the new corporation should be first offered to the shareholders of the lessor corporation, it was held that a corporation formed pursuant to such agreement and to which the stockholders of the lessor company largely subscribed was not identical with the lessor company so as to make it liable for the debts contracted by the lessee company. It was also held that the provision that the stock should be first offered to stockholders of the old company would not make the new company identical therewith, even if all the stock had been so subscribed as to have included all of the stockholders of the old company, as the new company would differ from the old company not only in organization, but also in objects and functions. *United Mines Co. v. Hatcher*, (C. C. A.) 79 Fed. Rep. 517, *reversed* 75 Fed. Rep. 369.

**1. Creditors' Remedy Is in Equity, Not at Law.** — *Jones v. Arkansas Agricultural, etc., Co.*, 38 Ark. 17; *Ewing v. Composite Brake Shoe Co.*, 169 Mass. 72; *Clokey v. International Rubber Clothing, etc., Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 326. See also *Hibernia Ins. Co. v. St. Louis, etc., Transp. Co.*, 13 Fed. Rep. 516; *McVicker v. American Opera Co.*, 40 Fed. Rep. 861; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524.

**When Judgment Against Old Corporation Unnecessary.** — The general rule is that a creditor who seeks to subject to the payment of his debt property fraudulently transferred by his debtor must first recover judgment against his debtor and have execution issue against him. If the execution is returned unsatisfied, he may then follow the property into the hands of the person or corporation to whom it was transferred. This rule, however, does not apply to a fraudulent transfer by an insolvent corporation of its property to a new corporation, as in such case equity will regard the new corporation as a mere continuation of the old one, and will permit the creditor to proceed against the property transferred without first obtaining a judgment against the old corporation. *Blanc v. Paymaster Min. Co.*, 95 Cal. 524.

**2. Rule Applies Though Stockholders Not Precisely Identical.** — *Hibernia Ins. Co. v. St. Louis, etc., Transp. Co.*, 13 Fed. Rep. 516.

**3. When Action at Law Maintainable Against New Company.** — *Douglas Printing Co. v. Ober*, (Neb. 1903) 95 N. W. Rep. 656.

**4.** *Campbell v. Farmers, etc., Bank*, 49 Neb. 143.

**5. Release from Liability by Statute.** — *Bruffett v. Great Western R. Co.*, 25 Ill. 353.

to pay their debts, as the promise is based on a good consideration.<sup>1</sup> If no such promise is made, the creditors of the *de facto* corporation have the right to follow the transferred property into the hands of the *de jure* corporation and subject it to the payment of their debts.<sup>2</sup>

**VI. REORGANIZATION IN ENGLAND AND CANADA** — 1. In England. — In England, reorganization takes place without foreclosure of the corporation's mortgage or mortgages. A "reconstruction agreement," or "scheme of arrangement" is submitted to the court, and the court is authorized by statute to approve and enforce such agreement or scheme, provided it is approved by the prescribed proportion of the persons in interest. When approved by the court the agreement becomes binding upon all stockholders and upon all creditors, those secured as well as those unsecured.<sup>3</sup> The English method of reorganization is so fundamentally and essentially different from that obtaining in the United States that it is thought no useful purpose would be served by entering into an extended discussion of the English statutes and decisions.

2. In Canada. — In Canada there is no general statute governing the reorganization of corporations, but a special act is passed for each particular case.<sup>4</sup> It has been held that such a statute is binding on bondholders even though it refers to them as a class and not by name, and even though they reside without the jurisdiction of the province by whose parliament it was passed.<sup>5</sup>

3. Effect Given in United States to Foreign Statute. — It has been held that a Canadian statute, providing for reorganization without foreclosure, which made no discrimination between British subjects and citizens of the United States was binding on bondholders who were citizens of the United States, and who resorted to the United States courts to enforce the payment of their original bonds.<sup>6</sup>

**WINDMILL.** — See note 7.

**WINDOW.** — A window is an opening in the wall of a building for the admission of light and air to the interior, and to enable those within to look out.<sup>8</sup>

1. Promise of De Jure to Pay Debts of De Facto Corporation. — *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa 147; *Benesh v. Mill Owners Mut. F. Ins. Co.*, 103 Iowa 165.

Such a promise is an original one made in consideration of receiving the property, and is not within the statute of frauds. *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa 147.

2. Liability in Absence of Express Promise. — *Georgia Ice Co. v. Porter*, 70 Ga. 637.

Defective Organization as Defense. — Where a corporation was sued upon a promissory note given by it in its corporate name, and the principal defense relied upon was that the corporation by mistake was not at the time of giving the note properly organized and that afterwards, upon ascertaining that fact, it was dissolved and a new corporation formed, it was held that the new corporation, having given the paper in the due course of its business, could not take advantage of its own mistake in the original organization by subsequently repudiating the transaction. *Empire Mfg. Co. v. Stuart*, 46 Mich. 482.

3. Reconstruction in England. — 2 Cook on Stock and Stockholders (3d ed.), §§ 884, 889; Short on Railway Bonds and Mortgages 844, note, 849, 850, 855. And see *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527.

4. No General Statute in Canada. — *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527.

5. Bondholders Bound by Special Act. — *Jones v. Canada Cent. R. Co.*, 46 U. C. Q. B. 250.

6. Canadian Statute Binding on American Bondholders. — *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527.

7. Warranty. — The defendant contracted with the plaintiffs for the purchase of a certain *windmill*, tank fixtures, etc.; the warranty was on "the within ordered *windmill*." It was contended that the warranty on the *windmill* did not cover the tank; the court held otherwise, saying: "It is contended that the warranting 'the within ordered *windmill*,' indorsed on the back of the contract, does not cover the tank used in connection therewith. This position is not tenable. The word *windmill* used in the contract of warranty refers to the whole machine as ordered by the defendant. Plaintiffs contracted to supply defendant with an appliance for drawing water and storing it for use of defendant's stock. Defendant was as much concerned in the tank or in the pump as in the mill proper. We construe the contract in the light of the circumstances, and, so construing, we must hold that the warranty includes tank, pump, mill—the whole plant." *Fairbanks v. De Lissa*, 36 Mo. App. 719. See generally the title WARRANTY, *ante*.

8. Insurance Contract. — *Hale v. Springfield F. & M. Ins. Co.*, 46 Mo. App. 508, *citing*



**WINE.** (See also the title INTOXICATING LIQUORS, vol. 17, p. 199.) — Wine is defined, first, as “the fermented juice of the grape; a spirituous liquid, resulting from the fermentation of grape juice;” and, second, “the fermented juice of certain fruits resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived; as, ginger wine, gooseberry wine, currant wine.”<sup>1</sup>

**WINNER.** (See generally the title GAMBLING CONTRACTS, vol. 14, p. 576.) — See note 2.

**WINNING.** — See note 3.

**WISH.** — The courts have often to determine whether the word “wish,” as used by a testator, gives rise to a precatory trust. In the notes will be found some cases in which the term has been held to create such a trust, and others in which, under the circumstances, it has been held not to have that effect.<sup>4</sup>

Bouvier's and Worcester's Dictionaries. In that case an insurance policy provided that plate-glass *windows* of a certain size should be separately insured. The plaintiff contended that a plate-glass front, which was immovable and stationary, was not a *window*, as the glass was part of the front of the building. This contention was upheld by the court, which said: “It is a matter of common information that glass enters almost as extensively into the construction of modern buildings as stone, wood, iron, etc. Its use is not so restricted in modern architecture as formerly. There are to be found, in almost any American city, houses into the structure of which glass so largely enters that they might, without impropriety, be characterized as ‘glass houses.’ These considerations would indicate that the clause in question is at least susceptible of the interpretation claimed by the assured. And the rule of construction in such cases is, that if there is a doubt in respect to the meaning of the terms of a clause of an insurance policy, that doubt must be resolved in favor of the interpretation of the assured, although intended otherwise by the insurer.”

**Covenant.** — But in *Burt v. Haslett*, 18 C. B. 162, 893, 86 E. C. L. 162, 893, it was held that a plate-glass shop front fixed with wooden wedges, without screws, nails, or glue, and removable without injury to the premises, was a *window* affixed or belonging to the premises within a covenant to deliver up the premises “with all *windows*,” etc.

**Bay Windows.** — As to *windows* projecting over sidewalk, see the title STREETS AND SIDEWALKS, vol. 27, p. 158.

**1. Wine.** — *Hinton v. State*, 132 Ala. 31, *quoting* *Worc. Dict.* See also *Watson v. State*, 55 Ala. 150; *State v. Moore*, 5 Blackf. (Ind.) 118.

**Spirituous Liquor.** — In *State v. Giersch*, 98 N. Car. 720, it was held that where a statute of *North Carolina* prohibited the introduction and sale of spirituous liquors, those terms were generic and included all intoxicating liquors containing alcohol, whether distilled, fermented, or vinous. This case is *disapproved* in *Sarlls v. U. S.*, 152 U. S. 574, but is in line with *Kizer v. Randleman*, 5 Jones L. (50 N. Car.) 428. See also the title INTOXICATING LIQUORS, vol. 17, p. 199.

**Judicial Notice — Intoxicating Liquor.** — See *State v. Williamson*, 21 Mo. 496; *Jones v. Sur-*

*prise*, 64 N. H. 243. And see the title INTOXICATING LIQUORS, vol. 17, p. 199.

**2. Winner — Broker.** — A broker or commission merchant who received money to pay losses incurred in certain transactions in grain, declared to be gambling contracts by statute, was held a *winner* within the meaning of a statute imposing penalties upon *winners*. *Kruse v. Kennett*, 181 Ill. 205; *Jamieson v. Wallace*, 167 Ill. 388; *Pearce v. Foote*, 113 Ill. 228; *Elder v. Talcott*, 43 Ill. App. 441. Compare *Higgins v. McCrear*, 116 U. S. 671; *White v. Barber*, 123 U. S. 392.

**Proprietor of Gaming House.** — In *Triplett v. Seelbach*, 91 Ky. 32, it was held that the proprietor of a gaming house, who received a certain per cent. of the winnings of each game, called the “take-out,” was interested in the winnings to that extent and was therefore a *winner* within the meaning of the *Kentucky* statute which gives a right of action to the loser. The court said: “We do not understand that the *winner*, in the sense of said statute, must be one of the players with cards in his hands; but if he is to receive a per cent. of the winnings by the actual player he is, in the sense of the statute, a *winner*.”

**3. Winning — Coal.** — In *Lewis v. Fothergill*, L. R. 5 Ch. 107, it is said: “There is also a dispute about what is the meaning of the word *winning*. I conceive that the coal is *won* when it is put in a state in which continuous working can go forward in the ordinary way.” See also *Rokeby v. Elliot*, 13 Ch. D. 277.

**4. Precatory Trusts.** (See also the title PRECATORY TRUSTS, vol. 22, p. 1162.) — In the following cases a trust was held to have been created: *Liddard v. Liddard*, 28 Beav. 266; *McRee v. Means*, 34 Ala. 349; *Matter of Copeland*, (Surrogate Ct.) 38 Misc. (N. Y.) 402; *Bliven v. Seymour*, 88 N. Y. 469; *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737; *Meehan v. Brennan*, 16 N. Y. App. Div. 398; *Cook v. Ellington*, 6 Jones Eq. (59 N. Car.) 371.

In the following cases a trust was held not to have been created: *Hopkins v. Glunt*, 111 Pa. St. 287; *Lines v. Darden*, 5 Fla. 51; *Montreal Bank v. Bower*, 17 Ont. Rep. 548; *Clay v. Wood*, 153 N. Y. 134.

In *Gaston's Estate*, 188 Pa. St. 374, it is said: “If, instead of saying ‘it my *wish*,’ at the commencement of the writing [the testatrix] had said ‘it my will,’ there could have been no doubt of the intention that the disposition of



**WITH.** — The word "with," in one of its primary senses, is a word of addition, meaning "in addition to," and in that sense it is in common and frequent use by the best writers as well as by people in general.<sup>1</sup> The preposition "with" is, in general, used as denoting connection, appendage, company of, concomitance,<sup>2</sup> along with in place or time.

her property following these words was to take effect after her death. The use of the word 'will' preceding the gifts would have been conclusive as to the character of the instrument. But what distinction is there in fact between the signification of the words 'will' and *wish*, when used as preliminary to a schedule of property to be distributed among a number of beneficiaries? The *wish* of a testator as to a disposition expressed in writing, and formally signed in his lifetime, is just as effective as his 'I will,' or 'I desire,' or 'I direct.'"

1. "**With**" in the Sense of "in Addition to." — *Houston, etc., R. Co. v. State*, 95 Tex. 507.

**Exemption Statutes.** — A *Vermont* statute exempted from execution "two horses \* \* \* *with* sufficient forage for the keeping of the same." It was held that the exemption of forage was an independent claim or right, not conditioned upon the debtor's having the exempt animals. The court said: "The preposition *with*, as here used, is to be construed as connecting two independent subjects rather than as joining a dependent or qualifying clause to one subject. It is the same as if it read, 'a yoke of oxen, and, in addition thereto, forage.'" *Kimball v. Woodruff*, 55 Vt. 229.

2. **Connection.** — *Hart v. Fanny Ann*, 6 T. B. Mon. (Ky.) 51.

**Filing with.** (See also *FILE*, vol. 13, p. 13.) — The provision of the thirteenth section of the chapter of the Revised Statutes of *Illinois*, entitled "Ne Exeat and Injunctions," authorizing affidavits filed *with* the bill and answer to be read on motions to dissolve injunctions, must not be construed as requiring the affidavits to be filed at the same time *with* the bill and answer to authorize them to be read, but only to be filed in the case *with* the bill or answer, no matter when, so as it is before the hearing of the motion. *Hummert v. Schwab*, 54 Ill. 142; *Goldie v. McDonald*, 78 Ill. 605.

But in *Hossler v. Hartman*, 82 Pa. St. 55, it was held to be a sufficient compliance with the rule that the plaintiff should file *with* his declaration or statement an affidavit of claim, that they both be filed at the same time, and that the rule did not require them to be attached or deposited in the same pigeonhole.

In order to recover an attorney's fee the statute provided that an affidavit should be filed *with* the original papers. In *Wilkins v. Troutner*, 66 Iowa 559, the court said: "The statute uses the expression 'filed *with* the original papers.' It is said that *with* is not synonymous with 'at the same time.' Ordinarily this may be so, but we think it must be so construed in the statute under consideration. If this is not so, then the statute is meaningless, unless it can be said that the affidavit may be filed *with*, that is, placed among, the original papers, and filed at any time after judgment; and clearly this is not the intent of the statute."

**With and Of.** — See *OF*, vol. 21, p. 830.

**With in the Sense of By.** — See *Pettee v. Flewellen*, 2 Ga. 239.

**With Costs.** — See *Wood v. Excise Com'rs*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 507. And see 5 *ENCYC. OF PL. AND PR.*, p. 100, title *COSTS*.

**With Effect.** (See also *EFFECT*, vol. 10, p. 445.) — The common condition of an appeal bond is that the principal "shall prosecute his appeal *with effect*." The words "*with effect*," in such instrument, mean successfully. *Perreau v. Bevan*, 5 B. & C. 291, 11 E. C. L. 230; *Legate v. Marr*, 8 Blackf. (Ind.) 404; *Karhaus v. Owings*, 6 Har. & J. (Md.) 134; *Champomier v. Washington*, 2 La. Ann. 1013. See also *Robinson v. Brinson*, 20 Tex. 439; *Trent v. Rhomberg*, 66 Tex. 249; *Gould v. Warner*, 3 Wend. (N. Y.) 54; *Babbitt v. Finn*, 101 U. S. 7; *Marryott v. Young*, 33 N. J. L. 336.

In *Hobart v. Hilliard*, 11 Pick. (Mass.) 143, however, it is held that filing the transcript of the Supreme Court complies *with* the condition. But in *Trent v. Rhomberg*, 66 Tex. 249, and in *Champomier v. Washington*, 2 La. Ann. 1013, it is held that an abandonment of the appeal is a breach of the condition.

**With All Faults.** (See also the *IMPLIED WARRANTY*, vol. 15, p. 1211; *WARRANTY, ante*.) — In *Shepherd v. Kain*, 5 B. & Ald. 240, 7 E. C. L. 82, it is said: "'*With all faults*' must mean *with all faults* which it may have consistently with its being the thing described." And in that case, where a ship was advertised as "a copper fastened vessel," to be taken "*with all faults*," and it appeared that she was not copper fastened, it was held that the vendor was liable for a breach of warranty.

The meaning of selling *with all faults* is that the purchaser shall make use of his eyes and understanding to discover what defects there are. But the vendor is not to make use of any artifice or practice to conceal faults, or to prevent the purchaser from discovering a fault which he, the vendor, knew to exist. *Smith v. Andrews*, 8 Ired. L. (30 N. Car.) 6.

**With Liberty of a Port.** — As to the effect of these words in a policy of marine insurance, see *Allegre v. Maryland Ins. Co.*, 8 Gill & J. (Md.) 190, 29 Am. Dec. 536.

**With an Officer.** — A *Pennsylvania* statute provided that when the defendant appealed he should enter into a recognizance *with* the prothonotary in the nature of a special bail. It was held that this meant that the defendant should give sufficient security to be filed in the office of the prothonotary, and not taken out before him; that the recognizance could be entered into before such persons as are legally authorized to take bail in the court where the suit is pending. *Jones v. Badger*, 5 Binn. (Pa.) 461.

**With Quick Child.** (See also *QUICK WITH CHILD*, vol. 23, p. 587, and the references there given.) — In *Reg. v. Wycherley*, 8 C. & P. 262,

**WITHDRAW.** — To withdraw is to take away what has been enjoyed; to take from.<sup>1</sup>

**WITHDRAWING A JUROR.** — Withdrawing a juror describes a fiction to which a court may resort when it appears that, owing to some accident or surprise, defect of proof, unexpected and difficult question of law, or like reason, a trial cannot proceed without injustice to a party. In such cases a judge has power to withdraw a juror and postpone the trial.<sup>2</sup>

**WITHHOLD.** — Withhold means to retain; to keep back.<sup>3</sup>

34 E. C. L. 381, Gurney, B., said: "'Quick *with* child' is having conceived; '*with* quick child' is when the child has quickened." This distinction is denied, however, in *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248, where it is said: "There is no foundation whatever in law for this distinction. The ancient authorities show clearly that the terms are synonymous, both importing that the child had quickened in the womb, and that the period had arrived when the life of the infant, in contemplation of law, had commenced." In support of this statement the opinion cites *Baynton's Case*, 14 How. St. Tr. 634, 1 Hale's P. C. 368, 4 B. C. 395. See also *Mitchell v. Com.*, 78 Ky. 208, 39 Am. Rep. 227.

**With a Strong Hand.** — In an indictment for forcible detainer the words "and *with* a strong hand" should never be omitted. The same description and degree of force are necessary to constitute the offense of forcible detainer that are required to constitute a forcible entry. Greater force must be averred than is expressed by the phrase "*with* force and arms." The court said: "Greater force must be averred than is expressed by '*vi et armis*.'" The words 'and *with* a strong hand' should never be omitted. Whart. on Crim. Law, § 2047. These words mean something more than a common trespass. They imply that the entry was accompanied *with* that terror and violence which constitute the offense. *Com. v. Shattuck*, 4 Cush. (Mass.) 141. The same description and degree of force is necessary to constitute a forcible detainer as a forcible entry." *Com. v. Brown*, 138 Pa. St. 452. See also *Rex v. Wilson*, 8 T. R. 357; *Com. v. Shattuck*, 4 Cush. (Mass.) 141; *Baude's Case*, Cro. Jac. 41, and 9 ENCYC OF PL. AND PR. 19, title FORCIBLE ENTRY AND DETAINER.

**With Surety.** — In *Cavence v. Butler*, 6 Binn. (Pa.) 53, in order to effectuate the intent of the legislature the court construed the expression "he shall be bound *with* surety" as equivalent to "he shall be bound by surety" or "he shall find surety."

**With a View to.** — In *Stone v. Jenison*, 111 Mich. 592, Hooker, J., said: "It seems to be agreed that the right of plaintiff to recover must be based upon the fact that after the bank had committed an act of insolvency, or when in contemplation thereof, the payment sought to be recovered back was made *with* a view to prevent the application of its assets in the manner prescribed in the Banking Act, or *with* a view to the preference of one creditor over another. We may reasonably say that the words '*with* a view to' mean *with* the intent to or design of pursuing a particular course, and that this intent or design means the intent of the bank or officer making the

payment, and not the recipient of the payment."

**1. Withdraw.** — *Central R., etc., Co. v. State*, 54 Ga. 409. That case was a construction of a statute reserving to the state the right to *withdraw* franchises thereafter conferred upon private corporations.

**Withdrawal of Field Notes.** — The *Texas* statute provides a penalty for the *withdrawal* of field notes of a survey from the land office. It was held that the *withdrawal* contemplated by the statute was intended to designate the act of the owner or some one for him. The court said: "The primary meaning of the word *withdraw* carries with it the idea that the act from which it results is the act of some person who has formerly possessed, who made the deposit, who owns or controls. Of the word Mr. Richardson says: 'But to *withdraw*, e. g., implies a putting forth or forward, and then a drawing back from one person or thing to another; and considered in relation to that from which (is drawn) it denotes privation; but considered in relation to that to which (is drawn) it denotes reunion; agreeably to the meaning of the word "*with*.'" 'To draw back or away; to take back or away; to resume.' Mr. Webster gives to the word substantially the same meaning. If the legislature had intended to embrace a wrongful and unauthorized taking from the general land office, a taking wrongful to the owner and unauthorized by him, some appropriate words would certainly have been used to express such intention." *Snider v. Methvin*, 60 Tex. 498.

**An Agreement by a Partner to "withdraw from the firm"** means to *withdraw* at once; and it further means (1) "that the withdrawing partner shall make over to the continuing partners all his interest in the partnership and in the partnership assets, whether there be real or personal estate, whether there be outstanding contracts, or anything of the kind;" (2) "that the continuing partners shall indemnify the retiring partner against all the liabilities of the firm from that time forth. They take the assets, they take the benefit of the contracts, they take the chances of success for the future, and they must keep him indemnified." *Gray v. Smith*, 43 Ch. D. 208.

**Withdrawal of a Claim.** — There is not a *withdrawal* of a claim where the claim has been dismissed for failure to make parties and prosecute the claim. *Lynch v. Bond*, 19 Ga. 314.

**2. Withdrawing a Juror.** — *Wabash R. Co. v. McCormick*, 23 Ind. App. 258. See also 21 ENCYC. OF PL. AND PR. 1002, title TRIAL.

**3. Withhold.** — *People v. Lammerts*, 164 N. Y. 137.

**Distinguished from Conceal.** — *Withholding*



**WITHIN.** (See also AT, vol. 3, p. 167; IN, vol. 16, p. 123; and the title TIME (COMPUTATION OF), vol. 28, p. 209.) — This term, referring both to time and place, means in the limits or compass of; not beyond; not later than;<sup>1</sup> in the inner part.<sup>2</sup>

property is not equivalent to concealing property. The court said: "The argument of the appellee that the word 'conceal' is manifestly the synonym of *withholding*, is not sustained by any lexicographer we have consulted, or the popular sense of the term. Secrecy is an essential ingredient of the act of concealment. 'To hide or *withhold* from observation, to cover or keep from sight,' are the meanings technically and popularly conveyed by the word 'conceal.' It can scarcely be imagined that the extraordinary power of requiring an answer upon oath, with the summary process of attachment, sequestration, and commitment, were to be exercised by a court of special limited jurisdiction in every case in which the administrator or executor should allege a third person *withheld* property which belonged to the estate of the deceased." *Taylor v. Bruscup*, 27 Md. 226.

**Withholding Commissions.** — A *United States* statute provides that the postmaster-general may *withhold* commissions when he is satisfied that a postmaster has made false returns. It was held that an order of the postmaster-general reciting that he is satisfied that a false return has been made, and fixing the compensation which he deems reasonable, is not conclusive in a suit against the postmaster and sureties upon his official bond to recover the moneys alleged to have been illegally withheld. The court said: "The action of the postmaster-general in assigning a postmaster to his proper class and fixing his salary accordingly, under such provisions of the statute, is essentially different from the exercise of the discretion conferred of *withholding* commissions on such returns as the postmaster-general may be satisfied are false. To *withhold* commissions seems fairly to imply a temporary suspension rather than a total and final denial or rejection of the same. If such *withholding* is not conclusive upon the postmaster, how can the allowance made, while the commissions are being *withheld*, be treated or regarded as a final and conclusive adjudication as to the compensation the postmaster is, or shall be, entitled to receive?" *U. S. v. Dumas*, 149 U. S. 278.

1. **Within.** — *Webst. Dict.*; *Levert v. Read*, 54 Ala. 531; *Jennings v. Russell*, 92 Ala. 606; *French v. Powell*, 135 Cal. 636; *Chicago, etc., R. Co. v. Eubanks*, 32 Mo. App. 184.

2. **In the Inner Part.** — *Webst. Dict.* In several cases the courts have refused to accept this second definition, preferring, under the circumstances, that first given in the text. See *Levert v. Read*, 54 Ala. 531, and the examples set out in this note.

**Before.** — A statute provided that exceptions should be filed *within* ten days after service of notice of the filing of a commissioner's report. It was held that whether the exceptions are placed on file before or after the service, can make no difference. The court said: "Taking the statute literally, the question would

turn on the meaning of the word *within*. The primary meaning is, 'in the inner part or side of.' Worcester gives as examples these: 'Go, shut thyself *within* thy house.' *Ezek. iii. 24.* 'That which is *within* the cup and platter.' *Matt. xxiii. 26.* This meaning is therefore not applicable, as I think, to the word as used in the statute. The word is otherwise defined by both Worcester and Webster as 'not beyond;' and it is in this sense that it is used in the statute. The word *within* is not one of such preciseness as to have but one meaning, and in construing a statute we must adopt that meaning always which has application to the subject." *Chicago, etc., R. Co. v. Eubanks*, 32 Mo. App. 189.

So where a statute giving a lien on ships required a certificate to be filed *within* four days from the time of the vessel's departure from port, it was held that this allowed it to be filed at any time before the expiration of the four days. *Young v. The Orpheus*, 119 Mass. 179.

In *Atherton v. Corliss*, 101 Mass. 40, where a statute provided that a widow might waive the provision for her in her husband's will at any time *within* six months after the probate of the will, it was held that a waiver made two months before probate was sufficient.

Where a statute allowed the filing of claims against insolvent estates *within* nine months after the declaration of insolvency, it was held that the claim was properly filed before such declaration. *Levert v. Read*, 54 Ala. 529.

In *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, it is said: "When time is spoken of, any act is *within* the time named that does not extend beyond it."

**Statute of Limitations.** (See also the title LIMITATION OF ACTIONS, vol. 19, p. 219.) — A provision of the *Pennsylvania* statute gives a period of ten years after a removal of a disability for bringing suits, and "in case such person or persons shall die *within* the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit that such person or persons could or might have had by living until the disabilities should have ceased or been removed." In *Thompson v. Smith*, 7 S. & R. (Pa.) 209, 10 Am. Dec. 453, the court said: "Our act of assembly is indeed not clearly or accurately expressed when it speaks of a person dying under a disability *within* the ten years. But the meaning is that if the title first descends or accrues to a person under disability, and that person dies before the disability cease or be removed, his heir, whatever may be his condition as to ability or disability, shall have the same benefit that he himself might have had by living until the disability had ceased, that is to say, he shall have ten years from the death of his ancestor; but if the person to whom the title first descends or accrues, being then under a disability, shall live till the disability cease, then ten years and no



more shall be allowed to him and his heir, in case he died *within* the ten years." See also *Henry v. Carson*, 59 Pa. St. 302.

**Computation of Time.** (See also the title TIME (COMPUTATION OF), vol. 28, p. 209.)—*Within* a certain time generally includes the last day named. *Williams v. Burgess*, 12 Ad. & El. 635, 40 E. C. L. 142; *Massachusetts Ship Canal Co. v. Shaw*, 170 Mass. 572; *Shelton v. Gillett*, 79 Mich. 173; *Steamboat Mary Blane v. Bechler*, 12 Mo. 477; *Windsor v. China*, 4 Me. 298; *Frantz v. Kaser*, 3 S. & R. (Pa.) 395; *Union Trust Co. v. Chattanooga Electric R. Co.*, 101 Tenn. 297; *Hamilton v. State*, 101 Tenn. 417; *Chaffee v. Harrington*, 60 Vt. 718; *McDonald v. Vinette*, 58 Wis. 619. Compare *Patrick v. Faulke*, 45 Mo. 312, where under the *Missouri* statute both the first and last days were excluded.

In *Massachusetts* it was held, in *Bigelow v. Wilson*, 1 Pick. (Mass.) 487, under a statute which allowed the redemption of an equitable estate sold on execution "*within* one year next after the time of executing, by the officer to the purchaser, the deed thereof," that in computing the year allowed for the redemption, the day on which the deed was executed should be excluded.

In *Sims v. Hampton*, 1 S. & R. (Pa.) 411, the Supreme Court of *Pennsylvania* held that, in computing the twenty days allowed for entering an appeal with the prothonotary after the entry of the award of arbitrators upon his docket, the day upon which the entry of the award was made should be excluded. The words of the statute are, "shall enter such appeal with the prothonotary of the proper county \* \* \* *within* twenty days after the entry of the award of the arbitrators on his docket."

A delivering up of a poor debtor on the thirtieth day from his arrest, although not leaving time to give the statutory notice, is no breach of a recognizance to deliver up "*within* thirty days." *City Nat. Bank v. Williams*, 122 Mass. 534.

**Within Ten Days After Foreclosure.**—A statute provided that the party foreclosing a mortgage should make and file an affidavit of costs and disbursements "*within* ten days after foreclosure." It was held that the ten days begin to run, not from the day the property is offered for sale and struck off to the purchaser, but from the time the foreclosure sale is completed by the execution and recording of the certificate of sale. *Larocque v. Chapel*, 63 Minn. 517.

**"Within" in the Sense of "in" or "at the End of."**—In *Adams v. Cummiskey*, 4 Cush. (Mass.) 420, it was held that the words "*within* sixty days," in the direction to return an execution issued by a justice of the peace, mean the same as "in sixty days" or "at the end of sixty days," and that the execution could not be returned before the end of the period.

**Note Payable Within a Certain Time.**—"The note has not been put into the case, and its precise terms are not stated. Nor is it important. No case has been cited in the argument, and we have found none, giving a construction to a note where the promise is to pay a sum of money *within* a certain time.

We are inclined to believe that the maker of such a note may tender the money to the holder at any reasonable time *within* the period specified, although the holder cannot enforce the payment until the expiration of the time. The time of payment depends entirely upon the agreement of the parties. If the promise was to deliver specific articles, or to perform any other act than the payment of money, *within* a certain period, we think the party would have the right to tender the performance at any reasonable period, although the other party could not demand it till the last day; and no very sound reason occurs to us why the same rule should not apply to a contract to pay money, giving the maker an option to pay if he finds the holder at the place, in case place be specified. It is true that there is but a slight difference in phraseology between such a note and one payable 'in' a certain time; and perhaps commercial usage may have construed the latter as an engagement to pay at the expiration of the period, so that the party is not at liberty to tender payment before that time." *Buffum v. Buffum*, 11 N. H. 457.

**Sale of Land Within a Year.**—A party purchased a tract of land stipulating that it should sell *within* one year at the purchase price or over, or the vendor should make up the deficiency. It was held that the vendee was at liberty to sell the lot at any time *within* the year, although it was contended that he was bound to keep it until the end of the year. *Hakes v. Peck*, 1 Keyes (N. Y.) 505.

**Within a Certain Distance of a Road.**—To determine, under a *New Jersey* law to prevent accidents at crossings, whether a proposed new road is *within* five hundred feet of an old one, the width of the old road where it crosses the railroad must be regarded. *New York, etc., R. Co. v. Drummond*, 45 N. J. L. 511.

**Within a Certain Distance of a Named Place.**—A local law prohibiting the sale of spirituous liquors *within* three miles of a named town includes the corporate limits of the town. The court said: "It is urged that the act above referred to presents no obstacle to the granting of a license to the petitioner to sell spirituous, vinous, or malt liquors *within* the limits of the town of Falkville. The contention is that the prohibition operates only in the area extending three miles in all directions from the outer limits of the town, and not in the town itself. To impute this meaning to the words of the statute would result in defeating the obvious purpose of its enactment. \* \* \* Manifestly, the town itself is included *within* the defined limits, and only beyond those limits could the traffic in question be licensed. In *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64, the court construed a contract which stipulated that the defendant should not practice dentistry '*within* a radius of ten miles of Litchfield.' It was held that this expression meant '*within* ten miles of the centre of the village of Litchfield.' This construction seems natural and reasonable." *Jennings v. Russell*, 92 Ala. 606.

**Within the Inclosure—Distress.**—In *Pettit v. May*, 34 Wis. 666, it was held that where the plaintiff's horse, being in the street, was destroying the fence surrounding defendant's inclosure, he was liable to be distrained as doing

**WITHOUT.** — See note 1.

damage *within* the inclosure. The court said: "The horse of the plaintiff was in the street, tearing down and destroying the defendant's fence surrounding his inclosure, at the time the defendant seized and held him as an animal *damage feasant*; and the first question to be determined is, whether the horse was liable to be distrained under such circumstances. Was the horse 'doing damage within his inclosure,' so as to authorize the defendant to distrain and keep him in the manner prescribed by the statute? The fence is a part of the inclosure of the owner or occupant of lands, and to injure or destroy that is, in our judgment, to do 'damage *within* the inclosure,' as those words are used and to be understood in the statute."

**Within a Street.** — Where a statute gave power to assess, for expenses of road repair, all premises *within* certain streets, it was held that a yard — Kent and Essex Yard, Whitechapel — set back from one of such streets, and having other houses between it and the street, but the only access to which was from the street by means of carriage gates and along a private covered way, was *within* the street. *Baddeley v. Gingell*, 17 L. J. Exch. 63, 1 Exch. 319. In that case Alderson, B., said: "You cannot say that any house is literally *within* the street, and we must therefore come to the consideration of what is intended by the expression *within*;" and the yard was held (see especially judgment of Parke, B.) to be *within* the street because its sole communication was by means of the street, and because it fronted and abutted on, and derived the benefit of the repairs to, the street.

**Within or Under.** — It seems difficult to see how a grant of "minerals" "*within* or under" land is fuller, and less liable to receive a restricted meaning, than if "under" alone were used; but this suggestion has been made. *Per Romilly, M. R., Midland R. Co. v. Checkley*, L. R. 4 Eq. 25; *observed upon* by Wickens, V. C., *Hext v. Gill*, L. R. 7 Ch. 705, note.

**1. As a Word of Positive Negation.** — In *Com. v. Thompson*, 2 Allen (Mass.) 508, it was held that an averment that defendant did keep a certain dog "*without* said dog being then and there licensed according to law," was a sufficient allegation that the dog was not licensed. The court said: "And we think the allegation that the defendant kept 'a dog *without* said dog being licensed,' is of the same legal import and effect as would be an allegation that he kept 'a dog not licensed,' or 'a dog not being licensed;' that the word *without* is a word of sufficiently positive negation." The court cited and relied upon the following authorities: *Faulkner's Case*, 1 Saund. 249; *Nelson's Justice* (8th ed.) 16, 22; *Archb. on Commitments and Convictions*, 116; *Com. v. Wilson*, 11 Cush. (Mass.) 412; *Com. v. Clapp*, 5 Gray (Mass.) 98; *Com. v. Kingman*, 14 Gray (Mass.) 85; *Com. v. Tower*, 8 Met. (Mass.) 527; *Com. v. Odlin*, 23 Pick. (Mass.) 276; *Com. v. Twitchell*, 4 Cush. (Mass.) 74; *Com. v. Ober*, 12 Cush. (Mass.) 493; *State v. Keen*, 34 Me. 505; 2 *Burn's Justice* (20th ed.) 469, 470, where although the precise question was not raised, yet the phrases "*without* being duly author-

ized" or "*without* being duly licensed" had been used in the indictment or complaint, and the indictment or complaint had been sustained.

**Without Assistance — Husband and Wife.** — The *Louisiana Code* provides that "the wife has the right to administer personally her paraphernal property *without* the assistance of her husband." In *Miller v. Handy*, 33 La. Ann. 163, the court says: "The terms, '*without* assistance,' as used in this article, mean, unquestionably, *without* his control, *without* the necessity of being thereunto authorized by him, as is the case with many of her acts. It is not incompatible with her personal administration that she should avail herself of the assistance of her husband, if he is willing to render it, provided he act under her authority and merely as her proclaimed agent. Such acts, though performed by him, are still the acts of the wife, under the maxim '*qui facit per alium, facit per se*.' With regard to the administration of her paraphernal property, when she chooses to retain it, a married woman has all the powers of a *feme sole*, including the power to employ agents to aid and represent her in reference thereto. See *Reynolds v. Rowley*, 2 La. Ann. 893; *Dodd v. Orillion*, 14 La. Ann. 68; *Jordan v. Anderson*, 29 La. Ann. 749."

**Without Benefit of Salvage.** — In *Allkins v. Jupe*, 2 C. P. D. 389, it is said: "The words '*without* benefit of salvage' are definite enough; they mean that if there be any salvage upon the occurrence of a loss within the terms of the policy, the underwriter is not to have the benefit of it."

**Without Her Consent — Rape.** — In *Com. v. Burke*, 105 Mass. 376, 7 Am. Rep. 531, it was held that a man who has carnal intercourse with a woman *without* her consent, while he knows she is insensible, is guilty of rape; "*without* her consent" and "against her will" being equivalent. See also the title RAPE, vol. 23, p. 854.

**Without Contradiction.** — To say that testimony is *without* contradiction is not equivalent to saying that it is true. *Birch v. Hutchings*, 144 Mass. 563.

**Without Day.** — In *State v. Hicklin*, 5 Ark. 190, it was held that, where judgment was arrested and it was adjudged that the prisoner go *without* day, this was a final judgment discharging the prisoner.

**Without Deduction.** — A testator having directed legacies to be paid at the expiration of six months after his decease, *without* deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Barksdale v. Gilliat*, 1 Swanst. 562. See also the title SUCCESSION TAXES, vol. 27, p. 353.

**Without Deduction for Benefits — Eminent Domain.** — There are various statutory and constitutional provisions enacting that the landowner shall receive compensation for land taken under eminent domain "*without* deduction for benefits," "irrespective of benefits," etc. These provisions have received statutory construction. See the title EMINENT DOMAIN, vol. 10, p. 1043. In *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308, it was held that the expressions



**WITHOUT OFFSET.**—See the title **OFFSET**, vol. 21, p. 914.

**WITHOUT PREJUDICE.** (See also 2 ENCYC. OF PL. AND PR. 433, title **APPEALS**; 6 ENCYC. OF PL. AND PR. 919, 994, title **DISMISSAL**, **DISCONTINUANCE**, AND **NONSUIT**.)—See note 1.

"irrespective of benefits," and "*without* deduction for benefits," both of which were used in the constitution of *Ohio*, were equivalent in meaning. And in speaking of the compensation to be paid for land condemned for railroad purposes, the court, by Ranney, J., said: "The word '*irrespective*' relates to this full compensation and binds the jury to assess the amount, *without* looking at or regarding any benefits contemplated by the construction of the improvement. Where this is done and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken; which is but saying that nothing shall be deducted from that value on account of such benefits. The opposite construction, so far from requiring the assessment to be made irrespective of these benefits, in effect compels the jury to ascertain their value to the property, and to deduct so much as they have increased it; thus using a word introduced for the sole benefit of the property holder in such manner as to deprive him of a portion of the acknowledged present value of his property, or to allow him to be paid for a part of its value in benefits; and, at the same time, fastens upon the constitution the gross inconsistency of allowing a corporation to procure the right of way upon easier terms than could be done by the public."

**Without Delay.**—See 2 ENCYC. OF PL. AND PR. 239, title **APPEALS**.

**Without Fault.** (See also the title **CONTRIBUTORY NEGLIGENCE**, vol. 7, p. 368.)—A statute provides for the recovery by an employee from a railroad company, where he has sustained injuries by reason of the negligence of other employees, when he is "*without* fault" or negligence. In *Central R., etc., Co. v. Lanier*, 83 Ga. 591, the court said: "'Without fault' means that the party suing must not have done anything to contribute to his injury, or must have done everything to prevent the consequences of the company's negligence. In other words, he must show that he did nothing he ought not to have done, and neglected to do nothing he ought to have done. Under this clause of the code we think this is the clear meaning of '*without* fault or negligence.'"

In an action for damages for injuries caused by the defendant's negligence, a complaint alleging that the injury was caused "*without* the fault of plaintiff" sufficiently alleges that it occurred *without* her fault or negligence. *Mississinewa Min. Co. v. Patton*, 129 Ind. 472.

A statute provided for the separate maintenance of a wife living apart from her husband "*without* fault." It was held that this meant *without* voluntarily assenting to the separation, or *without* such failure of duty or misconduct on her part as materially contributed to the separation. *Johnson v. Johnson*, 125 Ill. 510.

**Without the Jurisdiction—Without the State.** (See also the title **LIMITATION OF ACTIONS**, vol. 19, pp. 228, 237.)—In the statute of limita-

tions "beyond the seas" is synonymous with "*without* the jurisdiction." *Alexandria Bank v. Dyer*, 5 Cranch (C. C.) 403; *Denham v. Holeman*, 26 Ga. 183.

**Without Leaving Issue.**—See the title **ISSUE**, vol. 17, p. 537; and see **LEAVE**, vol. 18, p. 700.

**Without Notice.**—See the title **PURCHASERS FOR VALUE AND WITHOUT NOTICE**, vol. 23, p. 472.

**Equivalent to "in Good Faith."**—"Without notice" and "in good faith" are equivalent terms when used in reference to a *bona fide* purchaser. *Lee v. Bowman*, 55 Mo. 400; *Coover v. Johnson*, 86 Mo. 533.

**1. Without Prejudice.**—In *Genet v. Delaware, etc., Canal Co.*, 170 N. Y. 278, it is said: "So, too, the words '*without* waiver or *prejudice*' have in the legal profession and among business men a well-understood value. They import into any writing in which they appear that the parties have agreed that, as between themselves, the receipt of the money by one, and its payment by the other, shall not, because of the facts of the receipt and payment, have any legal effect upon the rights of the parties in the premises; that such rights will be as open to settlement by negotiation or legal controversy as if the money had not been turned over by the one to the other. The contention that the phrase is meaningless, because it does not point out in terms the subject to which it relates, is without force, if the phrase has by common consent come to mean what I have asserted, namely, that each and every one of the rights of the parties in the subject-matter out of which the payment grows is not to be affected in any wise by the payment of the money and its receipt."

**As an Admission of Right.** (See also the title **ADMISSIONS**, vol. 1, p. 715.)—A letter *without prejudice* cannot be treated as an admission of right, and though in *Williams v. Thomas*, 31 L. J. Ch. 676, *Kindersley, V. C.*, said: "The party writing it can use it against the other on the question of costs" (see also *Jones v. Foxall*, 21 L. J. Ch. 725, 15 Beav. 388), yet it has been held in the *English* Court of Appeals, *questioning Williams v. Thomas*, 31 L. J. Ch. 676, that a letter written *without prejudice* cannot be looked at as furnishing good cause for depriving the successful litigant of costs. *Walker v. Wilsheer*, 23 Q. B. D. 335. This, in fact, seems to establish the principle that a letter *without prejudice* cannot be read without the consent of both parties. *Healey v. Thatcher*, 8 C. & P. 388, 34 E. C. L. 442.

In *In re Daintrey*, (1893) 2 Q. B. 116, it was held that a written notice sent by a debtor to one of his creditors that he has suspended, or is about to suspend, payment of his debts, though expressed to be written *without prejudice*, is admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition.

**Negotiation Closed by an Agreement.**—But  
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**WITHOUT RECOURSE.** (See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, pp. 276, 478, 486.) — See note 1.

**WITHOUT RESERVE.** — See the title *AUCTIONS AND AUCTIONEERS*, vol. 3, p. 492.

even as regards the rights between the parties, a letter *without prejudice* is only inadmissible so long as it relates to a negotiation; when the negotiation is closed by an agreement the privilege ceases. *Holdsworth v. Dimsdale*, 19 W. R. 798. See also *Hoghton v. Hoghton*, 15 Beav. 278; *Paddock v. Forrester*, 3 M. & G. 903, 42 E. C. L. 470.

**Whole Negotiation Covered.** — The whole negotiation is covered if its commencement is *without prejudice*. *Ex p. Harris*, 44 L. J. Bankr. 33; *Healey v. Thatcher*, 8 C. & P. 388, 34 E. C. L. 442.

**Withdrawal of Suit by Plaintiff.** — *Without prejudice* means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal. All his rights were to remain as they then stood. *Creighton v. Kerr*, 20 Wall. (U. S.) 12.

**Dismissal of Appeal.** — Where it appeared upon appeal that the statement sent up had not been settled by the judge below; and, on the appellant's motion for leave to withdraw it for correction the appeal was dismissed *without prejudice*, and after correction the case was again taken up, it was held that the dismissal of the first appeal did not operate as an affirmation of the judgment or prevent the second appeal. *Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705.

**Dismissing Libel.** — A decree dismissing a libel for divorce, *without prejudice*, even after the evidence has been heard, is not a bar to a new libel for the same cause. *Burton v. Burton*, 58 Vt. 414.

**Judgment Without Prejudice.** — In *Fisher v. Williams*, 56 Vt. 586, it was held that a judgment was conclusive and could not be collaterally attacked, although rendered *without prejudice* to the plaintiff's rights. The court said: "It is contended that the judgment was rendered *without prejudice* to the plaintiff's right to hold the sum due from the school district in this suit. We know of no practice nor authority by which a court can thus qualify a judgment. There was a judgment between the parties to the suit — the claimant and the school district. The plaintiff was not a party to that suit. How any rights could be reserved in the judgment in favor of a person who was neither a party, nor a proper person to be made party, to the suit, is beyond the comprehension of this court. If the suit had been in favor of the defendant against the district, the statute provides that the plaintiff in the trustee suit may have it stayed — beyond ascertaining therein what may be due from the trustee — until his trustee suit is ended. But, beyond this, the statute makes no provision in favor of a plaintiff in a trustee suit in regard to a

suit by the defendant against the supposed trustee. There is no such provision in regard to a suit by the claimant against the supposed trustee. When, therefore, the court rendered a judgment, that the fund sought to be attached in this suit belonged to the claimant, it concluded not only the claimant and trustee, but established judicially that the fund was the property of the claimant, and for that reason not attachable by the trustee process as the property of the defendant."

**Publication of Testimony.** — "The testimony was, by consent, published *without prejudice*, which by the common understanding of solicitors and chancellors is a consent reservation of the right to take additional testimony." *Dixon v. Higgins*, 82 Ala. 284.

**Stipulations.** — In *De Mott v. Taylor*, 51 N. J. L. 310, it is said: "The natural import of the words *without prejudice*, as they were used in the stipulation, was that no harm should result to the rights of either party by reason of his consent to the adjournment at that time."

**1. With Recourse — Without Recourse.** — In *Kline v. Keiser*, 87 Pa. St. 486, it was said: "An assignment of a specialty 'with recourse' certainly meant something. Without these words it is clear the assignee could not come back upon the assignor to make good the debt in the event of the insolvency of the obligor. If it had been an indorsement of a note, on which recourse could be had at law, *without recourse*, certainly every one would understand the expression as intended to relieve the indorser from a legal liability. Why, then, should not 'with recourse' be interpreted to mean a liability by contract when none existed in law? The literal meaning of the word is to run back, so that in the assignment it must be held to mean to run back or have recourse upon the assignor in case of nonpayment."

**Assignment of a Judgment — Partly Paid.** — A judgment, part of which had been paid and no record of such payment made, was assigned in the following form: "For value received we hereby sell and assign all our right, title, and interest in this judgment to M. *without recourse* on us." It was held, no fraud being shown, that the assignors were not liable to the assignee for the amount which had been paid on the judgment. The court said: "The assignors transferred their right, title, and interest in the judgment *without recourse*. The words used clearly indicate, in the absence of any intention to warrant the validity or value of the judgment, that it was collectible." *Scofield v. Moore*, 31 Iowa 241. Compare *Frazer v. D'Invilleirs*, 2 Pa. St. 200, 44 Am. Dec. 190.

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## CROSS-REFERENCES.

*For matters of PROCEDURE, see the title WITNESSES in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 22, p. 1325, and the cross-references there given.*

*As to Attesting Witnesses to Deeds, Wills, and Other Instruments, see in this work the titles BUILDING AND LOAN ASSOCIATIONS, vol. 4, p. 1063; CONTRACTS, vol. 7, p. 143; DEEDS, vol. 9, p. 148; EXECUTION AND PROOF OF DOCUMENTS, vol. 11, p. 583; LEGACIES AND DEVISES, vol. 18, p. 737; VERBAL AGREEMENTS (STATUTE OF FRAUDS), vol. 29, p. 864; WILLS, ante, p. 537.*

*As to Bribery or Corruption of Witnesses, see the titles ATTORNEY AND CLIENT, vol. 3, p. 312; BRIBERY, vol. 4, p. 914; CONFESSIONS, vol. 6, p. 524; EMBRACERY, vol. 10, p. 1041; ILLEGAL CONTRACTS, vol. 15, p. 978.*

*As to Contracts with Witnesses, see the title ILLEGAL CONTRACTS, vol. 15, p. 978.*

*As to Defamatory Statements in Giving Testimony, see the title LIBEL AND SLANDER, vol. 18, p. 1026.*

*As to Liability for Witness Fees, see the titles ATTORNEY AND CLIENT, vol. 3, p. 406; COUNTIES, vol. 7, p. 955.*



*As to Presence of Accused When Witnesses Are Sworn, see the title CONSTITUTIONAL LAW*, vol. 6, p. 995.

*As to Privileges from Arrest in Civil Cases, see the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*, vol. 16, p. 42.

*As to Refusal to Testify, see the titles CONTEMPT*, vol. 7, p. 46; *HABEAS CORPUS*, vol. 15, p. 179.

*As to Release of Liability for Purpose of Removing Disqualification of Interest, see the title ATTORNEY AND CLIENT*, vol. 3, p. 360.

*As to Securing and Compelling Attendance of Witnesses, see the title BAIL AND RECOGNIZANCE (IN CRIMINAL CASES)*, vol. 3, p. 729; *MANDAMUS*, vol. 19, p. 837; *UNITED STATES COMMISSIONERS*, vol. 29, p. 186; *UNITED STATES COURTS*, vol. 29, p. 211.

*As to Self-crimination, see the titles DUELLING*, vol. 10, p. 314; *ELECTIONS*, vol. 10, p. 828; *EVIDENCE*, vol. 11, p. 542.

*As to Various Matters Affecting the Competency of Witnesses, see the titles FORGERY*, vol. 13, p. 1107; *FREEMASONS*, vol. 14, p. 542; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1052; *INFAMY AND INFAMOUS CRIMES*, vol. 16, p. 246; *INFANTS*, vol. 16, p. 267; *JUDGE*, vol. 17, p. 724; *RAPE*, vol. 23, p. 880; *RELIGIOUS SOCIETIES*, vol. 24, p. 371; *SEAMEN*, vol. 25, p. 123.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ADMISSIONS*, vol. 1, p. 670; *ARBITRATION AND AWARD*, vol. 2, p. 533; *BIGAMY*, vol. 4, p. 44; *CHARACTER (IN EVIDENCE)*, vol. 5, p. 850; *CONTEMPT*, vol. 7, p. 25; *DEAF AND DUMB PERSONS*, vol. 8, p. 844; *DEPOSITIONS*, vol. 9, p. 295; *DETECTIVES*, vol. 9, p. 410; *DIVORCE*, vol. 9, p. 847; *DYING DECLARATIONS*, vol. 10, p. 359; *EVIDENCE*, vol. 11, p. 484, and the cross-references there given; *EXPERT AND OPINION EVIDENCE*, vol. 12, p. 414; *PRIVILEGED COMMUNICATIONS*, vol. 23, p. 47.

**I. DEFINITION.** — In a strict legal sense and for most purposes of this title it may be said that a witness is a person who appears before a court or judge or other officer, and, being sworn or affirmed according to law, is orally examined as to his knowledge of matters undergoing judicial investigation.<sup>1</sup> The word as a law term, however, has different significations, dependent upon the context,<sup>2</sup> and has been variously defined by courts and law

1. "Being Sworn or Affirmed." — The word "witness," in a statute authorizing the examination of "witnesses for or against" liquor dealers summoned before the license commissioners to show cause why their licenses should not be revoked, means witnesses duly sworn. *License Com'rs v. O'Connor*, 17 R. I. 40. See *infra*, this title, III. *Swearing the Witness*.

**Competency to Give Evidence in Court** is involved in the term "witness," when applied to a particular subject-matter, such as the execution of wills and the like. *Smith v. Jones*, 68 Vt. 132. To similar effect, *Barker v. Coit*, 1 Root (Conn.) 224. See the title *WILLS*, *ante*, p. 537; *infra*, this title, IV. *Competency*.

**Ordinary and Expert Witnesses Distinguished.** — *Le Mere v. McHale*, 30 Minn. 410, cited *Farmer v. Stillwater Water Co.*, 86 Minn. 59.

**Parties as Witnesses.** — Parties to actions, or suits, where competent to testify therein, are within the terms of statutes providing for the attendance or examination of witnesses. *Bliss v. Shuman*, 47 Me. 248; *Moffatt v. Prentice*, 6 Ont. Pr. 33, *sapproving dictum in Young v. O'Reilly*, 24 U. C. Q. B. 172, followed *Bank of British North America v. Eddy*, 9 Ont. Pr.

396. See also *Abshire v. Mather*, 27 Ind. 381. Under a statute authorizing the examination out of court of "any witness or person," a general order to examine witnesses does not include a party to the suit. Otherwise the word "person" in the statute would have no meaning. To be included a party should be designated by name. *Seymour v. Doull*, 23 Nova Scotia 364.

"Witness" Includes "Affiant" or "Deponent." — *Bliss v. Shuman*, 47 Me. 248.

**Examinations Before Trial.** — It is not an essential to a person being a witness that his evidence should be receivable in any event. *Examinations de bene esse* are examples to the contrary. Nor does the circumstance that an examining party has an option to use or not to use evidence taken before trial, divest the person examined of the character of "witness." *Moffatt v. Prentice*, 6 Ont. Pr. 33, *per Spragge, C.*

2. **Documentary Evidence as a "Witness."** The word "witness" does not generally include documentary evidence. *U. S. v. Wood*, 14 Pet. (U. S.) 430, *per Thompson, J.*; *Henny Buggy Co. v. Patt*, 73 Iowa 485; *State v. Farrington*, 90 Iowa 673. But it is some-

writers.<sup>1</sup> In some jurisdictions, by force of express statute, a witness is a person whose declaration under oath or affirmation is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.<sup>2</sup>

**II. SECURING ATTENDANCE OF WITNESSES.** — The various methods provided by law for securing the attendance of witnesses on trials and examinations before trial, and questions of practice and procedure arising thereon, are fully treated elsewhere.<sup>3</sup>

**III. SWEARING THE WITNESS** — 1. **In General.** — Before a witness is examined he should be sworn by the proper officer of the court,<sup>4</sup> and if a witness testifies without being sworn, and the irregularity is not discovered until after verdict, the verdict will be set aside.<sup>5</sup> If, on the other hand, the defect is discovered before the jury retires, it must be taken advantage of at once, as inaction in such a case amounts to an acquiescence in the reception of the unsworn witness's statements.<sup>6</sup>

times so used. *M'Chesney v. Lansing*, 18 Johns. (N. Y.) 388.

**Persons Not Cognizant of Facts in Issue.** — The mere fact that a person is under subpoena does not make him a witness within the contemplation of a statute providing that a witness in a case, appearing as a jurymen therein, is obnoxious to challenge for cause. A "witness" within the meaning of the statute, is one who bears testimony or furnishes evidence or proof (Cent. Dict.), and not one who, though without any knowledge of any material fact, has been summoned to attend. *Seals v. State*, 35 Tex. Crim. 138.

**Persons Voluntarily Present, but Not Testifying.** — Generally speaking a witness is one who gives evidence in a court. Thus, a person who was neither subpoenaed nor called nor used upon a trial is not a witness, within a statute fixing the compensation of witnesses, though he was present by request of one of the parties. *Fisher v. Burlington, etc., R. Co.*, 104 Iowa 588.

**Statute Punishing Bribery or Intimidation of Witnesses.** — A person who has knowledge of the facts is a witness, within a statute punishing the intimidation, persuasion, bribery, or attempted bribery of witnesses not to testify in a cause, although the cause was not begun or tried until after the alleged offense was committed. A witness is one who is cognizant or has knowledge of the fact. *Webst. Dict.*; *State v. Desforges*, 47 La. Ann. 1167. To the same effect, *State v. Tisdale*, 41 La. Ann. 338.

**1. Various Definitions of Word "Witness."** — *Bliss v. Shuman*, 47 Me. 248; *M'Chesney v. Lansing*, 18 Johns. (N. Y.) 388; *Moffatt v. Prentice*, 6 Ont. Pr. 33. See also the various law dictionaries.

**Under Statutes Removing Incompetency of Parties.** — A definition of a witness as "an indifferent person to each party, who is sworn to speak the truth, the whole truth, and nothing but the truth" (Tomlinson, L. Dict.), is no longer accurate, since the statutes enabling parties to testify. Otherwise of such a definition or statement as: "A person who gives testimony or evidence in a judicial proceeding and is sworn to speak the truth, the whole truth, and nothing but the truth" (Imperial Dict.), or "oral or unwritten testimony is that

which is given by, or taken down from the mouth of, living witnesses." 2 Dan. Ch. Pl. & Pr. (2d Am. ed.) 1030. *Moffatt v. Prentice*, 6 Ont. Pr. 33.

**2. Statutory Definitions.** — 1 *Bellinger & Cotton*, Annot. Code & Stat. Oregon, § 121. To the same effect, Code Civ. Pro. Cal., § 1878; 2 Stat. Minn., § 5657; Code Civ. Pro. Mont., § 3160.

**3.** See the title WITNESSES, 22 ENCYC. OF PL. AND PR. 1325; and *infra*, this title, XI. *Compensation and Expenses*.

**4. Witness Must Be Sworn Before Examination.** — *Rex v. Powell*, 1 Leach C. C. 110; *Rex v. Brasier*, 1 Leach C. C. 199; *Maden v. Catanach*, 7 H. & N. 360; *Manley v. Shaw*, C. & M. 361, 41 E. C. L. 200; *Atcheson v. Everitt*, Cowp. 389; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; *Hawks v. Baker*, 6 Me. 72; *Slauter v. Whitelock*, 12 Ind. 338; *People v. Frindel*, 58 Hun (N. Y.) 482; *State v. Tom*, 8 Oregon 177. See also *Gill v. Caldwell*, 1 Ill. 53; *McKinney v. People*, 7 Ill. 540. See also the title DEPOSITIONS, vol. 9, p. 331.

**The Unsworn Statements of a Prosecuting Attorney** are not evidence against a prisoner. He should be sworn as well as any other witness. *State v. Lowry*, 42 W. Va. 205.

**Failure to Swear a Witness Before the Examination Is Immaterial** if, upon being subsequently sworn, his testimony is repeated and no portion of it taken prior to the oath is admitted in evidence. *Com. v. Keck*, 148 Pa. St. 639.

**A Witness Not Sworn with the Other Witnesses**, but who is under the rule with them, may be sworn when put upon the stand to testify. *Ripley v. State*, 29 Tex. App. 37.

**Unsworn Statements** by a prisoner who calls no witnesses and gives no evidence himself are not admissible after the prosecution has summed up. *Rex v. Sheriff*, 20 Cox C. C. 334.

**5. Witness Not Sworn — Effect on Verdict.** — *Reg. v. James*, 6 Cox C. C. 5; *Hawks v. Baker*, 6 Me. 72. Compare *Rankin v. Com.*, 82 Ky. 424.

**6. Time of Objection to Unsworn Witness.** — *Slauter v. Whitelock*, 12 Ind. 338; *Cady v. Norton*, 14 Pick. (Mass.) 236. See also *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236; *Goldsmith v. State*, 32 Tex. Crim. 112.

**Infants of Tender Years Constituted an Exception to the General Rule** in the opinion of Lord Hale, who considered that such persons might be examined without oath where the exigencies of the case required it.<sup>1</sup> And 48 & 49 Vict., c. 69, § 4, provided that in cases of criminal assault on girls of tender age, they might be examined without oath, if possessed of sufficient intelligence to speak the truth, although too young to understand the nature of an oath.<sup>2</sup>

**A Witness Need Be Sworn but Once** on the trial of the same cause, though the matters in issue may be varied during the trial.<sup>3</sup>

**A Witness Must Be Sworn Generally** in a cause when he is competent in chief, and this is true even where the examination of such witness may be confined to a particular or incidental fact.<sup>4</sup>

**Testimony on Solemn Affirmation** is usually permitted by statute where a witness has conscientious scruples against taking an oath.<sup>5</sup> But a witness not belonging to a class permitted by statute to affirm must be sworn.<sup>6</sup>

**No Particular Form of Oath Is Essential at Common Law**, and the witness should be sworn in the manner which he considers the most binding on his conscience, and according to the peculiar ceremonies of his own religion.<sup>7</sup>

**A Witness Brought into Court under a Subpœna Duces Tecum** need not be sworn. He may be compelled to produce the document without being sworn,<sup>8</sup> and if he is sworn by mistake, and a question is put to him which he does not answer, the opposite party has no right to cross-examine him.<sup>9</sup>

**2. Through Interpreters.** — If the witness cannot understand the English language, an interpreter should be called and sworn. The oath is then administered in English by an officer of the court and translated by the interpreter into the vernacular of the witness.<sup>10</sup>

**IV. COMPETENCY** — **1. Persons Interested** — *a. INTRODUCTORY.* — Since in every jurisdiction the statutory abolition of the interest disqualification has rendered obsolete the common-law rules as to the competency of an interested witness,<sup>11</sup> no extended treatment of the subject will be attempted here. In the following pages will be found a general statement of the common-law rules, with the cases grouped by states under each general proposition.

*b. PARTIES OF RECORD* — (1) *In General.* — It was a general rule of the common law that a party of record was not a competent witness for himself or a co-suitor if he had any interest, however slight, in the event of the suit. As to whether a party without interest could be examined there was con-

1. **Infants of Tender Years — Oath Unnecessary.** — 2 Hale P. C. 278.

2. **48, 49 Vict., c. 69, § 4.** — Reg. v. Pruntye, 16 Cox C. C. 344; Reg. v. Wealand, 20 Q. B. D. 827. See also the title **INFANTS**, vol. 16, p. 271.

3. **Witness Need Be Sworn but Once.** — Bullock v. Koon, 9 Cow. (N. Y.) 30.

**A Witness Who Is Sworn Before Arraignment**, but after the prisoner has stated his readiness to proceed in open court, need not be resworn. State v. Weber, 22 Mo. 321.

4. **Witness Competent in Chief.** — Jackson v. Parkhurst, 4 Wend. (N. Y.) 369.

5. **Testimony on Solemn Affirmation.** — See the titles **DEPOSITIONS**, vol. 9, p. 331; **OATHS AND AFFIRMATIONS**, vol. 21, p. 744. See also Bunnell v. Whitlaw, 14 U. C. Q. B. 241.

6. **Witness Not Permitted to Affirm.** — U. S. v. Coolidge, 2 Gall. (U. S.) 364. See also Maden v. Catanach, 7 H. & N. 360, 7 Jur. N. S. 1107. See the title **OATHS AND AFFIRMATIONS**, vol. 21, p. 746.

**General Allegations** by a witness that the principles of his religion do not authorize him to be sworn are not sufficient, in the absence

of particulars, to excuse him from taking the oath. Hennegal v. Evance, 12 Ves. Jr. 201.

7. **No Particular Form of Oath Essential.** — Ramkissenseat v. Barker, 1 Atk. 19; Omychund v. Barker, 1 Atk. 21, Willes 548; Rex v. Gilham, 1 Esp. 285; Mildrone's Case, 1 Leach C. C. 412; Atcheson v. Everitt, Cowp. 389; Reg. v. Entrehman, C. & M. 248, 41 E. C. L. 139; Mee v. Reid, Peake N. P. (ed. 1795) 23. See also Noble v. People, 1 Ill. 54; McKinney v. People, 7 Ill. 540. See the title **OATHS AND AFFIRMATIONS**, vol. 21, p. 751.

8. **Witness Summoned under Subpœna Duces Tecum Need Not Be Sworn.** — Summers v. Moseley, 2 C. & M. 477, 4 Tyrw. 158; Perry v. Gibson, 3 N. & M. 462, 1 Ad. & El. 48, 28 E. C. L. 32; Davies v. Dale, M. & M. 514.

9. **Sworn by Mistake.** — Rush v. Smith, 1 C. M. & R. 94, 4 Tyrw. 675.

10. **Swearing Witness Through Interpreter.** — See the titles **INTERPRETERS**, vol. 17, p. 27; **OATHS AND AFFIRMATIONS**, vol. 21, p. 743.

11. **Statutory Abolition of Interest Disqualification.** — See *infra*, this title, VI. *Incompetency Removed by Statute*.



siderable conflict, but the weight of authority was in favor of his competency. <sup>1</sup>

(2) *Corporators and Stockholders.* — Although corporations sue and are sued in their corporate names, and their members are not technically parties of record, it is nevertheless true that the members constitute the corporation; and where a private business corporation, organized for the pecuniary gain of its members, was a party to an action, the common-law rule excluding parties

1. **General Rule — England.** — *Lloyd v. Williams*, Lee t. Hardw. 123; *Cotton v. Luttrell*, 1 Atk. 452. See also *Blackett v. Weir*, 5 B. & C. 385, 11 E. C. L. 257.

*United States.* — *Blanchard v. Sprague*, 1 Cliff. (U. S.) 288; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186; *Bridges v. Armour*, 5 How. (U. S.) 91.

*Alabama.* — *Kirksey v. Kirksey*, 41 Ala. 626

*California.* — *Lucas v. Payne*, 7 Cal. 92.

*Connecticut.* — *Bradley v. Goodyear*, 1 Day (Conn.) 104; *Weed v. Bishop*, 7 Conn. 129; *Johnson v. Blackman*, 11 Conn. 342.

*Georgia.* — *James v. Mercer University*, 17 Ga. 515; *McNabb v. Lockhart*, 18 Ga. 495.

*Illinois.* — *Marks v. Butler*, 24 Ill. 567.

*Indiana.* — *Conwell v. Smith*, 4 Ind. 359.

*Kentucky.* — *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 214.

*Louisiana.* — *Beer v. Word*, 13 La. Ann. 467; *Taylor v. Hancock*, 14 La. Ann. 704; *Beebe v. Kaiser*, 19 La. Ann. 270.

*Maryland.* — *Lingan v. Henderson*, 1 Bland (Md.) 236; *Baugh v. Culler*, 12 Md. 6.

*Massachusetts.* — *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Smith v. Smith*, 1 Allen (Mass.) 231; *Adams v. Leland*, 7 Pick. (Mass.) 62; *Nason v. Thatcher*, 7 Mass. 398; *Fischer v. Morse*, 9 Gray (Mass.) 440; *Sears v. Dillingham*, 12 Mass. 358; *Fox v. Whitney*, 16 Mass. 118.

*Missouri.* — *Steigers v. Gross*, 7 Mo. 261.

*New Jersey.* — *Little v. Arrowsmith*, 16 N. J. L. 221.

*New York.* — *Van Norden v. Striker*, 9 Wend. (N. Y.) 286; *Stockham v. Jones*, 10 Johns. (N. Y.) 21; *Robinson v. Frost*, 14 Barb. (N. Y.) 536; *Haswell v. Bussing*, 10 Johns. (N. Y.) 128; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Terry v. Dayton*, 31 Barb. (N. Y.) 519.

*North Carolina.* — *Matter of Macay*, 84 N. Car. 63.

*Pennsylvania.* — *Purviance v. Dryden*, 3 S. & R. (Pa.) 402; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Entriken v. Brown*, 32 Pa. St. 364.

*Tennessee.* — *Evans v. Gibbs*, 6 Humph. (Tenn.) 405; *Anderson v. Bradie*, 7 Yerg. (Tenn.) 297.

*Texas.* — *Evans v. Hardgrove*, 11 Tex. 210; *Nalle v. Gates*, 20 Tex. 315.

*Virginia.* — *Murphy v. Carter*, 23 Gratt. (Va.) 485.

The contrary was held in *Parke v. Bird*, 3 Pa. St. 360.

**Slight Interest Enough to Exclude — England.** — *Clutterbuck v. Huntingtower*, 1 Stra. 506; *James v. Hatfeild*, 1 Stra. 548; *Davies v. Morgan*, 1 Tyrw. 457, 1 Cromp. & J. 587; *Phillips v. Bucks*, 1 Vern. 230; *Dowdeswell v. Nott*, 2 Vern. 317; *Hopkins v. Neal*, 2 Stra. 1026; *Rex v. Governor*, etc., of Poor, 3 East 7;

*Bauerman v. Radenius*, 7 T. R. 659; *Sinclair v. Sinclair*, 13 M. & W. 640.

*United States.* — *Bridges v. Armour*, 5 How. (U. S.) 94; *Stein v. Bowman*, 13 Pet. (U. S.) 219.

*California.* — *Lucas v. Payne*, 7 Cal. 95.

*Florida.* — *Patterson v. Cobb*, 4 Fla. 485.

*Illinois.* — *Kennedy v. Evans*, 31 Ill. 258.

*Kentucky.* — *Chenoweth v. Fielding*, 2 Met. (Ky.) 517; *Sproule v. Botts*, 5 J. J. Marsh. (Ky.) 162; *Walker v. McKnight*, 15 B. Mon. (Ky.) 467, 61 Am. Dec. 190.

*Maryland.* — *Foley v. Mason*, 6 Md. 37; *Owings v. Emery*, 7 Gill (Md.) 405; *Selby v. Clayton*, 7 Gill (Md.) 240; *Wade v. Lynch*, 21 Md. 537.

*Massachusetts.* — *Adams v. Leland*, 7 Pick. (Mass.) 62; *Sears v. Dillingham*, 12 Mass. 358; *Fox v. Whitney*, 16 Mass. 118.

*Mississippi.* — *Scott v. Watkins*, 2 Smed. & M. (Miss.) 233.

*New Hampshire.* — *Essex Bank v. Rix*, 10 N. H. 201.

*North Carolina.* — *Hawkins v. Hawkins*, 2 Law Repos. (4 N. Car.) 627.

*Pennsylvania.* — *Wood v. Ludwig*, 5 S. & R. (Pa.) 446.

*South Carolina.* — *Bellamy v. Cains*, 3 Rich. L. (S. Car.) 354; *Gray v. Ottenlenqui*, 12 Rich. L. (S. Car.) 101.

*Virginia.* — *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

**Interest Only Reason for Exclusion — England.** — *Norden v. Williamson*, 1 Taunt. 378; *Fotherby v. Pate*, 3 Atk. 604; *Worrall v. Jones*, 7 Bing. 395, 20 E. C. L. 177; *Pipe v. Steele*, 2 Q. B. 733, 42 E. C. L. 888.

*United States.* — *Willings v. Consequa*, Pet. (C. C.) 301. See *Scott v. Lloyd*, 12 Pet. (U. S.) 145; *Stein v. Bowman*, 13 Pet. (U. S.) 219.

*Alabama.* — *Johnson v. Cunningham*, 1 Ala. 249; *Duffee v. Pennington*, 1 Ala. 506; *Prewett v. Marsh*, 1 Stew. & P. (Ala.) 17, 21 Am. Dec. 645; *Stone v. Bibb*, 2 Ala. 100.

*Connecticut.* — *Johnson v. Blackman*, 11 Conn. 342.

*Delaware.* — *Clendaniel v. Hastings*, 5 Harr. (Del.) 408.

*Georgia.* — *Ragan v. Echols*, 5 Ga. 71; *Wooten v. Nall*, 18 Ga. 609; *Neal v. Lamar*, 18 Ga. 746; *Central R., etc., Co. v. Hines*, 19 Ga. 203; *Wellborn v. Rogers*, 24 Ga. 558; *Foster v. Leeper*, 29 Ga. 297; *Robert v. Boynton*, 30 Ga. 939.

*Indiana.* — *Shellenbarger v. Norris*, 2 Ind. 285; *Draper v. Vanhorn*, 12 Ind. 353.

*Kentucky.* — *Spalding v. Bull*, 1 Duv. (Ky.) 311; *Chenoweth v. Fielding*, 2 Met. (Ky.) 517.

*Louisiana.* — *Beebe v. Kaiser*, 19 La. Ann. 270.

*Maryland.* — *Hodges v. Mullikin*, 1 Bland (Md.) 503; *Barker v. Ayers*, 5 Md. 202.

of record from the witness box was held to be applicable to its stockholders when they were proposed as witnesses on its behalf. But the witness was competent if he had made a sale and transfer of his stock, and was always competent to enlighten the court as to collateral matters. The statutes removing the interest disqualifications have, of course, rendered stockholders competent witnesses.<sup>1</sup>

*Massachusetts*.—*Adams v. Leland*, 7 Pick. (Mass.) 62.

*Mississippi*.—*Coopwood v. Foster*, 12 Smed. & M. (Miss.) 718.

*Missouri*.—*Block v. Chase*, 15 Mo. 344; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Hale v. Meegan*, 39 Mo. 272.

*New Hampshire*.—*Essex Bank v. Rix*, 10 N. H. 201; *Jackson v. Barron*, 37 N. H. 494.

*New Jersey*.—*Neville v. Demeritt*, 2 N. J. Eq. 321.

*New York*.—*Safford v. Lawrence*, 6 Barb. (N. Y.) 566; *Miller v. McCan*, 7 Paige (N. Y.) 457; *Main v. Newton*, Anth. N. P. (N. Y.) 11; *Talbot v. Talbot*, 23 N. Y. 19.

*North Carolina*.—*Wilson v. Allen*, 1 Jones Eq. (54 N. Car.) 24; *Jones v. Sasser*, 1 Dev. & B. L. (18 N. Car.) 452.

*Pennsylvania*.—*Ash v. Patton*, 3 S. & R. (Pa.) 300; *Hoak v. Hoak*, 5 Watts (Pa.) 80; *Heckert v. Haine*, 6 Binn. (Pa.) 16; *Drum v. Simpson*, 6 Binn. (Pa.) 478, 6 Am. Dec. 490; *Patton v. Ash*, 7 S. & R. (Pa.) 116; *King v. Cloud*, 7 Pa. St. 467; *Keim v. Taylor*, 11 Pa. St. 163; *Ryerss v. Presbyterian Congregation*, 33 Pa. St. 114; *Swanzy v. Parker*, 50 Pa. St. 441, 88 Am. Dec. 549; *Steele v. Phenix Ins. Co.*, 3 Binn. (Pa.) 311; *Cox v. McKean*, 56 Pa. St. 343.

*South Carolina*.—*Price v. Gregory*, 4 McCord L. (S. Car.) 261; *Corrie v. Calder*, 6 Rich. L. (S. Car.) 198.

*Vermont*.—*Sargeant v. Sargeant*, 18 Vt. 371; *Day v. Cummings*, 19 Vt. 496; *Paine v. Tilden*, 20 Vt. 563.

*Virginia*.—*Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519; *Taylor v. Moore*, 2 Rand. (Va.) 563; *Eacho v. Cosby*, 26 Gratt. (Va.) 112.

**Party Excluded Regardless of Interest**—*United States*.—*Bridges v. Armour*, 5 How. (U. S.) 94; *De Wolf v. Johnson*, 10 Wheat. (U. S.) 384; *Scott v. Lloyd*, 12 Pet. (U. S.) 145; *Stein v. Bowman*, 13 Pet. (U. S.) 219, *disapproving Willings v. Consequa*, Pet. (C. C.) 301.

*Alabama*.—*Goodwin v. Harrison*, 6 Ala. 438.

*Illinois*.—*Smith v. Moore*, 4 Ill. 462; *Gillett v. Sweat*, 6 Ill. 475.

*Maine*.—*Hackett v. Martin*, 8 Me. 77; *Gilmore v. Bowden*, 12 Me. 412; *Kennedy v. Niles*, 14 Me. 54; *Wing v. Andrews*, 59 Me. 505.

*Massachusetts*.—*Com. v. Marsh*, 10 Pick. (Mass.) 57; *Columbian Mfg. Co. v. Dutch*, 13 Pick. (Mass.) 125; *Page v. Page*, 15 Pick. (Mass.) 373; *Fox v. Whitney*, 16 Mass. 118.

*New York*.—*Chenango v. Birdsall*, 4 Wend. (N. Y.) 453; *Norton v. Woods*, 5 Paige (N. Y.) 249; *Miller v. McCan*, 7 Paige (N. Y.) 451; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Austin v. Fuller*, 12 Barb. (N. Y.) 360; *Benjamin v.*

*Coventry*, 19 Wend. (N. Y.) 353; *Terry v. Dayton*, 31 Barb. (N. Y.) 519.

*South Carolina*.—*Canty v. Sumter*, 2 Bay (S. Car.) 93; *Knight v. Packard*, 3 McCord L. (S. Car.) 71.

**1. Stockholders Excluded**—*United States*.—*Bank of North America v. Wycoff*, 4 Dall. (U. S.) 151.

*Alabama*.—*Montgomery, etc., Plank-Road Co. v. Webb*, 27 Ala. 618; *Alabama, etc., Rivers R. Co. v. Sanford*, 36 Ala. 703.

*California*.—*Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; *Blen v. Bear River, etc., Water, etc., Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 329.

*Connecticut*.—*Middletown Sav. Bank v. Bates*, 11 Conn. 519.

*Florida*.—*Southern L. Ins., etc., Co. v. Cole*, 4 Fla. 359.

*Illinois*.—*Thrasher v. Pike County R. Co.*, 25 Ill. 393.

*Kentucky*.—*Danville, etc., Turnpike Road Co. v. Burdett*, 7 Dana (Ky.) 99. *Contra, Kentucky Bank v. M'Williams*, 2 J. J. Marsh. (Ky.) 256.

*Maine*.—*Oldtown Bank v. Houlton*, 21 Me. 501. *Contra, Watson v. Lisbon Bridge*, 14 Me. 201.

*Maryland*.—*National F. Ins. Co. v. Cranc*, 16 Md. 260, 77 Am. Dec. 289. *Contra, Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324.

*Pennsylvania*.—*Jackson v. U. S. Bank*, 10 Pa. St. 61; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250; *Simons v. Vulcan Oil, etc., Co.*, 61 Pa. St. 220. *Contra, Philadelphia, etc., R. Co. v. Hickman*, 28 Pa. St. 318.

*Vermont*.—*Porter v. Rutland Bank*, 19 Vt. 410.

*Compare Doe v. Tooth*, 3 Y. & J. 19; *Davies v. Morgan*, 1 Tyrw. 457; *Washington Bank v. Palmer*, 2 Sandf. (N. Y.) 686; *Charleston v. King*, 4 McCord L. (S. Car.) 487. *Contra, Americoscoggin Bridge v. Bragg*, 11 N. H. 102; *Stevenson v. Simmons*, 4 Jones L. (49 N. Car.) 12.

**Competency Restored by Sale of Stock**—*Alabama*.—*Smith v. Tallassee Branch of Cent. Plank-Road Co.*, 30 Ala. 650.

*California*.—*McAuley v. York Min. Co.*, 6 Cal. 80; *Tuolumne County Water Co. v. Columbia, etc., Water Co.*, 10 Cal. 193; *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319.

*Illinois*.—*Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Thrasher v. Pike County R. Co.*, 25 Ill. 393.

*Maine*.—*Lewis v. Eastern Bank*, 32 Me. 90.

*Massachusetts*.—*Wyman v. American Powder Co.*, 8 Cush. (Mass.) 168; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 453.

*New Hampshire*.—*Manchester Bank v.*

**Municipal and Charitable Corporations.** — As a general rule a member of a municipal, charitable, or educational corporation was a competent witness in behalf of the corporation, unless personally interested in the outcome of the suit. But a distinction was sometimes made between rated and ratable inhabitants of a municipality.<sup>1</sup>

White, 30 N. H. 456; White Mountains R. Co. v. Eastman, 34 N. H. 134.

*New Jersey.* — Delaware, etc., R. Co. v. Irick, 23 N. J. L. 321.

*New York.* — Utica Bank v. Smalley, 2 Cow. (N. Y.) 777, 14 Am. Dec. 526; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 300; Pierce v. Kearney, 5 Hill (N. Y.) 82; Gilbert v. Manchester Iron Mfg. Co., 11 Wend. (N. Y.) 627; Stall v. Catskill Bank, 18 Wend. (N. Y.) 466.

*Pennsylvania.* — Swatara Bank v. Green, 3 Watts (Pa.) 374; Hill v. Frazier, 22 Pa. St. 320; Meighen v. Bank, 25 Pa. St. 288.

*Tennessee.* — Union Bank v. Owen, 4 Humph. (Tenn.) 338.

**Testimony as to Collateral Matters.** — Blen v. Bear River, etc., Water, etc., Co., 20 Cal. 602, 81 Am. Dec. 132; Ryder v. Alton, etc., R. Co., 13 Ill. 516; Peake v. Wabash R. Co., 18 Ill. 88; Huntress v. Patten, 20 Me. 28; York, etc., R. Co. v. Pratt, 40 Me. 447; Union Bank v. Ridgely, 1 Har. & G. (Md.) 324; Wiggin v. Lowell First Freewill Baptist Church, 8 Met. (Mass.) 301; Schuykill, etc., Nav. Co. v. Diffebach, 1 Yeates (Pa.) 367; Union Canal Co. v. Loyd, 4 W. & S. (Pa.) 393; Fell v. McHenry, 42 Pa. St. 41.

**Competency Restored by Statute.** — Kerr v. Modern Woodmen of America, (C. C. A.) 117 Fed. Rep. 593; Sherret v. Royal Clan, etc., 37 Ill. App. 446.

**1. Municipal and Charitable Corporations — England.** — M'Gahey v. Alston, 2 M. & W. 206; Middleton v. Frost, 4 C. & P. 16, 19 E. C. L. 255; Fletcher v. Greenwell, 5 Tyrw. 316; Hebrew Congregation's Case, 6 Ct. Cl. 241. See also the opinion of Lord Camden, in Doe v. Kersey, printed as a note to Cornwell v. Isham, 1 Day (Conn.) 41, 2 Am. Dec. 50.

*United States.* — Hunter v. Marlboro', 2 Woodb. & M. (U. S.) 175.

*Alabama.* — Tuskaloosa v. Wright, 2 Port. (Ala.) 235; Burdine v. Grand Lodge, 37 Ala. 478.

*Arkansas.* — Hershey v. Clarksville Institute, 15 Ark. 128; Trapnall v. Burton, 24 Ark. 371.

*Connecticut.* — Smith v. Barber, 1 Root (Conn.) 207; Cornwell v. Isham, 1 Day (Conn.) 35, 2 Am. Dec. 50; Fuller v. Hampton, 5 Conn. 416.

*Illinois.* — Sawyer v. Alton, 4 Ill. 127; Holbrook v. School Trustees, 22 Ill. 539.

*Indiana.* — See Cooper v. Sisters of Providence, 16 Ind. 164.

*Kentucky.* — Maysville v. Shultz, 3 Dana (Ky.) 10.

*Maine.* — Anderson v. Brock, 3 Me. 243; Miller v. Mariner's Church, 7 Me. 51, 20 Am. Dec. 341; Hill v. School Dist. No. 2, 17 Me. 316; State v. Woodward, 34 Me. 293; Ministerial, etc., Fund v. Reed, 39 Me. 41; Richardson v. Freeman, 6 Me. 57.

*Massachusetts.* — Nason v. Thatcher, 7 Mass. 398; Haven v. Hilliard, 23 Pick. (Mass.) 10;

Allen v. School Dist. No. 2, 15 Pick. (Mass.) 35.

*Mississippi.* — Mann v. Yazoo City, 31 Miss. 574.

*Missouri.* — Barada v. Carondelet, 8 Mo. 644.

*New Hampshire.* — Canning v. Pinkham, 1 N. H. 353; Eustis v. Parker, 1 N. H. 273; Congregational Soc. v. Perry, 6 N. H. 164, 25 Am. Dec. 455.

*New Jersey.* — Schenck v. Corshen, 1 N. J. L. 219; Overseers of Poor v. Overseers of Poor, 4 N. J. L. 211; Roll v. Maxwell, 5 N. J. L. 568.

*New York.* — Matter of Kip, 1 Paige (N. Y.) 601; Watertown v. Cowen, 4 Paige (N. Y.) 510; Wells v. Lane, 8 Johns. (N. Y.) 462; Hunter v. Sandy Hill, 6 Hill (N. Y.) 407; Van Wormer v. Albany, 15 Wend. (N. Y.) 262.

*North Carolina.* — Jackson v. Hillsborough, 1 Dev. & B. L. (18 N. Car.) 177.

*Ohio.* — M. E. Church v. Wood, 5 Ohio 283.

*Pennsylvania.* — Shortz v. Unangst, 3 W. & S. (Pa.) 45; Davies v. Morris, 17 Pa. St. 205; Sorg v. First German Evangelical St. Paul's Congregation, 63 Pa. St. 156.

*South Carolina.* — Charleston v. King, 4 McCord L. (S. Car.) 487.

*Tennessee.* — Jonesboro v. M'Kee, 2 Yerg. (Tenn.) 167; Ezell v. Giles County, 3 Head (Tenn.) 583; Gass v. Gass, 3 Humph. (Tenn.) 278.

*Texas.* — Kemper v. Victoria, 3 Tex. 135; Lewis v. San Antonio, 7 Tex. 288.

*Vermont.* — Pond v. Sage, 1 D. Chip. (Vt.) 250; Selectmen v. M'Gennes, N. Chip. (Vt.) 45.

**Witness Having Personal Interest Incompetent.** — Prewitt v. Tilly, 1 C. & P. 140, 11 E. C. L. 347; Rhodes v. Ainsworth, 1 B. & Ald. 87; Rex v. Governor, etc., of Poor, 3 East 7. See also Burton v. Hinde, 5 T. R. 174; Moore v. Griffin, 22 Me. 350; Lufkin v. Haskell, 3 Pick. (Mass.) 355; Odiorne v. Wade, 8 Pick. (Mass.) 518; Jacobson v. Fountain, 2 Johns. (N. Y.) 170; Gould v. James, 6 Cow. (N. Y.) 369; Chester v. Rockingham, Brayt. (Vt.) 239; Stone v. Congregational Soc., 14 Vt. 86.

**Distinction Between Rated and Ratable — England.** — Phill. Ev. (5th Am. ed.), \*pp. 40, 57; Rex v. Kirdford, 2 East 559; Reg. v. Adderbury East, 5 Q. B. 187, 48 E. C. L. 187; Rex v. Little Lumley, 6 T. R. 157; Doe v. Murrell, 8 C. & P. 134, 34 E. C. L. 327; Marsden v. Stansfield, 7 B. & C. 815, 14 E. C. L. 137. See also Rex v. Bondgate Tp., 1 Ad. & El. 744, 28 E. C. L. 197; Davies v. Morgan, 1 Tyrw. 457; Rex v. Netherthong Tp., 2 M. & S. 337; Rex v. Prosser, 4 T. R. 19; Rex v. South Lynn, 5 T. R. 664; Rex v. Woburn, 10 East 395; Rex v. Hardwick, 11 East 587; Oxenden v. Palmer, 2 B. & Ad. 236, 22 E. C. L. 64.

*Massachusetts.* — Connecticut v. Bradish, 14 Mass. 296.

*New York.* — Falls v. Belknap, 1 Johns. (N.



(3) *Effect of a Default.*—A distinction was made between the default of a defendant in an action *ex contractu* and his default in an action *ex delicto*. In the former case he was as a rule competent in favor of his codefendant, but not in the latter case.<sup>1</sup>

(4) *Effect of a Nolle Prosequi or Separate Verdict.*—If a *nolle prosequi* was entered as to a defendant, it put an end to the proceedings so far as he was concerned, and his competency as a witness was restored. In actions *ex delicto*, if there was no proof against one defendant, the court would restore his competency by dismissing the action against him, or by ordering a separate verdict in his favor. The cases were in conflict as to the propriety of such a course in actions *ex contractu*.<sup>2</sup>

Y.) 486; *Bloodgood v. Overseers of Poor*, 12 Johns. (N. Y.) 285.

*Pennsylvania.*—*Com. v. Baird*, 4 S. & R. (Pa.) 141; *Barnet v. School Directors*, 6 W. & S. (Pa.) 46. See also *Thornbury v. Directors of Poor*, 12 S. & R. (Pa.) 110; *McFarland v. Moyamensing Tp.*, 12 S. & R. (Pa.) 297.

*South Carolina.*—*State v. Davidson*, 1 Bailey L. (S. Car.) 35.

*Vermont.*—*Chester v. Rockingham, Brayt.* (Vt.) 239; *Peacham v. Carter*, 21 Vt. 515.

**1. Effect of Default in Actions Ex Contractu—England.**—*Pipe v. Steele*, 2 Q. B. 733, 42 E. C. L. 888; *Green v. Sutton*, 2 M. & Rob. 270; *Brown v. Brown*, 4 Taunt. 752; *Worrall v. Jones*, 7 Bing. 395, 20 E. C. L. 177; *Mant v. Mainwaring*, 8 Taunt. 141, 4 E. C. L. 48.

*Alabama.*—*Scott v. Jones*, 5 Ala. 694; *Gooden v. Morrow*, 8 Ala. 486; *Aicardi v. Strang*, 38 Ala. 326.

*California.*—*Fairchild v. Amsbaugh*, 22 Cal. 572.

*Georgia.*—*Cody v. Cody*, 31 Ga. 619.

*Illinois.*—*Brooks v. McKinney*, 5 Ill. 309; *Alexander v. Crosthwaite*, 44 Ill. 359; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94.

*Indiana.*—*Kincaid v. Purcell*, 1 Ind. 324.

*Iowa.*—*Williams v. Soutter*, 7 Iowa 435.

*Kentucky.*—*Culbertson v. Holden*, 8 Bush (Ky.) 161.

*Louisiana.*—*Glasscock v. McRae*, 6 La. Ann. 284; *State Bank v. Hudson*, 13 La. Ann. 600.

*Maine.*—*Gilmore v. Bowden*, 12 Me. 412; *Thornton v. Blaisdell*, 37 Me. 190.

*Maryland.*—*Thomas v. Mohler*, 25 Md. 36.

*Massachusetts.*—*Bull v. Strong*, 8 Met. (Mass.) 11; *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Shaw, C. J., in Columbian Mfg. Co. v. Dutch*, 13 Pick. (Mass.) 125; *Bradlee v. Neal*, 16 Pick. (Mass.) 501; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Vinal v. Burrill*, 18 Pick. (Mass.) 29.

*Mississippi.*—*Lake v. Munford*, 4 Smed. & M. (Miss.) 318.

*New Hampshire.*—*Essex Bank v. Rix*, 10 N. H. 201; *Manchester Bank v. Moore*, 19 N. H. 564.

*New York.*—*Rich v. Husson*, 4 Sandf. (N. Y.) 115; *King v. Lowry*, 20 Barb. (N. Y.) 532.

*North Carolina.*—*Walton v. Tomlin*, 1 Ired. L. (23 N. Car.) 593.

*Pennsylvania.*—*Miller v. M'Clenachan*, 1 Yeates (Pa.) 144.

**Actions Ex Delicto—England.**—*Mash v. Smith*, 1 C. & P. 577, 11 E. C. L. 478; *Ward v. Haydon*, 2 Esp. 552; *Chapman v. Graves*, 2 Campb. 333, note; *Doe v. Green*, 4 Esp. 198;

*Thorpe v. Barber*, 5 C. B. 675, 57 E. C. L. 675; *Wren v. Heslop*, 12 Jur. 600; *Buller's N. P.* 286, citing *Dormer v. Fortescue*, Willes 343, note.

*Arkansas.*—*Ballard v. Noaks*, 2 Ark. 45.

*Maine.*—*Wood v. Kelley*, 30 Me. 47.

*Massachusetts.*—*Gerrish v. Cummings*, 4 Cush. (Mass.) 391.

*New Hampshire.*—*Chase v. Lovering*, 27 N. H. 295.

*New York.*—*Bohun v. Taylor*, 6 Cow. (N. Y.) 313.

*Pennsylvania.*—*WaKely v. Hart*, 6 Binn. (Pa.) 316; *Kennedy v. Philiply*, 13 Pa. St. 408.

**2. Effect of Nolle Prosequi.**—*Moody v. King*, 2 B. & C. 558, 9 E. C. L. 177; *Aflalo v. Fourdrinier*, 6 Bing. 306, 19 E. C. L. 89; *Emmet v. Butler*, 7 Taunt. 607, 2 E. C. L. 599; *Park, J.* See also *Wood v. Dodgson*, 2 M. & S. 195; *Man v. Ward*, 2 Atk. 229; *Spencer v. Harrison*, 2 C. & K. 429, 61 E. C. L. 429; *Hawkesworth v. Showler*, 12 M. & W. 45; *Butcher v. Forman*, 6 Hill (N. Y.) 583; *Irwin v. Shumaker*, 4 Pa. St. 199.

**Separate Verdict Restoring Competency—Actions Ex Delicto—England.**—1 Phil. Ev. (5th Am. ed.), p. 46, citing 1 Sid. 441; *Buller's N. P.* 285; *Berrington v. Parkhurst*, Lee t. Hardw. 163.

*United States.*—*Elwell v. Martin, Ware* (U. S.) 53.

*Connecticut.*—*Barney v. Cuttler*, 1 Root (Conn.) 489; *Ranny v. Church*, 2 Root (Conn.) 420.

*Indiana.*—*Goodhue v. Palmer*, 13 Ind. 457; *Carpenter v. Crane*, 5 Blackf. (Ind.) 119.

*Kentucky.*—*Dougherty v. Dorsey*, 4 Bibb (Ky.) 207; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 53.

*Maine.*—*Gilmore v. Bowden*, 12 Me. 412.

*Massachusetts.*—*Sawyer v. Merrill*, 10 Pick. (Mass.) 16.

*Missouri.*—*Campbell v. Hood*, 6 Mo. 211; *Brown v. Burrus*, 8 Mo. 26; *Benoist v. Sylvestre*, 26 Mo. 585.

*New York.*—*Bates v. Conkling*, 10 Wend. (N. Y.) 392; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Van Deusen v. Van Slyck*, 15 Johns. (N. Y.) 223; *Higby v. Williams*, 16 Johns. (N. Y.) 217.

*Ohio.*—*Rohrer v. Morningstar*, 18 Ohio 579.

*Pennsylvania.*—*Over v. Blackstone*, 8 W. & S. (Pa.) 71.

*Tennessee.*—*Beasley v. Bradley*, 2 Swan (Tenn.) 180.

**Time to Direct Verdict—England.**—*Wright v. Paulin, R. & M.* 128, 21 E. C. L. 396;

(5) *Criminal Proceedings* — (a) *In General*. — At common law and under early legislation in most jurisdictions the defendant in a criminal case was incompetent on his own behalf.<sup>1</sup> But in many jurisdictions great progress was made in that direction by the enactment of statutes permitting all defendants in criminal proceedings to take the stand if they so desired and make statements to the jury concerning the facts and circumstances of the case; and in one state, where the accused is still incompetent, such law remains on the statute books. Such statements, while not part of the evidence, are in the nature of evidence and are to be considered by the jury.<sup>2</sup>

(b) *Codefendants and Accomplices*. — The competency of accomplices and codefendants for and against each other has already been treated in another part of this work.<sup>3</sup>

(6) *Exceptions to General Rule* — (a) *At Law*. — There were some recognized exceptions to the rule excluding the testimony of parties to the record; for example, where the defendant had, by other evidence, been proved guilty of

*Huxley v. Berg*, 1 Stark. 98, 2 E. C. L. 46; *Neilau v. Hanny*, 2 C. & K. 710, 61 E. C. L. 710; *Wynne v. Anderson*, 3 C. & P. 596, 14 E. C. L. 471; *Child v. Chamberlain*, 6 C. & P. 213, 25 E. C. L. 362; *Sowell v. Champion*, 6 Ad. & El. 407, 33 E. C. L. 92; *White v. Hill*, 6 Q. B. 487, 51 E. C. L. 487; *Russell v. Rider*, 6 C. & P. 416, 25 E. C. L. 463.

*Delaware*. — *Prettyman v. Dean*, 2 Harr. (Del.) 494.

*Illinois*. — *Cochran v. Ammon*, 16 Ill. 316.

*Missouri*. — *Brown v. Burrus*, 8 Mo. 26; *Hood v. Mathis*, 21 Mo. 308.

*New York*. — *Bates v. Conkling*, 10 Wend. (N. Y.) 390.

*Pennsylvania*. — *Over v. Blackstone*, 8 W. & S. (Pa.) 71.

**No Separate Verdict if Evidence Against Witness.** — *Dallas, J.*, in *Emmet v. Butler*, 7 Taunt. 607, 2 E. C. L. 599; *Campbell v. Hood*, 6 Mo. 211; *Steamboat Prairie Rose v. Cross*, 34 Mo. 109; *Bates v. Conkling*, 10 Wend. (N. Y.) 390; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Van Deusen v. Van Slyck*, 15 Johns. (N. Y.) 223; *Brotherton v. Livingston*, 3 W. & S. (Pa.) 334.

**Separate Verdict in Actions Ex Contractu.** — *Domingo v. Getman*, 9 Cal. 97; *Berry v. Stevens*, 71 Me. 503; *Brown v. Lewis*, 25 Mo. 335; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 119; *Safford v. Lawrence*, 6 Barb. (N. Y.) 569. See also *Harrison v. Johnson*, 18 N. J. Eq. 420.

**Effect of Bankruptcy of Party.** — *Bate v. Russell*, M. & M. 332, 22 E. C. L. 327; *Raven v. Dunning*, 3 Esp. 25; *Currie v. Child*, 3 Campb. 283; *Aflalo v. Fourdrinier*, 6 Bing. 306, 19 E. C. L. 89; *Emmet v. Butler*, 7 Taunt. 599, 2 E. C. L. 599; *Hawkesworth v. Showler*, 12 M. & W. 45; *Mills v. Lee*, 4 Hill (N. Y.) 549; *Safford v. Lawrence*, 6 Barb. (N. Y.) 338; *Wolf v. Fink*, 1 Pa. St. 435, 44 Am. Dec. 141; *Bittinger v. Keys*, 2 Pa. St. 459; *McClelland v. Mahon*, 1 Pa. St. 364; *Steele v. Phoenix Ins. Co.*, 3 Binn. (Pa.) 306; *Given v. Albert*, 5 W. & S. (Pa.) 338.

**1. Defendant Incompetent.** — *Reg. v. Humphreys*, 9 U. C. Q. B. 337; *Parker v. Green*, 2 B. & S. 299, 110 E. C. L. 299, 8 Jur. N. S. 409, 9 Cox C. C. 169; *Cattell v. Ireson*, El. Bl. & El. 91, 96 E. C. L. 91, 4 Jur. N. S. 560; *Hoagland v. State*, 17 Ind. 488; *Whelchell v. State*,

23 Ind. 89; *State v. Laffer*, 38 Iowa 422; *State v. Bixby*, 39 Iowa 465; *State v. Darrington*, 47 Iowa 518; *Harwell v. State*, 10 Lea (Tenn.) 544.

**2. Statement to Jury — England.** — *Reg. v. Taylor*, 1 F. & F. 535; *Reg. v. Burrows*, 2 M. & Rob. 124; *Reg. v. Butcher*, 2 M. & Rob. 228; *Reg. v. Teste*, 4 Jur. N. S. 244; *Reg. v. Rider*, 8 C. & P. 539, 34 E. C. L. 521; *Reg. v. Boucher*, 8 C. & P. 141, 34 E. C. L. 328; *Reg. v. Manzano*, 2 F. & F. 64; *Reg. v. Malings*, 3 C. & P. 242, 34 E. C. L. 371; *Reg. v. Beard*, 8 C. & P. 142, 34 E. C. L. 328; *Reg. v. Walkling*, 8 C. & P. 243, 34 E. C. L. 372; *Reg. v. Stephens*, 11 Cox C. C. 669; *Reg. v. Weston*, 14 Cox C. C. 346; *Reg. v. Shimmin*, 15 Cox C. C. 122.

*Alabama*. — *Chappell v. State*, 71 Ala. 322; *Beasley v. State*, 71 Ala. 328; *Whizenant v. State*, 71 Ala. 383; *Williams v. State*, 74 Ala. 18.

*Florida*. — *Barber v. State*, 13 Fla. 675; *Miller v. State*, 15 Fla. 577; *Hawkins v. State*, 29 Fla. 554; *Ortiz v. State*, 30 Fla. 256.

*Georgia*. — *Holsenbake v. State*, 45 Ga. 43; *Loyd v. State*, 45 Ga. 58; *Bird v. State*, 50 Ga. 585; *Tucker v. State*, 57 Ga. 503; *Brown v. State*, 60 Ga. 212; *Reich v. State*, 63 Ga. 616; *Day v. State*, 63 Ga. 667; *Ross v. State*, 59 Ga. 248; *Jones v. State*, 65 Ga. 506; *Stewart v. State*, 66 Ga. 90; *Coxwell v. State*, 66 Ga. 309; *McConnell v. State*, 67 Ga. 635; *Hanvey v. State*, 68 Ga. 612; *Montross v. State*, 72 Ga. 261, 53 Am. Rep. 840; *Howard v. State*, 73 Ga. 83; *Robinson v. State*, 82 Ga. 535; *Underwood v. State*, 88 Ga. 47.

*Michigan*. — *People v. Thomas*, 9 Mich. 321; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *Durant v. People*, 13 Mich. 351; *People v. Annis*, 13 Mich. 511; *De Foe v. People*, 22 Mich. 224; *People v. Jones*, 24 Mich. 215; *Gale v. People*, 26 Mich. 157; *Burden v. People*, 26 Mich. 162; *People v. Arnold*, 43 Mich., 303, 38 Am. Rep. 182.

*New York*. — *People v. Lopez*, 2 Edm. Sel. Cas. (N. Y.) 262.

**3. Competency of Accomplices.** — See the title ACCOMPLICES, vol. 1, p. 393 *et seq.*

**As to Competency of Husband or Wife of Codefendant.** — See *infra*, this section, 13. *Husband and Wife*.

gross fraud, wilful interference with the plaintiff's property, or spoliation thereof, the plaintiff himself was competent to prove the amount of his damages where other evidence on the question was not obtainable.<sup>1</sup> Thus, it was held that in actions against carriers and innkeepers for the loss of baggage, where the liability of the bailee was established by other evidence, the plaintiff was competent to prove the list of articles lost and their value, if other proof could not be obtained.<sup>2</sup> And there were other exceptions.<sup>3</sup>

(b) **In Equity.**—The rule excluding the testimony of parties of record was never enforced with the same severity in chancery as at common law. Under certain circumstances a plaintiff might examine a defendant, or even a coplaintiff, if it appeared he had no interest. But the exceptions were numerous.<sup>4</sup>

**1. Wilful Misconduct of Defendant.**—*Childrens v. Saxby*, 1 Vern. 207, 1 Eq. Cas. Abr. 229, pl. 11; *Anonymous*, cited in *East India Co. v. Evans*, 1 Vern. 308; *Bennet v. Hundred of Hartford*, Style 233, 2 Rolle Abr. 685, *Norris' Peake* 223, note; *Herman v. Drinkwater*, 1 Me. 27; *Garvey v. Camden*, etc., R. Co., 1 Hilt. (N. Y.) 280; *County v. Leidy*, 10 Pa. St. 45; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123.

**Necessity Reason for Rule.**—*Buller's N. P.* 289; *Lancum v. Lovell*, 9 Bing. 465, 23 E. C. L. 335; *Lampley v. Scott*, 24 Miss. 528; *Evans v. Hardgrove*, 11 Tex. 210.

**2. Actions for Loss of Baggage.**—*England.*—12 *Viner's Abr.* 24, pl. 34.

*United States.*—*U. S. v. Clark*, 96 U. S. 37. *Alabama.*—*Douglass v. Montgomery*, etc., R. Co., 37 Ala. 641, 79 Am. Dec. 76.

*Georgia.*—*Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Kitchen v. Robbins*, 29 Ga. 713.

*Illinois.*—*Parmelee v. McNulty*, 19 Ill. 556; *Davis v. Michigan Southern*, etc., R. Co., 22 Ill. 278; *Illinois Cent. R. Co. v. Taylor*, 24 Ill. 323; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Adams Express Co. v. Haynes*, 42 Ill. 90.

*Indiana.*—*Indiana Cent. R. Co. v. Gulick*, 19 Ind. 83.

*Louisiana.*—*Pope v. Hall*, 14 La. Ann. 324.

*Maryland.*—*Pettigrew v. Barnum*, 11 Md. 445, 69 Am. Dec. 212.

*Michigan.*—*Wright v. Caldwell*, 3 Mich. 51.

*Missouri.*—*Nolan v. Ohio*, etc., R. Co., 39 Mo. 114; *Williams v. Frost*, 39 Mo. 516.

*New York.*—*Taylor v. Monnot*, 4 Duer (N. Y.) 116.

*Pennsylvania.*—*David v. Moore*, 2 W. & S. (Pa.) 230; *Clark v. Spence*, 10 Watts (Pa.) 336.

*Tennessee.*—*Oppenheimer v. Edney*, 9 *Humph. (Tenn.)* 393; *Johnson v. Stone*, 11 *Humph. (Tenn.)* 419.

**Must Be More Than Negligence.**—*Christian's Case*, 7 Ct. Cl. 431; *Packard v. Northcraft*, 2 Met. (Ky.) 439; *Block v. Steamboat Trent*, 18 La. Ann. 664; *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44; *Garvey v. Camden*, etc., R. Co., 1 Hilt. (N. Y.) 280; *Smith v. North Carolina R. Co.*, 1 Winst. L. (60 N. Car.) 203.

**3. Party Competent as to Preliminary Matters to Be Decided by Court.**—*Forbes v. Wale*, 1 W. Bl. 532; *Fortescue's Case*, Godb. 193; *Anonymous*, Godb. 326; *Morrow v. Saunders*, 3 Moo. 671; *Taylor v. Riggs*, 1 Pet. (U. S.) 591; *Jackson v. Frier*, 16 Johns. (N. Y.) 193. See also *Jevens v. Harridge*, 1 Saund. 9; *Soresby*

*v. Sparrow*, 2 Stra. 1186; *Cook v. Remington*, 6 Mod. 237; *Ward v. Apprice*, 6 Mod. 264.

**As to Competency of Party to Testify as to Loss of Written Instrument.**—See the title *LOST PAPERS AND RECORDS*, vol. 19, p. 552.

**4. Rule in Equity.**—*England.*—*Winter v. Kent*, 2 Dick. 595; *Hewatson v. Tookey*, 2 Dick. 799; *Kilmurry v. Crew*, 1 Dick. 60; *Troughton v. Getley*, 1 Dick. 382; *Whately v. Smith*, 2 Dick. 650; *Benson v. Chester*, Jac. 577; *Casey v. Beachfield*, Pre. Ch. 411, Gilb. Eq. 98; *Nightingale v. Dodd*, Ambl. 583, *Mosely* 229; *Monday v. Guyer*, 1 De G. & S. 182, 11 Jur. 861; *Smith v. Pincombe*, 13 Jur. 158; *Thompson v. Harrison*, 1 Cox Ch. 344; *Weymouth v. Boyer*, 1 Ves. Jr. 417; *Paris v. Hughes*, 1 Keen 1; *Lee v. Atkinson*, 2 Cox Ch. 413; *Ewer v. Atkinson*, 2 Cox Ch. 393; *Murray v. Shadwell*, 2 Ves. & B. 401; *Dixon v. Parker*, 2 Ves. 219; *Houham v. Sandys*, 2 Sim. & Stu. 221; *Hubbard v. Hewlett*, 2 Madd. 587; *Man v. Ward*, 2 Atk. 228; *Anonymous*, 2 Ch. Cas. 214; *Hurd v. Partington*, *Younge* 307; *Fletcher v. Glegg*, *Younge* 345; *Goold v. O'Keefe*, *Beatty* 356; *Daniell v. Daniell*, 3 De G. & S. 337, 13 Jur. 164; *Suffolk v. Greenwill*, 3 Ch. Rep. 89; *Barret v. Gore*, 3 Atk. 401; *Piddock v. Brown*, 3 P. Wms. 288; *Ellis v. Deane*, 3 Molloy 63; *Rowland v. Witherden*, 3 Macn. & G. 568; *Atty.-Gen. v. Drew*, 3 De G. & S. 488, 13 Jur. 1066; *Carrington v. Pell*, 3 De G. & S. 512; *Holmes v. Arundel*, 3 Beav. 303; *Barret v. Gore*, 3 Atk. 402; *Ward v. Ward*, 4 Beav. 223; *Fereday v. Wightwick*, 4 Russ. 114; *Steed v. Oliver*, 5 Hare 492; *Smith v. Smith*, 6 Hare 524; *Baker v. Thurnall*, 6 Beav. 333; *Tamlyn v. Reynolds*, 7 Jur. 166; *Meadbury v. Isdall*, 9 Mod. 438; *Gibson v. Albert*, 10 Mod. 19; *Edwards v. Goodwin*, 10 Sim. 123; *Fisher v. Fisher*, 11 Jur. 419; *Clarke v. Wyburn*, 12 Jur. 613; *Ashton v. Parker*, 14 Sim. 632, 9 Jur. 574; *Fyler v. Newcombe*, 14 Jur. 1039; *Walker v. Wingfield*, 15 Ves. Jr. 178; *Champion v. Champion*, 15 Sim. 101; *Franklyn v. Colquhoun*, 16 Ves. Jr. 218; *Fyfield v. Vinore*, Cary 45; *Gwynn v. Petty*, *Tothill* 71.

*United States.*—*Foote v. Silsby*, 3 *Blatchf. (U. S.)* 507; *De Wolf v. Johnson*, 10 *Wheat. (U. S.)* 367.

*Connecticut.*—*Webb v. Fitch*, 1 *Root (Conn.)* 177; *Livingston v. Bird*, 1 *Root (Conn.)* 255.

*Georgia.*—*Ragan v. Echols*, 5 Ga. 71.

*Illinois.*—*Mixell v. Lutz*, 34 Ill. 388.

*Indiana.*—*Wheeler v. Emerson*, 2 *Blackf. (Ind.)* 293.

*Maryland.*—*Lingan v. Henderson*, 1 *Bland*



*c. PERSONS NOT PARTIES OF RECORD*—(1) *In General*.—The prohibition of the common law extended not only to parties of record, but also to all persons who had any interest, however small, in the result of the suit. But to exclude the witness, the interest had to be direct and beneficial, and a mere honorary obligation to the party calling him, or a bias from the possession of similar interests, was not sufficient, but was a matter going to his credibility only.<sup>1</sup> It followed that if the witness was called to testify against

(Md.) 268; *Clagett v. Hall*, 9 Gill & J. (Md.) 80.

*Michigan*.—*Thomas v. Stone*, Walk. (Mich.) 117; *Wilcox v. Hill*, 11 Mich. 260.

*New Hampshire*.—*Hopkinton Second Cong. Soc. v. Hopkinton First Cong. Soc.*, 14 N. H. 315.

*New Jersey*.—*Neville v. Demeritt*, 2 N. J. Eq. 321; *Harrison v. Johnson*, 18 N. J. Eq. 420.

*New York*.—*Bogert v. Bogert*, 2 Edw. (N. Y.) 399; *Palmer v. Van Doren*, 2 Edw. (N. Y.) 192; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127; *Bradley v. Root*, 5 Paige (N. Y.) 632; *Eckford v. De Kay*, 6 Paige (N. Y.) 565.

*Pennsylvania*.—*Pusey v. Wright*, 31 Pa. St. 387.

See also *Day v. Cummings*, 19 Vt. 499.

**Answer of Defendant as Evidence For and Against Him.**—See the title ANSWERS IN EQUITY PLEADING, 1 ENCYC. OF PL. AND PR. 910 *et seq.*

**1. Interested Witness Incompetent**—*United States*.—*Reece v. Johnson*, Hempst. (U. S.) 83.

*Alabama*.—*Bean v. Pearsall*, 12 Ala. 592.

*Connecticut*.—*Stebbins v. Sackett*, 5 Conn. 258.

*Georgia*.—*Rome v. Dickerson*, 13 Ga. 302; *Governor v. Justices*, 20 Ga. 359; *Foster v. Rutherford*, 20 Ga. 676.

*Kentucky*.—*Richardson v. Bartley*, 2 B. Mon. (Ky.) 333; *Athey v. McHenry*, 6 B. Mon. (Ky.) 55.

*Louisiana*.—*Kennedy v. Bossiere*, 16 La. Ann. 445.

*Mississippi*.—*Dunbar v. Chevalier*, 28 Miss. 161.

*New York*.—*Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 584; *Herrick v. Whitney*, 15 Johns. (N. Y.) 240.

*North Carolina*.—*Blum v. Stafford*, 4 Jones L. (49 N. Car.) 94.

*Pennsylvania*.—*Kimball v. Kimball*, 3 Rawle (Pa.) 469; *Wilkinson v. Pittsburgh Farmers, etc., Turnpike Co.*, 6 Pa. St. 398; *Thomas v. Brady*, 10 Pa. St. 167.

*South Carolina*.—*Brown v. O'Brien*, 1 Rich. L. (S. Car.) 268, 44 Am. Dec. 254; *Pickett v. Cloud*, 1 Bailey L. (S. Car.) 362; *Cleverly v. McCullough*, 2 Hill L. (S. Car.) 445; *State v. Halder*, 2 McCord L. (S. Car.) 377, 13 Am. Dec. 738.

*Texas*.—*Johnson v. Alexander*, 14 Tex. 382.

*Wisconsin*.—*Eaton v. Gentle*, 1 Chand. (Wis.) 10.

**Amount of Interest.**—*Dowdeswell v. Nott*, 2 Vern. 317; *Burton v. Hinde*, 5 T. R. 174; *Scott v. McLellan*, 2 Me. 199; *Hunter v. Gatewood*, 5 T. B. Mon. (Ky.) 268; *Gage v. Stewart*, 4 Johns. (N. Y.) 293; *Herrick v. Whitney*, 15

Johns. (N. Y.) 240; *Marquand v. Webb*, 16 Johns. (N. Y.) 93.

**Test of Competency**—*England*.—*Walton v. Shelley*, 1 T. R. 302; *Anscomb v. Shore*, 1 Taunt. 261; *Hockley v. Lamb*, 1 Ld. Raym. 731; *Rex v. Cole*, 1 Esp. 169; *Nix v. Cutting*, 4 Taunt. 18; *Ward v. Wilkinson*, 4 B. & Ald. 412, 6 E. C. L. 539; *Rex v. Boston*, 4 East 572, *per Lord Ellenborough*; *Bent v. Baker*, 3 T. R. 27, *per Lord Kenyon*; *Buckland v. Tankard*, 5 T. R. 578; *Falmouth v. George*, 5 Bing. 286, 15 E. C. L. 449; *Burton v. Hinde*, 5 T. R. 174; *Doe v. Tyler*, 6 Bing. 390, 19 E. C. L. 111; *Smith v. Prager*, 7 T. R. 56, *per Lord Kenyon*; *Lancum v. Lovell*, 9 Bing. 465, 23 E. C. L. 335; *Shrewsbury v. Hayward*, 1 Dougl. 374, Bull. N. P. 289. See also *Masters v. Drayton*, 2 T. R. 496; *Yardley v. Arnold*, 10 M. & W. 141.

*United States*.—*Burroughs v. U. S.*, 2 Paine (U. S.) 569.

*Alabama*.—*Massey v. Rogan*, 6 Ala. 647; *Stewart v. Conner*, 9 Ala. 803; *Wright v. Lewis*, 18 Ala. 194; *Poe v. Dorrah*, 20 Ala. 288, 56 Am. Dec. 196; *Coltart v. Laughinghouse*, 38 Ala. 190.

*California*.—*Jones v. Post*, 4 Cal. 14; *Griffin v. Alsop*, 4 Cal. 406.

*Connecticut*.—*Fitch v. Boardman*, 12 Conn. 346.

*Georgia*.—*Bailey v. Lumpkin*, 1 Ga. 392; *Adams v. Barrett*, 3 Ga. 277; *Howard v. Brown*, 3 Ga. 523; *Harvey v. Anderson*, 12 Ga. 69; *Jordan v. Pollock*, 14 Ga. 153; *Harbin v. Roberts*, 33 Ga. 45.

*Illinois*.—*Robbins v. Butler*, 24 Ill. 387.

*Iowa*.—*Cutter v. Fanning*, 2 Iowa 580.

*Kentucky*.—*Day v. Green*, Hard. (Ky.) 124; *Millett v. Parker*, 2 Met. (Ky.) 608; *Clarke v. Robinson*, 5 B. Mon. (Ky.) 57; *Smith v. White*, 5 Dana (Ky.) 376; *Easley v. Easley*, 18 B. Mon. (Ky.) 86.

*Maine*.—*Marwick v. Georgia Lumber Co.*, 18 Me. 49; *Blake v. Irish*, 21 Me. 450; *Frankfort Bank v. Johnson*, 24 Me. 490.

*Maryland*.—*Melvin v. Melvin*, 6 Md. 541.

*Massachusetts*.—*Com. v. Snell*, 3 Mass. 84; *Connecticut v. Bradish*, 14 Mass. 296; *Phillips v. Bridge*, 11 Mass. 242; *Bean v. Bean*, 12 Mass. 22; *Burt v. Nichols*, 16 Pick. (Mass.) 560.

*Mississippi*.—*Estice v. Cockerell*, 26 Miss. 127.

*New Hampshire*.—*Latham v. Kenniston*, 13 N. H. 206; *Green v. Pickering*, 28 N. H. 360.

*New York*.—*Van Nuys v. Terhune*, 3 Johns. Cas. (N. Y.) 82; *Ten Eyck v. Bill*, 5 Wend. (N. Y.) 55; *Gould v. James*, 6 Cow. (N. Y.) 369; *Stockham v. Jones*, 10 Johns. (N. Y.) 21.

*North Carolina*.—*State v. Poteet*, 7 Ired. L. (29 N. Car.) 356.

*Pennsylvania*.—*Cornogg v. Abraham*, 1 Yeates (Pa.) 84; *Lewis v. Manly*, 2 Yeates

his own interest, the rule of exclusion on the ground of interest did not apply;

(Pa.) 200; *Galbraith v. Scott*, 2 Dall. (Pa.) 95; *Shirk v. Vanneman*, 3 Yeates (Pa.) 196; *McCaskey v. Graff*, 23 Pa. St. 321, 62 Am. Dec. 336; *Scully v. Mason*, 43 Pa. St. 99.

*South Carolina*.—*Sims v. Sims*, 3 Brev. (S. Car.) 252; *Ford v. M'Kibbon*, 1 Strobb. L. (S. Car.) 33; *Smith v. Asbill*, 2 Rich. L. (S. Car.) 546.

*Tennessee*.—*Hill v. Miller*, 2 Swan (Tenn.) 650.

*Texas*.—*Osborn v. Cummings*, 4 Tex. 10; *Wentworth v. Crawford*, 11 Tex. 127; *Bigham v. Carr*, 21 Tex. 142.

*Vermont*.—*Phelps v. Hall*, 2 Tyler (Vt.) 390; *Linsley v. Lovely*, 26 Vt. 123.

**If Interest Doubtful, Question Left to Jury**—*England*.—*Rex v. Bray*, Lee t. Hardw. 360; *Walton v. Shelley*, 1 T. R. 300; *Bent v. Baker*, 3 T. R. 32.

*Iowa*.—*West v. Steamboat Berlin*, 3 Iowa 532; *School Dist. No. Two v. Rogers*, 8 Iowa 316; *Platt v. Hedge*, 8 Iowa 392.

*Kentucky*.—*Day v. Green*, Hard. (Ky.) 124; *Offutt v. Twyman*, 9 Dana (Ky.) 43.

*Maine*.—*Jones v. Lowell*, 35 Me. 538.

*Maryland*.—*Andre v. Bodman*, 13 Md. 241. 71 Am. Dec. 628.

*Pennsylvania*.—*Geisse v. Dobson*, 3 Whart. (Pa.) 34.

*South Carolina*.—*Sims v. Sims*, 3 Brev. (S. Car.) 252; *Richardson v. Dingle*, 11 Rich. L. (S. Car.) 405.

*Vermont*.—*Phelps v. Hall*, 2 Tyler (Vt.) 399.

**Possession of Similar Interest Immaterial**—*England*.—*Lock v. Hayton*, Fortesc. 246; *Trelawney v. Thomas*, 1 H. Bl. 308; *Bent v. Baker*, 3 T. R. 33.

*United States*.—*Evans v. Eaton*, 7 Wheat. (U. S.) 356.

*Alabama*.—*Kennon v. M'Rea*, 2 Port. (Ala.) 389; *Williams v. Jones*, 2 Ala. 314; *Stewart v. Conner*, 9 Ala. 803.

*Connecticut*.—*Fairchild v. Beach*, 1 Day (Conn.) 266; *Phelps v. Winchel*, 1 Day (Conn.) 269; *Fowler v. Collins*, 2 Root (Conn.) 231; *Stoddard v. Mix*, 14 Conn. 12; *Wadhams v. Litchfield*, etc., Turnpike Co., 10 Conn. 416.

*Kentucky*.—*Woodard v. Spiller*, 1 Dana (Ky.) 179, 25 Am. Dec. 139; *Jarboe v. Colvin*, 4 Bush (Ky.) 70.

*Maine*.—*Rollins v. Taber*, 25 Me. 144.

*Massachusetts*.—*Bliss v. Thompson*, 4 Mass. 488.

*Mississippi*.—*Clapp v. Mandeville*, 5 How. (Miss.) 197.

*Missouri*.—*Todd v. Boone County*, 8 Mo. 431.

*New Jersey*.—*Henarie v. Maxwell*, 10 N. J. L. 297.

*New York*.—*McLaren v. Hopkins*, 1 Paige (N. Y.) 18; *Hoyt v. Wildfire*, 3 Johns. (N. Y.) 518; *Van Nuys v. Terhune*, 3 Johns. Cas. (N. Y.) 82; *Stewart v. Kip*, 5 Johns. (N. Y.) 256; *Gould v. James*, 6 Cow. (N. Y.) 369.

*Pennsylvania*.—*Harrisburg Bank v. Forster*, 8 Watts (Pa.) 307; *Nass v. Vanswearingen*, 7 S. & R. (Pa.) 192; *Bennett v. Hethington*, 16 S. & R. (Pa.) 195.

*South Carolina*.—*Cotchet v. Dixon*, 4 McCord L. (S. Car.) 311.

*Texas*.—*Bass v. Peevey*, 22 Tex. 295.

*Virginia*.—*Masters v. Varner*, 5 Gratt. (Va.) 168, 50 Am. Dec. 114.

**Honorary Obligation Not Enough**—*England*.—*Pederson v. Stoffles*, 1 Campb. 144; *Solarte v. Melville*, 1 M. & R. 202, 17 E. C. L. 240.

*Alabama*.—*M'Causland v. Neal*, 3 Stew. & P. (Ala.) 131; *Beall v. Ridgeway*, 18 Ala. 117.

*Connecticut*.—*Smith v. Downs*, 6 Conn. 365.

*Illinois*.—*Frink v. McClung*, 9 Ill. 569.

*Indiana*.—*Orput v. Miller*, 5 Blackf. (Ind.) 571.

*Kentucky*.—*Com. v. Gore*, 3 Dana (Ky.) 474.

*Maryland*.—*Stimmel v. Underwood*, 3 Gill & J. (Md.) 282.

*Massachusetts*.—*Union Bank v. Knapp*, 3 Pick. (Mass.) 108, 15 Am. Dec. 181.

*Mississippi*.—*Phebe v. Prince*, Walk. (Miss.) 131.

*New Hampshire*.—*Howe v. Howe*, 10 N. H. 88.

*New York*.—*Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Gilpin v. Vincent*, 9 Johns. (N. Y.) 219; *Mulheran v. Gillespie*, 12 Wend. (N. Y.) 349; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466.

*North Carolina*.—*State v. Poteet*, 7 Ired. L. (29 N. Car.) 356.

*Pennsylvania*.—*Carman v. Foster*, 1 Ashm. (Pa.) 133; *Ludlow v. Union Ins. Co.*, 2 S. & R. (Pa.) 119; *Dellone v. Rehmer*, 4 Watts (Pa.) 9; *Long v. Bailie*, 4 S. & R. (Pa.) 222.

*Tennessee*.—*Hill v. Miller*, 2 Swan (Tenn.) 659; *Tilford v. Hayes*, 2 Yerg. (Tenn.) 89.

**Belief of Witness as to His Interest**—*Alabama*.—*Gayle v. Bishop*, 14 Ala. 552.

*California*.—*Coghill v. Boring*, 15 Cal. 213; *McCabe v. Hand*, 18 Cal. 496.

*Georgia*.—*Stallings v. Carson*, 24 Ga. 423.

*Kentucky*.—*Com. v. Gore*, 3 Dana (Ky.) 476; *Sentney v. Overton*, 4 Bibb (Ky.) 445; *Elliot v. Porter*, 5 Dana (Ky.) 304, 30 Am. Dec. 689; *Com. v. Moore*, 5 J. J. Marsh. (Ky.) 656; *Offutt v. Twyman*, 9 Dana (Ky.) 43.

*Maine*.—*George v. Stubbs*, 26 Me. 243.

*Maryland*.—*Colston v. Nicols*, 1 Har. & J. (Md.) 105; *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282; *Peter v. Beall*, 4 Har. & M. (Md.) 342; *Washington*, etc., Turnpike Road Co. v. State, 19 Md. 239.

*Massachusetts*.—*Plumb v. Whiting*, 4 Mass. 518; *Peirce v. Chase*, 8 Mass. 487.

*Mississippi*.—*Phebe v. Prince*, Walk. (Miss.) 131.

*New York*.—*Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466.

*North Carolina*.—*State v. Poteet*, 7 Ired. L. (29 N. Car.) 356.

*Pennsylvania*.—*Fernsler v. Carlin*, 3 S. & R. (Pa.) 130; *Long v. Bailie*, 4 S. & R. (Pa.) 222; *Dellone v. Rehmer*, 4 Watts (Pa.) 9; *Cassiday v. McKenzie*, 4 W. & S. (Pa.) 282, 39 Am. Dec. 76.

*South Carolina*.—*Havis v. Barkley*, Harp. L.

and so where his interest was equally balanced between the litigants.<sup>1</sup>

(S. Car.) 63; *Cotchet v. Dixon*, 4 McCord L. (S. Car.) 311.

*Tennessee*.—*Hill v. Miller*, 2 Swan (Tenn.) 650.

*Vermont*.—*State v. Clark*, 2 Tyler (Vt.) 277; *Nichols v. Holgate*, 2 Aik. (Vt.) 138.

*Virginia*.—*Richardson v. Hunt*, 2 Munf. (Va.) 148.

**Effect of Acquisition of Interest After Learning Facts to Which Called to Testify**—*England*.—*Barlow v. Vowell*, Skin. 586; *Bent v. Baker*, 3 T. R. 27; *Forrester v. Pigou*, 3 Campb. 380, 1 M. & S. 9.

*Alabama*.—*Jones v. Hoskins*, 18 Ala. 480.

*Connecticut*.—*Simons v. Payne*, 2 Root (Conn.) 406; *Phelps v. Riley*, 3 Conn. 266.

*Georgia*.—*Way v. Arnold*, 18 Ga. 181.

*Kentucky*.—*Baylor v. Smithers*, 1 Litt. (Ky.) 105; *M'Daniel's Will*, 2 J. J. Marsh. (Ky.) 331; *Price v. Wood*, 7 T. B. Mon. (Ky.) 223.

*Maine*.—*Burgess v. Lane*, 3 Me. 165.

*Massachusetts*.—*Eastman v. Winship*, 14 Pick. (Mass.) 46.

*Mississippi*.—*Clapp v. Mandeville*, 5 How. (Miss.) 197.

*New York*.—*Jackson v. Rumsey*, 3 Johns. Cas. (N. Y.) 237.

*North Carolina*.—*Rhem v. Jackson*, 2 Dev. L. (13 N. Car.) 187; *Hafner v. Irwin*, 4 Ired. L. (26 N. Car.) 533.

*Pennsylvania*.—*Long v. Bailie*, 4 S. & R. (Pa.) 222.

*Tennessee*.—*Tatum v. Lofton*, Cooke (Tenn.) 115; *Netherton v. Robertson*, 3 Hayw. (Tenn.) 29.

*Wisconsin*.—*Whiting v. Gould*, 1 Wis. 195.

**Incompetent as to Some Matters and Competent as to Others**.—*Wright v. Rogers*, 3 McLean (U. S.) 229; *Smith v. Carrington*, 4 Cranch (U. S.) 62; *Shelton v. Tomlinson*, 2 Root (Conn.) 132; *Gage v. Stewart*, 4 Johns. (N. Y.) 293; *Rowe v. Cockrell*, Bailey Eq. (S. Car.) 126.

**Presumption of Competency**.—*Adams v. Barrett*, 3 Ga. 277; *Smith v. White*, 5 Dana (Ky.) 376; *Cotchet v. Dixon*, 4 McCord L. (S. Car.) 311. See also *Hall v. Gittings*, 2 Har. & J. (Md.) 112; *Stoddert v. Manning*, 2 Har. & G. (Md.) 147; *Jackson v. Delancey*, 4 Cow. (N. Y.) 427; *Saxon v. Boyce*, 1 Bailey L. (S. Car.) 66.

*United States*.—*The Schooner Sally*, 1 Gall. (U. S.) 401; *The Schooner Boston*, 1 Sumn. (U. S.) 344; *The Ship Henry Ewhank*, 1 Sumn. (U. S.) 432; *Story, J.*, in *The Anne*, 3 Wheat. (U. S.) 445; *The Grotius*, 9 Cranch (U. S.) 368.

**Rule in Admiralty**—*England*.—*The Charlotte Caroline*, 1 Dod. 192; *Robinett v. The Ship Exeter*, 2 Rob. 261; *The Amitie*, 5 C. Rob. 307, note; *The Drie Gebroeders*, 5 C. Rob. 303; *The Glierktigheit*, 6 C. Rob. 58, note a; *The Haabet*, 6 C. Rob. 54; *The L'Amitie*, 6 C. Rob. 269, note a.

**1. Testimony Against Interest**—*England*.—*Norden v. Williamson*, 1 Taunt. 378; *Oxenden v. Penderice*, 2 Salk. 691; *Worrall v. Jones*, 7 Bing. 395, 20 E. C. L. 177.

*United States*.—*Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 630.

*Connecticut*.—*Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

*Georgia*.—*Brown v. Burke*, 22 Ga. 574.

*Indiana*.—*Sims v. Givan*, 2 Blackf. (Ind.) 461.

*Iowa*.—*Merchand v. Cook*, 4 Greene (Iowa) 115; *Tyler v. Coolbaugh*, 7 Iowa 474.

*Kentucky*.—*Kennedy v. Barnett*, 1 Bibb (Ky.) 154; *Wright v. Nichols*, 1 Bibb (Ky.) 298.

*Maryland*.—*Belt v. Miller*, 4 Har. & M. (Md.) 536.

*Mississippi*.—*Doe v. Jackson*, 1 Smed. & M. (Miss.) 494; *Englehard v. Slater*, 7 How. (Miss.) 538.

*New York*.—*Jackson v. Vredenberg*, 1 Johns. (N. Y.) 159; *Lansingbury v. Willard*, 8 Johns. (N. Y.) 428; *Canandarqua Academy v. McKechnie*, 90 N. Y. 618.

*Pennsylvania*.—*Ralph v. Brown*, 3 W. & S. (Pa.) 395; *Turner v. Waterson*, 4 W. & S. (Pa.) 171; *Stockton v. Demuth*, 7 Watts (Pa.) 39; *Commercial Bank v. Wood*, 7 W. & S. (Pa.) 89; *Strawn v. Shank*, 110 Pa. St. 259.

*Tennessee*.—*Gardner v. Gardner*, 4 Heisk. (Tenn.) 303.

*Texas*.—*Loftin v. Nally*, 24 Tex. 565; *Tuttle v. Turner*, 28 Tex. 759.

**Interest Balanced**—*England*.—*Fancourt v. Bull*, 1 Bing. N. Cas. 681, 27 E. C. L. 542; *York v. Blott*, 5 M. & S. 71.

*United States*.—*Scott v. Propeller Plymouth*, 6 McLean (U. S.) 463.

*Alabama*.—*Standefer v. Chisholm*, 1 Stew. & P. (Ala.) 449; *Pyke v. Searcy*, 4 Port. (Ala.) 52; *Spence v. Mitchell*, 9 Ala. 744; *Lockett v. Child*, 11 Ala. 640; *Governor v. Gee*, 19 Ala. 199.

*California*.—*Elgin v. Hill*, 27 Cal. 372.

*Illinois*.—*Cadwell v. Meek*, 17 Ill. 220; *Muchmore v. Jeffers*, 25 Ill. 199; *Montague v. Mitchell*, 28 Ill. 481; *Kennedy v. Evans*, 31 Ill. 258; *Smalley v. Ellet*, 36 Ill. 500.

*Kentucky*.—*Wright v. Nichols*, 1 Bibb (Ky.) 298; *Douglass v. Holbert*, 7 J. J. Marsh. (Ky.) 1; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 308; *Vannmeter v. McFaddin*, 8 B. Mon. (Ky.) 439; *Adams v. Gardiner*, 13 B. Mon. (Ky.) 197.

*Louisiana*.—*Rhodes v. Myers*, 16 La. Ann. 398.

*Maine*.—*Eldridge v. Wadleigh*, 12 Me. 371; *Lewis v. Hodgdon*, 17 Me. 269; *Norton v. Waite*, 20 Me. 175; *Cutter v. Copeland*, 18 Me. 127; *Nute v. Bryant*, 31 Me. 555.

*Maryland*.—*Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628.

*Massachusetts*.—*Cushman v. Loker*, 2 Mass. 108; *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237.

*Mississippi*.—*Doe v. Roe*, 13 Smed. & M. (Miss.) 466.

*Missouri*.—*Bridges v. Bell*, 13 Mo. 69.

*New York*.—*Starkweather v. Mathews*, 2 Hill (N. Y.) 131; *Milward v. Hallett*, 2 Cai. (N. Y.) 344.

*Ohio*.—*Vairin v. Canal Ins. Co.*, 10 Ohio 223.

*Pennsylvania*.—*Nessly v. Swearingen*, Add. (Pa.) 144; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *Miller v. Little*, 1 Yeates (Pa.) 26.



(2) *Real Parties in Interest* — (a) *Cestuis que Trustent*. — A *cestui que trust*, being substantially, though not nominally, a party, was not a competent witness for the trustee in actions concerning the trust estate or fund.<sup>1</sup>

(b) *Bankrupts and Their Creditors* — *a. i.* *BANKRUPTS*. — A bankrupt, being interested in increasing the estate in the hands of his assignee, was not a competent witness where the effect of his testimony would be to increase the fund or prevent its diminution.<sup>2</sup>

*South Carolina*. — Ford *v.* M'Kibbon, 1 Strobb. L. (S. Car.) 33; Alston *v.* Huggins, 3 Brev. (S. Car.) 185.

*Tennessee*. — Stump *v.* Roberts, Cooke (Tenn.) 350.

*Vermont*. — Abbott *v.* Cobb, 17 Vt. 593.

*Virginia*. — Brown *v.* Johnson, 13 Gratt. (Va.) 644.

**Preponderance of Interest Fatal** — *England*. — Edmonds *v.* Lowe, 8 B. & C. 407, 15 E. C. L. 250.

*United States*. — Ferson *v.* Sanger, 1 Woodb. & M. (U. S.) 138.

*Alabama*. — Ware *v.* Jordan, 21 Ala. 837.

*Arkansas*. — Hoys *v.* Tuttle, 8 Ark. 124, 46 Am. Dec. 309.

*Connecticut*. — Beach *v.* Swift, 2 Conn. 269; Barnwell *v.* Mitchell, 3 Conn. 101; Bill *v.* Porter, 9 Conn. 23; Seymour *v.* Harvey, 11 Conn. 275.

*Georgia*. — Vason *v.* Merchants' Bank, 2 Ga. 140; Robinson *v.* Towns, 30 Ga. 822.

*Illinois*. — Stokes *v.* Kane, 5 Ill. 167; Muchmore *v.* Jeffers, 25 Ill. 199.

*Indiana*. — Craven *v.* Updyke, 3 Blackf. (Ind.) 272.

*Kentucky*. — Turner *v.* Davis, 1 B. Mon. (Ky.) 151; Hunter *v.* Gatewood, 5 T. B. Mon. (Ky.) 268.

*Maine*. — Scott *v.* M'Lellan, 2 Me. 199; Amidown *v.* Woodman, 31 Me. 580.

*Mississippi*. — Cason *v.* Robson, 29 Miss. 97.

*Missouri*. — Bridges *v.* Bell, 13 Mo. 69.

*New York*. — Hubby *v.* Brown, 16 Johns. (N. Y.) 70.

*North Carolina*. — See Cowles *v.* Rowland, 2 Jones L. (47 N. Car.) 219.

*Ohio*. — Dille *v.* Woods, 14 Ohio 122.

*Pennsylvania*. — Mackinley *v.* McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522.

*South Carolina*. — Jones *v.* M'Neil, 2 Bailey L. (S. Car.) 466.

*Texas*. — Bennett *v.* Dowling, 22 Tex. 660; Gill *v.* Campbell, 24 Tex. 405.

*Vermont*. — Hopkinson *v.* Guildhall, 19 Vt. 533.

**1. Cestui que Trust Incompetent**. — Bell *v.* Smith, 5 B. & C. 188, 11 E. C. L. 198; Stone *v.* Stone, 1 Ala. 582; Alabama State Bank *v.* M'Dade, 4 Port. (Ala.) 252; Jackson *v.* Cadwell, 1 Cow. (N. Y.) 622; St. John *v.* American Mut. L. Ins. Co., 2 Duer (N. Y.) 419; Hoak *v.* Hoak, 5 Watts (Pa.) 80; Campbell *v.* Galbreath, 5 Watts (Pa.) 423; Buchanan *v.* Buchanan, 46 Pa. St. 186.

**Testimony Against Interest Admissible**. — Hanson *v.* Parker, 1 Wils. C. Pl. 257; Harrison *v.* Vallance, 1 Bing. 45, 8 E. C. L. 394; Doe *v.* Wainwright, 3 N. & P. 598; May *v.* Taylor, 6 M. & G. 261, 46 E. C. L. 261; Bell *v.* Ansley, 16 East 141; Petermans *v.* Laws, 6 Leigh (Va.) 523.

**2. Bankrupt Incompetent** — *England*. — Butler *v.* Cooke, 1 Cowp. 70; Ewens *v.* Gold, Bull. N. P. 43; *Ex p.* Burt, 1 Madd. 36; Goodhay *v.* Hendry, M. & M. 319, 22 E. C. L. 321; Masters *v.* Drayton, 2 T. R. 496; Kennett *v.* Greenwollers, Peake N. P. (ed. 1795) 3; Williams *v.* Williams, 6 M. & W. 170.

*United States*. — Bridges *v.* Armour, 5 How. (U. S.) 91.

*Alabama*. — Houston *v.* Prewitt, 8 Ala. 846; Colgin *v.* Redman, 20 Ala. 650.

*Connecticut*. — Bates *v.* Coe, 10 Conn. 280.

*Louisiana*. — Clay *v.* Kirkland, 4 Mart. (La.) 405.

*Maryland*. — Bussy *v.* Ady, 3 Har. & M. (Md.) 97.

*New Hampshire*. — Coleman *v.* Tebbetts, 20 N. H. 408.

*Pennsylvania*. — Sharp *v.* Long, 28 Pa. St. 434.

*South Carolina*. — Cleverly *v.* M'Cullough, 2 Hill L. (S. Car.) 445; Coit *v.* Owen, 2 Desaus. (S. Car.) 456.

**Competent if No Interest**. — Wright *v.* Rogers, 3 McLean (U. S.) 229; Boas *v.* Hetzel, 3 Pa. St. 298; Gilchrist *v.* Martin, Bailey Eq. (S. Car.) 492; Onion *v.* Fullerton, 19 Vt. 317.

**Effect of Discharge** — *England*. — Tennant *v.* Strachan, M. & M. 377; Ewens *v.* Gold, Bull. N. P. 43; Binns *v.* Tetley, M'Clel. & Y. 404; Goodhay *v.* Hendry, M. & M. 319, 22 E. C. L. 321; Ferguson *v.* Spencer, 1 M. & G. 987, 39 E. C. L. 735; Oxlade *v.* Perchard, 1 Esp. 287; Feild *v.* Curtis, 2 Stra. 829; Masters *v.* Drayton, 2 T. R. 496; Chapman *v.* Gardner, 2 H. Bl. 279; Cross *v.* Fox, 2 H. Bl. 279, note a; Flower *v.* Herbert, 2 H. Bl. 279, note a; Hoffman *v.* Pitt, 5 Esp. 25; Wyatt *v.* Wilkinson, 5 Esp. 187; Sayer *v.* Garnett, 7 Bing. 103, 20 E. C. L. 63; Dixon *v.* Purse, Peake Add. Cas. 187; Schneider *v.* Parr, Peake Add. Cas. 66.

*United States*. — Bridges *v.* Armour, 5 How. (U. S.) 91.

*Alabama*. — Frow *v.* Downman, 11 Ala. 880.

*Indiana*. — Cully *v.* Ross, 7 Blackf. (Ind.) 312; Dean *v.* Speakman, 7 Blackf. (Ind.) 317; Oldham *v.* McCormick, 8 Blackf. (Ind.) 387.

*Massachusetts*. — Greene *v.* Durfee, 6 Cush. (Mass.) 362.

*New York*. — Dickinson *v.* Codwise, 1 Sandf. Ch. (N. Y.) 214; Fellows *v.* American L. Ins., etc., Co., 1 Sandf. Ch. (N. Y.) 203; Morse *v.* Hovey, 1 Sandf. Ch. (N. Y.) 187, 11 Barb. (N. Y.) 100; Jaques *v.* Marquand, 6 Cow. (N. Y.) 497.

*Tennessee*. — Carman *v.* White, 4 Humph. (Tenn.) 301.

**Testimony by Insolvent Debtor**. — Rudge *v.* Ferguson, 1 C. & P. 253, 11 E. C. L. 380; Wilkins *v.* Ford, 2 C. & P. 344, 12 E. C. L. 161; Delafield *v.* Freeman, 6 Bing. 294, 19 E.

**§5. CREDITORS.** — The creditors of a bankrupt or of an insolvent debtor were not competent witnesses where their testimony would tend to preserve or increase the fund or to support the bankruptcy.<sup>1</sup>

(c) **Persons Interested in Estates of Decedents.** — In an action by or against the estate of a deceased person, heirs at law, next of kin, legatees, and devisees were not competent in favor of the estate if the result of the suit would be to increase or decrease their share. But they could testify against interest, and were made competent by a release of their interest.<sup>2</sup>

C. L. 85, 4 C. & P. 67, 19 E. C. L. 277; Krum v. Beard, 31 Mo. 505; Legee v. Burbank, 2 E. D. Smith (N. Y.) 419; Davies v. Cram, 4 Sandf. (N. Y.) 355; Allen v. Franklin F. Ins. Co., (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 501; Symonds v. Peck, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 395; Allen v. Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 442; Jones v. East Soc., 21 Barb. (N. Y.) 161; Wilkinson v. Pittsburgh Farmers, etc., Turnpike Co., 6 Pa. St. 398.

**1. Creditors Incompetent — England.** — Shuttleworth v. Bravo, 1 Stra. 507; Green v. Jones, 2 Campb. 411; Crooke v. Edwards, 2 Stark. 303, 3 E. C. L. 419, *overruling* Williams v. Stevens, 2 Campb. 301; *Ex p.* Malkin, 2 Rose 27; *Ex p.* Osborne, 2 Ves. & B. 177; Adams v. Malkin, 3 Campb. 543. Cherer v. Sodo, 3 C. & P. 10, 14 E. C. L. 185.

**United States.** — Carr v. Hilton, 1 Curt. (U. S.) 390; Corps v. Robinson, 2 Wash. (U. S.) 388.

**Massachusetts.** — Marland v. Jefferson, 2 Pick. (Mass.) 240; Farrington v. Farrington, 4 Mass. 237.

**New York.** — Jacks v. Nichols, 3 Sandf. Ch. (N. Y.) 317; Duel v. Fisher, 4 Den. (N. Y.) 516; Phoenix v. Dey, 5 Johns. (N. Y.) 427.

**Competent to Prove Fraud.** — Greene's Case, 2 Dall (U. S.) 268; Cutler v. Taylor, 1 Sandf. (N. Y.) 593.

**Effect of Sale of Claim.** — Granger v. Furlong, 2 W. Bl. 1273; Heath v. Hall, 4 Taunt. 326.

**2. Heirs at Law and Next of Kin Incompetent — England.** — Mathews v. Smith, 2 Y. & J. 426.

**United States.** — Randall v. Phillips, 3 Mason (U. S.) 378.

**Alabama.** — M'Kinney v. M'Kinney, 2 Stew. (Ala.) 17; McGuire v. Shelby, 20 Ala. 456; McLemore v. Nuckolls, 37 Ala. 662; Coate v. Coate, 37 Ala. 695.

**Arkansas.** — Brown v. Hicks, 1 Ark. 232.

**Georgia.** — Anderson v. Primrose, Dudley (Ga.) 216.

**Iowa.** — See Cushman v. Blakesly, 3 Greene (Iowa) 542.

**Kentucky.** — Denny v. Booker, 2 Bibb (Ky.) 427; Brown v. Durbin, 5 J. J. Marsh. (Ky.) 170. See also Botts v. Fitzpatrick, 5 B. Mon. (Ky.) 397.

**Louisiana.** — Weigel's Succession, 18 La. Ann. 49. See also Lazare v. Jacques, 15 La. Ann. 599.

**Maryland.** — Dunnington v. Dunnington, 3 Har. & J. (Md.) 279; State v. Greenwell, 4 Gill & J. (Md.) 407; Smith v. Morgan, 8 Gill (Md.) 133.

**Massachusetts.** — White v. Derby, 1 Mass. 239.

**Mississippi.** — M'Intyre v. Ledyard, 1 Smed. & M. Ch. (Miss.) 91; Carter v. Graves, 6 How.

(Miss.) 9; Dillard v. Wright, 11 Smed. & M. (Miss.) 455; Spears v. Burton, 31 Miss. 547.

**Missouri.** — Foster v. Nowlin, 4 Mo. 18.

**New Hampshire.** — Sawyer v. Tappan, 14 N. H. 352.

**New Jersey.** — King v. King, 9 N. J. Eq. 44.

**New York.** — Scott v. Young, 4 Paige (N. Y.) 542; Allen v. Blanchard, 9 Cow. (N. Y.) 631. See also Vultee v. Rayner, 2 Hall (N. Y.) 376; Shepard v. Ward, 8 Wend. (N. Y.) 542.

**North Carolina.** — Cox v. Wilson, 2 Ired. L. (24 N. Car.) 234; M'Kinna v. Hayer, 2 Hawks (9 N. Car.) 422.

**Ohio** — Fagin v. Cooley, 17 Ohio 44.

**Pennsylvania.** — Kimball v. Kimball, 3 Rawle (Pa.) 469; Asay v. Hoover, 5 Pa. St. 21, 45 Am. Dec. 713; Buchanan v. Buchanan, 46 Pa. St. 186.

**South Carolina.** — Ordinary v. Bracey, 2 Bay (S. Car.) 542.

**Statutory Modifications.** — Swofford v. Gray, 8 Ind. 508; Gunnison v. Lane, 45 Me. 165; Nash v. Reed, 46 Me. 168; Stein v. Weidman, 20 Mo. 17 (*overruling* Penn. Watson, 20 Mo. 13); Perry v. McGuire, 31 Mo. 287; Wheeler v. Towns, 43 N. H. 56; Butt v. Butt, 1 Ohio St. 222; Doebler v. Snavelly, 5 Watts (Pa.) 225.

**Residuary Legatee Incompetent.** — Baker v. Tyrwhitt, 4 Campb. 27; Austin v. Bradley, 2 Day (Conn.) 466; Lampton v. Lampton, 6 T. B. Mon. (Ky.) 620; La Rue v. Boughaner, 4 N. J. L. 115; Campbell v. Tousey, 7 Cow. (N. Y.) 64; Dimond v. McDowell, 7 Watts (Pa.) 510.

**Competency of Specific Legatee — England.** — Wilcocks v. Phillips, 1 Wall. Jr. (C. C.) 47; Clarke v. Gannon, R. & M. 31, 21 E. C. L. 374; Johnson v. Baker, 2 C. & P. 207, 12 E. C. L. 92.

**Alabama.** — Strong v. Finch, Minor (Ala.) 256; Roberts v. Trawick, 13 Ala. 68; Clealand v. Huey, 18 Ala. 346.

**Illinois.** — Mester v. Zimmerman, 7 Ill. App. 156.

**Georgia.** — Johnson v. Lewis, 8 Ga. 460.

**Kentucky.** — Higgins v. Morrison, 4 Dana (Ky.) 106.

**Maine.** — Carlisle v. Burley, 3 Me. 250.

**New Jersey.** — Hedges v. Boyle, 7 N. J. L. 68.

**New York.** — Mesick v. Mesick, 7 Barb. (N. Y.) 120; Clark v. Vorce, 19 Wend. (N. Y.) 232.

**North Carolina.** — Learey v. Littlejohn, 1 Murph. (5 N. Car.) 406.

**Pennsylvania.** — Landis v. Landis, 1 Grant Cas. (Pa.) 248; Cornell v. Vanartsdalen, 4 Pa. St. 364; Levers v. Van Buskirk, 4 Pa. St. 315.

**Virginia.** — Temple v. Ellett, 2 Munf. (Va.) 452.

(3) *Persons Jointly Interested with a Party.* — One partner was not competent for a copartner in a contest concerning partnership matters; nor for the other party, because it was for his interest to prove his partner liable. So, too, one part owner of personal property was incompetent for the other in a suit concerning such property as to joint contractors, joint lessors, etc.<sup>1</sup>

**Competency of Devisee.** — *Helliard v. Jennings*, 1 *Ld. Raym.* 505, cited in *Windham v. Chetwynd*, 1 *Burr.* 424; *Pyke v. Crouch*, 1 *Ld. Raym.* 730; *Bloor v. Davies*, 7 *M. & W.* 235; *Hall v. Hall*, 17 *Pick. (Mass.)* 373; *Canfield v. Ball*, 8 *N. J. Eq.* 582; *Jackson v. Nelson*, 6 *Cow. (N. Y.)* 248; *Norris v. Johnston*, 5 *Pa. St.* 287.

**Testimony Against Interest.** — *Roberts v. Tra- wick*, 17 *Ala.* 55, 52 *Am. Dec.* 164; *Richmond v. Cross*, 13 *Mo.* 75; *Cox v. Wilson*, 2 *Ired. L.* (24 *N. Car.*) 234; *Nunn v. Owens*, 2 *Strobh. L. (S. Car.)* 101.

**Effect of Release** — *England.* — *Lowe v. Jol- liffe*, 1 *W. Bl.* 365; *Goodtitle v. Welford*, 1 *Dougl.* 139; *Baker v. Tyrwhitt*, 4 *Campb.* 27.

*Alabama.* — *Hall v. Alexander*, 9 *Ala.* 219; *Dent v. Portwood*, 17 *Ala.* 242; *Herndon v. Givens*, 19 *Ala.* 313; *Coate v. Coate*, 37 *Ala.* 695.

*Georgia.* — *Martin v. Mitchell*, 28 *Ga.* 382.

*Kentucky.* — *Boon v. Nelson*, 2 *Dana (Ky.)* 391.

*Maine.* — *Reed v. Gilbert*, 32 *Me.* 519.

*Maryland.* — *Smith v. Morgan*, 8 *Gill (Md.)* 133; *Morris v. Harris*, 9 *Gill (Md.)* 19.

*Massachusetts.* — *Boynton v. Turner*, 13 *Mass.* 391.

*New Jersey.* — *King v. King*, 9 *N. J. Eq.* 44.

*New York.* — *Whelpley v. Loder*, 1 *Dem. (N. Y.)* 368; *Meehan v. Rourke*, 2 *Bradf. (N. Y.)* 385; *Reeve v. Crosby*, 3 *Redf. (N. Y.)* 74; *Allen v. Blanchard*, 9 *Cow. (N. Y.)* 631; *Coffin v. Coffin*, 23 *N. Y.* 9, 80 *Am. Dec.* 235; *Loder v. Whelpley*, 111 *N. Y.* 239.

*Pennsylvania.* — *Asay v. Hoover*, 5 *Pa. St.* 21, 45 *Am. Dec.* 713; *Steininger v. Hoch*, 42 *Pa. St.* 432.

*South Carolina.* — *Spann v. Ballard*, *Rice L. (S. Car.)* 440.

*Vermont.* — *Baxter v. Buck*, 10 *Vt.* 548; *Sylvester v. Downer*, 20 *Vt.* 355.

**1. Incompetent for Partner** — *England.* — *Goodacre v. Breame*, *Peake N. P. (ed. 1795)* 174; *Young v. Bairner*, 1 *Esp.* 103; *Cheyne v. Koops*, 4 *Esp.* 112; *Evans v. Yeatherd*, 2 *Bing.* 133, 9 *E. C. L.* 345; *Jackson v. Galloway*, 8 *C. & P.* 480, 34 *E. C. L.* 489.

*Alabama.* — *Cochran v. Cunningham*, 16 *Ala.* 448, 50 *Am. Dec.* 186; *Myers v. Gilbert*, 18 *Ala.* 467.

*Connecticut.* — *Bill v. Porter*, 9 *Conn.* 23.

*Florida.* — *Hooker v. Johnson*, 8 *Fla.* 453.

*Maryland.* — *Robertson v. Mills*, 2 *Har. & G. (Md.)* 98.

*Mississippi.* — *Randolph v. Govan*, 14 *Smed. & M. (Miss.)* 9.

*Missouri.* — *Weston v. Hunt*, 19 *Mo.* 505.

*New York.* — *Grant v. Shurter*, 1 *Wend. (N. Y.)* 148.

*Ohio.* — *Choteau v. Raitt*, 20 *Ohio* 132.

**Incompetent for Other Party** — *England.* — *Blackett v. Weir*, 5 *B. & C.* 385, 11 *E. C. L.* 257; *Hall v. Curzon*, 9 *B. & C.* 646, 17 *E. C. L.*

466; *Hudson v. Robinson*, 4 *M. & S.* 475; *York v. Blott*, 5 *M. & S.* 71; *Lockart v. Graham*, 1 *Stra.* 35; *Gossham v. Goldney*, 2 *Stark.* 414, 3 *E. C. L.* 469; *Evans v. Yeatherd*, 2 *Bing.* 133, 9 *E. C. L.* 345; *Ripley v. Thompson*, 12 *Moo.* 55, 22 *E. C. L.* 433.

*Alabama.* — *Lewis v. Post*, 1 *Ala.* 65; *Barney v. Earle*, 20 *Ala.* 405.

*Illinois.* — *Hurd v. Brown*, 25 *Ill.* 616; *Brown v. Hurd*, 41 *Ill.* 121; *Bell v. Thompson*, 34 *Ill.* 529.

*Kentucky.* — *Merritt v. Pollys*, 16 *B. Mon. (Ky.)* 355.

*Louisiana.* — *McIlvaine v. Franklin*, 2 *La. Ann.* 622; *Ellis v. Lauve*, 4 *La. Ann.* 245.

*Massachusetts.* — *Page v. Weeks*, 13 *Mass.* 199; *Columbian Mfg. Co. v. Dutch*, 13 *Pick. (Mass.)* 128.

*Mississippi.* — *Garner v. Myrick*, 30 *Miss.* 448.

*Missouri.* — *Dixon v. Hood*, 7 *Mo.* 414, 38 *Am. Dec.* 461.

*New Hampshire.* — *Latham v. Kenniston*, 13 *N. H.* 203; *Wright v. Boynton*, 37 *N. H.* 9.

*New York.* — *Rich v. Husson*, 4 *Sandf. (N. Y.)* 115; *Pierce v. Kearney*, 5 *Hill (N. Y.)* 82; *Hosack v. Rogers*, 25 *Wend. (N. Y.)* 313; *Kapp v. Barthan*, 1 *E. D. Smith (N. Y.)* 622.

*Ohio.* — *Hale v. Wetmore*, 4 *Ohio St.* 600.

*Pennsylvania.* — *Porter v. Wilson*, 13 *Pa. St.* 641; *Collier v. Leech*, 29 *Pa. St.* 404; *Brewster v. Sterrett*, 32 *Pa. St.* 115; *Wright v. Funck*, 94 *Pa. St.* 26; *Taylor v. Henderson*, 17 *S. & R. (Pa.)* 453.

*Tennessee.* — *Philips v. Henry*, 2 *Head (Tenn.)* 133; *Foster v. Hall*, 4 *Humph. (Tenn.)* 346.

**Competent if No Interest** — *England.* — *Cheyne v. Koops*, 4 *Esp.* 112; *Young v. Bairner*, 1 *Esp.* 103; *Simons v. Smith*, *R. & M.* 29, 21 *E. C. L.* 374; *Wilson v. Hirst*, 4 *B. & Ad.* 760, 24 *E. C. L.* 156.

*United States.* — *Le Roy v. Johnson*, 2 *Pet. (U. S.)* 194.

*California.* — *Cravens v. Dewey*, 13 *Cal.* 40.

*Connecticut.* — *Tomkins v. Beers*, 2 *Root (Conn.)* 498.

*Indiana.* — *Cline v. Little*, 5 *Blackf. (Ind.)* 486.

*Iowa.* — See *White v. Tucker*, 9 *Iowa* 100.

*Kentucky.* — *Dougherty v. Smith*, 4 *Met. (Ky.)* 279.

*Louisiana.* — See *White v. Jones*, 14 *La. Ann.* 692.

*Mississippi.* — *Scott v. Watkins*, 2 *Smed. & M. (Miss.)* 239; *Collins v. Flowers*, 1 *How. (Miss.)* 26.

*Missouri.* — See *Long v. Story*, 13 *Mo.* 4.

*New Jersey.* — See *Ward v. Coulter*, 4 *N. J. L.* 236.

*New York.* — *Grant v. Shurter*, 1 *Wend. (N. Y.)* 148; *Bagley v. Osborn*, 2 *Wend. (N. Y.)* 527; *Lefferts v. De Mott*, 21 *Wend. (N. Y.)* 136; *Clarkson v. Carter*, 3 *Cow. (N. Y.)* 84.



(4) *In Actions Concerning Real Estate.* — In actions concerning real estate, there were many persons who, by reason of their relation to the land or to the parties, were rendered incompetent or competent, according to the nature of the action. Thus, the grantor might be incompetent or competent for the grantee according to the nature of his deed; and the mortgagor for the mortgagee, according to the question involved. In the note the cases are grouped according to the various relations.<sup>1</sup>

(5) *Lenders and Purchasers of Personal Property.* — Whether or not the

See also *Chapman v. Andrews*, 3 Wend. (N. Y.) 240.

*Pennsylvania.* — *Thomas v. Brady*, 10 Pa. St. 164; *Wells v. Peck*, 23 Pa. St. 155; *Whitehead v. Pittsburgh Bank*, 2 W. & S. (Pa.) 172; *Church v. Hampton*, 6 W. & S. (Pa.) 514; *Curcier v. Pennock*, 14 S. & R. (Pa.) 51; *Black v. Marvin*, 2 P. & W. (Pa.) 138; *McCoy v. Lightner*, 2 Watts (Pa.) 351; *Carter v. Connell*, 1 Whart. (Pa.) 398. See also *Little v. Clarke*, 36 Pa. St. 114.

*South Carolina.* — *Mooreman v. De Graffenreid*, 2 Mill (S. Car.) 195; *Sloan v. Bangs*, 11 Rich. L. (S. Car.) 97.

*Tennessee.* — *Wilson v. Smith*, 5 Yerg. (Tenn.) 408.

*Vermont.* — *Loomis v. Loomis*, 26 Vt. 198.

*West Virginia.* — *Black v. Campbell*, 6 W. Va. 51.

**Part Owners, etc.** — *England.* — *Hall v. Rex*, 6 Bing. 181, 19 E. C. L. 47.

*United States.* — *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 193; *Ruan v. Gardner*, 1 Wash. (U. S.) 145; *Malone v. Bell*, 1 Pet. Adm. 139; *Jones v. The Brig Phoenix*, 1 Pet. Adm. 201; *Atkins v. Burrows*, 1 Pet. Adm. 244.

*Alabama.* — *Steamboat Farmer v. McCraw*, 31 Ala. 659.

*Iowa.* — *West v. Steamboat Berlin*, 3 Iowa 532.

*Kentucky.* — *Ford v. Bronaugh*, 11 B. Mon. (Ky.) 14.

*Maine.* — *Clement v. Durgin*, 5 Me. 9; *Churchill v. Bailey*, 13 Me. 64; *Caldwell v. Cole*, 13 Me. 120; *Lufkin v. Patterson*, 38 Me. 282.

*Missouri.* — *Lee v. Murray*, 12 Mo. 280.

*New Hampshire.* — *Gray v. Johnson*, 14 N. H. 414.

*New York.* — *Ransom v. Keyes*, 9 Cow. (N. Y.) 128; *Marquand v. Webb*, 16 Johns. (N. Y.) 89; *Outwater v. Dodge*, 6 Wend. (N. Y.) 403.

*Pennsylvania.* — *Thompson v. Franks*, 37 Pa. St. 327. See also *Galloway v. Morris*, 3 Yeates (Pa.) 445.

**1. Remaindermen and Tenant in Tail.** — *Doe v. Tyler*, 6 Bing. 390, 19 E. C. L. 111; *Smith v. Blackham*, 1 Salk. 283; *Commings v. Oakhampton*, Say. 45.

**Ejectment — Tenant in Possession** — *Doe v. Wilde*, 5 Taunt. 183; *Doe v. Bingham*, 4 B. & Ald. 672, 6 E. C. L. 648; *Doe v. Birchmore*, 9 Ad. & El. 662, 36 E. C. L. 235; *Doe v. Maisey*, 1 B. & Ad. 439, 20 E. C. L. 420; *Gully v. Exeter*, 5 Bing. 171, 15 E. C. L. 408, 2 M. & P. 276, 17 E. C. L. 207; *Doe v. Reynolds*, 27 Ala. 374; *Doe v. Attica*, 7 Ind. 641; *Foust v. Trice*, 8 Jones L. (53 N. Car.) 490; *Brant v. Dyckman*, 1 Johns. Cas. (N. Y.) 275; *Jackson v. Trusdell*, 12 Johns. (N. Y.)

246; *Jackson v. Hills*, 8 Cow. (N. Y.) 290; *Boyer v. Smith*, 5 Watts (Pa.) 58.

**Landlord and Tenant** — *England.* — *Smith v. Chambers*, 4 Esp. 164; *Doe v. Clarke*, 3 Bing. N. Cas. 429, 32 E. C. L. 191 (dictum by Tindal, C. J.); *Thurgood v. Richardson*, 4 C. P. 481, 19 E. C. L. 484.

*Alabama.* — *Harris v. Plant*, 31 Ala. 639; *House v. Camp*, 32 Ala. 549.

*California.* — *McCormick v. Bailey*, 10 Cal. 230.

*Maryland.* — *Grant v. Beall*, 4 Har. & M. (Md.) 419; *Baker v. Pearce*, 4 Har. & M. (Md.) 502.

*New York.* — *Jackson v. Ogden*, 4 Johns. (N. Y.) 140. See also *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Alexander v. Mahon*, 11 Johns. (N. Y.) 185.

*North Carolina.* — *Forbes v. Williams*, 1 Jones L. (46 N. Car.) 393; *Sanderlin v. Shaw*, 6 Jones L. (51 N. Car.) 225.

*Pennsylvania.* — *Dickson v. Boland*, 4 Pa. St. 112; *Detweiler v. Groff*, 10 Pa. St. 376; *Collin's Appeal*, 35 Pa. St. 83; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 9; *Strawbridge v. Cartledge*, 7 W. & S. (Pa.) 398; *Kuester v. Keck*, 8 W. & S. (Pa.) 16; *McConahy v. Kessler*, 3 P. & W. (Pa.) 467.

*South Carolina.* — *Wilson v. Douglas*, 2 Strobb. L. (S. Car.) 97.

**Mortgagor and Mortgagee** — *England.* — *Doe v. Bamford*, 11 Ad. & El. 786, 39 E. C. L. 228.

*Alabama.* — *Gunter v. Williams*, 40 Ala. 561.

*Connecticut.* — *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695.

*Indiana.* — *Perrin v. Johnson*, 16 Ind. 72; *Indianapolis, etc., R. Co. v. Waggoner*, 16 Ind. 367.

*Kentucky.* — *Miller v. Dillon*, 2 T. B. Mon. (Ky.) 73.

*Maine.* — *Howard v. Chadbourne*, 3 Me. 461, 5 Me. 15; *Woodman v. Skeetup*, 35 Me. 464.

*Maryland.* — *Willard v. Ramsburg*, 22 Md. 206.

*Massachusetts.* — *Plympton v. Moore*, 13 Pick. (Mass.) 191.

*Michigan.* — *Wilcox v. Hill*, 11 Mich. 256.

*Missouri.* — *King v. Bailey*, 8 Mo. 332.

*New Hampshire.* — *Rideout v. Newton*, 17 N. H. 71; *Gage v. Whittier*, 17 N. H. 312; *Gilman v. Moody*, 43 N. H. 244.

*New Jersey.* — *Cummins v. Wire*, 6 N. J. Eq. 73; *Brolasky v. Miller*, 9 N. J. Eq. 807.

*New York.* — *Post v. Dart*, 8 Paige (N. Y.) 639; *Jackson v. M'Chesney*, 7 Cow. (N. Y.) 360, 17 Am. Dec. 521; *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260.

*Pennsylvania.* — *Hartz v. Woods*, 8 Pa. St. 471; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *Shrom v. Williams*, 43 Pa. St. 520; *Enters v. Peres*, 2 Rawle (Pa.) 279.

vendor of personal property was competent for his vendee, in an action concerning the title to such property, depended on whether there was a warranty of title express or implied. If there was such a warranty, the vendor was

*South Carolina*.—Lamar v. Simpson, 1 Rich. Eq. (S. Car.) 71, 42 Am. Dec. 345.

*Vermont*.—Nichols v. Holgate, 2 Aik. (Vt.) 138.

*Virginia*.—Beverley v. Brooke, 2 Leigh (Va.) 425; Sitlington v. Brown, 7 Leigh (Va.) 271.

**Grantor—Quitclaim Deed—United States**.—Taylor v. Luther, 2 Sumn. (U. S.) 228; Flag v. Mann, 2 Sumn. (U. S.) 486.

*Alabama*.—Swift v. Fitzhugh, 9 Port. (Ala.) 39.

*California*.—See Johnson v. Parks, 10 Cal. 446.

*Connecticut*.—Kline v. Beebe, 6 Conn. 494; Lay v. Hayden, 2 Root (Conn.) 317.

*Illinois*.—Doe v. Herbert, 1 Ill. 354.

*Kentucky*.—Major v. Deer, 4 J. J. Marsh. (Ky.) 585; Smith v. Morrow, 7 J. J. Marsh. (Ky.) 442; Finlay v. Humble, 2 A. K. Marsh. (Ky.) 569; Rogers v. Turley, 4 Bibb (Ky.) 355. See also Manifee v. Conn, 2 Bibb (Ky.) 627.

*Louisiana*.—See Hyman v. Bailey, 15 La. Ann. 560.

*Maine*.—Wise v. Tripp, 13 Me. 9. See also Bullen v. Arnold, 31 Me. 583.

*New York*.—Jackson v. Hubble, 1 Cow. (N. Y.) 615; Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371; Jackson v. Britton, 4 Wend. (N. Y.) 507.

*Pennsylvania*.—Gratz v. Ewalt, 2 Binn. (Pa.) 95; Cain v. Henderson, 2 Binn. (Pa.) 108; Johnston v. Eckart, 3 Yeates (Pa.) 427. See also Balliot v. Bowman, 2 Binn. (Pa.) 162, note.

*South Carolina*.—Barry v. Wilbourne, 2 Bailey L. (S. Car.) 91.

*Texas*.—Hodges v. Johnson, 15 Tex. 570.

**Grantor in Warranty Deed—England**.—Busby v. Greenslate, 1 Stra. 445; Doe v. Howells, C. & M. 648, 41 E. C. L. 351; Title v. Grevett, 2 Ld. Raym. 1008.

*Alabama*.—Sims v. Killen, 12 Ala. 498; Norton v. Linton, 18 Ala. 690.

*California*.—Jones v. Love, 9 Cal. 68; Rowe v. Bradley, 12 Cal. 226; Grady v. Early, 18 Cal. 109.

*Connecticut*.—See Fowler v. Norton, 2 Root (Conn.) 231.

*Illinois*.—Lloyd v. Higbee, 25 Ill. 603; Hamilton v. Doolittle, 37 Ill. 473; Lester v. White, 44 Ill. 464.

*Iowa*.—Stewart v. Chadwick, 8 Iowa 463.

*Kentucky*.—Wright v. Nichols, 1 Bibb (Ky.) 298; M'Clain v. Gregg, 2 A. K. Marsh. (Ky.) 454; Stemmons v. Duncan, 9 B. Mon. (Ky.) 352. See also Porter v. Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153.

*Louisiana*.—Macheva v. Avegno, 20 La. Ann. 339.

*Maine*.—Schillinger v. McCann, 6 Me. 364.

*Maryland*.—Hall v. Gittings, 2 Har. & J. (Md.) 380.

*Massachusetts*.—Twambly v. Henley, 4 Mass. 441; Loker v. Haynes, 11 Mass. 498; Worcester v. Eaton, 11 Mass. 368; Roberts v. Whiting.

16 Mass. 186; Hudson v. Hulbert, 15 Pick. (Mass.) 423.

*Mississippi*.—Doe v. Jackson, 1 Smed. & M. (Miss.) 494.

*Missouri*.—Byrne v. Becker, 42 Mo. 264.

*New Hampshire*.—Hadduck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570; Marston v. Brackett, 9 N. H. 336; Harris v. Fletcher, 10 N. H. 20; Stevenson v. Chapman, 12 N. H. 524; Prescott v. Hawkins, 22 N. H. 191; Gage v. Gage, 29 N. H. 533.

*New Jersey*.—Farley v. Woodburn, 10 N. J. Eq. 96.

*New York*.—Jackson v. Hallenback, 2 Johns. (N. Y.) 394; Swift v. Dean, 6 Johns. (N. Y.) 523. See also Jackson v. Rice, 3 Wend. (N. Y.) 180; Jackson v. Leek, 19 Wend. (N. Y.) 339; Jackson v. Eaton, 20 Johns. (N. Y.) 478.

*North Carolina*.—Alston v. Jones, 1 Murph. (5 N. Car.) 45; Norwood v. Marrow, 4 Dev. & B. L. (20 N. Car.) 442.

*Ohio*.—Swisher v. Williams, Wright (Ohio) 754.

*Pennsylvania*.—Shields v. Buchanan, 2 Yeates (Pa.) 219; Erb v. Underwood, 3 Yeates (Pa.) 172; Goodman v. Losey, 3 W. & S. (Pa.) 526; Sweitzer v. Meese, 6 Binn. (Pa.) 500; McFerran v. Powers, 1 S. & R. (Pa.) 102; Brown v. Downing, 4 S. & R. (Pa.) 494; Greenwalt v. Horner, 6 S. & R. (Pa.) 79.

*South Carolina*.—Simmons v. Parsons, 1 Bailey L. (S. Car.) 62.

*Tennessee*.—Elliott v. Boren, 2 Sneed (Tenn.) 662.

*Texas*.—Robertson v. Mosson, 26 Tex. 248. See also McKay v. Treadwell, 8 Tex. 176.

*Vermont*.—Seymour v. Beach, 4 Vt. 493; Beach v. Sutton, 5 Vt. 209; Beach v. Packard, 10 Vt. 96, 33 Am. Dec. 185. See also Edgell v. Lowell, 4 Vt. 405; Warner v. Percy, 22 Vt. 155.

**Grantor—Release from Liability**.—Wall v. Nelson, 3 Litt. (Ky.) 395; Gilbert v. Curtis, 37 Me. 45; Field v. Snell, 4 Cush. (Mass.) 504; Cooper v. Granberry, 33 Miss. 117; Marston v. Brackett, 9 N. H. 336; Smith v. Smith, 15 N. H. 55; Jackson v. Frost, 6 Johns. (N. Y.) 135; Jackson v. Root, 18 Johns. (N. Y.) 60; Dayton v. Newman, 19 Pa. St. 194; Summers v. Wallace, 9 Watts (Pa.) 161; Myers v. Brownell, 1 D. Chip. (Vt.) 448.

**Grantor in Deed of Trust**.—Stewart v. Fowler, 3 Ala. 629; Hodge v. Thompson, 9 Ala. 131; Kirksey v. Dubose, 19 Ala. 43; Smith v. Ver-trees, 2 Bush (Ky.) 63; Dameron v. Williams, 7 Mo. 138; Keiser v. Moore, 14 Mo. 28.

**Grantees—United States**.—Wilson v. Speed, 3 Cranch (U. S.) 283.

*Alabama*.—Hogan v. Stone, 1 Ala. 496, 35 Am. Dec. 39.

*Kentucky*.—Ford v. Bronaugh, 11 B. Mon. (Ky.) 14.

*Maine*.—Schillinger v. McCann, 6 Me. 364; Jackson v. Sheldon, 22 Me. 569.

*Maryland*.—Ringgold v. Bryan, 3 Md. Ch. 488; Clagett v. Hall, 9 Gill & J. (Md.) 96.

16 Mass. 186; Hudson v. Hulbert, 15 Pick. (Mass.) 423.

*Mississippi*.—Doe v. Jackson, 1 Smed. & M. (Miss.) 494.

*Missouri*.—Byrne v. Becker, 42 Mo. 264.

*New Hampshire*.—Hadduck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570; Marston v. Brackett, 9 N. H. 336; Harris v. Fletcher, 10 N. H. 20; Stevenson v. Chapman, 12 N. H. 524; Prescott v. Hawkins, 22 N. H. 191; Gage v. Gage, 29 N. H. 533.

*New Jersey*.—Farley v. Woodburn, 10 N. J. Eq. 96.

*New York*.—Jackson v. Hallenback, 2 Johns. (N. Y.) 394; Swift v. Dean, 6 Johns. (N. Y.) 523. See also Jackson v. Rice, 3 Wend. (N. Y.) 180; Jackson v. Leek, 19 Wend. (N. Y.) 339; Jackson v. Eaton, 20 Johns. (N. Y.) 478.

*North Carolina*.—Alston v. Jones, 1 Murph. (5 N. Car.) 45; Norwood v. Marrow, 4 Dev. & B. L. (20 N. Car.) 442.

*Ohio*.—Swisher v. Williams, Wright (Ohio) 754.

*Pennsylvania*.—Shields v. Buchanan, 2 Yeates (Pa.) 219; Erb v. Underwood, 3 Yeates (Pa.) 172; Goodman v. Losey, 3 W. & S. (Pa.) 526; Sweitzer v. Meese, 6 Binn. (Pa.) 500; McFerran v. Powers, 1 S. & R. (Pa.) 102; Brown v. Downing, 4 S. & R. (Pa.) 494; Greenwalt v. Horner, 6 S. & R. (Pa.) 79.

*South Carolina*.—Simmons v. Parsons, 1 Bailey L. (S. Car.) 62.

*Tennessee*.—Elliott v. Boren, 2 Sneed (Tenn.) 662.

*Texas*.—Robertson v. Mosson, 26 Tex. 248. See also McKay v. Treadwell, 8 Tex. 176.

*Vermont*.—Seymour v. Beach, 4 Vt. 493; Beach v. Sutton, 5 Vt. 209; Beach v. Packard, 10 Vt. 96, 33 Am. Dec. 185. See also Edgell v. Lowell, 4 Vt. 405; Warner v. Percy, 22 Vt. 155.

**Grantor—Release from Liability**.—Wall v. Nelson, 3 Litt. (Ky.) 395; Gilbert v. Curtis, 37 Me. 45; Field v. Snell, 4 Cush. (Mass.) 504; Cooper v. Granberry, 33 Miss. 117; Marston v. Brackett, 9 N. H. 336; Smith v. Smith, 15 N. H. 55; Jackson v. Frost, 6 Johns. (N. Y.) 135; Jackson v. Root, 18 Johns. (N. Y.) 60; Dayton v. Newman, 19 Pa. St. 194; Summers v. Wallace, 9 Watts (Pa.) 161; Myers v. Brownell, 1 D. Chip. (Vt.) 448.

**Grantor in Deed of Trust**.—Stewart v. Fowler, 3 Ala. 629; Hodge v. Thompson, 9 Ala. 131; Kirksey v. Dubose, 19 Ala. 43; Smith v. Ver-trees, 2 Bush (Ky.) 63; Dameron v. Williams, 7 Mo. 138; Keiser v. Moore, 14 Mo. 28.

**Grantees—United States**.—Wilson v. Speed, 3 Cranch (U. S.) 283.

*Alabama*.—Hogan v. Stone, 1 Ala. 496, 35 Am. Dec. 39.

*Kentucky*.—Ford v. Bronaugh, 11 B. Mon. (Ky.) 14.

*Maine*.—Schillinger v. McCann, 6 Me. 364; Jackson v. Sheldon, 22 Me. 569.

*Maryland*.—Ringgold v. Bryan, 3 Md. Ch. 488; Clagett v. Hall, 9 Gill & J. (Md.) 96.

incompetent, unless he was released from liability, or his testimony was against interest. In an action between the vendor and a third person the vendee was competent, unless interested.<sup>1</sup>

*Massachusetts*.—Johnson v. Johnson, 3 Met. (Mass.) 63.

*New Hampshire*.—Cheswell v. Eastham, 16 N. H. 296.

*Ohio*.—Messenger v. Armstrong, 19 Ohio 41.

*Pennsylvania*.—Jones v. Patterson, 1 W. & S. (Pa.) 321.

*Tennessee*.—Hill v. McLean, 10 Lea (Tenn.) 107.

*Vermont*.—Beach v. Packard, 10 Vt. 96, 33 Am. Dec. 185.

**Tenants in Common.**—Barrett v. French, 1 Conn. 354, 6 Am. Dec. 241; Cook v. Brown, 34 N. H. 460; Cheswell v. Eastham, 16 N. H. 296; Bennett v. Hethington, 16 S. & R. (Pa.) 193.

**1. Competency of Vendor for Vendee**—*England*.—Biss v. Mountain, 1 M. & Rob. 302. See also Nix v. Cutting, 4 Taunt. 18; Ward v. Wilkinson, 4 B. & Ald. 410, 6 E. C. L. 539.

*Alabama*.—Easley v. Dye, 14 Ala. 158; Jones v. Hoskins, 18 Ala. 489; Humphries v. Dawson, 38 Ala. 199.

*Arkansas*.—Arnold v. McNeill, 17 Ark. 179; Lindsay v. Lamb, 24 Ark. 222; Dunnahoe v. Williams, 24 Ark. 264.

*Kentucky*.—Edwards v. Ballard, 14 B. Mon. (Ky.) 233.

*Louisiana*.—O'Blennis v. Corri, 5 La. Ann. 101; Bennett v. Quirk, 13 La. Ann. 547.

*Maine*.—Hale v. Smith, 6 Me. 416; Thompson v. Towle, 32 Me. 87.

*Maryland*.—Heskett v. Borden Min. Co., 10 Md. 179.

*Massachusetts*.—Whitney v. Heywood, 6 Cush. (Mass.) 82.

*Mississippi*.—Moore v. McKie, 5 Smed. & M. (Miss.) 238.

*New York*.—Crosby v. Nichols, 3 Bosw. (N. Y.) 450; Heermance v. Vernoy, 6 Johns. (N. Y.) 5.

*North Carolina*.—Wetmore v. Click, 5 Jones L. (50 N. Car.) 155; Freeman v. Lewis, 5 Ired. L. (27 N. Car.) 91.

*South Carolina*.—Saunders v. Addis, 1 Bailey L. (S. Car.) 49.

*Tennessee*.—Burke v. Clarke, 2 Swan (Tenn.) 310; Gunn v. Mason, 2 Sneed (Tenn.) 646; Waller v. Parker, 5 Coldw. (Tenn.) 481.

*Texas*.—Howerton v. Holt, 23 Tex. 51.

*Vermont*.—Parker v. Hammond, 13 Vt. 242.

**Effect of Release from Liability.**—Goodrich v. Hanson, 33 Ill. 508; O'Blennis v. Corri, 5 La. Ann. 101; Freeman v. Lewis, 5 Ired. L. (27 N. Car.) 91; Cadbury v. Nolen, 5 Pa. St. 320.

**Testimony Against Interest.**—Martin v. Kelly, 1 Stew. (Ala.) 198; Clinton v. Estes, 20 Ark. 216; Dickinson v. Johnson, 24 Ark. 251; Coghill v. Boring, 15 Cal. 213; Dickinson v. Dickinson, 9 Met. (Mass.) 471; Hendricks v. Mount, 5 N. J. L. 856; Shropshire v. Shropshire, 7 Yerg. (Tenn.) 165.

**Interest Balanced.**—Jones v. Parks, 1 Stew. (Ala.) 419; Holman v. Arnett, 4 Port. (Ala.) 63; Butler v. Tufts, 13 Me. 302; Morrison v. Fowler, 18 Me. 402; Fister v. Beall, 1 Har. & J. (Md.) 31; Frost v. Hill, 3 Wend. (N. Y.)

386; M'Cabe v. Moorehead, 1 W. & S. (Pa.) 513; Miller v. Fitch, 7 W. & S. (Pa.) 366; Wright v. Bonta, 19 Tex. 385.

**Competency to Prove Sale Fraudulent**—*England*.—Willies v. Farley, 3 C. & P. 395, 14 E. C. L. 366; Bland v. Ansley, 2 B. & P. N. R. 331, per Mansfield, C. J.

*Alabama*.—Holman v. Arnett, 4 Port. (Ala.) 63; Borland v. Mayo, 8 Ala. 112; Zackowski v. Jones, 20 Ala. 189; Sawyer v. Ware, 36 Ala. 675; Garner v. Bridges, 38 Ala. 276.

*California*.—Howe v. Scannell, 8 Cal. 325; Waugenheim v. Childs, 23 Cal. 444.

*Illinois*.—Clifton v. Bogardus, 2 Ill. 32; Warner v. Carlton, 22 Ill. 422.

*Indiana*.—Hankins v. Ingols, 4 Blackf. (Ind.) 35; Bradbury v. Dougherty, 7 Blackf. (Ind.) 467.

*Iowa*.—Adams v. Foley, 4 Iowa 44; Wisner v. Brady, 11 Iowa 248; Kingsbury v. Buchanan, 11 Iowa 390.

*Kentucky*.—Paul v. Rogers, 5 T. B. Mon. (Ky.) 167; Lampton v. Lampton, 6 T. B. Mon. (Ky.) 618; Smead v. Williamson, 16 B. Mon. (Ky.) 492; Ragland v. Wickware, 4 J. J. Marsh. (Ky.) 530.

*Maine*.—Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713; Ward v. Chase, 35 Me. 515.

*Massachusetts*.—Bailey v. Foster, 9 Pick. (Mass.) 139; Prince v. Shepard, 9 Pick. (Mass.) 176; Clark v. Gordon, 13 Met. (Mass.) 434; Pratt v. Stephenson, 16 Pick. (Mass.) 325; Rice v. Austin, 17 Mass. 197.

*Mississippi*.—Mizell v. Herbert, 12 Smed. & M. (Miss.) 547; Ewing v. Cargill, 13 Smed. & M. (Miss.) 79.

*New Hampshire*.—Kingsbury v. Smith, 13 N. H. 109.

*New Jersey*.—Sherron v. Humphreys, 14 N. J. L. 217.

*New York*.—Rea v. Smith, 19 Wend. (N. Y.) 293; Gardenier v. Tubbs, 21 Wend. (N. Y.) 169.

*Pennsylvania*.—Forsyth v. Palmer, 14 Pa. St. 96, 53 Am. Dec. 522; Graham v. McCreary, 40 Pa. St. 518, 80 Am. Dec. 591; Reitenbach v. Reitenbach, 1 Rawle (Pa.) 362, 18 Am. Dec. 638; Wilbur v. Strickland, 1 Rawle (Pa.) 458.

*South Carolina*.—Caston v. Ballard, 1 Hill L. (S. Car.) 406.

*Vermont*.—Brown v. Marsh, 8 Vt. 310.

*Virginia*.—Clayton v. Anthony, 6 Rand. (Va.) 285.

**Sale Without Warranty.**—Mahone v. Yancey, 14 Ala. 395; Lackey v. Stouder, 2 Ind. 376; Connelly v. Chiles, 2 A. K. Marsh. (Ky.) 242; Cannon v. White, 16 La. Ann. 85; Lothrop v. Muzzy, 5 Me. 450; McInroy v. Dyer, 47 Pa. St. 118.

**Competency of Vendee.**—Babcock v. Huntington, 9 Ala. 869; Smith v. Bainbridge, 6 Blackf. (Ind.) 12; Mumma v. McKee, 10 Iowa 107; Loud v. Pierce, 25 Me. 233; Ratcliffe v. Sangston, 18 Md. 383; Cutter v. Rathbun, 3 Hill (N. Y.) 577; Stafford v. Ames, 9 Pa. St. 343; Chamberlain v. Smith, 44 Pa. St. 431; Turley v. Brewster, 33 Tex. 188.



(6) *Principal and Agent — Master and Servant.* — As a general rule an agent or servant was admissible for or against the principal or master, even when interested in the matter litigated. But where the action was to recover for injuries resulting from the misconduct or negligence of the agent or servant, he was incompetent.<sup>1</sup>

**1. Competency of Agent for Principal** — *England.* — *Martineau v. Woodland*, 2 C. & P. 65, 12 E. C. L. 32; *Ilderton v. Atkinson*, 7 T. R. 476; *Birt v. Kershaw*, 2 East 458; *Matthews v. Haydon*, 2 Esp. 509; *Adams v. Davis*, 3 Esp. 48; *Dixon v. Cooper*, 3 Wils. C. Pl. 40; *Martin v. Horrell*, 1 Stra. 647; *Barker v. Macrae*, 3 Campb. 144; *De Symonds v. De La Cour*, 2 B. & P. N. R. 374; *Hunter v. Leathley*, 10 B. & C. 858, 21 E. C. L. 184; *Edmonds v. Lowe*, 8 B. & C. 407, 15 E. C. L. 250, *per Lord Tenterden*; *Benjamin v. Porteus*, 2 H. Bl. 590.

*United States.* — *Pendall v. Rench*, 4 McLean (U. S.) 259; *Chapin v. Siger*, 4 McLean (U. S.) 378; *Lowber v. Shaw*, 5 Mason (U. S.) 241.

*Alabama.* — *Falls v. Gaither*, 9 Port. (Ala.) 605; *Stringfellow v. Mariott*, 1 Ala. 573; *Harrison v. Tulane*, 3 Ala. 534; *Bean v. Pearsall*, 12 Ala. 592; *Gayle v. Bishop*, 14 Ala. 552; *Governor v. Gee*, 19 Ala. 199; *Napier v. Barry*, 24 Ala. 511; *Manaway v. State*, 44 Ala. 375.

*Arkansas.* — *Scott v. Jester*, 13 Ark. 437.

*California.* — *Tomlinson v. Spencer*, 5 Cal. 201; *Mills v. Beard*, 19 Cal. 159.

*Connecticut.* — *Shepard v. Palmer*, 6 Conn. 95.

*Florida.* — *Croom v. Noll*, 6 Fla. 52.

*Georgia.* — *Collins v. Lester*, 16 Ga. 415. See also *Montgomery v. Evans*, 8 Ga. 178.

*Illinois.* — *Cadwell v. Meek*, 17 Ill. 220; *Collins v. Smith*, 18 Ill. 160; *Nichols v. Guibor*, 20 Ill. 285.

*Indiana.* — *State v. Holloway*, 8 Blackf. (Ind.) 45.

*Kentucky.* — *Bonham v. Laird*, 4 B. Mon. (Ky.) 403; *Kelly v. Lank*, 7 B. Mon. (Ky.) 220; *Weaver v. Bracken County Ct.*, 18 B. Mon. (Ky.) 728; *Kirkpatrick v. Cisna*, 3 Bibb (Ky.) 244; *Connelly v. Chiles*, 2 A. K. Marsh. (Ky.) 242.

*Louisiana.* — *Caune v. Sagory*, 4 Mart. (La.) 81; *Phelps v. Hodge*, 6 La. Ann. 525; *Barriere v. Peychaud*, 14 La. Ann. 371.

*Maine.* — *Descadillas v. Harris*, 8 Me. 298; *Crooker v. Appleton*, 25 Me. 131; *Perkins v. Jordan*, 35 Me. 23.

*Massachusetts.* — *Kennebeck Purchase v. Call*, 1 Mass. 483; *New York Slate Co. v. Osgood*, 11 Mass. 60; *Phillips v. Bridge*, 11 Mass. 242; *Fisher v. Willard*, 13 Mass. 379; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Franklin Bank v. Freeman*, 16 Pick. (Mass.) 535; *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50.

*Mississippi.* — *Dean v. Young*, 13 Smed. & M. (Miss.) 118.

*Missouri.* — *Stothard v. Aull*, 7 Mo. 318.

*New Hampshire.* — *Strafford Bank v. Cornell*, 1 N. H. 192; *Caldwell v. Wentworth*, 16 N. H. 318; *Rice v. Tyson*, 20 N. H. 121; *Downer v. Button*, 26 N. H. 338. See also *Caldwell v. Wentworth*, 16 N. H. 318.

*New Jersey.* — *Runyon v. Farmers, etc., Bank*, 4 N. J. Eq. 482.

*New York.* — *U. S. Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Milward v. Hallett*, 2 Cai. (N. Y.) 343.

*North Carolina.* — *Ward v. Griffin*, 3 Ired. Eq. (38 N. Car.) 150.

*Pennsylvania.* — *Miller v. Hayman*, 1 Yeates (Pa.) 23; *Steward v. Richardson*, 2 Yeates (Pa.) 89; *McGunnagle v. Thornton*, 10 S. & R. (Pa.) 251; *Scott v. Wells*, 6 W. & S. (Pa.) 357, 40 Am. Dec. 568; *Gilpin v. Howell*, 5 Pa. St. 41, 45 Am. Dec. 720; *Grayson v. Bannon*, 8 Watts (Pa.) 524; *Nicholson v. Mifflin*, 2 Dall. (Pa.) 246.

*South Carolina.* — *Black v. Goodman*, 1 Bailey L. (S. Car.) 201; *Johnson v. Harth*, 2 Bailey L. (S. Car.) 183; *Depeau v. Hyams*, 2 McCord L. (S. Car.) 146; *Covington v. Bussey*, 4 McCord L. (S. Car.) 412; *Salas v. Cay*, 12 Rich. L. (S. Car.) 558.

*Tennessee.* — *Harvey v. Sweasy*, 4 Humph. (Tenn.) 449.

*Texas.* — See *Kerr v. Cotton*, 23 Tex. 411.

*Vermont.* — *Eastman v. Hodges*, 1 D. Chip. (Vt.) 101; *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675; *Linsley v. Lovely*, 26 Vt. 123; *Lytle v. Bond*, 40 Vt. 618.

*West Virginia.* — *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.

**Competency of Servant** — *Alabama.* — *Johnson v. Lightsey*, 34 Ala. 169, 73 Am. Dec. 450.

*Arkansas.* — *Roberts v. Totten*, 13 Ark. 609.

*Kentucky.* — *Alexander v. Emerson*, 2 Litt. (Ky.) 25; *Kentucky Bank v. M'Williams*, 2 J. J. Marsh. (Ky.) 261; *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

*Louisiana.* — *Diggs v. Kirkland*, 8 La. Ann. 309; *Wright v. Rogers*, 18 La. Ann. 671.

*Maine.* — *Campbell v. Thompson*, 16 Me. 117; *Jones v. Lowell*, 35 Me. 538.

*Missouri.* — *Burd v. Ross*, 15 Mo. 254; *Bates v. Forcht*, 89 Mo. 121.

*New Hampshire.* — *Moses v. Boston, etc., R. Co.*, 24 N. H. 72, 55 Am. Dec. 222.

*New York.* — *Noble v. Paddock*, 19 Wend. (N. Y.) 456; *Barnes v. Cole*, 21 Wend. (N. Y.) 188; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465.

*Pennsylvania.* — *Wilmarth v. Mountford*, 8 S. & R. (Pa.) 124; *Moore v. Shenk*, 3 Pa. St. 13, 45 Am. Dec. 618.

*South Carolina.* — *Carter v. Pinchbeck*, 7 Rich. L. (S. Car.) 356.

*Texas.* — *Lion F. Ins. Co. v. Starr*, 71 Tex. 733.

**Misconduct of Servant or Agent** — *England.*

— *Hawkins v. Finlayson*, 3 C. & P. 305, 14 E. C. L. 319; *Whitehouse v. Atkinson*, 3 C. & P. 344, 14 E. C. L. 339; *Whitmore v. Waterhouse*, 4 C. & P. 383, 19 E. C. L. 432; *Harrington v. Caswell*, 6 C. & P. 352, 25 E. C. L. 434; *Field v. Mitchell*, 6 Esp. 71; *Powell v. Hord*,

(7) *Bail and Surety*. — Bail and sureties were not as a rule competent for the principal, or for each other; but otherwise if in any manner discharged.<sup>1</sup>

: *Ld. Raym.* 1411, 1 *Stra.* 650; *Gevers v. Mainwaring*, *Holt* 139, 3 *E. C. L.* 63; *Green v. New River Co.*, 4 *T. R.* 589; *Clark v. Lucas*, *R. & M.* 32.

*United States*. — *The Hope*, 2 *Gall. (U. S.)* 48; *The William Harris, Ware (U. S.)* 367.

*Alabama*. — *Johnson v. Lightsey*, 34 *Ala.* 169, 73 *Am. Dec.* 450.

*California*. — *Finn v. Vallejo St. Wharf Co.*, 7 *Cal.* 253.

*Delaware*. — *Newbold v. Wilkins*, 1 *Harr. (Del.)* 43.

*Georgia*. — *Allen v. Lacy, Dudley (Ga.)* 81. *Illinois*. — *Galena, etc., Union R. Co. v. Welch*, 24 *Ill.* 31; *Chicago, etc., R. Co. v. Hutchins*, 34 *Ill.* 108.

*Kentucky*. — *Harris v. Paynes*, 5 *Litt. (Ky.)* 105; *Lexington, etc., R. Co. v. Kidd*, 7 *Dana (Ky.)* 248; *Bentley v. Bustard*, 16 *B. Mon. (Ky.)* 697, 63 *Am. Dec.* 561.

*Massachusetts*. — *Downer v. Davis*, 19 *Pick. (Mass.)* 72.

*New York*. — *Noble v. Paddock*, 19 *Wend. (N. Y.)* 456; *Barnes v. Cole*, 21 *Wend. (N. Y.)* 188.

*North Carolina*. — *Jones v. McRay*, 6 *Jones L. (51 N. Car.)* 192; *Ashe v. Murchison*, 8 *Ired. L. (30 N. Car.)* 215.

*Pennsylvania*. — *Plumer v. Alexander*, 12 *Pa. St.* 81; *Dorrance v. Com.*, 13 *Pa. St.* 160; *Catawissa R. Co. v. Armstrong*, 49 *Pa. St.* 186; *Arnold v. Anderson*, 2 *Yeates (Pa.)* 93; *Galloway v. Morris*, 3 *Yeates (Pa.)* 445; *Juniata Bank v. Beale*, 1 *W. & S. (Pa.)* 227; *Schuylkill Nav. Co. v. Harris*, 5 *W. & S. (Pa.)* 28; *Humphreys v. Reed*, 6 *Whart. (Pa.)* 444.

*South Carolina*. — *Charleston Gas Light Co. v. Charleston*, 9 *Rich. L. (S. Car.)* 342.

*Tennessee*. — *Horne v. Memphis, etc., R. Co.*, 1 *Coldw. (Tenn.)* 72; *Memphis, etc., R. Co. v. Tugwell*, 1 *Coldw. (Tenn.)* 91.

**Action for Damage Done to Property in Hands of Agent or Servant — Latter Incompetent — England.**

— *Kerrison v. Coatsworth*, 1 *C. & P.* 645, 11 *E. C. L.* 510; *Wake v. Lock*, 5 *C. & P.* 454, 24 *E. C. L.* 402; *Miller v. Falconer*, 1 *Campb.* 251; *Morish v. Foote*, 8 *Taunt.* 454, 4 *E. C. L.* 164, 2 *Moo.* 508; *Rotheroe v. Elton*, *Peake N. P. (ed. 1795)* 84; *Sherman v. Barnes*, 1 *M. & Rob.* 69; *Boorman v. Brown*, 9 *Ad. & El.* 487, 36 *E. C. L.* 173.

*Alabama*. — *Otis v. Thom*, 23 *Ala.* 469, 58 *Am. Dec.* 303.

*Indiana*. — *McClure v. Whitesides*, 2 *Ind.* 573.

*Maine*. — *Littlefield v. Portland*, 26 *Me.* 39; *Jones v. Lowell*, 35 *Me.* 538.

*Maryland*. — *Middlekauff v. Smith*, 1 *Md.* 341.

*Mississippi*. — *Steamboat General Worth v. Hopkins*, 30 *Miss.* 703.

*New York*. — *Dudley v. Bolles*, 24 *Wend. (N. Y.)* 467.

*Vermont*. — *Christy v. Smith*, 23 *Vt.* 663.

**Master Competent for Servant.** — *State v. Aaron*, 4 *N. J. L.* 263, 7 *Am. Dec.* 592.

**Principal Incompetent for Agent.** — *Kirksey v. Bates*, 1 *Ala.* 303; *Wallace v. Peck*, 12 *Ala.*

768; *Sherman v. Bruce*, 37 *Ill.* 39; *Russell v. McKenzie*, 13 *Md.* 560; *Strohecker v. Hoffman*, 19 *Pa. St.* 226; *Hayes v. Grier*, 4 *Binn. (Pa.)* 80; *Seidel v. Peckworth*, 10 *S. & R. (Pa.)* 442; *Case v. Reeve*, 14 *Johns. (N. Y.)* 79.

**Rule under Modern Statutes.** — As to the statutory rule in case of the death of the master or servant, or principal or agent, see *infra*, this title, VI. 3. e. (5) *Transactions with Partners and Other Joint Contractors*; (6) *Transactions with Agents*.

**1. Bail and Sureties Incompetent — England.** — *Carter v. Pearce*, 1 *T. R.* 164, *per Buller, J.*; *Lacon v. Higgins*, 3 *Stark.* 178, 14 *E. C. L.* 176; *Piesly v. Von Esch*, 2 *Esp.* 605; *Hawkins v. Inwood*, 4 *C. & P.* 148, 19 *E. C. L.* 315; *Bailey v. Bailey*, 1 *Bing.* 92, 8 *E. C. L.* 418.

*United States*. — *Virginia v. Evans*, 1 *Cranch (C. C.)* 581. *Compare Fairfax v. Fairfax*, 2 *Cranch (C. C.)* 25; *Thompson v. Carbery*, 2 *Cranch (C. C.)* 35; *Craig v. Reintzel*, 2 *Cranch (C. C.)* 128.

*Alabama*. — *Whatley v. Johnson*, 1 *Stew. (Ala.)* 498; *Stowe v. Sewall*, 3 *Stew. & P. (Ala.)* 67; *Greene v. Tims*, 16 *Ala.* 541; *McCreeless v. Hinkle*, 17 *Ala.* 459; *Atwood v. Wright*, 29 *Ala.* 346; *Henderson v. Simmons*, 33 *Ala.* 291, 70 *Am. Dec.* 590. See also *Planters', etc., Bank v. Willis*, 5 *Ala.* 770. *Compare Poe v. Dorrah*, 20 *Ala.* 288, 56 *Am. Dec.* 196.

*Arkansas*. — *Atkins v. Guice*, 21 *Ark.* 164. *Georgia*. — *Rowe v. Ware*, 30 *Ga.* 278; *Molyneux v. Collier*, 13 *Ga.* 406.

*Iowa*. — *Cook v. Lyon*, 10 *Iowa* 434.

*Kentucky*. — *Shelby v. Smith*, 2 *A. K. Marsh. (Ky.)* 504; *Wallace v. Twyman*, 3 *J. J. Marsh. (Ky.)* 457; *Wickliffe v. Mosely*, 4 *J. J. Marsh. (Ky.)* 172; *Miller v. Henshaw*, 4 *Dana (Ky.)* 325; *Rucker v. Pritchett*, 3 *Bush (Ky.)* 689; *Covington, etc., R. Co. v. Ingles*, 15 *B. Mon. (Ky.)* 637.

*Maine*. — *Paine v. Hussey*, 17 *Me.* 274; *Webb v. Wilshire*, 19 *Me.* 406; *Johnson v. Whidden*, 32 *Me.* 230; *Cates v. Noble*, 33 *Me.* 258.

*Maryland*. — *Bean v. Jenkins*, 1 *Har. & J. (Md.)* 135; *Sanderson v. Marks*, 1 *Har. & G. (Md.)* 252; *Morton v. Beall*, 2 *Har. & G. (Md.)* 136; *Ferguson v. Cappeau*, 6 *Har. & J. (Md.)* 394; *Mitchell v. Mitchell*, 1 *Gill (Md.)* 66; *Owens v. Collinson*, 3 *Gill & J. (Md.)* 25; *Mitchell v. Mitchell*, 11 *Gill & J. (Md.)* 388; *Townshend v. Townshend*, 6 *Md.* 295.

*Massachusetts*. — *Niles v. Brackett*, 15 *Mass.* 378; *Greely v. Dow*, 2 *Met. (Mass.)* 176; *Blood v. Hayman*, 13 *Met. (Mass.)* 231; *Chapel v. White*, 3 *Cush. (Mass.)* 537; *Kimball v. Thompson*, 4 *Cush. (Mass.)* 441, 50 *Am. Dec.* 799.

*Mississippi*. — *Peters v. Moss*, 1 *Smed. & M. (Miss.)* 331.

*Missouri*. — *Craig v. Callaway County Ct.*, 12 *Mo.* 94; *Steamboat Madison v. Wells*, 14 *Mo.* 360; *Bates v. Steamboat Madison*, 18 *Mo.* 99.

*New Hampshire*. — *Low v. Smart*, 5 *N. H.* 353.

(8) *Principal Obligor*. — The principal was not competent in favor of the surety in a separate action against the latter, unless released from liability for costs, but he was competent against him. One obligor was competent for or against the other, unless interested.<sup>1</sup>

(9) *Parties to Negotiable Instruments*. — Parties to negotiable instruments

*New Jersey*. — *Browning v. Cooper*, 18 N. J. L. 196.

*New York*. — *Butler v. Warrner*, 11 Johns. (N. Y.) 57; *Benedict v. Hecox*, 18 Wend. (N. Y.) 490.

*North Carolina*. — *State Bank v. Littlejohn*, 2 Dev. L. (13 N. Car.) 381; *Keywood v. Barnett*, 3 Dev. & B. L. (20 N. Car.) 91.

*Ohio*. — *Hale v. Wetmore*, 4 Ohio St. 600.

*Pennsylvania*. — *Reeme v. Parthemere*, 8 Pa. St. 460; *Dannels v. Fitch*, 8 Pa. St. 495; *Hill v. Hill*, 32 Pa. St. 511; *Bell v. Cowgell*, 1 Ashm. (Pa.) 7; *Reigert v. Hix*, 14 S. & R. (Pa.) 134; *Myers v. Clark*, 3 W. & S. (Pa.) 535.

*South Carolina*. — *Gray v. Young*, Harp. L. (S. Car.) 38; *Phillips v. Caldwell*, 2 Rich. L. (S. Car.) 1; *Anderson v. Smoot*, 2 Rich. Eq. (S. Car.) 285; *Leech v. Kennedy*, 3 Strobb. L. (S. Car.) 488.

*Tennessee*. — *Black v. Crain*, 10 Yerg. (Tenn.) 516; *Keer v. Clark*, 11 Humph. (Tenn.) 77.

*Vermont*. — *Nichols v. Bellows*, 22 Vt. 581, 54 Am. Dec. 85.

*Wisconsin*. — *Andrews v. State*, 4 Wis. 385.

**Effect of Discharge** — *England*. — *Whartley v. Fearnley*, 2 Chit. 103; *Bailey v. Bailey*, 1 Bing. 92, 8 E. C. L. 418; *Bailey v. Hole*, 3 C. & P. 560, 14 E. C. L. 449; *Pearcy v. Fleming*, 5 C. & P. 503, 24 E. C. L. 429.

*Alabama*. — *Taylor v. Branch Bank*, 14 Ala. 633.

*California*. — *Mayo v. Avery*, 18 Cal. 309.

*Indiana*. — *Hanna v. Spencer*, 3 Ind. 351.

*Kentucky*. — *Rucker v. Pritchett*, 3 Bush (Ky.) 689; *Jones v. Letcher*, 13 B. Mon. (Ky.) 363.

*Louisiana*. — *Comstock v. Paie*, 3 Rob. (La.) 440.

*Maine*. — *Paine v. Hussey*, 17 Me. 274; *Cooper v. Bakeman*, 33 Me. 376.

*Maryland*. — *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282.

*Massachusetts*. — *Hall v. Baylies*, 15 Pick. (Mass.) 51. Compare *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Beckley v. Freeman*, 15 Pick. (Mass.) 468.

*Mississippi*. — *Moore v. McKie*, 5 Smed. & M. (Miss.) 238.

*New York*. — *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; *Tompkins v. Curtis*, 3 Cow. (N. Y.) 251; *Irwin v. Caryell*, 8 Johns. (N. Y.) 407; *Brandigee v. Hale*, 13 Johns. (N. Y.) 125.

*North Carolina*. — *M'Culloch v. Tyson*, 2 Hawks (9 N. Car.) 336. Compare *Gilliam v. Henneberry*, 6 Jones L. (51 N. Car.) 224.

*Pennsylvania*. — *Salmon v. Rance*, 3 S. & R. (Pa.) 311.

*South Carolina*. — *Gray v. Young*, Harp. L. (S. Car.) 38.

*Tennessee*. — *Craighead v. State Bank*, Meigs (Tenn.) 199; *Ross v. Blair*, Meigs (Tenn.) 525.

*Virginia*. — *Caldwell v. McCortney*, 2 Gratt. (Va.) 187.

**1. Principal Competent for Surety** — *United States*. — *Riddle v. Moss*, 7 Cranch (U. S.) 206.

*Alabama*. — *Richards v. Griffin*, 5 Ala. 195; *Garrett v. Holloway*, 24 Ala. 376.

*Georgia*. — *Rackley v. Sanders*, 1 Ga. 258.

*Kentucky*. — *Williams v. Hall*, 2 Dana (Ky.) 97; *Hunter v. Gatewood*, 5 T. B. Mon. (Ky.) 269; *Kelly v. Lank*, 7 B. Mon. (Ky.) 226.

*Maryland*. — *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103.

*North Carolina*. — *Moffitt v. Gaines*, 1 Ired. L. (23 N. Car.) 158.

*Ohio*. — *Crowell v. Western Reserve Bank*, 3 Ohio St. 406.

*Pennsylvania*. — *Morrison v. Hartman*, 14 Pa. St. 55; *Marshall v. Franklin Bank*, 25 Pa. St. 384; *Com. v. McKee*, 2 Grant Cas. (Pa.) 27.

*South Carolina*. — *Cleveland v. Covington*, 3 Strobb. L. (S. Car.) 184; *Canty v. Blair*, 1 Rich. Eq. (S. Car.) 41, 2 Rich. Eq. (S. Car.) 46; *Douglass v. Owens*, 5 Rich. L. (S. Car.) 149.

*Tennessee*. — *Hurst v. Word*, 3 Head (Tenn.) 564.

*Virginia*. — *Jones v. Raine*, 4 Rand. (Va.) 386.

**No Liability for Costs** — *United States*. — *Gass v. Stinson*, 2 Sumn. (U. S.) 453. Compare *U. S. v. Leffler*, 11 Pet. (U. S.) 86.

*Arkansas*. — *Pogue v. Joyner*, 7 Ark. 462.

*Georgia*. — *Holland v. Chambers*, 22 Ga. 193.

*Illinois*. — *Kennedy v. Evans*, 31 Ill. 258.

*Kentucky*. — *Bartlow v. Boude*, 3 Dana (Ky.) 591; *Reid v. Watts*, 4 J. J. Marsh. (Ky.) 440; *Field v. Davidson*, 9 B. Mon. (Ky.) 77.

*Massachusetts*. — *Leavenworth v. Pope*, 6 Pick. (Mass.) 419; *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

*Mississippi*. — *Hunt v. Chambliss*, 7 Smed. & M. (Miss.) 532.

*North Carolina*. — *Moffitt v. Gaines*, 1 Ired. L. (23 N. Car.) 158; *Ligon v. Dunn*, 6 Ired. L. (28 N. Car.) 133; *Cannon v. Jones*, 4 Hawks (11 N. Car.) 368.

*Ohio*. — *Preble County Bank v. Russell*, 1 Ohio St. 313.

*Pennsylvania*. — *Cameron v. Paul*, 6 Pa. St. 322; *Miller v. Stem*, 12 Pa. St. 383; *Simpson v. Bovard*, 74 Pa. St. 357.

*Virginia*. — *Armistead v. Ward*, 2 Patt. & H. (Va.) 504.

**Competent Against Surety**. — *Lockart v. Graham*, 1 Stra. 35; *Buckingham v. Clary*, 4 Gill (Md.) 223; *Morse v. Green*, 13 N. H. 32. Compare *Gayle v. Bishop*, 14 Ala. 552.

**Competency for or Against Co-obligor**. — *Whartley v. Johnson*, 1 Stew. (Ala.) 498; *Rowe v. Ware*, 30 Ga. 278; *Long v. Ray*, 1 Dana (Ky.) 430; *Williams v. Cummins*, 6 T. B. Mon. (Ky.) 157; *Huff v. Freeman*, 15 La. Ann. 240; *Ely v. Hager*, 3 Pa. St. 154; *Lovett v. Adams*, 3 Wend. (N. Y.) 380; *Hopkinson v. Steel*, 12 Vt. 582. *Contra*, *Callaway County Ct. v. Craig*, 9 Mo. 846.



were competent or incompetent according as they were or were not interested. Thus, an indorser was competent in a suit between maker and holder, unless interested in securing or preventing a recovery. So one joint maker was not competent for or against another, unless released from his liability to contribute.<sup>1</sup>

**1. Competency of Maker** — *United States*. — *Frazer v. Carpenter*, 2 McLean (U. S.) 235.

*Alabama*. — *Moore v. Henderson*, 18 Ala. 282.

*California*. — *Vance v. Collins*, 6 Cal. 435.

*Georgia*. — *Nisbet v. Lawson*, 1 Ga. 275; *Hayden v. McKnight*, 45 Ga. 147.

*Kentucky*. — *Gilman v. Pugh*, 1 Litt. (Ky.) 286.

*Maine*. — *Franklin Bank v. Pratt*, 31 Me. 501.

*Maryland*. — *Schley v. Merritt*, 37 Md. 352; *Crowley v. Barry*, 4 Gill (Md.) 194; *Columbia Bank v. Magruder*, 6 Har. & J. (Md.) 172, 14 Am. Dec. 271.

*Massachusetts*. — *Peirce v. Butler*, 14 Mass. 303; *Wheaton v. Wilmarth*, 13 Met. (Mass.) 422.

*Mississippi*. — *Routh v. Helm*, 6 How. (Miss.) 127.

*Missouri*. — *Kleinmann v. Boernstein*, 32 Mo. 311.

*New Jersey*. — *Woodruff v. Smith*, 6 N. J. L. 214.

*Pennsylvania*. — *Mevey v. Matthews*, 9 Pa. St. 112; *Bank v. Fordyce*, 9 Pa. St. 275; *Campbell v. Knapp*, 15 Pa. St. 27; *Breitenbach v. Houtz*, 35 Pa. St. 153; *Saurman v. Bodey*, 42 Pa. St. 476; *Fry v. Coleman*, 1 Grant Cas. (Pa.) 445.

*South Carolina*. — *Haig v. Newton*, 1 Mill (S. Car.) 423.

**Joint Maker Incompetent for Comaker** — *Alabama*. — *Turner v. Lazarus*, 6 Ala. 878; *Korne-gay v. Salle*, 12 Ala. 534, *overruling Thompson v. Armstrong*, 5 Ala. 383.

*Illinois*. — *Marine Bank v. Ferry*, 40 Ill. 255.

*Indiana*. — *Madison Ins. Co. v. Mitchell*, 1 Ind. 384.

*Mississippi*. — *Commercial, etc., Bank v. Lum*, 7 How. (Miss.) 414.

*New Hampshire*. — *Ames v. Withington*, 3 N. H. 115; *Carleton v. Whitcher*, 5 N. H. 196; *Jewett v. Davis*, 6 N. H. 518; *Concord Bank v. Rogers*, 16 N. H. 9; *Whipple v. Stevens*, 19 N. H. 150.

*New York*. — *Miller v. M'Cagg*, 4 Hill (N. Y.) 35.

*Pennsylvania*. — *Wolf v. Fink*, 1 Pa. St. 435, 44 Am. Dec. 141.

*South Carolina*. — *Kile v. Graham*, 1 McCord L. (S. Car.) 552.

*Vermont*. — *Pinney v. Bugbee*, 13 Vt. 623.

*Wisconsin*. — *Groat v. Palmer*, 7 Wis. 338.

**Incompetent Against Comaker**. — *Whatley v. Johnson*, 1 Stew. (Ala.) 498; *McCall v. Sinclair*, 14 Ala. 764; *Marshall v. Thraillkill*, 12 Ohio 275; *Armstrong v. Deshler*, 12 Ohio 475; *Harvey v. Sweasy*, 4 Humph. (Tenn.) 449; *Hopkinson v. Steel*, 12 Vt. 582.

**Competency of Indorser** — *England*. — *Birt v. Kershaw*, 2 East 458.

*Alabama*. — *Kennon v. M'Rea*, 2 Port. (Ala.) 389; *Isbell v. Brown*, 13 Ala. 383.

*California*. — *Tomlinson v. Spenser*, 5 Cal.

291; *Soule v. Dawes*, 6 Cal. 473; *Bryant v. Watriss*, 13 Cal. 85; *Smith v. Richmond*, 19 Cal. 476; *Priest v. Bounds*, 25 Cal. 188.

*Illinois*. — *Hayes v. Gorham*, 3 Ill. 429; *Curtis v. Marrs*, 29 Ill. 508.

*Iowa*. — *Craig v. Andrews*, 7 Iowa 17.

*Kentucky*. — *Smith v. Northern Bank*, 1 Met. (Ky.) 575.

*Maine*. — *Adams v. Carver*, 6 Me. 390; *Buck v. Appleton*, 14 Me. 284; *Berry v. Hall*, 33 Me. 493; *Goodwin v. Chadwick*, 35 Me. 193.

*Maryland*. — *Williams v. Banks*, 11 Md. 108; *Whiteford v. Munroe*, 17 Md. 135; *Williams v. Brailsford*, 25 Md. 126.

*Massachusetts*. — *Barker v. Prentiss*, 6 Mass. 430; *Richardson v. Lincoln*, 5 Met. (Mass.) 201.

*Mississippi*. — *Partee v. Silliman*, 44 Miss. 273; *Drake v. Henly*, Walk. (Miss.) 541.

*Missouri*. — *Presbury v. Papin*, 31 Mo. 490.

*New York*. — *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Baskins v. Wilson*, 6 Cow. (N. Y.) 471; *White v. Kibling*, 11 Johns. (N. Y.) 128; *Herrick v. Whitney*, 15 Johns. (N. Y.) 240; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Tilden v. Gardinier*, 25 Wend. (N. Y.) 663. But a discharge in bankruptcy restored his competency. *Murray v. Judah*, 6 Cow. (N. Y.) 484. But he might testify if he were released from liability. *Bay v. Gunn*, 1 Den. (N. Y.) 108.

*North Carolina*. — *Murray v. Marsh*, 2 Hayw. (3 N. Car.) 290 (competency restored by discharge in bankruptcy).

*Ohio*. — *Ellis v. Bervellier*, 15 Ohio 489.

*Pennsylvania*. — *Mitchell v. Cooper*, 17 Pa. St. 343; *Girard F. & M. Ins. Co. v. Marr*, 46 Pa. St. 504; *Ward v. Tyler*, 52 Pa. St. 393; *Geoghegan v. Reid*, 2 Whart. (Pa.) 152; *Zeigler v. Gray*, 12 S. & R. (Pa.) 42; *Juniata Bank v. Brown*, 5 S. & R. (Pa.) 226.

*Tennessee*. — *Oliver v. Tennessee Bank*, 11 Humph. (Tenn.) 74; *Smithwick v. Anderson*, 2 Swan (Tenn.) 573.

**Competency of Drawer** — *England*. — *Barber v. Gingell*, 3 Esp. 60; *Dickinson v. Prentice*, 4 Esp. 32.

*Connecticut*. — *Huntington v. Champlin*, Kirby (Conn.) 166.

*Illinois*. — *Eddy v. Peterson*, 22 Ill. 535.

*Maine*. — *Scott v. M'Lellan*, 2 Me. 199; *Hewitt v. Lovering*, 12 Me. 201.

*Maryland*. — *Whiteford v. Burckmyer*, 1 Gill (Md.) 127, 39 Am. Dec. 640.

*Massachusetts*. — *Storer v. Logan*, 9 Mass. 55; *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297; *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

*New York*. — *Hubble v. Brown*, 16 Johns. (N. Y.) 70.

*Pennsylvania*. — *Dennistoun v. Fleming*, 7 Pa. St. 528; *Smith v. Thorne*, 9 Watts (Pa.) 144; *Montgomery County Bank v. Walker*, 9 S. & R. (Pa.) 237, 11 Am. Dec. 709.

**Competency of Drawee**. — *Tarble v. Underwood*, 34 Ill. 67; *Kinsley v. Robinson*, 21 Pick. (Mass.)

(10) *Parties to Assignments of Choses in Action.* — The assignor of a chose in action was a competent witness only in cases where it appeared that the assignment had been made in good faith; otherwise he was incompetent. The assignee, being the real party in interest, was incompetent to sustain the claim.<sup>1</sup>

(11) *Bailor and Bailee.* — As a general rule the bailor was not competent, in favor of the bailee, to prove ownership. But the bailee was competent in a suit between the bailor and a third party.<sup>2</sup>

(12) *Debtors and Creditors.* — A debtor was incompetent whenever it was sought to make some one else liable for his debt; but whenever he was indifferent as to the result of the suit he was competent. A creditor was not incompetent, unless payment of his claim depended on the result of the suit in which he was called to testify. Whether or not a creditor of an estate was competent for the executor depended on the solvency of the estate.<sup>3</sup>

(13) *Prosecutors and Informers in Criminal Cases.* — Prosecutors and

327, Shaw, C. J.; *Parsons v. Phipps*, 4 Tex. 341.

**As to Competency of Party to Impeach Validity of Instrument.** — See *infra*, this section, 14. *Competency of Party to Negotiable Instrument to Impeach Its Validity.*

**1. Assignor Competent.** — *Cobb v. Baldwin*, 1 Root (Conn.) 534; *Platt v. Hedge*, 8 Iowa 392; *Warner v. Turner*, 18 B. Mon. (Ky.) 758; *Doub v. Barnes*, 1 Md. Ch. 127; *Watson v. Smith*, 13 Wend. (N. Y.) 51; *Roshing v. Chandler*, 3 Pa. St. 375; *Himblewright v. Armstrong*, 25 Pa. St. 428; *M'Iroy v. M'Iroy*, 1 Rawle (Pa.) 433; *Fetterman v. Plummer*, 9 S. & R. (Pa.) 20; *Freeman v. Jennings*, 7 Rich. L. (S. Car.) 381. *Compare Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 440; *Taylor v. Gitt*, 10 Pa. St. 428; *Caton v. Lenox*, 5 Rand. (Va.) 31; *McConnell v. McCracken*, 14 Wis. 83.

**Assignor Incompetent** — *England.* — *Bell v. Smith*, 5 B. & C. 188, 11 E. C. L. 198.

*Alabama.* — *Houston v. Prewitt*, 8 Ala. 846; *Clifton v. Sharpe*, 15 Ala. 618.

*California.* — *Adams v. Woods*, 8 Cal. 306; *Wilkins v. Stidger*, 22 Cal. 235, 83 Am. Dec. 64.

*Indiana.* — *Cox v. Davis*, 16 Ind. 378; *Swails v. Coverdill*, 17 Ind. 337; *Ketcham v. Hill*, 42 Ind. 64.

*Kentucky.* — *Woolfolk v. McDowell*, 9 Dana (Ky.) 268.

*Louisiana.* — *Delee v. Sandel*, 12 La. Ann. 208.

*Missouri.* — *Parish v. Frampton*, 32 Mo. 396; *Hendricks v. Ebbitt*, 37 Mo. 24; *Perry v. Siter*, 37 Mo. 279; *Weil v. Tyler*, 38 Mo. 558; *Bidwell v. St. Louis Floating Dock, etc., Co.*, 40 Mo. 42.

*New York.* — *Bell v. Drew*, 4 E. D. Smith (N. Y.) 59; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 223; *Watson v. McLaren*, 19 Wend. (N. Y.) 557.

*Pennsylvania.* — *Phinney v. Tracey*, 1 Pa. St. 173; *McClelland v. Mahon*, 1 Pa. St. 364; *Muirhead v. Kirkpatrick*, 2 Pa. St. 425; *Grayson's Appeal*, 5 Pa. St. 395; *Burrows v. Shultz*, 6 Pa. St. 325; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Ludwig v. Meyre*, 5 W. & S. (Pa.) 435; *Post v. Avery*, 5 W. & S. (Pa.) 510; *Leiper v. Peirce*, 6 W. & S. (Pa.) 555; *Patterson v. Reed*, 7 W. & S. (Pa.) 144; *Reading R.*

*Co. v. Johnson*, 7 W. & S. (Pa.) 324; *Sypher v. Long*, 4 Watts (Pa.) 253.

**Competency of Assignee.** — *Stewart v. Conner*, 13 Ala. 94; *Harbin v. Roberts*, 33 Ga. 45; *Locke v. North American Ins. Co.*, 13 Mass. 61; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Palmer v. White*, 10 Cush. (Mass.) 321; *Benoist v. Darby*, 12 Mo. 196; *Thorp v. Amos*, 1 Sandf. Ch. (N. Y.) 26; *Clover v. Painter*, 2 Pa. St. 46; *Grayson's Appeal*, 5 Pa. St. 395.

**2. Competency of Bailor.** — *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Maine Stage Co. v. Longley*, 14 Me. 444; *Moran v. Portland Steam Packet Co.*, 35 Me. 55; *Chesley v. St. Clair*, 1 N. H. 189; *Heitzman v. Divil*, 11 Pa. St. 264.

**Competency of Bailee.** — *Oliver v. McClellan*, 21 Ala. 675; *Wright v. Ross*, 2 Greene (Iowa) 266; *Walmsley v. Hubbard*, 24 Tex. 612; *Pierce v. Hindsall*, 1 Tyler (Vt.) 153. *Compare Smith v. Seward*, 3 Pa. St. 342.

**3. Debtor Incompetent** — *England.* — *M'Brain v. Fortune*, 3 Campb. 317; *Brown v. Brown*, 4 Taunt. 752; *Bland v. Ansley*, 2 B. & P. N. R. 331; *Ripley v. Thompson*, 12 Moo. 55, 22 E. C. L. 433.

*United States.* — *Winship v. U. S. Bank*, 5 Pet. (U. S.) 529.

*Alabama.* — *Whatley v. Johnson*, 1 Stew. (Ala.) 498; *Miller v. Hale*, *Dudley* (Ga.) 119; *Edwards v. Musgrove*, *Dudley* (Ga.) 219; *Leiper v. Gewin*, 8 Ala. 326.

*Connecticut.* — *Sheldon v. Ackley*, 4 Day (Conn.) 458.

*Kentucky.* — *Paul v. Rogers*, 5 T. B. Mon. (Ky.) 167.

*Maine.* — *Danforth v. Roberts*, 20 Me. 307; *Philbrook v. Handley*, 27 Me. 55.

*Massachusetts.* — *Emerton v. Andrews*, 4 Mass. 653; *Griffin v. Brown*, 2 Pick. (Mass.) 304; *Eastman v. Winship*, 14 Pick. (Mass.) 46; *Pratt v. Stephenson*, 16 Pick. (Mass.) 325.

*New York.* — *Jackson v. Peek*, 4 Wend. (N. Y.) 300; *Marquand v. Webb*, 16 Johns. (N. Y.) 89; *Collins v. Ellis*, 21 Wend. (N. Y.) 390.

*North Carolina.* — *Waller v. Mills*, 3 Dev. L. (14 N. Car.) 517.

*Pennsylvania.* — *Hickling v. Fitch*, 1 Miles (Pa.) 208; *Miller v. M'Clenachan*, 1 Yeates (Pa.) 144; *Purviance v. Dryden*, 3 S. & R.

informers in criminal cases were competent witnesses for the prosecution, unless they would receive a direct benefit from the prisoner's conviction. The possibility of a reward did not render them incompetent.<sup>1</sup>

(Pa.) 402; Doeblor v. Snively, 5 Watts (Pa.) 225.

**Debtor Competent**—*Alabama*.—Fruit v. Lowry, 1 Port. (Ala.) 101; Burns v. Taylor, 3 Port. (Ala.) 187; Holman v. Arnett, 4 Port. (Ala.) 63.

*Connecticut*.—Enos v. Tuttle, 3 Conn. 247; Newell v. Hoadley, 8 Conn. 381.

*Georgia*.—Edwards v. Musgrove, Dudley (Ga.) 219; Williams v. Kelsey, 6 Ga. 365; Thornton v. Lane, 11 Ga. 459.

*Illinois*.—Clifton v. Bogardus, 2 Ill. 32.

*Indiana*.—Hankins v. Ingols, 4 Blackf. (Ind.) 35; Bond v. Brady, 7 Blackf. (Ind.) 39; Limpus v. State, 7 Blackf. (Ind.) 43; Bradbury v. Dougherty, 7 Blackf. (Ind.) 467.

*Kentucky*.—Taylor v. Com., 3 Bibb (Ky.) 356.

*Maine*.—Pillsbury v. Small, 19 Me. 435.

*Maryland*.—Ohio L. Ins., etc., Co. v. Ross, 2 Md. Ch. 25.

*Massachusetts*.—Prince v. Shepard, 9 Pick. (Mass.) 176.

*Mississippi*.—Ewing v. Cargill, 13 Smed. & M. (Miss.) 79.

*Missouri*.—Scales v. Southern Hotel Co., 37 Mo. 520.

*New York*.—Gay v. Cary, 9 Cow. (N. Y.) 44; Waters v. Burnet, 14 Johns. (N. Y.) 362.

*Pennsylvania*.—Smith v. Wagenseller, 21 Pa. St. 494; Galway's Appeal, 34 Pa. St. 242; Jones v. Northern Liberties Bank, 44 Pa. St. 253; Clark v. Watson, 50 Pa. St. 317; Updegraff v. Rowland, 52 Pa. St. 317; Ferree v. Thompson, 52 Pa. St. 353; Stewart v. Stocker, 1 Watts (Pa.) 135.

*South Carolina*.—Yongue v. Aiken, 3 Strobb. L. (S. Car.) 533.

*Texas*.—Converse v. McKee, 14 Tex. 20.

**Creditor Competent**.—Lillie v. Wilson, 2 Root (Conn.) 517; Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co., 6 Ill. 236; Gray v. Morey, 26 Ill. 409; Seaver v. Bradley, 6 Me. 60; Noyes v. Sturdivant, 18 Me. 104; Warne v. Prentiss, 9 Mo. 544; Delaware, etc., R. Co. v. Irick, 23 N. J. L. 321; Duel v. Fisher, 4 Den. (N. Y.) 515; Hart v. Deamer, 6 Wend. (N. Y.) 497; Jones v. Brownfield, 2 Pa. St. 55; Lothrop v. Wightman, 41 Pa. St. 297; Quinlan v. Davis, 6 Whart. (Pa.) 169.

**Creditor Incompetent**.—Benedict v. Brownson, Kirby (Conn.) 70; Russell v. Sprigg, 10 La. 421; Marland v. Jefferson, 2 Pick. (Mass.) 240; Peyton v. Hallett, 1 Cai. (N. Y.) 363; Ten Eyck v. Bill, 5 Wend. (N. Y.) 55; M'Veaugh v. Goods, 1 Dall. (Pa.) 62; Innis v. Miller, 2 Dall. (Pa.) 50.

**Competency of Creditor Determined by Solvency of Estate**—*England*.—Craig v. Cundell, 1 Campb. 381; Paull v. Brown, 6 Esp. 34; Nowell v. Davies, 5 B. & Ad. 386, 27 E. C. L. 96; Davies v. Davies, M. & M. 345, 22 E. C. L. 330.

*Georgia*.—See Latimer v. Sayre, 45 Ga. 468.

*Maryland*.—Owens v. Collinson, 3 Gill & J. (Md.) 25.

*Massachusetts*.—Chamberlin v. Chamberlin, 4 Allen (Mass.) 184.

*Missouri*.—Foster v. Wallace, 2 Mo. 231. *New Hampshire*.—Barns v. Hatch, 3 N. H. 304, 14 Am. Dec. 369.

*New York*.—Marre v. Ginocchio, 2 Bradf. (N. Y.) 165; Flinn v. Chase, 4 Den. (N. Y.) 85.

*Pennsylvania*.—Youst v. Martin, 3 S. & R. (Pa.) 423; Boyer v. Kendall, 14 S. & R. (Pa.) 178.

**1. Prosecutors Competent**—*England*.—Rex v. Nunez, 2 Stra. 1043; Rex v. Ellis, 2 Stra. 1104; Rex v. Broughton, 2 Stra. 1229; Rex v. Blackman, 1 Esp. 95; Rex v. Cole, 1 Esp. 169; Abrahams v. Bunn, 4 Burr. 2255; Bush v. Ralling, Say. 289; Heward v. Shipley, 4 East 180; Rex v. Boston, 4 East 572; Mead v. Robinson, Willes 423; R. v. Johnson, Willes 425, note; R. v. Luckup, Willes 425, note; Rex v. Williams, 9 B. & C. 549, 17 E. C. L. 440; Reg. v. Sewel, 7 Mod. 118; Reg. v. Mackartney, 1 Salk. 286 Bent v. Baker, 3 T. R. 27; Smith v. Prager, 7 T. R. 58.

*United States*.—U. S. v. Murphy, 16 Pet. (U. S.) 203.

*Alabama*.—State v. Truss, 9 Port. (Ala.) 126.

*Connecticut*.—Salisbury v. State, 6 Conn. 104.

*Kentucky*.—Com. v. Oliver, 3 Bibb (Ky.) 474.

*Mississippi*.—Murphy v. State, 28 Miss. 650; State v. Blennerhassett, Walk. (Miss.) 7.

*New York*.—People v. Cunningham, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; Pettingal v. Brown, 1 Cai. (N. Y.) 168.

*North Carolina*.—State v. Hassett, Tayl. (1 N. Car.) 55.

*South Carolina*.—Charleston v. Haywood, 2 Nott & M. (S. Car.) 308.

*Virginia*.—Baker v. Com., 2 Va. Cas. 353; Gilliam v. Com., 4 Leigh (Va.) 688.

**Prosecutors Incompetent**—*England*.—Rex v. Whiting, 1 Salk. 283; Rex v. Williams, 9 B. & C. 549, 17 E. C. L. 440; Rex v. Beaven, R. & M. 342; Rex v. Tilly, 1 Stra. 316; Rex v. Stone, 2 Ld. Raym. 1545; Rex v. Piercy, Andr. 18; Rex v. Blaney, Andr. 240; Masters v. Drayton, 2 T. R. 496.

*Alabama*.—Northcot v. State, 43 Ala. 330.

*Connecticut*.—Bill v. Scott, Kirby (Conn.) 62; Salisbury v. State, 6 Conn. 104.

*Kentucky*.—Com. v. Gore, 3 Dana (Ky.) 475.

*Massachusetts*.—Com. v. Frost, 5 Mass. 58.

*North Carolina*.—State v. Fellows, 2 Hayw. (3 N. Car.) 340.

*Pennsylvania*.—Com. v. Hargesheimer, 1 Ashm. (Pa.) 413.

*South Carolina*.—Van Evour v. State, 2 Nott & M. (S. Car.) 309, note; State v. Vaughan, 1 Bay (S. Car.) 283.

**Cases of Robbery**.—Rex v. Williams, 9 B. & C. 549, 17 E. C. L. 440; Brook v. Carpenter, 3 Bing. 297, 11 E. C. L. 108; Salisbury v. State,



**2. Judicial and Other Officers.** — The competency of judicial and other public officers has been discussed in various articles throughout this work, to which the reader is referred in the note below.<sup>1</sup>

**3. Jurors** — *a. PETIT JURORS* — (1) *Competency in General.* — In early times jurors were taken from the neighborhood for the express reason that they were supposed to have peculiar knowledge of the subject of the litigation and were thus best fitted to render a just verdict.<sup>2</sup> But this idea is long since exploded, and it is now the rule that no juror shall be permitted to give evidence in the jury room.<sup>3</sup> But there is no rule of law rendering a juror incompetent as a witness in the cause in which he has been empaneled. If he is otherwise competent he should be sworn and examined as to all relevant facts within his knowledge.<sup>4</sup> But he is not competent to testify as to facts learned by him as juror, and by observation in open court.<sup>5</sup> It was held in an early case that a juror would not be compelled to testify.<sup>6</sup> But this rule has found no recognition in modern times.

(2) *Competency to Impeach Verdict.* — Whether or not a member of the jury is competent to testify or make affidavit as to matters impeaching the verdict has been fully discussed elsewhere.<sup>7</sup>

*b. GRAND JURORS.* — The competency of grand jurors to testify as to what took place in the jury room has already been fully treated in another part of this work.<sup>8</sup>

**4. Defect of Understanding** — *a. INFANTS.* — The competency of infants to testify under oath, and the manner of determining such competency, have already been treated in another part of this work, to which reference is made in the note.<sup>9</sup>

*b. IDIOTS, LUNATICS, ETC.* — (1) *Condition at Time of Trial* — (a) *In General.* — All persons who are examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and give them a knowledge of right and wrong; therefore, idiots and lunatics while under the influence of their malady, not possessing their share of understanding, are

6 Conn. 104; Com. v. Moulton, 9 Mass. 30; State v. Casados, 1 Nott & M. (S. Car.) 91.

**Reward Immaterial.** — Rex v. Williams, 9 B. & C. 549, 17 E. C. L. 440; U. S. v. Wilson, Baldw. (U. S.) 78; State v. Bennet, 1 Root (Conn.) 249; State v. Rush, 95 Mo. 199.

**As to the Rule in Prosecutions for Forgery,** see the title FORGERY, vol. 13, p. 1107.

1. See the following titles: ARBITRATION AND AWARD, vol. 2, p. 704 *et seq.*; EXPERT AND OPINION EVIDENCE, vol. 12, p. 455; JUDGE, vol. 17, pp. 724, 725; PROSECUTING AND DISTRICT ATTORNEYS, vol. 23, p. 271.

2. **Jurors Having Knowledge of Facts Selected.** — See Thayer on Evidence, p. 47 *et seq.*

3. **Evidence Not Received in Jury Room.** — See the title JURY AND JURY TRIAL, vol. 17, p. 1237.

4. **Juror Competent as Witness** — *England.* — Bennet v. Hundred of Hartford, Style 233; Fitz-James v. Moys, Sid. 133; Rex v. Reading, 7 How. St. Tr. 259; Rex v. Perkins, Holt K. B. 403; Heath's Case, 18 How. St. Tr. 132; Manley v. Shaw, C. & M. 361, 41 E. C. L. 200; Rex v. Rosser, 7 C. & P. 648, 32 E. C. L. 670.

*Georgia.* — Chattanooga, etc., R. Co. v. Owen, 90 Ga. 266; Savannah, etc., R. Co. v. Quo, 103 Ga. 125.

*Maine.* — Fellows's Case, 5 Me. 333.

*Massachusetts.* — Patterson v. Boston, 20

Pick. (Mass.) 159; Murdock v. Sumner, 22 Pick. (Mass.) 156; Schmidt v. New York Union Mut. F. Ins. Co., 1 Gray (Mass.) 529.

*Mississippi.* — White v. State, 73 Miss. 50. *Nebraska.* — Richards v. State, 36 Neb. 17; Wood River Bank v. Dodge, 36 Neb. 708; Chicago, etc., R. Co. v. Collier, (Neb. 1901) 95 N. W. Rep. 472.

*Pennsylvania.* — State v. Leach, Add. (Pa.) 352; Howser v. Com., 51 Pa. St. 332.

*Texas.* — Wharton v. State, 45 Tex. 2.

*Vermont.* — Dunbar v. Parks, 2 Tyler (Vt.) 217.

See the Practice Criticised in Reg. v. Petrie, 20 Ont. 317.

**As to the Competency of Such Person as a Juror,** see the title JURY AND JURY TRIAL, vol. 17, p. 1153.

5. **Facts Learned in Court.** — Scruggs v. State, 90 Tenn. 81.

6. **Juror Not Compelled to Testify.** — Manley v. Shaw, C. & M. 361, 41 E. C. L. 200.

7. **Impeaching Verdict.** — See the titles EVIDENCE, vol. 11, p. 547; VERDICT, vol. 29, p. 1008 *et seq.*; and NEW TRIAL, 14 ENCYC. OF PL. AND PR. 915 *et seq.*

8. **Competency of Grand Jurors.** — See the title JURY AND JURY TRIAL, vol. 17, p. 1294 *et seq.*

9. **Infants.** — See the title INFANTS, vol. 16, p. 267 *et seq.*

excluded.<sup>1</sup> But a witness is not excluded merely because he is a lunatic. He must, at the time of the examination, be so under the influence of his malady as to be deprived of that "share of understanding which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong;" or, as it is generally expressed, the question is as to his competency, at the time of the trial, to distinguish between right and wrong, to appreciate the nature and obligation of an oath, to remember events correctly, and to answer questions intelligently. If he fulfils these requirements he is competent, his credibility being submitted to the jury.<sup>2</sup> But he must be capable of understanding questions put on cross-examination, as well as on direct examination, since otherwise the chance for fraud would be too great.<sup>3</sup>

**Monomaniacs.** — The question whether a monomaniac is competent is one on which the text writers differ, and on which there seems to be a paucity of judicial decisions. But the better view is that he may testify as to all subjects not connected with his delusion, provided he can meet the tests above referred to.<sup>4</sup>

**Effect of Statute Declaring Insane Persons Incompetent.** — In some states it is provided by statute that persons of unsound mind shall be incompetent. These statutes are generally held to be merely declaratory, and persons are excluded in those jurisdictions only when unsound of mind to a degree that would exclude them at common law.<sup>5</sup> But in one state it is held otherwise.<sup>6</sup>

**Old Age.** — If the mind of the witness is impaired by old age, so that he is incapable of recollecting events or of testifying intelligently, he should be excluded.<sup>7</sup>

(b) **Proof of Insanity** — *aa.* IN GENERAL. — Whether or not a witness is a question going to his incompetency, and therefore is for the court and not for the jury.<sup>8</sup> The usual mode of determining competency is by examination

**1. Insane Persons Excluded.** — *Armstrong v. Timmons*, 3 Harr. (Del.) 342; *Livingston v. Kiersted*, 10 Johns. (N. Y.) 362; *State v. Smith*, 26 Wash. 354. See also *Holcomb v. Holcomb*, 28 Conn. 177; *Huling v. Huling*, 32 Ill. App. 519; *Phebe v. Prince*, Walk. (Miss.) 131.

**2. Test of Competency** — *England.* — *Reg. v. Hill*, 5 Cox C. C. 259; *Spittle v. Walton*, L. R. 11 Eq. 420.

*United States.* — *Evans v. Hettich*, 7 Wheat. (U. S.) 453; *District of Columbia v. Armes*, 107 U. S. 519; *Wright v. Southern Express Co.*, 80 Fed. Rep. 85; *Pittsburgh, etc., R. Co. v. Thompson*, (C. C. A.) 82 Fed. Rep. 720.

*Alabama.* — *Campbell v. State*, 23 Ala. 44; *Worthington v. Mencer*, 96 Ala. 310; *Walker v. State*, 97 Ala. 85. See also *Allen v. State*, 60 Ala. 19.

*California.* — *Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920.

*Connecticut.* — *Holcomb v. Holcomb*, 28 Conn. 177.

*Delaware.* — *State v. Brown*, 2 Marv. (Del.) 380.

*Massachusetts.* — *Kendall v. May*, 10 Allen (Mass.) 59.

*Minnesota.* — *Cannady v. Lynch*, 27 Minn. 435; *State v. Hayward*, 62 Minn. 474.

*New York.* — See *Hartford v. Palmer*, 16 Johns. (N. Y.) 143.

*Oklahoma.* — *Guthrie v. Shaffer*, 4 Okla. 459.

*Compare infra*, this subsection, *Proof of Insanity* — *Effect of Previous Commitment to Asylum.*

**Thus, a Lunatic Is Competent During a Lucid Interval.** *Evans v. Hettich*, 7 Wheat. (U. S.) 453; *Campbell v. State*, 23 Ala. 44.

**Rule in Louisiana.** — Under Act La. No. 29 of 1886, requiring "proper understanding," a person is not incompetent merely by stating that he does not know the consequences of giving false testimony, if the judge certifies that he appears to have as much intelligence as an ordinary person of his class. *State v. Langford*, 45 La. Ann. 1177. *Compare State v. Washington*, 49 La. Ann. 1602.

**3. Capacity to Understand Cross-examination.** — *Udy v. Stewart*, 10 Ont. 591.

**4. Monomaniacs.** — *Reg. v. Hill*, 5 Cox C. C. 259. See also *Spittle v. Walton*, L. R. 11 Eq. 420; *District of Columbia v. Armes*, 107 U. S. 519; *Kendall v. May*, 10 Allen (Mass.) 59. But *compare Waring v. Waring*, 12 Jur. 947.

**5. Effect of Statute.** — *Pittsburgh, etc., R. Co. v. Thompson*, (C. C. A.) 82 Fed. Rep. 720; *Cannady v. Lynch*, 27 Minn. 435; *Guthrie v. Shaffer*, 7 Okla. 459. *Compare Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920.

**6. Lopez v. State**, 30 Tex. App. 487.

**7. Mind Impaired by Old Age.** — *Woodhull v. Whittle*, 63 Mich. 575; *McCutchen v. Pigue*, 4 Heisk. (Tenn.) 565.

**8. Question for Court.** — *Reg. v. Hill*, 5 Cox C. C. 259; *District of Columbia v. Armes*, 107 U. S. 519; *Worthington v. Mencer*, 96 Ala. 310; *Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920; *Holcomb v. Holcomb*, 28 Conn. 177; *Dickson v. Waldron*, 135 Ind. 507; *State v.*

of witnesses, or a personal examination by the court or by counsel, or by all these methods.<sup>1</sup> But it has been held that a witness is presumed, on reaching the age of fourteen, to be competent, and to exclude him on the score of idiocy or insanity the defect in the understanding must be shown by the party objecting to his competency; not on his preliminary examination, but by testimony *aliunde*.<sup>2</sup>

*bb. EFFECT OF PREVIOUS COMMITMENT TO ASYLUM.* — It follows from the rules already laid down that the mere fact that the witness has been judicially declared insane is not a reason for excluding him, if he fulfils the requirements as to competency.<sup>3</sup> And so if a conservator has been appointed over him.<sup>4</sup> But it should be borne in mind that if the witness has been once found insane this has the effect of casting upon the party offering him the burden of showing him to possess the necessary qualifications.<sup>5</sup>

*cc. ALLEGATIONS AND ADMISSIONS IN THE PLEADINGS.* — The condition of the witness at the time of the trial cannot be conclusively determined by the allegations or admissions in the pleadings. Thus, an allegation in the complaint that the plaintiff is of unsound mind does not prevent him from testifying if the court considers him competent.<sup>6</sup> So in an action for assault and battery the plaintiff is not rendered incompetent by an allegation in the complaint that the injuries received have impaired his mind;<sup>7</sup> and where the plaintiff alleges that he is of unsound mind and sues by his next friend, the court will nevertheless examine him and determine as to his competency.<sup>8</sup> It has been held that where an indictment for rape charges that the prosecutrix was of such feeble mind as to be unable to give consent, she was not competent to prove the *corpus delicti*.<sup>9</sup> But this decision may well be questioned, for the obvious reason that, under such a rule, a conviction would, in most cases, be rendered impossible.

(2) *Condition at Time of Event Testified To.* — Whether or not the witness must have been sane at the time of the event to which he testifies is a question on which there is a singular dearth of authority. In one state it is provided by statute that he must have been sane at such time.<sup>10</sup> But in the absence of such a statute the law appears to be that the fact of the witness's insanity at the time of the event goes to his credibility only, and not to his competency.<sup>11</sup>

*c. PERSONS UNDER INFLUENCE OF LIQUOR OR DRUGS* — (1) *Condition at Time of Trial.* — The same rule applies to the case of an intoxicated person as to a lunatic. If he is, at the time of the trial, able to answer questions intelligently and to understand the nature and obligation of an oath he is

Hayward, 62 Minn. 474; Guthrie v. Shaffer, 7 Okla. 459; Mills v. Cook, (Tex. Civ. App. 1900) 57 S. W. Rep. 81. See generally *infra*, this title, *Determining the Question of Competency*.

1. *Mode of Determining Competency.* — Reg. v. Hill, 5 Cox C. C. 259; Holcomb v. Holcomb, 28 Conn. 177; Lopez v. State, 30 Tex. App. 487.

2. Robinson v. Dana, 16 Vt. 474.

3. *Effect of Commitment to Asylum.* — Wright v. Southern Express Co., 80 Fed. Rep. 85; Pittsburgh, etc., R. Co. v. Thompson, (C. C. A.) 82 Fed. Rep. 720; Clements v. McGinn, (Cal. 1893) 33 Pac. Rep. 920; State v. Brown, 2 Marv. (Del.) 380.

As to the Retrospective Effect of an Adjudication of Insanity, see State v. Smith, 26 Wash. 354.

4. *Conservator Appointed.* — Tucker v. Shaw, 158 Ill. 326.

5. *Burden of Proof.* — Pittsburgh, etc., R. Co. v. Thompson, (C. C. A.) 82 Fed. Rep. 720; Armstrong v. Timmons, 3 Harr. (Del.) 342;

Hoyt v. Adey, 3 Lans. (N. Y.) 173. See also Hottle v. Weaver, 206 Pa. St. 87.

6. Cannady v. Lynch, 27 Minn. 437.

7. Dickson v. Waldron, 135 Ind. 507.

8. Worthington v. Mencer, 96 Ala. 310.

9. Lee v. State, 43 Tex. Crim. 285. Compare Gore v. State, 119 Ga. 418.

10. *Express Statute.* — Lopez v. State, 30 Tex. App. 487; Lee v. State, 43 Tex. Crim. 285.

11. *Witness Competent.* — Holcomb v. Holcomb, 28 Conn. 177; State v. Brown, 2 Marv. (Del.) 380; Sarbach v. Jones, 20 Kan. 497. Compare Pones v. State, 43 Tex. Crim. 201; State v. White, 10 Wash. 611.

*No Presumption of Prior Insanity.* — The fact that the prosecuting witness is insane at the time of trial does not prevent the state from proving his declarations, made as part of the *res gesta*, at the time of the commission of the alleged crime, more than two months before the trial, it not appearing that he was not then entirely sane. State v. Smith, 26 Wash. 354.



competent.<sup>1</sup> But if his mind is so befogged as to incapacitate him from giving testimony, he should be excluded.<sup>2</sup>

**Witness under Influence of Opium.** — If the witness is under the influence of opium at the time of the trial he is nevertheless competent, but his testimony should be received with great caution.<sup>3</sup>

**Manner of Determining Competency.** — The competency of the witness is to be determined by the court; and from the nature of the case this is to be done by means of a personal inspection and not by the introduction of witnesses.<sup>4</sup> Proof that the witness has been found to be a habitual drunkard by an inquisition is not enough to exclude him, if the court is satisfied as to his competency.<sup>5</sup>

(2) **Condition at Time of Event Testified To.** — While the intoxication of a witness at the time of the transactions of which he testifies does not destroy his competency, it undoubtedly impairs his credibility; but if his testimony is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief.<sup>6</sup>

**d. DEAF MUTES.** — The competency and manner of examination of deaf mutes have been fully treated elsewhere in this work.<sup>7</sup>

**5. Want of Religious Belief — a. AT COMMON LAW — (1) Test of Competency.** — The proper test of the competency of a witness, on the ground of his religious principles, is "whether he believes in the existence of a God who will punish him if he swears falsely."<sup>8</sup> This doctrine is based on the ground that the law requires all evidence to be given under the sanction of an oath, and as without religious belief a person cannot be subject to this indispensable sanction, he should not be permitted blasphemously to invoke the name of a Supreme Being in whose existence as "the regarder of truth

**1. Test of Conditions at Moment of Examination.** — *Gebhart v. Shindle*, 15 S. & R. (Pa.) 235.

**2. Drunkard Incompetent.** — *Hartford v. Palmer*, 16 Johns. (N. Y.) 143. And see the cases cited throughout this subdivision. *Contra*, *Meyers v. State*, 37 Tex. Crim. 208.

**3. Opium.** — *State v. White*, 10 Wash. 611.

**4. Competency Determined by Court.** — *Hartford v. Palmer*, 16 Johns. (N. Y.) 143; *Gould v. Crawford*, 2 Pa. St. 89.

**5. Finding by Inquisition.** — *Gebhart v. Shindle*, 15 S. & R. (Pa.) 235.

Evidence that a witness is a habitual drunkard is not admissible for the purpose of impeaching him. *Thayer v. Boyle*, 30 Me. 475.

**6. Condition at Time of Event.** — *State v. Castello*, 62 Iowa 404; *State v. Sejours*, (La. 1904) 37 So. Rep. 599; *Pones v. State*, 43 Tex. Crim. 201; *State v. White*, 10 Wash. 611.

The witness is competent, though he was stupefied with drugs at the time of the occurrence, if he remembers what happened sufficiently to give a rational account thereof. *Pones v. State*, 43 Tex. Crim. 201.

**7. Deaf Mutes.** — See the title DEAF AND DUMB PERSONS, vol. 8, p. 844.

**8. Test of Competency — England.** — *Rex v. Taylor, Peake N. P.* (ed. 1795) 11; *Atty.-Gen. v. Bradlaugh*, 14 Q. B. D. 667; *Omichund v. Barker*, Willes 549.

*Canada.* — *Reg. v. Pah-mah-gay*, 20 U. C. Q. B. 195; *Gray v. Macallum*, 2 British Columbia 104.

*United States.* — *U. S. v. Kennedy*, 3 McLean (U. S.) 175; *Wakefield v. Ross*, 5 Mason (U. S.) 18.

*Alabama.* — *Blocker v. Burness*, 2 Ala. 354.

*Connecticut.* — *Curtiss v. Strong*, 4 Day (Conn.) 51; *Atwood v. Welton*, 7 Conn. 66.

*Delaware.* — *Perry v. Stewart*, 2 Harr. (Del.) 37.

*Georgia.* — *Donkle v. Kohn*, 44 Ga. 266.

*Illinois.* — *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541.

*Iowa.* — *Searcy v. Miller*, 57 Iowa 613.

*Massachusetts.* — *Com. v. Batchelder, Thach. Crim. Cas.* (Mass.) 191; *Com. v. Barnard, Thach. Crim. Cas.* (Mass.) 431.

*New York.* — *Butts v. Swartwood*, 2 Cow. (N. Y.) 431, note; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98.

*North Carolina.* — *Shaw v. Moore*, 4 Jones L. (49 N. Car.) 25.

*Ohio.* — *Brock v. Milligan*, 10 Ohio 125; *Clinton v. State*, 33 Ohio St. 27.

*Pennsylvania.* — *Com. v. Winnemore*, 1 Brews. (Pa.) 378; *Cubbison v. M'Creary*, 2 W. & S. (Pa.) 262; *Com. v. Kauffman*, 1 Pa. Co. Ct. 410; *Blair v. Seaver*, 26 Pa. St. 274.

*Vermont.* — *Arnold v. Arnold*, 13 Vt. 362; *Scott v. Hooper*, 14 Vt. 535.

**Belief in Trinity Immaterial.** — Whether the witness believes in Jesus Christ or the Holy Gospels is not a proper question. *Rex v. Taylor, Peake N. P.* (ed. 1795) 11. See also *Donkle v. Kohn*, 44 Ga. 266.

**Denominational Differences Immaterial.** — The religious faith of a witness is not a subject for argument or proof, for the purpose of showing that he is entitled to more or less credit than persons of a different religious sect. *Com. v. Buzzell*, 16 Pick. (Mass.) 153.

and avenger of falsehood he does not believe." <sup>1</sup> That a witness would feel bound to speak the truth out of regard to his own character, or from a sense of moral rectitude, or from any other motive than a regard for the sanctity of his oath, is not sufficient. <sup>2</sup> Accordingly, atheists, that is, persons who do not believe in the existence of God, where the common-law rule is in force, are invariably held incompetent. <sup>3</sup> Applying this test, a Universalist has been admitted to testify, it not appearing that he did not believe in the punishment of the wicked in the world to come. <sup>4</sup> But where it is proved that the witness has avowed his disbelief in the existence of God, evidence is not admissible to show that for many years he has been a member of the Universalist church. <sup>5</sup>

**Belief in Anthropomorphic God.** — Whether the witness must believe in a Deity possessing human form and attributes is not clear. It has been held that a witness who declares that God is in all things, but otherwise there is no God, is incompetent. <sup>6</sup> But it seems better to admit such a witness, and there are cases holding competent one who sees God in trees, stones, and the whole universe, provided he believes in future punishment. <sup>7</sup>

**Necessity of Belief in Punishment in Next World.** — A few of the older cases seem to imply that the witness must believe in the punishment of perjury in the world to come, <sup>8</sup> and in a few cases the witness was excluded because he had not such a belief; <sup>9</sup> but the general weight of authority is to the effect that it is not indispensable to competency that the witness believe that the punishment of perjury will be inflicted in the next world; it is sufficient if he has a religious sense of accountability to God, and believes that he will punish in this world the commission of perjury. <sup>10</sup> In *Kansas* the rule was still further

**1. Reason for Rule.** — *Omichund v. Barker*, 1 Atk. 48, Willes 538; 1 Smith's Lead. Cas. (8th ed.) 1360; *Rex v. White*, 1 Leach C. C. 430; *Arnold v. Arnold*, 13 Vt. 362.

**2. Sense of Moral Obligation Not Enough.** — *Omichund v. Barker*, Willes 538; *Maden v. Catanach*, 7 H. & N. 360; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541. See also *Atty.-Gen. v. Bradlaugh*, 14 Q. B. D. 667.

To be competent as a witness, one must have a conscience alive to the conviction of accountability to a higher power than human law. Solely his regard for the good of society, or his fear of punishment, is not sufficient. *Com. v. Winnemore*, 2 Brews. (Pa.) 378.

**3. Atheists Incompetent — England.** — *Omichund v. Barker*, Willes 538. See also *Atty.-Gen. v. Bradlaugh*, 14 Q. B. D. 667.

*Canada.* — *Gray v. Macallum*, 2 British Columbia 104.

*United States.* — *Wakefield v. Ross*, 5 Mason (U. S.) 16; Anonymous, 1 Fed. Cas. No. 446.

*Illinois.* — *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541.

*Maine.* — *Smith v. Coffin*, 18 Me. 157.

*Massachusetts.* — *Com. v. Batchelder*, Thach. Crim. Cas. (Mass.) 191; *Thurston v. Whitney*, 2 Cush. (Mass.) 104.

*New Hampshire.* — *Norton v. Ladd*, 4 N. H. 444.

*New York.* — *People v. M'Garren*, 17 Wend. (N. Y.) 460; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Butts v. Swartwood*, 2 Cow. (N. Y.) 431.

*Ohio.* — *Brock v. Milligan*, 10 Ohio 121.

*Tennessee.* — *Odell v. Koppee*, 5 Heisk. (Tenn.) 88.

*Vermont.* — *Arnold v. Arnold*, 13 Vt. 363; *Scott v. Hooper*, 14 Vt. 535.

Where a child eleven years old said she

had never heard of God, heaven, or hell, and did not know that she would be punished if she swore falsely, otherwise than by being put in jail, it was held that she should not have been allowed to testify. *Beeson v. State*, 72 Ala. 191; *Lawson v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 345. See generally as to the competency of children as witnesses, the title INFANTS, vol. 16, p. 267 *et seq.*

**4. Universalist Competent.** — *Butts v. Swartwood*, 2 Cow. (N. Y.) 431.

**5.** *Smith v. Coffin*, 18 Me. 157.

**6. Belief in Anthropomorphic God.** — *U. S. v. Lee*, 4 Cranch (C. C.) 446; *Smith v. Coffin*, 18 Me. 157.

**7.** *Easterday v. Kilborn*, Wright (Ohio) 345; *Clinton v. State*, 33 Ohio St. 27.

**8. Belief in Future State of Punishment.** — *Rex v. White*, 1 Leach C. C. 430; *Curtiss v. Strong*, 4 Day (Conn.) 51; *Perry v. Stewart*, 2 Harr. (Del.) 37; *Phebe v. Prince*, Walk. (Miss.) 131; *State v. Cooper*, 2 Overt. (Tenn.) 96.

**9. Witness Excluded.** — *Atwood v. Welton*, 7 Conn. 66; *Bell v. Bell*, 34 N. Bruns. 615; *Schwarsenski v. Vineberg*, 5 Montreal Super. Ct. 372.

In *Jackson v. Gridley*, 18 Johns. (N. Y.) 98, a belief in a future state of rewards and punishments was said to be necessary to render a witness competent. But the point was not directly in issue, as the witness believed nothing.

**10. Belief in Punishment Sufficient — England.** — *Omichund v. Barker*, Willes 545. See also *Atty.-Gen. v. Bradlaugh*, 14 Q. B. D. 667.

*United States.* — *U. S. v. Kennedy*, 3 McLean (U. S.) 175.

*Alabama.* — *Blocker v. Burness*, 2 Ala. 354; *Beeson v. Moore*, 132 Ala. 391.

*Illinois.* — *Noble v. People*, 1 Ill. 54; Cen-

relaxed, an Indian having been permitted to testify though he merely believed that he would be hanged if he told a lie.<sup>1</sup>

(2) *Proof of Incompetency*.—(a) *By Previous Declarations of Witness*.—The burden of proving the witness incompetent is, of course, on the party objecting to him, for every person living in a Christian community is presumed to have the requisite amount of religious faith.<sup>2</sup> It has been said that stronger evidence is required to exclude a witness for want of religious belief than is required to set aside a juror.<sup>3</sup>

The *Mode of Proof* is usually by calling witnesses to testify to the previous declarations of the witness on religious matters.<sup>4</sup> In order that no change in his opinions may have taken place it would seem wise to admit only such declarations as have been made within a short period before the trial;<sup>5</sup> but the atheistical declarations of the witness having once been proved, the law will presume that they were sincere, and that the belief thus disclosed remains unchanged.<sup>6</sup> A change of opinion may, however, be shown;<sup>7</sup> but this is a question of fact to be decided by the trial court.<sup>8</sup>

(b) *By Interrogating the Witness*.—The weight of authority is that the witness himself cannot be questioned concerning his want of religious belief, either before or after he has been sworn.<sup>9</sup> But authority is not wanting for the

trial *Military Tract R. Co. v. Rockafellow*, 17 Ill. 541.

*Iowa*.—*Searcy v. Miller*, 57 Iowa 620.

*Maine*.—*Smith v. Coffin*, 18 Me. 157.

*Massachusetts*.—*Com. v. Batchelder*, Thach. Crim. Cas. (Mass.) 191; *Hunscom v. Hunscom*, 15 Mass. 184. See also *Thurston v. Whitney*, 2 Cush. (Mass.) 104.

*New Hampshire*.—See *Free v. Buckingham*, 59 N. H. 219.

*New York*.—*People v. Matteson*, 2 Cow. (N. Y.) 433, note.

*North Carolina*.—*Shaw v. Moore*, 4 Jones L. (49 N. Car.) 25.

*Ohio*.—*Brock v. Milligan*, 10 Ohio 121; *Clinton v. State*, 33 Ohio St. 27.

*Pennsylvania*.—*Cubbison v. McCreary*, 2 W. & S. (Pa.) 262; *Blair v. Seaver*, 26 Pa. St. 274.

*South Carolina*.—*Jones v. Harris*, 1 Strobb. L. (S. Car.) 160; *State v. Belton*, 24 S. Car. 187, 58 Am. Rep. 245.

*Tennessee*.—*Bennett v. State*, 1 Swan (Tenn.) 411.

*Vermont*.—*Arnold v. Arnold*, 13 Vt. 362.

1. *Belief in Punishment by Law*.—*Smith v. Brown*, 8 Kan. 608. But compare *Priest v. State*, 10 Neb. 393, where an Indian was excluded. In both these cases, however, the question of religious belief was ignored, and the decisions turned on mental capacity.

2. *Presumption of Competency*.—*Smith v. Coffin*, 18 Me. 157; *Free v. Buckingham*, 59 N. H. 219; *Den v. Vancleve*, 5 N. J. L. 689; *Donnelly v. State*, 26 N. J. L. 601; *Territory v. Yee Shun*, 3 N. Mex. 82; *People v. Matteson*, 2 Cow. (N. Y.) 433, note; *Com. v. Winnemore*, 2 Brews. (Pa.) 378. See also *Atty.-Gen. v. Bradlaugh*, 14 Q. B. D. 667.

*Referring Evidence to Jury*.—Where the incompetency is not clearly proven, the rule is to refer the evidence on the point to the jury, to be considered by it as bearing on the question of credibility. *Com. v. Winnemore*, 1 Brews. (Pa.) 356, 2 Brews. (Pa.) 378.

3. *McFadden v. Com.*, 23 Pa. St. 17, 62 Am. Dec. 308.

4. *Proof of Previous Declarations*.—*Bow v. Parsons*, 1 Root (Conn.) 480; *Beardsly v. Foot*, 2 Root (Conn.) 399; *Curtiss v. Strong*, 4 Day (Conn.) 51; *State v. Townsend*, 2 Harr. (Del.) 543; *Smith v. Coffin*, 18 Me. 157; *Thurston v. Whitney*, 2 Cush. (Mass.) 104; *Anderson v. Maberry*, 2 Heisk. (Tenn.) 653; *Odell v. Hoppee*, 5 Heisk. (Tenn.) 88; *Brock v. Milligan*, 10 Ohio 121. See also *Com. v. Smith*, 2 Gray (Mass.) 516.

5. *Brock v. Milligan*, 10 Ohio 126.

6. *Presumption as to Change of Opinion*.—*Com. v. Wyman*, Thach. Crim. Cas. (Mass.) 432; *State v. Stinson*, 7 Law Rep. 383. See also *Stanbro v. Hopkins*, 28 Barb. (N. Y.) 265.

7. *Change of Opinion May Be Shown*.—*Smith v. Coffin*, 18 Me. 157; *Clinton v. State*, 33 Ohio St. 27; *Cubbison v. McCreary*, 2 W. & S. (Pa.) 262; *State v. Stinson*, 7 Law Rep. 383; *Scott v. Hooper*, 14 Vt. 535. See also *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541.

8. *Question of Fact*.—*Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Scott v. Hooper*, 14 Vt. 535.

9. *Witness Cannot Be Questioned*.—*England*.—See *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147.

*United States*.—See *U. S. v. Kennedy*, 3 McLean (U. S.) 175.

*Connecticut*.—*Atwood v. Welton*, 7 Conn. 73.

*Illinois*.—*Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541; *Hronek v. People*, 134 Ill. 139.

*Iowa*.—*Searcy v. Miller*, 57 Iowa 613.

*Maine*.—*Smith v. Coffin*, 18 Me. 157.

*Maryland*.—See *Arnd v. Amling*, 53 Md. 192.

*Massachusetts*.—*Com. v. Smith*, 2 Gray (Mass.) 516; *Com. v. Burke*, 16 Gray (Mass.) 33. See also *Com. v. Batchelder*, Thach. Crim. Cas. (Mass.) 191.

*New Jersey*.—*Den v. Vancleve*, 5 N. J. L. 731.

*Vermont*.—See *Scott v. Hooper*, 14 Vt. 535.



opposite view.<sup>1</sup> In like manner, it has been held that his incompetency having been shown by proof *aliunde*, he cannot be sworn on the *voir dire* to restore his competency by his own testimony.<sup>2</sup> But there are cases to the contrary.<sup>3</sup>

**b. STATUTORY AND CONSTITUTIONAL CHANGES.**—With the growth of a more tolerant spirit in theology and a more thorough comprehension of the law of evidence, the legislatures of the various states have seen the questionable policy of the foregoing rules; so that in the great majority of jurisdictions at the present day all disqualifications for want of religious belief have been abolished by statutory or constitutional provisions.<sup>4</sup>

**Effect of Constitutional Provisions.**—The rejection of a witness as incompetent by reason of his want of belief in the existence of a God is not repugnant to a constitutional proviso that no person shall be molested or restrained in his person on account of his religious profession or sentiments.<sup>5</sup> But if the constitution provides that no person shall be affected in regard to his "civil capacities" it is held that a witness cannot be excluded on account of his religious opinions.<sup>6</sup> And where the constitution provides that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles," the right of a party to testify in his own behalf is held

*Virginia.*—Perry v. Com., 3 Gratt. (Va.) 602.

**Maryland Rule.**—In Arnd v. Amling, 53 Md. 192, the trial court examined a witness on his *voir dire* as to his religious belief, and on his reply that he believed in God and future punishments, permitted him to testify; the appellate court, while disapproving the custom as contrary to the modern practice, held that it was not reversible error. Compare the opinion of Bryan, J., in Du Puy v. Transportation, etc., Co., 82 Md. 444.

**Proof of His Belief to Affect Credibility.**—This rule of the common law is not changed by a statute forbidding objection to the competency of a witness on account of want of any religion. In such case his disbelief, in order to affect his credibility, must be proved in the same way as before the statute. Com. v. Burke, 16 Gray (Mass.) 33.

**1. Contra.**—Rex v. White, 1 Leach C. C. 430; Maden v. Catanach, 7 H. & N. 360; Rex v. Taylor, Peake N. P. (ed. 1795) 11; Queen's Case, 2 Brod. & B. 284, 6 E. C. L. 147; Gray v. Macallum, 2 British Columbia, 104; Com. v. Kauffman, 1 Pa. Co. Ct. 410; Anderson v. Maberry, 2 Heisk. (Tenn.) 653; Harrel v. State, 1 Head (Tenn.) 125; Odell v. Koppee, 5 Heisk. (Tenn.) 88.

Even under these decisions, however, the court cannot require that the witness be interrogated as a condition precedent to admitting proof of his declarations. Odell v. Koppee, 5 Heisk. (Tenn.) 88.

**2. Witness Cannot Be Sworn to Restore His Competency.**—Curtiss v. Strong, 4 Day (Conn.) 51; State v. Townsend, 2 Harr. (Del.) 543; Smith v. Coffin, 18 Me. 157; Com. v. Wyman, Thach. Crim. Cas. (Mass.) 432; Jackson v. Gridley, 18 Johns. (N. Y.) 98. See also Odell v. Koppee, 5 Heisk. (Tenn.) 88.

**3. Contra.**—U. S. v. White, 5 Cranch (C. C.) 38; Com. v. Winnemore, 1 Brews. (Pa.) 356; McFadden v. Com., 23 Pa. St. 17. See also Central Military Tract R. Co. v. Rockafellow, 17 Ill. 541; Cubbison v. McCreary, 2 W. & S. (Pa.) 262.

**4. Statutory Abolition of Religious Test.**—Consult the codes and statutes in the various states. And see the following cases:

*England.*—Clarke v. Bradlaugh, 7 Q. B. D. 38.

*California.*—Fuller v. Fuller, 17 Cal. 612.

*Georgia.*—Donkle v. Kohn, 44 Ga. 266.

*Illinois.*—Hronek v. People, 134 Ill. 139; Ewing v. Bailey, 36 Ill. App. 191.

*Iowa.*—Searcy v. Miller, 57 Iowa 613; State v. Elliott, 45 Iowa 486; Dedric v. Hopson, 62 Iowa 562.

*Kansas.*—Bill of Rights, § 7; Dickinson v. Beal, 10 Kan. App. 233.

*Kentucky.*—Bush v. Com., 80 Ky. 244.

*Louisiana.*—State v. Williams 111 La. 179, overruling State v. Washington, 49 La. Ann. 1602.

*Michigan.*—People v. Jenness, 5 Mich. 305.

*Missouri.*—Londener v. Lichtenheim, 11 Mo. App. 385.

*New Mexico.*—Territory v. Yee Shun, 3 N. Mex. 82.

*Ohio.*—Clinton v. State, 33 Ohio St. 27.

*Pennsylvania.*—Com. v. Kauffman, 1 Pa. Co. Ct. 410.

*Texas.*—Bill of Rights, § 5, Code Crim. Pro., art. 12; Taylor v. State, 22 Tex. App. 529; Colter v. State, 37 Tex. Crim. 284.

*Vermont.*—A statute making competent all parties in interest does not make competent a party to the suit who is incompetent by reason of lack of religious belief. Arnold v. Arnold, 13 Vt. 362. But see Vt. Rev. St. 1880, § 1007.

*Virginia.*—Perry v. Com., 3 Gratt. (Va.) 602.

**5. "Restrained in Person or Estate."**—Atwood v. Welton, 7 Conn. 73; Thurston v. Whitney, 2 Cush. (Mass.) 104. See also Central Military Tract R. Co. v. Rockafellow, 17 Ill. 541.

**6. "Civil Capacities" Not to Be Affected.**—Hronek v. People, 134 Ill. 139; Ewing v. Bailey, 36 Ill. App. 191; Bush v. Com., 80 Ky. 244; Shaw v. Moore, 4 Jones L. (49 N. Car.) 25; Perry v. Com., 3 Gratt. (Va.) 602.

to be a civil right that cannot be denied on the ground that he does not believe that God will punish perjury.<sup>1</sup>

6. **Infamy.** — At common law, a person convicted of an infamous crime was not thereafter competent to testify as a witness in any court of justice, unless his competency was restored by a reversal of the judgment of conviction or by a pardon. This subject, however, has been separately treated in another part of this work.<sup>2</sup>

7. **Vagrancy.** — In one jurisdiction it has been found necessary to decide as to the competency of a tramp. As would be expected, he is competent, but his credibility may be affected by proof of his vagrancy.<sup>3</sup>

8. **Indians.** — Formerly there were statutes in some of the states prohibiting Indians from testifying for or against white persons.<sup>4</sup> But these have been repealed wherever found, and in the absence of such a statute, the law makes no such distinction.<sup>5</sup>

9. **Chinamen.** — In *California*, Chinamen were by statute excluded as witnesses in favor of or against a white person.<sup>6</sup> But this statute is no longer in force in that state, and Chinamen are everywhere competent witnesses, except to prove that a fellow countryman attempting to re-enter the United States had been engaged as a merchant previous to his departure therefrom.<sup>7</sup>

10. **Negroes.** — So, also, it was formerly the law in many states that a negro was incompetent to testify for or against a white person;<sup>8</sup> but in states where this was the rule it was generally held that the act of Congress known as the Civil Rights Bill<sup>9</sup> placed negroes on the same footing as white persons in respect to their competency as witnesses.<sup>10</sup> In one jurisdiction, however, the contrary was held, on the ground that Congress has no constitutional power to prescribe rules of evidence for the courts of the states.<sup>11</sup> But at the present

1. **Testifying in One's Own Behalf a "Civil Right."** — *State v. Powers*, 51 N. J. L. 432. But *quære* as to the competency in such a case of a witness not testifying in his own behalf.

2. **Infamy.** — See the title INFAMY AND INFAMOUS CRIMES, vol. 16, p. 246 *et seq.*

3. **Vagrancy.** — *Parker v. Parker*, 102 Iowa 500.

4. **Indians Excluded by Statute.** — *Carroll v. Pathkiller*, 3 Port. (Ala.) 279; *Harris v. Doe*, 4 Blackf. (Ind.) 369. See also *Miller v. Dawson*, Dudley L. (S. Car.) 174; *State v. Belmont*, 4 Strobb. L. (S. Car.) 445.

5. **Indians Competent.** — *Bruguier v. U. S.*, 1 Dak. 5; *Smith v. Brown*, 8 Kan. 608; *Doe v. Newman*, 3 Smed. & M. (Miss.) 565; *Coleman v. Doe*, 4 Smed. & M. (Miss.) 40. See also *Priest v. State*, 10 Neb. 393.

But see traces of such legislation in U. S. Rev. Stat., § 2140; Minn. Gen. Stat., § 2007; Neb. Comp. Stat., § 5902; Wash. Annot. Codes & Stat., §§ 6940, 7316.

6. **Chinamen Excluded by Statute.** — *Speer v. See Yup Co.*, 13 Cal. 73; *People v. Hall*, 4 Cal. 399; *People v. Jones*, 31 Cal. 565.

The statute applied only to criminal cases when white persons were on trial. *People v. Awa*, 27 Cal. 638.

7. **Incompetent under Federal Statute.** — *Li Sing v. U. S.*, 180 U. S. 486; *Fong Yue Ting v. U. S.*, 149 U. S. 698.

8. **Negroes Incompetent** — *Alabama.* — *Smyth v. Oliver*, 31 Ala. 39; *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Heath v. State*, 34 Ala. 250.

*Georgia.* — *Grady v. State*, 11 Ga. 253; *Brown v. Lester*, 1 Ga. Dec. (pt. i.) 77.

*Indiana.* — *Graham v. Crockett*, 18 Ind. 119; *Nave v. Williams*, 22 Ind. 368.

*Kentucky.* — *Page v. Carter*, 8 B. Mon. (Ky.) 192.

*Maryland.* — *Rusk v. Sowerwine*, 3 Har. & J. (Md.) 97; *Sprigg v. Negro Mary*, 3 Har. & J. (Md.) 491; *Hughes v. Jackson*, 12 Md. 450.

*Ohio.* — *Jordan v. Smith*, 14 Ohio 199.

*Virginia.* — *Dean v. Com.*, 4 Gratt. (Va.) 541.

See also the title SLAVES AND SLAVERY, vol. 25, p. 1100.

For Various Applications of the Rule, see *Ivey v. Hardy*, 2 Port. (Ala.) 548; *People v. Elyea*, 14 Cal. 144; *State v. Rash*, 1 Houst. Cr. Cas. (Del.) 271; *State v. Downham*, 1 Houst. Cr. Cas. (Del.) 45; *Webb v. Pindergrass*, 4 Harr. (Del.) 439; *Elliott v. Morgan*, 3 Harr. (Del.) 316; *State v. Griffin*, 3 Harr. (Del.) 560; *Woodward v. State*, 6 Ind. 492; *Potts v. Harper*, 3 N. J. L. 583; *Gurnee v. Dessies*, 1 Johns. (N. Y.) 508; *Hawkins v. State*, 7 Mo. 190; *Ragland v. Huntingdon*, 1 Ired. L. (23 N. Car.) 561; *Gray v. State*, 4 Ohio 353; *Groning v. Devana*, 2 Bailey L. (S. Car.) 192; *Jones v. Jones*, 12 Rich. L. (S. Car.) 116; *State v. M'Dowell*, 2 Brev. (S. Car.) 145; *White v. Helmes*, 1 McCord L. (S. Car.) 430; *Jones v. State*, Meigs (Tenn.) 120.

9. **Civil Rights Bill.** — Act of March 17, 1866.

10. **Effect of Civil Rights Bill.** — *Kelley v. State*, 25 Ark. 392; *State v. Underwood*, 63 N. Car. 98; *Ex p. Warren*, 31 Tex. 143. Compare *Turner v. Parry*, 27 Ind. 163.

11. **Contra.** — *Bowlin v. Com.*, 2 Bush (Ky.) 5, 92 Am. Dec. 468.

day negroes are generally competent in all actions.<sup>1</sup>

**11. Attorneys.**—In the absence of a disqualifying interest in the event of the suit, an attorney is at common law a competent witness for his client.<sup>2</sup> The contrary rule obtains in *Delaware*,<sup>3</sup> where it has been held that a student at law who has assisted one of the defendant's attorneys in the preparation of the case is incompetent to testify for the defendant, the decision being rested on grounds of public policy.<sup>4</sup> If the attorney had an interest in the event of the suit he was of course disqualified at common law, in accordance with the general rule as to persons interested;<sup>5</sup> but at the present day no amount of interest is a disqualification, since statutes removing the incompetency of a witness on account of interest are now universal.<sup>6</sup>

**Witness for Adverse Party.**—The attorney of one party may be called to testify for the other, except as to facts that came to his knowledge through confidential relations with his client.<sup>7</sup>

1. See the various local codes and statutes in the *United States*. But compare the peculiar provisions of Laws Del. (1893), c. 107, § 4; Comp. Stat. Neb. (1899), § 5902.

2. **Competent for Client**—*Alabama*.—McGehee v. Hansell, 13 Ala. 17; *Morrow v. Parkman*, 14 Ala. 769; *Quarles v. Waldron*, 20 Ala. 217.

*Connecticut*.—Smith v. Huntington, 1 Root (Conn.) 226.

*Georgia*.—Willis v. West, 60 Ga. 613.

*Iowa*.—Walsh v. Murphy, 2 Greene (Iowa) 227; *Abbott v. Striblen*, 6 Iowa 191.

*Louisiana*.—Grant's Succession, 14 La. Ann. 807.

*Maryland*.—Beatty v. Davis, 9 Gill (Md.) 211.

*Massachusetts*.—Potter v. Ware, 1 Cush. (Mass.) 519; *Phillips v. Bridge*, 11 Mass. 242.

*Mississippi*.—Clark v. Kingsland, 1 Smed. & M. (Miss.) 248.

*New Mexico*.—Beall v. Territory, 1 N. Mex. 507.

*New York*.—Robinson v. Dauchy, 3 Barb. (N. Y.) 20; *Little v. McKeon*, 1 Sandf. (N. Y.) 607; *Sherman v. Scott*, 27 Hun (N. Y.) 331.

*North Carolina*.—State v. Woodside, 9 Ired. L. (31 N. Car.) 496.

*Ohio*.—Cox v. Hill, 3 Ohio 411.

*Pennsylvania*.—Boulden v. Hebel, 17 S. & R. (Pa.) 312; *Bell v. Bell*, 12 Pa. St. 235; *Johns v. Bolton*, 12 Pa. St. 339; *Linton v. Com.*, 46 Pa. St. 294; *Braine v. Spalding*, 52 Pa. St. 247; *Follansbee v. Walker*, 72 Pa. St. 228.

*South Carolina*.—Reid v. Colcock, 1 Nott & M. (S. Car.) 592, 9 Am. Dec. 729; *Simonton v. Yongue*, 3 Strobb. L. (S. Car.) 538.

*Virginia*.—Rea v. Trotter, 26 Gratt. (Va.) 585. See also cases *infra*, par. *Objectionable Practice*.

**English Rule.**—In *England*, it was once considered a sufficient ground for a new trial that the attorney of the successful party testified in his behalf. *Stones v. Bacon*, 1 Lowndes & M. 248; *Dunn v. Packwood*, 1 Lowndes & M. 312, 11 Jur. 242. But these cases were subsequently disapproved in *Cobbett v. Hudson*, 1 El. & Bl. 11, 72 E. C. L. 11.

**Statute Making All Persons Competent.**—Under a statute providing that all persons, except those thereafter specified (among which attorneys are not included), may testify, an attorney is a competent witness for his client,

though he be the sole attorney and actively engaged in the trial. *McLaren v. Gillispie*, 19 Utah 137.

**The Attorney of One of the Parties to a Promissory Note** is a competent subscribing witness. *Sowell v. Brewton Bank*, 119 Ala. 92.

3. **Contra in Delaware.**—*Pritchard v. Roe*, 3 Penn. (Del.) 128.

4. **Student at Law.**—*Wallace v. Wilmington*, etc., R. Co., 8 Houst. (Del.) 529.

5. **Disqualification from Interest.**—See the following cases for a statement of the rule, and of what interest was necessary to render him incompetent:

*Connecticut*.—*Carrington v. Holabird*, 17 Conn. 530.

*Kentucky*.—*Com. v. Moore*, 5 J. J. Marsh. (Ky.) 655.

*Louisiana*.—*Hall v. Acklen*, 9 La. Ann. 219.

*Massachusetts*.—*Phillips v. Bridge*, 11 Mass. 242; *Chadwick v. Upton*, 3 Pick. (Mass.) 442.

*New Hampshire*.—*Meserve v. Hicks*, 24 N. H. 295.

*New York*.—*Jones v. Savage*, 6 Wend. (N. Y.) 658; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Brandigee v. Hale*, 13 Johns. (N. Y.) 125.

*North Carolina*.—*Slocum v. Newby*, 1 Murph. (5 N. Car.) 423.

*Pennsylvania*.—*Newman v. Bradley*, 1 Dall. (Pa.) 240; *Miles v. O'Hara*, 1 S. & R. (Pa.) 32; *Orphans' Ct. v. Woodburn*, 7 W. & S. (Pa.) 162; *McLaughlin v. Shields*, 12 Pa. St. 283; *Braine v. Spalding*, 52 Pa. St. 247.

*Texas*.—*Dailey v. Monday*, 32 Tex. 141.

6. **Incompetency Removed by Statute.**—*Baldwin v. National Hedge*, etc., Co., (C. C. A.) 73 Fed. Rep. 574; *Central Branch Union Pac. R. Co. v. Andrews*, 41 Kan. 370; *Thon v. Rochester R. Co.*, 83 Hun (N. Y.) 443. And see generally *infra*, this title, VI. *Incompetency Removed by Statute*—1. a. *Civil Cases*.

7. **Called by Adversary.**—*Buckmaster v. Kelley*, 15 Fla. 180. Thus, he might be called for the other side and asked who employed him, in order to show the real party and so let in his declarations. *Levy v. Pope*, M. & M. 410, 22 E. C. L. 343. And where notice to produce a written instrument had been served, the attorney for the opposite party might be asked if he had the instrument, in order to let in secondary evidence of its contents if not produced. *Bevan v. Waters*, M. & M. 235, 22 E.



**Objectionable Practice.** — While there is no rule of law to prevent an attorney testifying, yet his position in thus offering himself is one of extreme delicacy to the witness and to the court; and it is always desirable, for the harmony of the profession, the independence of the bench, and the public confidence in the administration of justice, that an attorney should not take the stand for his client. If, in extreme cases, where all other means of proof are impossible, he is forced to take this step, he should immediately withdraw from active participation in the case.<sup>1</sup> But the conduct of an attorney in taking the stand is not a subject for comment to the jury.<sup>2</sup>

**12. Parent and Child.** — At common law there was nothing in the relation of parent and child to prevent their being witnesses for each other. The natural bias of feeling which accompanies the relationship went only to the credibility of the witnesses. Accordingly, in the absence of a disqualified legal interest in the event of the suit, a parent was a competent witness for his child,<sup>3</sup> and a child was also competent for his parent.<sup>4</sup>

**13. Husband and Wife** — *a.* AT COMMON LAW AND UNDER STATUTES DECLARATORY OF THE COMMON LAW — (1) *General Rule* — (a) *Testimony for Each Other* — *aa.* CIVIL CASES — (*aa*) *One Spouse Party of Record* — **General Rule.** — It is a firmly established rule of the common law — a rule which also has found expression in early legislation — that neither husband nor wife is a competent witness for the other in any action, suit, or proceeding to which such other is an interested party of record.<sup>5</sup> And the rule is enforced even though the

C. L. 301. See also *State v. Hedgepeth*, 125 Mo. 14.

The prosecution may call the defendant's attorney to prove what a witness since deceased testified on a former trial of the case. *State v. Cook*, 23 La. Ann. 347.

**1. Objectionable Practice.** — *Morgan v. Roberts*, 38 Ill. 65; *Ross v. Demoss*, 45 Ill. 447; *O'Donoghue v. Title Guarantee, etc., Co.*, 79 Ill. App. 263; *Harhins's Succession*, 2 La. Ann. 923; *Potter v. Ware*, 1 Cush. (Mass.) 519; *Little v. McKeon*, 1 Sandf. (N. Y.) 607; *State v. Woodside*, 9 Ired. L. (31 N. Car.) 496; *Frear v. Drinker*, 8 Pa. St. 520; *McLaren v. Gillispie*, 19 Utah 137; *Connolly v. Straw*, 53 Wis. 649. See also *Blanc v. Forgay*, 5 La. Ann. 695; *Madden v. Farmer*, 7 La. Ann. 580.

**2. Not Subject for Comment to Jury.** — *Connolly v. Straw*, 53 Wis. 645.

**3. Parent Competent for Child.** — *Haworth v. Norris*, 28 Fla. 763; *Cass v. State*, 2 Greene (Iowa) 359; *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Wiseman v. Cornish*, 8 Jones L. (53 N. Car.) 218; *Stanley v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 320. See also *O'Neil v. Teague*, 8 Ala. 345.

**Under Louisiana Civ. Code, Art. 2260**, a grandfather was incompetent as a witness for his grandchild. *Hargis's Succession*, 3 La. Ann. 142.

**4. Child Competent for Parent.** — *McClung v. Spotswood*, 19 Ala. 165; *Highberger v. Stiffler*, 21 Md. 350, 83 Am. Dec. 593; *Parker v. McNeill*, 12 Smed. & M. (Miss.) 355; *Powers v. Powers*, 53 N. Y. App. Div. 384. See also *Mott v. Goddard*, 1 Root (Conn.) 472; *Mester v. Zimmerman*, 7 Ill. App. 156; *Aiken v. Cato*, 23 Ga. 154; *Murray v. Finster*, 2 Johns. Ch. (N. Y.) 155.

**Under Louisiana Civ. Code, Art. 2260**, the son is incompetent for his father in a civil case.

But in a criminal proceeding he is competent. *State v. Thompson* 10 La. Ann. 122.

**5. Incompetent in Favor of Other Spouse** — *England.* — *Davis v. Dinwoody*, 4 T. R. 678; *Barker v. Dixie*, Lee t. Hardw. 264; *Woodgate v. Potts*, 2 C. & K. 457, 61 E. C. L. 457; *Barbat v. Allen*, 7 Exch. 609. See also *Wyndham v. Chetwynd*, 1 Burr. 424.

*United States.* — *Gilleland v. Martin*, 3 McLean (U. S.) 490.

*Alabama.* — *Wilson v. Sheppard*, 28 Ala. 623. *Delaware.* — *Bradley v. Kent*, 7 Houst. (Del.) 372.

*District of Columbia.* — *Holtzman v. Wagner*, 5 Mackey (D. C.) 35.

*Florida.* — *Schnabel v. Betts*, 23 Fla. 178; *Storrs v. Storrs*, 23 Fla. 274.

*Illinois.* — *Ginsburg v. Morrall*, 105 Ill. App. 213; *Keep v. Griggs*, 12 Ill. App. 511; *Sun Acc. Assoc. v. King*, 53 Ill. App. 182; *Hayes v. Parmalee*, 79 Ill. 563; *Wolff v. Van Housen*, 55 Ill. App. 295; *Kusch v. Kusch*, 143 Ill. 353; *Seaton v. Kendall*, 171 Ill. 410. See *Davenport v. Ryan*, 81 Ill. 218.

*Indiana.* — *McCollem v. White*, 23 Ind. 43; *Harrell v. Hammond*, 25 Ind. 104; *Jackson v. Reeves*, 53 Ind. 231; *Walker v. Steele*, 121 Ind. 436; *Case v. Colter*, 66 Ind. 336.

*Iowa.* — *Karney v. Paisley*, 13 Iowa 89.

*Louisiana.* — *White v. Vicksburg, etc., R. Co.*, 42 La. Ann. 990; *Beltran v. Gauthreaux*, 38 La. Ann. 106; *Watson v. Lyons*, 51 La. Ann. 1697.

*Massachusetts.* — *Barber v. Goddard*, 9 Gray (Mass.) 71; *Ray v. Smith*, 9 Gray (Mass.) 141.

*Mississippi.* — *Moore v. McKie*, 5 Smed. & M. (Miss.) 238.

*Missouri.* — *Orchard v. Collier*, 171 Mo. 390; *Paul v. Leavitt*, 53 Mo. 595; *Hardy v. Matthews*, 42 Mo. 406; *Joice v. Branson*, 73 Mo. 28; *Reno v. Kingsbury*, 39 Mo. App. 240; *Layson v. Cooper*, 174 Mo. 211.

*New Jersey.* — *Bird v. Davis*, 14 N. J. Eq.

cause of action had accrued to the wife *dum sola*.<sup>1</sup> And the fact that the interest of the wife in the subject-matter of the suit is independent of her husband, and not under his control, does not change the rule.<sup>2</sup> Thus, in a controversy respecting the wife's separate estate, the husband is not a competent witness for her or her trustee,<sup>3</sup> even though he has released all his interest in the trust estate.<sup>4</sup> The husband is incompetent even when called to testify as to his acts in the capacity of trustee of the separate estate.<sup>5</sup>

**Nominal Party to Record.** — In cases where one spouse, though a party to the record, has no interest in the result of the suit and is merely joined for conformity, the other is a competent witness.<sup>6</sup>

**Liability for Costs.** — The weight of authority is to the effect that the mere liability of the nominal party for costs is not enough to exclude the other spouse.<sup>7</sup>

(bb) *Spouse Not Party of Record.* — If Either the Husband or Wife Is a Beneficial Party, though not a party to the record, or has a direct interest in the outcome of

467; *Staats v. Bergen*, 17 N. J. Eq. 297; *Cramer v. Reford*, 17 N. J. Eq. 367. See also *Petrick v. Ashcroft*, 19 N. J. Eq. 339.

*New York.* — *White v. Stafford*, 38 Barb. (N. Y.) 419; *Warner v. Dyett*, 2 Edw. (N. Y.) 497; *Rogers v. Rogers*, 1 Daly (N. Y.) 194; *Hall v. Hall*, (County Ct.) 30 How. Pr. (N. Y.) 51. See also *Moffat v. Mount*, (N. Y. Super. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 4.

*Oklahoma.* — *Nix v. Gilmer*, 5 Okla. 740.

*Rhode Island.* — *Donnelly v. Smith*, 7 R. I. 12.

*South Carolina.* — *Footman v. Pendergrass*, 2 Strobb. Eq. (S. Car.) 317; *Osborn v. Black, Spears Eq.* (S. Car.) 431.

*Texas.* — *McDuffie v. Greenway*, 24 Tex. 625.

*Vermont.* — *Jenne v. Piper*, 69 Vt. 497; *Abbott v. Clark*, 19 Vt. 444; *Carpenter v. Moore*, 43 Vt. 392; *Wells v. Tucker*, 57 Vt. 223.

*Virginia.* — *Scott v. Rowland*, (Va. 1887) 4 S. E. Rep. 595; *Ratford v. Fowlkes*, 85 Va. 820; *Johnston v. Slater*, 11 Gratt. (Va.) 321; *William & Mary College v. Powell*, 12 Gratt. (Va.) 372.

*West Virginia.* — *Hill v. Proctor*, 10 W. Va. 59; *Rose v. Brown*, 11 W. Va. 122; *Anderson v. Snyder*, 21 W. Va. 632.

*Wisconsin.* — *Farrell v. Ledwell*, 21 Wis. 182; *Mountain v. Fisher*, 22 Wis. 93; *Menk v. Steinfurt*, 39 Wis. 370.

**Declarations Inadmissible.** — The wife's declaration that her child was born alive is not admissible in support of the husband's claim to an estate by the curtesy. *Gardner v. Klutts*, 8 Jones L. (53 N. Car.) 375, 80 Am. Dec. 331.

**1. Cause of Action Accruing to Wife Dum Sola.** — *Smith v. Boston*, etc., R. Co., 44 N. H. 334; *Donnelly v. Smith*, 7 R. I. 12.

**2. Independent Interest.** — *Osborn v. Black, Spears Eq.* (S. Car.) 431.

**3. Wife's Separate Estate** — *England.* — *Davis v. Dinwoody*, 4 T. R. 678. See also *Wyndham v. Chetwynd*, 1 Burr. 424.

*Canada.* — *Lindsay v. Montreal Bank*, 13 Grant Ch. (U. C.) 63.

*Alabama.* — *Hall v. Dargan*, 4 Ala. 696; *Hodges v. Branch Bank*, 13 Ala. 455.

*Georgia.* — *Cobb v. Edmondson*, 30 Ga. 30.

*Indiana.* — *Palmer v. Henderson*, 20 Ind. 297.

*Kentucky.* — *Hopkins v. Smith*, 7 J. J. Marsh. (Ky.) 263.

*Maryland.* — *Miller v. Williamson*, 5 Md. 219; *Williamson v. Morton*, 2 Md. Ch. 94.

*New Jersey.* — *Robbins v. Abrahams*, 5 N. J. Eq. 465; *Marshman v. Conklin*, 17 N. J. Eq. 282.

*New York.* — *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hasbrouck v. Vandervoort*, 9 N. Y. 153; *Warner v. Dyett*, 2 Edw. (N. Y.) 497.

**4. Effect of Release of Interest.** — *Warner v. Dyett*, 2 Edw. (N. Y.) 497.

**5. Husband as Trustee.** — *Wilson v. Shephard*, 28 Ala. 623. *Contra*, on ground of agency. *Chesley v. Chesley*, 54 Mo. 347; *Robison v. Robison*, 44 Ala. 227. See *infra*, this subdivision, c. *Statutes Expressly Removing Incompetency* — (4) *Agency*.

**6. One Spouse Nominal Party to Record** — *United States.* — *Green v. Taylor*, 3 Hughes (U. S.) 400.

*Arkansas.* — *St. Louis*, etc., R. Co. v. *Rexroad*, 59 Ark. 180.

*District of Columbia.* — *Beale v. Brown*, 6 Mackey (D. C.) 574.

*Illinois.* — *Belk v. Cooper*, 34 Ill. App. 649.

*Kansas.* — *Potter v. Stamfi*, 2 Kan. App. 788.

*Kentucky.* — *Collins v. Wilson*, (Ky. 1897) 39 S. W. Rep. 33.

*Louisiana.* — *Breton v. Her Husband*, 45 La. Ann. 117; *Watson v. Lyons*, 51 La. Ann. 1697; *Lapleigne v. Morgan's Louisiana*, etc., R., etc., Co., 40 La. Ann. 661.

*Maine.* — *Leavitt v. Bangor*, 41 Me. 458.

*Nebraska.* — *Buckingham v. Roar*, 45 Neb. 241.

*Pennsylvania.* — *Hill v. Leibig Mfg. Co.*, 3 Pa. Super. Ct. 398.

*Vermont.* — *Bonett v. Stowell*, 37 Vt. 258. See also *Robinson v. Hutchinson*, 31 Vt. 443.

*Virginia.* — *Ratliff v. Vandikes*, 89 Va. 307.

*Wisconsin.* — *Gordon v. Sullivan*, 116 Wis. 543.

**Unnecessary Party.** — Where the husband, though a party to the record, is not a necessary party, his wife may be a witness. *Hall v. Murphy*, 14 Tex. 637. *Contra*, *Leach v. Shelby*, 58 Miss. 681.

**7. Liability for Costs.** — *St. Louis*, etc., R. Co. v. *Rexroad*, 59 Ark. 180; *Belk v. Cooper*, 34 Ill. App. 649; *Potter v. Stamfi*, 2 Kan. App. 788; *Bonett v. Stowell*, 37 Vt. 258. *Contra*,

the litigation, the other is not competent to testify in his or her behalf.<sup>1</sup>

**A Mere Collateral Interest is not enough, however; and in such case the husband or wife is competent.**<sup>2</sup>

**Effect of Assignment or Release of Interest.** — In many cases, where the husband or wife is disqualified at common law by reason of a direct interest in the event of the suit, such a disqualification may be removed by a valid assignment or release by the interested spouse.<sup>3</sup>

**No Interest.** — It is plain that one spouse is a competent witness whenever the other is not a party to the record and has no interest at all in the event of the suit, for in such case the testimony cannot be said to be either in favor of or against the other.<sup>4</sup>

*bb. CRIMINAL CASES.* — In criminal prosecutions the same rule obtains as in

*Donnelly v. Smith*, 7 R. I. 12. See also *Leavitt v. Bangor*, 41 Me. 458.

**1. One Spouse Beneficial Party Not of Record** — *England.* — *Cornish v. Pugh*, 8 Dowl. & R. 65, 16 E. C. L. 335.

*United States.* — *Alexandria Bank v. Mandeville*, 1 Cranch (C. C.) 575.

*Alabama.* — *Wier v. Buford*, 8 Ala. 134; *Walker v. Walker*, 34 Ala. 469.

*Arkansas.* — *Leach v. Fowler*, 22 Ark. 143.

*California.* — *Lisman v. Early*, 12 Cal. 282.

*Illinois.* — *Craig v. Miller*, 133 Ill. 300; *Best v. Davis*, 44 Ill. App. 624; *Woolverton v. Sumner*, 53 Ill. App. 115; *McGrath v. Miller*, 61 Ill. App. 497.

*Kentucky.* — *Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Wall v. Nelson*, 3 Litt. (Ky.) 395; *Caperton v. Callison*, 1 J. J. Marsh. (Ky.) 396; *Pyle v. Maulding*, 7 J. J. Marsh. (Ky.) 202.

*Louisiana.* — *Beard v. Morancy*, 2 La. Ann. 347; *Johnson v. Boice*, 40 La. Ann. 273.

*Maryland.* — *Thomas v. Catheral*, 5 Gill & J. (Md.) 23.

*Massachusetts.* — *Griffin v. Brown*, 2 Pick. (Mass.) 304.

*Mississippi.* — *Routh v. Agricultural Bank*, 12 Smed. & M. (Miss.) 161.

*Missouri.* — *Swift v. Martin*, 19 Mo. App. 488.

*New Hampshire.* — *Young v. Gilman*, 46 N. H. 484.

*New Jersey.* — *Galway v. Fullerton*, 17 N. J. Eq. 389; *Jackson v. Miller*, 25 N. J. L. 90.

*New York.* — *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; *Stewart v. Stewart*, 7 Johns. Ch. (N. Y.) 229; *Hosack v. Rogers*, 8 Paige (N. Y.) 229.

*North Carolina.* — *Huie v. McConnell*, 2 Jones L. (47 N. Car.) 455.

*Ohio.* — *Bird v. Hueston*, 10 Ohio St. 418.

*Pennsylvania.* — *Snyder v. Snyder*, 6 Binn. (Pa.) 483; *Gross v. Reddig*, 45 Pa. St. 406; *Taylor v. Kelly*, 80 Pa. St. 95; *Bierly's Estate*, 81\* Pa. St. 419.

*South Carolina.* — *Vandiver v. Glaspy*, 7 Rich. L. (S. Car.) 14.

*Texas.* — *Jones v. Norton*, 10 Tex. 120; *Gilkey v. Peeler*, 22 Tex. 663; *Whitehead v. Foley*, 28 Tex. 268.

*Vermont.* — *Brown v. Burrington*, 36 Vt. 40; *Carpenter v. Moore*, 43 Vt. 392; *Wheeler v. Wheeler*, 47 Vt. 637; *Labaree v. Wood*, 54 Vt. 452; *Banister v. Ovitt*, 64 Vt. 580; *McEwen v. Shannon*, 64 Vt. 583; *Westcott v. Westcott*, 69 Vt. 234.

*Virginia.* — *Murphy v. Carter*, 23 Gratt. (Va.) 477; *Warwick v. Warwick*, 31 Gratt. (Va.) 70; *Lindsay v. McCormick*, 82 Va. 479; *Thornton v. Gaar*, 87 Va. 318; *Ginter v. Breeden*, 90 Va. 565.

*Wisconsin.* — *In re Valentine*, 93 Wis. 45.

**2. Mere Collateral Interest.** — *Phillips v. Poulter*, 111 Ill. App. 330; *Sneekner v. Taylor*, 1 Redf. (N. Y.) 427; *Rutland, etc., R. Co. v. Lincoln*, 29 Vt. 206; *Wiley v. Hunter*, 57 Vt. 79; *Purdy v. Purdy*, 67 Vt. 50. See also *Carpenter v. Moore*, 43 Vt. 392.

In *Dyer v. Homer*, 22 Pick. (Mass.) 253, it appeared that the defendant's intestate died before his father, who thereupon became his sole heir at law. Afterwards the father died leaving a will, in which a portion of his estate was given in trust for the sole and separate use of the wife of the witness, to whose competency objection was made. Chief Justice Shaw thought that the interest was too remote and contingent to sustain the objection. See also *Mitchell v. Clagett*, 9 Md. 42.

**3. Release of Interest.** — *Meredith v. Hughes*, 28 Ga. 571; *Norfolk, etc., R. Co. v. Read*, 87 Va. 186.

The wife of the payee in a promissory note which has been assigned without recourse, is a competent witness for the holder. *Bisbing v. Graham*, 14 Pa. St. 14, 53 Am. Dec. 510.

**Witness to Will.** — In *Daniel v. Proctor*, 1 Dev. L. (12 N. Car.) 428, it was held that the wife of a sole executor who had renounced the office was a competent witness to prove the execution of the will, but this case was said, in *Huie v. McConnell*, 2 Jones L. (47 N. Car.) 455, to have been virtually overruled.

**4. One Competent if Other Is Not Party and Has No Interest.** — *R. J. Gunning Co. v. Cusack*, 50 Ill. App. 290; *Morgan v. Hyatt*, 62 Ind. 560; *Singer Mfg. Co. v. Howes*, (Ky. 1899) 49 S. W. Rep. 963; *Evans v. Staalle*, 88 Minn. 253; *Funk v. Dillon*, 21 Mo. 294; *Wehrkamp v. Willet*, 4 Abb. App. Dec. (N. Y.) 548; *Seigling v. Main*, 1 McMull. L. (S. Car.) 252; *Wheeler v. Campbell*, 68 Vt. 98; *In re Hathaway*, 75 Vt. 137; *Armstrong v. Noble*, 55 Vt. 428; *Dugger v. Dugger*, 84 Va. 130; *Frankenthal v. Solomonson*, 20 Wash. 460. But compare *Blabon v. Gilchrist*, 67 Wis. 38.

**Infamy of Spouse Immaterial.** — The husband's disqualification by reason of conviction of crime does not disqualify his wife. *State v. Anthony*, 1 McCord L. (S. Car.) 285.



civil cases. Neither the husband nor the wife of the defendant is competent in his or her behalf. And this rule has been re-enacted by many early statutes.<sup>1</sup>

*cc. REASON FOR RULE.* — For this prohibition, jurists and text writers have assigned several reasons. Some of the early authorities place it, in part at least, on the technical ground of the unity of husband and wife.<sup>2</sup> Again, it was put on the ground of common interest, which was a disqualification at common law;<sup>3</sup> but the reason given by the great weight of judicial decisions is public policy, it being deemed of fundamental importance to society to preserve the sanctity and harmony of the marital relation.<sup>4</sup> That this is the true reason is shown by the fact that the consent of the adverse party is immaterial.<sup>5</sup> So, too, the witness is not rendered competent by proof that she has been married to the party to the suit after the occurrence of the event to which she testifies.<sup>6</sup>

(b) **Testimony Against Each Other** — *aa. CIVIL CASES* — (*aa*) *Against Spouse Party of Record.* — Coextensive with the rule prohibiting husband and wife from testifying in each other's behalf is another, making either spouse incompetent against the other. This prohibition is found both at common law and under legislative enactments.<sup>7</sup> Thus, where a woman sues as a *feme sole*, her alleged husband

**1. Criminal Cases** — *England.* — *Rex v. Locker*, 5 Esp. 107.

*Canada.* — *MacFarlane v. Reg.*, 16 Can. Sup. Ct. 393; *Reg. v. Humphreys*, 9 U. C. Q. B. 337; *Reg. v. Nan-e-quis-a-ka*, 1 N. W. Ter. 211.

*Alabama.* — *Miller v. State*, 45 Ala. 24; *Hampton v. State*, 45 Ala. 82; *Johnson v. State*, 47 Ala. 10; *Hussey v. State*, 87 Ala. 135; *Lide v. State*, 133 Ala. 43.

*Connecticut.* — *Lucas v. State*, 23 Conn. 18.

*Delaware.* — *State v. Smith*, (Del. 1904) 57 Atl. Rep. 368.

*Louisiana.* — *State v. Pain*, 48 La. Ann. 311.

*Maryland.* — *Turpin v. State*, 55 Md. 462.

*New York.* — *People v. Reagle*, 60 Barb. (N. Y.) 527; *Wilke v. People*, 53 N. Y. 525.

*Ohio.* — *Steen v. State*, 20 Ohio St. 333.

*Pennsylvania.* — *Gilson v. Com.*, 87 Pa. St. 253.

*South Carolina.* — *State v. Workman*, 15 S. Car. 540; *State v. Dodson*, 16 S. Car. 453.

*Tennessee.* — *Owen v. State*, 89 Tenn. 698.

*Wisconsin.* — *Kraimer v. State*, 117 Wis. 350; *Miller v. State*, 106 Wis. 156.

**Effect of Consent by Prosecution.** — If, by consent, the wife is permitted to testify in behalf of her husband, the prosecution may prove contradictory statements previously made, though such statements tend to prove the husband guilty. But the evidence is, of course, admissible only for the purpose of discrediting the witness. *Ficken v. State*, 97 Ga. 813.

**2. Unity of Marriage Relation.** — Blackstone says this is "partly because it is impossible their testimony should be indifferent, but principally because of the union of person, and, therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, *nemo in propria causa testis esse debet*. 1 Bl. Com. 443.

In *Windham v. Chetwynd*, 1 Burr. 424, Lord Mansfield said: "In matter of evidence, husband and wife are considered as one, and cannot be witnesses, the one for the other. The husband cannot be witness for his wife in a question touching her separate estate."

**3. Common Interest.** — *Merriam v. Hartford*, etc., R. Co., 20 Conn. 354; *Van Fleet v. Stout*, 44 Kan. 523; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48; *Peaslee v. McLoon*, 16 Gray (Mass.) 488.

**4. Public Policy** — *England.* — *Barker v. Dixie*, Lee t. Hardw. 264; *Davis v. Dinwoody*, 4 T. R. 678.

*Alabama.* — *Wilson v. Sheppard*, 28 Ala. 623.

*Arkansas.* — *Collins v. Mack*, 31 Ark. 684.

*District of Columbia.* — *Foertsch v. Germuller*, 9 App. Cas. (D. C.) 351.

*Florida.* — *Haworth v. Norris*, 28 Fla. 763.

*Georgia.* — *Cobb v. Edmondson*, 30 Ga. 30.

*Illinois.* — *Mitchinson v. Cross*, 58 Ill. 366.

*Iowa.* — *Russ v. Steamboat War Eagle*, 14 Iowa 263.

*New Hampshire.* — *Kelley v. Proctor*, 41 N. H. 139; *Young v. Gilman*, 46 N. H. 484; *Smith v. Boston*, etc., R. Co., 44 N. H. 325.

*New Jersey.* — *Bird v. Davis*, 14 N. J. Eq. 467.

*New York.* — *White v. Stafford*, 38 Barb. (N. Y.) 419; *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hasbrouck v. Vandervoort*, 9 N. Y. 153.

*North Carolina.* — *Rice v. Keith*, 63 N. Car. 319.

*Ohio.* — *Bird v. Hueston*, 10 Ohio St. 418.

*South Carolina.* — *Footman v. Pendergrass*, 2 Strobb. Eq. (S. Car.) 317.

*Texas.* — *McDuffie v. Greenway*, 24 Tex. 625; *Gee v. Scott*, 48 Tex. 510.

*Vermont.* — *Carpenter v. Moore*, 43 Vt. 392.

*Virginia.* — *William & Mary College v. Powell*, 12 Gratt. (Va.) 372.

*Wisconsin.* — *Farrell v. Ledwell*, 21 Wis. 182.

**5. Consent of Adverse Party Immaterial.** — *Barker v. Dixie*, Lee t. Hardw. 264.

**6. Witness Married After Occurrence of Event to Which She Testifies.** — *Elmore v. State*, (Ala. 1904) 37 So. Rep. 156. See also *Pedley v. Wellesley*, 3 C. & P. 558, 14 E. C. L. 448.

**7. Incompetent Against Other Spouse** — *England.* — *Langley v. Fisher*, 5 Beav. 443.

is not competent to prove his marriage to her and thereby nonsuit her.<sup>1</sup> So, in a suit for enticing away the plaintiff's wife, the defendant cannot introduce her as a witness to disprove the marriage,<sup>2</sup> and in an action by the husband for criminal conversation the plaintiff's wife is not competent to testify against her husband.<sup>3</sup>

**Effect of Statute Enabling Married Women to Sue.** — The incompetency of one spouse against the other is not removed by the passage of an act to enable married women to sue and be sued as if unmarried.<sup>4</sup>

**Statutes Prohibiting Testimony in Actions Founded in Adultery.** — In some states statutes provide that husband and wife shall be incompetent against each other on the

*Canada.* — *Peterborough v. Conger*, 1 Chamb. (U. C.) 35.

*United States.* — *In re Fowler*, 93 Fed. Rep. 417; *In re Mayer*, 97 Fed. Rep. 328; *In re Cohn*, 104 Fed. Rep. 328.

*Arkansas.* — *George Taylor Commission Co. v. Bell*, 62 Ark. 26.

*California.* — *Fitzgerald v. Livermore*, (Cal. 1887) 13 Pac. Rep. 167.

*Florida.* — *McGill v. McGill*, 19 Fla. 341.

*Illinois.* — *Hyman v. Harding*, 162 Ill. 357.

*Indiana.* — *Weikel v. Probasco*, 7 Ind. 690; *Woolley v. Turner*, 13 Ind. 253; *Kyle v. Frost*, 29 Ind. 382.

*Iowa.* — *Stephenson v. Cook*, 64 Iowa 265; *Ward v. Dickson*, 96 Iowa 708.

*Kansas.* — *Flohr v. Schwartzberg*, 9 Kan. App. 215.

*Kentucky.* — *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48. See also *Tacket v. May*, 3 Dana (Ky.) 79.

*Louisiana.* — *Tulley v. Alexander*, 11 La. Ann. 628; *Cull v. Herwig*, 18 La. Ann. 315; *Cooley v. Cooley*, 38 La. Ann. 195; *Lacoste v. Guidroz*, 47 La. Ann. 295.

*Maryland.* — See *Bradford v. Williams*, 2 Md. Ch. 1.

*Massachusetts.* — *Burlen v. Shannon*, 14 Gray (Mass.) 433.

*Mississippi.* — *Leach v. Shelby*, 58 Miss. 681; *Virden v. Dwyer*, 78 Miss. 763.

*Nebraska.* — *Niland v. Kalish*, 37 Neb. 47; *Bohner v. Bohner*, 46 Neb. 204; *Skinner v. Skinner*, 38 Neb. 756; *Greene v. Greene*, 42 Neb. 634; *Lihs v. Lihs*, 44 Neb. 143; *Reed v. Reed*, (Neb. 1904) 98 N. W. Rep. 76.

*New Hampshire.* — *Breed v. Gove*, 41 N. H. 452; *Blain v. Patterson*, 47 N. H. 523.

*New Jersey.* — *Den v. Johnson*, 18 N. J. L. 87.

*New York.* — *Macondray v. Wardle*, 26 Barb. (N. Y.) 612; *Copous v. Kauffman*, 8 Paige (N. Y.) 583; *Main v. Stephens*, 4 E. D. Smith (N. Y.) 86.

*Pennsylvania.* — *Boyle v. Haughey*, 10 Phila. (Pa.) 98, 30 Leg. Int. (Pa.) 424; *Johnson v. Watson*, 157 Pa. St. 454; *Callendar v. Kelly*, 190 Pa. St. 455.

*Vermont.* — See *Fratini v. Caslini*, 66 Vt. 273.

*Virginia.* — *Scott v. Rowland*, (Va. 1887) 4 S. E. Rep. 595.

*Wisconsin.* — *Carney v. Gleissner*, 58 Wis. 674.

**As to Competency of Parties to Divorce Proceedings,** see the title *DIVORCE*, vol. 9, p. 848 et seq.

**Answer to Interrogatories.** — Where husband

and wife are defendants, neither of them may answer interrogatories to be used in evidence against the other. *Carter v. Taylor*, 20 La. Ann. 421.

**Incompetent Against Wife's Separate Estate.** — *Langley v. Fisher*, 5 Beav. 443; *Lindsay v. Montreal Bank*, 13 Grant Ch. (U. C.) 63.

**Testimony Not Against Wife.** — A statute providing that husband and wife shall not be competent to testify against each other in civil cases does not include the case of a party to a suit testifying against his wife, who is not a party. *Roesner v. Darrah*, 65 Kan. 599.

**Contradicting Witness's Husband or Wife.** — Where one spouse has testified, neither being a party, the other may be called to testify on the other side, such testimony not being against the first witness. *Clubb v. State*, 14 Tex. App. 192.

**Testimony of Wife in Another Action Admissible Against Husband.** — In an action concerning the ownership of chattels, evidence that defendant's wife testified in a former action that she was the owner, is admissible to show that defendant had acquiesced in her claim by failing to assert his own. *State v. Dexter*, 115 Iowa 678.

**Proving Service of Process on Wife.** — Where a married woman contends that no valid service of process has been made on her, the husband, if he has been made an agent by the sheriff to serve the process, is a competent witness on that point. *Smoot v. Judd*, 161 Mo. 673.

**1. Suit by Wife as Feme Sole.** — *Bentley v. Cooke*, 3 Dougl. 422, 26 E. C. L. 176.

There is a dictum to the contrary in *Willis v. Underhill*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 396, but no authority is cited.

**2. Enticing Wife.** — *Scherpf v. Szadeczkzy*, 4 E. D. Smith (N. Y.) 110.

**3. Action for Crim. Con.** — *Groom v. Parables*, 28 Ill. App. 152; *Hicks v. Bradner*, 2 Abb. App. Dec. (N. Y.) 362; *Speck v. Gray*, 14 Wash. 589. See also *Rice v. Rice*, 104 Mich. 371; *Huot v. Wise*, 27 Minn. 68.

**Criminal Proceedings Begun by Husband.** — Where the husband institutes criminal proceedings against a defendant for fornication with the wife, the charge is a misdemeanor, and the husband being liable for costs, the wife cannot testify in behalf of the defendant. *Com. v. Beck*, 7 Pa. Dist. 399.

But it has been held that she may testify in behalf of her husband in a similar case. *State v. Borden*, 6 R. I. 495.

**4. Effect of Act Enabling Feme Covert to Sue.** — *Skinner v. Skinner*, 38 Neb. 756; *Greene v. Greene*, 42 Neb. 634.

trial of an action founded on the allegation of adultery, except to prove the marriage or to disprove the adultery.<sup>1</sup> The statutes apply even though the parties have been divorced.<sup>2</sup>

(bb) *Against Spouse Not Party of Record* — **Spouse Having Direct Interest in Suit.** — Where the husband or wife of the witness is not a party of record and yet has a direct interest in the outcome of the suit, the witness is competent to testify against the interests of the other party to the marriage.<sup>3</sup> Thus, in replevin by the wife to recover possession of goods sold by her husband she is incompetent to prove title in herself, as she would then be testifying against her husband and might render him liable on his implied warranty of title.<sup>4</sup> But where the proceeding is between the wife and the execution purchaser from the husband, and the husband disclaims ownership, her testimony is not against her husband, but in her own favor, and she is competent.<sup>5</sup>

**Spouse Having No Direct Interest in Suit.** — If the other spouse is not a party to the action and has no interest in its outcome, the rule is that the witness is competent, even if his testimony shows the other to be liable to a civil action; for this cannot be said to be testimony against the other.<sup>6</sup>

**Action for Criminal Conversation.** — It has been held that in an action for criminal conversation, the plaintiff, though competent under the statute as a witness in his own behalf, is nevertheless incompetent to prove his wife's adultery.<sup>7</sup> But other cases are to be found to the effect that such testimony is not against the wife, since she is not a party.<sup>8</sup>

bb. **CRIMINAL CASES** — (aa) *Spouse Defendant in Case in Which Witness Called.* — Where one spouse is on trial, the other is incompetent against him. This rule has been very commonly re-enacted by statute, even in those jurisdictions which have modified the common-law rule in other respects.<sup>9</sup> This incompetency

1. **Allegations of Adultery.** — *Carter v. Hill*, 81 Mich. 275; *People v. Isham*, 109 Mich. 72; *People v. Imes*, 110 Mich. 250; *People v. Neyer*, (County Ct.) 79 N. Y. Supp. 367; *State v. McDuffie*, 107 N. Car. 885.

As to Effect of These Statutes on the testimony of the husband in action for crim con., see *infra*, this subdivision, *Against Spouse Not Party of Record* — par. *Spouse Having No Direct Interest in Suit*.

2. **Effect of Divorce.** — *Hanselman v. Dovel*, 102 Mich. 505. See generally *infra*, this subsection, (2) *Effect of Divorce*.

3. **Direct Interest in Result.** — *Witters v. Sowles*, 28 Fed. Rep. 121; *Pleasanton v. Nutt*, 115 Pa. St. 266; *Edwards v. Pitts*, 3 Strobb. L. (S. Car.) 140.

4. **Goods Sold by Husband.** — *Pleasanton v. Nutt*, 115 Pa. St. 266. But see *Musser v. Gardner*, 66 Pa. St. 242, not mentioned in the case last cited.

5. **Husband Disclaiming Ownership.** — *Young v. Senft*, 153 Pa. St. 352; *Evans v. Evans*, 155 Pa. St. 572; *Norbeck v. Davis*, 157 Pa. St. 399; *Poundstone v. Jones*, 187 Pa. St. 289. See also *In re Domenig*, 128 Fed. Rep. 146.

6. **Subjecting Spouse to Civil Action.** — *Williams v. Johnson*, 1 Stra. 504; *Fitch v. Hill*, 11 Mass. 286; *Baring v. Reeder*, 1 Hen. & M. (Va.) 154; *Lewis v. McDougal*, 17 Wis. 517. See also *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *City Bank v. Bangs*, 3 Paige (N. Y.) 36; *Edwards v. Dismukes*, 53 Tex. 605.

7. **Proving Wife's Adultery.** — *Graves v. Harris*, 117 Ga. 817; *Cornelius v. Hambay*, 150 Pa. St. 359.

8. **Contra.** — *Roesner v. Darrah*, 65 Kan. 599.

A statute providing that a husband or wife is not competent to testify against the other upon the trial of an action founded on the allegation of adultery, does not prevent the husband in an action of crim. con. from testifying against his wife, since she is not a party. *Smith v. O'Brien*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 174; *Woods v. Gledhill*, 56 Hun (N. Y.) 220.

As to Other Testimony Subjecting Spouse to Criminal Prosecution, see *infra*, this subdivision, bb. *Criminal Cases* — *Testimony Tending to Subject Spouse to Criminal Prosecution*.

9. **Incompetent Against Spouse** — *United States*. — *U. S. v. Jones*, 32 Fed. Rep. 569.

*Alabama*. — *Merriwether v. State*, 81 Ala. 74. *Arkansas*. — *Kinnemer v. State*, 66 Ark. 206. *Georgia*. — *Barnett v. State*, 117 Ga. 298. *Delaware*. — *State v. Deputy*, 3 Penn. (Del.) 10.

*Michigan*. — *Dixon v. People*, 18 Mich. 84. *Mississippi*. — *Byrd v. State*, 57 Miss. 243.

*Missouri*. — *State v. Arnold*, 55 Mo. 89; *State v. Burlingame*, 146 Mo. 207.

*Ohio*. — *Steen v. State*, 20 Ohio St. 333; *Schultz v. State*, 32 Ohio St. 276.

*Pennsylvania*. — *Com. v. Jailer*, 1 Grant Cas. (Pa.) 218; *Com. v. Woodcroft*, 17 Pa. Co. Ct. 554.

*Texas*. — *Ray v. State*, 43 Tex. Crim. 234. *Wisconsin*. — *Crawford v. State*, 98 Wis. 623; *Baker v. State*, 120 Wis. 135.

**Mutual Assaults.** — When two are indicted for mutual assaults, the wife of one is not competent against him and in favor of the other. *State v. Harbison*, 94 N. Car. 885.

**Effect of Statute.** — A statute providing that



is an absolute one,<sup>1</sup> and is not removed by proof that the witness has been married since the indictment, for the express purpose of keeping out the evidence.<sup>2</sup> But the name of the defendant's wife may be indorsed on the information as a witness against him, and he is not prejudiced by being compelled to object to her competency at the trial.<sup>3</sup>

(bb) *Testimony Tending to Subject Spouse to Criminal Prosecution.* — It was laid down in an early English case that neither husband nor wife ought to be permitted to give any evidence, in any form of proceeding, which would even tend to charge the other with the commission of a crime.<sup>4</sup> After much discussion this rule was discarded as too broad and general, and it became the established rule in *England* that, in collateral proceedings which did not involve the mutual interests of husband and wife, either of them might testify to matters which merely tended to criminate the other, provided neither the record of such collateral proceedings nor the testimony given therein could afterwards be used as evidence in a direct prosecution against the consort of the witness.<sup>5</sup> This latter rule was generally adopted in the *United States*,<sup>6</sup> though it seems that such testimony should not be compelled if the witness declines to give it voluntarily.<sup>7</sup> But some cases have held that, even in collateral proceedings, neither the husband nor the wife should be permitted to testify directly to the criminality of the other.<sup>8</sup>

no prosecution for adultery shall be commenced except on the complaint of the husband or the wife, does not render the complaining spouse a competent witness against the other. *State v. Armstrong*, 4 Minn. 335. *Compare State v. Vollander*, 57 Minn. 225.

**Strict Construction of Enabling Statute.** — Under an act making competent the husband or wife of a defendant charged with an "offense involving bodily injury to a child under sixteen," the husband of a prisoner charged with feloniously causing grievous bodily harm to a certain person is not a competent witness, even though the victim of the assault is a child under sixteen. The offenses contemplated by the act are those of which it is an essential part that the person injured is a child under sixteen. *Reg. v. Roberts*, 18 Cox C. C. 530.

**1. Incompetent for All Purposes.** — In a prosecution for statutory rape on a girl under the age of consent, the girl's mother, who was the wife of the defendant, is not competent against him even to prove the age of the prosecuting witness. *State v. Deputy*, 3 Penn. (Del.) 19.

**2. Marriage After Indictment.** — *U. S. v. White*, 4 Utah 499.

**3. Indorsing Name on Information.** — *State v. Sloan*, 22 Mont. 293.

**4. Testimony Incriminating Spouse.** — *Rex v. Cliviger*, 2 T. R. 263.

**Statutory Enactment of This Doctrine.** — In *Rhode Island* it is provided by statute that husband or wife, though competent witnesses in civil cases, shall not be permitted to give any testimony criminating the other. Gen. Laws R. I., c. 244, §37. Thus the wife cannot testify that the husband put her out of the house. *Rose v. Mitchell*, 21 R. I. 270.

**5. Testimony Admitted.** — *Rex v. All Saints*, 6 M. & S. 194; *Rex v. Bathwick*, 2 B. & Ad. 639, 22 E. C. L. 152.

**6. Rule Followed in United States** — *Alabama.* — *Woods v. State*, 76 Ala. 35, 52 Am. Rep. 315.

See also *Fincher v. State*, 58 Ala. 215; *Powell v. State*, 58 Ala. 362.

*California.* — *People v. Langtree*, 64 Cal. 256.

*Iowa.* — See *State v. Rainsbarger*, 71 Iowa 746.

*Michigan.* — *People v. Isham*, 109 Mich. 72.

*New Jersey.* — *Den v. Johnson*, 18 N. J. L. 87; *Hunter v. State*, 40 N. J. L. 495; *Munyon v. State*, 62 N. J. L. 1.

*New York.* — *Van Cort v. Van Cort*, 4 Edw. (N. Y.) 621.

*Pennsylvania.* — *Com. v. Reid*, 8 Phila. (Pa.) 385.

*Rhode Island.* — *State v. Briggs*, 9 R. I. 361, 11 Am. Rep. 270.

*Texas.* — See *Edwards v. Dismukes*, 53 Tex. 605.

*Vermont.* — *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124.

*Wisconsin.* — *State v. Dudley*, 7 Wis. 664.

A married woman is competent to prove threats made by her husband to induce her to sign a deed. *Vicknair v. Trosclair*, 45 La. Ann. 373.

In *New Jersey* a husband or wife, in a suit in which neither is a party, may be asked a question for the purpose of discrediting the testimony of the other, when the matter inquired into is not an indictable offense. *Ware v. State*, 35 N. J. L. 553.

**7. Must Be Voluntary.** — *Woods v. State*, 76 Ala. 39, 52 Am. Rep. 315; *Com. v. Reid*, 8 Phila. (Pa.) 385; *State v. Briggs*, 9 R. I. 362, 11 Am. Rep. 270. See also *State v. Dudley*, 7 Wis. 668.

**8. Testimony Excluded.** — *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Rice v. Rice*, (N. J. 1889) 18 Atl. Rep. 457; *Munyon v. State*, 62 N. J. L. 1; *State v. Bradley*, 9 Rich. L. (S. Car.) 168; *French v. Ware*, 65 Vt. 338.

Upon the trial of an indictment for stealing wheat, a married woman was called on the part of the Crown to prove that her husband, who had absconded, was present when the wheat

**Indictment of Wife's Paramour.** — Thus, in the trial of an indictment against a man for the crime of adultery, the husband of the woman with whom the crime is alleged to have been committed is not a competent witness to prove the act of adultery, according to some of the cases, as such testimony would be a direct charge of criminality against his wife.<sup>1</sup> But the weight of modern decisions is to the contrary.<sup>2</sup>

*cc. REASON FOR RULE.* — The rule of the common law can be supported on but one theory, viz., that of public policy; and to this effect the decisions are practically unanimous.<sup>3</sup> It seems that the rule is not changed by the consent of the husband or wife,<sup>4</sup> and the testimony will not be admitted merely because the defendant has married the plaintiff's principal witness after she has been subpœnaed.<sup>5</sup> It is no reason for an exception to the rule that the testimony is also against the witness's own interest.<sup>6</sup>

(c) **Confidential Communications.** — The incompetency of either spouse to testify as to confidential communications from the other has been fully discussed in another portion of this work.<sup>7</sup>

(2) *Effect of Divorce* — (a) **In Favor of Former Spouse.** — The question as to the competency of husband or wife to testify in favor of a person from whom he or she has been divorced has been the subject of much loose talk in the reported cases, and the decisions are not in harmony. After the severance of the marriage relation there seems no reason of public policy forbidding one of the parties to give testimony in favor of the other. It is generally held that either may testify in the other's behalf, except as to confidential communications received during marriage.<sup>8</sup> But it is difficult to see any reason

was stolen, and that she saw him deliver it to the prisoner then on trial. Taunton, J., after consultation with Littledale, J., excluded the evidence on the ground that the wife was directly accusing her husband of crime, and while her testimony could not be used against him if he were put upon trial for that offense, yet it might cause a charge to be made against him. *Rex v. Gleed*, Gloucester Lent Assize 1832, cited in 3 Russ. on Crimes (9th ed.) 631.

Logically there are only two alternatives — either to admit the testimony, provided no use can be made thereof in any direct proceedings, or to exclude it entirely. *State v. Briggs*, 9 R. I. 361.

**1. Indictment for Adultery.** — *Cotton v. State*, 62 Ala. 12; *State v. Gardner*, 1 Root (Conn.) 485; *Howard v. State*, 94 Ga. 587; *State v. Welch*, 26 Me. 30; *Com. v. Sparks*, 7 Allen (Mass.) 534; *People v. Fowler*, 104 Mich. 449; *Com. v. Gordon*, 2 Brews. (Pa.) 569; *Com. v. Geary*, 9 Pa. Co. Ct. 60. See also *State v. Jolly*, 3 Dev. & B. L. (20 N. Car.) 110; *Rice v. Rice*, (N. J. 1889) 18 Atl. Rep. 457. But see *Com. v. Reid*, 8 Phila. (Pa.) 385.

In *State v. Wilson*, 31 N. J. L. 77, the alleged guilty parties were jointly indicted for adultery. The woman was first tried and acquitted; and, upon the trial of her alleged paramour, the husband of the woman was offered as a witness to prove that he had come upon the defendant and his wife *in flagrante delicto*. The court, upon a review of the authorities, held that he was not competent to give such testimony.

**2. Contra.** — *Pruett v. State*, (Ala. 1904) 37 So. Rep. 343; *State v. Wiseman*, 130 N. Car. 726; *Alonzo v. State*, 15 Tex. App. 378; *State v. Bridgman*, 49 Vt. 202; *State v. Dudley*, 7

Wis. 664; *State v. West*, 118 Wis. 469. See also *Campbell v. State*, 133 Ala. 158; *State v. Marvin*, 35 N. H. 22.

Under a statute providing that no prosecution for adultery shall be commenced save on complaint of the husband or wife, the husband of the faithless wife may testify in such cases. *State v. Vollander*, 57 Minn. 225. Compare *State v. Armstrong*, 4 Minn. 335.

**3. Public Policy.** — *Langley v. Fisher*, 5 Beav. 443; *Rex v. Cliviger*, 2 T. R. 263; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48; *Cooley v. Cooley*, 37 La. Ann. 195; *Dwelly v. Dwelly*, 46 Me. 378; *Kelly v. Drew*, 12 Allen (Mass.) 107; *Dixon v. People*, 18 Mich. 84; *Breed v. Gove*, 41 N. H. 452; *Den v. Johnson*, 18 N. J. L. 87; *Erwin v. Smaller*, 2 Sandf. (N. Y.) 340; *Zane v. Fink*, 18 W. Va. 693.

**Contra.** — Husband and wife may testify against each other when they are opposing parties and have conflicting interests. *Spitz's Appeal*, 56 Conn. 184; *Beaudry v. Starnes*, 4 Quebec Super. Ct. 55.

**4. Consent Immaterial.** — *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48.

**5. Marriage After Witness Subpœnaed.** — *Pedley v. Wellesley*, 3 C. & P. 558, 14 E. C. L. 448. See also *Elmore v. State*, (Ala. 1904) 37 So. Rep. 156; *U. S. v. White*, 4 Utah 499.

**6. Testimony Against Interest of Witness.** — *Stephenson v. Cook*, 64 Iowa 265. See also *Ward v. Dickson*, 96 Iowa 708.

**7. Confidential Communications.** — See the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 96 *et seq.*

**8. Facts Not Confidential.** — *Elsrich v. Com.*, 13 Bush (Ky.) 155; *Turner v. Washburn*, (Ky. 1904) 80 S. W. Rep. 460; *Dickerman v. Graves*, 6 Cush. (Mass.) 308; *Toovey v. Baxter*, 59 Mo. App. 470; *Ratcliff v. Wales*, 1 Hill (N. Y.) 63;

for excluding confidential communications in such cases, for the spouse having the privilege, by calling the other, would seem impliedly to have declared his willingness to make public the secrets of the marital relation.<sup>1</sup> But the cases do not go to this extent.<sup>2</sup>

(b) **Against Former Spouse.** — If the witness is called to testify against her former spouse he is, under all the decisions, incompetent as to anything learned through the confidence of the marriage relation.<sup>3</sup> But after a divorce either spouse may testify against the other, provided neither discloses confidential communications.<sup>4</sup> And so after a decree of annulment.<sup>5</sup> And either is, of course, competent as to all facts occurring after the termination of the marriage relation.<sup>6</sup> But the divorce must be an absolute one. Thus, a wife divorced *a mensa et thoro* cannot be a witness against her husband,<sup>7</sup> and the fact that the husband and wife are living apart does not make either competent against the other.<sup>8</sup>

**Criminal Cases.** — In criminal cases the courts have been more rigorous in excluding the testimony of divorced persons against the former spouse. In most of the reported cases the witness has been held incompetent.<sup>9</sup> But there seems to be no reason for excluding anything except confidential communications, and so it has been held.<sup>10</sup> Either party may, of course, testify as to any facts occurring after the divorce has been granted.<sup>11</sup>

(3) **Effect of Death of One Spouse** — (a) **In Favor of Decedent's Estate.** — As in the case of divorce,<sup>12</sup> so in regard to the death of one spouse, the cases for the most part fail to recognize the distinction between testimony in favor of the estate and against it, although the great majority of them arrive at a correct result. In one jurisdiction it was held that the survivor was in all cases incompetent in favor of the estate;<sup>13</sup> but the great weight of authority is to

Wottrich v. Freeman, 71 N. Y. 601. See also Long v. Martin, 152 Mo. 668.

**Living Apart Not Enough.** — Terry v. Belcher, 1 Bailey L. (S. Car.) 568. And see cases cited in the next following subdivision, (b) *Against Former Spouse.*

**1. Privilege Waived.** — Dickerman v. Graves, 6 Cush. (Mass.) 308. See also Cornell v. Vanartsdalen, 4 Pa. St. 364.

**2. See Waddams v. Humphrey,** 22 Ill. 661; Rea v. Tucker, 51 Ill. 110. And see generally the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 98, note 13.

**3. Confidential Communications Excluded.** — Monroe v. Twistleton, Peake Add. Cas. 219; Crose v. Rutledge, 81 Ill. 266; Griffeth v. Griffeth, 162 Ill. 368; *In re Evans*, 114 Iowa 240; Anderson v. Anderson, 9 Kan. 112; Barnes v. Camack, 1 Barb. (N. Y.) 392; Cook v. Grange, 18 Ohio 526; Kimbrough v. Mitchell, 1 Head (Tenn.) 539. And see the cases cited in the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 98, note 13.

A statute providing that husband and wife shall be incompetent in a suit by one founded on allegations of adultery, applies even after a divorce, and the husband is incompetent in an action against a third person for crim. con. with the wife. *Hanselman v. Dovel*, 102 Mich. 505.

**4. Facts Not Learned by Means of Relation.** — Mercer v. Patterson, 41 Ind. 440; Hitt v. Sterling-Gould Mfg. Co., 111 Iowa 458; Storms v. Storms, 3 Bush (Ky.) 77; Clark v. Evans, 6 S. Dak. 244; French v. Ware, 65 Vt. 338; Crook v. Henry, 25 Wis. 569; Bigelow v. Sickles, 75 Wis. 427; Woolley v. Turner, 13 Ind. 253; Long v. Martin, 152 Mo. 668.

**5. Decree of Annulment.** — Thomas v. Thomas, 64 Neb. 581.

**6. Occurrences After Divorce.** — Crose v. Rutledge, 81 Ill. 266. See also Monroe v. Twistleton, Peake Add. Cas. 219.

**7. Divorce from Bed and Board.** — Kemp v. Downham, 5 Harr. (Del.) 417.

**8. Living Apart.** — Tulley v. Alexander, 11 La. Ann. 628; Johnson v. State, 27 Tex. App. 135. See also Terry v. Belcher, 1 Bailey L. (S. Car.) 568.

**9. Rule in Criminal Cases.** — Long v. State, 86 Ala. 36; State v. Kodat, 158 Mo. 125; State v. Jolly, 3 Dev. & B. L. (20 N. Car.) 110; State v. Jones, 89 N. Car. 559; State v. Raby, 121 N. Car. 682; State v. Phelps, 2 Tyler (Vt.) 374, *overruling* State v. J. N. B., 1 Tyler (Vt.) 36.

**10. Anything Not Confidential.** — Chamberlain v. People, 23 N. Y. 85. See also *Ex p. Fatheree*, 34 Tex. Crim. 594.

**Under Comp. Laws Mich., §§ 5966, 5969,** the husband may, after divorce, testify against his wife on a criminal prosecution, if he does not disclose any communications made during marriage. *People v. Marble*, 38 Mich. 117.

**11. Occurrences After Divorce.** — Long v. State, 86 Ala. 36; Tompkins v. Com., (Ky. 1903) 77 S. W. Rep. 712; State v. Leasia, (Oregon 1904) 78 Pac. Rep. 328.

**12. See supra,** this subsection, (2) *Effect of Divorce.*

**13. Survivor Incompetent.** — Cornell v. Vanartsdalen, 4 Pa. St. 364; William & Mary College v. Powell, 12 Gratt. (Va.) 372; Smith v. Bradford, 76 Va. 758; Swann v. Housman, 90 Va. 816. See also Scroggin v. Holland, 16 Mo. 419.



the effect that, after the death of one of the parties to the marriage, the other may testify in favor of the estate as to all facts not learned through the confidence of the marital relation; <sup>1</sup> and the survivor may, of course, testify as to anything that has occurred since the death of the other spouse. <sup>2</sup>

(b) **Against Estate.** — When the survivor is called against the estate a few cases have held that he is incompetent in all respects; <sup>3</sup> but the weight of authority, while excluding all confidential communications, <sup>4</sup> admits the witness as to everything else. <sup>5</sup> In a few states the survivor cannot give evidence tending to show the other to have been guilty of a crime. <sup>6</sup>

(c) **Estate Not Concerned in Controversy.** — Where the estate of the deceased spouse is not interested in the litigation the testimony of the survivor cannot be for or against such estate, and he or she is competent, except, of course, as to confidential communications. <sup>7</sup>

(4) **Where Marriage Is Void** — (a) **In General.** — Since the rule excluding husband and wife from testifying for or against each other is based on consideration of public policy, <sup>8</sup> it follows that if the supposed marriage is void

1. **Testimony Admissible** — *Heros.* — *Lingteen v. Illinois Cent. R. Co.*, 61 Ill. App. 174.

*Indiana.* — *Denbo v. Wright*, 53 Ind. 226; *Floyd v. Miller*, 61 Ind. 224; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Alexandria Min., etc., Co. v. Irish*, 16 Ind. App. 534.

*Kentucky.* — *English v. Cropper*, 8 Bush (Ky.) 292.

*Maine.* — *Walker v. Sanborn*, 46 Me. 470.  
*Massachusetts.* — *Robinson v. Talmadge*, 97 Mass. 171.

*Mississippi.* — *Whitfield v. Whitfield*, 44 Miss. 254; *Stuhlmuller v. Ewing*, 39 Miss. 447.

*Missouri.* — *Scroggin v. Holland*, 16 Mo. 419; *Stein v. Weidman*, 20 Mo. 17; *Sherwood v. Hill*, 25 Mo. 391.

*New Hampshire.* — *Jackson v. Barron*, 37 N. H. 494; *Ryan v. Follansbee*, 47 N. H. 100. See also *Pike v. Hayes*, 14 N. H. 19.

*Pennsylvania.* — *Chambers v. Spencer*, 5 Watts (Pa.) 404; *Gebhart v. Shindle*, 15 S. & R. (Pa.) 235; *Cornell v. Vanartsdalen*, 4 Pa. St. 364.

*South Carolina.* — *Hay v. Hay*, 3 Rich. Eq. (S. Car.) 384.

*Tennessee.* — *Patton v. Wilson*, 2 Lea (Tenn.) 101.

2. **Matters Occurring After Death.** — *Dugger v. Dugger*, 84 Va. 130.

3. **Total Incompetency.** — *O'Connor v. Marjoribanks*, 4 M. & G. 435, 43 E. C. L. 228; *Yokem v. Hicks*, 93 Ill. App. 667; *Swann v. Housman*, 90 Va. 816.

4. **Confidential Communications Excluded.** — See the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 98, note 13. And see the following cases: *Keaton v. McGwier*, 24 Ga. 217; *Maynard v. Vinton*, 59 Mich. 139; *Babcock v. Booth*, 2 Hill (N. Y.) 181, 38 Am. Dec. 578; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 519; *Keator v. Dimmick*, 46 Barb. (N. Y.) 158; *Brewer v. Ferguson*, 11 Humph. (Tenn.) 564.

**Contra in Louisiana.** — *Ames's Succession*, 33 La. Ann. 1317, citing *Reilly v. Reilly*, 28 La. Ann. 669; *Lehman v. Levy*, 30 La. Ann. 749; *State v. Ryan*, 30 La. Ann. 1176.

**What Communications Excluded.** — Only such confidential communications should be excluded as would be excluded if the deceased spouse were living. *Moseley v. Eakin*, 15 Rich. L. (S. Car.) 324.

**As to What Is a Privileged Communication,** see the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 96 et seq.

**Survivor Competent to Prove Parol Gift.** — The widow is competent against the estate to prove a parol gift to the plaintiff, as this effectuates her husband's intent. *Caldwell v. Stuart*, 2 Bailey L. (S. Car.) 574. See also *Hester v. Hester*, 4 Dev. L. (15 N. Car.) 228.

5. **Witness Competent in General** — *United States.* — *Stickney v. Stickney*, 131 U. S. 227. *District of Columbia.* — *Shea v. McMahon*, 16 App. Cas. (D. C.) 65.

*Indiana.* — *Shaffer v. Richardson*, 27 Ind. 122; *Griffin v. Smith*, 45 Ind. 366.

*Iowa.* — *Romans v. Hay*, 12 Iowa 270; *Parcello v. McReynolds*, 71 Iowa 623.

*Kentucky.* — *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Short v. Tinsley*, 1 Met. (Ky.) 307.

*Massachusetts.* — *Dexter v. Booth*, 2 Allen (Mass.) 559.

*New York.* — *Babcock v. Booth*, 2 Hill (N. Y.) 181.

*North Carolina.* — *Hester v. Hester*, 4 Dev. L. (15 N. Car.) 228; *Gaskill v. King*, 12 Ired. L. (34 N. Car.) 211.

*Ohio.* — *Stober v. McCarter*, 4 Ohio St. 513.

*Pennsylvania.* — *Strause v. Braunreuter*, 4 Pa. Super. Ct. 263; *Eichhorn's Estate*, 7 Pa. Co. Ct. 433; *Tucker's Estate*, 9 Pa. Co. Ct. 345; *Hood v. Prudential Ins. Co.*, 22 Pa. Super. Ct. 244; *Robb's Appeal*, 98 Pa. St. 501. See also *Wells v. Tucker*, 3 Binn. (Pa.) 366.

6. **Testimony Affecting Character of Deceased.** — *Edgell v. Bennett*, 7 Vt. 534; *Williams v. Baldwin*, 7 Vt. 503; *Smith v. Potter*, 27 Vt. 304; *Lafferty v. Lafferty*, 42 W. Va. 783. Compare *supra*, this subdivision of this section, (1) (b) *bb. Criminal Cases.*

7. **Survivor Competent.** — *Powell v. Powell*, 114 Ill. 329; *Jack v. Russey*, 8 Ind. 180; *Carpenter v. Dame*, 10 Ind. 125; *Haugh v. Blythe*, 20 Ind. 24; *Adams v. Adams*, 23 Ind. 50; *Pratt v. Delavan*, 17 Iowa 307; *Winship v. Enfield*, 42 N. H. 197; *Matlack v. Mutual L. Ins. Co.*, 37 W. N. C. (Pa.) 526; *Peiffer v. Lytle*, 58 Pa. St. 386; *Williams v. Baldwin*, 7 Vt. 503.

8. **Public Policy.** — See *supra*, this subdivision, (1) *General Rule* — (a) *Testimony for Each Other* — *cc. Reason for Rule*; and (b) *Testi-*

the alleged husband and wife are competent witnesses for or against each other, even though they in good faith believe themselves to be lawfully married; <sup>1</sup> and, *a fortiori*, persons who cohabit as husband and wife without the formality of a marriage ceremony are not disqualified as witnesses for or against each other. <sup>2</sup> But a marriage will not be taken to be void on slight evidence merely. <sup>3</sup>

(b) **Bigamous Marriages.** — Since a bigamous marriage is void, it is obvious that the second wife is competent for or against her supposed husband. <sup>4</sup> If, however, the second marriage is not disputed, and the issue is as to the fact or validity of the first marriage, the alleged second wife should not be admitted as a witness, because she is *prima facie* the lawful wife of the defendant, <sup>5</sup> and her testimony to prove the first marriage cannot be got before the jury on the pretext that its purpose is to establish her competency. <sup>6</sup>

**Testimony of Lawful Wife.** — The first and lawful wife of a bigamist is not competent to testify against her husband, there being in such case no reason for departing from the general rule, <sup>7</sup> and her incompetency cannot be waived. <sup>8</sup> It has been held that after *prima facie* proof of a valid marriage, the first wife is not competent to prove such marriage invalid, <sup>9</sup> but this ruling has been severely criticised by able text writers and seems untenable. And such seems to be the opinion of the courts. <sup>10</sup>

*mony Against Each Other*—cc. Reason for Rule.

**1. Marriage Void.**—Wells v. Fletcher, 5 C. & P. 12, 24 E. C. L. 198; Reg. v. Young, 5 Cox C. C. 296; Reg. v. Ayley, 15 Cox C. C. 328; Reg. v. Nan-e-quis-a-ka, 1 N. W. Ter. 211; Johnson v. State, 61 Ga. 305; Wrye v. State, 95 Ga. 466; Clark v. People, 178 Ill. 37; People v. Schoonmaker, 119 Mich. 242; People v. McCraney, (Oyer & T. Ct.) 6 Park. Crim. (N. Y.) 49; Crow v. State, (Tex. Crim. 1903) 72 S. W. Rep. 392; Morrill v. Palmer, 68 Vt. 1.

**As to Competency Where Marriage Is under Duress,** see *infra*, this subdivision, (6) *Exceptions to General Rule, Based on Policy*—(a) *Crimes Against Each Other.*

**Estoppel to Prove No Marriage.**—See Campbell v. Twemlow, 1 Price 81; Batthews v. Galindo, 4 Bing. 610, 15 E. C. L. 88.

**Slave Marriages.**—Slaves could not contract a valid marriage, and hence, though married according to the ceremonies permitted to them, they were not disqualified as witnesses for or against each other. State v. Samuel, 2 Dev. & B. L. (19 N. Car.) 177; State v. Taylor, Phil. L. (61 N. Car.) 508.

But where such marriages were legalized by statute after the emancipation of the parties, the same rules applied as if they had been lawfully married in the first instance. Hampton v. State, 45 Ala. 82; Jackson v. State, 53 Ala. 472; Williams v. State, 67 Ga. 260.

**2. Man and Mistress.**—Batthews v. Galindo, 4 Bing. 610, 15 E. C. L. 88; Reg. v. Young, 2 Cox C. C. 291; Flanagan v. State, 25 Ark. 92; Rickerstricker v. State, 31 Ark. 207; Hill v. State, 41 Ga. 484; State v. Brown, 28 La. Ann. 279; Meunier v. Couet, 2 Mart. (La.) 56; Dennis v. Crittenden, 42 N. Y. 542; Sims v. State, 30 Tex. App. 605; Mann v. State, 44 Tex. 642.

**3. Slight Evidence Not Enough.**—Dixon v. People, 18 Mich. 84.

**4. Second Wife Competent.**—Wells v. Fletcher,

5 C. & P. 12, 24 E. C. L. 198; Salter v. State, 92 Ala. 68; Johnson v. State, 61 Ga. 305; Barber v. People, 203 Ill. 543; State v. Shreve, 137 Mo. 1; State v. Patterson, 2 Ired. L. (24 N. Car.) 346; Finney v. State, 3 Head (Tenn.) 544.

**5. First Marriage Disputed.**—Miles v. U. S., 103 U. S. 304; Lowery v. People, 172 Ill. 466. See also Reg. v. Tubbee, 1 Ont. Pr. 98.

**6. Inadmissible on Pretext.**—Miles v. U. S., 103 U. S. 304.

**7. Lawful Wife Incompetent—England.**—Griggs's Case, T. Raym. 1.

*Canada.*—Reg. v. Nan-e-quis-a-ka, 1 N. W. Ter. 211; Reg. v. Tubbee, 1 Ont. Pr. 98.

*United States.*—Bassett v. U. S., 137 U. S. 496.

*Alabama.*—Salter v. State, 92 Ala. 68; Williams v. State, 44 Ala. 24.

*Delaware.*—State v. Ryan, 1 Penn. (Del.) 81.

*Georgia.*—Williams v. State, 67 Ga. 260.

*Illinois.*—Barber v. People, 203 Ill. 543; Hiler v. People, 156 Ill. 511.

*Louisiana.*—State v. McDavid, 15 La. Ann. 403.

*Michigan.*—People v. Quanstrom, 93 Mich. 254.

*Missouri.*—State v. Ulrich, 110 Mo. 350.

*New Jersey.*—Wilson v. Hill, 13 N. J. Eq. 143.

*New York.*—People v. Houghton, 24 Hun (N. Y.) 501.

*Texas.*—Boyd v. State, 33 Tex. Crim. 470.

**Competent to Contradict Statement.**—But where the husband testifies that the first wife told him she was already married, she may be called solely to contradict this statement. State v. Ryan, 1 Penn. (Del.) 81.

**8. No Waiver of Incompetency.**—Barber v. People, 203 Ill. 543. See also Wilson v. Hill, 13 N. J. Eq. 143.

**9. First Wife Incompetent to Prove Her Marriage Invalid.**—Peat's Case, 2 Lewin C. C. 288; Reg. v. Madden, 14 U. C. Q. B. 588.

**10. Proving Witness Not Lawful Wife.**—Where

(5) *Codefendants of Husband or Wife* — (a) **Criminal Cases** — *aa. TESTIMONY IN FAVOR OF CODEFENDANT.* — Where two or more persons are jointly indicted and jointly tried for the commission of a crime, the husband or wife of one of them is not, at common law, a competent witness for the others.<sup>1</sup> But there are cases in which the rule is relaxed, as where the defendants are being jointly tried, and the wife of one of them is permitted to testify in favor of her husband's codefendant, it clearly appearing that the proffered testimony can have no bearing on the question of her husband's innocence or guilt.<sup>2</sup> So, one defendant may call the wife of a codefendant to prove an alibi;<sup>3</sup> but she cannot be examined where her testimony would impeach the credit of witnesses who have testified against her husband.<sup>4</sup>

**Separate Trials.** — According to the weight of authority, the rule is otherwise if the defendants have separate trials, and the witness is competent, for the record of the testimony given at the trial of a codefendant cannot be used as evidence for the consort of the witness.<sup>5</sup> The few cases to the contrary are not generally supported.<sup>6</sup>

*bb. TESTIMONY AGAINST CODEFENDANT.* — In the case of a joint trial, the husband or wife of one defendant is incompetent against the other,<sup>7</sup> except in *Louisiana* and *Idaho*, where it is held that the wife of one codefendant may testify against the other, the jury being instructed to restrict her testimony to him alone.<sup>8</sup> But if the defendants have separate trials the rule is otherwise, and the witness is competent in all jurisdictions.<sup>9</sup> So if husband or wife has

a statute provides that in a prosecution for bigamy the lawful husband or wife shall be competent, but not compellable, a witness claiming the right to refuse to testify before the grand jury on the ground that she is the lawful wife of the accused may be compelled to answer a question as to whether or not another was married to the accused on the same day as that on which she claims to have been married. *Ex p. Henderson*, 6 Utah 3.

**1. Excluded on Joint Trial** — *England.* — Reg. v. Thompson, 12 Cox C. C. 202; *Rex v. Hood*, 1 Moody 281.

*Canada.* — Reg. v. Thompson, 13 N. Bruns. 71.

*Alabama.* — Childs v. State, 55 Ala. 25; *Holley v. State*, 105 Ala. 100; *Birge v. State*, 78 Ala. 435.

*Arkansas.* — Collier v. State, 20 Ark. 36.

*Georgia.* — Trowbridge v. State, 74 Ga. 434; *Stephens v. State*, 106 Ga. 116.

*Massachusetts.* — Com. v. Easland, 1 Mass. 15; *Com. v. Robinson*, 1 Gray (Mass.) 555.

*South Carolina.* — State v. Workman, 15 S. Car. 540; *State v. McGrew*, 13 Rich. L. (S. Car.) 316.

*Vermont.* — State v. Sargood, (Vt. 1904) 58 Atl. Rep. 971.

**In Tennessee** the wife is competent in behalf of the codefendants, the jury being instructed not to consider her evidence in favor of the husband. *Smartt v. State*, (Tenn. 1904) 80 S. W. Rep. 586.

**2. Testimony Not Affecting Spouse's Guilt.** — Reg. v. Bartlett, 1 Cox C. C. 105.

On the trial of an indictment for breaking into a house and stealing property therefrom, where it is proved that part of the stolen property was found in the house of each of the prisoners, the wife of one may testify that she took to the house of the other the property found there. *Reg. v. Sills*, 1 C. & K. 494, 47 E. C. L. 494.

**3. Proving Alibi.** — Reg. v. Moore, 1 Cox C. C. 59; *State v. Smith*, (Del. 1904) 57 Atl. Rep. 368.

**4. Impeaching Witnesses.** — *Rex v. Smith*, 1 Moody 289; Reg. v. Denslow, 2 Cox C. C. 230.

**5. Separate Trials.** — U. S. v. Addatte, 6 Blatchf. (U. S.) 76; *Carr v. State*, 42 Ark. 204; *Gill v. State*, 59 Ark. 422; *Thompson v. Com.*, 1 Met. (Ky.) 13; *Cornelius v. Com.*, 3 Met. (Ky.) 481; *State v. Burnside*, 37 Mo. 343; *State v. McCarron*, 51 Mo. 27; *Com. v. Manson*, 2 Ashm. (Pa.) 31; *State v. Anthony*, 1 McCord L. (S. Car.) 285; *State v. Bradley*, 9 Rich. L. (S. Car.) 168; *Moffit v. State*, 2 Humph. (Tenn.) 99; *Workman v. State*, 4 Sneed (Tenn.) 425.

**Default of Witness's Husband.** — Where persons are jointly indicted for a misdemeanor and one is put on trial alone, he may call as a witness the wife of a codefendant who stands defaulted on his recognizance. *State v. Worthing*, 31 Me. 62.

**6. Contra.** — Pullen v. People, 1 Dougl. (Mich.) 48; *State v. Smith*, 2 Ired. L. (24 N. Car.) 405.

**7. Incompetent on Joint Trial.** — Reg. v. Brittleton, 12 Q. B. D. 266; *Rex v. Webb*, 3 Russ. on Crimes (9th ed.) 630; *Cotton v. State*, 62 Ala. 12; *McLean v. State*, 32 Tex. Crim. 521.

**8. Louisiana and Idaho.** — *State v. Adams*, 40 La. Ann. 213; *State v. Wright*, 41 La. Ann. 600; *Shields v. Ruddy*, 3 Idaho 148.

**9. Competent if Separate Trials** — *Alabama.* — *Fincher v. State*, 58 Ala. 215; *Campbell v. State*, 133 Ala. 158.

*California.* — *People v. Langtree*, 64 Cal. 256.

*Florida.* — *Adams v. State* 28 Fla. 511.

*Georgia.* — *Williams v. State*, 69 Ga. 11; *Whitlow v. State*, 74 Ga. 819; *Askea v. State*, 75 Ga. 356; *Fuller v. State*, 109 Ga. 809; *Rivers v. State*, 118 Ga. 42.

*Iowa.* — *State v. Rainsbarger*, 71 Iowa 746.



already been acquitted or convicted,<sup>1</sup> or if a *nolle prosequi* has been entered.<sup>2</sup> And where the accomplice has not been indicted, his wife is, of course, competent against the one on trial.<sup>3</sup>

*cc. OFFENSES INVOLVING JOINT CRIMINAL INTENT.* — Whenever the conviction or acquittal of one defendant would necessarily prove the other guilty or innocent, as in cases where a joint criminal intent is material, the spouse of one defendant is incompetent for or against the other, even on a separate trial. Thus, on trials for criminal conspiracy, the husbands and wives of the defendants are excluded from the witness stand, because any evidence relevant to the issue on trial must necessarily tend either to acquit or convict all of the defendants;<sup>4</sup> and so in a prosecution against both parties for adultery.<sup>5</sup>

(b) *Civil Cases.* — In a civil action the wife of one of two codefendants is not competent to testify in favor of the other if they are equally interested, as in testifying in support of their joint defense she would be in effect testifying in her husband's behalf.<sup>6</sup> But where a separate judgment may be rendered as to each defendant she may testify in behalf of all the defendants but her husband.<sup>7</sup> And if the action has been dismissed as to the husband, the wife is competent for the other defendants.<sup>8</sup>

(6) *Exceptions to General Rule, Based on Policy* — (a) *Crimes Against Each Other* — *aa. IN GENERAL.* — An exception to the rule excluding the testimony of husband and wife against each other is to be found in cases of personal outrage committed by one upon the other. In all manner of offenses involving personal injury to the wife or affecting her liberty, she has always been allowed to testify directly against her husband as a matter of necessity, as otherwise the crime might go unpunished.<sup>9</sup> And similarly, where the husband is the

*New Jersey.* — *Munyon v. State*, 62 N. J. L. 1; *Hunter v. State*, 40 N. J. L. 495.

*New York.* — *Wixson v. People*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 119; *People v. Bosworth*, 64 Hun (N. Y.) 72.

*Pennsylvania.* — *Com. v. Reid*, 8 Phila. (Pa.) 385.

*South Carolina.* — *State v. Drawdy*, 14 Rich. L. (S. Car.) 87.

*Texas.* — *Bluman v. State*, 33 Tex. Crim. 43; *Alonzo v. State*, 15 Tex. App. 378.

*Virginia.* — *Smith v. Com.*, 90 Va. 759.

*Contra.* — *People v. Colbern*, (Ct. Sess.) 1 Wheel. Crim. (N. Y.) 479.

1. *Previous Acquittal or Conviction.* — *Reg. v. Thompson*, 3 F. & F. 824; *Reg. v. Glassie*, 7 Cox C. C. 1; *Reg. v. Williams*, 8 C. & P. 283, 34 E. C. L. 391; *Woods v. State*, 76 Ala. 35; *Graff v. People*, 208 Ill. 312; *State v. Goforth*, 136 Mo. 111; *Frack v. Gerber*, 167 Pa. St. 316. See also *Daffin v. State*, 11 Tex. App. 76.

2. *Effect of Nolle Pros.* — *Woods v. State*, 76 Ala. 35; *State v. Wiseman*, 130 N. Car. 726.

*Agreement to Dismiss Case of One.* — Where two are separately indicted for the same offense, and the district attorney agrees to dismiss the case of one, the latter's wife is competent against the other. *Rios v. State*, 39 Tex. Crim. 675.

3. *Accomplice Not Indicted.* — *Powell v. State*, 58 Ala. 362; *Burns v. State*, (Tex. Crim. 1901) 66 S. W. Rep. 303.

But where the husband is under indictment with the codefendant, who is an alleged principal in the offense, and the case is still pending against the husband, who has not been introduced as a witness by the state, the wife is not competent as against the codefendant. *Dungan v. State*, 39 Tex. Crim. 115.

4. *Conspiracy.* — *Rex v. Locker*, 5 Esp. 107; *Rex v. Serjeant*, R. & M. 352, 21 E. C. L. 453; *State v. Burlingham*, 15 Me. 104; *Mask v. State*, 32 Miss. 405; *Com. v. Manson*, 2 Ashm. (Pa.) 31. See also *Stein v. Bowman*, 13 Pet. (U. S.) 209.

5. *Adultery.* — *Birge v. State*, 78 Ala. 435.

6. *Incompetent in Support of Joint Defense.* — *Walker v. Steele*, 121 Ind. 436; *Arn v. Matthews*, 39 Kan. 272; *Tomlinson v. Lynch*, 32 Mo. 160; *Craig v. Kittredge*, 20 N. H. 169; *Stewart v. Stewart*, 41 Wis. 624; *Bartlett v. Clough*, 94 Wis. 196. But see *Shields v. Ruddy*, 3 Idaho 148, where it was held that the wife could testify against the defendants, the jury being instructed not to consider her testimony against her husband.

7. *Possibility of Separate Judgment.* — *Dovey v. Lam*, (Ky. 1903) 77 S. W. Rep. 383. See also *Ruth v. Ford*, 9 Kan. 17.

The husband of an heiress may testify for or against a co-heir. *Boisse v. Dickson*, 31 La. Ann. 741; *Starns v. Hadnot*, 45 La. Ann. 318.

8. *Action Dismissed as to Spouse.* — *Van Valkenburg v. Lynde*, 63 Kan. 887, 66 Pac. Rep. 994.

9. *Crimes Against Each Other.* — 1 Hale P. C. 301; 1 East P. C., c. 11, § 5, p. 455; 2 Hawk. P. C., c. 46, § 47, Buller N. P. 287. And see the cases cited throughout this subdivision.

*Declaratory Statute.* — A statute prohibiting husband and wife from testifying against each other is only declaratory of the common law, and so the common-law exceptions are exceptions under the statute; and husband and wife are competent against each other in the case of crimes committed against each other. *Com. v. Sapp*, 90 Ky. 580, *overruling Turnbull v. Com.*, 79 Ky. 495.

injured party, he may testify against his wife.<sup>1</sup>

**Competency When Other Witness Available.** — In a few early cases some doubt was expressed as to the competency of one spouse against the other to prove facts which could be proved by other witnesses;<sup>2</sup> but in the leading case on this subject the wife was admitted without discussion or opposition, although the incriminating facts had already been proved by other witnesses,<sup>3</sup> and the point has been directly raised and decided in favor of the competency in such a case.<sup>4</sup>

**Spouse Compellable as Well as Competent.** — This exception being based on considerations of policy, it follows that the injured spouse is not only competent to testify against the other, but will be compelled to do so if unwilling.<sup>5</sup>

**Competency in Favor of Spouse.** — In cases where the husband and wife are competent to testify against each other, they may also testify in favor of each other.<sup>6</sup>

**bb. WHAT CRIMES WITHIN EXCEPTION.** — This relaxation of the rule excluding husband and wife as witnesses for or against each other is demanded by the necessities of justice, but it extends no further than such necessities require. Consequently, the exception is confined to cases of personal violence endangering the bodily safety or liberty of the witness. Thus, the witness is competent in cases of assault and battery,<sup>7</sup> robbery,<sup>8</sup> poisoning,<sup>9</sup> shooting,<sup>10</sup> and procuring a miscarriage,<sup>11</sup> especially by violence.<sup>12</sup> So the wife may prove that her husband has compelled her to submit to sexual intercourse with

**Articles of Peace.** — She may also exhibit articles of peace against him. *Rex v. Doherty*, 13 East 171; *Vane's Case*, 13 East 171, note (a); 2 Stra. 1202.

**The Wife's Dying Declarations** are admissible against her husband upon his trial for her murder. *Rex v. Woodcock*, 1 Leach C. C. 500; *John's Case*, 1 Leach C. C. 504, note (a); *State v. Pearce*, 56 Minn. 226; *State v. Belcher*, 13 S. Car. 459. See the title DYING DECLARATIONS, vol. 10, p. 376.

**1. Husband Competent Against Wife.** — *State v. Harris*, (Del. 1904) 58 Atl. Rep. 1042; *State v. Davidson*, 77 N. Car. 522; *Whipp v. State*, 34 Ohio St. 87, 32 Am. Rep. 359.

**2. Doubt as to Competency.** — *Whitehouse Case*, 3 Russ. on Crimes, 633; *Reg. v. Bissell*, 1 Ont. 514; *State v. Davis*, 3 Brev. (S. Car.) 3.

**3. Testimony Admissible.** — *Rex v. Castlehaven*, 3 How. St. Tr. 402.

**4. Point Decided.** — *People v. Northrup*, 50 Barb. (N. Y.) 147, reversed on other grounds 37 N. Y. 203; *People v. Mercein*, 8 Paige (N. Y.) 47.

**5. Compellable Witness.** — *Johnson v. State*, 94 Ala. 53; *Turner v. State*, 60 Miss. 351, 45 Am. Rep. 412; *Bramlette v. State*, 21 Tex. App. 611.

**6. Competent in Favor of Defendant.** — *State v. Neill*, 6 Ala. 685; *Tucker v. State*, 71 Ala. 342; *Clarke v. State*, 117 Ala. 1; *Com. v. Murphy*, 4 Allen (Mass.) 491. See also *Rex v. Serjeant, R. & M.* 352, 21 E. C. L. 453.

**7. Assault and Battery** — *England*. — *Rex v. Azire*, 1 Stra. 633.

*United States*. — *U. S. v. Fitton*, 4 Cranch (C. C.) 658; *U. S. v. Smallwood*, 5 Cranch (C. C.) 35.

*Maryland*. — *Hanon v. State*, 63 Md. 123.

*Massachusetts*. — *Com. v. Murphy*, 4 Allen (Mass.) 491.

*Michigan*. — *People v. Sebring*, 66 Mich. 705.

*Mississippi*. — *Turner v. State*, 60 Miss. 351, 45 Am. Rep. 412.

*Missouri*. — *State v. Pennington*, 124 Mo. 388.

*Ohio*. — *Whipp v. State*, 34 Ohio St. 87, 32 Am. Rep. 359.

*South Carolina*. — *State v. Davis*, 3 Brev. (S. Car.) 3.

*Texas*. — *Bramlette v. State*, 21 Tex. App. 611.

See also *Tucker v. State*, 71 Ala. 342; *State v. Neill*, 6 Ala. 685.

In *North Carolina* it has been held that the husband or wife is not a competent witness against the other upon the trial of an indictment for assault and battery where no lasting injury is inflicted or threatened. *State v. Hussey, Busb. L.* (44 N. Car.) 123.

But where the wife struck her husband with an axe without sufficient provocation, the court held that the husband might testify against her. *State v. Davidson*, 77 N. Car. 522.

**8. Robbery.** — *State v. Smith*, 9 Ohio Dec. 749, 7 Ohio N. P. 72.

**But Not Theft.** — *Overton v. State*, 43 Tex. 616.

**9. Poisoning.** — *Rex v. Jagger*, 3 Russ. on Crimes (9th ed.) 633; *People v. Northrup*, 50 Barb. (N. Y.) 147; *Com. v. Sapp*, 90 Ky. 580; *Davis v. Com.*, 99 Va. 838.

**10. Shooting.** — *Whitehouse Case*, 3 Russ. on Crimes (9th ed.) 633; *Reg. v. Pearce*, 9 C. & P. 667, 38 E. C. L. 281; *State v. Parker*, 42 La. Ann. 972.

**11. Procuring Miscarriage.** — *State v. Dyer*, 59 Me. 303.

**12. Abortion Produced by Violence.** — *Navarro v. State*, 24 Tex. App. 378.

**Abortion Produced by Wife's Consent.** — It seems that if the abortion is procured by drugs with the consent of the woman, it is not enough to make her competent. *Miller v. State*, 37 Tex. Crim. 575.

another,<sup>1</sup> or that he was guilty of a conspiracy to have her committed to an insane asylum,<sup>2</sup> or that he has behaved so cruelly towards her as to justify her in leaving him.<sup>3</sup> But slandering the wife does not make her competent,<sup>4</sup> and subornation of perjury to wrong the wife in a proceeding affecting her property rights is not considered a crime against her personally within the rule.<sup>5</sup> Upon an indictment for the forcible abduction and marriage of a woman, she is a competent witness, as there could be no legal marriage without her consent.<sup>6</sup> And on the trial of an indictment for the abduction and seduction of a girl she is a competent witness for the prosecution, although the defendant alleges that he has married her.<sup>7</sup>

**Desertion and Refusal to Support.** — Whether or not desertion of the wife and neglect to support are within the exception is a matter of doubt. It would seem that on principle they are not, and it is so held in *England* and *Canada*.<sup>8</sup> In some jurisdictions it has been deemed necessary to make the wife competent in such cases by legislative enactment,<sup>9</sup> but others have admitted the witness without the aid of a statute.<sup>10</sup>

**Crimes Against the Marriage Relation.** — In *Iowa* and *Nebraska* the courts have taken the position that bigamy, incest, and adultery are crimes against the other spouse, who is therefore admitted as a witness for the state in a prosecution for such an offense;<sup>11</sup> and the divorce of the parties, after the institution of the proceedings, does not render the prosecutor incompetent.<sup>12</sup> But these crimes seem to be offenses against the marriage relation rather than against the wife, and the great weight of authority is to the effect that no outrage upon the feelings of the wife by the commission of an offense, however detestable, will render her competent as a witness against her husband when he is put upon trial for the offense. Thus, bigamy,<sup>13</sup> adultery,<sup>14</sup> and even incest committed by the husband with his daughter,<sup>15</sup> are not such personal wrongs to the wife as will render her testimony admissible against the defendant.

**1. Assisting Rape.** — *Rex v. Castlehaven*, Lord Audley's Case, 1 St. Tr. 393, 3 How. St. Tr. 402.

**2. Conspiracy to Declare Wife Insane.** — *Com. v. Spink*, 137 Pa. St. 255.

**3. Acts of Cruelty.** — *People v. Mercein*, 8 Paige (N. Y.) 47. Compare *People v. Chegaray*, 18 Wend. (N. Y.) 637.

**4. Slandering Wife Not Enough.** — *Bohner v. Bohner*, 46 Neb. 204; *Baxter v. State*, 34 Tex. Crim. 516.

**5. Subornation of Perjury in Wife's Case.** — *People v. Carpenter*, 9 Barb. (N. Y.) 580. But see *Dill v. People*, 19 Colo. 469, where it was held that a husband's perjury in a divorce suit against his wife is a crime against her.

**6. Forcible Abduction and Marriage.** — 1 Hale P. C. 301; 2 Hawk., c. 46, § 78; *Buller N. P.* 286; *Wakefield's Case*, 2 Lewin C. C. 279; *Rex v. Perry*, cited by the court in *Rex v. Serjeant, R. & M.* 352, 21 E. C. L. 453; *Rex v. Yore*, 1 Jebb & S. 563.

**Procuring One Without Authority to Solemnize a Marriage.** — Under a statute providing that no marriage solemnized by a person without authority shall be void if one of the contracting parties believe him to have authority, a woman is competent to testify against the man to whom she has been married by a person without authority, on the trial of the husband for procuring one without authority to solemnize a marriage, even though she supposed the person solemnizing it had due authority. *Barclay v. Com.*, (Ky. 1903) 76 S. W. Rep. 4.

**7. Seduction.** — *State v. Gordon*, 46 N. J. L. 432.

**8. Deserting Wife Not Enough.** — *Reeve v. Wood*, 10 Cox C. C. 58; *Reg. v. Bissell*, 1 Ont. 514.

**9. Competent by Statute.** — *Bea v. People*, 101 Ill. App. 132; *Wilcoxon v. Read*, 95 Ill. App. 33; *People v. Malsch*, 119 Mich. 112; *Reg. v. Meyer*, 11 Ont. Pr. 477.

**10. Desertion a Crime Against Wife.** — *Stebbins v. Anthony*, 5 Colo. 348; *State v. Bean*, (Mo. App. 1904) 78 S. W. Rep. 640; *State v. Newberry*, 43 Mo. 429.

**11. Rule in Iowa and Nebraska.** — *State v. Bennett*, 31 Iowa 24; *State v. Hazen*, 39 Iowa 648; *State v. Sloan*, 55 Iowa 219; *State v. Hughes*, 58 Iowa 165; *State v. Chambers*, 87 Iowa 1; *Lord v. State*, 17 Neb. 529; *Owens v. State*, 32 Neb. 167; *Hills v. State*, 61 Neb. 589. See also *State v. Russell*, 90 Iowa 569.

**Utah Decisions.** — And it was held in Utah that polygamy was a crime against the wife. *U. S. v. Bassett*, 5 Utah 131; *U. S. v. Cutler*, 5 Utah 608.

**12. Effect of Divorce.** — *State v. Russell*, 90 Iowa 569.

**13. Bigamy.** — *Bassett v. U. S.*, 137 U. S. 496; *State v. McDavid*, 15 La. Ann. 403; *People v. Quanstrom*, 93 Mich. 254; *Boyd v. State*, 33 Tex. Crim. 470.

**14. Adultery.** — *State v. Armstrong*, 4 Minn. 335; *Thomas v. State*, 14 Tex. App. 70; *McLean v. State*, 32 Tex. Crim. 521.

**15. Incest.** — *State v. Burt*, (S. Dak. 1903) 94 N. W. Rep. 409; *Compton v. State*, 13 Tex.



And the same may be said of an indecent assault upon the daughter.<sup>1</sup> In the consideration of this question it makes no difference whether the statute under which the witness is sought to be rendered competent is worded "cases of criminal violence upon one by the other," or merely "prosecution for a crime committed by one against the other." In either case the statute is merely declaratory of the common law.<sup>2</sup>

*cc. TIME OF COMMISSION OF OFFENSE.*—The offense must be committed during the existence of the marriage relation, for otherwise it is not a crime against the wife. Thus, the wife is not competent against her husband on a prosecution for rape committed on her before the marriage.<sup>3</sup> And so on a prosecution for an abortion on her previous to marriage.<sup>4</sup>

(b) *Actions for Value of Lost Baggage.*—A well-known exception to the common-law rule excluding parties from the witness stand is to be found in actions against carriers and innkeepers for the loss of baggage, the amount and value of which was known only to the owner. As the wife generally packs her husband's trunk, as well as her own, it will readily be seen that the same ground of necessity which justified the admission of the plaintiff himself will also, in such cases, render his wife admissible as a witness in his behalf;<sup>5</sup> but in one jurisdiction it has been held that the wife could prove only the contents, and not the value thereof.<sup>6</sup>

(c) *Agency.*—Where either spouse has acted as agent for the other in the transaction of his business, the latter is bound by his acts, declarations, and admissions concerning that business, and they are admissible in evidence against him the same as those of any other agent.<sup>7</sup> But their admissions are not to be received in evidence until the fact of the agency is established.<sup>8</sup> And the statements concerning matters outside the scope of the agency are not admissible at all.<sup>9</sup>

*Competency as Witness.*—Following the doctrine of the common law, and influenced by considerations of policy, it is held in a few jurisdictions that one spouse is competent for the other where he or she has acted as agent for such other in some business transaction. But this rule is more conveniently treated in connection with the statutes laying down a similar doctrine.<sup>10</sup>

App. 271, 44 Am. Rep. 703, *overruling* Morrill v. State, 5 Tex. App. 447, and Roland v. State, 9 Tex. App. 277.

1. *Indecent Assault.*—People v. Westbrook, 94 Mich. 629, *following* People v. Quanstrom, 93 Mich. 254.

2. *Statutes Declaratory.*—Bassett v. U. S., 137 U. S. 496; People v. Langtree, 64 Cal. 256; State v. Burt, (S. Dak. 1903) 94 N. W. Rep. 409. *Contra*, State v. Chambers, 87 Iowa 1.

3. *Rape Committed Before Marriage.*—People v. Curiale, 137 Cal. 534; State v. McKay, (Iowa 1904) 98 N. W. Rep. 510; People v. Schoonmaker, 117 Mich. 190; State v. Frey, 76 Minn. 526; State v. Evans, 138 Mo. 116; U. S. v. White, 4 Utah 499. But *compare* State v. Gordon, 46 N. J. L. 432, where it was held that on a prosecution for the abduction and seduction of a girl under fifteen, she was a competent witness for the state, although the defendant claimed he had married her.

4. *Abortion Before Marriage.*—Miller v. State, 37 Tex. Crim. 575. *Contra*, Com. v. Kreuger, 17 Pa. Co. Ct. 181.

5. *Wife Competent.*—Dibble v. Brown, 12 Ga. 223, 56 Am. Dec. 460; Sasseen v. Clark, 37 Ga. 242; Illinois Cent. R. Co. v. Taylor, 24 Ill. 323; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749; Northern Line

Packet Co. v. Shearer, 61 Ill. 263; McGill v. Rowand, 3 Pa. St. 452, 45 Am. Dec. 654.

*Statutory Re-enactment of Common Law.*—Civ. Code Ky., § 606, provides that in actions for lost baggage or its value against a common carrier, an innkeeper, or a wrongdoer, husband and wife are competent witnesses for each other. Board of Internal Imp. v. Moore, (Ky. 1902) 66 S. W. Rep. 417.

6. *Testimony Restricted to Contents.*—Illinois Cent. R. Co. v. Taylor, 24 Ill. 323; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749. But see Rev. St. Ill., c. 51, § 5.

7. *Acting as Agent for the Other.*—Anderson v. Sanderson, Holt 591, 3 E. C. L. 232; Gregory v. Parker, 1 Campb. 394; Palethorp v. Furnish, 2 Esp. 511, note; Williamson v. Morton, 2 Md. Ch. 94; Hughes v. Stokes, 1 Hayw. (2 N. Car.) 372; Fenner v. Lewis, 10 Johns. (N. Y.) 38; Thomas v. Hargrave, Wright (Ohio) 595; Curtis v. Ingham, 2 Vt. 287. See also the title ADMISSIONS, vol. 1, p. 700.

8. *Proof of Agency Necessary.*—Duckworth v. Johnston, 1 C. & K. 584, 47 E. C. L. 584; Gilson v. Gilson, 16 Vt. 464. And see the title ADMISSIONS, vol. 1, p. 701.

9. *Must Be Within Scope of Agency.*—Meredith v. Footner, 11 M. & W. 202. See also the title ADMISSIONS, vol. 1, p. 700.

10. *Agency.*—See *infra*, this subsection, c.

(d) **Other Exceptions — Facts Within Knowledge of Wife Alone.** — Another exception to the general rule, adopted in a few cases, is to permit the wife to testify against the husband whenever she is the individual directly injured by the act committed by her husband, and the facts are peculiarly within her knowledge, and impossible or difficult of proof by any other witness.<sup>1</sup> Thus, in an action against the husband for necessities furnished the wife she is competent to testify as to the manner in which he turned her out of the house, for otherwise no proof of such circumstances can be obtained.<sup>2</sup>

**Action by Husband for Abortion on Wife.** — It has been held that in an action by the husband against a physician for producing an abortion on the wife, the latter is competent in her husband's behalf on grounds of public policy.<sup>3</sup>

**b. EFFECT OF STATUTES REMOVING INTEREST DISQUALIFICATION —**  
 (1) *Testimony in Favor of Spouse.* — In every jurisdiction there are to be found statutes removing the incompetency of witnesses on account of being a party or otherwise interested in the event of the suit. On the passage of these statutes it was at once contended that husband and wife were thereby rendered competent for each other. But the common-law prohibition against such testimony rests on other grounds than interest; and accordingly it is held in nearly every jurisdiction that the incompetency resulting from the marital relation is not affected by statutes of the kind referred to.<sup>4</sup> But the contrary is held in two jurisdictions, where the view is taken that the common-law prohibition was founded on the interest of the witness and not on reasons of public policy.<sup>5</sup> And in another jurisdiction it is held that the statutory prohibition declaratory of the common law should be rigorously construed, and the testimony admitted unless clearly within the words of the statute.<sup>6</sup>

*Statutes Expressly Removing Incompetency —*  
 (4) *Agency.*

**1. Facts Known Only to Wife.** — *State v. Bean*, (Mo. App. 1904) 78 S. W. Rep. 640; *State v. Newberry*, 43 Mo. 429; *Bach v. Parmely*, 35 Wis. 238.

**2. Action for Necessaries.** — *Bach v. Parmely*, 35 Wis. 238.

**3. Abortion on Wife.** — *Cramer v. Hurt*, 154 Mo. 112.

**4. Incompetency Removed — England.** — *Barbat v. Allen*, 7 Exch. 609; *Stapleton v. Crofts*, 18 Q. B. 367, 83 E. C. L. 367.

*United States.* — *Lucas v. Brooks*, 18 Wall. (U. S.) 436.

*Arkansas.* — *Collins v. Mack*, 31 Ark. 684; *Watkins v. Turner*, 34 Ark. 663.

*District of Columbia.* — *Holtzman v. Wagner*, 5 Mackey (D. C.) 15; *Foertsch v. Germuller*, 9 App. Cas. (D. C.) 351.

*Florida.* — *Haworth v. Norris*, 28 Fla. 763.

*Illinois.* — *Mitchinson v. Cross*, 58 Ill. 366; *Craig v. Miller*, 133 Ill. 300, *overruling Lincoln Ave., etc., Gravel Road Co. v. Madaus*, 102 Ill. 417; *Sun Acc. Assoc. v. King*, 53 Ill. App. 182.

*Maine.* — *McKeen v. Frost*, 46 Me. 239.

*Mississippi.* — *Dunlap v. Hearn*, 37 Miss. 471, *overruling Lockhart v. Luker*, 36 Miss. 68.

*Missouri.* — *Swift v. Martin*, 19 Mo. App. 488.

*New Hampshire.* — *Kelley v. Proctor*, 41 N. H. 139; *Smith v. Boston, etc., R. Co.*, 44 N. H. 325; *Young v. Gilman*, 46 N. H. 484.

*New Jersey.* — *Bird v. Davis*, 14 N. J. Eq. 467; *Marshman v. Conklin*, 17 N. J. Eq. 282.

*New York.* — *Rogers v. Rogers*, 1 Daly (N.

Y.) 194; *White v. Stafford*, 38 Barb. (N. Y.) 419; *Hasbrouck v. Vandervoort*, 9 N. Y. 153.

*North Carolina.* — *Rice v. Keith*, 63 N. Car. 319.

*Ohio.* — *Bird v. Hueston*, 10 Ohio St. 418.

*Texas.* — *Gee v. Scott*, 48 Tex. 510.

*Vermont.* — *Cram v. Cram*, 33 Vt. 15; *Carpenter v. Moore*, 43 Vt. 392.

*West Virginia.* — *Hill v. Proctor*, 10 W. Va. 59; *Rose v. Brown*, 11 W. Va. 122; *Anderson v. Snyder*, 21 W. Va. 632.

*Wisconsin.* — *Farrell v. Ledwell*, 21 Wis. 182.

**As to the True Reason of the Common-law Prohibition**, see *supra*, this subsection, *a. At Common Law and under Statutes Declaratory of the Common Law — (a) Testimony for Each Other — cc. Reason for Rule.*

A section in an act providing that a party to an action may be a witness in his own behalf does not repeal a former section of the act, providing that husband and wife shall be incompetent to testify for or against each other. *Dawley v. Ayers*, 23 Cal. 108.

**5. Connecticut Rule.** — *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354. See also *Peaslee v. McLoon*, 16 Gray (Mass.) 488.

*Georgia.* — *Phillips v. Williams*, 39 Ga. 597; *McIntyre v. Meldrim*, 40 Ga. 490; *Jackson v. Jackson*, 40 Ga. 150; *Watts v. Baker*, 78 Ga. 622; *Porter v. Allen*, 54 Ga. 623; *Savannah, etc., R. Co. v. Wainwright*, 99 Ga. 255.

**6. Kansas Rule.** — *Higbee v. McMillan*, 18 Kan. 133.

Thus a subscribing witness to a will may prove its execution in the probate proceedings, although his wife is a legatee. Such proceedings are not "actions" within the meaning

**Criminal Cases.** — The rule is the same in criminal as in civil cases.<sup>1</sup>

(2) *Testimony Against Spouse.* — Since the authorities generally agree that the incompetency of one spouse against the other is founded on principles of public policy, it follows that the statutory removal of the interest disqualification does not result in a removal of such incompetency either in civil<sup>2</sup> or in criminal cases.<sup>3</sup>

(3) *Both Husband and Wife Parties of Record* — (a) **Statutes Making Parties Competent.** — In one respect the abolition of the interest disqualification has had important results, viz., in cases where both husband and wife are parties. It is clear that a statute which provides that all parties shall be competent witnesses is broad enough to include husband and wife, and so it is held that they may testify for or against each other.<sup>4</sup>

(b) **Statutes Providing Witness Not to Be Incompetent by Reason of Being Party.** — The form usually taken by such statutes, however, is that no person shall be incompetent by reason of interest or because of being a party. Under such a statute it might be argued that the common-law rule as to husband and wife would still prevail. But the opposite view is more reasonable, and it is held almost universally that in actions where both are parties, either as plaintiffs or defendants, and each has an interest in the matter in controversy, each may testify in his or her own behalf, notwithstanding their incompetency to testify in favor of each other, provided, of course, that no testimony is given in violation of the confidence of the marital relation. The consideration that the testimony incidentally may, and probably will, benefit the other is rightly considered subordinate to the legislative will that no one shall be deprived of his own testimony.<sup>5</sup> But the witness must be a party in order to be compe-

of Kan. Gen. St. 1901, § 4771. Lanning v. Gay, (Kan. 1904) 78 Pac. Rep. 810.

And the husband is competent to testify in favor of his wife's testator's estate, in an action brought by the wife in her representative capacity, notwithstanding Code Kan., § 323, providing that husband and wife shall be incompetent to testify for or against each other except in certain cases, and notwithstanding the wife is also indirectly interested in the result of the suit. Van Fleet v. Stout, 44 Kan. 523.

**1. Criminal Cases.** — Reg. v. Humphreys, 9 U. C. Q. B. 337; U. S. v. Crow Dog, 3 Dak. 106; Turpin v. State, 55 Md. 462; Steen v. State, 20 Ohio St. 333; State v. Workman, 15 S. Car. 540.

**2. Testimony Against Each Other.** — Alcock v. Alcock, 16 Jur. 653; Dwelly v. Dwelly, 46 Me. 377; Kelly v. Drew, 12 Allen (Mass.) 107; Breed v. Gove, 41 N. H. 452; Pillow v. Bushnell, 5 Barb. (N. Y.) 156; Mecondray v. Wardle, 26 Barb. (N. Y.) 612; Erwin v. Smaller, 2 Sandf. (N. Y.) 340; Hicks v. Bradner, 2 Abb. App. Dec. (N. Y.) 362; Bihin v. Bihin, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 19; Manchester v. Manchester, 24 Vt. 649.

**3. Criminal Cases.** — Steen v. State, 20 Ohio St. 333.

**4. Statute Making Parties Competent.** — Union Packet Co. v. Clough, 20 Wall. (U. S.) 528; Capital Traction Co. v. Lusby, 12 App. Cas. (D. C.) 295; Chamberlain v. People, 23 N. Y. 85; Marsh v. Potter, 30 Barb. (N. Y.) 506; Hooper v. Hooper, 43 Barb. (N. Y.) 292; Matteson v. New York Cent. R. Co., 62 Barb. (N. Y.) 364. See also Wehkamp v. Willet, 4 Abb. App. Dec. (N. Y.) 548; Shoemaker v. McKee, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 86.

**Husband and Wife Opposing Parties.** — So, also, where husband and wife are opposing parties to an action, each may testify in his or her own behalf. Moore v. Moore, 51 Mo. 118. See also Southwick v. Southwick, 49 N. Y. 510; Westerman v. Westerman, 25 Ohio St. 500.

**As to the Rule in Divorce Cases,** see the title DIVORCE, vol. 9, p. 723.

**5. Right of Party to His Own Testimony** — *England.* — Cadman v. Strong, 10 U. C. Q. B. 591.

*Canada.* — *Contra*, Toms v. Whitby Tp., 32 U. C. Q. B. 249; Storey v. Veach, 22 U. C. C. P. 164. See also Van Norman v. Hamilton, 25 U. C. Q. B. 149.

*Arkansas.* — Klenk v. Knoble, 37 Ark. 298; St. Louis, etc., R. Co. v. Amos, 54 Ark. 159; Little Rock, etc., R. Co. v. Harkey, (Ark. 1891) 15 S. W. Rep. 456.

*Dakota.* — Sanders v. Reister, 1 Dak. 151.

*Florida.* — Schnable v. Betts, 23 Fla. 178; Haworth v. Norris, 28 Fla. 763.

*Illinois.* — Kelly v. Hale, 59 Ill. App. 568; Vercler v. Jansen, 96 Ill. App. 328.

*Indiana.* — Gee v. Lewis, 20 Ind. 149; Palmer v. Henderson, 20 Ind. 297; Lowe v. Hughes, 29 Ind. 399; Crane v. Buchanan, 29 Ind. 570; Albaugh v. James, 29 Ind. 398; Rogers v. Rogers, 46 Ind. 1; McConnell v. Martin, 52 Ind. 434; Wood v. Bibbins, 58 Ind. 392; Scarry v. Eldridge, 63 Ind. 44; Clouse v. Elliott, 71 Ind. 302.

*Kansas.* — Chicago, etc., R. Co. v. Anderson, 42 Kan. 297; Atchison Sav. Bank v. Means, 61 Kan. 857, 58 Pac. Rep. 989; Zimmerman v. Clarke, 9 Kan. App. 889, 58 Pac. Rep. 277; Ruth v. Ford, 9 Kan. 17; Pfeiffer v. State, 39 Kan. 128.

*Louisiana.* — Cosgrove v. His Creditors, 41



tent, and if the action is dismissed as to him he is no longer competent.<sup>1</sup> And if one is not a party, a mere collateral interest in the result is not enough to render him competent.<sup>2</sup> But the fact that judgment is first rendered against one spouse does not make him incompetent.<sup>3</sup>

**Necessity for Interest.**—To make competent a spouse who is a party, it must appear that he or she has an interest in the suit, for if this does not appear, it is obvious that the witness is testifying, not for himself, but for the other spouse, and the common-law prohibition and not the statute must take precedence.<sup>4</sup> But the real party in interest is in all cases competent.<sup>5</sup>

La. Ann. 274; *Schoppel v. Daly*, 112 La. 201. See also *Lehman v. Coulon*, 105 La. 431.

*Massachusetts.*—*Snell v. Westport*, 9 Gray (Mass.) 321.

*Missouri.*—*Reilly v. Hannibal, etc.*, R. Co., 94 Mo. 600; *Edmondson v. Moberly*, 98 Mo. 523; *Fugate v. Pierce*, 49 Mo. 441; *Buck v. Ashbrook*, 51 Mo. 539; *Cooper v. Ord*, 60 Mo. 420; *Steffen v. Bauer*, 70 Mo. 399; *O'Bryan v. Allen*, 95 Mo. 68; *Brownlee v. Fenwick*, 103 Mo. 420; *McKee v. Spiro*, 107 Mo. 452; *Landy v. Kansas City*, 58 Mo. App. 141; *Toovey v. Baxter*, 59 Mo. App. 470.

*New York.*—*Shoemaker v. McKee*, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 86; *Marsh v. Potter*, 30 Barb. (N. Y.) 506; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378; *Schaffner v. Reuter*, 37 Barb. (N. Y.) 44; *Hooper v. Hooper*, 43 Barb. (N. Y.) 292; *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364.

*Pennsylvania.*—*Rowley v. McHugh*, 66 Pa. St. 269.

*Tennessee.*—*Orr v. Cox*, 3 Lea (Tenn.) 617, overruling *Goodwin v. Nicklin*, 6 Heisk. (Tenn.) 256.

*Texas.*—*Cameron v. Fay*, 55 Tex. 58.

*Vermont.*—*In re Hathaway*, 75 Vt. 137.

*Wisconsin.*—*Barnes v. Martin*, 15 Wis. 240; *Hackett v. Bonnell*, 16 Wis. 471.

**Competent by Statute.**—By statute in *Vermont*, when husband and wife are properly joined as plaintiffs or defendants, both may testify. *Swerdferger v. Hopkins*, 67 Vt. 136; *Minard v. Currier*, 67 Vt. 489.

**Wife's Separate Property.**—In an action concerning the separate property of the wife, the husband, if a party, is a competent witness in behalf of his wife. *Hackett v. Bonnell*, 16 Wis. 471; *Snell v. Bray*, 56 Wis. 156; *Hoverson v. Noker*, 60 Wis. 511.

In *Virginia* it was held, prior to the act expressly making husband and wife competent witnesses, that where they were both parties, and both interested in the event of the suit, neither was competent to testify. *Burton v. Mill*, 78 Va. 470; *Norfolk, etc., R. Co. v. Prindle*, 82 Va. 122; *Witz v. Osburn*, 83 Va. 227; *Keagy v. Trout*, 85 Va. 390; *Crabtree v. Dunn*, 86 Va. 953; *De Farges v. Ryland*, 87 Va. 406; *Jones v. Degge*, 84 Va. 685; *Johnson v. Fry*, 88 Va. 695; *Bowman v. Reinhart*, 89 Va. 435. But if one of them, though a party, had no interest in the suit, the other might testify. *Hayes v. Virginia Mut. Protection Assoc.*, 76 Va. 228; *Farley v. Tillar*, 81 Va. 279; *Nicholas v. Austin*, 82 Va. 817; *Thomas v. Sellman*, 87 Va. 683; *Frank v. Lilienfeld*, 33 Gratt. (Va.) 377; *Ratliff v. Vandikes*, 89 Va. 307. But the disinterested spouse was incompetent. *Farley*

*v. Tillar*, 81 Va. 275; *Nicholas v. Austin*, 82 Va. 817.

**Louisiana Statute.**—Under Civ. Code La., art. 2281, providing that "in any case in which the husband or wife may be joined as plaintiffs or defendants, and have a separate interest, they shall be competent witnesses for or against their separate interest therein," the wife may be called to testify against herself, in an action in which she and her husband are codefendants. *Hennen v. Hacker*, 32 La. Ann. 668.

**1. Witness Must Be a Party.**—*Kusch v. Kusch*, 143 Ill. 357.

Where husband and wife are sued together, but no judgment is rendered against the wife, she is not a competent witness for her husband on his appeal, since she is not a joint party on the appeal, as she has no grounds for appealing. *Nutt v. Gaddis*, 10 Kan. App. 358.

**2. Collateral Interest Not Enough.**—*Layson v. Cooper*, 174 Mo. 211.

**Contra.**—Under Laws Wis. 1858, c. 134, § 2, if the husband sues as administrator for damages for the death of a son, the wife may, being a real party in interest, testify in behalf of her husband, though the statute merely renders competent parties to an action. *Strong v. Stevens Point*, 62 Wis. 255.

**3. Judgment Rendered Against One.**—*Atchison Sav. Bank v. Means*, 61 Kan. 857, 58 Pac. Rep. 989. But see *Jenkins v. Levis*, 25 Kan. 479.

**4. Nominal Party Incompetent.**—*Dunfy v. Kelly*, 20 Quebec Super. Ct. 231; *Haerle v. Kreihn*, 65 Mo. 202; *Wood v. Broadley*, 76 Mo. 23; *Rider v. Culp*, 68 Mo. App. 527; *Harrington v. Sedalia*, 98 Mo. 583. See also *Russ v. Steamboat War Eagle*, 14 Iowa 363.

**Especially Against the Other.**—*Burrell Tp. v. Uncapher*, 117 Pa. St. 353.

**5. Real Party in Interest.**—*District of Columbia.*—*Beale v. Brown*, 6 Mackey (D. C.) 574; *Smith v. Cook*, 10 App. Cas. (D. C.) 487.

*Florida.*—*Williams v. Jacksonville, etc., R. Co.*, 26 Fla. 533.

*Indiana.*—*Lockwood v. Joab*, 27 Ind. 423.

*Louisiana.*—*Shantz v. Stoll*, 34 La. Ann. 1237; *Jones v. Texas, etc., R. Co.*, 47 La. Ann. 383. See also *White v. Vicksburg, etc., R. Co.*, 42 La. Ann. 990.

*Missouri.*—*Tingley v. Cowgill*, 48 Mo. 291; *Evers v. Life Assoc.*, 59 Mo. 429; *Quade v. Fisher*, 63 Mo. 325; *Wilcox v. Todd*, 64 Mo. 388; *Scrutchfield v. Sauter*, 119 Mo. 615.

*New York.*—*Babbott v. Thomas*, 31 Barb. (N. Y.) 277; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378.

*Vermont.*—*Robinson v. Hutchinson*, 31 Vt. 443; *Simkins v. Eddie*, 56 Vt. 612.

**Only One Allowed to Testify.** — In one jurisdiction it is provided by statute that in an action where the wife, if unmarried, might have sued, only one spouse may testify. Under the statute it is held that where both husband and wife are parties only one may testify.<sup>1</sup>

**c. STATUTES EXPRESSLY REMOVING INCOMPETENCY** — (1) *Introductory.* — At a comparatively early stage in the development of the law of evidence, the fallacy of the rule prohibiting the testimony of husband and wife for and against each other began to appear to the legislative mind, but so firmly was the doctrine rooted that its abolition has been a slow and gradual process. In very few jurisdictions has the course of legislation assumed the same form, with the result that few general rules can be laid down. In every case the determination of the competency of the husband and wife rests on the words of the local statutes, and it is here possible only to group such legislative enactments as are similar in nature, together with the decisions construing and enforcing the same. The course of legislation has assumed in general two forms. In some jurisdictions husband and wife have been rendered competent for and against each other, with certain exceptions. In other states they have been declared incompetent, except in certain cases. One provision, however, is common to all jurisdictions, viz., that neither spouse shall testify as to confidential communications received from the other.<sup>2</sup>

(2) *Absolute Competency* — (a) *Civil Cases.* — In the great majority of jurisdictions husband and wife are made competent witnesses for each other in civil cases.<sup>3</sup> And the statute is enforced, even if the cause of action arose and the suit was begun before the statute took effect, provided the trial occurs after such period.<sup>4</sup> In a large number of jurisdictions the spouses are also competent against each other in civil cases.<sup>5</sup>

(b) *Criminal Cases.* — In a much smaller number of states the husband or wife of the accused in a criminal case is made competent in his or her behalf.<sup>6</sup> In

*Virginia.* — *Hayes v. Virginia Mut. Protection Assoc.*, 76 Va. 225.

*Wisconsin.* — *Kaime v. Omro*, 49 Wis. 371.

**1. Testimony of One Spouse Only.** — Civ. Code Ky., § 606. See *infra*, this subsection, *c. Statutes Expressly Removing Incompetency* — (7) *Actions in Which Wife Would Be Plaintiff or Defendant if Unmarried.*

**2.** See generally the various local codes and statutes in the United States.

**3. Competent for Each Other** — *United States.* — *In re Domenig*, 128 Fed. Rep. 146.

*Delaware.* — *Nichols v. Vinson*, 9 Houst. (Del.) 274.

*District of Columbia.* — *Mallory v. Frye*, 21 App. Cas. (D. C.) 105.

*Indiana.* — *Brown v. Norton*, 67 Ind. 424.

*Iowa.* — *Auchampaugh v. Schmidt*, 77 Iowa 13.

*Maine.* — *Shepard v. Parker*, 97 Me. 86.

*Mississippi.* — *Saffold v. Horne*, 72 Miss. 470.

*Nebraska.* — *Smith v. Meyers*, 52 Neb. 70.

*Pennsylvania.* — *Chicago Cottage Organ Co. v. McManigal*, 8 Pa. Super. Ct. 632; *Evans v. Evans*, 155 Pa. St. 576; *Norbeck v. Davis*, 157 Pa. St. 399; *Jack v. Kintz*, 177 Pa. St. 571. See also *Dellinger's Appeal*, 71 Pa. St. 425. But see *Taylor v. Kelly*, 80 Pa. St. 95.

*Texas.* — *Cameron v. Fay*, 55 Tex. 58.

And see the codes and statutes in the various states.

In Ohio and Tennessee the only restriction is

as to confidential communications and acts. *Holtz v. Dick*, 42 Ohio St. 23; *Hill v. Fly*, (Tenn. Ch. 1899) 52 S. W. Rep. 731.

**The Wording of the Illinois Statute** implies that the language was intended to be used in a sense so broad as to admit husband and wife to testify for or against each other in all cases, except so far as the act provides otherwise. *Belk v. Cooper*, 34 Ill. App. 649; *Mueller v. Rebhan*, 94 Ill. 142.

**Incompetent in Proceeding by Creditor to Avoid Conveyance.** — By Acts Va. 1893-94, p. 722, and Acts 1897-98, p. 753, husband and wife may testify for or against each other except in a proceeding by a creditor to avoid a conveyance or gift from one to the other on the ground of fraud. *Hoge v. Turner*, 96 Va. 624; *Crowder v. Garber*, 97 Va. 565. But see *Burk v. Putman*, (Iowa 1901) 84 N. W. Rep. 1053.

**Controversy Between Third Parties.** — The widow of a vendor of property is competent as to what took place at the sale in a controversy between third parties though money is still owed to her husband's estate by the vendee. *Little v. Ratliff*, 126 N. Car. 262.

**4. Competent At Time of Trial.** — *Mallory v. Frye*, 21 App. Cas. (D. C.) 105.

**5. Competent Against Each Other.** — *Selfe v. Isaacson*, 1 F. & F. 194; *Westerman v. Westerman*, 25 Ohio St. 500. And see the local statutes.

**6. Competent for Accused.** — *Walker v. State*, 34 Fla. 167; *Com. v. Moore*, 162 Mass. 441; *People v. Hovey*, 92 N. Y. 554; *Dumas v.*

such event the witness is compellable as well as competent.<sup>1</sup> And when the wife is an eye-witness to an occurrence and the husband fails to call her on his behalf, the jury may properly infer that her testimony would be adverse to him.<sup>2</sup> But if the wife testifies in her husband's behalf, it must be assumed that the testimony is voluntary and not given under the husband's coercion, and she is subject to an indictment for perjury if she gives false testimony.<sup>3</sup>

**Testimony Against Spouse.** — In but a few jurisdictions may husband and wife testify against each other without restriction.<sup>4</sup> But in some states the testimony is admitted provided it is voluntarily given by the witness.<sup>5</sup>

**Scope of Cross-examination.** — Where a witness, by virtue of an enabling statute, testifies in favor of the other spouse in a criminal prosecution, he may be cross-examined, but such cross-examination should be limited to the matters as to which he has testified in chief. He must not be compelled, by means of such cross-examination, to testify against the other spouse.<sup>6</sup>

(3) *Competent with Consent of Each Other* — (a) **In Favor of Each Other.** — In a few states there is to be found a provision that consent to the testimony must be given by the spouse of the witness.<sup>7</sup> Where the testimony is in favor of such spouse, the provision would seem to be superfluous, since consent will be implied from merely calling the witness.<sup>8</sup> That the provision may be harmful as well as superfluous is seen from the rule that the witness is incompetent in favor of an insane spouse, since consent in such case cannot be given.<sup>9</sup>

(b) **Against Each Other.** — In several of the states there are statutes providing that neither husband nor wife may testify against each other without consent, except in certain enumerated cases differing in each jurisdiction.<sup>10</sup> Under these statutes, the fact that one spouse avails himself of the right to refuse consent to the examination of the other raises no presumption that the testimony, if given, would be unfavorable to the one so refusing.<sup>11</sup> A refusal by the wife to allow the husband to testify against her does not preclude her from afterward calling on him in her behalf.<sup>12</sup> But if one spouse gives consent he or she thereby waives the statutory privilege completely, and cannot thereafter object to the cross-examination taking a wider range than the direct

State, 14 Tex. App. 464; *Secker v. State*, 28 Tex. App. 479.

**1. Witness Compellable.** — In *Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241, the defendant called his alleged first wife to testify in his behalf, in rebuttal of evidence of their marriage which had been introduced by the state. She refused to be examined, and it was held on appeal that the trial court properly compelled her to testify.

**2. Effect of Failure to Call.** — *People v. Hovey*, 92 N. Y. 554.

**3. Testimony Voluntary.** — *Com. v. Moore*, 162 Mass. 441.

**4. Testimony Against Accused.** — *Gosselin v. Rex*, 33 Can. Sup. Ct. 255; *Everett v. State*, 33 Fla. 661; *Hutchason v. State*, 67 Ind. 449; *State v. Reynolds*, 48 S. Car. 384.

**5. Voluntary Testimony Admitted.** — *State v. Geer*, 48 Kan. 752; *Com. v. Barker*, 185 Mass. 324; *State v. Kenyon*, 18 R. I. 217.

Under the *New York* statute (Laws 1876, c. 182, § 2) providing that a husband or wife should not be compelled to testify against the other, it was held that one spouse would not be allowed to testify against the other, even though willing. *People v. Houghton*, 24 Hun (N. Y.) 501.

**6. Limits of Cross-examination.** — *National German-American Bank v. Lawrence*, 77 Minn. 282; *Johnson v. State*, 28 Tex. App. 17; *Jones*

*v. State*, 38 Tex. Crim. 87; *Penny v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 297; *Merritt v. State*, 39 Tex. Crim. 70; *Bluman v. State*, 33 Tex. Crim. 43.

Asking the defendant's wife if she has not taken a great interest in her husband's behalf in the defense, and whether she has not asked the prosecutrix not to tell anything, which is answered in the negative, is not compelling her to testify against her husband. *Buchanan v. State*, 41 Tex. Crim. 127.

**7. Consent Necessary.** — *In re Holt*, 56 Minn. 33; *Murphy v. Ganey*, 23 Utah 633.

**8. Consent Implied.** — *Murphy v. Ganey*, 23 Utah 633.

**9. Inability to Give Consent.** — *Falk v. Wittram*, 120 Cal. 479.

**10. Statutes Making Consent Necessary.** — *Hubbell v. Grant*, 39 Mich. 641; *Eaton v. Knowles*, 61 Mich. 625; *Berles v. Adsit*, 102 Mich. 495; *Rice v. Rice*, 104 Mich. 371; *Riggs v. Whitaker*, 130 Mich. 327; *Wolford v. Farnham*, 44 Minn. 159; *National German-American Bank v. Lawrence*, 77 Minn. 282; *Huot v. Wise*, 27 Minn. 68; *Lloyd v. Simons*, 90 Minn. 237; *Stanley v. Stanley*, 27 Wash. 570; *Krueger v. Dodge*, 15 S. Dak. 159.

**11. Effect of Refusal.** — *National German-American Bank v. Lawrence*, 77 Minn. 282.

**12. Wolford v. Farnham**, 44 Minn. 159.



examination.<sup>1</sup>

**Criminal Cases.** — Such a provision is also to be found as to the competency of witnesses in criminal cases.<sup>2</sup>

(4) *Agency* — (a) *In General.* — Notwithstanding the rule admitting against one party to the marriage the admissions and declarations of the other, made in the course of his agency,<sup>3</sup> the fact that one spouse has acted as agent for the other constitutes, at common law, no exception to the general rules as to their competency as witnesses,<sup>4</sup> though in some jurisdictions the courts have departed from the common law without the aid of a statute, basing the exception on the ground of necessity and policy.<sup>5</sup>

**Exception as to Books of Entry.** — Where the wife has kept her husband's books of original entry, she is a competent witness for him when he sues on the book account.<sup>6</sup> But it is necessary that they be books of original entry. If she has made up the books from original memoranda, made by him from day to day, she is not thereby rendered a competent witness.<sup>7</sup>

**Statutory Competency.** — But in a number of states, chiefly those in which the statutory removal of incompetency is greatly restricted, it is provided by statute that where the husband or wife acts as agent for the other in any business transaction, the one so acting may be a witness for the other concerning all things done or said within the scope of such agency.<sup>8</sup> And in

1. **Effect of Consent.** — *National German-American Bank v. Lawrence*, 77 Minn. 282.

2. **Criminal Cases.** — *People v. Gordon*, 100 Mich. 518; *State v. Willis*, 119 Mo. 485; *State v. McGrath*, 35 Oregon 109. See also *People v. Fultz*, 109 Cal. 258.

**Effect of Accused Taking the Stand in Own Behalf.** — The defendant by offering himself as a witness does not thereby make his wife competent against him. *State v. McGrath*, 35 Oregon 109.

3. **Admissions of Agent.** — See *supra*, this subsection, a. *At Common Law and under Statutes Declaratory of the Common Law* — (6) *Exceptions to General Rule, Based on Policy* — (c) *Agency*.

4. **Fact of Agency Immaterial.** — *Watkins v. Turner*, 34 Ark. 663; *Haller v. Clark*, 21 D. C. 128; *Seargent v. Seward*, 31 Vt. 509.

**Even When No Other Witness.** — One spouse is incompetent even where he acts as agent, and where there is no other witness to the transaction. *Seargent v. Seward*, 31 Vt. 509.

5. **Departure from the Common Law** — *England*. — See *Reg. v. Mallory*, 13 Q. B. D. 33.

*Alabama.* — *Robison v. Robison*, 44 Ala. 227; *Lang v. Waters*, 47 Ala. 624; *Sumner v. Cooke*, 51 Ala. 521.

*Wisconsin.* — *Birdsall v. Dunn*, 16 Wis. 235; *Hobby v. Wisconsin Bank*, 17 Wis. 167; *O'Connor v. Hartford F. Ins. Co.*, 31 Wis. 160; *Chunot v. Larson*, 43 Wis. 538, 28 Am. Rep. 567; *Engmann v. Immel*, 59 Wis. 249; *Bach v. Parmely*, 35 Wis. 238; *Menk v. Steinfert*, 39 Wis. 370; *Arndt v. Harshaw*, 53 Wis. 269.

6. **Keeping Books of Entry.** — *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Littlefield v. Rice*, 10 Met. (Mass.) 287.

**Vermont Rule.** — A contrary ruling was made in an early Vermont case. One reason given by the court for the decision was that, if the wife were admitted, she would be subject to cross-examination and might be compelled to testify against her husband. *Carr v. Cornell*,

4 Vt. 116. But see *Eastabrooks v. Prentiss*, 34 Vt. 457.

7. **Must Be Books of Original Entry.** — *Eastabrooks v. Prentiss*, 34 Vt. 457.

8. **Agent in Business Transactions** — *England*. — *Lunn v. Houliston*, 14 Quebec Super. Ct. 289.

*United States.* — *American Express Co. v. Lankford*, (C. C. A.) 93 Fed. Rep. 380.

*Illinois.* — *Robertson v. Brost*, 83 Ill. 116; *Pain v. Farson*, 179 Ill. 185; *Sargeant v. Marshall*, 38 Ill. App. 642. See also *Robnett v. Robnett*, 43 Ill. App. 191; *McDavid v. Rork*, 92 Ill. App. 482.

*Massachusetts.* — See *Bliss v. Franklin*, 13 Allen (Mass.) 244; *Burke v. Savage*, 13 Allen (Mass.) 408; *Packard v. Reynolds*, 100 Mass. 153; *Morony v. O'Laughlin*, 102 Mass. 184; *Baxter v. Boston, etc., R. Corp.*, 102 Mass. 383; *Bunker v. Bennett*, 103 Mass. 516.

*Missouri.* — *Curry v. Stephens*, 84 Mo. 442; *Leete v. State Bank*, 115 Mo. 184; *Turner v. Overall*, 172 Mo. 271; *Degenhart v. Schmidt*, 7 Mo. App. 117; *College Hill Press Brick Works v. Thompson*, 59 Mo. App. 98; *McGuire v. De Frese*, 77 Mo. App. 683; *Jesse French Piano, etc., Co. v. Wallace*, 84 Mo. App. 378. See also *Haerle v. Kreihn*, 65 Mo. 202; *Wheeler, etc., Mfg. Co. v. Tinsley*, 75 Mo. 458; *Quade v. Fisher*, 63 Mo. 325; *Flannery v. St. Louis, etc., R. Co.*, 44 Mo. App. 396.

*Vermont.* — *Towne v. Lampshire*, 37 Vt. 52; *Lunay v. Vantyne*, 40 Vt. 501; *Pierce v. Bradford*, 64 Vt. 219; *Farrar v. Bell*, 73 Vt. 342; *Reynolds v. Chynoweth*, 68 Vt. 104. See also *Sanborn v. Cole*, 63 Vt. 590.

*Wisconsin.* — *Engmann v. Immel*, 59 Wis. 249. And see the cases cited throughout the subdivision.

**Canadian Statute.** — Under 35 Vict. (Que.), c. 6, § 9, the right to examine a spouse who has acted as agent for the other is confined to the adverse party. *Foisy v. Lefebvre*, 4 Rev. Leg. 564; *Fourquin v. McGreevy*, 9 Rev. Leg. 383; *Brush v. Stephens*, 17 L. C. Jur. 140; *Lareau v. Beaudry*, 22 L. C. Jur. 336;

two states the competency extends to the case of agency in any transaction.<sup>1</sup> But nothing seems to turn on this different wording.

**Operation and Effect of Statute.** — The statutory competency extends to transactions in which the agency existed before the marriage<sup>2</sup> and remains even after the death of the principal.<sup>3</sup> The witness is competent though he has acted as agent for both parties to the transaction.<sup>4</sup> The operation of the statute is not confined to cases where the cause of action arose out of a transaction conducted by one as agent for the other, but the witness may testify in collateral proceedings as to all matters within the scope of the agency.<sup>5</sup> A married woman, when transacting business as agent for her husband, is on the same footing, as respects her competency to testify as to that particular transaction, as if she were a *feme sole*.<sup>6</sup>

(b) **Proof of Agency** — *aa. NECESSITY OF PROOF.* — This rule of law, whether it is laid down by statute or whether it exists at common law, arises out of the necessities of the situation, and should be closely guarded on account of the temptation to false swearing which such a situation presents. Before such testimony should be admitted all the circumstances requisite to bring it clearly within the exception to the general rule excluding the testimony of husband and wife should be shown. That the agency in fact existed must be shown, and if such proof is not offered the witness is incompetent.<sup>7</sup>

**Estoppel to Dispute Competency.** — If one seeks to charge the defendant on a contract alleged to have been made by the defendant's wife, the plaintiff cannot object to the competency of the wife.<sup>8</sup>

*bb. HOW PROVED.* — In accordance with a general rule of the law of agency either spouse is competent to prove the fact of his agency.<sup>9</sup> The contrary was held in some early decisions in *Missouri*, and still seems to be the law

*Lajeunesse v. Price*, 2 Montreal Super. Ct. 281, citing *Thomson v. Westcott*, S. C. 1873, M. (Beaudry, J.). Compare *Lunn v. Houlston*, 14 Quebec Super. Ct. 289.

1. **Kansas Statute** — "Transactions." — *Pfefferle v. State*, 39 Kan. 128; *Wiggins v. Foster*, 8 Kan. App. 579; *Bell v. Day*, 9 Kan. App. 111.

**Kentucky Statute.** — Code Civ. Pro. Ky., § 606, subd. 1, providing that whenever "a husband or a wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency," authorizes either to testify as to facts within his or her own knowledge, but both cannot testify with reference to the same facts. *Logsdon v. Stern*, (Ky. 1904) 77 S. W. Rep. 927.

2. **Transactions Before Marriage.** — *Teckenbrock v. McLaughlin*, 25 Mo. App. 524.

3. **Competency After Death.** — *Reed v. Crissey*, 63 Mo. App. 184.

4. **Agent for Both Parties.** — *Martin v. Hurlburt*, 60 Vt. 364.

5. **Transaction Need Not Result in Cause of Action.** — *Poppers v. Miller*, 14 Ill. App. 87; *Bliss v. Franklin*, 13 Allen (Mass.) 244, where the wording of the statute was different.

6. **Competency Absolute.** — *Poppers v. Miller*, 14 Ill. App. 87.

7. **Fact of Agency Must Be Established.** — *Fulkerson v. Kilgore*, 10 Okla. 655; *Jenne v. Piper*, 69 Vt. 497; *Goessel v. Davis*, 100 Wis. 678. And see the cases cited *infra*, this subdivision of this section, *What Constitutes*.

8. **Estoppel.** — *Coons v. Drake*, 64 Ill. App. 51. See also *Schneider v. Kabsch*, 91 Ill. App. 386.

9. **Witness May Prove Agency** — *Alabama.* —

*Lang v. Waters*, 47 Ala. 624; *Sumner v. Cooke*, 51 Ala. 521.

*Illinois.* — *Mitchell v. Hughes*, 24 Ill. App. 308.

*Indian Territory.* — *American Express Co. v. Lankford*, 2 Indian Ter. 18, 1 Indian Ter. 233, affirmed (C. C. A.) 93 Fed. Rep. 380.

*Kansas.* — *Wichita, etc., R. Co. v. Kuhn*, 38 Kan. 104; *Pfefferle v. State*, 39 Kan. 128; *Paulsen v. Hall*, 39 Kan. 365; *Green v. McCracken*, 64 Kan. 330.

*Missouri.* — *Williams v. Williams*, 67 Mo. 661; *Wheeler, etc., Mfg. Co. v. Tinsley*, 75 Mo. 458; *Leete v. State Bank*, 115 Mo. 184, overruling on this point *Long v. Martin*, 152 Mo. 668; *Smith v. Wilson*, 160 Mo. 657; *Reed v. Peck*, 163 Mo. 333, overruling *Basye v. Kansas City, etc., R. Co.*, 65 Mo. App. 468; *Orchard v. Collier*, 171 Mo. 390; *Ingerham v. Weatherman*, 79 Mo. App. 480. See also *College Hill Press Brick Works v. Thompson*, 59 Mo. App. 98.

*New York.* — *Hothorn v. Louis*, 52 N. Y. App. Div. 218, affirmed 170 N. Y. 576.

*Wisconsin.* — *O'Conner v. Hartford F. Ins. Co.*, 31 Wis. 160.

And see generally the title AGENCY, vol. 1, p. 969.

The authority given by one spouse to the other to transact his business is not confidential nor intended to be private. Such authority may be in writing or it may be verbal. It is intended to be known and would be worthless unless known. *Schmied v. Frank*, 86 Ind. 250; *McAdow v. Hassard*, 58 Kan. 171; *Bell v. Day*, 9 Kan. App. 111; *Scrutchfield v. Sauter*, 119 Mo. 615. But see *Washington v. Bedford*, 10 Lea (Tenn.) 243.



in *Vermont*.<sup>1</sup>

**6. WHAT CONSTITUTES — Absence of Husband.** — The mere fact that the wife has been left in charge of the house, like any wife in her husband's absence, is not enough to constitute her her husband's agent.<sup>2</sup> Thus, the wife is not a competent witness for her husband in an action of trespass *de bonis asportatis* against a stranger, if she has had no special care of the property intrusted to her.<sup>3</sup> But if the property is left in the care of the wife, with instructions as to what to do with it, the wife is competent as to all matters connected with her care of the property.<sup>4</sup> The agency may also arise from necessity, as where the husband is absent for a long period. In such case, if the house is destroyed by fire, the wife becomes his agent to deal with the insurance companies, and may testify as to facts transpiring within the scope of her agency.<sup>5</sup> In one jurisdiction a more liberal rule has been adopted, and it is held that whenever, in the absence of the husband from his home, the wife acts in protection of property claimed by him, and within the circle of the home, although without any express directions, she is acting as his agent, and is a competent witness as to what she does and resists. She represents him in his absence so far as the preservation and protection of the home and its appurtenances are concerned.<sup>6</sup>

**Purchasing Necessaries.** — The wife is by operation of law the agent of her husband in purchasing necessities, or in borrowing money with which to purchase the same, and is competent as to all facts connected with the purchase.<sup>7</sup>

**Acting in Husband's Presence.** — Where the wife acts in her husband's presence, she cannot be said to act as his agent, and her testimony is not, therefore, admissible.<sup>8</sup> But the fact that the husband was at home at the time of the transaction, and might have known of it, is not enough to disqualify the wife, it not appearing that he was actually present.<sup>9</sup>

**Custom of Vicinity.** — Where, by the usual practice of the country, the wife acts in certain matters for the husband, the person dealing with the wife is supposed to know such general custom and to act on it. But in such case the custom must be a common, general, well-known custom, like other customs of which people are bound to take notice. Where the work she does or the business she carries on, by its very character and nature, gives notice to all that she is authorized by her husband to carry it on, and is the party to deal with, she is a competent witness.<sup>10</sup>

**(c) Competency Limited to Scope of Agency.** — Although the fact of the agency be clearly established, still the testimony must be strictly confined to matters which have come to the knowledge of the witness as a necessary part and parcel of the transaction in which she has been engaged as agent of the other.<sup>11</sup>

**1. Witness Incompetent to Prove Agency.** — *Sanborn v. Cole*, 63 Vt. 590.

**2. Mere Absence of Husband Not Enough.** — *Bates v. Cilley*, 47 Vt. 1; *Meek v. Pierce*, 19 Wis. 300.

**Care of Husband's Dog.** — In an action to recover damages for injuries inflicted on the plaintiff by a vicious dog the fact that the defendant's wife sometimes tied the dog and watched him in her husband's absence does not constitute her his agent so as to let in her testimony in his behalf. *Garrison v. Barnes*, 42 Ill. App. 21.

**3. Hayes v. Parmalee**, 79 Ill. 563; *Poppers v. Wagner*, 33 Ill. App. 113.

**4. Instructions as to Management.** — *Sargeant v. Marshall*, 38 Ill. App. 642.

**5. House Destroyed by Fire.** — *O'Conner v. Hartford F. Ins. Co.*, 31 Wis. 160.

**6. More Liberal Rule.** — *Fisher v. Conway*, 21 Kan. 18.

**7. Purchase of Necessaries.** — *Reed v. Crissey*, 63 Mo. App. 184.

**8. Acts in Presence of Husband.** — *Trepp v. Barker*, 78 Ill. 146; *Waggoner v. Rexford*, 2 Ill. App. 455; *Bates v. Sabin*, 64 Vt. 511; *Pingree v. Johnson*, 69 Vt. 225. See also *Hale v. Danforth*, 40 Wis. 382. *Contra*, *Menk v. Steinfert*, 39 Wis. 370.

**9. Actual Presence Necessary.** — *Lunay v. Vantyne*, 40 Vt. 501.

**10. Custom of Vicinity.** — *Orcutt v. Cook*, 37 Vt. 515. See generally the title *USAGES AND CUSTOMS*, vol. 29, p. 363.

**11. Matters Within Scope of Agency.** — *Mississippi River, etc., R. Co. v. Ford*, 71 Ark. 192; *Robertson v. Brost*, 83 Ill. 116; *Waggoner v. Rexford*, 2 Ill. App. 455; *Robnett v. Robnett*, 43 Ill. App. 191; *Schneider v. Kabsch*, 91 Ill. App. 386; *O'Conner v. Hartford F. Ins. Co.*, 31 Wis. 160; *Hale v. Danforth*, 40 Wis. 382.



Thus, where the wife is sent to demand money, she is not competent to prove admissions of the debtor going to prove a prior contract.<sup>1</sup> The fact that the wife has written letters at her husband's dictation does not make her competent as to the making of a contract alleged to be contained in the letters.<sup>2</sup> Nor does she by writing at her husband's dictation the memorandum of a contract become competent as to its substance.<sup>3</sup> Neither may she testify as to the making of a contract under which she has merely done work for her husband.<sup>4</sup> The fact that the wife, as agent of her husband, has bought goods does not make her competent to prove the value thereof in an action by him for their loss.<sup>5</sup> Nor may the husband testify as to the value of land condemned by a railroad company, merely because he has been authorized by the wife to negotiate with the railroad for a right of way.<sup>6</sup> Again, the husband, by having the management of his wife's property, is not rendered competent as to the ownership thereof, in an action of trespass *de bonis asportatis*.<sup>7</sup> But an agency to "care for" the husband's money includes the right to lend the same.<sup>8</sup> So, too, where the husband goes to a physician as his wife's agent to inquire as to the significance of her symptoms, it is properly within the scope of his agency to ascertain what operation, if any, is necessary to relieve her, and he may testify as to what the physician said.<sup>9</sup>

(5) *Actions Concerning Wife's Separate Estate*.—Another provision found in a few states is one rendering the husband competent in suits concerning his wife's separate estate.<sup>10</sup> Thus, he is competent for her in an action brought by her for an injury to her person,<sup>11</sup> or for malicious prosecution.<sup>12</sup> In an action by the wife to recover damages sustained by the sale of intoxicating liquor to her husband, the latter is a competent witness in her behalf, since what she recovers is exclusively her property.<sup>13</sup> And so where she sues to recover money lost by her husband at gaming.<sup>14</sup> The statutory provision is not limited to cases where the wife is plaintiff or defendant, but is general and extends to all cases where the litigation concerns her separate property. Thus, where a defendant in replevin pleads the separate property of his wife in the goods, the wife is competent to prove that fact.<sup>15</sup>

(6) *Adverse Interests in Separate Property*.—In one state there is a provision to the effect that husband and wife shall be competent in actions respecting the separate property of either, when each is a party to the record,

1. *Robertson v. Brost*, 83 Ill. 116. See also *Hale v. Danforth*, 40 Wis. 382.

2. *Writing Letters*.—*Leavenworth First Nat. Bank v. Wright*, (Mo. App. 1904) 78 S. W. Rep. 686.

3. *Writing Memorandum*.—*Hazer v. Streich*, 92 Wis. 505.

4. *Doing Work under Contract*.—*Gifford v. Wilkins*, 24 Ill. App. 367.

5. *Value of Goods Bought by Agent*.—*Flannery v. St. Louis, etc., R. Co.*, 44 Mo. App. 396.

6. *Value of Land Taken by Railroad*.—*Mississippi River, etc., R. Co. v. Ford*, 71 Ark. 192.

7. *Ownership of Property*.—*White v. Chaney*, 20 Mo. App. 389.

8. *Caring for Money Includes Lending*.—*Green v. McCracken*, 64 Kan. 330.

*Caring for Stock*.—*Chunot v. Larson*, 43 Wis. 536.

9. *Consulting Physicians*.—*Allen v. Voje*, 114 Wis. 1.

10. *Separate Estate of Wife*.—*Kingsbury v. Buckner*, 134 U. S. 650; *Hanna v. Barker*, 6 Colo. 303; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *Mueller v. Rebhan*, 94 Ill. 142;

*Cassem v. Heustis*, 201 Ill. 208; *Booker v. Booker*, 208 Ill. 529; *Ledford v. Weber*, 7 Ill. App. 87; *Toler v. Bishop*, 84 Ill. App. 278; *Pfirshing v. Heitner*, 91 Ill. App. 407.

*Suit for Partition of Land*.—The husband is also competent in behalf of his wife where she sues for partition of land which she with others has inherited. *Pigg v. Carroll*, 89 Ill. 205. See also *Best v. Jenks*, 123 Ill. 447.

11. *Suit by Wife for Personal Injuries*.—*Rock Island v. Deis*, 38 Ill. App. 409; *Anderson v. Moore*, 108 Ill. App. 106.

12. *Malicious Prosecution*.—*Anderson v. Friend*, 71 Ill. 475.

13. *Liquor Sold to Husband*.—*Davenport v. Ryan*, 81 Ill. 218; *Noy v. Creed*, 1 Ill. App. 557.

In the absence of such a statute the husband is not a competent witness in such a case. *Jackson v. Reeves*, 53 Ind. 231.

14. *Money Lost by Husband in Gaming*.—*Johnson v. McGregor*, 55 Ill. App. 530, affirmed 157 Ill. 350.

15. *Wife Need Not Be Party*.—*McNail v. Ziegler*, 68 Ill. 224; *J. Obermann Brewing Co. v. Ohlerking*, 33 Ill. App. 356.

and their claims are opposing.<sup>1</sup> But neither can testify against the other, without consent, unless the interests are adverse.<sup>2</sup>

(7) *Actions in Which Wife Would Be Plaintiff or Defendant if Unmarried.* — It is sometimes provided that husband and wife shall be competent in actions which would be brought by or against the wife if she were unmarried.<sup>3</sup>

**Testimony of One Allowed.** — In *Kentucky*, in such a case, only one spouse is allowed to testify, by the express words of the statute.<sup>4</sup> The statute applies to cases where both spouses are parties;<sup>5</sup> but only when the meritorious cause of action is in the wife;<sup>6</sup> and the prohibition extends only to cases where both seek to testify on the same side.<sup>7</sup> Where one sues alone he has the privilege of taking the stand himself or of calling the other,<sup>8</sup> and should be allowed to withdraw the deposition of the other and testify himself.<sup>9</sup> The fact that the husband is equally interested with the wife in the result of a suit brought by him does not make her incompetent in his behalf,<sup>10</sup> but the husband of one who has already testified is incompetent, although there are several parties equally interested with the wife.<sup>11</sup> To exclude the testimony of one spouse on the ground that the other has already testified, it must appear that such testimony has been given on the trial on the merits. Thus, the wife is not rendered incompetent by proof that the husband testified, on the hearing of a motion for continuance, as to the whereabouts of a material witness.<sup>12</sup>

(8) *Husband and Wife Both Parties of Record.* — In *Vermont* it is provided that when husband and wife are properly joined as plaintiffs or defendants both may testify.<sup>13</sup>

(9) *Proceedings to Set Aside Conveyance from One to Other.* — In *Iowa* it is enacted that husband and wife shall be competent against each other in a civil action brought by a judgment creditor against either to set aside a conveyance of property from one to the other. Such a statute is not open to the constitutional objection of being class legislation.<sup>14</sup> But directly to the contrary is the statute in *Virginia*.<sup>15</sup>

(10) *Refusal to Support Wife.* — In a few jurisdictions it has been considered advisable to render the wife competent against her husband in actions growing out of his neglect to support her.<sup>16</sup> Under such a statute she is not

1. *Michigan Statute.* — *Dowling v. Dowling*, 116 Mich. 346.

2. *Interests Must Be Adverse.* — *Hunt v. Eaton*, 55 Mich. 362; *Blanchard v. Moors*, 85 Mich. 380; *Michigan Beef, etc., Co. v. Coll*, 116 Mich. 261; *Anderson v. Snyder*, 21 W. Va. 632; *Zane v. Fink*, 18 W. Va. 693.

3. *Actions by or Against Wife if Unmarried.* — Ky. Civ. Code Proc., § 606; Ill. Rev. St., c. 51, § 5. See also Ohio Code Civ. Pro., § 314; *Pigg v. Carroll*, 89 Ill. 205.

4. *Only One May Testify.* — *Howard v. Tenney*, 87 Ky. 52; *Wise v. Foote*, 81 Ky. 10; *Allen v. Russell*, 78 Ky. 105.

In *Ohio* the statute was formerly the same. *Nuser v. Beach*, 15 Ohio St. 172; *Robinson v. Chadwick*, 22 Ohio St. 527.

5. *Both Spouses Parties.* — *Covington v. Geyler*, 93 Ky. 275; *Raison v. Williams*, (Ky. 1892) 18 S. W. Rep. 8; *Howard v. Tenney*, 87 Ky. 52.

6. *Limitation of Rule.* — *Henning v. Stevenson*, (Ky. 1904) 80 S. W. Rep. 1135.

7. *May Testify on Opposite Sides.* — *Truitt v. Curd*, (Ky. 1891) 16 S. W. Rep. 364.

8. *Exercise of Privilege.* — *Glover v. Suter*, (Ky. 1897) 38 S. W. Rep. 869; *Smith v. Doherty*, 109 Ky. 616; *Swinchroad v. Bright*, (Ky. 1903) 76 S. W. Rep. 365.

9. *Withdrawing Deposition.* — *Westview Sav. Bank, etc., Co. v. Zooks*, (Ky. 1895) 30 S. W. Rep. 1016; *Floore v. Green*, (Ky. 1904) 83 S. W. Rep. 133.

10. *Interest of Husband Immaterial.* — *Board of Internal Imp. v. Moore*, (Ky. 1902) 66 S. W. Rep. 417.

11. *Other Parties Interested.* — *Williams v. Williams*, (Ky. 1903) 71 S. W. Rep. 505. See also *Henning v. Stevenson*, (Ky. 1904) 80 S. W. Rep. 1135.

12. *Testimony at Preliminary Hearing.* — *Board of Internal Imp. v. Moore*, (Ky. 1903) 74 S. W. Rep. 683.

13. *Vermont Statute.* — *Swerdferger v. Hopkins*, 67 Vt. 136; *Minard v. Currier*, 67 Vt. 489.

14. *Iowa Statute.* — *Burk v. Putnam*, (Iowa 1901) 84 N. W. Rep. 1053.

15. *Virginia Statute.* — *Crowder v. Garber*, 97 Va. 565; *Hoge v. Turner*, 96 Va. 624.

16. *Neglect to Support Wife* — *Illinois.* — *Bea v. People*, 101 Ill. App. 132; *Wilcoxon v. Read*, 95 Ill. App. 33.

*Michigan.* — *People v. Malsch*, 119 Mich. 112.

*Canada.* — *Reg. v. Meyer*, 11 Ont. Pr. 477. For the Common-law Rule, see *supra*, this subsection, a. (6) (a) *Crimes Against Each Other.*

competent in a suit against him for support furnished her, if it appears that he has been willing to receive her back at any time.<sup>1</sup>

(11) *Prosecutions for Bigamy.* — In the federal courts and in some of the states husband and wife are made competent in prosecutions for bigamy.<sup>2</sup>

**14. Competency of Party to Negotiable Instrument to Impeach Its Validity —**  
*a. RULE OF WALTON V. SHELLEY.* — It was held by Lord Mansfield that a person who had signed a negotiable instrument, thereby giving it credit and circulation, should not be permitted to give testimony impeaching its validity after it had passed into the hands of an innocent holder.<sup>3</sup> This rule was adopted in a number of jurisdictions in the *United States*<sup>4</sup> with the qualification that it applied only to parties to negotiable instruments<sup>5</sup> which had actually been negotiated before maturity, in the ordinary course of trade, and had passed into the hands of *bona fide* holders,<sup>6</sup> and to matters only which tended to destroy the validity of an instrument at the time of its execution, thus not precluding the witness from testifying to subsequent matters which

**1. Willingness to Receive Wife.** — *Travis v. Stevens*, 127 Mich. 687.

**2. Prosecutions for Bigamy.** — *State v. Melton*, 120 N. Car. 591; *Ex p. Henderson*, 6 Utah 3. See also Mich. Acts 1897, No. 212.

**In the Federal Courts** the husband or wife is a competent witness, but not compellable. 24 U. S. Stat. at L. 635. See *Ex p. Henderson*, 6 Utah 3.

**3. Walton v. Shelley**, 1 T. R. 300. Compare *Buckland v. Tankard*, 5 T. R. 578, wherein Lord Kenyon expressed his disapproval of the rule.

**As to Common-law Competency of Parties to Negotiable Instruments as Affected by Interest**, see *supra*, this section, 1. *Persons Interested — c. Persons Not Parties of Record* — (9) *Parties to Negotiable Instruments*.

**4. Rule of Walton v. Shelley Adopted in United States — United States.** — *U. S. Bank v. Dunn*, 6 Pet. (U. S.) 51; *Bank of Metropolis v. Jones*, 8 Pet. (U. S.) 12; *Henderson v. Anderson*, 3 How. (U. S.) 73; *Smyth v. Strader*, 4 How. (U. S.) 404; *Saltmarsh v. Tuthill*, 13 How. (U. S.) 229; *Sweeny v. Easter*, 1 Wall. (U. S.) 166; *Nicholls v. Wright*, 4 Cranch (C. C.) 700. *Illinois*. — *Walters v. Smith*, 23 Ill. 342; *Walters v. Witherell*, 43 Ill. 388; *Dewey v. Warriner*, 71 Ill. 108, 22 Am. Rep. 91.

*Maine*. — *Chandler v. Morton*, 5 Me. 374; *Clapp v. Hanson*, 15 Me. 345; *Goodwin v. Chadwick*, 35 Me. 194; *Lincoln v. Fitch*, 42 Me. 456.

*Massachusetts*. — *Knights v. Putnam*, 3 Pick. (Mass.) 184; *Parker v. Lovejoy*, 3 Mass. 565; *Warren v. Merry*, 3 Mass. 27; *Churchill v. Suter*, 4 Mass. 156; *Widgery v. Munroe*, 6 Mass. 449; *Manning v. Wheatland*, 10 Mass. 502; *Butler v. Damon*, 15 Mass. 225; *Hartford Bank v. Barry*, 17 Mass. 94.

*Ohio*. — *Treon v. Brown*, 14 Ohio 482; *Bodkins v. Taylor*, 14 Ohio 489.

*Pennsylvania*. — *Griffith v. Reford*, 1 Rawle (Pa.) 196; *Montgomery County Bank v. Walker*, 9 S. & R. (Pa.) 239, 11 Am. Dec. 709; *Harrisburg Bank v. Forster*, 8 Watts (Pa.) 304; *Harding v. Mott*, 20 Pa. St. 469; *Thompson v. Gettysburg Bank*, 3 Grant Cas. (Pa.) 110.

The witness is incompetent to prove facts that together with other facts would invali-

date the instrument. *Saltmarsh v. Tuthill*, 13 How. (U. S.) 229.

In an action by an indorser against the promisor, one who signed as agent for the promisor is not competent to prove usury. *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123. Compare *Webster v. Vickers*, 3 Ill. 295.

**5. Rule Confined to Negotiable Instruments.** — *Bent v. Baker*, 3 T. R. 35; *U. S. v. Leffler*, 11 Pet. (U. S.) 86; *Pleasants v. Pemberton*, 2 Dall. (Pa.) 196; *Baring v. Shippen*, 2 Binn. (Pa.) 154; *Hepburn v. Cassel*, 6 S. & R. (Pa.) 113. See also *Brown v. Babcock*, 3 Mass. 29; *Hill v. Payson*, 3 Mass. 559; *Hudson v. Hulbert*, 15 Pick. (Mass.) 423; *Worcester v. Eaton*, 11 Mass. 368; *Loker v. Haynes*, 11 Mass. 498; *McFerran v. Powers*, 1 S. & R. (Pa.) 102.

*Contra*. — *Canty v. Sumter*, 2 Bay (S. Car.) 93; *Gilliam v. Clay*, 3 Leigh (Va.) 590; *Wise v. Lamb*, 9 Gratt. (Va.) 294. But see *Knight v. Packard*, 3 McCord L. (S. Car.) 71.

**6. Must Be Negotiated in Usual Course of Business.** — *Pine v. Smith*, 11 Gray (Mass.) 38; *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565; *Bubier v. Pulsifer*, 4 Gray (Mass.) 592; *Newell v. Holton*, 10 Gray (Mass.) 349; *Little v. Rogers*, 1 Met. (Mass.) 108; *Thayer v. Crossman*, 1 Met. (Mass.) 416; *American Bank v. Jenness*, 2 Met. (Mass.) 288; *Myers v. Palmer*, 18 Johns. (N. Y.) 167; *Rohrer v. Morningstar*, 18 Ohio 579; *Baird v. Cochran*, 4 S. & R. (Pa.) 397; *Parke v. Smith*, 4 W. & S. (Pa.) 287. See also *Topping v. Van Pelt*, Hoffm. (N. Y.) 545.

**Indorser Competent for Maker to Prove Usury.** — *Tuthill v. Davis*, 20 Johns. (N. Y.) 285.

A person to whom a bill of exchange had been indorsed as agent of the payee for collection, and who had indorsed it to another in trust for the payee, was competent to prove that fact in an action against the drawer to collect the bill. *Barker v. Prentiss*, 6 Mass. 430.

**Latest Federal Decision.** — In *Metropolitan Nat. Bank v. Jansen*, (C. C. A.) 108 Fed. Rep. 572, it was held that, in a suit against the maker by an indorsee who has taken after maturity, the maker and indorser are competent to show that the note was founded on an illegal consideration.



might defeat the holder, unless he was disqualified on account of interest.<sup>1</sup> In a suit between the original parties the negotiable instrument has not been given currency by anybody and the rule does not apply.<sup>2</sup> So where the legal title remains in the payee, he is competent to impeach the consideration.<sup>3</sup> The rule was applicable only when the note or bill was sued on,<sup>4</sup> and only those were excluded whose names were on the instrument.<sup>5</sup>

**b. RULE OF JORDAINE V. LASHBROOKE.** — This rule, however, was quickly repudiated by the *English* courts, and it was laid down as a general rule that payees and indorsers of negotiable instruments might be admitted to prove them voidable or void *ab initio*, unless the witnesses were disqualified for some other reason.<sup>6</sup> The weight of authority in the *United States* is in support of this latter rule.<sup>7</sup>

**1. Competent as to Matters Subsequent to Inception** — *United States*. — *Frazer v. Carpenter*, 2 McLean (U. S.) 235.

*Georgia*. — *Wendell v. George*, 8 M. Charl. (Ga.) 51.

*Maine*. — *Adams v. Carver*, 6 Me. 390; *Buck v. Appleton*, 14 Me. 284; *Davis v. Sawtelle*, 30 Me. 389.

*Massachusetts*. — *Warren v. Merry*, 3 Mass. 27; *Barker v. Prentiss*, 6 Mass. 430; *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565; *Bubier v. Pulsifer*, 4 Gray (Mass.) 592.

*Mississippi*. — *Williams v. Miller*, 10 Smed. & M. (Miss.) 139; *Partee v. Silliman*, 44 Miss. 272.

*New York*. — *Woodhull v. Holmes*, 10 Johns. (N. Y.) 231; *Skilding v. Warren*, 15 Johns. (N. Y.) 270.

*Ohio*. — *Stone v. Vance*, 6 Ohio 246.

*Pennsylvania*. — *Appleton v. Donaldson*, 3 Pa. St. 385; *Gulliford v. Skinner*, 9 Pa. St. 334; *Maynard v. Nekervis*, 9 Pa. St. 81; *Wilt v. Snyder*, 17 Pa. St. 77; *Pennypacker v. Umberger*, 22 Pa. St. 492.

*South Carolina*. — *Crayton v. Collins*, 2 McCord L. (S. Car.) 457.

*Tennessee*. — *Jones v. Matthews*, 76 Tenn. 84.

**May Testify to Validity of Note as Executed.** — *Goodwin v. Chadwick*, 35 Me. 194.

**2. Suit Between Original Parties.** — *Fox v. Whitney*, 16 Mass. 118; *Davis v. Brown*, 94 U. S. 423.

**3. Legal Title Still in Witness.** — *Watts v. Smith*, 24 Miss. 77.

**4. Rule Applicable Only Where Note Sued On.** — Thus, in an action to recover from a prior indorser the amount advanced to take up the bill, the drawer and acceptor may prove that the bill was indorsed for the accommodation of the party who made the advance. *Wright v. Truefitt*, 9 Pa. St. 507. But in *Deering v. Sawtel*, 4 Me. 191, it was held that the rule applied even where the validity of the instrument came collaterally in question.

**5. Only Those Excluded Whose Names Were on Instrument.** — Thus, a former owner of a coupon payable to bearer was competent to impeach it in the hands of the holder. *Columbia Coal, etc., Co. v. Fox*, 33 Pa. St. 239; *Wilt v. Snyder*, 17 Pa. St. 77.

**6. English Rule.** — *Jordaine v. Lashbrooke*, 7 T. R. 601, overruling *Walton v. Shelley*, 1 T. R. 296; *Jones v. Brooke*, 4 Taunt. 464.

**7. Rule in United States** — *United States*. — See *Metropolitan Nat. Bank v. Jansen*, (C. C. A.) 108 Fed. Rep. 572.

*Arkansas*. — *Tucker v. Wilamouicz*, 8 Ark. 157.

*Connecticut*. — *Townsend v. Bush*, 1 Conn. 260; *Johnson v. Blackman*, 11 Conn. 342.

*Georgia*. — *Slack v. Moss*, *Dudley* (Ga.) 161; *Winkler v. Scudder*, 1 Ga. 108.

*Kentucky*. — See *Gorham v. Carroll*, 3 Litt. (Ky.) 221.

*Maryland*. — *Ringgold v. Tyson*, 3 Har. & J. (Md.) 172; *Hunt v. Edwards*, 4 Har. & J. (Md.) 283.

*Michigan*. — *Orr v. Lacey*, 2 Dougl. (Mich.) 230.

*Missouri*. — *State Bank v. Hull*, 7 Mo. 273. See also *St. John v. McConnell*, 19 Mo. 38.

*New Jersey*. — *Rosevelt v. Gardner*, 3 N. J. L. 358; *Freeman v. Brittin*, 17 N. J. L. 191; *Heath v. Everson*, 17 N. J. L. 245.

*North Carolina*. — *Guy v. Hall*, 3 Murph. (7 N. Car.) 150.

*South Carolina*. — *Farrar v. Metts*, 12 Rich. L. (S. Car.) 667; *Knight v. Packard*, 3 McCord L. (S. Car.) 71, wherein it is said that the case of *Canty v. Sumter*, 2 Bay (S. Car.) 93, was not correctly reported.

*Tennessee*. — *Stump v. Napier*, 2 Yerg. (Tenn.) 35.

*Texas*. — *Parson v. Phipps*, 4 Tex. 341.

*Vermont*. — *Nichols v. Holgate*, 2 Aik. (Vt.) 138 criticised in *Chandler v. Mason*, 2 Vt. 198; *Pecker v. Sawyer*, 24 Vt. 459.

*Virginia*. — *Taylor v. Beck*, 3 Rand. (Va.) 316.

**Alabama.** — In Alabama the court, in *Ross v. Wells*, 1 Stew. (Ala.) 139, apparently adopted the rule laid down by Lord Mansfield, but in subsequent cases the later English rule was followed. *Todd v. Stafford*, 1 Stew. (Ala.) 199; *Griffing v. Harris*, 9 Port. (Ala.) 225; *Adams v. Moore*, 9 Port. (Ala.) 406.

**New Hampshire.** — And in New Hampshire the court first followed the rule of *Walton v. Shelley*, 1 T. R. 300, in *Houghton v. Page*, 1 N. H. 60, and it was subsequently recognized as law in *Bryant v. Ritterbush*, 2 N. H. 212; *Carleton v. Whiteher*, 5 N. H. 196; *Odiorne v. Howard*, 10 N. H. 343. But in *Haines v. Dennett*, 11 N. H. 180, the court, after careful consideration of the question upon principle and authority, overruled these former decisions and adopted the rule of *Jordaine v. Lashbrooke*, 7 T. R. 597.

**New York.** — So, also, in New York, the rule of *Walton v. Shelley*, 1 T. R. 300, was adopted in some early cases. *Winton v. Saidler*, 3 Johns. Cas. (N. Y.) 185; *Coleman v. Wise*,

*c. WHETHER RULE NULLIFIED BY STATUTORY ABOLITION OF INTEREST DISQUALIFICATION.* — Whether the rule of *Walton v. Shelley* has been nullified by the statutory abolition of the interest disqualification has, singularly enough, never been passed upon by any court. The rule being founded, not on interest, but on supposed principles of public policy, it is difficult to see what effect the statutory changes referred to can have. In one jurisdiction it has been held that the rule has been abolished by a statute providing that no "interest or policy of law" shall exclude a witness,<sup>1</sup> and the same result would probably be reached in jurisdictions having similar statutes. It is believed, however, that in no jurisdiction at the present day would the rule be enforced. Such is the opinion of the best text writers.<sup>2</sup>

**V. DETERMINING QUESTION OF COMPETENCY — 1. Time of Making Objection** — *a. BEFORE EXAMINATION IN CHIEF.* — Owing to the preliminary nature of an objection to the competency of a witness, it must be made before the examination in chief, if the fact of incompetency is at that time known to the objecting party.<sup>3</sup> This rule was formerly so strictly adhered to that an objection made after the witness had been sworn in chief came too late to be considered.<sup>4</sup>

*b. DURING EXAMINATION.* — This rule, however, has been greatly relaxed, and in cases where the adverse party was not previously aware of the incompetency of the witness, it has long been the practice to consider the objection whenever, in the course of the examination, cause for excluding him is made to appear, provided the objection is made as soon as the disability of the witness becomes apparent, or at the first opportunity thereafter.<sup>5</sup> The rule

2 Johns. (N. Y.) 165; *Mann v. Swann*, 14 Johns. (N. Y.) 270. But these cases were overruled, and the rule of *Jordaine v. Lashbrooke*, 7 T. R. 597, was adopted as the law of that state. *Stafford v. Rice*, 5 Cow. (N. Y.) 23; *Utica Bank v. Hillard*, 5 Cow. (N. Y.) 153; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Truscott v. Davis*, 4 Barb. (N. Y.) 495.

*Tennessee.* — The force of the decision in *Stump v. Napier*, 2 Yerg. (Tenn.) 35, would seem to be weakened by the later case of *Jones v. Matthews*, 76 Tenn. 84, in which the court refused to state the rule as broadly as had been done in the earlier case, and carefully confined their decisions to the exact facts before them.

**1. Rule Abolished by Statute.** — *State Bank v. Rhoads*, 89 Pa. St. 353.

2. See for example 1 *Wigram on Ev.*, § 529.

**3. Time of Making Objection — Before Examination in Chief — England.** — *Howell v. Lock*, 2 Campb. 14; *Yardley v. Arnold*, 10 M. & W. 145; *Rex v. Watson*, 2 Stark. 116, 3 E. C. L. 341; *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; *Beeching v. Gower*, Holt. 313, 3 E. C. L. 129.

*Colorado.* — *Milsap v. Stone*, 2 Colo. 137.

*Georgia.* — The Georgia Code expressly requires that where the objection to competency is known it shall be made before the examination in chief. *Dowdy v. Watson*, 115 Ga. 42; *Brunswick, etc., R. Co. v. Clem*, 80 Ga. 535.

*Massachusetts.* — *Donelson v. Taylor*, 8 Pick. (Mass.) 390.

*Missouri.* — *Hickman v. Green*, 123 Mo. 165; *State v. Crab*, 121 Mo. 554; *Curtis v. Tyler*, 90 Mo. App. 345.

*Ohio.* — *Inglebright v. Hammond*, 19 Ohio 337, 53 Am. Dec. 430.

*Pennsylvania.* — *Patterson v. Wallace*, 44 Pa.

St. 88; *Scovell v. Wright*, 4 Lack. Leg. N. (Pa.) 303.

*South Carolina.* — *State v. Summer*, 55 S. Car. 32.

**4. Old Rule — Objection Must Be Taken on Voir Dire.** — *Hartshorne v. Watson*, 5 Bing. N. Cas. 477, 35 E. C. L. 187; *Dewdney v. Palmer*, 4 M. & W. 664, overruled in *Jacobs v. Layborn*, 11 M. & W. 685; *Beeching v. Gower*, Holt 313, 3 E. C. L. 129. Compare *Abrahams v. Bunn*, 4 Burr. 2252.

**5. Objection Made During Examination — England.** — *Jacobs v. Layborn*, 11 M. & W. 685; *Reg. v. Whitehead*, 35 L. J. M. C. 186; *Needham v. Smith*, 2 Vern. 463; *Stone v. Blackburn*, 1 Esp. 37; *Yardley v. Arnold*, C. & M. 437, 41 E. C. L. 240.

*British Columbia.* — *Gray v. Macallum*, 2 British Columbia 104.

*California.* — *Brooks v. Crosby*, 22 Cal. 42.

*Iowa.* — *Veiths v. Hagge*, 8 Iowa 163.

*Maine.* — *Butler v. Tufts*, 13 Me. 302; *State v. Damery*, 48 Me. 327.

*Maryland.* — *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 388; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Morton v. Beall*, 2 Har. & G. (Md.) 136.

*Massachusetts.* — *Fisher v. Willard*, 13 Mass. 379; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

*Mississippi.* — *Carter v. Graves*, 6 How. (Miss.) 9.

*New Jersey.* — *Sheridan v. Medara*, 10 N. J. Eq. 469, 64 Am. Dec. 464.

*New York.* — *Swift v. Dean*, 6 Johns. (N. Y.) 523.

*South Carolina.* — *State v. Summer*, 55 S. Car. 32.

*Texas.* — *Johnson v. Alexander*, 14 Tex. 382.

*Virginia.* — *Hill v. Postley*, 90 Va. 200.

holds good even after an objection to the competency has been already overruled.<sup>1</sup> If a witness is competent to testify in reference to some matters and incompetent as to others,<sup>2</sup> the objection need not be taken until it is sought to examine the witness as to the matters about which it is claimed he is incompetent to testify.<sup>3</sup>

*c. EFFECT OF CROSS-EXAMINATION.* — If the objecting party cross-examines the witness on the inadmissible testimony an objection afterwards comes too late.<sup>4</sup> But cross-examination on testimony in chief, after objection, will not waive the objection.<sup>5</sup> And cross-examination as to matters not testified to in chief, being in effect to make said person a witness for the party cross-examining, is a waiver of objection as to his competency.<sup>6</sup> Failure to object to an incompetent witness until after prejudicial evidence has been brought out on cross-examination is also a waiver.<sup>7</sup>

*d. AFTER WITNESS LEAVES STAND.* — But when the witness leaves the box there is an end of all question as to his competency,<sup>8</sup> and it is too late to object when the witness is recalled for further examination,<sup>9</sup> especially if his incompetency appeared when he was first on the witness stand.<sup>10</sup>

*In Criminal Prosecutions and in Equity.* — The above rules apply as well to criminal prosecution as to civil actions;<sup>11</sup> and in equity where there is no examination on the *voir dire*.<sup>12</sup>

*At Any Time During Trial.* — *Gray v. Macallum*, 2 British Columbia 104. *Compure State v. Downs*, 50 La. Ann. 694.

*At First Opportunity.* — An objection on the ground of interest must be distinctly made at the first opportunity after the interest is discovered by the party, or it will be considered as waived. *Jacobs v. Layborn*, 11 M. & W. 685; *Hudson v. Crow*, 26 Ala. 515; *Drake v. Foster*, 28 Ala. 649; *Lewis v. Morse*, 20 Conn. 211; *Kingsbury v. Buchanan*, 11 Iowa 387; *Stuart v. Lake*, 33 Me. 87; *Dent v. Hancock*, 5 Gill (Md.) 120; *Baughner v. Duphorn*, 9 Gill (Md.) 325; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Groshon v. Thomas*, 20 Md. 234. And see *Lindsay v. Montreal Bank*, 13 Grant Ch. (U. C.) 63.

*1. After Objection Already Overruled.* — Where the court has overruled a preliminary objection to the competency of a witness, a subsequent objection may, nevertheless, be sustained, if his incompetency appears in the course of the examination. *Heely v. Barnes*, 4 Den. (N. Y.) 73; *Schillinger v. McCann*, 6 Me. 364. The contrary was held in *Coit v. Bishop*, 2 Root (Conn.) 222; *Mallet v. Mallet*, 1 Root (Conn.) 501. And in *Henderson v. State*, 135 Ala. 43, an objection in such circumstances was held to be waived.

But the motion to strike out the evidence must be made by the party. It is error for the court of its own motion to do so. *Heely v. Barnes*, 4 Den. (N. Y.) 73.

The evidence of an incompetent witness may be withdrawn from the jury on the incompetency appearing during his examination in chief, though he has been examined previously on the *voir dire* and pronounced to be competent. *Reg. v. Whitehead*, L. R. 1 C. C. 33.

*Contra.* — "If the objector attempt to prove incompetency and fail, he is not afterwards permitted to prove it." *Gray v. Macallum*, 2 British Columbia 104. See also *Henderson v. State*, 135 Ala. 43.

*Before Cross-examination.* — An objection to the competency of a witness, made before the cross-examination begins, is not necessarily too late, there being nothing to warrant the inference that it was delayed in order to gain an unfair advantage. *Hill v. Postley*, 90 Va. 200.

That four questions have been put on examination in chief is no waiver of right to except. *Warwick v. Warwick*, 31 Gratt. (Va.) 70.

*2. Brown v. Grove*, 116 Ind. 84.

*3. Dowdy v. Watson*, 115 Ga. 42.

*4. Effect of Cross-examination.* — *Kimball v. Thurman*, 98 Ky. 578; *Dent v. Hancock*, 5 Gill (Md.) 120.

*5. Johnston v. Johnston*, 173 Mo. 91.

*6. Miller v. Miller*, 92 Va. 510.

*7. After Prejudicial Evidence Brought Out.* — *Ladd v. Williams*, (Mo. App. 1904) 79 S. W. Rep. 511; *State v. Burns*, 27 Nev. 289.

*Reason for Rule.* — Where the incompetency is known to the opposing counsel from the commencement of his examination, he ought not to be allowed to lie by and take the chance of the evidence being in his favor, and when he finds it to be unfavorable to him then to take the objection. *Jacobs v. Layborn*, 11 M. & W. 685.

*Privileges of Voir Dire Not Allowed in Cross-examination.* — *Howell v. Lock*, 2 Campb. 14.

*8. After Witness Leaves Stand.* — *Beeching v. Gower*, Holt 313, 3 E. C. L. 129; *Fellingham v. Sparrow*, 9 Dowl. 141; *Snow v. Batchelder*, 8 Cush. (Mass.) 513.

*9. Too Late on Recall.* — *Fellingham v. Sparrow*, 9 Dowl. 141.

*10. Wollaston v. Hakewill*, 3 M. & G. 297, 42 E. C. L. 161; *Powell v. Jarvis*, 5 U. C. Q. B. 489; *Patterson v. Wallace*, 44 Pa. St. 88.

*11. Lovat's Case*, 18 How. St. Tr. 596.

*12. In Equity.* — *Needham v. Smith*, 2 Vern. 463; *Vaughan v. Worrall*, 2 Madd. 322, 2 Swanst. 400; *Selway v. Chappell*, 12 Sim. 113; *Bousfield v. Mould*, 1 De G. & Sm. 347; *Jacobs*



*e. AFTER CONCLUSION OF TRIAL.* — It is too late to make the objection after the conclusion of the trial,<sup>1</sup> unless the party who introduced the incompetent witness has intentionally taken advantage of his adversary by sharp practice.<sup>2</sup>

*f. DEPOSITIONS.* — The time to raise any known objection to the competency of a witness testifying on deposition is at the taking of the deposition, where the party or his attorney attends the taking. If he, with full knowledge of the incompetency of the witness, cross-examines him without objection, the court will not permit him to raise the objection at the hearing.<sup>3</sup> To permit such a course would be to give the objecting party an undue advantage, since in many cases the incompetency may be removed by release or other, wise, or the party in whose behalf the witness is examined may be able to procure other evidence.<sup>4</sup> But the objection may be made at the time of the reading of the deposition at the trial if the facts constituting it were not known to the objecting party when the witness was examined.<sup>5</sup>

*g. WAIVER BY MAKING WITNESS OWN WITNESS.* — The objecting party waives his objection to the incompetency of the witness by making him his own witness.<sup>6</sup>

*v. Layborn*, 11 M. & W. 691; *Swift v. Dean*, 6 Johns. (N. Y.) 523.

**1. After Conclusion of Trial.** — *Turner v. Pearte*, 1 T. R. 717; *Newsom v. Huey*, 36 Ala. 37; *Pease v. Hunt*, 60 Ill. App. 585; *House v. House*, 5 Ind. 237; *Com. v. Green*, 17 Mass. 537; *Curtis v. Tyler*, 90 Mo. App. 345; *State v. Crab*, 121 Mo. 554; *Kash v. Coleman*, 145 Mo. 645; *Jackson v. Barron*, 37 N. H. 494; *Jackson v. Jackson*, 5 Cow. (N. Y.) 173; *McInroy v. Dyer*, 47 Pa. St. 118. See also *Essex Bank v. Rix*, 10 N. H. 201. *Compare Com. v. Waite*, 5 Mass. 261.

**Canada.** — The objection of a defendant in a criminal case that he was not a competent or compellable witness, taken for the first time on appeal, was considered and the conviction quashed in *Reg. v. Becker*, 20 Ont. 676, citing *Garrett v. Roberts*, 10 Ont. App. 650.

**2.** *Wade v. Simeon*, 2 C. B. 342, 52 E. C. L. 342; *Niles v. Brackett*, 15 Mass. 378.

**3. At Deposition of Witness of Opposite Party** — *England.* — *Corporation, etc., v. Wilson*, 1 Vern. 254; *Ogle v. Paleski*, Holt 485, 3 E. C. L. 193; *Bland v. Armagh*, 3 Bro. P. C. (Toml. ed.) 620.

*United States.* — *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 400.

*Alabama.* — *Drake v. Foster*, 28 Ala. 649; *Hudson v. Crow*, 26 Ala. 515.

*California.* — *Brooks v. Crosby*, 22 Cal. 42. *Missouri.* — *Ladd v. Williams*, (Mo. App. 1904) 79 S. W. Rep. 511.

*New York.* — *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 415; *Mohawk Bank v. Atwater*, 2 Paige (N. Y.) 54; *Town v. Needham*, 3 Paige (N. Y.) 545; *Gregory v. Dodge*, 14 Wend. (N. Y.) 593, affirming 4 Paige (N. Y.) 558.

*Virginia.* — *Hord v. Colbert*, 28 Gratt. (Va.) 49.

**Reading Deposition in Evidence.** — And a party reading in evidence a portion of the opposite party's deposition before it had been offered on behalf of such opposite party thereby waives the incompetency of such party. *In re Souldard*, 141 Mo. 642.

**Taking Deposition to Break Testimony.** — But

the taking of depositions of witnesses to break the force of their testimony, as given in their depositions previously taken by the adverse party, is not a waiver of an objection to the competency of the witnesses. *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384.

**After Objection Made.** — Having made the objection, however, in due season, he may then proceed to cross-examine, without prejudice to his right to move to suppress the deposition at the hearing. *Hord v. Colbert*, 28 Gratt. (Va.) 49.

*Miffin v. Bingham*, 1 Dall. (Pa.) 272, is not really authority for permitting objections to be made at the hearing when none were made at the examination of the witness. In that case the witness, who was about to depart on a voyage, was examined under a rule subject to all legal exceptions at the trial. See *Hord v. Colbert*, 28 Gratt. (Va.) 49.

**In Proceedings Before an Examiner** the proper way is to note the objection to competency and take the evidence and not to interrupt the proceedings for the opinion of the court. *De Roux v. Girard*, 90 Fed. Rep. 537.

**4. Reason for Rule.** — *Snow v. Batchelder*, 8 Cush. (Mass.) 513; *Mohawk Bank v. Atwater*, 2 Paige (N. Y.) 60; *Town v. Needham*, 3 Paige (N. Y.) 551; *Gregory v. Dodge*, 14 Wend. (N. Y.) 593, affirming 4 Paige (N. Y.) 558.

**5. Where Objection Not Known at Time of Deposition.** — *U. S. v. One Case Hair Pencils*, 1 Paine (U. S.) 400; *Talbot v. Clark*, 8 Pick. (Mass.) 51. See also the title *DEPOSITIONS*, 6 ENCYC. OF PL. AND PR. 599.

**6. Waiver by Making Witness Own Witness.** — *Hoehn v. Struttman*, 71 Mo. App. 399; *Saettele v. Metropolitan L. Ins. Co.*, 86 Mo. App. 156; *Hume v. Hopkins*, 140 Mo. 65; *Ess v. Griffith*, 139 Mo. 322; *Ratliff v. Ratliff*, (Va. 1904) 47 S. E. Rep. 1007.

Where a party to a suit is incompetent to testify, the taking of his deposition by the opposite party constitutes a waiver of the incompetency, but if the party whose deposition is so taken relies on the waiver as entitling him to testify, he must suggest that to the trial court. *Tomlinson v. Ellison*, 104 Mo. 105.

1. **WAIVER BY STIPULATION.** — Objection to competency may be waived by stipulation.<sup>1</sup>

2. **Specifying Ground of Objection.** — In many cases a witness may be competent to testify concerning some of the facts in issue, though incompetent as to others, and therefore should not be rejected generally. It follows that the objection should be sufficiently specific to enable the court to pass on the competency of the witness as regards the particular facts which he is called to prove, as well as to allow the opposite party to remove the incompetency, if possible.<sup>2</sup>

**Objections to Testimony Are Not Objections to Competency of Witness.** — Objections to the evidence given by a witness do not raise the question of the competency of the witness.<sup>3</sup>

3. **Evidence on Question of Competency** — *a.* **EXAMINATION ON VOIR DIRE.** — A witness is said to be examined on the *voir dire* when he is sworn and examined in regard to facts touching his competency to testify as a witness in the cause on trial. This is usually done before the witness is sworn in chief, and formerly this rule was strictly adhered to;<sup>4</sup> but the rule has been relaxed,<sup>5</sup> and generally it may now be done at any time during the examination, if it is done whenever the incompetency is discovered, though in that case the formality of swearing on the *voir dire* is not necessary.<sup>6</sup> An exception to the usual rule of evidence is that the witness may, if necessary, testify to the contents of written documents which are not in court so far as they contain matters affecting his competency to testify in the cause, because a party, if he did not know the witness was to be called, could not reasonably be expected to be prepared with the best evidence,<sup>7</sup> though if such documents be in court they are themselves the best evidence of their contents and on production by the witness they must be read.<sup>8</sup> And where the disqualification of the witness

1. **Waiver by Stipulation.** — *Brooks v. Crosby*, 22 Cal. 42.

But the statutory incompetency of a wife to testify against her husband in a criminal prosecution cannot be waived. *Brock v. State*, 44 Tex. Crim. 335.

2. **Objection Should Be Specific.** — *Bent v. Baker*, 3 T. R. 35; *Wright v. Rogers*, 3 McLean (U. S.) 229; *Prather v. Lentz*, 6 Blackf. (Ind.) 244; *Brown v. Grove*, 116 Ind. 84; *White Water Valley Canal Co. v. Dow*, 1 Ind. 141; *Pegg v. Warford*, 7 Md. 582; *Leach v. Kelsey*, 7 Barb. (N. Y.) 466.

**Objection Limited to Ground Specified.** — If not explicitly stated at the trial, the ground of objection will not be considered on a review of the case, and where objection is specifically taken the party is bound by that limitation and cannot on appeal be allowed to set up any other interest as affecting the witness's testimony. *Bunker v. Gilmore*, 40 Me. 90.

3. **Objections to Testimony Not Objections to Competency.** — *State v. Hughes*, 106 Iowa 125; *White v. Smith*, 54 Iowa 233; *Ball v. Keokuk*, etc., R. Co., 74 Iowa 132; *Chicago*, etc., R. Co. v. *Behney*, 48 Kan. 47; *Coles v. Shepard*, 30 Minn. 446; *U. S. Leather Co. v. Aldrich*, 75 N. Y. App. Div. 616.

4. *Dewdney v. Palmer*, 4 M. & W. 664.

5. *Turner v. Pearte*, 1 T. R. 717.

6. *Opinion of Baron Rolfe in Jacobs v. Layborn*, 11 M. & W. 688.

7. **Witness May Testify to Documents Not Produced** — *England*. — *Butcher's Co. v. Jones*, 1 Esp. 160; *Botham v. Swingler*, 1 Esp. 164;

*Rex v. Gisburn*, 15 East 57; *Lunniss v. Row*, 10 Ad. & El. 606, 37 E. C. L. 191; *Carlisle v. Eady*, 1 C. & P. 234, 11 E. C. L. 378; *Brockbank v. Anderson*, 7 M. & G. 295, 49 E. C. L. 295; *Butler v. Carver*, 2 Stark. 433, 3 E. C. L. 477; *Lucas v. Eades*, 2 Dowl. N. S. 424; *Perryman v. Steggall*, 5 C. & P. 197, 24 E. C. L. 276.

*Alabama*. — *Herndon v. Givens*, 16 Ala. 261. *Connecticut*. — *Stebbins v. Sackett*, 5 Conn. 258.

*Illinois*. — *Babcock v. Smith*, 31 Ill. 57.

*Maine*. — *Miller v. Mariner's Church*, 7 Me. 54.

*Maryland*. — *Hays v. Richardson*, 1 Gill & J. (Md.) 366.

*New Jersey*. — *Mayo v. Gray*, 3 N. J. L. 405.

*Wisconsin*. — *McDonald v. Ashland*, 78 Wis. 251.

**Pardon Need Not Be Produced.** — If it be shown by the preliminary examination of a witness that he has been convicted of felony, it may also be shown by him that he has been pardoned. It is not necessary to produce the pardon. *Houser v. Com.*, 51 Pa. St. 332.

8. **If Documents in Court, Must Be Read.** — *Butler v. Carver*, 2 Stark. 434, 3 E. C. L. 477; *Gumcester v. Phillips*, 4 Ad. & El. 550, 31 E. C. L. 132; *Quarterman v. Cox*, 8 C. & P. 97, 34 E. C. L. 309; *Carlisle v. Eady*, 1 C. & P. 234, note, 11 E. C. L. 378, note. And see *Hamblett v. Hamblett*, 6 N. H. 333.

In *Goodhay v. Hendry*, M. & M. 319, 22 E. C. L. 321, it was held that where the witness stands disqualified, and the objector knew of the incompetency, he must come prepared with

appears from his own testimony, it may be removed by his further examination, even though there be documentary evidence of the restoration of his competency, under the rule that the incompetency of a witness may be removed by the same kind of evidence by which it is shown.<sup>1</sup> But if the party who called the witness attempts to remove the objection by independent proof, and not by questioning the witness himself, he will be subject to all the ordinary rules of evidence, and the best proof will be required.<sup>2</sup> According to the practice as it has long been established, the objecting party may either have the witness sworn and examined on the *voir dire* or permit him to be sworn in chief and make his objection when, in the course of the examination, any ground therefor first appears, in which case, if the objection is sustained, the court will order the evidence already given by the witness to be stricken out.<sup>3</sup> The exercise of this option should not be restrained by the court, because, as we have seen, the disqualification of the witness is frequently evidenced by written instruments which the objecting party cannot produce at the trial, and to compel him to forego the examination on the *voir dire*, and rely on his bringing to light the disqualifying facts after the witness has been sworn in chief, might, under the rules of evidence, deprive him of his only means of getting rid of an incompetent hostile witness.<sup>4</sup>

*b. PROOF FROM OTHER SOURCES.* — A party who objects to a witness on the ground that he is incompetent is not confined to the examination on the *voir dire*. He may introduce other evidence, either written or verbal, of the facts on which he relies to sustain his objection.<sup>5</sup> In some early English cases it was ruled that both of these modes of proving incompetency could not be pursued on the same objection; that the election of one conclusively barred any subsequent recourse to the other.<sup>6</sup> But this rule has been discarded in *England* as having no substantial foundation in reason.<sup>7</sup> In the *United States*, however, the early English rule has been strictly followed in most cases.<sup>8</sup> A failure to prove one set of facts relied on to exclude the

the best evidence, and a bankrupt's release without his certificate was held not to be enough. *Lunniss v. Row*, 10 Ad. & El. 606, 37 E. C. L. 191, and *Carlisle v. Eady*, 1 C. & P. 234, 11 E. C. L. 378, show that this case has not been followed.

**1. Witness's Disqualification Appearing from His Own Testimony May Be Removed by His Own Testimony** — *England*. — *Carlisle v. Eady*, 1 C. & P. 234, 11 E. C. L. 378; *Lunniss v. Row*, 10 Ad. & El. 606, 37 E. C. L. 191; *Butchers' Co. v. Jones*, 1 Esp. 160; *Brockbank v. Anderson*, 7 M. & G. 295, 49 E. C. L. 295; *Wells v. Fletcher*, 5 C. & P. 12, 24 E. C. L. 190.

*Alabama*. — *Tarleton v. Johnson*, 25 Ala. 300, 60 Am. Dec. 515.

*Illinois*. — *Ault v. Rawson*, 14 Ill. 484.

*Louisiana*. — *McMicken v. Fair*, 6 Mart. N. S. (La.) 515.

*New York*. — *Fanning v. Myers*, Anth. N. P. (N. Y.) 47.

*Pennsylvania*. — *Blackstock v. Leidy*, 19 Pa. St. 335.

**2. Where Best Evidence Required.** — *Corking v. Jarrard*, 1 Campb. 37; *Botham v. Swingler*, 1 Esp. 164. And see *Southard v. Wilson*, 21 Me. 491.

**When the Disqualification Is Shown Aliunde** the witness cannot by his own evidence remove the objection. *Montgomery*, etc., *Plank Road Co. v. Webb*, 27 Ala. 618; *Gordon v. Bowers*, 16 Pa. St. 226.

**3. Evidence Stricken Out on Objection Appearing.**

— *Turner v. Pearte*, 1 T. R. 720; *Stone v. Blackburn*, 1 Esp. 37; *Howell v. Lock*, 2 Campb. 14; *Jacobs v. Layborn*, 11 M. & W. 690; *Evans v. Eaton*, 1 Pet. (C. C.) 322, reversed on other grounds, 3 Wheat. (U. S.) 454; *U. S. Fidelity, etc., Co. v. Damskipsaktieselskabet Habil*, 138 Ala. 348; *Butler v. Butler*, 3 Day (Conn.) 214; *Stuart v. Lake*, 33 Me. 87; *Fisher v. Willard*, 13 Mass. 379; *Gordon v. Bowers*, 16 Pa. St. 226; *Bank of North America v. Wikoff*, 2 Yeates (Pa.) 39, 4 Dall. (Pa.) 151; *Dorr v. Osgood*, 2 Tyler (Vt.) 28.

**4.** *Seeley v. Engell*, 13 N. Y. 545, reversing 17 Barb. (N. Y.) 530.

**5. Proof from Other Sources.** — *Wakefield's Case*, 2 Lewin C. C. 279; *Thrasher v. Tulloch*, 5 U. C. Q. B. O. S. 326; *Dowdy v. Watson*, 115 Ga. 42; *Davis v. Whiteside*, 4 J. J. Marsh. (Ky.) 116; *Smallwood v. Mitchell*, 2 Hayw. (3 N. Car.) 145; *Cotchet v. Dixon*, 4 McCord L. (S. Car.) 311; *Chambers v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 192.

**6.** *Bewdley's Case*, 10 Mod. 151; *Reg. v. Muscot*, 10 Mod. 193; *Lovat's Case*, 18 How. St. Tr. 596.

**7.** Opinion of Lord Abinger, Chief Baron, in *Jacobs v. Layborn*, 11 M. & W. 685; *Thrasher v. Tulloch*, 5 U. C. Q. B. O. S. 326.

**8. United States — Party Must Elect Which Mode of Proving Incompetency He Is to Follow** — *United States*. — *The Watchman*, 1 Ware (U. S.) 232.

*Connecticut*. — *Stebbins v. Sackett*, 5 Conn.



witness, will not, however, preclude the objecting party from examining the witness on the *voir dire* in regard to other facts on which an objection is made;<sup>1</sup> and an objection based on the opposing party's own evidence already in the case is not such an attempt to prove the incompetency of the witness by evidence *aliunde* as will preclude a resort to an examination on the *voir dire*.<sup>2</sup> Though, after an examination on the *voir dire*, other evidence may not be introduced to contradict the witness, yet if it afterwards appears in the course of the examination, on the facts at issue and on trial, that the witness is incompetent, the court may sustain a motion to expunge his testimony.<sup>3</sup> The unsworn declarations of the witness touching his interest in the matter in controversy are merely hearsay and are not admissible in evidence on the question of his competency;<sup>4</sup> though the statements of the party who introduces him, being in the nature of admissions against interest, may be proved in order to exclude the witness.<sup>5</sup> When the competency of a witness has

258; *Mallet v. Mallet*, 1 Root (Conn.) 501; *Chance v. Hine*, 6 Conn. 231; *Butler v. Butler*, 3 Day (Conn.) 214.

*Georgia*.—Dowdy *v. Watson*, 115 Ga. 42. *Illinois*.—Walker *v. Collier*, 37 Ill. 362; *Diversy v. Will*, 28 Ill. 216; *Waghoph v. Weeks*, 22 Ill. 350.

*Kentucky*.—Davis *v. Whiteside*, 4 J. J. Marsh. (Ky.) 116.

*Maine*.—Le Barron *v. Redman*, 30 Me. 536; *Stuart v. Lake*, 33 Me. 87.

*Massachusetts*.—Bridge *v. Wellington*, 1 Mass. 219.

*New York*.—Welden *v. Buck*, Anth. N. P. (N. Y.) 9.

*Ohio*.—Bisbee *v. Hall*, 3 Ohio 449.

*Pennsylvania*.—Gordon *v. Bowers*, 16 Pa. St. 226; *Schnader v. Schnader*, 26 Pa. St. 384; *Davis v. Barr*, 9 S. & R. (Pa.) 138; *Anderson v. Young*, 21 Pa. St. 447; *Mifflin v. Bingham*, 1 Dall. (Pa.) 272.

*Tennessee*.—M'Alister *v. Williams*, 1 Overt. (Tenn.) 107.

*Vermont*.—Dorr *v. Osgood*, 2 Tyler (Vt.) 28.

**Reading Document Not a Resort to Both Methods.**—Hamblett *v. Hamblett*, 6 N. H. 333.

In *Florida* the modern English rule is adopted. Thus, in *Hooker v. Johnson*, 6 Fla. 730, a witness for the plaintiff was examined by the defendant on the *voir dire*, and denied his interest in the suit. The defendant then offered to prove by other witnesses that the witness objected to was in fact a partner of the plaintiff. The trial court refused to permit him to do so, and for this error the judgment was reversed.

**Further Examination.**—A witness having denied his interest on the *voir dire* may be further interrogated as to his situation for the purpose of discovering his interest. *Reid v. Dodson*, 1 Overt. (Tenn.) 396; *Blackwell v. Hagerman*, 3 N. J. L. 585.

**A Contrary Ruling** was sustained in *Moore v. Sheridan*, 2 Har. & M. (Md.) 453.

**1. Different Mode May Be Followed on Different Ground.**—Though the election of one mode precludes recourse to the other on the same ground, yet a resort to one mode on one ground does not preclude recourse to the other on a different ground. *Stebbins v. Sackett*, 5 Conn. 258.

**2. Bridge v. Wellington**, 1 Mass. 219. *Com-*

*pare Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

**3. Incompetency Appearing on Facts at Issue.**

—Butler *v. Tufts*, 13 Me. 302; *Schillinger v. McCann*, 6 Me. 364; *Le Barron v. Redman*, 30 Me. 537; *Chatfield v. Lathrop*, 6 Pick. (Mass.) 417; *Hamblett v. Hamblett*, 6 N. H. 351; *Heely v. Barnes*, 4 Den. (N. Y.) 73; *Davis v. Barr*, 9 S. & R. (Pa.) 138.

**4. Unsworn Declarations of Witness Not Admissible**—*Alabama*.—Densler *v. Edwards*, 5 Ala. 31.

*Illinois*.—Waghoph *v. Weeks*, 22 Ill. 350.

*Kentucky*.—Jones *v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; *Freeman v. Luckett*, 2 J. J. Marsh. (Ky.) 390; *Davis v. Whiteside*, 4 J. J. Marsh. (Ky.) 116.

*Maine*.—Young *v. Garland*, 18 Me. 409; *Stuart v. Lake*, 33 Me. 87.

*Maryland*.—Stimmel *v. Underwood*, 3 Gill & J. (Md.) 282, *overruling Colston v. Nicols*, 1 Har. & J. (Md.) 105.

*Massachusetts*.—Com. *v. Waite*, 5 Mass. 261; *Peirce v. Chase*, 8 Mass. 487.

*New Hampshire*.—Rich *v. Eldredge*, 42 N. H. 153.

*New York*.—Jackson *v. Gridley*, 18 Johns. (N. Y.) 99.

*North Carolina*.—Ingram *v. Watkins*, 1 Dev. & B. L. (18 N. Car.) 442.

*Ohio*.—Dunn *v. Cronise*, 9 Ohio 82.

*Pennsylvania*.—Walker *v. Coursin*, 19 Pa. St. 321; *Pollock v. Gillespie*, 2 Yeates (Pa.) 129; *Fernsler v. Carlin*, 3 S. & R. (Pa.) 130.

*South Carolina*.—Cotchet *v. Dixon*, 4 McCord L. (S. Car.) 311.

*Tennessee*.—Vining *v. Wooten*, 1 Cooke (Tenn.) 127.

*Vermont*.—Nichols *v. Holgate*, 2 Aik. (Vt.) 138.

**5. Party's Admissions.**—*Peirce v. Chase*, 8 Mass. 487; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Walker v. Coursin*, 19 Pa. St. 321.

**The Confession of the Party** is the proper proof of the interest of the witness. The declaration of the witness would be hearsay. Witnesses cannot be permitted to testify to their own competency. *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Jackson v. Gridley*, 18 Johns. (N. Y.) 99; *Nichols v. Holgate*, 2 Aik. (Vt.) 138.

been successfully attacked, the party offering him may introduce evidence to sustain his competency.<sup>1</sup> But if it is made to appear, by evidence other than the testimony of the witness himself, that he is incompetent, he may not be examined for the purpose of removing the objection.<sup>2</sup>

**Presumption of Competency.** — There is always a presumption, both in civil and criminal cases, in favor of the competency of a witness above fourteen years of age who is neither a party to the action nor the husband or wife of a party, and the burden of establishing the facts which render him incompetent rests on the party who makes the objection.<sup>3</sup>

**4. Competency a Question for the Court.** — In deciding the question of the competency of a witness, the court is not only the judge of the law, but also of the preliminary questions of fact necessary to be decided in order to determine the question of competency, the subsequent question of credibility being, of course, for the jury.<sup>4</sup>

1. *State v. Twitty*, 2 Hawks (9 N. Car.) 449.

If, after the examination on the *voir dire*, the witness is *prima facie* interested, the party calling him should satisfy the court that his competency is free from legal exception. If this were left doubtful his exclusion would constitute no ground of reversal. *Story v. Saunders*, 8 Humph. (Tenn.) 665.

**2. Witness's Own Testimony Cannot Remove Competency Proved Aliunde** — *Alabama*. — *Hiscox v. Hendree*, 27 Ala. 216; *Carroll v. Pathkiller*, 3 Port. (Ala.) 279.

*Illinois*. — *Diversy v. Will*, 28 Ill. 216.

*Iowa*. — *Robinson v. Turner*, 3 Greene (Iowa) 540.

*Louisiana*. — *Evans v. Gray*, 1 Martin N. S. (La.) 709.

*Maine*. — *Southard v. Wilson*, 21 Me. 494; *Hobart v. Bartlett*, 17 Me. 429.

*New York*. — *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

*North Carolina*. — *Murray v. Marsh*, 2 Hayw. (3 N. Car.) 290.

*Pennsylvania*. — *Anderson v. Young*, 21 Pa. St. 443; *Banks v. Clegg*, 14 Pa. St. 390; *Vincent v. Huff*, 4 S. & R. (Pa.) 298.

*Vermont*. — *Fay v. Green*, 1 Aik. (Vt.) 71.

**3. Presumption of Competency** — *England*. — *Marsden v. Stansfield*, 7 B. & C. 815, 14 E. C. L. 137. See also *Carter v. Pearce*, 1 T. R. 163.

*Canada*. — *Gray v. Macallum*, 2 British Columbia 104.

*United States*. — See *Taylor v. U. S.*, 3 How. (U. S.) 206.

*Alabama*. — *Densler v. Edwards*, 5 Ala. 31.

*Connecticut*. — *Carrington v. Holabird*, 17 Conn. 530.

*Delaware*. — *State v. Brown*, 2 Marv. (Del.) 380.

*Georgia*. — *Dowdy v. Watson*, 115 Ga. 42; *Richardson v. Hoge*, 24 Ga. 203; *Adams v. Barrett*, 3 Ga. 277. See also *Howard v. Brown*, 3 Ga. 523.

*Indiana*. — *State v. Holloway*, 8 Blackf. (Ind.) 15.

*Iowa*. — *State v. King*, 117 Iowa 484.

*Kentucky*. — *Smith v. White*, 5 Dana (Ky.) 376; *Anderson v. Irvine*, 5 B. Mon. (Ky.) 488; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509.

*Maryland*. — *Watts v. Garrett*, 3 Gill & J. (Md.) 355; *Callis v. Tolson*, 6 Gill & J. (Md.) 80; *Renwick v. Williams*, 2 Md. 356; *Pegg v. Warford*, 7 Md. 582. See also *Hall v. Gittings*, 2 Har. & J. (Md.) 112.

*Michigan*. — *Norris v. Hurd*, Walk. (Mich.) 102.

*Nebraska*. — *Sorensen v. Sorensen*, 56 Neb. 729.

*New Jersey*. — *Hulshart v. Hart*, 1 N. J. L. 62.

*New York*. — *Henry v. New York*, etc., R. Co., 57 Hun (N. Y.) 76, 19 Civ. Pro. (N. Y.) 188; *Duel v. Fisher*, 4 Den. (N. Y.) 515; *People v. Mateson*, 2 Cow. (N. Y.) 433, note. And see *Howell v. Delancey*, 4 Cow. (N. Y.) 427.

*Ohio*. — See *Cox v. Hill*, 3 Ohio 411.

*Pennsylvania*. — *Com. v. Mudgett*, 174 Pa. St. 211.

*South Carolina*. — *Cotchet v. Dixon*, 4 McCord L. (S. Car.) 311; *Lott v. Sandifer*, 2 Mill (S. Car.) 167. See also *Saxon v. Boyce*, 1 Bailey L. (S. Car.) 66.

**4. Competency — Court Is Judge of Law and Fact** — *England*. — *Reg. v. Whitehead*, 10 Cox C. C. 234; *Reg. v. Hill*, 5 Cox C. C. 259; *Doe v. Webster*, 12 Ad. & El. 442, 40 E. C. L. 88; *Bartlett v. Smith*, 11 M. & W. 483; *Doe v. Pearce*, 5 M. & W. 506.

*United States*. — *Pittsburgh*, etc., R. Co. v. *Thompson*, (C. C. A.) 82 Fed. Rep. 720; *Wright v. Southern Express Co.*, 80 Fed. Rep. 85; *Wakefield v. Ross*, 5 Mason (U. S.) 16.

*Alabama*. — *Worthington v. Mencer*, 96 Ala. 310; *Campbell v. State*, 23 Ala. 44; *Pierce v. State*, 124 Ala. 66.

*California*. — *Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920; *People v. Daily*, 135 Cal. 104.

*Connecticut*. — *Holcomb v. Holcomb*, 28 Conn. 177; *Cook v. Mix*, 11 Conn. 432.

*Delaware*. — *State v. Brown*, 2 Marv. (Del.) 380.

*Georgia*. — *Dowdy v. Watson*, 115 Ga. 42. But see *Gainesville v. Caldwell*, 81 Ga. 76.

*Illinois*. — *Christiansen v. Dunham Towing*, etc., Co., 75 Ill. App. 267.

*Indiana*. — *Nave v. Williams*, 22 Ind. 368.

*Maine*. — *Hobart v. Bartlett*, 17 Me. 429.

*Maryland*. — *Stimmel v. Underwood*, 3 Gill & J. (Md.) 282.

*Massachusetts*. — *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Amory v. Fellowes*, 5

**Error to Leave Question of Fact to Jury.** — It is error to leave the question of fact to the jury, and for such error the court will order a new trial.<sup>1</sup>

**Court's Decision Conclusive.** — On the question of fact the judge's decision is conclusive and not subject to review<sup>2</sup> unless clearly wrong<sup>3</sup> as being against the evidence or wholly or mainly without the support of facts,<sup>4</sup> or unless, on satisfactory considerations, he thinks proper to report the whole evidence and reserve the question for the whole court when perhaps the merits of the case may depend on it,<sup>5</sup> or in case of gross abuse of the court's discretion.<sup>6</sup>

**Expert Witnesses.** — The rule that the question of competency is for the determination of the court applies as well to expert witnesses as to ordinary witnesses, the value and weight of such expert evidence thereafter resting with

Mass. 219; *Dole v. Thurlow*, 12 Met. (Mass.) 157; *Kendall v. May*, 10 Allen (Mass.) 59.

*Michigan.* — See *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Bowdle v. Detroit St. R. Co.*, 103 Mich. 272.

*Minnesota.* — *Cannady v. Lynch*, 27 Minn. 435.

*Missouri.* — *Chouteau v. Searcy*, 8 Mo. 733. *New York.* — *Jackson v. Gridley*, 18 Johns. (N. Y.) 99; *Hartford v. Palmer*, 16 Johns. (N. Y.) 143; *Reynolds v. Lounsbury*, 6 Hill (N. Y.) 534; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466.

*North Carolina.* — *State v. Sanders*, 84 N. Car. 728.

*Ohio.* — *Rohrer v. Morningstar*, 18 Ohio 579. *Oklahoma.* — *Guthrie v. Shaffer*, 7 Okla. 459.

*Pennsylvania.* — *Semple v. Callery*, 184 Pa. St. 95. But see *Hart v. Heilner*, 3 Rawle (Pa.) 411; *Gordon v. Bowers*, 16 Pa. St. 226; *Haynes v. Hunsicker*, 26 Pa. St. 58.

*South Carolina.* — *Charleston v. Haywood*, 2 Nott & M. (S. Car.) 308.

*Texas.* — *Mills v. Cook*, (Tex. Civ. App. 1900) 57 S. W. Rep. 81; *Taylor v. State*, 22 Tex. App. 529.

*Washington.* — *Birkel v. Chandler*, 26 Wash. 241.

*West Virginia.* — *Uthermohlen v. Bogg's Run Min., etc., Co.*, 50 W. Va. 457; *State v. Michael*, 37 W. Va. 565.

**Competency of Young Children Peculiarly Within Discretion of Court.** — *Wheeler v. U. S.*, 159 U. S. 523; *People v. Stouter*, 142 Cal. 146; *People v. Wilmot*, 139 Cal. 103; *State v. King*, 117 Iowa 484; *Com. v. Robinson*, 165 Mass. 427; *Ham v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 929; *Davidson v. State*, 39 Tex. 129; *State v. Bailey*, 31 Wash. 89; *Uthermohlen v. Bogg's Run Min., etc., Co.*, 50 W. Va. 457; *State v. Michael*, 37 W. Va. 565; *State v. Juneau*, 88 Wis. 180. See also *supra*, this title, IV. 4. *a. Competency — Defect of Understanding — Infants*; and the title *INFANTS*, vol. 16, p. 267.

**1. Error to Leave Question of Fact to Jury.** *Bartlett v. Smith*, 11 M. & W. 483; *Fairbank v. Hughson*, 58 Cal. 314; *Chouteau v. Searcy*, 8 Mo. 733; *State v. Michael*, 37 W. Va. 565.

An instruction to the jury that if it found the witness to be mentally incompetent it could consider her testimony of no value was held not error where the record showed that the judge was satisfied that the witness was competent to testify, and intended by his instruction to submit to the jury the question as to the weight that it was to give to her testi-

mony. *Mead v. Harris*, 101 Mich. 585.

**2. Court's Decision Conclusive.** — *Jones v. Tucker*, 41 N. H. 546; *State v. Efer*, 85 N. Car. 585; *State v. Burgwyn*, 87 N. Car. 572. And see *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453, where, however, the point was not expressly decided.

*Contra.* — The judge's opinion on the facts is subject to review in the court above; but his opinion will be upheld in case of doubt where he has admitted the witness. *Doe v. Webster*, 12 Ad. & El. 442, 40 E. C. L. 88.

**Judge's Decision Conclusive — Infant Witnesses.** — The rule in the text has been applied in many instances to decisions as to the competency of infant witnesses. *Wade v. State*, 50 Ala. 164; *Peterson v. State*, 47 Ga. 524; *State v. Manuel*, 64 N. Car. 601; *State v. Edwards*, 79 N. Car. 648; *Uthermohlen v. Bogg's Run Min., etc., Co.*, 50 W. Va. 457. And see *supra*, this title, IV. 4. *a. Competency — Defect of Understanding — Infants*, and the title *INFANTS*, vol. 16, p. 267.

**Instructing Infant Witness.** — Causes have been held properly postponed for the purpose of instructing an infant witness as to the nature of an oath. *Com. v. Lynes*, 142 Mass. 577. *Contra*, *State v. King*, 117 Iowa 484; *Taylor v. State*, 22 Tex. App. 529. See also the title *INFANTS*, vol. 16, p. 267.

Where the prosecuting witness in a criminal case has been found incompetent after the trial has commenced, in consequence of not understanding the nature of an oath, or because deaf and dumb and without education, the jury cannot be discharged and the defendant held until an opportunity has been given to the witness of being instructed and having his incompetency removed. *Reg. v. Whitehead*, L. R. 1 C. C. 33.

**3. Christiansen v. Dunham Towing, etc., Co.**, 75 Ill. App. 267; *State v. King*, 117 Iowa 484.

**4. Slocovich v. Orient Mut. Ins. Co.**, 108 N. Y. 56; *Woodworth v. Brooklyn El. R. Co.*, 22 N. Y. App. Div. 501.

**Court Must Hear Proof.** — The court will review the decision of a judge who rejects a witness as incompetent on the mere statement of the county attorney that he was indicted for the offense under trial, without proof of that fact. *Traylor v. State*, (Tex. Crim. 1893) 23 S. W. Rep. 798.

**5. Where Question Reserved.** — *Dole v. Thurlow*, 12 Met. (Mass.) 157; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Jones v. Tucker*, 41 N. H. 546.

**6. Abuse of Discretion.** — *Taylor v. State*, 22 Tex. App. 529.



the jury to determine.<sup>1</sup>

**VI. INCOMPETENCY REMOVED BY STATUTE — 1. Interest Disqualification —**  
**a. CIVIL CASES — (1) In England.** — The injustice and hardship which frequently resulted from the rigid enforcement of the common-law rules governing the competency of witnesses were long felt and deplored by eminent jurists and legal writers before legislatures could be induced to make any material changes in this branch of the law.<sup>2</sup> In England, the first considerable measure of relief came in the year 1833, when a statute was passed making competent persons who were incompetent on the ground that the record might be used as evidence for or against them in a subsequent action, and providing that in the event of their examination their names should be indorsed on the record, which should not, thereafter, be used as evidence for or against them.<sup>3</sup> Ten years later a much more sweeping change was effected by the enactment of the statute since known as Lord Denman's Act,<sup>4</sup> which, with a few exceptions, rendered competent persons who had theretofore been incapable of testifying on account of their interest in the event of the action.<sup>5</sup> In 1846 it was enacted that all parties to actions, their wives, and all other persons might be examined either on behalf of the plaintiff or defendant,<sup>6</sup> and, by a series of amendments following this act, the common-law incompetency of parties and persons interested in the event of civil actions has been swept away; the former grounds of incompetency going now only to the credibility of the witness.<sup>7</sup>

(2) *In United States* — (a) **Federal Courts.** — So, too, in the United States, the common law has been superseded by statutes more consistent with reason and justice. In July, 1864, it was provided by Act of Congress that in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried, provided that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other or to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court.<sup>8</sup> And the rules of evidence thereby declared cannot be enlarged by state legislation so far as regards the interest of the witness.<sup>9</sup> This act applies to the courts of the *District of Columbia*,<sup>10</sup> but does not apply to territorial courts, as they are not courts of the United States within the meaning of the statute.<sup>11</sup> Under the Act of Congress above referred to, it has been held that the term "civil action" includes suits in chancery as well as actions at law,<sup>12</sup> and also includes proceedings in admiralty and all other judicial controversies in which the rights of property are involved, though the government be a party thereto; the term being used in contradistinction to criminal proceedings.<sup>13</sup>

1. **Expert Witnesses.** — *Fairbank v. Hughson*, 58 Cal. 314; *Berry v. Reed*, 53 Me. 487; *Ives v. Leonard*, 50 Mich. 296; *Jones v. Tucker*, 41 N. H. 546; *Boardman v. Woodman*, 47 N. H. 120; *Woodworth v. Brooklyn El. R. Co.*, 22 N. Y. App. Div. 501; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *State v. Secrest*, 80 N. Car. 450; *State v. Cole*, 94 N. Car. 959; *Flynt v. Bodenhamer*, 80 N. Car. 205; *State v. Ward*, 39 Vt. 225. See also the title **EXPERT WITNESSES**, 8 ENCYC. OF PL. AND PR. 743.

2. **Fallacies of Common Law.** — See *Phil. Ev.* (5th Am. ed.) 24 *et seq.*; 2 *Taylor Ev.*, § 1344; 1 *Benth. Ev.*, b. IX., pt. III., c. 111.

3. *Stat.* 3 & 4 Wm. IV., c. 42, §§ 26, 27, repealed by 37 & 38 Vict., c. 35.

4. **Lord Denman's Act.** — *Stat.* 6 & 7 Vict. 85.

5. **Effect of Lord Denman's Act.** — 1 *Phil. Ev.* (5th Am. ed.), pp. 26, 27.

6. *Stat.* 9 & 10 Vict., c. 95.

7. **Incompetency Removed.** — See *Stats.* 14 & 15 Vict., c. 99; 16 & 17 Vict., c. 85; 32 & 33 Vict., c. 68; 37 & 38 Vict., c. 35; 2 *Taylor Ev.*, § 1348 *et seq.*

8. **United States Courts.** — *Rev. Stat. U. S.*, § 858; *De Beaumont v. Webster*, (C. C. A.) 81 Fed. Rep. 535.

9. **Effect of State Legislation.** — *Travis v. Nedcrland L. Ins. Co.*, (C. C. A.) 104 Fed. Rep. 486; *White v. Wansey*, (C. C. A.) 116 Fed. Rep. 345.

10. **Applies to District of Columbia.** — *Page v. Burnstine*, 102 U. S. 664.

11. **Territorial Courts.** — *Good v. Martin*, 95 U. S. 90.

12. **Suits in Equity Included.** — *Rison v. Cribbs*, 1 *Dill. (U. S.)* 181.

13. **Controversies as to Property Rights.** — *Green*

(b) *State Courts.* — In every one of the various states and territories, substantially similar statutes have been enacted, which are too numerous to find a place in this article.<sup>1</sup> These statutes control all trials which take place after they go into effect. Being laws which change the rules of evidence only, their retrospective operation does not affect the vested rights of litigants in such manner as to be open to constitutional objection.<sup>2</sup>

b. *CRIMINAL CASES* — (1) *Early Legislation.* — The statutes making the accused a competent witness in his own behalf are of later date than those making competent parties to civil actions. It was held that a statute making parties to an action competent witnesses did not include the case of criminal prosecutions,<sup>3</sup> and *a fortiori* a statute rendering parties to civil actions competent witnesses in their own behalf did not, by implication, make defendants in criminal prosecutions competent;<sup>4</sup> neither did a statute authorizing the defendant to make an unsworn statement to the jury enable him to take the stand in his own behalf as a witness.<sup>5</sup> So, also, a statute permitting defendants to testify in prosecutions for misdemeanors did not open the door to the testimony of persons indicted for both a felony and a misdemeanor.<sup>6</sup> Nor did the enabling acts in the several states apply to prosecutions in the federal courts for crimes against the United States.<sup>7</sup> It is only in civil actions or proceedings that the laws of evidence of the states are applied by the federal courts sitting therein.<sup>8</sup>

(2) *Modern Legislation* — (a) *In England.* — It is now declared by statute in England that "every person charged with an offense shall be a competent witness for the defense at every stage of the proceedings," but he may not be required to answer any question tending to show that he has been convicted of or has committed any offense other than the one with which he is charged.<sup>9</sup>

(b) *Federal Courts.* — It is now provided by Act of Congress that "in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors

*v. U. S.*, 9 Wall. (U. S.) 655; *U. S. v. 10,000 Cigars, Woolw.* (U. S.) 123.

But an action to recover a penalty under the act prohibiting the importation of foreign laborers under contract, though a civil action in form, is criminal in its nature, and the defendant cannot be compelled to testify against himself. *Lees v. U. S.*, 150 U. S. 476.

1. *Removal of Incompetency in States.* — See the codes and statutes of the various states.

2. *Statutes Constitutional.* — *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667; *Walthall v. Walthall*, 42 Ala. 450; *Mallery v. Frye*, 21 App. Cas. (D. C.) 105; *Ralston v. Lothain*, 18 Ind. 303; *West v. His Creditors*, 1 La. Ann. 365; *Southwick v. Southwick*, 49 N. Y. 510; *Tabor v. Ward*, 83 N. Car. 291; *Wilkerson v. Buchanan*, 83 N. Car. 296. See also the title CONSTITUTIONAL LAW, vol. 6, p. 950.

*Competency at Time of Trial.* — The competency is to be determined at the time of the trial, and not at the time a disposition is taken. *Vanscoy v. Stinchcomb*, 29 W. Va. 263.

*Statutes Do Not Impose Incompetency.* — The statutes render no person an incompetent witness under circumstances where he was competent before. *Curry v. Curry*, 114 Pa. St. 367; *McKay v. Riley*, 135 Ill. 536.

3. *Effect of Statute Making Parties Competent.* — *U. S. v. Black*, 12 Nat. Bankr. Reg. 340; *State v. Connell*, 38 N. H. 81; *State v. Flan-*

*ders*, 38 N. H. 324; *Williams v. People*, 33 N. Y. 688; *Patterson v. People*, 46 Barb. (N. Y.) 625.

4. *Statute Making Competent Parties to Civil Actions.* — *Green v. U. S.* 9 Wall. (U. S.) 655; *Deloohery v. State*, 27 Ind. 521. Compare *Lucas v. State*, 23 Conn. 18.

*Statute Applicable Only to Existing Conditions.* — A statute providing that "all persons who are competent to testify in civil actions" are competent witnesses in criminal causes is intended to adopt the law as it then stood on the subject of the competency of witnesses in civil actions, and therefore a later statute removing the incompetency of parties to civil actions to testify therein is not applicable to criminal causes. *Hoagland v. State*, 17 Ind. 488.

5. *Making Statement to Jury.* — *People v. Thomas*, 9 Mich. 314.

6. *Competent as to Misdemeanors.* — *Stevick v. Com.*, 78 Pa. St. 460; *Hunter v. Com.*, 79 Pa. St. 503, 21 Am. Rep. 83.

7. *State Statutes Inapplicable to Federal Courts.* — *U. S. v. Hawthorne*, 1 Dill. (U. S.) 422.

8. *State Laws of Evidence Applicable in Civil Cases Only.* — *Logan v. U. S.*, 144 U. S. 263; *U. S. v. Hall*, 53 Fed. Rep. 352; *U. S. v. Read*, 12 How. (U. S.) 364; *U. S. v. Hawthorne*, 1 Dill. (U. S.) 422; *U. S. v. Brown*, 1 Sawy. (U. S.) 511.

9. *English Statute.* — St. 61 & 62 Vict., c. 36, § 1.

in the United States courts, territorial courts, and courts martial and courts of inquiry in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."<sup>1</sup>

**Effect of Infamy.** — Under this statute it has been held that the competency of the defendant is to be determined by the same rules as in the case of other witnesses. Therefore, where it appeared that the defendant had previously been under sentence of conviction for the commission of a crime which rendered him legally infamous, the court refused to permit him to testify in his own behalf.<sup>2</sup> But under similar statutes it is held in the state courts that the prisoner may testify notwithstanding he has previously been convicted of an infamous crime and served his time in the state prison without receiving a pardon.<sup>3</sup>

**(c) State Courts.** — In nearly all American jurisdictions, the prisoner is now permitted to take the stand and testify in his own behalf if he chooses to do so, though he is nowhere compelled to do so. In one state, however, he has only the privilege of going upon the witness stand and making a statement to the court and jury which, though not technically evidence, is nevertheless in the nature of evidence and is to be considered by the jurors and given such weight as, in their judgment, it merits.<sup>4</sup>

**Extent of Testimony.** — When the defendant takes the witness stand in his own behalf, he has the right to make any statement he can in explanation or mitigation of the offense with which he stands charged, and it is reversible error to refuse him the privilege of doing so.<sup>5</sup> Thus, he may testify even though the effect of his testimony is to cast the guilt on his codefendants.<sup>6</sup>

**Testimony as to Motive.** — One of the most valuable features of these statutes is that innocent parties may frequently break the chain of circumstantial evidence with which they are fettered by an ingenious prosecution, by giving a rational and reasonable account of their acts and motives. It is, therefore, error to exclude a defendant's testimony concerning his motives in doing a particular act in cases where the question of intent is material.<sup>7</sup> Thus, on an indictment for stealing meat, the defendant may be asked what his intention was in taking the meat at the time it came into his possession,<sup>8</sup> and on an indictment for larceny of a watch he may be asked why he helped to his feet

1. **Federal Courts.** — Act of March 16, 1878, c. 37, 20 U. S. Stat. at L. 30; Rev. Stat. U. S., Supp. (1874-'91), p. 155.

2. **Effect of Infamy.** — *U. S. v. Hollis*, 43 Fed. Rep. 248.

3. **Contra in State Courts.** — *Ransom v. State*, 49 Ark. 176; *Newman v. People*, 63 Barb. (N. Y.) 630; *Delamater v. People*, 5 Lans. (N. Y.) 333; *Morgan v. State*, 86 Tenn. 472.

4. **Accused Competent in His Own Behalf.** — See the codes and statutes in the various states, and also the cases throughout this subdivision.

In *Georgia* the contrary rule prevails. 3 Code Ga. (1895), § 1011. See *supra*, this title, *Competency* — *Persons Interested* — *Parties of Record* — *Criminal Proceedings*.

In *Tennessee* the defendant must testify before any other witnesses are examined on his behalf. *Clemons v. State*, 92 Tenn. 282. See also *Morgan v. State*, 86 Tenn. 472.

**Testimony on Preliminary Examination.** — A defendant may testify in his own favor on a preliminary examination. *State v. Kinder*, 96 Mo. 548.

**Taking Effect of Statute.** — The defendant can-

not testify unless the enabling statute has gone into effect at the time of the trial. *Giebel v. State*, 28 Tex. App. 151.

5. **Testimony Unrestricted.** — *Morrow v. State*, 48 Ind. 432; *Donohue v. People*, 56 N. Y. 208.

6. **Casting Guilt on Codefendants.** — *State v. Sims*, 106 La. 453.

7. **Testimony as to Motive Admissible.** — *People v. Farrell*, 31 Cal. 576; *White v. State*, 53 Ind. 595; *People v. Quick*, 51 Mich. 547; *State v. Banks*, 73 Mo. 592; *State v. Brown*, 104 Mo. 365; *State v. Maynard*, 19 Nev. 284; *Babcock v. People*, 15 Hun (N. Y.) 347. See also the cases cited in the title EVIDENCE vol. 11, p. 507, note 2.

**Denying Fraudulent Intent.** — When a fraudulent intent is imputed to a person or forms an element of a crime with which he is charged, he may deny the fraudulent intent, whether the effect is to defeat the cause of action or lessen the damages or punishment which may be inflicted. *Babcock v. People*, 15 Hun (N. Y.) 347.

8. **Intention in Taking Property.** — *White v. State*, 53 Ind. 595.



the owner of the watch, whom he found lying in a public street.<sup>1</sup> So, where the offense charged is assault with a deadly weapon with intent to kill, the prisoner may state for what purpose the weapon was in his possession at the time of the commission of the alleged offense.<sup>2</sup> In a murder trial the defendant may, if he relies on a plea of self defense, answer a question as to whether or not, at the time of the killing, he believed himself to be in danger of losing his life, or of receiving great bodily harm.<sup>3</sup> The accused may always testify as to the intent with which certain words were spoken.<sup>4</sup> Thus, in a prosecution for criminal libel, where the defense is that the statements in the alleged libelous publication are true, the defendant's interpretation of the publication is material and admissible in evidence on the question of actual malice.<sup>5</sup>

**Expected Answer Must Be Material.** — But in all these cases it is not error to refuse to permit him to testify as to his intent unless it is shown that the expected answer is material and that he is prejudiced by such refusal.<sup>6</sup>

**2. Husband and Wife** — *a.* **EFFECT OF STATUTES REMOVING INTEREST DISQUALIFICATION.** — According to the overwhelming weight of authority the statutory removal of the interest disqualification did not render husband and wife competent witnesses for or against each other, since their incompetency at common law rested, not on intent, but on grounds of public policy.<sup>7</sup>

*b.* **STATUTES EXPRESSLY REMOVING INCOMPETENCY.** — But in *England* and in the various jurisdictions in the *United States* great statutory innovations have been made, ranging from slight modifications of the common-law rule to statutes making husband and wife competent witnesses for or against each other in all judicial proceedings, whether civil or criminal, subject to the restriction that they are not to be permitted to testify to matters which came to their knowledge in the confidence of the marital relation, if objection be made. But in many jurisdictions it has been thought that an intermediate rule is more consistent with public policy, and better calculated to subserve the ends of justice, than either the common-law rule or the complete removal of incompetency. It is accordingly provided, in substance, that husband and wife may be witnesses for each other, but, if objection be made, they may not testify against each other, except in cases where they might have done so at common law.<sup>8</sup>

**3. Death or Disability of Opposing Party** — *a.* **DOCTRINE AS TO INCOMPETENCY OF SURVIVOR IN GENERAL** — (1) *Statutory Modification of Common-law Rule.* — The ancient rule of the common law that parties to actions and

1. **Intention in Doing Act.** — *People v. Quick*, 51 Mich. 547.

2. **Purpose in Possessing Deadly Weapon.** — *Kerrains v. People*, 60 N. Y. 228; 19 Am. Rep. 158. Compare *State v. Montgomery*, 65 Iowa 486.

3. **Belief as to Dangerous Situation.** — *State v. Harrington*, 12 Nev. 125. And see the title *SELF-DEFENSE*, vol. 25, p. 280.

4. **Testimony as to Meaning of Words.** — *People v. Farrell*, 31 Cal. 576.

5. **Explanation of Published Words.** — In *Com. v. Damon*, 136 Mass. 441, the court said: "The questions put to the defendant, who offered himself as a witness, if put to any other witness might, perhaps, be held incompetent as calling for an opinion upon the character of articles published in a newspaper, when, so far as appears, the articles themselves could be obtained and were the best evidence of what they contained. But the intention or state of mind of the defendant towards Hart, in making the publication with which he was charged, was material; and for this pur-

pose his opinion or understanding of the articles published by him in his newspaper, as friendly or unfriendly towards Hart, would be relevant upon the question of good or ill will towards Hart with which he made the publication." See also the title *LIBEL AND SLANDER*, vol. 18, p. 1003.

6. **Harmless Error.** — *Bolen v. State*, 26 Ohio St. 371.

7. **Incompetency Not Affected.** — *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Kelly v. Proctor*, 41 N. H. 142. See *contra*, *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 362, 52 Am. Dec. 344. Compare *Lucas v. State*, 23 Conn. 19. For a full discussion on this point, see *supra*, this title, *Competency — Husband and Wife — Effect of Statutes Removing Interest Disqualification*.

8. **Statutes Removing Incompetency.** — For a full treatment of the statutory enactments relating to the competency of husband and wife, see *supra*, this title, *Competency — Husband and Wife — Statutes Expressly Removing Incompetency*.

persons having a direct interest in the result were wholly incompetent to testify therein was probably never supported either by sound reason or by the principles of justice. Certainly the modern view on the subject is that the injustice done by excluding such witnesses was manifestly a greater evil than that resulting from admitting their testimony, and thus affording a temptation to perjury.<sup>1</sup> In accordance with this view, statutes have been enacted which abrogate the general rule of the common law by declaring that no person shall be excluded from testifying as a witness in any cause by reason of his interest therein, or because he is a party thereto.<sup>2</sup> But at the same time, the view has quite generally been taken that where, at the time of the trial, one party to the matter or transaction involved in the litigation is dead, or is mentally incompetent to testify, because of either insanity or infancy, substantial justice requires that the surviving or competent party should not be allowed to give his testimony. Hence, the enabling statutes referred to generally except from their operation, under certain circumstances, parties to and persons interested in the event of the suit where other parties thereto have since died or have become incompetent to testify.<sup>3</sup> By death, in this connection, the statutes refer exclusively to natural death.<sup>4</sup>

**No Exclusion in Some Jurisdictions.** — It may be regarded as a matter of some doubt whether or not the theory of these exceptions is sound in principle. They are inconsistent with the general theory of the enabling acts, viz., that there should be no exclusion of any witness because he is a party to or interested in the event of the action, and that the interest of the witness and the inability of his adversary to contradict his testimony should be merely a circumstance to be considered by the court or jury as affecting the credibility. That this view is sometimes taken appears from the progression of legislation on the subject, because it is found that in some jurisdictions such witnesses are made fully competent, but corroboration of their testimony is required,<sup>5</sup> while in other jurisdictions the exceptions originally made have been swept away by later enactments, with the result that a party to a suit or person interested in the result of it is placed on the same basis as other witnesses.<sup>6</sup>

(2) *Operation and Effect of Statutes* — (a) **In General — No Disabilities Created.** — Since the provisions of the various statutes on the subject under consideration are in the form of exceptions to general provisions removing the incompetency, as witnesses, of persons who are interested in the result of the suit or action, it follows that no new disabilities are created, and no one is rendered incompetent to testify in any case in which he would have been a competent witness at common law.<sup>7</sup>

1. **Common-law Rule Not Adapted to Modern Conditions.** — *Wylie v. Charlton*, 43 Neb. 840.

2. See *supra*, this section, *Interest Disqualification*.

3. **General Disqualification of Interest Removed.** — See the title EVIDENCE, vol. 11, p. 543, note 3. And see generally *supra*, this section, *Interest Disqualification*.

4. **Natural Death.** — In *Williams v. Edwards*, 94 Mo. 447, the objection was raised that the defendant was incompetent to testify, because a corporation which had been dissolved was a party to the transaction involved, but the court said that the point was too frivolous for discussion, because "the statute only refers to natural death, death of persons, and not to defunct corporations."

5. **Corroboration.** — *Gildersleeve v. Atkinson*, 6 N. Mex. 250; *McClenaghan v. Perkins*, 5 Ont. L. Rep. 129; *Taylor v. Regis*, 26 Ont. 485.

6. **No Exceptions in Alaska.** — *Corbus v.*

*Leonhardt*, 114 Fed. Rep. 10, 51 C. C. A. 636.

**No Exceptions in Oregon.** — *Grubbe v. Grubbe*, 26 Oregon 363.

**Other States.** — See Gen. Stat. Conn. (1902), § 677; *Merrick's Civ. Code La.*, vol. 2, art. 2281; *Code Mont.* (1895), vol. 3, pp. 677, 678 *Pub. Laws R. I.* (1896), c. 244, § 35.

**In Massachusetts** the former statute removing the disqualification of parties excepted the case where one of the original parties to the contract or cause of action in issue and on trial should be dead. *Gen. Stat. Mass.*, c. 131, § 14. But that exception was omitted by the Act of 1870, and therefore no longer exists. *Woodrow v. Mansfield*, 106 Mass. 112.

**7. No Disabilities Created by Statutes — Alabama.** — *Dudley v. Steele*, 71 Ala. 423; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 740.

*Georgia.* — *Daniel v. Burts*, 72 Ga. 143; *Nesbitt v. Parrott*, 84 Ga. 142.

*Illinois.* — *King v. Worthington*, 73 Ill. 164.

**The Statutes Are Strictly Construed in Respect to the Persons Excluded from Testifying,** and the exclusion will not be extended by implication to a class of persons not named, though the reasons for embracing them may have been equally as strong as those which existed for excluding the persons expressly designated.<sup>1</sup> Accordingly, under a statute excluding a party to an action when the adverse party sues or defends as executor, etc., an executor or administrator may testify in his own behalf as to a personal transaction between himself and his decedent, since he is not within the terms of exclusion;<sup>2</sup> and on the same principle, a remote grantee of a decedent's title is not an "assignee" of the decedent, within a statute providing that a party to an action shall not testify as to transactions or communications between himself and a deceased person, against an assignee of the decedent.<sup>3</sup>

**Spirit and Letter of Statute.** — A party who is incompetent because within the letter of the statute is not competent within the spirit of the statute, but a person competent within the letter of the statute may be incompetent within its spirit.<sup>4</sup>

**Competency Determined by Law in Force When Witness Testifies.** — The general rule is that the competency of a witness is to be determined by the law as it exists at the time of trial.<sup>5</sup> Therefore, where a witness was competent at the time the cause was tried, but pending an appeal the law was so changed as to make the witness incompetent, there can be no reversal because of his testimony;<sup>6</sup> and for the same reason, where a party to an action dies after his adversary has testified, such testimony, having been admissible at the time it was given, continues so and is not to be stricken out because of the subsequent death of the other party.<sup>7</sup> This principle is also applied to the case of

*Iowa.* — *Keech v. Cowles*, 34 Iowa 259; *Rinehart v. Buckingham*, 34 Iowa 409; *Godard v. Lefingwell*, 40 Iowa 249.

*Maryland.* — *Horner v. Frazier*, 65 Md. 2.

*Missouri.* — *Angell v. Hester*, 64 Mo. 142; *Fuchs v. Fuchs*, 48 Mo. App. 18.

*Montana.* — *Shober v. Jack*, 3 Mont. 351.

*New Hampshire.* — *Moore v. Taylor*, 44 N. H. 374; *Clements v. Marston*, 52 N. H. 31; *Page v. Whidden*, 59 N. H. 507.

*Pennsylvania.* — *Sheetz v. Hanbest*, 81 Pa. St. 100; *Pratt v. Patterson*, 81 Pa. St. 114; *Krumrine v. Grenoble*, 165 Pa. St. 98; *Smith v. Hay*, 152 Pa. St. 377.

*Virginia.* — *Reynolds v. Callaway*, 31 Gratt. (Va.) 436.

*West Virginia.* — *Crothers v. Crothers*, 40 W. Va. 169.

**Rule in Equity Not Abrogated.** — *Bradshaw v. Combs*, 102 Ill. 428, *affirming* 6 Ill. App. 115; *White v. Ross*, 147 Ill. 427; *English v. Landon*, 181 Ill. 614; *Camp v. Shaw*, 52 Ill. App. 241; *Thompson v. Wilson*, 56 Ill. App. 159; *Page v. Whidden*, 59 N. H. 507; *Peirce v. Burroughs*, 59 N. H. 512.

**Revival of Action.** — The death of one of the original parties to an action closes the mouth of the other after the action is revived. *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Walker v. Hill*, 21 N. J. Eq. 191; *Oram v. Rothermel*, 98 Pa. St. 300.

**1. Statutes Strictly Construed.** — *Harman v. Harman*, (C. C. A.) 70 Fed. Rep. 808; *Minton v. Pickens*, 24 S. Car. 592; *Newton v. Newton*, 77 Tex. 510; *Wootters v. Hale*, 83 Tex. 564; *Sackman v. Thomas*, 24 Wash. 660.

The courts will not add a disqualification to a witness not specified in the statute. *Hilde-*

*brant v. Crawford*, 65 N. Y. 107; *Cochran v. Almack*, 39 Ohio St. 314.

**The Presumption Being in Favor of Competency,** it is incumbent on the party affirming the incompetency of the witness to show that the testimony sought to be introduced falls within the statutory exclusion. *Hill v. Helton*, 80 Ala. 528.

**2. Boyd v. Jennings**, 46 Ill. App. 290; *Kelly v. Burroughs*, 102 N. Y. 93, *affirming* 33 Hun (N. Y.) 349.

In some states representatives of deceased persons are made competent witnesses by the express terms of the statutes. See *infra*, this subsection, *Exceptions to Rule of Incompetency* — *Admissibility of Testimony of Representative*.

**3. "Assignee" of Decedent Within Meaning of Statute.** — *Rapley v. Klugh*, 40 S. Car. 134, in which the court said that the exclusion could not be extended by judicial construction beyond the classes expressly denied the right to testify. See also *Guery v. Kinsler*, 3 S. Car. 421.

**4. Hudson v. Houser**, 123 Ind. 313. See also *Latimer v. Sayre*, 45 Ga. 468.

**5. Competency Determined by Law Existing at Time of Trial.** — See *supra*, this title, *Competency*. See also the title CONSTITUTIONAL LAW, vol. 6, p. 950.

**6. Change of Rule of Competency Pending Appeal.** — *Alford v. Alford*, 96 Ala. 387.

**7. Death of Party After Adversary Testifies.** — *Collins v. Ma Guire*, 76 N. Y. App. Div. 411.

**The Testimony Given at a Former Trial** by one party during the lifetime of the other party will not be received, even if an offer is made to admit the evidence given by the de-



depositions, the general rule laid down by the cases being that the admissibility of a deposition depends on the conditions existing at the time the deposition is read, because it is as of that time that the witness is regarded as testifying.<sup>1</sup>

**Testimony Given in Another Proceeding.** — A transcript of the testimony of a witness given on behalf of an administrator in a proceeding to discover assets is not admissible in behalf of such witness, where he is afterwards sued by the administrator for conversion.<sup>2</sup>

**Proof of Insanity of Opposite Party.** — Some of the statutes, by their terms, seem to exclude the testimony of one party, on the ground that the opposite party is insane, only when the fact of such insanity has been ascertained by an adjudication thereof.<sup>3</sup> The usual provision, however, is to exclude in general terms one party when the other party is insane at the time of the trial, and where the statute so provides it is held that an adjudication of insanity is not necessary.<sup>4</sup>

**Witness, Not Evidence, Incompetent.** — While the statutes provide that a party or person interested in the result of the suit shall not testify as to personal transactions or communications with a decedent, some cases hold that the effect of the statutes is to make the witness incompetent and not to make the evidence incompetent, because the fact may be proved by any witness other than a party or person interested;<sup>5</sup> but it is generally held that such party is not an incompetent witness except as to conversations or transactions with the decedent,<sup>6</sup> and, therefore, he may testify as to any matter known to him "independent of any conversation" had with the decedent.<sup>7</sup>

**Constitutionality of Statute.** — Within the rule that there is no vested right in respect to the qualifications and competency of witnesses, but that the legislature has general control of the rules of evidence and may change them at pleasure,<sup>8</sup> it has been held that a statute changing the rule of competency in the respect now under consideration is constitutional.<sup>9</sup>

ceased at said former trial. *Barker v. Hebbard*, 81 Mich. 267.

1. See *infra*, this division of this section.

*Doctrine Applied to Depositions.*

2. **Testimony Given in Another Proceeding.** — *Frick v. Kabaker*, 116 Iowa 494.

3. **Adjudication of Insanity Required.** — Thus, the *Pennsylvania* statute is limited to cases "where any party \* \* \* has been adjudged a lunatic." Act Pa. May 23, 1887, § 5.

So, too, the *Illinois* statute prescribes the rule of exclusion "when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or distracted person." *Starr & Curt. Annot. Stat. Ill.* (1896), c. 51, par. 2.

4. **Adjudication of Insanity Not Necessary.** — *Bailey v. Harvey*, 60 N. H. 152; *Whitney v. Traynor*, 74 Wis. 289.

The rule of exclusion under the *Missouri* statute is when the party "is shown to the court to be insane." *Rev. Stat. Mo.*, § 4652.

**Who Are Insane Within Meaning of Exception.**

— A man over seventy years old who, through softening of the brain, has so far lost his mental faculties as to be entirely incapable of giving testimony in court, or any coherent statement of past events, is insane within the meaning of the statute. *Whitney v. Traynor*, 74 Wis. 289.

But a mere excitable condition of mind which renders a party's appearance in court inadmissible is not insanity within the meaning of the statute. *McCormick v. Hickey*, 24 Mo. App. 362.

And see generally the title *INSANITY*, vol. 16, p. 558.

5. **Witness, Not Evidence, Incompetent.** — *Crebin v. Jarvis*, 64 Kan. 885, 67 Pac. Rep. 531; *Bick v. Reese*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 757.

Accordingly, a witness is not rendered competent by the fact that other competent witnesses have testified to the matter in question, though in such case admitting the incompetent witness to testify may be harmless error. *Bryant v. Stainbrook*, 40 Kan. 356.

And an objection to an interrogatory as incompetent, no other objection being interposed, does not challenge the competency of the witness, but only the competency of the evidence, and therefore is not sufficient to raise the question whether or not a transaction with a decedent is involved. *Hines v. Consolidated Coal, etc., Co.*, 29 Ind. App. 563; *Hoag v. Wright*, 174 N. Y. 36, reversing 69 N. Y. App. Div. 381.

6. *Allensworth v. Lowdermilk*, (Ky. 1896) 35 S. W. Rep. 1030; *Sharmer v. McIntosh*, 43 Neb. 509; *Riddell v. Riddell*, (Neb. 1903) 97 N. W. Rep. 609.

7. See *infra*, this division of this section, e. (1) (c) *cc. Independent Facts*.

8. See the titles *CONSTITUTIONAL LAW*, vol. 6, p. 950; *EVIDENCE*, vol. 11, p. 550.

9. *Ivers v. Ivers*, 61 Iowa 721; *Donnell v. Braden*, 70 Iowa 551, construing the statute of *Iowa* which provides that "a party shall have the right to use any other person as a witness

**Rule in Federal and Territorial Courts.** — The rule in the federal courts is governed exclusively by the Act of Congress without regard to any statute of the state in which the court may be sitting;<sup>1</sup> and the Act of Congress also applies to the courts of the *District of Columbia*,<sup>2</sup> but not to territorial courts.<sup>3</sup>

(b) **Reason and Purpose of Exceptions.** — So far as the exceptions in the enabling statutes limit the rule of incompetency to cases in which the adverse party sues or defends as the representative of a decedent,<sup>4</sup> the purpose is to protect the estates of deceased and insane persons from the apprehended danger of permitting the surviving or sane party to a contract or transaction to testify in respect to it after the lips of the other party have been closed by death or insanity.<sup>5</sup> But in many jurisdictions the exceptions are more extensive, it being provided that when one party to a contract or cause of action is dead, the surviving party shall not be permitted to testify concerning it;<sup>6</sup> and the purpose of such statutes is generally declared to be to put the two parties to a suit on terms of substantial equality in regard to the opportunity of giving testimony; that is to say, parties who have contracted with each other may be supposed to have an equal knowledge of the transaction, and both, if living and sane, are allowed to testify, but if one is precluded by death or insanity, the other is not entitled to the undue advantage of being a witness in his own case.<sup>7</sup>

(3) **Doctrine Applied to Depositions.** — Where the deposition of one party has been taken, and afterwards, but before trial, the other party dies without his deposition having been taken, the question arises whether the deposition so taken may be read. This question has been presented several times, and the reported decisions seem to be unanimous in holding the negative, because it is considered that a deponent testifies at the time his deposition is read, and not at the time it was taken.<sup>8</sup> But when regard is had to the reason on

not disqualified on account of interest."

**1. Rule in Federal Courts.** — *Stephens v. Bernays*, 42 Fed. Rep. 488; *De Beaumont v. Webster*, 71 Fed. Rep. 226, (C. C. A.) 81 Fed. Rep. 535; *Goodwin v. Fox*, 129 U. S. 601.

**2. Act of Congress Applicable to Courts of District of Columbia.** — *Page v. Burnstine*, 102 U. S. 664; *Meguire v. Corwine*, 3 MacArthur (D. C.) 81.

**3. Act of Congress Not Applicable to Territorial Courts.** — The provisions of the Act of Congress on the subject (Rev. Stat. U. S., § 858) do not apply to territorial courts, because such courts are not courts of the United States. *Corbus v. Leonhardt*, (C. C. A.) 114 Fed. Rep. 10.

**4.** See *infra*, this division of this section, d. *Persons Protected*.

**5. Protection of Estates of Deceased and Insane Persons** — *Alabama*. — *Austin v. Bean*, 101 Ala. 133.

*Florida*. — *Edwards v. Rives*, 35 Fla. 89.

*Indiana*. — *Durham v. Shannon*, 116 Ind. 495.

*Maryland*. — *Wright v. Gilbert*, 51 Md. 157; *Horner v. Frazier*, 65 Md. 2; *Robertson v. Mowell*, 66 Md. 530.

*Massachusetts*. — *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184; *Brown v. Brightman*, 11 Allen (Mass.) 226; *Ela v. Edwards*, 97 Mass. 319.

*Missouri*. — *Chapman v. Dougherty*, 87 Mo. 617.

*New Jersey*. — *Woolverton v. Van Syckel*, 57 N. J. L. 393; *McCartin v. Traphagen*, 43 N. J. Eq. 328, 45 N. J. Eq. 265.

*Pennsylvania*. — *Karns v. Tanner*, 66 Pa. St. 297; *Hess v. Gourley*, 89 Pa. St. 195.

**6.** See *infra*, this division of this section, c. (2) *Parties to Thing or Contract in Action*.

**7. Doctrine of Substantial Equality** — *Kentucky*. — *Hurry v. Kline*, 93 Ky. 358.

*Missouri*. — *Looker v. Davis*, 47 Mo. 140; *Stam v. Smith*, (Mo. 1904) 81 S. W. Rep. 1217.

*New Hampshire*. — *Moore v. Taylor*, 44 N. H. 370; *Chandler v. Davis*, 47 N. H. 462; *Tuck v. Nelson*, 62 N. H. 469; *Clark v. Clough*, 65 N. H. 76.

*Pennsylvania*. — *Adams v. Bleakley*, 117 Pa. St. 283.

*West Virginia*. — *McMechen v. McMechen*, 17 W. Va. 683.

"The reason of the statutory prohibition is the prevention of one person testifying where death has sealed the lips of his adversary." *Fulkerson v. Thornton*, 68 Mo. 468.

The *Kentucky* statute, having in view the rule of substantial equality, excludes the testimony of interested persons as to transactions, etc., with the decedent only as against persons who were not present when the alleged transaction occurred. *Girdner v. Girdner*, (Ky. 1895) 32 S. W. Rep. 266.

**8. Deposition of One Party Held Not Admissible After Death of Other Party Before Trial** — *Arkansas*. — *Park v. Lock*, 48 Ark. 133.

*Illinois*. — *Smith v. Billings*, 177 Ill. 446.

*Iowa*. — *Quick v. Brooks*, 29 Iowa 484.

*Mississippi*. — *Hewlett v. George*, 68 Miss. 707.

*Missouri*. — *Messimer v. McCray*, 113 Mo. 382.



which these decisions are based, viz., "that when one of the parties to a transaction is cut off from giving his version of it by death, the other shall not be heard,"<sup>1</sup> it would seem to be a matter of some doubt whether the rule stated is one of universal application, because it is readily conceivable that cases might arise in which the reason for such a rule ceases;<sup>2</sup> and there are cases which hold that a deposition taken in the lifetime of both parties is admissible notwithstanding the subsequent death of the adverse party.<sup>3</sup>

(4) *Extent of Incompetency.*—The extent of the incompetency under these exceptions varies in several important particulars in the different jurisdictions.<sup>4</sup> In a few instances, the surviving party is declared in general terms to be incompetent as a witness in his own behalf,<sup>5</sup> and when the statute is in such form, the incompetency of the party does not depend on the character of the testimony that he may give.<sup>6</sup> But the general rule is that no person is wholly incompetent as a witness because of interest in the litigation. The rule of incompetency under the statutes usually goes only to the extent of excluding the witness from testifying in his own behalf<sup>7</sup> or in behalf of a

Ohio.—*St. Clair v. Orr*, 16 Ohio St. 220.

West Virginia.—*Zane v. Fink*, 18 W. Va. 749.

Where a portion of the survivor's deposition, previously taken, is introduced by the personal representative himself, the witness is then entitled to have the rest of it read so far as it is material. *Beardslee v. Reeves*, 76 Mich. 661. And see *infra*, this division of this section, *f. Exceptions to Rule of Incompetency.*

1. *Reason of Rule of Exclusion.*—*Park v. Lock*, 48 Ark. 133; *Quick v. Brooks*, 29 Iowa 484.

2. *Suggested Limitations of Rule.*—Thus in a suit in equity, where all the testimony is in the form of depositions, if a party permits the taking of testimony to be closed without having his own deposition taken, and afterwards dies before the hearing, it could not be claimed that his death prevented him from giving his version of the matter, and therefore it would seem clear on principle that the deposition of the adverse party should not be excluded; and *a fortiori* would this be the case where the party died after the cause was set for hearing, but before it came on to be heard.

In the cases cited in the next preceding note but one, with the exception of *Zane v. Fink*, 18 W. Va. 693, the deceased party would have had the right to testify at the trial had he survived, and, therefore, the correctness of those decisions could not be doubted.

In *Zane v. Fink*, 18 W. Va. 693, which was a suit in equity, it did not appear whether the party died before or after the taking of testimony was closed, so that it could not be said that his death did not prevent him from giving his testimony; and the view seems to have been taken that the rule of exclusion applies only where the party could have testified but for his death.

3. *McMullen v. Ritchie*, 64 Fed. Rep. 253; *Armitage v. Snowden*, 41 Md. 123; *Neis v. Farquharson*, 9 Wash. 508.

4. *The Statutes Vary* in respect to the persons excluded from testifying, the persons protected, and the subjects and character of the testimony, as to which matters see the following subdivisions of this division of this section.

5. *Parties Declared Generally Incompetent.*—See for instance the *Missouri* statute (Rev.

Stat. Mo., § 4652) which provides that "in actions where one of the original parties to the contract or cause of action in issue or on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him." Under this provision it is held that the surviving party is wholly incompetent to testify in the cause. *Rice v. McFarland*, 41 Mo. App. 489. See also *Sherman v. Hall*, 89 Me. 411.

6. *Character of Testimony Not Material*—*Colorado*.—*Jones v. Hensshall*, 3 Colo. App. 448; *Carpenter v. Ware*, 4 Colo. App. 458.

*Illinois*.—*Pigg v. Carroll*, 89 Ill. 205; *Muel-ler v. Rebhan*, 94 Ill. 142; *Ebert v. Gerding*, 116 Ill. 216; *Comer v. Comer*, 119 Ill. 170; *Laurence v. Laurence*, 164 Ill. 367; *Crumley v. Worden*, 201 Ill. 105; *In re Maher*, 210 Ill. 160.

*Iowa*.—*McDonald v. Young*, 109 Iowa 704. *Minnesota*.—*Comstock v. Comstock*, 76 Minn. 396.

*Mississippi*.—*Watson v. Duncan*, (Miss. 1904) 37 So. Rep. 125.

*Wyoming*.—*Bliler v. Boswell*, 9 Wyo. 57.

7. *Witness Incompetent Only in His Own Be-half as to Specified Matters*—*United States*.—*McMullen v. Ritchie*, 64 Fed. Rep. 253.

*Alabama*.—*Glover v. Gentry*, 104 Ala. 222; *Marcy v. Howard*, 91 Ala. 133.

*Colorado*.—*Rathvon v. White*, 16 Colo. 41.

*Florida*.—*Ley v. Edwards*, 21 Fla. 333.

*Georgia*.—*Medlock v. Miller*, 94 Ga. 652; *Frizzell v. Reed*, 77 Ga. 724; *McBride v. McBride*, 82 Ga. 714; *Harrison v. Perry*, 86 Ga. 813; *Johnson v. Champion*, 88 Ga. 527.

*Illinois*.—*Stewart v. Fellows*, 128 Ill. 480; *Johnston v. Johnston*, 138 Ill. 385; *Morrison v. Morrison*, 140 Ill. 560; *Murray v. Smith*, 42 Ill. App. 548.

*Indiana*.—*Reed v. Reed*, 30 Ind. 313; *Charles v. Malott*, 65 Ind. 184; *Abshire v. Williams*, 76 Ind. 97.

*Kentucky*.—*Helton v. Asher*, 103 Ky. 730; *United Loan, etc., Bank v. Bitzer*, 78 S.W. Rep. 183, 25 Ky. L. Rep. 1538.

*Maryland*.—*Chapman v. Smoot*, 66 Md. 8.

*Michigan*.—*Ripley v. Seligman*, 88 Mich. 177; *Latourette v. McKeon*, 104 Mich. 156.



party whose interest is identical with his own,<sup>1</sup> or, under some of the statutes, in behalf of his successor in interest,<sup>2</sup> or against an adversary standing in a certain designated relation to a deceased person,<sup>3</sup> concerning personal transactions or communications between himself and such deceased person.<sup>4</sup> He is competent to testify against his own interest,<sup>5</sup> or in behalf of any other party

*Mississippi*.—*Jacks v. Bridewell*, 51 Miss. 881; *Rushing v. Rushing*, 52 Miss. 329; *Green v. Mizelle*, 54 Miss. 220; *Rothschild v. Hatch*, 54 Miss. 554.

*Nebraska*.—*Rakes v. Brown*, 34 Neb. 304.

*New Hampshire*.—*Cochran v. Langmaid*, 60 N. H. 571; *Berry v. McArdle*, 62 N. H. 354; *Clark v. Clough*, 65 N. H. 43.

*New York*.—*Conklin v. Snider*, 104 N. Y. 641; *Mason v. Prendergast*, 120 N. Y. 536; *Luetchford v. Lord*, 132 N. Y. 465; *Hall v. Roberts*, 63 Hun (N. Y.) 473; *Hard v. Ashley*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 413; *Doolittle v. Stone*, 5 Silv. Sup. (N. Y.) 412; *Matter of Stewart*, 1 Connolly (N. Y.) 412; *Matter of Georgi*, (Surrogate Ct.) 21 Misc. (N. Y.) 410.

*North Carolina*.—*Smith v. Smith*, 101 N. Car. 461; *Buie v. Scott*, 107 N. Car. 181; *Bunn v. Todd*, 107 N. Car. 266; *Barbee v. Barbee*, 108 N. Car. 581; *Sutton v. Walters*, 118 N. Car. 495; *Dunn v. Beaman*, 126 N. Car. 766; *In re Worth*, 129 N. Car. 223; *Wetherington v. Williams*, 134 N. Car. 276.

*Pennsylvania*.—*Crothers v. Crothers*, 149 Pa. St. 201.

*South Carolina*.—*Blakely v. Frazier*, 11 S. Car. 122; *Richards v. Munro*, 30 S. Car. 284.

*Texas*.—*Gurley v. Clarkson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 360.

*Vermont*.—*Walker v. Taylor*, 43 Vt. 612; *Blair v. Ellsworth*, 55 Vt. 415; *Randall v. Randall*, 64 Vt. 419; *Foster v. King*, 73 Vt. 278.

*Virginia*.—*Ellis v. Harris*, 32 Gratt. (Va.) 684; *Harper v. McVeigh*, 82 Va. 751; *Tunstall v. Withers*, 86 Va. 892.

**What Constitutes Testimony in One's Own Behalf.**—*Sackman v. Thomas*, 24 Wash. 660.

1. *Fenton v. Miller*, 94 Mich. 204.

**2. Incompetency as Witness for Successor in Interest.**—*Wilcox v. Corwin*, 50 Hun (N. Y.) 425, reversed on another point in 117 N. Y. 500.

See also *infra*, this division of this section, c. (4) (b) *Persons from Whom Party Derives Title*.

**3. Incompetency Only as Against Persons Representing Decedent's Interests.**—See generally *infra*, this division of this section, d. *Persons Protected*.

A statute prohibiting a party from testifying in his own favor against the representative of a decedent does not preclude him from testifying in favor of another party against an executor or administrator when the testimony of such witness is not in his own favor but against his own interest. *Kelsey v. Cooley*, 58 Hun (N. Y.) 601, 11 N. Y. Supp. 745; *Swan v. Morgan*, 88 Hun (N. Y.) 378; *Baxter v. Baxter*, 13 N. Y. App. Div. 65; *Trymby v. Address*, 175 Pa. St. 6; *Sackman v. Thomas*, 24 Wash. 660. See also *Jones v. Thomas*, 76

N. Y. App. Div. 596; *Wilcox v. Corwin*, 117 N. Y. 500, reversing 50 Hun (N. Y.) 425.

The *Mississippi* statute excludes a party from testifying only in support of his own claim or defense against a decedent's estate where the cause of action originated during the lifetime of the decedent. *Cockrell v. Cockrell*, (Miss. 1904) 36 So. Rep. 390.

**Party Having Community of Interest with Administrator.**—A party to an action by an administrator may testify in his own behalf, when his interest is identical with that of the administrator. *James v. Smith*, 3 Indian Ter. 447.

**4. Incompetency Limited to Personal Transactions and Communications**—*Alabama*.—*O'Neal v. Reynolds*, 42 Ala. 197; *Wood v. Brewer*, 73 Ala. 259; *Miller v. Cannon*, 84 Ala. 64.

*Arkansas*.—*Giles v. Wright*, 26 Ark. 476.

*Florida*.—*Raulerson v. Rockner*, 17 Fla. 809; *Belote v. O'Brian*, 20 Fla. 126.

*Georgia*.—*Sheibley v. Hill*, 57 Ga. 232; *Trimble v. Mims*, 92 Ga. 103.

*Iowa*.—*Marietta v. Marietta*, 90 Iowa 201; *French v. French*, 91 Iowa 140.

*Kansas*.—*Anthony v. Stinson*, 4 Kan. 211; *Hook v. Bixby*, 13 Kan. 164; *Nicolls v. Esterly*, 16 Kan. 32; *Clary v. Smith*, 20 Kan. 83; *Jaquith v. Davidson*, 21 Kan. 341; *McCartney v. Spencer*, 26 Kan. 65; *O'Neill v. Martin*, 26 Kan. 494; *McKean v. Massey*, 9 Kan. 600; *Park v. Ensign*, 10 Kan. App. 173.

*Minnesota*.—*Parker v. Maxwell*, 51 Minn. 523.

*Missouri*.—*Ring v. Jamison*, 2 Mo. App. 584.

*Nebraska*.—*Sharmer v. McIntosh*, 43 Neb. 500.

*New Jersey*.—*Besson v. Cox*, 35 N. J. Eq. 87.

*North Carolina*.—*Dobbins v. Osborne*, 67 N. Car. 259; *Ballard v. Ballard*, 75 N. Car. 190.

*Pennsylvania*.—*Hoffer's Estate*, 156 Pa. St. 473; *Krepps v. Carlisle*, 157 Pa. St. 358.

*South Carolina*.—*Trimmier v. Thomson*, 41 S. Car. 125.

*Texas*.—*Hamilton v. Starr*, (Tex. Civ. App. 1894) 27 S. W. Rep. 587.

*Wisconsin*.—*Daniels v. Foster*, 26 Wis. 686; *Stewart v. Stewart*, 41 Wis. 624; *Page v. Danaher*, 43 Wis. 226; *Engmann v. Immel*, 59 Wis. 249; *Belden v. Scott*, 65 Wis. 425; *Pritchard v. Pritchard*, 69 Wis. 373.

As to what constitutes a personal transaction or communication, see generally *infra*, this division of this section, c. *Subjects and Character of Testimony Excluded*.

**5. May Testify Against Interest**—*Georgia*.—*Lasseter v. Simpson*, 78 Ga. 61; *Harrison v. Perry*, 86 Ga. 813.

*Illinois*.—*Godfrey v. Phillips*, 209 Ill. 584; *Thayer v. El Plomo Min. Co.*, 40 Ill. App.

whose interest is not identical with his;<sup>1</sup> and he may be called as a witness by his adversary, and also, in some jurisdictions, the court may, for special reasons, permit him to testify in his own behalf.<sup>2</sup>

*b. ACTIONS AND PROCEEDINGS AFFECTED BY STATUTE*—(1) *In General*.—Where the statute prohibits in general terms any witness from testifying as to any transaction, etc., with a decedent, the prohibition is not limited to actions in which it is sought to charge the estate of the decedent.<sup>3</sup> Most of the statutes prohibit parties from testifying in actions by or against the personal representatives of the decedent or persons claiming under the decedent, and of course the action must fall within this requirement to render the parties incompetent as witnesses;<sup>4</sup> and where the statutes prohibit a party from testi-

344; *Neish v. Gannon*, 198 Ill. 219; *McKay v. Riley*, 135 Ill. 586; *Hawley v. Hawley*, 187 Ill. 351; *Volbracht v. White*, 197 Ill. 298.

*Iowa*.—*Parcell v. McReynolds*, 71 Iowa 623.

*Minnesota*.—*Bowers v. Schuler*, 54 Minn. 99.

*Missouri*.—*State v. Miller*, 44 Mo. App. 159.

*New York*.—*Carpenter v. Soule*, 88 N. Y. 251, 42 Am. Rep. 248; *Matter of Potter*, 161 N. Y. 84; *Pursell v. Fry*, 19 Hun (N. Y.) 595; *Brown v. Brown*, 29 Hun (N. Y.) 498; *Davis v. Gallagher*, 55 Hun (N. Y.) 593; *Matter of Hedges*, 57 N. Y. App. Div. 48; *Meislahn v. Meislahn*, 56 N. Y. App. Div. 566; *Hixon v. Rodbourn*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 19, judgment reversed 67 N. Y. App. Div. 424; *Wiltse v. Wiltse*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 559; *Matter of Woodward*, 69 N. Y. App. Div. 286. But under the former statute (Code Pro., § 399) it was held otherwise. *Howell v. Taylor*, 11 Hun (N. Y.) 214; *Cornell v. Cornell*, 12 Hun (N. Y.) 312; *Gifford v. Sackett*, 15 Hun (N. Y.) 79, citing *Le Clare v. Stewart*, 8 Hun (N. Y.) 127.

*North Carolina*.—*Weinstein v. Patrick*, 75 N. Car. 344; *Tredwell v. Graham*, 88 N. Car. 208; *Roberts v. Preston*, 100 N. Car. 243.

*South Carolina*.—*Shell v. Boyd*, 32 S. Car. 359.

*Virginia*.—*Burkholder v. Ludlam*, 30 Gratt. (Va.) 255, 32 Am. Rep. 668.

*West Virginia*.—*Crothers v. Crothers*, 40 W. Va. 169; *McMechen v. McMechen*, 17 W. Va. 683; *Beall v. Shaull*, 18 W. Va. 262; *Coffman v. Hedrick*, 32 W. Va. 119.

*Wisconsin*.—*Crowe v. Colbeth*, 63 Wis. 643.

1. Within this principle it is held that a party to a suit may testify in favor of another party as to personal transactions between the witness and the decedent, though incompetent to give such testimony in his own behalf. The fact that it would be difficult to confine such testimony in its effect to the party for whom it was offered is not sufficient to exclude it. *Reed v. Baldwin*, 102 Ga. 80; *Beach v. Cummins*, (Ky. 1892) 18 S. W. Rep. 360; *Nichols v. King*, 68 S. W. Rep. 133, 24 Ky. L. Rep. 124.

In *New Ebenezer Assoc. v. Gress Lumber Co.*, 89 Ga. 125, it was held that one sued jointly with the representative of a deceased person was competent as a witness for the plaintiff, though he might have an interest in charging the personal representative.

But a complainant in a bill to foreclose a

mortgage will not be allowed to testify on the ground that his testimony is in the interest of the defendant. *Reed v. Kidder*, 70 Ill. App. 498.

2. See *infra*, this division of this section, *f. Exceptions to Rule of Incompetency*.

When Called by the Adverse Party he is not a witness in his own behalf. *Ainsworth v. Stone*, 73 Vt. 101.

3. *Actions and Proceedings Affected by Statute*.—*Turner v. Mitchell*, (Ky. 1901) 61 S. W. Rep. 468; *Elliott v. Campbell*, (Ky. 1904) 78 S. W. Rep. 1122; *Park Com'rs v. Marrett*, (Ky. 1904) 80 S. W. Rep. 166; *Lowe v. Lowe*, 83 Minn. 206. See also *Cofer v. Gardner*, 9 Ky. L. Rep. 196.

4. *United States*.—*Potter v. Chicago Third Nat. Bank*, 102 U. S. 163; *Page v. Burnstine*, 102 U. S. 668; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 277; *Crawford v. Moore*, 28 Fed. Rep. 830; *Mutual L. Ins. Co. v. Watson*, 30 Fed. Rep. 653.

*Georgia*.—*Parrott v. Baker*, 82 Ga. 364; *Woodson v. Jones*, 92 Ga. 662; *Gunn v. Petty-grew*, 93 Ga. 327; *Heard v. Phillips*, 101 Ga. 691; *Elliott v. Keith*, 102 Ga. 117; *Buchanan v. Buchanan*, 103 Ga. 90; *Oliver v. Powell*, 114 Ga. 592; *Whitley v. Hudson*, 114 Ga. 668.

*Idaho*.—*Greene v. Camas Prairie Bank*, 7 Idaho 576.

*Illinois*.—*Firemen's Ins. Co. v. Peck*, 126 Ill. 493; *Robbins v. Moore*, 129 Ill. 30; *Gage v. Eddy*, 179 Ill. 492; *Houston v. Maddux*, 73 Ill. App. 203.

*Indiana*.—*Hall v. State*, 39 Ind. 301; *Dille v. Webb*, 61 Ind. 85; *Hess v. Lowrey*, 122 Ind. 225; *Hankey v. Downey*, 10 Ind. App. 500; *Leffler v. Watson*, 13 Ind. App. 176.

*Mississippi*.—*Love v. Stone*, 56 Miss. 449.

*Missouri*.—*St. Charles First Nat. Bank v. Payne*, 111 Mo. 291.

*New Jersey*.—*Force v. Dutcher*, 18 N. J. Eq. 404; *Sweet v. Parker*, 22 N. J. Eq. 455; *Montgomery v. Simpson*, 31 N. J. Eq. 2; *Palmateer v. Tilton*, 40 N. J. Eq. 555; *Lehigh Coal, etc., Co. v. Central R. Co.*, 41 N. J. Eq. 186; *Hodge v. Coriell*, 44 N. J. L. 456.

*New York*.—*Severn v. National State Bank*, 18 Hun (N. Y.) 228.

*Texas*.—*Kahler v. Carruthers*, 18 Tex. Civ. App. 216.

*Vermont*.—*Downs v. Belden*, 46 Vt. 674; *Randall v. Randall*, 64 Vt. 419.

See *infra*, this section, *d. Persons Protected*.

An Application for Letters of Administration.—*Buchanan v. Buchanan*, 103 Ga. 90.

Actions Between Two Estates.—The *Indiana*

fying to any transaction with a decedent whose estate is interested in the result of the suit, it is not an interest on the part of the decedent's estate in the judgment which disqualifies a party as a witness, but a direct and immediate conflict of interests involved in the issue to be tried; the effect of the evidence must be to diminish or enlarge the rights of the decedent.<sup>1</sup> In *Texas*, the statute excluding parties as witnesses in actions in which the heir of a decedent is a party limits the application of the statute to actions "arising out of transactions with the decedent," and, of course, does not apply where the action does not arise out of such a transaction.<sup>2</sup>

**Death of Party Pending Action.** — Where one of the parties to an action dies pending trial and his executor or administrator is substituted, the action then becomes one by or against such executor or administrator, so as to disqualify other parties as witnesses under a statute disqualifying parties in actions by or against executors, etc.<sup>3</sup>

(2) *Actions in Which Judgment May Be Rendered For or Against Decedent's Estate.* — Other statutes are limited in terms to actions and proceedings "in which a judgment or decree may be rendered for or against" the executor, etc.;<sup>4</sup> and if this condition does not exist, the parties are competent to testify.<sup>5</sup>

(3) *Actions on "Claim or Demand" Against Decedent's Estate.* — Other statutes exclude the testimony of parties in actions on a claim or demand against the estate of the decedent, and in order to exclude a party the action must be one to enforce a claim or demand against the estate of the decedent,<sup>6</sup> and such statutes do not apply to any case in which a personal judgment cannot be obtained against the decedent's estate, but which is merely a proceeding *in rem* or *quasi in rem* affecting a particular item of property; accordingly it has been held, in a proceeding to enforce a materialman's lien, that the lien claimant

statute does not apply to actions between two estates of decedents, as where one estate is prosecuting a claim against another estate. *Sloan v. Sloan*, 21 Ind. App. 315. It has been held otherwise, however, in *New York*. *Generich v. Ulrich*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 353.

**Administrator Improperly Joined.** — In *Campbell v. Mayes*, 38 Iowa 9, the administrator of the deceased grantor was made a party defendant along with the heirs, but, as he was not a necessary party, the action was dismissed as to him and prosecuted against the heirs. It was held that the plaintiff and his wife were both competent to prove the contract on the ground that the defendants were not parties entitled to the protection of the statute of that state.

1. *Hill v. Helton*, 80 Ala. 528.

2. *Barrett v. Eastham*, 28 Tex. Civ. App. 189; *Lumkins v. Coates*, (Tex. Civ. App. 1897) 42 S. W. Rep. 580.

3. *Tyler v. Kelch*, 19 App. Cas. (D. C.) 180; *Crawford v. Shriver*, 139 Pa. St. 239.

4. **Proceedings Affected.** — Rev. Stat. U. S., § 858. See also the statutes of *Arizona*, *Arkansas*, and *Tennessee*. Compare the statutes of the other states.

5. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275; *Lake Erie, etc., R. Co. v. Charman*, (Ind. 1903) 67 N. E. Rep. 923. See also *Briggs v. Spaulding*, 141 U. S. 153.

**Action Between Guardian and Ward.** — Where the statute excludes parties as witnesses in actions by or against a guardian in which a judgment may be rendered against him "as

such," it does not apply to an action by the ward against his guardian, but only to actions by or against the guardian, in which the judgment for or against the guardian is for or against him in his representative character, and in effect a judgment against the ward. *Jones v. Parker*, 67 Tex. 76.

6. **"Claim or Demand" Against Estate.** — *Todd v. Martin*, (Cal. 1894) 37 Pac. Rep. 872; *Poulson v. Stanley*, 122 Cal. 655; *Moore v. Schofield*, 96 Cal. 488; *Frazier v. Murphy*, 133 Cal. 91; *McPherson v. Weston*, 85 Cal. 90; *Coats v. Harris*, (Idaho 1904) 75 Pac. Rep. 243.

The language of the *California* statute is, that "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person" shall not be permitted to testify as to any matter of fact occurring before the death of such deceased person. *McPherson v. Weston*, 85 Cal. 97.

**The Idaho Statute** is in the words of the *California* statute. Rev. Stat. Idaho, § 4405. Compare the statutes of other states.

**The Mississippi Statute** merely provides that "a person shall not testify as a witness to establish his own claim or defense against the estate of the deceased person which originated during the lifetime of such deceased person," and under this statute it is held that a claim against the estate to bring the case within the prohibition of the statute must be a money demand, or a claim to some specific property.



was competent to testify in support of his claim.<sup>1</sup> And the same rule has been applied to the enforcement of a mortgage lien;<sup>2</sup> and to an action to enforce a resulting trust against the personal representatives of the deceased trustee;<sup>3</sup> and to an action to establish a lost deed in which the decedent was the grantor, and to quiet the grantee's title to the land therein conveyed;<sup>4</sup> and to an action by a principal to set aside a deed to his deceased agent, on the ground that the deed was procured by fraud.<sup>5</sup> So, also, it has been held that an action by a husband against the administrator of his wife to quiet title to land which was community property is not on a claim against the deceased wife's estate so as to render him incompetent.<sup>6</sup>

(4) *Actions "Against" Executors, etc.* — Where the statutes prohibit a party from testifying in an action "against" executors, etc., a party defendant to an action by an executor or administrator to enforce a claim in favor of the estate is not disqualified.<sup>7</sup>

(5) *Action Against Person "Made a Party as Heir of a Decedent."* — The Maine statute prohibiting a party to testify when a person is "made a party as heir of a decedent," does not apply when a person claims property in his own right though by inheritance;<sup>8</sup> but when an heir of a decedent is made a party defendant in a suit to enforce a trust on the ground that the ancestor's estate cast upon him is a trust estate, he is "made a party as heir" of his ancestor, so as to render the statute applicable,<sup>9</sup> and the same is true where heirs commence proceedings to redeem a mortgage running to their ancestor.<sup>10</sup>

(6) *Intervention.* — Where the statute excludes certain witnesses in actions by or against executors, etc., it is not necessary, in order to bring a case within this provision, that the action should have been brought primarily by or against the person offered as a witness. Therefore, in an action by an executor or administrator, an intervener who bases his claim to the fund or property in controversy on a contract with the deceased is not competent to prove it, as he is in effect seeking a judgment against the decedent's estate.<sup>11</sup>

(7) *Interpleader.* — In a suit of interpleader, the original plaintiff becomes

Covington v. Frank, (Miss. 1899) 28 So. Rep. 20.

1. *Proceeding in Rem—Enforcement of Mechanic's Lien.* — Booth v. Pendola, 88 Cal. 36; Joost v. Sullivan, 111 Cal. 286. See also CLAIM, vol. 6, p. 101.

It is otherwise, however, in such an action where the statute in general terms disqualifies the party as a witness. Gunther v. Bennett, 72 Md. 384.

2. *Enforcement of Mortgage Lien.* — Fallon v. Butler, 21 Cal. 24. See also Matter of McCausland, 52 Cal. 576; Matter of Swain, 67 Cal. 641; Stuttmaster v. San Francisco, 72 Cal. 489.

3. *Enforcement of Resulting Trusts.* — Myers v. Reinstein, 67 Cal. 89; Nasholds v. McDonell, 6 Idaho 377. See, however, Whitney v. Fox, 166 U. S. 637, affirming 8 Utah 380; Rice v. Rigley, 7 Idaho 115; Coats v. Harris, (Idaho 1904) 75 Pac. Rep. 243.

It is otherwise, however, under statutes prohibiting witnesses generally from testifying in their own behalf as against the representative, etc., of the decedent. Boyd v. Boyd, 163 Ill. 611; Pope v. Pope, (Ky. 1900) 55 S. W. Rep. 194.

4. Poulson v. Stanley, 122 Cal. 655.

5. Calmon v. Sarraille, 142 Cal. 638. In this case Harrison, C., said: "The present action is not upon a claim against the estate of Garnier, but is brought to establish the

fact that the land described in the complaint never became a part of his estate."

It is otherwise where the statute prohibits generally a witness from testifying against decedents. Turner v. Washburn, (Ky. 1904) 80 S. W. Rep. 460.

6. Bollinger v. Wright, 143 Cal. 292.

7. "Against" Executors, etc. — Sedgwick v. Sedgwick, 52 Cal. 336; McPherson v. Weston, 85 Cal. 97.

The Utah Statute is in the words of the California statute, but is construed to include actions by executors and administrators as well as to actions against them. Ewing v. White, 8 Utah 250.

8. *Person "Made a Party as Heir."* — Johnson v. Merithew, 80 Me. 111; Pierce v. Rollins, 83 Me. 172; Goulding v. Horbury, 85 Me. 227; Golder v. Golder, 95 Me. 259.

The demandant in a writ of dower is a competent witness in her own behalf, although the tenant holds the estate by inheritance from his father, the demandant's late husband. The tenant in such a case is not "made a party as an heir of the deceased party," but is a party because he is the tenant of the estate. Wentworth v. Wentworth, 71 Me. 72.

9. Burleigh v. White, 64 Me. 23; Higgins v. Butler, 78 Me. 520.

10. Cary v. Herrin, 59 Me. 361.

11. *Intervention.* — Mutual L. Ins. Co. v. Watson, 30 Fed. Rep. 653; Bachelder v. Brown, 47

merely a stakeholder after the decree requiring the claimant to interplead, and the action then becomes one between the claimants, and if one of such claimants is an executor or administrator, the other party is incompetent to testify under a statute prohibiting a party to testify in actions by or against an executor or administrator.<sup>1</sup>

(8) "*Trial of an Action*"—**Feigned Issue Out of Chancery.**—Where in a suit in chancery a feigned issue out of chancery is ordered to be tried before a jury, the trial of such feigned issue is the "trial of an action" within the meaning of a statute excluding parties as witnesses in the "trial of an action" as against executors and administrators.<sup>2</sup>

(9) "*Proceeding.*"—A statute prohibiting a party to a proceeding from testifying against the executor of the decedent applies to any legal proceeding which is adversary in its character.<sup>3</sup>

**Proceeding in Nature of Motions.**—Statutes providing that a party shall not testify where the adverse party is an executor, etc., apply though the proceeding is in the nature of a motion.<sup>4</sup>

(10) *Tort Actions.*—Where witnesses within the rule of exclusion are prohibited from testifying in actions by or against executors or administrators, this includes tort actions, as well as actions on contract.<sup>5</sup>

**c. PERSONS EXCLUDED**—(1) *Parties to Actions or Proceedings*—(a) **In General.**—Under a statute removing the common-law disability of parties to testify without qualification, the competency of a party as a witness is not affected by the fact that the adverse party claims under a decedent;<sup>6</sup> and when the general disability, as witnesses, of parties to actions is removed, subject to specified exceptions, a party not within the terms of the exception is, of course, a competent witness.<sup>7</sup> Of course, under statutes excluding merely parties to the action, or parties interested therein, a person who is neither a party nor interested therein is not excluded.<sup>8</sup>

**Next Friend.**—A *prochein ami* or guardian *ad litem* is not a party to the action so as to render him incompetent as a witness under statutes excluding parties to the action;<sup>9</sup> but where the statute also excludes persons interested in the action, and a *prochein ami* is liable for costs, he has been

Mich. 366; *Lewis v. Oliver*, 22 Mo. App. 203.

1. *Fairfield Sav. Bank v. Small*, 90 Me. 546. See also *Smith v. Rishel*, 164 Pa. St. 181.

2. *Parks v. Andrews*, 56 Hun (N. Y.) 391.

3. *Ballinger v. Connable*, 100 Iowa 121 (proceeding in probate).

4. *Ullman v. Abbott*, 10 Wyo. 97.

**Rule to Open Judgment.**—*Cake v. Cake*, 162 Pa. St. 584.

5. **Tort Actions.**—*Irwin v. Nolde*, 164 Pa. St. 205.

The *Indiana* statute (Burns Rev. Stat. 1894, § 507) excluding witnesses in all suits founded on a contract with or demand against the decedent to obtain title to or possession of property, etc., does not, however, apply to tort actions. *Cincinnati, etc., R. Co. v. Gregor*, 150 Ind. 625.

6. **Parties to Actions, etc.**—*Corbus v. Leonhardt*, (C. C. A.) 114 Fed. Rep. 10, wherein it was held that in *Alaska* there is no rule rendering a party to an action by or against the personal representative of a decedent incompetent from testifying in his own behalf.

7. **Parties Not Within Terms of Exception.**—*Kenyon v. Peirce*, 17 R. I. 794.

**Statutes Strictly Construed in Favor of Competency.**—See *supra*, this section, 3. a. (1) *Statutory Modification of Common-law Rule.*

**8. Exclusion of "Parties" Only**—*United States.*—*Slavens v. Northern Pac. R. Co.*, (C. C. A.) 97 Fed. Rep. 255.

*Alabama.*—*Espalla v. Richard*, 94 Ala. 159.

*California.*—*Merriman v. Wickersham*, 141 Cal. 567.

*Georgia.*—*Logan v. Logan*, 108 Ga. 760.

*Kansas.*—*Fry v. Fry*, 56 Kan. 291.

*Michigan.*—*Pendill v. Neuberger*, 64 Mich. 220; *Waterman Real Estate Exch. v. Stephens*, 71 Mich. 104.

*Mississippi.*—*Jones v. Carrollton Bank*, 71 Miss. 1023.

*Missouri.*—*Reed v. Painter*, 145 Mo. 341.

*New York.*—*Pandjiris v. McQueen*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 705.

*North Carolina.*—*Bunn v. Todd*, 107 N. Car. 266.

*South Carolina.*—*Huff v. Latimer*, 33 S. Car. 255.

*Wisconsin.*—*Laack v. Runge*, 104 Wis. 59.

9. **Next Friend.**—*Kilpatrick v. Strozier*, 67 Ga. 247; *Trahern v. Colburn*, 63 Md. 99; *Neale v. Hermanns*, 65 Md. 474; *Murphy v. Murphy*, 24 Mo. 526; *Mason v. McCormick*, 75 N. Car. 263; *Taylor v. Travelers Ins. Co.*, 15 Tex. Civ. App. 254. See also *Matter of Van Alstine*, 26 Utah 193.

held disqualified as a witness on the ground of interest in the action.<sup>1</sup>

**Officers and Directors of Corporation.** — Officers and directors of a corporation which is a party to an action are not by reason of their relation to the corporation also parties, so as to render them incompetent as witnesses under statutes excluding parties to the action.<sup>2</sup> The question whether they are excluded under statutes excluding persons interested in the action will be treated later.<sup>3</sup>

**Cross-bill.** — Where, in a suit against several codefendants, a cross-bill is brought by one defendant against another for relief not involved in the original suit, such cross-bill is, in effect, a separate suit; and therefore parties defendant in the original suit, but not parties to the cross-bill, are not disqualified to testify in the cross-suit on the ground that they are parties to the suit.<sup>4</sup>

(b) **Parties Interested Adversely to Persons Within Protection of Statute.** — Some of the statutes expressly limit the exclusion of parties to those whose interest is adverse to the estate of a decedent, or the right acquired from the decedent, by the person within the protection of the statute, and therefore do not exclude witnesses whose interest is not adverse;<sup>5</sup> but, of course, under such statutes, if the interest of the witness is in fact adverse to the decedent's estate, or the right acquired from the decedent by the person within the protection of the statute, the witness is incompetent.<sup>6</sup> Thus, where one party claims under a deed from the decedent, and another party as heir of the decedent, the latter cannot testify to defeat the deed.<sup>7</sup>

(c) **Opposite Party.** — Some statutes provide that in actions by or against the representatives of a decedent, etc., the "opposite party" shall not be permitted to testify.<sup>8</sup> Such statutes do not prohibit the executor or administrator, etc., from testifying in their own behalf,<sup>9</sup> and it has been held that under such a statute one sued jointly with an executor or administrator was not prohibited from testifying in favor of the plaintiff, though such witness may have an interest in charging the representative of the decedent jointly with himself.<sup>10</sup> In ascertaining whether there is such a relation of the parties to each other as to render one a party opposite to the executor, administrator, etc., the court will examine the record to see if they are in fact antagonistic, and will not be controlled by the complainant's voluntary classification of parties in his complaint.<sup>11</sup> The question with regard to who are opposite parties within the exception contained in statutes allowing one party to the

1. *Mason v. McCormick*, 75 N. Car. 263. Compare *Matter of Van Alstine*, 26 Utah 193. See *infra*, this subsection, (3) *Persons Interested in Event of Action*.

2. **Officers and Directors of Corporations.** — *City Sav. Bank v. Enos*, 135 Cal. 167; *Merriman v. Wickersham*, 141 Cal. 567; *Flach v. Gottschalk Co.*, 88 Md. 368; *New Jersey Trust, etc., Co. v. Camden Safe Deposit, etc., Co.*, 58 N. J. L. 196; *Colonial, etc., Mortg. Co. v. Thedford*, 21 Tex. Civ. App. 254; *In re Bruendl*, 102 Wis. 45; *Twohy Mercantile Co. v. McDonald*, 108 Wis. 21. See also *Matter of O'Rourke*, (Surrogate Ct.) 12 Misc. (N. Y.) 248.

3. See *infra*, this subsection, (3) *Persons Interested in Event of Action*.

4. **Cross-bill.** — *Baldwin v. Trowbridge*, 62 N. J. Eq. 468.

5. **Parties Adversely Interested to Decedent.** — *Walker v. Steele*, 121 Ind. 436; *Case v. Ellis*, 9 Ind. App. 274; *Smith v. Rishel*, 164 Pa. St. 181; *Strauss v. Braunreuter*, 14 Pa. Super. Ct. 125, reversing 8 Pa. Dist. 718; *Rudolph v. Rudolph*, 17 Pa. Super. Ct. 558; *Cunningham v. Morrow*, 24 Pa. Co. Ct. 348. See also *infra*,

this subsection, (3) *Persons Interested in Event of Action*.

6. *Irwin's Estate*, 160 Pa. St. 82; *Robbins v. Farwell*, 193 Pa. St. 37; *Rieter v. McJunkin*, 194 Pa. St. 301; *Myers v. Litts*, 195 Pa. St. 595; *Acklin v. McCalmont Oil Co.*, 201 Pa. St. 257; *Shroyer v. Smith*, 204 Pa. St. 310; *Paschall v. Fels*, 207 Pa. St. 71; *Hause v. Sloyer*, 3 Pa. Dist. 320; *Conway's Estate*, 18 Lanc. L. Rev. 129.

7. *Crothers v. Crothers*, 149 Pa. St. 201; *Baldwin v. Stier*, 191 Pa. St. 432.

8. **"Opposite Party."** — *Thompson v. Cody*, 100 Ga. 771; *Wilson v. Wilson*, 80 Mich. 472; *Penny v. Croul*, 87 Mich. 15; *People's Nat. Bank v. Wilcox*, (Mich. 1904) 100 N. W. Rep. 24; *Kempton v. Bartine*, 59 N. J. Eq. 149, 60 N. J. Eq. 411; *Hoxie v. Farmers', etc., Nat. Bank*, 20 Tex. Civ. App. 462.

9. *Illinois Cent. R. Co. v. Reardon*, 157 Ill. 372; *Tabor v. Tabor*, (Mich. 1904) 99 N. W. Rep. 4. See *infra*, this section, d. *Persons Protected*.

10. *New Ebenezer Assoc. v. Gress Lumber Co.*, 80 Ga. 125.

11. *McCartin v. Traphagen*, 43 N. J. Eq. 323.



action to call an opposite party to testify will be treated later.<sup>1</sup>

(d) **Parties Improperly Joined.** — If a party is improperly joined as a defendant in the action, for the sole purpose of suppressing his testimony under the rule incapacitating parties as witnesses, such party is not necessarily incapacitated to testify;<sup>2</sup> but it has been held that, in order to render him competent to testify, it is necessary that the case be dismissed as to him.<sup>3</sup>

(e) **Persons Subsequently Made Parties.** — Where the witness was not a party to the action at the time his testimony was given, the fact that he is subsequently made a party does not render his testimony inadmissible or render it necessary that his testimony be stricken out.<sup>4</sup>

(f) **Person Named as Party, but Not Served and Not Appearing.** — The mere fact that a person is named in the petition or complaint as a party does not make him a party when he is not served with process and does not appear, so as to render him incompetent as a witness;<sup>5</sup> but the rule of exclusion applies to one who was properly made a party, though he did not appear and answer.<sup>6</sup>

(g) **Plaintiff in Whose Stead Another Has Been Substituted.** — A statute prohibiting a party to the action to testify does not include one who was originally a party but in whose stead another has been substituted.<sup>7</sup>

(h) **Dismissal or Discontinuance as to One of Several Defendants.** — Where several defendants are sued and the action is discontinued as to one, he then ceases to be a party, and the disqualification as a witness attaching to parties to the action no longer affects him.<sup>8</sup> And when the action is dismissed as to one of several defendants on the ground that he was neither a necessary nor a proper party, he becomes competent to testify.<sup>9</sup>

(i) **Interested Parties of Record.** — Where the statute excludes as witnesses parties to the action, a party of record, interested in the event of the decision of the issue on which he testifies, is, of course, excluded;<sup>10</sup> and under a statute

Persons joined with executors and administrators or other persons protected by the statute as codefendants may still be opposite parties to the former. *Kempton v. Bartine*, 59 N. J. Eq. 149, 60 N. J. Eq. 411.

1. See *infra*, this section, *f. Exceptions to Rule of Incompetency*.

2. **Parties Improperly Joined.** — *McRae v. Poor*, (Tex. Civ. App. 1898) 48 S. W. Rep. 47.

3. *Bilger v. Buchanan*, (Tex. 1887) 6 S. W. Rep. 408.

4. **Person Subsequently Made Party.** — *Bell v. Brown*, Russ. Eq. Dec. (Nova Scotia) 20; *Snyder v. Harris*, 61 N. J. Eq. 480.

5. **Person Named as Party, but Not Summoned and Not Appearing.** — *Williams v. Carr*, 4 Colo. App. 363; *Giesecke Boot, etc., Mfg. Co. v. SeEVERS*, 85 Iowa 685; *Hicks v. Williams*, 112 Iowa 691; *Bunker v. Taylor*, 10 S. Dak. 526.

6. *Church v. Howard*, 79 N. Y. 420.  
7. **Substitution of Administrator De Bonis Non — Original Administrator May Testify.** — *Snyder v. Fiedler*, 139 U. S. 478.

8. **Action Discontinued as to One of Several Defendants.** — *Segar v. Lufkin*, 77 Me. 142.

But the widow of a decedent does not cease to be a party to a suit for partition of the decedent's real estate by reason of the fact that she had procured an allotment of her share, where the allotment had been appealed from by the other heirs, and she had not been dismissed from the partition suit. *Ellis v. Newell*, 120 Iowa 71.

9. *Campbell v. Mayes*, 38 Iowa 9.

10. **Interested Parties of Record** — *United States*. — *McMullen v. Ritchie*, 64 Fed. Rep. 253.

*Georgia.* — *McBride v. McBride*, 82 Ga. 714; *Jones v. Hough*, 98 Ga. 492; *Killian v. Banks*, 103 Ga. 245; *Rogers v. Chambers*, 112 Ga. 258.  
*Illinois.* — *Sayles v. Christie*, 187 Ill. 420.  
*Indiana.* — *Slayback v. Witt*, 151 Ind. 376.

*Iowa.* — *Sauer v. Nehls*, 121 Iowa 184.  
*Kentucky.* — *Raison v. Steele*, (Ky. 1895) 29 S. W. Rep. 454; *Robinson v. Redd*, (Ky. 1897) 43 S. W. Rep. 435; *Barnett v. Adams*, (Ky. 1904) 82 S. W. Rep. 406.

*Maryland.* — *Polk v. Clark*, 92 Md. 372.  
*Minnesota.* — *Comstock v. Comstock*, 76 Minn. 396.

*Mississippi.* — *Moore v. Crump*, (Miss. 1904) 37 So. Rep. 109; *Jackson v. Smith*, 68 Miss. 53.  
*New Jersey.* — *Adoue v. Spencer*, 62 N. J. Eq. 782, reversing 59 N. J. Eq. 231.

*New York.* — *Parks v. Andrews*, 56 Hun (N. Y.) 391; *Matter of Stewart*, 1 Connolly (N. Y.) 412.

*Ohio.* — *Matter of Runyan*, 7 Ohio Dec. 236.  
*Pennsylvania.* — *Watkins v. Moore*, 192 Pa. St. 211.

*Tennessee.* — *Hall v. Hall*, (Tenn. Ch. 1896) 39 S. W. Rep. 535.

*Texas.* — *Hicks v. Hicks*, (Tex. Civ. App. 1894) 26 S. W. Rep. 227; *Brown v. Mitchell*, 75 Tex. 9; *Gonzales v. Adoue*, 94 Tex. 120; *Haberzettler v. Dearing*, (Tex. Civ. App. 1904) 80 S. W. Rep. 539.

*Vermont.* — *Canfield v. Bentley*, 60 Vt. 655; *Randall v. Randall*, 64 Vt. 419; *Haskell v. Holt*, 75 Vt. 413.

*West Virginia.* — *Paxton v. Paxton*, 38 W. Va. 616.

**Wife.** — A wife in establishing her claim

prohibiting any party to a civil action from testifying when any adverse party sues and defends as executor, unless called as a witness by such adverse party, a codefendant who is sued with executors, etc., and whose interest is in harmony with that of the complainant, is incompetent to testify on behalf of the complainant.<sup>1</sup>

(j) **Nominal and Disinterested Parties of Record — General Rule.** — Though the terms of the statutes are broad enough to apply to all parties of record, yet it seems to be generally considered that the parties intended to be excluded from testifying are the real, and not merely formal, nominal, and wholly unnecessary parties.<sup>2</sup> The intended basis of the incompetency of a party of record being his interest,<sup>3</sup> a party of record may testify on an issue if he is wholly without interest therein.<sup>4</sup> Thus, a codefendant who has confessed judgment or suffered a default, or as to whom the action has otherwise gone to judgment, has been held competent to testify in favor of his codefendants, as his interest in the issue to which his testimony relates has ceased.<sup>5</sup> So, also, a party defendant who disclaims any interest in the subject of litigation may become a competent witness,<sup>6</sup> and where, in an amended com-

plaint against her husband's estate is not more competent to testify to transactions with or statements by the husband, when the executor or administrator of her deceased husband is a necessary party, than any other witness. *Adoue v. Spencer*, 62 N. J. Eq. 782, reversing 59 N. J. Eq. 231.

**A Cestui Que Trust** who is made a party of record, and for whose benefit a suit is brought by the trustee, is such a party to the record as to exclude his testimony. *Gabbett v. Sparks*, 60 Ga. 582.

1. *Pyle v. Pyle*, 158 Ill. 289.

2. **Nominal or Formal Parties Not Excluded — United States.** — *Kingsbury v. Buckner*, 134 U. S. 650 (husband with wife to enforce trust for sole benefit of wife, construing Illinois statute). See, however, *In re Josephson*, 121 Fed. Rep. 142, affirmed (C. C. A.) 124 Fed. Rep. 734 (trustee in bankruptcy held incompetent under Georgia statute to testify in his own behalf as against the decedent's estate).

*Indiana.* — *Works v. State*, 120 Ind. 119.

*Michigan.* — *Penny v. Croul*, 87 Mich. 15 (executor in behalf of his testator's estate held competent).

*New Hampshire.* — *Drew v. McDaniel*, 60 N. H. 480; *Emery v. Clough*, 63 N. H. 552.

*New York.* — *Loder v. Whelpley*, 111 N. Y. 239 (executor, proponent of will, held competent witness in support of will). Compare *Gennerich v. Ulrich*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 353 (executor of one estate held an interested party in establishing a claim against the estate of another decedent).

*Ohio.* — *Bell v. Wilson*, 17 Ohio St. 640; *Baker v. Kellogg*, 29 Ohio St. 663; *Wolf v. Pownor*, 30 Ohio St. 472; *Baker v. Jerome*, 50 Ohio St. 682.

*Pennsylvania.* — *Sturgeon v. Stevens*, 186 Pa. St. 350.

*Texas.* — *Mayfield v. Robinson*, 22 Tex. Civ. App. 385; *Jarrell v. Crow*, 30 Tex. Civ. App. 629. Compare *Ellis v. Stewart*, (Tex. Civ. App. 1893) 24 S. W. Rep. 585 (guardian); *Hicks v. Hicks*, (Tex. Civ. App. 1894) 26 S. W. Rep. 227.

**Relator.** — One who sues as relator to foreclose a school fund mortgage is a mere nominal

party and not interested in the suit, and therefore is not an incompetent witness. *Works v. State*, 120 Ind. 119.

**Assignment of Interest Pending Suit.** — The fact that a complainant, personally interested in the matter when the suit was instituted, transferred his interest pending the suit, does not remove his disqualification as a witness. *De Roux v. Girard*, (C. C. A.) 112 Fed. Rep. 89, affirming 105 Fed. Rep. 798.

3. **Interest the Basis of Incompetency.** — *Stallins v. Hinson*, 49 Ala. 97.

4. **Disinterested Parties — Indiana.** — *Upton v. Adams*, 27 Ind. 432; *Starret v. Burkhalter*, 86 Ind. 439; *Spencer v. Robbins*, 106 Ind. 580; *Scherer v. Ingerman*, 110 Ind. 443; *Martin v. Martin*, 118 Ind. 227; *Scott v. Harris*, 127 Ind. 520.

*Minnesota.* — *Bowers v. Schuler*, 54 Minn. 99.

*Oklahoma.* — *Murphy v. Colton*, 4 Okla. 181. *Texas.* — *Parker v. Cockrell*, (Tex. Civ. App. 1895) 31 S. W. Rep. 221.

5. **Effect of Judgment.** — *Upton v. Adams*, 27 Ind. 432; *Scherer v. Ingerman*, 110 Ind. 443. Compare *Coffin v. Loomis*, (Tex. Civ. App. 1897) 41 S. W. Rep. 511.

In *Iowa* it has been held that though a party to the action is not competent to testify by reason of his want of interest in the matter to which his testimony relates, still a defendant who withdraws his answer on a stipulation that judgment should be rendered against him for a certain amount is no longer a party to the action, and therefore, is not an incompetent witness. *Conger v. Bean*, 58 Iowa 321.

**Principal Debtor for Surety.** — *Starret v. Burkhalter*, 86 Ind. 439.

6. **Defendant Disclaiming.** — *Spencer v. Robbins*, 106 Ind. 580; *Martin v. Martin*, 118 Ind. 227; *Murphy v. Colton*, 4 Okla. 181; *Mayfield v. Robinson*, 22 Tex. Civ. App. 385; *Barrett v. Eastham*, 28 Tex. Civ. App. 189; *Britton v. Tischmacher*, (Tex. Civ. App. 1895) 31 S. W. Rep. 241.

But a warrantor who is joined as party in trespass to try title, so that he will be bound by the judgment, is still regarded as a "party" and therefore disqualified to testify,

plaint, one of the original parties plaintiff is omitted as a party and disclaims any interest in the action, he becomes a competent witness.<sup>1</sup> It seems that a party to the record will be presumed to have an interest in the result of the suit, unless there is something to show that he is without interest,<sup>2</sup> especially if he is a necessary party to the suit or action;<sup>3</sup> and if a party of record has in fact an interest in the issue on which his testimony is offered, the fact that his interest is not directly affected by the decision to be rendered does not render him competent to testify on the ground of want of interest.<sup>4</sup> So, also, the fact that the interests of the witness and another party to the action in whose favor he testifies, where their interests arise out of the same transaction, are divisible does not render the witness competent to testify in favor of such third person.<sup>5</sup> It seems that the liability for costs of a party to an action is such an interest in the action as will disqualify him.<sup>6</sup>

**Minority Rule.** — In some jurisdictions, however, under statutes excluding the testimony of any "party" to an action or proceeding, the courts have refused to restrict the meaning of the statutes to parties of record who are interested in the issue on which their testimony is given.<sup>7</sup>

**The Proponent of a Will,** if not otherwise interested in the probate of the will except as executor, is not such a "party" to the proceedings as to disqualify him as a witness in support of the will.<sup>8</sup>

**Party to Issue to Be Tried.** — Where the statute, instead of disqualifying as witnesses parties to the action, disqualifies parties to the issue to be tried, a party to the action, who is not a party to or interested in the issue on which his testimony is sought, is not disqualified to testify thereto.<sup>9</sup>

(k) **Interested Parties Not of Record** — **General Rule.** — The construction of the provision that in actions by or against the persons named neither "party"

though he has filed a disclaimer. *Bennett v. Virginia Ranch, etc., Co.*, 1 Tex. Civ. App. 321.

And the court will not allow parties to the action by filing disclaimers to render themselves competent as witnesses, if their action in so doing is an apparent attempt to evade the law disqualifying parties as witnesses. *McRae v. Poor*, (Tex. Civ. App. 1898) 48 S. W. Rep. 47.

1. *Oaks v. West*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033.

2. **Presumption of Interest in Party to Record.** — *Greely v. Willey*, 71 N. H. 240. See also *Oatis v. Harrison*, 60 Ga. 535; *Jenks v. Opp*, 43 Ind. 108.

3. **Necessary Party to Action** — *Alabama*. — *Englehart v. Richter*, 136 Ala. 562; *Deposit Bank v. Caffee*, 135 Ala. 208.

*Colorado*. — *Larson v. Ross*, 10 Colo. App. 267.

*District of Columbia*. — *Marmion v. McClellan*, 11 App. Cas. (D. C.) 467.

*Georgia*. — *Jones v. Hough*, 98 Ga. 492.

*Illinois*. — *Loeb v. Stern*, 99 Ill. App. 637, affirmed 198 Ill. 371; *Leavitt v. Leavitt*, 179 Ill. 87; *Morrison v. Morrison*, 140 Ill. 560; *Stewart v. Fellows*, 128 Ill. 480.

*Indiana*. — *Reddick v. Keesling*, 129 Ind. 128; *Hudson v. Houser*, 123 Ind. 309.

*Iowa*. — *Palmer v. Palmer*, 62 Iowa 204.

*Kentucky*. — *Thomas v. Payne*, (Ky. 1899) 51 S. W. Rep. 450.

*Mississippi*. — *Covington v. Frank*, 77 Miss. 606; *Snell v. Fewell*, 64 Miss. 655.

*Missouri*. — *Brandon v. Dawson*, 51 Mo. App. 244.

*New York*. — *Byerer v. Smith*, 55 N. Y.

App. Div. 405; *Danziger v. Deline*, 51 N. Y. App. Div. 618, 25 Misc. (N. Y.) 635.

*Pennsylvania*. — *Campbell v. Brown*, 183 Pa. St. 112; *Powell v. Derickson*, 178 Pa. St. 612; *Duffield v. Hue*, 136 Pa. St. 602; *Parry v. Parry*, 130 Pa. St. 94.

*South Carolina*. — *Gee v. Humphries*, 49 S. Car. 253.

*Wisconsin*. — *Wright v. Jackson*, 59 Wis. 569.

4. **Interest Not Directly Affected.** — Therefore, where a foreclosure suit is brought by the administrator of the mortgagee against the mortgagor and his grantee, in which the grantee sets up a defense of usury, the mortgagor, though he suffered a default, is incompetent to testify as to the transactions with the deceased mortgagee, because a judgment against the plaintiff would release him from liability on the mortgage debt. *Smith v. Hathorn*, 25 Hun (N. Y.) 159, reversed on another point 88 N. Y. 211.

5. *Matthews v. Hoagland*, 48 N. J. Eq. 455.

6. **Liability for Costs.** — *McKnight v. Reed*, 30 Tex. Civ. App. 204. See also *Mason v. McCormick*, 75 N. Car. 263.

7. **Minority Rule.** — *Blood v. Fairbanks*, 50 Cal. 420; *Williams v. Barrett*, 52 Iowa 637; *Benedict v. Jones*, 129 N. Car. 475; *Bunker v. Taylor*, 13 S. Dak. 433 (party in default for want of appearance); *Patterson v. Martin*, 33 W. Va. 494. See also *Guild v. Warne*, 149 Ill. 105. Compare *Bunker v. Taylor*, 10 S. Dak. 526.

8. **Proponent of Will.** — *Loder v. Whelpley*, 111 N. Y. 239.

9. **Party to Issue.** — *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275; *Snyder v. Fiedler*, 139 U. S. 478.



shall be allowed to testify against the others varies in an important particular in different jurisdictions. The courts of the *United States* and those of some of the states hold that only the parties of record to such actions or proceedings are excluded;<sup>1</sup> and under such statutes, though the witness was in the first instance a party, if he subsequently ceases to be a party his competency as a witness revives.<sup>2</sup>

**Minority Rule.**—In other jurisdictions a broader meaning is given to such statutes, and it is held that they operate to exclude not only the testimony of the parties of record but also that of parties to the issues on trial or the real parties in interest.<sup>3</sup> But under this construction of the statutes a person is not incompetent as a witness merely because he has some interest in the

### 1. "Party" Held to Mean Only Party of Record

—*United States*.—Potter v. Chicago Third Nat. Bank, 102 U. S. 163; Goodwin v. Fox, 129 U. S. 631; Berry v. Sawyer, 19 Fed. Rep. 286.

*Arkansas*.—McRae v. Holcomb, 46 Ark. 306.  
*District of Columbia*.—The provision of the United States statute (Rev. Stat. U. S., § 858) applies to the courts of the District of Columbia as fully as to the courts of the United States. Page v. Burnstine, 102 U. S. 664; McGuire v. Corwine, 3 MacArthur (D. C.) 81.

*Georgia*.—Hays v. Callaway, 58 Ga. 288; Flournoy v. Wooten, 71 Ga. 168; Byars v. Curry, 75 Ga. 515.

*Illinois*.—Boynton v. Phelps, 52 Ill. 210; Morrison First Nat. Bank v. Bressler, 38 Ill. App. 499.

*Maine*.—Rawson v. Knight, 73 Me. 340; Alden v. Goddard, 73 Me. 345; Haskell v. Hervey, 74 Me. 192; Segar v. Lufkin, 77 Me. 142.

*Michigan*.—Graham v. Alexander, 123 Mich. 168. Compare Hillman v. Schwenk, 68 Mich. 301; Penny v. Croul, 87 Mich. 15.

*New Jersey*.—Snyder v. Harris, 61 N. J. Eq. 480; Cullen v. Woolverton, 65 N. J. L. 279.

*South Dakota*.—Witte v. Koeppen, 11 S. Dak. 598.

*Tennessee*.—Taylor v. Mayhew, 11 Heisk. (Tenn.) 596; Key v. Holloway, 7 Baxt. (Tenn.) 575; McDonald v. Allen, 8 Baxt. (Tenn.) 446; Fuqua v. Dinwiddie, 6 Lea (Tenn.) 645; Rielly v. English, 9 Lea (Tenn.) 16; Grange Warehouse Assoc. v. Owen, 86 Tenn. 355; McBrien v. Martin, 87 Tenn. 13.

*Texas*.—Gilder v. Brenham, 67 Tex. 345; Gamble v. Butcher, 87 Tex. 643; Stevens v. Masterson, 90 Tex. 417; Parker v. Nusbaumer, 21 Tex. Civ. App. 180; Ingersol v. McWillie, 9 Tex. Civ. App. 543; Barnett v. Houston, 18 Tex. Civ. App. 134. See, however, Anglin v. Barlow, (Tex. Civ. App. 1898) 45 S. W. Rep. 827; Wootters v. Hale, 83 Tex. 564; Howard v. Galbraith, (Tex. Civ. App. 1894) 30 S. W. Rep. 689.

*West Virginia*.—Gilmer v. Baker, 24 W. Va. 72.

*Canada*.—Bell v. Brown, Russ. Eq. Dec. (Nova Scotia) 20.

*Compare* Michigan Trust Co. v. Probasco, 29 Ind. App. 109. See also Foxhever v. Order of Red Cross, 24 Ohio Cir. Ct. 56.

In a suit by a creditor against the executor of an attorney, to recover money collected for him, the debtor is competent to prove that he

paid the money to the attorney. McBrien v. Martin, 87 Tenn. 13.

Upon scire facias to revive a judgment against the stayor, the original judgment debtor, who is not a party to the proceedings, is competent to prove the judgment paid. Kelton v. Jacobs, 5 Baxt. (Tenn.) 574.

**Defendant Sued as Executor De Son Tort.**—The surviving party is not excluded where it is sought to charge the defendant as executor de son tort. Alexander v. Kelso, 1 Baxt. (Tenn.) 5.

**A Warrantor** in the defendant's chain of title not made a party to the action by the executor of a decedent to recover land is not disqualified as a witness in favor of the defendant. Stevens v. Masterson, 90 Tex. 417; Parker v. Nusbaumer, 21 Tex. Civ. App. 180. See also Sowles v. Butler, 71 Vt. 271.

**Community Property—Wife.**—Where a husband sues a decedent's estate to recover an indebtedness constituting community property, since he represents the community interest of himself and wife, she is a party to the action, though her name does not appear in the record as a party, and is disqualified as a witness. Hedges v. Williams, 26 Tex. Civ. App. 551. And where an action against the husband is such that the judgment would be against the community property, his wife is not a competent witness. Paddock v. Lewis, 13 Tex. Civ. App. 265; Simpson v. Brotherton, 62 Tex. 170.

2. Jones v. Wolcott, 15 Gray (Mass.) 541.

**3. "Party" Held to Include Party in Interest**—*Alabama*.—Louis v. Easton, 50 Ala. 470; Key v. Jones, 52 Ala. 238; Drew v. Simmons, 58 Ala. 463; McCrary v. Rash, 60 Ala. 374; Dudley v. Steele, 71 Ala. 423; Keel v. Larkin, 72 Ala. 493; Binford v. Dement, 72 Ala. 491; Goodlett v. Kelly, 74 Ala. 213; McDonald v. Jacobs, 77 Ala. 524.

*Indiana*.—Upton v. Adams, 27 Ind. 432; Starret v. Burkhalter, 86 Ind. 439; Spencer v. Robbins, 106 Ind. 580; Scherer v. Ingberman, 110 Ind. 443. Compare Sullivan v. Sullivan, 6 Ind. App. 65.

*Iowa*.—Campbell Banking Co. v. Cole, 89 Iowa 211.

*New Hampshire*.—Little v. Riley, 43 N. H. 109; Perkins v. Perkins, 46 N. H. 110; Townsend v. Riley, 46 N. H. 308; Foster v. Eln, 69 N. H. 460.

Thus, in a proceeding by the administrator of an insolvent estate to enforce a claim in favor of such estate, the creditors are the real parties in interest and are incompetent to tes-

result of the action; he must be a beneficiary, that is, he must have a direct interest in the result.<sup>1</sup>

(1) **Persons Who Are Necessary and Proper Parties, but Not Joined.** — Some of the statutes expressly exclude persons who may be necessary parties to the issue or record,<sup>2</sup> and under such a statute one who was a necessary and proper party is not rendered a competent witness because he was not in fact joined as a party,<sup>3</sup> and even in the absence of such provision it has been held that such a person is disqualified, though he is not joined as a party to the record.<sup>4</sup> This rule is both logical and just, because otherwise it would be possible to defeat the statute merely by a nonjoinder of parties.<sup>5</sup>

(2) **Parties to Thing or Contract in Action** — (a) **In General.** — Under some statutes, when any party to the thing or contract in action, or "in issue," as it is sometimes expressed, is dead or insane, the surviving or sane party to such thing or contract is incompetent, under circumstances more or less comprehensive, according to the form of the local statute, to testify.<sup>6</sup> Some of

tify as to transactions with the decedent. *Henegan's Case*, 17 Ct. Cl. 155.

1. **Direct Interest Essential.** — *Daily v. Daily*, 66 Ala. 266; *Morris v. Birmingham Nat. Bank*, 93 Ala. 511.

**Wife.** — A wife has no personal interest in the claim by her husband against a decedent's estate for damages for breach of contract so as to disqualify her as being a party in interest and testifying in favor of her husband. *Dunn v. Dunn*, 127 Mich. 385.

2. **Necessary Parties.** — Rev. Stat. Ind., § 408, quoted in *Taylor v. Duesterberg*, 109 Ind. 170; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109; *Bowen v. O'Hair*, 29 Ind. App. 466.

3. **Leach v. Dickerson, 14 Ind. App. 375; *Bowen v. O'Hair*, 29 Ind. App. 466.**

4. **Incompetency Notwithstanding Nonjoinder.** — *Alexander v. Hoffman*, 70 Ill. 114; *Jenks v. Opp*, 43 Ind. 108; *Randall v. Randall*, 64 Vt. 419. See also *Church v. Howard*, 79 N. Y. 420.

**A Person Who Ought to Be a Party** is incompetent to testify where the other party is dead. *Flournoy v. Wooten*, 71 Ga. 174. But see *Snyder v. Harris*, 61 N. J. Eq. 480.

5. In *Alexander v. Hoffman*, 70 Ill. 118, the court, referring to the subject of the text, said that the plaintiff would not be permitted to do indirectly what he could not do directly, and that the testimony of the witness would be treated in the same manner as if he had been made a party in accordance with the requirement of the law.

6. **Surviving Party to Thing or Contract in Action** — *Georgia*. — *Leaptrot v. Robertson*, 37 Ga. 586; *McWhorter v. Sell*, 66 Ga. 139; *Prendergast v. Wiseman*, 80 Ga. 419; *Robson v. Harris*, 82 Ga. 153; *Nesbitt v. Parrott*, 84 Ga. 142; *Harrison v. Perry*, 86 Ga. 813. These cases were decided before the statute of 1889 was enacted. As to the provisions of the present statute, see Code Ga. 1895, § 5269.

*Maryland*. — *Sanborn v. Lang*, 41 Md. 107; *Wright v. Gilbert*, 51 Md. 147; *Robertson v. Mowell*, 66 Md. 530. The provision of the Maryland statute (Pub. Gen. Laws, art. 35, § 2) disqualifying as a witness the surviving party to the contract or cause of action in issue was repealed by Laws 1902, p. 718, c. 495. *Duckworth v. Duckworth*, 98 Md. 92; *Justis v. Justis*, (Md. 1904) 57 Atl. Rep. 23; *St. Mark's*

*Evangelical Lutheran Church v. Miller*, (Md. 1904) 57 Atl. Rep. 644.

*Massachusetts*. — The former statute (Gen. Stat. Mass., c. 131, § 14) admitted parties to testify except "where one of the original parties to the contract or cause of action in issue and on trial is dead." *Smith v. Smith*, 1 Allen (Mass.) 231; *Byrne v. McDonald*, 1 Allen (Mass.) 293; *Hubbard v. Chapin*, 2 Allen (Mass.) 328; *Granger v. Bassett*, 98 Mass. 462; *Richardson v. Brackett*, 101 Mass. 497. But by a later enactment (Stat. Mass. 1870, c. 393) declaring what persons shall be competent witnesses, this exception was omitted, so that there is now no disqualification of a party to the suit or to the contract or cause of action in suit, though the other party may be dead or insane. *Woodrow v. Mansfield*, 106 Mass. 112. See also *Holmes v. Hunt*, 122 Mass. 518.

*Missouri*. — *Stanton v. Ryan*, 41 Mo. 510; *Johnson v. Quarles*, 46 Mo. 423; *Anderson v. Hance*, 49 Mo. 159; *Amonett v. Montague*, 63 Mo. 201; *Angell v. Hester*, 64 Mo. 142; *Sitton v. Shipp*, 65 Mo. 297; *Ring v. Jamison*, 66 Mo. 429; *Hisaw v. Sigler*, 68 Mo. 449; *Hughes v. Israel*, 73 Mo. 538; *Holman v. Bachus*, 73 Mo. 49; *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Meier v. Thieman*, 90 Mo. 433; *Emmel v. Hayes*, 102 Mo. 186; *Leeper v. Taylor*, 111 Mo. 312; *Messimer v. McCray*, 113 Mo. 382; *Baker v. Reed*, 162 Mo. 341; *Asbury v. Hicklin*, 181 Mo. 658; *Waddle v. McWilliams*, 21 Mo. App. 298; *Soeding v. Bonner*, etc., Iron Co., 35 Mo. App. 349; *Ashbrook v. Letcher*, 41 Mo. App. 369; *Rice v. McFarland*, 41 Mo. App. 489; *Scott v. Riley*, 49 Mo. App. 251; *Brandon v. Dawson*, 51 Mo. App. 244; *Cahill v. Elliott*, 54 Mo. App. 387; *Jones v. Burden*, 56 Mo. App. 199; *Mayer v. Old*, 57 Mo. App. 639; *Henry v. Buddecke*, 81 Mo. App. 360; *Saettel v. Metropolitan L. Ins. Co.*, 81 Mo. App. 509; *State v. Thompson*, 81 Mo. App. 549; *McElvain v. Garrett*, 84 Mo. App. 300; *Cleveland v. Coulson*, 99 Mo. App. 468; *Reed v. Morgan*, 100 Mo. App. 713; *Ladd v. Williams*, (Mo. App. 1904) 79 S. W. Rep. 511.

*Nevada*. — See *Gage v. Phillips*, 21 Nev. 150. *Pennsylvania*. — *Carey v. Fairchild*, (Pa. 1887) 9 Atl. Rep. 328; *Hart v. McGrew*, (Pa. 1887) 11 Atl. Rep. 617; *Ballentine v. Ballentine*, (Pa. 1888) 15 Atl. Rep. 859; *Watts v. Leidig*, 29 Leg. Int. (Pa.) 293; *Karns v. Tan-*

the statutes lay down the broad rule that where any party to a thing or contract in action is dead or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, no surviving or remaining party to such thing or contract shall be a competent witness, and this, of course, excludes a surviving party to the contract or cause of action in issue, though he is not a party to the action;<sup>1</sup> but in *Maryland*, before the enactment of 1902, the statute only excluded as a witness the surviving party to the contract or cause of action where he was also a party to the action.<sup>2</sup> To exclude a witness under a statute excluding the surviving party to the contract, etc., he must, of course, have been a party to the contract or cause of action in issue,<sup>3</sup> though in some jurisdictions the

ner, 66 Pa. St. 305; *Pattison v. Armstrong*, 74 Pa. St. 476; *Brady v. Reed*, 87 Pa. St. 111; *Hess v. Gourley*, 89 Pa. St. 195; *Gamble v. Hepburn*, 90 Pa. St. 439; *Ewing v. Ewing*, 96 Pa. St. 381; *Murray v. New York, etc., R. Co.*, 103 Pa. St. 37; *Foster v. Collner*, 107 Pa. St. 305; *Warren v. Steer*, 112 Pa. St. 634; *Adams v. Edwards*, 115 Pa. St. 211; *Duffield v. Hue*, 129 Pa. St. 94; *De Coursey v. Johnston*, 134 Pa. St. 328; *Arrott Steam-Power Mills Co. v. Way Mfg. Co.*, 143 Pa. St. 435; *Griggs v. Vermilya*, 151 Pa. St. 429; *Sutherland v. Ross*, 160 Pa. St. 29; *Irwin's Estate*, 160 Pa. St. 82; *Cake v. Cake*, 162 Pa. St. 584.

*Vermont*.—*Downs v. Belden*, 46 Vt. 674; *Farmers' Mut. F. Ins. Co. v. Wells*, 53 Vt. 14; *Pember v. Congdon*, 55 Vt. 58; *Barnes v. Dow*, 59 Vt. 530; *Randall v. Randall*, 64 Vt. 419; *Rickard v. Dana*, 74 Vt. 74; *Farmer's Nat. Bank v. Thomson*, 74 Vt. 442.

*Virginia*.—*Mason v. Wood*, 27 Gratt. (Va.) 783; *Grigsby v. Simpson*, 28 Gratt. (Va.) 348; *Parent v. Spittler*, 30 Gratt. (Va.) 819; *Morris v. Grubb*, 30 Gratt. (Va.) 286; *Carter v. Hale*, 32 Gratt. (Va.) 115; *Simmons v. Simmons*, 33 Gratt. (Va.) 461; *Knick v. Knick*, 75 Va. 12; *Harper v. McVeigh*, 82 Va. 751; *Wells v. Ayers*, 84 Va. 341; *Wager v. Barbour*, 84 Va. 419; *Hall v. Rixey*, 84 Va. 790; *Saunders v. Greever*, 85 Va. 252; *Tunstall v. Withers*, 86 Va. 802; *Ginter v. Breeden*, 90 Va. 565.

**Action on Indorsement.**—In an action by the representative of a deceased indorsee against an indorser, the latter is not competent to prove that he received no notice of protest. *Lewis v. Weisenham*, 1 Mo. App. 222.

**In an Action to Foreclose a Mechanic's Lien** on the property of a deceased person, the lien claimant is not competent to prove his contract with the decedent. *Gunther v. Bennett*, 72 Md. 384; *Cahill v. Elliott*, 54 Mo. App. 387. And where the lien claimant is dead, the contractor who employed him, and who is a party defendant, is not competent for the owner of the property. *Hommel v. Lewis*, 104 Pa. St. 465.

**The Death of the Payee** of a note, which he had indorsed as accommodation indorser for the maker, disqualifies the maker as a witness in an action by the indorsee. *Ashbrook v. Letcher*, 41 Mo. App. 369.

1. *Granger v. Bassett*, 98 Mass. 462; *Amonett v. Montague*, 63 Mo. 201; *Meier v. Thieman*, 90 Mo. 433; *Act Pa. May 23, 1887*, § 5; *Pattison v. Armstrong*, 74 Pa. St. 476; *Warren v. Steer*, 112 Pa. St. 634; *Downs v. Belden*, 46 Vt. 674; *Code Va. (1887)*, § 3346. Compare

*Looker v. Davis*, 47 Mo. 140; *Pritchett v. Reynolds*, 21 Mo. App. 674.

2. *Wright v. Gilbert*, 51 Md. 157; *Robertson v. Mowell*, 66 Md. 530.

3. *Maryland*.—*Wright v. Gilbert*, 51 Md. 146.

*Massachusetts*.—*Hubbard v. Chapin*, 2 Allen (Mass.) 328.

*Missouri*.—*Bates v. Forcht*, 89 Mo. 121; *O'Bryan v. Allen*, 95 Mo. 68; *Reed v. Painter*, 145 Mo. 341; *Klopfer v. Levi*, 33 Mo. App. 322.

*Pennsylvania*.—*Tarr v. Robinson*, 158 Pa. St. 60, 33 W. N. C. (Pa.) 189; *Roberts v. Root*, 6 Pa. Dist. 586.

*Vermont*.—*Morse v. Low*, 44 Vt. 561.

*Virginia*.—*Martz v. Martz*, 25 Gratt. (Va.) 361; *Hall v. Rixey*, 84 Va. 790.

**Actions Between Cosureties—Competency of Principal Debtor.**—In an action by a surety who has paid a promissory note to recover the amount so paid from the estate of a deceased surety, the maker of the note is not a party to the contract between the sureties as to their liability *inter se*, and is, therefore, competent to prove that the plaintiff was not a cosurety, but a surety of the deceased. *Canfield v. Bentley*, 60 Vt. 655. See also *Willingham v. Smith*, 48 Ga. 580; *Craig v. Brendel*, 69 Pa. St. 155; *Wager v. Barbour*, 84 Va. 419.

**Party to Action Not Party to Contract.**—A party to an action may testify concerning a contract to which he is not a party, though one of the parties to such contract is dead. *Knick v. Knick*, 75 Va. 12.

**Children of Surviving Party Not Disqualified.**—*Anderson v. Hance*, 49 Mo. 159.

**Heirs of Survivor.**—Where both the original parties to the contract are dead, the heirs of one may testify concerning it against the estate of the other. *Martin v. Jones*, 72 Mo. 24.

**Beneficiary of Contract.**—Where a third person had agreed with the maker of a note that he would pay it at maturity, and the payee sued such person to collect the same, it was held that the plaintiff was competent in his own behalf, notwithstanding the previous death of the maker of the note. *Amonett v. Montague*, 63 Mo. 201, 75 Mo. 43.

**The Widow of a Deceased Maker** of a note is competent to prove that she paid it as agent for her husband, notwithstanding the payee is also dead. *Rush v. Ross*, 65 Ga. 144.

**Maker of Note Is Competent in Action by Indorsee Against Indorser**, because he is no party to the contract or cause of action, which is



statutes provide that a party to the action deriving his interest from a party to the contract or cause of action in issue shall not be a competent witness where the latter would have been incompetent.<sup>1</sup> Statutes excluding parties to the action do not exclude one who is not a party to the action, though he was a party to the contract or cause of action in issue.<sup>2</sup>

**Interest in Event of Suit Not Material.** — Under a statute excluding as a witness a party to the contract or cause of action in issue when the other party is dead or insane, the surviving or sane party in such case is incompetent though he has no interest in the event of the action.<sup>3</sup>

(b) **Death of Other Party.** — When the statute prohibits the surviving party to the contract or cause of action in issue from testifying when the other party is dead, the death of such other party is, of course, essential to render the witness incompetent,<sup>4</sup> and when both parties to the contract or cause of action in issue are alive, the fact that one of the parties thereto has assigned his interest to a third person, who has died, does not render the other party to the contract, etc., incompetent to testify in an action by or against the estate of such third person.<sup>5</sup> So, where the creditors of a deceased grantor sue to set aside the conveyance as in fraud of their rights as creditors, "the cause of action in issue" is not the validity of the deed, as between the grantee and grantor, but its validity as between the grantee and the creditors; and therefore the death of the grantor is not the death of the "other party" to the cause of action so as to render the grantee incompetent as a witness to sustain the deed.<sup>6</sup>

**"Other Party."** — Where the statute provides that when one of the original parties to the contract or cause of action is dead the "other party" shall be permitted to testify, this, of course, only excludes the other original party to the contract, etc.,<sup>7</sup> and has been restricted to an original party to the contract standing in an opposite relation to the deceased party.<sup>8</sup>

(c) **What Is the Contract or Cause of Action in Issue.** — The term "contract or cause of action in issue" means the same as contract or cause in dispute or in question, and includes as well the substantive issues made by the evidence as the formal issues made by the pleadings.<sup>9</sup> But it does not include all contracts or causes of action with deceased persons which merely come incidentally into the action. The surviving party to a contract made with a decedent is competent to testify concerning it, where it comes incidentally into a suit on another contract, as a matter of evidence.<sup>10</sup>

the indorsement. And every indorsement is a new contract. *Freeman v. Bigham*, 65 Ga. 587.

1. *Ferguson v. Davidson*, 147 Mo. 664.

2. *Cullen v. Woolverton*, 65 N. J. L. 279.

3. **Interest in Event Not Material.** — *Oatis v. Harrison*, 60 Ga. 535, holding that a discharge in bankruptcy would not render competent a witness who would otherwise be incompetent on account of the opposite party to the contract being dead.

4. **Death of Other Party.** — *White v. Snelson*, 92 Mo. App. 490; *Girard Trust Co. v. Harrington*, 23 Pa. Super. Ct. 615.

5. *Hollister v. Young*, 42 Vt. 403; *Kuhn's Estate*, 163 Pa. St. 438; *Dutton's Estate*, 181 Pa. St. 426. Compare *Latimer v. Sayre*, 45 Ga. 468.

6. *Stam v. Smith*, (Mo. 1904) 81 S. W. Rep. 1217.

7. *Kenyon v. Peirce*, 17 R. I. 794.

8. *Citizens' Ins. Co. v. Broyles*, 78 Mo. App. 364, 2 Mo. App. Rep. 210. See also *Powell v. Basard*, 70 Mo. App. 627, 2 Mo. App. Rep. 555.

9. **What Is the Contract or Cause of Action in Issue.** — *Wright v. Gilbert*, 51 Md. 157; *Chap-*

*man v. Dougherty*, 87 Mo. 617; *Pember v. Congdon*, 55 Vt. 58; *Barnes v. Dow*, 59 Vt. 545. See also *Hollister v. Young*, 42 Vt. 403.

Where the plaintiff claims property through a sale by A, and the defendant through a sale by the administrator of A, the alleged contract of sale to the plaintiff comes directly and not collaterally in issue, and the plaintiff is not competent to prove it. *Hall v. Hamblett*, 51 Vt. 589.

10. **Contract Incidentally Involved.** — *Horner v. Frazier*, 65 Md. 1; *Robertson v. Mowell*, 66 Md. 530; *Gunn v. Thruston*, 130 Mo. 339; *Adams v. Bleakley*, 117 Pa. St. 283; *Manufacturers' Bank v. Scofield*, 39 Vt. 590; *Cole v. Shurtleff*, 41 Vt. 311, 98 Am. Dec. 587; *Morse v. Low*, 44 Vt. 561; *Holman v. Boyce*, 65 Vt. 318.

In trespass *quare clausum fregit* the plaintiff is competent to prove that her husband purchased the land on which the trespass is alleged to have been committed, from her father, although both of them are dead. The issue on trial is the commission of the alleged trespass. *Scott v. Mathis*, 72 Ga. 119.

**Contract and Not the Breach Is Cause of Action.** — When an action is brought on a contract with a decedent against the estate of the decedent, the cause of action in issue is the contract entered into with the decedent, and not the breach of the contract,<sup>1</sup> and, therefore, the surviving party to the contract is excluded as a party to the cause of action in issue, though the breach of the contract did not occur until after the death of the decedent.<sup>2</sup>

**Ejectment.** — Where, in ejectment, both parties claim to have derived their title from the same deceased party, the one as heir and the other by deed or contract of sale from the deceased, the contract in issue is the validity of the deed or the contract of sale, so as to preclude the grantee or vendee thereunder from testifying with regard thereto,<sup>3</sup> and in an action by the devisee or heir of the grantee against the alleged grantor, the contract or cause of action in issue is the validity of the alleged deed, so as to preclude the grantor from testifying thereto.<sup>4</sup>

**Implied Trusts.** — Where an implied trust in land is sought to be enforced against the heirs of a decedent, the contract or cause of action in issue is the circumstances or contract by which the trust is raised, so as to exclude the testimony of the plaintiff as to transactions with the decedent which tend to establish the trust,<sup>5</sup> and when the heirs of a decedent seek to enforce a resulting trust on the ground that the land purchased by the defendant was paid for with the money of the decedent, the defendant is incompetent to testify that he paid for it with his own money.<sup>6</sup>

**Specific Performance — Part Performance.** — Where specific performance of an oral contract for the sale of land is brought against the estate of the deceased vendor, the validity of the agreement for sale is in issue and the vendee cannot testify as to improvements made by him.<sup>7</sup>

**Trover.** — In trover against a legatee of a decedent, where the title of the plaintiff was not derived from the decedent, but from an entirely different source, there is no cause of action in issue between the decedent and plaintiff, so as to render the plaintiff incompetent to testify.<sup>8</sup>

**Action by Widow to Set Aside Husband's Deed.** — In an action by a widow to set aside a conveyance of her husband's land, on the ground that she was induced to sign the deed by the fraud of her deceased husband, the deed is the contract or cause of action in suit, and, therefore, she is incompetent to testify in her own behalf concerning communications between herself and her deceased husband which tend to support her claim.<sup>9</sup>

(d) **Protection of Estate or Persons Holding under Deceased Party.** — Under the statutes prohibiting a surviving party to the contract or cause of action in issue from testifying where the other party is dead, if the right of the deceased has passed to a party to the record, such transfer or devolution must exist as well as the death of the party to the contract, etc.<sup>10</sup> Accordingly, in a contest between an execution creditor of a deceased or insane person and the claimant of property sought to be taken on execution against the estate, both plaintiff and claimant are competent witnesses, because the issue is between them, and

1. *Biggs v. McCurley*, 76 Md. 409.

2. *Biggs v. McCurley*, 76 Md. 409 (action for breach of lease where the breach occurred after the death of the lessor).

3. *Huit v. Huit*, 122 Iowa 338; *Hach v. Rollins*, 158 Mo. 182; *Vann v. Howle*, 44 S. Car. 546; *Pember v. Congdon*, 55 Vt. 58.

4. *Chapman v. Dougherty*, 87 Mo. 617; *Davis v. Wood*, 161 Mo. 17; *Patton v. Fox*, 169 Mo. 97.

5. *Johnson v. Quarles*, 46 Mo. 423; *Curd v. Brown*, 148 Mo. 82; *Mulock v. Mulock*, 156 Mo. 431; *Johnston v. Johnston*, 173 Mo. 91.

6. *Miller v. Slupsky*, 158 Mo. 643; *Wolf v. Wolf*, 158 Pa. St. 621.

7. *Emmel v. Hayes*, 102 Mo. 186.

8. *Walling v. Newton*, 59 Vt. 684; *Downs v. Belden*, 46 Vt. 674. Compare *Banister v. Oviatt*, 64 Vt. 580.

9. **Suit by Wife to Set Aside Husband's Deed.** — *Palmer v. Palmer*, 62 Iowa 204.

10. *Strause v. Brauenreuter*, 4 Pa. Super. Ct. 263, 40 W. N. C. (Pa.) 253; *Gold v. Scott*, 5 Pa. Super. Ct. 262; *Weaver v. Roth*, 105 Pa. St. 408; *Royer v. Ephrata*, 171 Pa. St. 429, 37 W. N. C. (Pa.) 257. And see *infra*, this section, *d. Persons Protected*.

not on any matter arising or on trial between the plaintiff and the representatives of the deceased execution defendant.<sup>1</sup>

(e) **Extent of Incompetency.** — Where the statutes, in unqualified terms, exclude as a witness any party to the contract or cause of action in issue, such a party is excluded without regard to the character of his testimony;<sup>2</sup> but when the exclusion is only with regard to the contract or cause of action in issue, it does not exclude testimony not relating thereto.<sup>3</sup> So, also, where the prohibition is with regard to testimony in the witness's own favor, it will, of course, be restricted to such testimony.<sup>4</sup>

(3) **Persons Interested in Event of Action** — (a) **Disqualification of Interest in General.** — Many of the statutes include in the exceptions to the general rule of competency not only parties to actions, but also persons who have an interest in the result thereof;<sup>5</sup> and under such a provision, persons

1. **Contest Between Execution Creditor of Decedent and Claimant of Property Levied on.** — *Powell v. Watts*, 72 Ga. 770; *Parrott v. Baker*, 82 Ga. 364.

The case of *Bothwell v. Dobbs*, 59 Ga. 787, while in apparent conflict with the two foregoing cases, may possibly be reconcilable with them, because it involved not only an effort to prove by the claimant a gift from the deceased debtor, but also to prove a gift by parol, though the subject-matter was land.

**Insane Execution Debtor.** — *Anderson v. Wilson*, 45 Ga. 25.

2. *Biggs v. McCurley*, 76 Md. 409 (testimony as to matters happening after death of decedent excluded).

3. *Eyermann v. Piron*, 151 Mo. 107.

4. *Harrison v. Perry*, 86 Ga. 813; *Gunn v. Thruston*, 120 Mo. 339; *Carpenter v. Coats*, (Mo. 1904) 81 S. W. Rep. 1089; *Ford v. O'Donnell*, 40 Mo. App. 51.

5. **Persons Interested in Event Generally Incompetent** — *Alabama*. — *Noble v. Jackson*, 124 Ala. 311; *Hagan v. Easter*, 111 Ala. 480. Under the earlier Alabama statute, only parties to actions and proceedings were incompetent as witnesses, and therefore, on the hearing of an application by an administrator to sell real estate for the payment of debts, a creditor who was not a party to the proceeding was competent to prove the existence of his debt; but the statute was afterwards amended so as to include in the rule of incompetency persons having a pecuniary interest in the result of the suit or proceeding. *Alford v. Alford*, 96 Ala. 385; Code Ala. (1896), § 1794.

*Georgia*. — *Johnston v. Coney*, 120 Ga. 767; *Hendrick v. Daniel*, 119 Ga. 358; *Morgan v. Johnson*, 87 Ga. 382.

*Illinois*. — *Fletcher v. Shepherd*, 174 Ill. 262; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; *Bressier v. Baum*, 42 Ill. App. 190; *Morrison First Nat. Bank v. Bressler*, 38 Ill. App. 499.

*Indiana*. — *Thornburg v. Allman*, 8 Ind. App. 531.

*Iowa*. — *Furenes v. Eide*, 109 Iowa 511.

*Kentucky*. — *Townsend v. Wilson*, 114 Ky. 504; *Cheatham v. Leathers*, (Ky. 1899) 49 S. W. Rep. 534.

*Nebraska*. — *Wylie v. Charlton*, 43 Neb. 840; *Mead v. Weaver*, 42 Neb. 149.

*New Hampshire*. — *Smith v. Wells*, 70 N. H. 49; *English v. Porter*, 63 N. H. 206; *Townsend v. Riley*, 46 N. H. 300; *Wheeler v.*

*Towns*, 43 N. H. 56; *Carlton v. Patterson*, 29 N. H. 580.

*New York*. — *Luetchford v. Lord*, 132 N. Y. 465; *Hixson v. Rodbourn*, 67 N. Y. App. Div. 424; *Matter of Meehan*, 59 N. Y. App. Div. 156; *Carpenter v. Romer*, etc., *Steamboat Co.*, 48 N. Y. App. Div. 363; *Duane v. Paige*, 82 Hun (N. Y.) 139; *Brigham v. Gott*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 518.

*North Carolina*. — *In re Peterson*, (N. Car. 1904) 48 S. E. Rep. 561.

*Pennsylvania*. — *Walton v. Hinnau*, 146 Pa. St. 396; *Murphy v. Murphy*, 24 Pa. Super. Ct. 547.

*South Carolina*. — *Earle v. Harrison*, 18 S. Car. 329.

*Vermont*. — *Barnes v. Dow*, 59 Vt. 530.

*West Virginia*. — *Lafferty v. Lafferty*, 42 W. Va. 783.

And see the statutes of the several states.

Thus, the death of an original party to a contract excludes the other party's testimony, when he is directly interested, even though he is not a party to the action. *Browning v. Kelly*, 124 Ala. 645; *Chambers v. Wesley*, 113 Ga. 343; *Miller v. Meers*, 155 Ill. 284; *Thiemann v. Meier*, 25 Mo. App. 306; *Tunstall v. Withers*, 86 Va. 892; *Burton's Estate*, 15 Pa. Co. Ct. 367; *Ladd v. Williams*, (Mo. App. 1904) 79 S. W. Rep. 511; *Proctor v. Proctor*, (Ky. 1904) 81 S. W. Rep. 272.

And a person from whom the plaintiff has acquired his cause of action against the estate of the testator is not competent for the plaintiff respecting transactions with the deceased. *Moore v. Williams*, 129 Ala. 329; *Sublett v. Hodges*, 88 Ala. 491; *Eyermann v. Piron*, 151 Mo. 107; *Shields v. Smith*, 104 N. Car. 57; *Carey v. Carey*, 104 N. Car. 171; *Clawson v. Wallace*, 16 Utah 300; *Quarrier v. Quarrier*, 36 W. Va. 310; *Dawson v. Hemelrick*, 33 W. Va. 675.

In an action to charge a decedent's estate as a member of a partnership, a surviving partner is interested in the result and is therefore incompetent to prove that the decedent was a partner, because the effect of his testimony would be to shift a portion of his responsibility. *Cooper v. Wood*, 1 Colo. App. 101; *Epping v. Canepa*, 20 Fla. 262; *Hurlbut v. Meeker*, 104 Ill. 541; *Giesecke Boot*, etc., *Mfg. Co. v. Seevers*, 85 Iowa 685; *Hixson v. Rodbourn*, 67 N. Y. App. Div. 424; *Pierce v. Kearney*, 5 Ill. (N. Y.) 82; *Hunter*



who are neither parties to the action nor interested in the event thereof, and through whom neither party claims, are competent to testify in their own favor, or in the favor of persons or parties whose interests are identical with their own, as to personal transactions and conversations with a person since deceased, whose representative is a party to the record.<sup>1</sup>

*v. Herrick*, 26 Hun (N. Y.) 272, *affirmed* without opinion 92 N. Y. 626; *Sikes v. Parker*, 95 N. Car. 232; *Hogeboom v. Gibbs*, 88 Pa. St. 235, *distinguishing* *Brewster v. Sterrett*, 32 Pa. St. 115.

In *Virginia* a witness who is interested in the event of the action is not disqualified if he was not a party to the contract or other transaction which is the subject of investigation, though one of the original parties thereto be dead, insane, or otherwise rendered incompetent. *Wager v. Barbour*, 84 Va. 419; *Hall v. Rixey*, 84 Va. 790; *Knick v. Knick*, 75 Va. 12; *Simmons v. Simmons*, 33 Gratt. (Va.) 461.

**Federal Statute.**—Rev. Stat. U. S., § 858, excludes only parties from testifying. *Stephens v. Bernays*, 42 Fed. Rep. 488; *McMullen v. Ritchie*, 64 Fed. Rep. 253.

**Person Acquiring Interest After Conversation with Decedent Excluded.**—*Eighmie v. Taylor*, 68 Hun (N. Y.) 573.

**1. Persons Not Parties Nor Interested in Event Competent to Testify**—*United States*.—*Kingsbury v. Buckner*, 134 U. S. 650; *Slavens v. Northern Pac. R. Co.*, (C. C. A.) 97 Fed. Rep. 255.

*Alabama*.—*Dicus v. Childress*, 128 Ala. 617; *Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co.*, 127 Ala. 137; *Pugh v. Barnes*, 108 Ala. 167; *Glover v. Gentry*, 104 Ala. 222, 112 Ala. 500; *Howle v. Edwards*, 97 Ala. 649; *Espalla v. Richard*, 94 Ala. 159; *Fitzgerald v. Williamson*, 85 Ala. 585; *Huckaba v. Abbott*, 87 Ala. 409; *Sublett v. Hodges*, 88 Ala. 491; *Keel v. Larkin*, 72 Ala. 493; *Daily v. Daily*, 66 Ala. 266; *Key v. Jones*, 52 Ala. 238; *Louis v. Easton*, 50 Ala. 470.

*Colorado*.—*Williams v. Carr*, 4 Colo. App. 363.

*Georgia*.—*Hooper v. Howell*, 52 Ga. 315; *Jackson v. Bennett*, 98 Ga. 106; *Hooks v. Hays*, 86 Ga. 797; *Wood v. Crawford*, 75 Ga. 733.

*Illinois*.—*Tanton v. Keller*, 167 Ill. 129; *McClure v. Otrich*, 118 Ill. 320.

*Indiana*.—*Scott v. Harris*, 127 Ind. 520; *Works v. State*, 120 Ind. 119.

*Iowa*.—*Hogan v. Sullivan*, 114 Iowa 456; *Bird v. Jacobus*, 113 Iowa 194.

*Kentucky*.—*Parker v. Cumberland Telephone, etc., Co.*, 77 S. W. Rep. 1109, 25 Ky. L. Rep. 1391; *Swinebroad v. Bright*, 73 S. W. Rep. 1031, 24 Ky. L. Rep. 2253, *reversed* (Ky. 1903) 76 S. W. Rep. 365.

*Maryland*.—*Swartz v. Chickering*, 58 Md. 290; *Robertson v. Mowell*, 66 Md. 530.

*Michigan*.—*Dunn v. Dunn*, 127 Mich. 385; *Graham v. Alexander*, 123 Mich. 168; *Finch v. Modern Woodmen of America*, 113 Mich. 646; *Krause v. Equitable L. Assur. Soc.*, 105 Mich. 329; *Wilson v. Wilson*, 80 Mich. 472; *Waterman Real Estate Exch. v. Stephens*, 71 Mich. 104; *Doolittle v. Gavagan*, 74 Mich. 11.

*Minnesota*.—*Bowers v. Schuler*, 54 Minn. 99; *Harrington v. Samples*, 36 Minn. 200.

*Missouri*.—*Paul E. Wolff Shirt Co. v. Frankenthal*, 96 Mo. App. 307; *MacDonald v. Tittmann*, 96 Mo. App. 536; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Ford v. O'Donnell*, 40 Mo. App. 51.

*Nebraska*.—*Wamsley v. Crook*, 3 Neb. 344; *Ransom v. Schmela*, 13 Neb. 73; *Magemau v. Bell*, 13 Neb. 247; *Housel v. Cremer*, 13 Neb. 298; *Rakes v. Brown*, 34 Neb. 304; *Parrish v. McNeal*, 36 Neb. 727; *Mead v. Weaver*, 42 Neb. 149; *Sharmer v. McIntosh*, 43 Neb. 509.

*Nevada*.—*Burgess v. Helm*, 24 Nev. 242.

*New Hampshire*.—*Wilson v. Russell*, 61 N. H. 354.

*New Jersey*.—*Foley v. Loughran*, 60 N. J. L. 464.

*New York*.—*Murray v. Fox*, 104 N. Y. 382; *Lyon v. Ricker*, 141 N. Y. 225; *Porter v. Dunn*, 131 N. Y. 314; *Mason v. Prendergast*, 120 N. Y. 536; *Connelly v. O'Connor*, 117 N. Y. 91; *Hughes v. Jones*, 116 N. Y. 67; *Clark v. McNeal*, 114 N. Y. 287; *Wallace v. Straus*, 113 N. Y. 238; *Rank v. Grote*, 110 N. Y. 12; *Nearpass v. Gilman*, 104 N. Y. 506; *Hoffmann v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329; *Putnam v. Lincoln Safe Deposit Co.*, 87 N. Y. App. Div. 13, *reversing* 39 Misc. (N. Y.) 738; *Farrar v. Farmers' L. & T. Co.*, 85 N. Y. App. Div. 478; *Lecour v. Importers', etc., Nat. Bank*, 61 N. Y. App. Div. 163; *Bouton v. Welch*, 59 N. Y. App. Div. 288; *Benjamin v. Ver Nooy*, 36 N. Y. App. Div. 581; *Matter of McNeany*, 5 N. Y. App. Div. 456; *Humphrey v. Sweeting*, 92 Hun (N. Y.) 447; *Ketchum v. Holden*, 88 Hun (N. Y.) 482; *Townsend v. Rackham*, 68 Hun (N. Y.) 235; *Pandjiris v. McQueen*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 705; *Luetchford v. Lord*, 57 Hun (N. Y.) 572; *Porter v. Dunn*, 61 Hun (N. Y.) 310; *Hixson v. Rodboura*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 19, *judgment reversed* 67 N. Y. App. Div. 424; *Healy v. Healy*, 55 N. Y. App. Div. 315; *Olcott v. Kohlsaat*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 116; *Podmore v. Seamen's Bank*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 379; *Korminsky v. Korminsky*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 138; *Ehmann v. Scheuerman*, 14 Daly (N. Y.) 411.

*North Carolina*.—*Watts v. Warren*, 108 N. Car. 514; *Marsh v. Richardson*, 106 N. Car. 539; *Cade v. Davis*, 96 N. Car. 139; *Allen v. Gilkey*, 86 N. Car. 64. See also *Jones v. Emory*, 115 N. Car. 158.

*Pennsylvania*.—*Williams v. Davis*, 69 Pa. St. 21; *Young's Estate*, 148 Pa. St. 575; *Taylor's Estate*, 154 Pa. St. 183; *Fowler v. Smith*, 153 Pa. St. 639; *Dickson v. McGraw*, 151 Pa. St. 98; *Crothers v. Crothers*, 149 Pa. St. 201; *Flack v. Kinney*, 4 Lack. Leg. N. (Pa.) 289.

*South Carolina*.—*Brickle v. Leach*, 55 S. Car. 510; *Griffin v. Earle*, 34 S. Car. 246; *Blohme v. Lynch*, 26 S. Car. 300; *Brown v. Cave*, 23 S. Car. 251; *Wood v. Wood*, 25 S. Car. 600.

**Burden of Proving Interest.** — The burden of proving interest is on the party objecting to the witness.<sup>1</sup>

(b) **Nature of Disqualifying Interest** — *aa.* **INTEREST IN EVENT OF SUIT ESSENTIAL.** — A person is not disqualified as a witness by reason of the fact that he has an interest in the questions involved in the suit or in the thing which is the subject of the litigation. By the terms of the statute, it is necessary, in order to disqualify him, that he should be interested in the event of the suit, that is to say, some question of his rights or liabilities must be so involved that the judgment or decree may operate in his favor or against him;<sup>2</sup> or the record must be competent evidence for or against him in another action or proceeding.<sup>3</sup>

**Interest Balanced — Liability in Any Event.** — It sometimes happens that a liability

*West Virginia.* — *Carter v. Gill*, 47 W. Va. 504; *Paxton v. Paxton*, 38 W. Va. 616; *Hooper v. Hooper*, 32 W. Va. 526.

*Wisconsin.* — *Curtis v. Hoxie*, 88 Wis. 41.

*Canada.* — *Batzold v. Upper*, 4 Ont. L. Rep. 116.

See also *Jones v. Carrollton Bank*, 71 Miss. 1023.

In an action to establish a claim that plaintiffs were tenants in common of certain land of defendants and to recover possession of their respective shares of the land, the defendants claim sole ownership under a deed from the deceased ancestor of all the parties. In such case the widow of the deceased grantor, not being a party to the suit, was competent to testify. She had no interest in the suit, because if the deed should be sustained her right of dower was barred, and if the deed should not be sustained her right of dower would not be in any way affected by the result of the suit. *Wetherington v. Williams*, 134 N. Car. 276.

If the testimony of the witness does not tend to promote his interest, he is competent whether he is a party or not. *Moffatt v. Hardin*, 22 S. Car. 25.

**1. Burden of Proving Interest.** — *Perine v. Grand Lodge, etc.*, 48 Minn. 82; *Sorensen v. Sorensen*, 56 Neb. 729.

**Party Prima Facie Interested.** — *Englehart v. Richter*, 136 Ala. 562.

**2. Interest in Event Necessary to Disqualify** — *Illinois.* — *Bevan v. Atlanta Nat. Bank*, 39 Ill. App. 577.

*Iowa.* — *Wormley v. Hamburg*, 40 Iowa 23; *Russell v. Smith*, 115 Iowa 261.

*Kentucky.* — *Swinebroad v. Bright*, 76 S. W. Rep. 365, 25 Ky. L. Rep. 742.

*Minnesota.* — *Kells v. Webster*, 71 Minn. 276; *Beard v. Minneapolis First Nat. Bank*, 39 Minn. 546.

*Missouri.* — *MacDonald v. Tittmann*, 96 Mo. App. 536.

*New York.* — *Eisenlord v. Clum*, 126 N. Y. 552; *Hobart v. Hobart*, 62 N. Y. 80; *Meaker v. Fiero*, 77 Hun (N. Y.) 65; *Brooks v. Wilson*, 53 Hun (N. Y.) 173; *Lyon v. Ricker*, 141 N. Y. 225.

*North Carolina.* — *Robinson v. McDowell*, 130 N. Car. 246; *Matter of Young*, 123 N. Car. 358; *Ducker v. Whitson*, 112 N. Car. 44; *Bunn v. Todd*, 107 N. Car. 266; *Mull v. Martin*, 85 N. Car. 406; *Mason v. McCormick*, 75 N. Car. 263.

*Pennsylvania.* — *McCartney v. Kipp*, 171 Pa. St. 644; *Tarr v. Robinson*, 158 Pa. St. 64; *Smith v. Hay*, 152 Pa. St. 377; *Gerz v. Weber*, 151 Pa. St. 396; *Dickson v. McGraw*, 151 Pa. St. 98; *Shaak v. Meily*, 136 Pa. St. 161; *Broomall v. McCallon*, (Pa. 1887) 8 Atl. Rep. 413; *Miller's Estate*, 14 Pa. Co. Ct. 147.

*South Carolina.* — *Twitty v. Houser*, 7 S. Car. 153.

*Texas.* — *Markham v. Carothers*, 47 Tex. 21.

"The disqualifying interest must be in the event of the case itself, and not in the question to be decided. The 'liability to a like action, or his standing in the same predicament with the party if the verdict cannot be given in evidence for or against him, is an interest in the question only,' and does not exclude the witness." *German-American Sav. Bank v. Hanna*, (Iowa 1904) 100 N. W. Rep. 57.

As to what constitutes a disqualifying interest in general, see *supra*, this title, IV. 1. *Competency* — *Persons Excluded*.

**Different Claimants on Estate Competent Witnesses for Each Other.** — *Street v. Street*, 113 Ala. 333; *Matter of Sworthout*, (Surrogate Ct.) 38 Misc. (N. Y.) 56; *Brock v. O'Dell*, 44 S. Car. 22; *Story v. Story*, (Ky. 1901) 61 S. W. Rep. 279, rehearing denied (Ky. 1901) 62 S. W. Rep. 865.

**Contra.** — *Clark v. Gibbons*, 56 Ill. App. 357.

**3. Record Competent Evidence in Another Action** — *Iowa.* — *Wormley v. Hamburg*, 40 Iowa 22; *Giesecke Boot, etc., Mfg. Co. v. Seevers*, 85 Iowa 685; *Fuller v. Lendrum*, 58 Iowa 356.

*Minnesota.* — *Perine v. Grand Lodge, etc.*, 48 Minn. 82; *Marvin v. Dutcher*, 26 Minn. 391.

*Nebraska.* — *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709.

*New Hampshire.* — *Weston v. Elliott*, 72 N. H. 433.

*New York.* — *Eisenlord v. Clum*, 126 N. Y. 552; *Connelly v. O'Connor*, 117 N. Y. 93; *Wallace v. Straus*, 113 N. Y. 242; *Nearpass v. Gilman*, 104 N. Y. 507; *Hobart v. Hobart*, 62 N. Y. 81.

*North Carolina.* — *Bunn v. Todd*, 107 N. Car. 266.

*Washington.* — *O'Toole v. Faulkner*, 34 Wash. 371.

Where, in a suit to compel an executor to deliver a deed executed by his testator, a decree for the plaintiff would establish the validity of a lease of the premises, the lessee is disqualified by reason of interest. *Miller v. Meers*, 155 Ill. 284.

is to be imposed on the witness, and that the measure of such liability will be the same whether one party or the other obtains the judgment. When such is the case, the witness cannot be said to have any interest in the event of the suit, because the event will not affect his liability one way or the other. His interest is said to be balanced, and he is competent to testify.<sup>1</sup> Notwithstanding an equal liability on either side, the witness is incompetent, if the success of the party calling him would relieve him from a distinct and additional liability;<sup>2</sup> and where the witness is interested on both sides of the record, but the interests are of a different character, the court will not undertake to weigh such conflicting interests one against the other and admit the testimony of the witness.<sup>3</sup>

*bb. PECUNIARY INTEREST.* — The law does not recognize any interest in the event of a suit or action as operating to disqualify a witness to testify therein other than such as is of a pecuniary nature. Unless the witness may give testimony which will tend to benefit him pecuniarily, he is not to be excluded.<sup>4</sup>

**What Constitutes Pecuniary Interest.** — Such pecuniary interest exists if the witness may be made liable to pay money as a result of the action, or his responsibility increased or relieved,<sup>5</sup> or his interest as heir or beneficiary affected.<sup>6</sup>

**1. Interest Balanced** — *Georgia.* — *Allen v. Davis*, 65 Ga. 179; *Lassefer v. Simpson*, 78 Ga. 61; *Hidell v. Funkhouser*, 96 Ga. 85; *Hidell v. Dwinell*, 89 Ga. 532; *Crawford v. Parker*, 96 Ga. 156.

*Illinois.* — *White v. Ross*, 147 Ill. 427; *Baker v. Updike*, 155 Ill. 54.

*Iowa.* — *Hitt v. Sterling Goold Mfg. Co.*, 111 Iowa 458; *Hicks v. Williams*, 112 Iowa 691.

*Kentucky.* — *Adams v. Brown*, (Ky. 1895) 32 S. W. Rep. 282.

*New York.* — *Brooks v. Wilson*, 53 Hun (N. Y.) 173; *Beakes v. Da Cunha*, 126 N. Y. 293; *Crampton v. Foster*, 29 N. Y. App. Div. 215.

*Pennsylvania.* — *Kisterbrock v. Lanning*, (Pa. 1887) 7 Atl. Rep. 596; *Smith v. Rishel*, 164 Pa. St. 181.

Thus, in a contest as to which of two parties was the grantee in a lost deed, the grantor, standing indifferent between them, is competent to prove that a person dead at the time of the trial was the grantee. *Gregg v. Hill*, 80 N. Car. 255.

The sureties in a note, who are distributees of the deceased principal's estate, are competent to prove the execution of the note. *Robinson v. Robinson*, 20 S. Car. 567.

In *Ilderton v. Atkinson*, 7 T. R. 476, a witness was held competent because, whichever way the action resulted, he was bound to pay the amount involved, according to its event, either to one party or to the other. See also *Birt v. Kershaw*, 2 East 458.

**2. Additional Liability.** — *Jones v. Brooke*, 4 Taunt. 464; *Larbalestier v. Clark*, 1 B. & Ad. 899, 20 E. C. L. 505.

**3. Weighing Interests of Different Character.** — *Wyllie v. Charlton*, 43 Neb. 840.

**4. Pecuniary Benefit** — *Alabama.* — *Hill v. Helton*, 80 Ala. 528.

*Illinois.* — *McClure v. Otrich*, 118 Ill. 320.

*Iowa.* — *Clinton Sav. Bank v. Underhill*, 115 Iowa 292, (Iowa 1900) 84 N. W. Rep. 667.

*Kentucky.* — *Apperson v. Exchange Bank*, (Ky. 1888) 10 S. W. Rep. 801; *Wilhite v. Boulware*, 88 Ky. 169.

*Minnesota.* — *Darwin v. Keigher*, 45 Minn. 64; *Marvin v. Dutcher*, 26 Minn. 391.

*Mississippi.* — *Jones v. Carrollton Bank*, 71 Miss. 1023.

*New York.* — *Matter of Lasak*, 131 N. Y. 624; *Rosseau v. Rouss*, 91 N. Y. App. Div. 230; *Matter of Lewis*, 5 N. Y. App. Div. 178; *Matter of Sproule* (Surrogate Ct.) 42 Misc. (N. Y.) 448; *Cunningham v. Whitford*, 74 Hun (N. Y.) 273.

*Pennsylvania.* — *Walls v. Walls*, 182 Pa. St. 226; *Shrader v. U. S. Glass Co.*, 179 Pa. St. 623; *Dickson v. McGraw*, 151 Pa. St. 98.

*South Carolina.* — *Robinson v. Robinson*, 20 S. Car. 572.

**Common-law Tests Apply** — *Goddard v. Leifingwell*, 40 Iowa 249; *Wyllie v. Charlton*, 43 Neb. 840; *Sorensen v. Sorensen*, 56 Neb. 729; *Hunter v. Herrick*, 26 Hun (N. Y.) 272, affirmed 92 N. Y. 626.

**5. Liability Resulting from Action** — *Alabama.* — *McDonald v. Harris*, 131 Ala. 359.

*Georgia.* — *Crawford v. Parker*, 96 Ga. 156.

*Illinois.* — *Off v. Trapp*, 109 Ill. App. 49; *Morrison First Nat. Bank v. Bressler*, 38 Ill. App. 499.

*Kansas.* — *Park v. Ensign*, 10 Kan. App. 173.

*Kentucky.* — *Whitlow v. Whitlow*, 109 Ky. 573.

*Nebraska.* — *Kroh v. Heins*, 48 Neb. 691.

*New Hampshire.* — *White v. Dakin*, 70 N. H. 632.

*New York.* — *Redfield v. Redfield*, 110 N. Y. 671; *Squire v. Greene*, 38 N. Y. App. Div. 431; *Frey v. Horton*, (Supm. Ct. App. T.) 85 N. Y. Supp. 402; *Gardner v. Cohen*, (Supm. Ct. App. Div.) 52 N. Y. Supp. 461.

*North Carolina.* — *McGowan v. Davenport*, 134 N. Car. 526; *Charlotte Oil, etc., Co. v. Rippey*, 123 N. Car. 656.

*Pennsylvania.* — *Miller's Estate*, 43 Pittsb. Leg. J. N. S. (Pa.) 344.

A member of a bankrupt firm has such an interest in a proceeding by the assignee in bankruptcy to collect a claim of the firm against a decedent's estate as will disqualify him as a witness, because he has a clear stake in any surplus that may remain after payment of the debts of the firm. *Zeh's Estate*, 13 Phila. (Pa.) 272, 36 Leg. Int. (Pa.) 436.

**6. Interest as Heir or Beneficiary Affected** —



Relationship to a Party does not of itself create an interest sufficient to exclude a witness.<sup>1</sup>

Trustees and Executors are not excluded by virtue of their office,<sup>2</sup> except as to matters between them and deceased *cestuis que trustent*,<sup>3</sup> or where it is sought to charge them with trust funds,<sup>4</sup> or unless they are also beneficiaries.<sup>5</sup>

Servants, Agents, etc. — Employees of a corporation or municipality are not interested in the event by virtue of their employment,<sup>6</sup> nor attorneys merely as such.<sup>7</sup>

Stockholders. — Where a corporation is a party to an action by or against an executor, etc., the stockholders of such corporation are interested in the event of the litigation, and are, therefore, generally held to be incompetent to testify in behalf of the corporation,<sup>8</sup> unless they are expressly declared competent by statute.<sup>9</sup>

*Missouri*. — *Nowack v. Berger*, 133 Mo. 24; *Bieber v. Boeckmann*, 70 Mo. App. 503.

*New York*. — *Matter of Dunham*, 121 N. Y. 575; *Mills v. Davis*, 113 N. Y. 243; *Richards v. Crocker*, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 954; *Eisenlord v. Eisenlord*, 49 Hun (N. Y.) 340; *In re Lasak*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 80; *Devinney v. Corey*, 1 Silv. Sup. (N. Y.) 148.

*Pennsylvania*. — *Griggs v. Vermilya*, 151 Pa. St. 429; *Marschall's Estate*, 8 Pa. Dist. 313.

*Utah*. — *In re Atwood*, 14 Utah 1.

*Vermont*. — *Foster v. Dickerson*, 64 Vt. 233.

*West Virginia*. — *Kerr v. Lunsford*, 31 W. Va. 659.

*Wisconsin*. — *In re Valentine*, 93 Wis. 45; *Goerke v. Goerke*, 80 Wis. 516.

1. **Relationship**. — *Mother*. — *Rosseau v. Rouss*, 91 N. Y. App. Div. 230; *Matter of Bedlow*, 67 Hun (N. Y.) 408; *Stone's Appeal*, 23 W. N. C. (Pa.) 285.

*Wife or Son*. — *Meyers v. Meyers*, (Ala. 1904) 37 So. Rep. 451.

*Father*. — *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529.

*Husband*. — *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71.

*Widow Independently of Dower Rights*. — *McCall v. Burk*, 76 S. W. Rep. 177, 25 Ky. L. Rep. 643; *Dicken v. Winters*, 169 Pa. St. 126.

*Children*. — *Anderson v. Hance*, 49 Mo. 159; *Blount v. Beall*, 95 Ga. 182.

2. **Trustees and Executors**. — *Cromwell v. Horton*, 94 Ala. 647; *Jenkinson v. Brooks*, 119 Mich. 108; *Matter of Folts*, 71 Hun (N. Y.) 492; *In re Gagan*, (Surrogate Ct.) 20 N. Y. Supp. 426; *Matter of Palmer*, 1 Silv. Sup. (N. Y.) 235; *Taylor's Appeal*, (Pa. 1887) 11 Atl. Rep. 307; *Kraft v. Neuffer*, 202 Pa. St. 558; *Devereux v. McCrady*, 46 S. C. Rep. 133; *Lawson v. Zinn*, 48 W. Va. 312; *Doty v. Doty*, (Ky. 1904) 80 S. W. Rep. 803.

3. *Taylor's Appeal*, (Pa. 1887) 11 Atl. Rep. 307.

4. *Morgan v. Johnson*, 87 Ga. 382.

5. **Trustees Also Beneficiaries**. — *Brothers v. Mitchell*, 157 Pa. St. 484; *Fisher's Estate*, 7 Pa. Dist. 116.

6. **Employees**. — *Feitl v. Chicago City R. Co.*, 211 Ill. 279; *Lake Shore, etc., R. Co. v. Rohlf's*, 51 Ill. App. 215; *Chicago University v. Emmert*, 108 Iowa 500; *Keigher v. St. Paul*, 73 Minn. 21; *Connor v. New York*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 85.

An employee of the company through whose alleged negligence the death of the plaintiff's intestate was caused is a competent witness notwithstanding his interest. *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290.

7. **Attorneys**. — *Paine v. Kerr*, 66 Hun (N. Y.) 636, 21 N. Y. Supp. 880; *Propst v. Fisher*, 104 N. C. 214.

8. **Stockholders**. — *Georgia*. — *Clements v. Western Lodge No. 91*, 101 Ga. 62. But see *Bank of Southwestern Georgia v. McGarrah*, 120 Ga. 944.

*Illinois*. — *Cronin v. Supreme Council, etc.*, 199 Ill. 228; *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 483, *affirming* 26 Ill. App. 466; *C. H. Albers Commission Co. v. Sessel*, 87 Ill. App. 378; *Christiansen v. Dunham Towing, etc., Co.*, 75 Ill. App. 267.

*Kentucky*. — *Storey v. Louisville First Nat. Bank*, 72 S. W. Rep. 318, 24 Ky. L. Rep. 1799. See *New York L. Ins. Co. v. Johnson*, 72 S. W. Rep. 762, 24 Ky. L. Rep. 1867.

*Minnesota*. — *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 152.

*Missouri*. — *Fink v. Hey*, 42 Mo. App. 295.

*North Carolina*. — *Morehead Bankng Co. v. Walker*, 121 N. C. 115.

*Pennsylvania*. — *Gunster v. Jessup*, 196 Pa. St. 548; *Hamill v. Supreme Council, etc.*, 152 Pa. St. 537.

*West Virginia*. — *Huntington v. Thornburg*, 46 W. Va. 99.

See *contra*, *Downes v. Maryland, etc., R. Co.*, 37 Md. 100; *Grange Warehouse Assoc. v. Owen*, 86 Tenn. 355.

The cashier of a bank, to whom stock was transferred by the owner to avoid liability as a stockholder, is not prevented, after the latter's death, from testifying as to the facts. *Stephens v. Bernays*, 42 Fed. Rep. 488.

9. **Stockholders Expressly Declared Competent**. — *Matter of O'Rourke*, (Surrogate Ct.) 12 Misc. (N. Y.) 248.

**Officer of Corporation**. — *Bopple v. Supreme Tent, etc.*, 18 N. Y. App. Div. 488.

And in *Missouri* the same result has been reached by judicial interpretation of the statute of that state. The court reached the conclusion that officers and stockholders of banking corporations were competent at common law, and that it was not the intention of the statute to disqualify any one who was formerly a competent witness. *Bates v. Forcht*, 89

*cc.* **INTEREST MUST BE PRESENT, CERTAIN, AND FIXED.** — The interest of the witness must be present, certain, and fixed in order to disqualify him. A contingent, remote, or uncertain interest is not sufficient.<sup>1</sup>

*dd.* **INTEREST ADVERSE TO OTHER PARTY.** — In order to exclude a witness on the ground of interest in the result of the suit, the party representing the decedent or succeeding to the decedent's rights must have an interest in the result of the suit,<sup>2</sup> and the interest of the witness must be opposed to that of the representative of the deceased person concerning whose doings or sayings the witness is called to testify. If there is no such conflict of interest, there is no incompetency.<sup>3</sup> But if the interest is opposed, even in a slight degree, to

Mo. 121; *Banking House v. Rood*, 132 Mo. 256. See also *Fink v. Hey*, 42 Mo. App. 295.

**Stockholders in Bank.** — *Carr v. Jones*, 29 Wash. 78.

**1. Interest Must Be Present, Certain, and Fixed** — *Alabama*. — *Harraway v. Harraway*, 136 Ala. 499; *Huckaba v. Abbott*, 87 Ala. 409.

*Arkansas*. — *Stanley v. Wilkerson*, 63 Ark. 556.

*Georgia*. — *Blount v. Beall*, 95 Ga. 182.

*Illinois*. — *Boyd v. Boyd*, 163 Ill. 611; *Griffin v. Griffin*, 125 Ill. 430; *Christiansen v. Dunham Towing, etc., Co.*, 75 Ill. App. 267.

*Iowa*. — *Frick v. Kabaker*, 116 Iowa 494; *Muir v. Miller*, 82 Iowa 700; *Smith v. James*, 72 Iowa 515; *Lines v. Lines*, 54 Iowa 600; *Wormley v. Hamburg*, 40 Iowa 22; *Zerbe v. Reigart*, 42 Iowa 229.

*Kentucky*. — *Doty v. Doty*, (Ky. 1904) 80 S. W. Rep. 803.

*Minnesota*. — *Towie v. Sherer*, 70 Minn. 312; *Bowers v. Schuler*, 54 Minn. 99.

*New York*. — *Johnson v. Cochrane*, 159 N. Y. 555; *Contielly v. O'Connor*, 117 N. Y. 91; *Eisenlord v. Clum*, 126 N. Y. 558; *Wallace v. Straus*, 113 N. Y. 242; *Nearpass v. Gilman*, 104 N. Y. 507; *Hobart v. Hobart*, 62 N. Y. 80; *Farrar v. Farmers' L. & T. Co.*, 85 N. Y. App. Div. 367; *Hixon v. Rodbourn*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 19, judgment reversed 67 N. Y. App. Div. 424; *Matter of Hanley*, 44 Hun (N. Y.) 559; *Todd v. Dibble*, 6 Dem. (N. Y.) 35. Compare *Payne v. Kerr*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 880.

*North Carolina*. — *Porter v. White*, 128 N. Car. 42; *Jones v. Emory*, 115 N. Car. 158; *Williams v. Johnston*, 82 N. Car. 288.

*Pennsylvania*. — *Spott's Estate*, 156 Pa. St. 281; *Sayers's Estate*, 8 Pa. Co. Ct. 32; *Shaef-fer v. Geary*, 3 Pa. Dist. 418.

*Utah*. — *Matter of Van Alstine*, 26 Utah 193.

**Husband's Contingent Estate as Tenant by Curtesy Does Not Disqualify.** — The fact that the husband of a devisee will be tenant by the curtesy of the land devised, in case his wife dies intestate before his death, does not disqualify him on the ground of interest; such interest is too remote and contingent. *Bowen v. Sweeney*, 63 Hun (N. Y.) 224, 22 Civ. Pro. (N. Y.) 79; *Matter of Clark*, 40 Hun (N. Y.) 233; *Cooper v. Monroe*, 77 Hun (N. Y.) 1; *Spindler v. Gibson*, 75 N. Y. App. Div. 444; *Leary v. Corvin*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 68.

**Wife's Inchoate Right of Dower Disqualifies Her.** — The inchoate estate of dower which would accrue to the wife should her husband succeed in the action, constitutes a direct legal in-

terest in its event. *Wylie v. Charlton*, 43 Neb. 840; *Sanford v. Ellithorpe*, 95 N. Y. 48; *Eckert v. Eckert*, 13 N. Y. App. Div. 490; *Steele v. Ward*, 30 Hun (N. Y.) 555; *Matter of Clark*, 40 Hun (N. Y.) 237; *Erwin v. Erwin*, 54 Hun (N. Y.) 166, 18 Civ. Pro. (N. Y.) 11; *Johnson v. Cochrane*, 91 Hun (N. Y.) 165. But see *Scherrer v. Kaufman*, 1 Dem. (N. Y.) 39.

**Attorney's Fee, Where Contingent.** — An attorney whose fee is contingent upon success in the suit is not competent for his client when the opposing party is an executor or administrator. *Smick v. Beswick*, 113 Ky. 439; *Tretheway v. Carey*, 60 Minn. 457; *Mott v. Bernard*, 97 Mo. App. 265; *White v. Beaman*, 96 N. Car. 122.

**2. Decedent's Representatives Must Be Interested in Event.** — *Nelson v. Howison*, 122 Ala. 573; *Butler v. Jones*, 80 Ala. 436; *Hendricks v. Kelly*, 64 Ala. 388; *Gunn v. Pettygrew*, 93 Ga. 327; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493; *Hankey v. Downey*, 10 Ind. App. 500; *Latourette v. McKeon*, 104 Mich. 156; *Brown v. Carey*, 149 Pa. St. 134; *Lewie v. Hallman*, 53 S. Car. 18; *Norris v. Clinkscales*, 47 S. Car. 488.

That the estate may be affected in another suit is not sufficient. *Fennell v. McGowan*, 58 Miss. 261; *Leffler v. Watson*, 13 Ind. App. 176.

A widow who brings a suit to set aside a conveyance of her own land, made during coverture, is competent to prove that the deed was executed under duress of threats from her husband, since deceased. *Washington City First Nat. Bank v. Eccleston*, 48 Md. 145.

Where the estate of a deceased person will be liable to the defendant for the amount recovered by the plaintiff, plaintiff is not competent to testify as to a conversation with the deceased concerning the matter in controversy. *Jackson v. Clopton*, 66 Ala. 34.

In a contest among the creditors of an estate, as to the priority of their respective claims, the parties thereto may testify, as the rights of the estate are not involved in the issues. *Gordon v. Kennedy*, 36 Iowa 167.

**3. When Interest Not Opposed to Decedent's Representatives** — *Georgia*. — *Elliott v. Banks*, 115 Ga. 926.

*Illinois*. — *White v. Ross*, 147 Ill. 427.

*Indiana*. — *Lewis v. Buskirk*, 14 Ind. App. 439.

*Iowa*. — *Harrow v. Brown*, 76 Iowa 179.

*Missouri*. — *Stam v. Smith*, (Mo. 1904) 81 S. W. Rep. 1217; *Crook v. Tull*, 111 Mo. 283; *Roan v. Winn*, 93 Mo. 511; *Jackman v. Robinson*, 64 Mo. 292; *Merry v. Frenon*, 44 Mo.

that of the party entitled to the protection of the statute, the testimony should be excluded.<sup>1</sup>

(c) **Removal of Interest.** — The statutes excluding as witnesses persons interested in the event of the action are generally applicable only when such interest exists at the time the witness offers to testify, and, therefore, one who was formerly so connected with the subject-matter of the action that the judgment would operate either to benefit him or to impose a liability on him, had his situation remained unchanged, is a competent witness, where he has transferred his rights or where his liabilities have become definitely fixed so that the judgment could not change or affect them in any way.<sup>2</sup>

518; *George v. Williamson*, 26 Mo. 190; *Hoyt v. Davis*, 30 Mo. App. 309.

*Ohio.* — *Baker v. Kellogg*, 29 Ohio St. 663.

*Pennsylvania.* — *Rine v. Hall*, 187 Pa. St. 264; *Brose's Estate*, 155 Pa. St. 619; *Young v. Senft*, 153 Pa. St. 352; *Gerz v. Weber*, 151 Pa. St. 396; *Palmier v. Farrell*, 129 Pa. St. 172; *Van Horne v. Clark*, 126 Pa. St. 411; *Norris v. Dalrymple*, 18 Pa. Super. Ct. 287; *Miller v. Garrecht*, 17 Lanc. L. Rev. 133; *Miller v. Miller*, 1 Pa. Dist. 95.

*Vermont.* — *Walling v. Newton*, 59 Vt. 684.

To exclude the witness, it should be made to appear that there is a direct immediate conflict between his rights and those of the estate of the deceased person with whom it is proposed to prove a transaction. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Hill v. Helton*, 80 Ala. 532; *Campbell v. Campbell*, 130 Ill. 466; *Snell v. Fewell*, 64 Miss. 655. See also *Dismukes v. Tolson*, 67 Ala. 386; *Howle v. Edwards*, 97 Ala. 654; *Gerz v. Weber*, 151 Pa. St. 396; *Brose's Estate*, 155 Pa. St. 619; *Bowers v. Schuler*, 54 Minn. 99.

Thus, where a life estate in land was conveyed with remainder over in fee to certain of the life tenant's grandchildren by name, and a bill to establish a resulting trust was brought after the death of the life tenant by one who claimed to have advanced the purchase money, it was held that the plaintiff might testify to communications between the deceased and himself, because the defendants claimed under the deed and not as heirs of the deceased. *Bibb v. Hunter*, 79 Ala. 351.

When the interest of the witness is opposed to that of the estate, he will be excluded, although the representative of the deceased is a party on the same side of the suit with the witness. *Apperson v. Gogin*, 3 Ill. App. 48.

Thus, when the witness is a defendant in form, but his interests are identified with those of the plaintiff, he will not be allowed to testify against defendants entitled to the protection of the statute against the plaintiff's testimony. *Weinstein v. Patrick*, 75 N. Car. 346; *Mason v. McCormick*, 75 N. Car. 263, 80 N. Car. 244; *Gulley v. Macy*, 84 N. Car. 434; *Owens v. Phelps*, 92 N. Car. 231; *Corderey v. Hughes*, 6 Ill. App. 401; *McCartin v. Traphagen*, 43 N. J. Eq. 323; *Trabue v. Turner*, 10 Heisk. (Tenn.) 447; *Aymett v. Butler*, 8 Lea (Tenn.) 453; *Hill v. McLean*, 10 Lea (Tenn.) 115; *Hubbell v. Hubbell*, 22 Ohio St. 208.

A defendant is competent for the administrator of one who, while living, was his codefendant. *Sublett v. Hodges*, 88 Ala. 491.

**Interest Adverse to Party Calling Witness Will**

**Exclude.** — "In Iowa it is held that a party adverse to the representative of a deceased cannot examine a witness as to a conversation with the deceased when such witness is interested on behalf of the representative and adversely to the party calling him. *Neas v. Neas*, 61 Iowa 641; *Ivers v. Ivers*, 61 Iowa 721; *Donnell v. Braden*, 70 Iowa 551. But these cases construe a statute which provides: 'No party to any action or proceeding, nor any person interested in the event thereof, \* \* \* shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person,' etc. (Iowa Rev. Stat., § 4889). The language of this statute is quite plain, although it extends the prohibition beyond the reason thereof." *Wylie v. Charlton*, 43 Neb. 840.

**1. Interest Opposed, Though Slightly — Surety on Bond or Note.** — *Miller v. Montgomery*, 78 N. Y. 282; *Munz v. Colvin*, 35 N. Y. App. Div. 188; *Kyte v. Foran*, 167 Pa. St. 252. See also *Whitney v. Shippin*, 89 Pa. St. 22; *Williams v. Johnston*, 82 N. Car. 288.

**Costs.** — Where the opposing party is an executor or administrator a party liable for costs only is incompetent. *Dunn v. Duncan*, 61 S. W. Rep. 1011, 22 Ky. L. Rep. 1867; *Smith v. Perry*, 52 Neb. 738; *Ransom v. Schmela*, 13 Neb. 73; *Poucher v. Scott*, 33 Hun (N. Y.) 230, affirmed 98 N. Y. 422; *Mason v. McCormick*, 75 N. Car. 263; *Tunstall v. Withers*, 86 Va. 892. But not if for costs in a prior action. *Ross's Estate*, 26 Pittsb. Leg. J. N. S. (Pa.) 266. And a contingent liability for costs as a nominal plaintiff is not such a claim against an estate as will exclude the witness. *Hedges v. Aydelott*, 46 Miss. 99.

**2. Removal of Interest.** — *Warren v. Steer*, 112 Pa. St. 634.

**The Contrary Has Been Held.** — *Peebles v. Stanley*, 77 N. Car. 245; *Mason v. McCormick*, 80 N. Car. 244.

Though the latter rule is now limited to persons through or under whom parties to the action, or persons interested in the event thereof, derive their title or interest. *Bunn v. Todd*, 107 N. Car. 266.

**Removal Not Complete.** — *Ladd v. Williams*, (Mo. App. 1904) 79 S. W. Rep. 511; *Keener v. Zartman*, 144 Pa. St. 179; *Gilmore v. H. W. Baker Co.*, 12 Wash. 468.

**A Discharged Bankrupt** who is not a party to the suit and therefore not liable for costs has



**Judgment by Default.** — Thus, suffering judgment to go by default will enable a defendant to testify where his liability is fixed by such judgment,<sup>1</sup> but if his liability may be affected by the further proceedings in the case, a judgment by default will not qualify him to testify.<sup>2</sup>

**Release of Interest.** — A release of interest will render the witness competent,<sup>3</sup> but only if given in good faith.<sup>4</sup>

**Transfer of Interest.** — One who has in good faith transferred or assigned his interest in the event is no longer incompetent to testify,<sup>5</sup> but a mere colorable assignment, given for the purpose of qualifying himself as a witness, is not sufficient,<sup>6</sup> and a transfer of his interest by a party complainant pending an action will not render him a competent witness, when he remains a party to the record.<sup>7</sup>

**Resignation or Removal of Personal Representatives.** — An executor who resigns office is no longer incompetent to testify, though his accounts remain unsettled, where it is shown that he has no interest in the result of the action.<sup>8</sup>

(4) *Persons in Particular Relations* — (a) **Creditors of Decedents.** — A creditor of a decedent is generally incompetent, in an action or proceeding against the estate for the purpose of establishing and enforcing his claim, to testify as a witness in his own behalf.<sup>9</sup> The disqualification in this respect extends not

no interest in the suit and is not incompetent as a witness on the ground of interest. Reynolds v. Calloway, 31 Gratt. (Va.) 436.

1. **Judgment by Default.** — Chase v. Pitman, 69 N. H. 423; Peebles v. Stanley, 77 N. Car. 243; Hoskinson v. Miller, 104 Pa. St. 175.

**Where No Further Interest in Event.** — Where the principal obligor in a promissory note had suffered judgment by default, it was held that he was competent to testify to personal transactions with one of the sureties, who had died, as the witness had no further interest in the event, his liability being fixed. Hoskinson v. Miller, 104 Pa. St. 175; Peebles v. Stanley, 77 N. Car. 243.

Where one of several co-obligors withdrew his answer upon a stipulation that judgment was to be entered against him for a certain amount, it was held that he might testify to transactions between himself and the plaintiff's intestate, as he had no further interest in the event of the action. Conger v. Bean, 58 Iowa 321; Baker v. Kellogg, 29 Ohio St. 663.

2. **Hutchinson v. Brown**, 19 D. C. 136; Good v. Martin, 2 Colo. 218.

**Member of Firm.** — A member of a firm cannot render himself competent for his copartners, as against the personal representative of a deceased person, by permitting judgment to go against him by default. Moore v. Schofield, 96 Cal. 486; Worthington v. Miller, 85 Ky. 320; Dick v. Williams, 130 Pa. St. 41.

**Withdrawal of Party in Interest.** — Withdrawal from an action by one who became a party defendant on his own motion will not render him competent to testify, where he is still the real party in interest. Messimer v. McCray, 113 Mo. 382.

3. **Release of Interest.** — Grand United Order, etc. v. Merklin, 65 Md. 579; Laprad v. Sherwood, 79 Mich. 520; Squire v. Greene, 168 N. Y. 659, 47 N. Y. App. Div. 636; Cobb v. Cobb, 4 Pa. Super. Ct. 273.

**Release by Legatee.** — Grimm v. Tittman, 113 Mo. 56; Loder v. Whelpley, 111 N. Y. 239;

Matter of Wilson, 103 N. Y. 374; O'Brien v. Weiler, 68 Hun (N. Y.) 64; Matter of Fitzgerald, (Surrogate Ct.) 33 Misc. (N. Y.) 325; Brown v. Klock, 1 Silv. Sup. (N. Y.) 273, 5 N. Y. Supp. 245. See also Volbracht v. White, 197 Ill. 298.

**Disclaimer After Close of Evidence Held Sufficient.** — Shorten v. Judd, 56 Kan. 43.

4. **Good Faith.** — De Roux v. Girard, 90 Fed. Rep. 537; Jack v. Moyer, 187 Pa. St. 87; Duffield v. Hue, 129 Pa. St. 94; Fidelity Trust, etc., Co. v. Black, 8 Pa. Dist. 580.

**Release to Wife Not Sufficient.** — Boustead v. Cuyler, 116 Pa. St. 551.

5. **Transfer of Interest.** — White v. Ross, 147 Ill. 427; Dubuque Lumber Co. v. Kimball, 111 Iowa 48; Harrison v. Patterson, (N. J. 1901) 50 Atl. Rep. 113; Miller v. Withers, 188 Pa. St. 128; Turner v. Warren, 160 Pa. St. 336; Westbury v. Simmons, 57 S. Car. 467.

**Retired Partner Held Competent.** — Flournoy v. Wooten, 71 Ga. 168.

6. **Colorable Assignment Not Sufficient.** — Glover v. Gentry, 112 Ala. 500, 104 Ala. 222; Mitchell v. Goodell, 56 Ill. App. 280; Tretheway v. Carey, 60 Minn. 457; Post v. Avery, 5 W. & S. (Pa.) 509; Thorne v. Joy, 15 Wash. 83.

In Rothschild v. Hatch, 54 Miss. 555, it was held that a witness who had before suit transferred his interest by deed of gift, the action being brought by the grantee, was competent.

**An Original Party to a Contract** cannot, the other party being dead, render himself competent by transferring his interest to another. Drew v. Simmons, 58 Ala. 463.

7. **De Roux v. Girard**, (C. C. A.) 112 Fed. Rep. 89, affirming 105 Fed. Rep. 798.

8. **Resignation or Removal of Personal Representative.** — Smith v. Smith, 168 Ill. 488.

9. **Creditor of Decedent Incompetent as Witness in His Own Behalf** — *United States*. — Hene-gan's Case, 17 Ct. Cl. 155.

*Alabama.* — Dolan v. Dolan, 89 Ala. 256; Scarborough v. Blackman, 108 Ala. 656; Hullett v. Hood, 109 Ala. 345.

only to direct proceeding by the creditor against the decedent's estate, but also to a contest of the report of the personal representative who paid the claim when presented by the creditor, because otherwise the creditor would be permitted to do by indirection that which he could not do directly; <sup>1</sup> and the same rule is applicable where a creditor of the claimant is seeking to establish the claim against the decedent's estate for the purpose of enforcing his debt against the claimant. <sup>2</sup>

**Claim for Personal Injuries.** — A claim against a decedent's estate for personal injuries resulting from the decedent's negligence is a "demand which the deceased owed" within a statute providing for the allowance of such demands against insolvent estates, and the claimant is not competent to testify in disproof of contributory negligence. <sup>3</sup>

**(b) Persons from Whom Party Derives Title** — *aa. IN GENERAL.* — In some jurisdictions the statutes exclude any person "from, through, or under whom" a party to the suit or a person interested in the event thereof derives his right to title or interest. These provisions are construed to apply to all persons in general whose rights have passed, whether by assignment or otherwise, to a party or interested person. <sup>4</sup>

**Beneficiary in Contract Between Third Persons.** — The beneficiary in a contract made on his behalf by one person with another person, who thereby binds himself directly with the beneficiary, does not derive his interest in such contract from the person who made the contract on his behalf so as to exclude such person as a witness in a suit by the beneficiary against the estate of a third party. <sup>5</sup>

**Remote Assignees.** — Assignees claiming under the same assignor, the priority of their assignments being in issue, do not derive their title from a remote assignor of their assignor so as to exclude such remote assignor as a witness on the ground that the title of such contesting assignees was derived

*California.* — *Todd v. Martin*, (Cal. 1894) 37 Pac. Rep. 872.

*Georgia.* — *Nesbitt v. Parrott*, 84 Ga. 142; *Johnson v. Champion*, 88 Ga. 527.

*Illinois.* — *Henderson v. Treadway*, 69 Ill. App. 357.

*Indiana.* — *Reed v. Reed*, 30 Ind. 313; *Clift v. Shockley*, 77 Ind. 297; *McConnell v. Huntington*, 108 Ind. 405; *Larch v. Goodacre*, 126 Ind. 224.

*Michigan.* — *Seligman v. Ten Eyck*, 60 Mich. 267.

*Mississippi.* — *Wood v. Stafford*, 50 Miss. 370; *Jacks v. Bridewell*, 51 Miss. 881.

*New York.* — *Boughton v. Bogardus*, 35 Hun (N. Y.) 198.

*Virginia.* — *Tate v. Tate*, 75 Va. 522.

**Claim by Widow.** — If the widow claims as a creditor of the estate, she is not competent to support her own claim. *Buckingham v. Wesson*, 54 Miss. 533.

**Priority of Claims.** — In *Latimer v. Sayre*, 45 Ga. 468, it was held, in a proceeding involving priority between creditors of a decedent, that one creditor was not competent to testify as to the priority of his claim.

**1. Contest of Personal Representative's Accounts.** — *White v. Thompson*, 123 Ala. 610; *Goodwin v. Goodwin*, 48 Ind. 584; *Clift v. Shockley*, 77 Ind. 297; *Baker v. Galpin*, 39 N. J. Eq. 491; *Fross's Appeal*, 105 Pa. St. 258; *Young's Estate*, 148 Pa. St. 573, 575; *Dawson v. Hemelrick*, 33 W. Va. 675. But see *contra*, *Eacott*, Appellant, 95 Me. 522.

**2. Proceeding by Creditor of Claimant.** — *Aymett v. Butler*, 8 Lea (Tenn.) 453.

**3. Claim for Personal Injuries.** — *Simpson v. Gafney*, 66 N. H. 261.

**4. Mortgagors.** — *Clinton Sav. Bank v. Underhill*, 115 Iowa 292.

But in a contest between a living mortgagee and the legal representative of a deceased mortgagee of the same land, as to the priority of the mortgages, the mortgagor is not competent to prove that the decedent's mortgage, though prior in date, was not in fact delivered first. *Hoadley v. Hadley*, 48 Ind. 452.

**Judgment Debtors.** — *Taylor v. Meldrum*, (Supm. Ct. Gen. T.) 6 Civ. Pro. (N. Y.) 235; *Geissman v. Wolf*, 46 Hun (N. Y.) 289.

**5.** Thus, where parents surrender their child to an adopting parent under an agreement for the benefit of the child that the adopting parent will make a will in favor of the child, the child does not derive her interest from her parents so as to render her parents incompetent as witnesses in her behalf in an action against the estate of the adopting parent. *Gordine v. Kidd*, 64 Hun (N. Y.) 585.

So, also, where a mortgagee, for a consideration moving from the mortgagor, agreed that upon the death of the mortgagee the mortgage should belong to the wife of the mortgagor, the wife does not derive her title through her husband so as to render him incompetent as a witness to enforce the wife's claim against the estate of the mortgagee. *Bouton v. Welsh*, 170 N. Y. 554.

through him.<sup>1</sup>

**Wife's Claim for Services.** — In *New York*, where a wife renders services to a third person after an agreement with her husband that her claim for services rendered by her shall constitute her separate property, it has been held that the wife did not derive her interest to such claim from her husband so as to disqualify him as a witness.<sup>2</sup>

**Husband's Claim for Services Rendered by Wife.** — A husband does not derive from his wife his claim for services rendered by her, but his right arises out of the marital relation, and, therefore, the wife is not disqualified to testify in an action by the husband against a decedent's estate for such services on the ground that the husband derived his title from her.<sup>3</sup>

**bb. GRANTORS AND ASSIGNORS — Grantors.** — Under these provisions the grantor of a party or of a person interested in the event of the suit is not competent to testify in favor of his grantee against the representatives of a decedent,<sup>4</sup> unless he is first released from liability on his covenant of warranty, because he is interested in protecting his grantee's title.<sup>5</sup>

**Assignors.** — Some of the statutes expressly provide that the assignor of a party shall not testify in favor of his assignee against the representatives of a decedent;<sup>6</sup> others have accomplished the same result by the exclusion of

1. *Squire v. Greene*, 38 N. Y. App. Div. 431.

2. *Lashaw v. Croissant*, 88 Hun (N. Y.) 206; *Sands v. Sparling*, 82 Hun (N. Y.) 401.

And in *Slack v. Norton*, 111 Mich. 213, where the wife was permitted by her husband to keep boarders, and furnished the provisions herself, and the action was on an account brought by the wife, it was a matter with which the husband had nothing to do. And, as he did not stand towards her as the assignor of the claim, it was held that he was not prohibited from testifying to the arrangement which she made with the deceased for his board and care.

But in *Stackable v. Stackable*, 65 Mich. 515, a husband, who is the head of the house and furnishes the family supplies, was held an assignor within section 7545, How. Stat., as amended by Acts 1885, pp. 156-157, where the wife receives pay for board, as without some assignment a claim for such board would belong to the husband.

3. *Hopkins v. Clark*, 90 Hun (N. Y.) 4.

4. **Grantors Excluded** — *Florida*. — *Stewart v. Stewart*, 19 Fla. 846.

*Illinois*. — *King v. Worthington*, 73 Ill. 161.

*Kentucky*. — *Norfleet v. Logan*, (Ky. 1900) 54 S. W. Rep. 713; *Hornshy v. Davidson*, (Ky. 1900) 55 S. W. Rep. 684.

*Michigan*. — *Youngs v. Cunningham*, 57 Mich. 153.

*New York*. — *Smith v. Cross*, 90 N. Y. 556; *Connolly v. Keenan*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 589; *Bell v. Howe*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 569.

*North Carolina*. — *Carey v. Carey*, 104 N. Car. 171.

*Pennsylvania*. — *Gray v. Whitney*, 81\* Pa. St. 332; *Barbour v. Wiehle*, 116 Pa. St. 308.

*Texas*. — *Bennett v. Virginia Ranch, etc.*, Co., 1 Tex. Civ. App. 321.

*Virginia*. — *Dawson v. Hemelrick*, 33 W. Va. 675.

Where a claimant of land assigns his title after the death of the party in possession, he is not competent to testify that the possessor

held merely by his permission. *Jones v. Sherman*, 56 Miss. 559.

**Grantor's Grantor Competent to Prove Execution of Deed.** — *Shoptaw v. Ridgway*, (Ky. 1901) 60 S. W. Rep. 723.

**Conveyance to Different Grantees.** — Where a grantor has conveyed the same land twice to different grantees, and the former of his grantees is dead, he is not a competent witness for the other in an action against the heirs of the deceased grantee to avoid the prior conveyance. *McCann v. Atherton*, 106 Ill. 31. But see *Allen v. Davis*, 65 Ga. 179.

5. **Reason for Exclusion.** — *Warren v. Steer*, 112 Pa. St. 634, and cases in preceding note.

6. **Assignors — Express Statutory Provision** — *Alabama*. — *White v. Thompson*, 123 Ala. 610; Civ. Code, § 1794.

*California*. — *Shain v. Forbes*, 82 Cal. 577; Code Civ. Pro., § 1880, cl. 3.

*Indiana*. — *Toner v. Wagner*, 158 Ind. 447; *Burns's Rev. Stat.* (1901), § 510.

*Iowa*. — *Parcell v. McReynolds*, 71 Iowa 623; Code Iowa, § 4604.

*Kansas*. — *Miller v. McDowell*, 63 Kan. 75; Gen. Stat., § 333.

*Kentucky*. — *Alexander v. Alford*, 89 Ky. 105; *Neale v. Neale*, (Ky. 1896) 36 S. W. Rep. 526; *Hagins v. Arnett*, (Ky. 1901) 64 S. W. Rep. 430; *James v. Walker*, (Ky. 1902) 68 S. W. Rep. 1106; *Huff v. Miniard*, (Ky. 1903) 73 S. W. Rep. 1036; Civ. Code (1888), § 606, cl. 2.

*Michigan*. — *Buck v. Haynes*, 75 Mich. 397; *Berry v. Adams*, 122 Mich. 17; *Stackable v. Stackable*, 65 Mich. 515; *Comp. Laws*, § 10212.

*New York*. — *O'Brien v. Weiler*, 140 N. Y. 281, affirming 68 Hun (N. Y.) 64; *Lyon v. Snyder*, 61 Barb. (N. Y.) 172; Code Civ. Pro., § 829; *Rockwell v. Peck*, 13 N. Y. App. Div. 621; *Beck v. Cooke*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 185, affirmed 31 Misc. (N. Y.) 832, 65 N. Y. Supp. 1127.

*North Carolina*. — *Shields v. Smith*, 104 N. Car. 57; Code, § 590.

*Ohio*. — *Banning v. Gotshall*, 62 Ohio St.



persons having an interest in the event of the suit or proceeding;<sup>1</sup> and in some jurisdictions the exclusion of either party to an action against the personal representative of the decedent, wherein a judgment may be rendered either for or against the decedent's estate, is construed as comprehending the assignor of a claim against the decedent, though he is not named in the statute, on the theory that otherwise the policy of the law, which is to protect the estates of decedents, would be evaded and its purposes thwarted.<sup>2</sup>

**Construction of Statute.** — The words of the statute, "any interest or title," are construed to mean any interest or title in or to the subject-matter of the action, and the prohibition is not limited to an examination in respect to matters relating only to the parts of the action that are assigned, but extends to the entire action.<sup>3</sup>

**Thing Assigned.** — In order that a proposed witness may be excluded on the ground that he is the assignor of a party or of an interested person, the thing assigned must be involved in the litigation, because it is only when the assignor may be prejudiced by the failure of his assignee to make a good title and so come back on him that the exclusion is intended; otherwise there is no motive of self-interest that will influence the assignor's testimony.<sup>4</sup>

(c) **Husband and Wife — Disqualification of One Disqualifies Other.** — In most jurisdictions it is the rule that the identity of interest of husband and wife is such that, in the absence of a statute expressly removing the liability, where one of them is rendered incompetent to testify by reason of the death of the opposing party, the other is also incompetent.<sup>5</sup>

**No Disqualification from Marital Relation.** — In some jurisdictions, however,

210; Rev. Stat., § 5211. See *Duffield v. Hue*, 129 Pa. St. 94.

*Pennsylvania.* — In *Tinstman v. Croushore*, 104 Pa. St. 192, it was held that the assignor of the personal representative was not competent to support the claim in the latter's hands, although the court expressed regret that this ruling was made necessary by the language of the statute. But the Pennsylvania statute has been amended since this decision was rendered. See Act Pa. May 23, 1887, § 5.

See also Rev. Stat. Fla. (1892), § 1095, and the statutes of the various states.

**Assignor Defined.** — In *Hess v. Gourley*, 89 Pa. St. 195, it was said that "in the statutory sense the assignor of the thing or contract is he whose rights therein or thereunder, at or before the time of his decease, passed by his own act, or by law, to a party in the action."

**Assignment of Partnership Interest to Copartner — Assignor Incompetent.** — *Lyon v. Snyder*, 61 Barb. (N. Y.) 172.

**Maker and Payee of Note.** — Where a promissory note is delivered to the payee by the maker for a consideration, there is an original and direct promise moving from the maker to the payee, and, therefore, the payee is not a successor to the title or interest of the maker so as to exclude the maker from testifying in favor of the payee against a deceased party to the transaction. *Wilcox v. Corwin*, 117 N. Y. 500, reversing 50 Hun (N. Y.) 425.

1. See *supra*, this subdivision of this section. (3) *Persons Interested in Event of Action.*

2. **Assignor Excluded Though Not Named.** — *Martin v. Asher*, 25 Ind. 237; *Ketcham v. Hill*, 42 Ind. 64; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709.

3. **Construction of Statute.** — *Lyon v. Snyder*, 61 Barb. (N. Y.) 172.

4. **Thing Assigned Must Be Involved in Litigation.** — *Hooper v. Hooper*, 32 W. Va. 526.

5. **Husband and Wife — Disqualification of One Disqualifies Other** — *Illinois.* — *Crane v. Crane*, 81 Ill. 165; *Warrick v. Hull*, 102 Ill. 280; *Treleaven v. Dixon*, 119 Ill. 553, overruling *Marshall v. Peck*, 91 Ill. 187; *Way v. Harriman*, 126 Ill. 132; *Shaw v. Schoonover*, 130 Ill. 448; *Craig v. Miller*, 133 Ill. 300; *Bevelot v. Lestrade*, 153 Ill. 625; *Pyle v. Pyle*, 158 Ill. 289; *Mann v. Forein*, 166 Ill. 446; *Smith v. Smith*, 168 Ill. 488; *Waggonseiler v. Rexford*, 2 Ill. App. 455; *Harriman v. Sampson*, 23 Ill. App. 159, affirmed 126 Ill. 132; *Giffert v. McGuern*, 51 Ill. App. 387.

*Indiana.* — *Scherer v. Ingerman*, 110 Ind. 443, where it is said that section 501 of Rev. Stat. (1881), was overlooked in *Williams v. Riley*, 88 Ind. 290, in which the contrary was held.

*Iowa.* — *Ashworth v. Grubbs*, 47 Iowa 354.

*Kentucky.* — *Bright v. Swinebroad*, 106 Ky. 737.

*Maine.* — *Berry v. Stevens*, 69 Me. 290.

*Michigan.* — *Laird v. Laird*, 115 Mich. 353; *Chaddock v. Chaddock*, (Mich. 1903) 95 N. W. Rep. 972.

*Missouri.* — *Tucker v. Gentry*, 93 Mo. App. 655.

*Pennsylvania.* — *Sower v. Weaver*, 78 Pa. St. 443; *Bitner v. Boone*, 128 Pa. St. 567; *Sutherland v. Ross*, 140 Pa. St. 379; *Yost v. Mensch*, 141 Pa. St. 73; *Sutherland v. Ross*, 160 Pa. St. 31; *Myers v. Litts*, 195 Pa. St. 595; *Smith's Estate*, 8 Pa. Co. Ct. 29; *Winings v. Hearst*, 17 Pa. Super. Ct. 314.

*Texas.* — *Eddie v. Tinnin*, 7 Tex. Civ. App. 371; *Hicks v. Hicks*, (Tex. Civ. App. 1894) 26 S. W. Rep. 227.

*Virginia.* — *McDevitt v. Frantz*, 85 Va. 740;

incompetency from this cause is removed where the witness has no direct legal interest in the matter in controversy other than that arising from the marital relation, as it is too remote, and the testimony proposed is of such a character as to be no violation of the confidence of such relation.<sup>1</sup> But where the statute, after declaring that no party to an action or proceeding shall testify in his own behalf when any adverse party sues or defends, as the heir, etc., of a deceased person, further provides that "husband or wife may testify for or against each other in the same manner as other parties may under the provisions of this act," the husband or wife of a party is not a competent witness, unless such party would be competent to testify in his or her own behalf.<sup>2</sup> Where the exclusion of husband and wife as witnesses for or against each other is not general, but only in regard to personal transactions between the witness and a person deceased, etc., at the commencement of the examination, a wife is competent to testify in behalf of her husband as to a conversation between him and the decedent in which she took no part.<sup>3</sup> The husband of an heir of the intestate may testify for the administrator in an action on the note of the intestate, neither the husband nor the wife being a party to the action.<sup>4</sup>

**By Express Statutory Provision.** — In some states the statutes contain an express provision against the competency of a husband or wife to testify in behalf of the other in an action when the other is incompetent to testify.<sup>5</sup>

*Johnson v. Fry*, 88 Va. 695. But the rule is now otherwise by statute in Virginia. See Acts of Assembly of Virginia, 1893-1894, c. 619, approved March 5, 1894.

*West Virginia*. — *Kilgore v. Hanley*, 27 W. Va. 451.

If, in an action against a husband, the judgment is collectible from the community estate, the wife is disqualified as being interested in the litigation. *Simpson v. Brotherton*, 62 Tex. 170; *Newton v. Newton*, 77 Tex. 508; *Paddock v. Lewis*, 13 Tex. Civ. App. 265.

**Interest of Husband and Wife Distinguished.** — In *Madson v. Madson*, 69 Minn. 37, it was decided that a wife was a competent witness for the purpose of showing admissions made by a deceased person concerning a sale of land to her husband. But, in *Lowe v. Lowe*, 83 Minn. 206, it was held that the husband's interest in the real estate of his wife was immediate, direct, and pecuniary, as distinguished from the uncertain and contingent interest of the wife in the real estate of her husband.

**Inchoate Right of Dower Constitutes Legal Interest.** — *Wylie v. Charlton*, 43 Neb. 840; *Steele v. Ward*, 30 Hun (N. Y.) 555; *Erwin v. Erwin*, 54 Hun (N. Y.) 166; *Baldwin v. Walker*, 67 Hun (N. Y.) 651, 23 N. Y. Supp. 1149. But see *Madson v. Madson*, 69 Minn. 37.

But the husband's right of curtesy initiate is not a sufficient interest to exclude him. *Cooper v. Monroe*, 77 Hun (N. Y.) 1. See also *supra*, this subsection, (3) (b) *Nature of Disqualifying Interest*.

**Suits to Set Aside Conveyance.** — In a suit by a wife against the heirs of the grantee to set aside a conveyance of land in which she joined with her husband, on the ground that she was induced to execute it by fraud and duress, neither she nor her husband is a competent witness to support such allegations. *Crane v. Crane*, 81 Ill. 165; *Warrick v. Hull*, 102 Ill. 280.

It has been held, however, that if a wife

brings a suit to set aside a conveyance of her own land made during coverture, she may testify that she executed it under duress or threats made by her husband, since deceased. *Washington City First Nat. Bank v. Eccleston*, 48 Md. 145.

**Wife Excluded by Provision of Statute.** — *In re Heatley*, 22 Nova Scotia 302.

**1. No Disqualification from Marital Relation** — *Iowa*. — *Auchampaugh v. Schmidt*, 77 Iowa 13, overruling 72 Iowa 656. Compare *Muir v. Miller*, 82 Iowa 700, where the wife was disqualified, being a party to the transaction.

*Mississippi*. — *Rushing v. Rushing*, 52 Miss. 329; *Ellis v. Alford*, 64 Miss. 8; *Saffold v. Horne*, 72 Miss. 470.

*Montana*. — *Shober v. Jack*, 3 Mont. 353; *Stewart v. Budd*, 7 Mont. 573.

*Nebraska*. — *Parker v. Wells*, (Neb. 1903) 94 N. W. Rep. 717.

*New Hampshire*. — *Clements v. Marston*, 52 N. H. 31.

*New York*. — *Whitman v. Foley*, 125 N. Y. 651; *Porter v. Dunn*, 131 N. Y. 314; *Hopkins v. Clark*, 90 Hun (N. Y.) 4.

See also *Glover v. Gentry*, 104 Ala. 222; *Best v. Jenks*, 123 Ill. 447.

**Husband as Prochein Ami.** — Where a married woman sues an executor by her husband as next friend, the husband may testify in her behalf. *Trahern v. Colburn*, 63 Md. 99.

**2. Husband and Wife Competent for Each Other "in Same Manner as Other Parties."** — *Illinois* Cent. R. Co. v. Taylor, 24 Ill. 323; *Freeman v. Freeman*, 62 Ill. 191; *Crane v. Crane*, 81 Ill. 165; *Treleaven v. Dixon*, 119 Ill. 548, overruling *Marshall v. Peck*, 91 Ill. 187; *Way v. Harriman*, 126 Ill. 137.

*3. Detestable v. Behrens*, 106 Iowa 585. And see generally *infra*, this division of this section, *e. (7) Transactions with Third Persons*.

**4. Husband and Wife Not Parties.** — *Graves v. Safford*, 41 Ill. App. 659.

**5. Express Statutory Provision.** — *Niehau v.*

In Arizona the wife may testify to conversations between her husband and a deceased person.<sup>1</sup>

(d) **Donor and Donee** — Suit by Donor to Set Aside Gift — Donee Dead. — Where an action or proceeding involves the question whether an alleged gift *inter vivos* was in fact made, or involves the validity of such a gift, either as between the parties or as between one of the parties and third persons, it is obvious that the gift is the "contract or cause of action," "thing in action," or "transaction which is the subject of the investigation," within the rule that the surviving party to such thing in action, etc., is not a competent witness concerning it after the death of the other party. Therefore, in a suit by a donor to set aside the gift on the ground of fraud or undue influence on the part of the donee, the donor is not, after the death of the donee, a competent witness in his own behalf as to the facts and circumstances relating to the transaction.<sup>2</sup>

**Contest Between Donee and Donor's Representative** — Donee Incompetent. — So, too, where the statute excludes from testifying in his own behalf a party to the suit or a person interested in the result when any adverse party sues or defends as personal representative, heir, etc., of a deceased person, one who claims property under an alleged gift from a person since deceased is not competent to testify in support of the alleged gift as against the claim of the personal representative of the decedent,<sup>3</sup> or as against the decedent's heirs, devisees, etc., when the subject of the alleged gift is real estate.<sup>4</sup> But some of the statutes exclude a party from testifying only when the action is by or against the personal representative of a decedent or the representative of a person *non*

Cooper, 22 Ind. App. 610; Muir v. Miller, 82 Iowa 700; Allison v. Parkinson, 108 Iowa 154. See Goodwin v. Bentley, 30 Ind. App. 477.

**Divorced Wife Incompetent.** — *In re Evans*, 114 Iowa 240.

1. **Arizona Rule.** — Miller v. Miller, (Ariz. 1901) 64 Pac. Rep. 415.

2. **Donor After Death of Donee.** — Yeakel v. McAtee, 156 Pa. St. 600; Wade v. Pulsifer, 54 Vt. 45.

3. **Donee Not Competent Witness Against Deceased Donor's Personal Representatives** — *Alabama*. — Stuckey v. Bellah, 41 Ala. 700.

*Georgia*. — Bothwell v. Dobbs, 59 Ga. 787; Elsinger v. Beytagh, 74 Ga. 399; Huggins v. Huggins, 71 Ga. 66.

*Illinois*. — Way v. Harriman, 126 Ill. 132; Yokem v. Hicks, 93 Ill. App. 667.

*Kentucky*. — Overbeck v. Lecquire, (Ky. 1897) 39 S. W. Rep. 254; Albro v. Albro, (Ky. 1901) 65 S. W. Rep. 592.

*Maryland*. — Johnson v. Heald, 33 Md. 352.

*Mississippi*. — Cockrell v. Mitchell, (Miss. 1894) 15 So. Rep. 41.

*Missouri*. — Dunn v. German-American Bank, 109 Mo. 101; Scott v. Riley, 49 Mo. App. 251; Johnson v. Burks, 103 Mo. App. 221.

*New Jersey*. — Sherman v. Lanier, 39 N. J. Eq. 249.

*New York*. — Waver v. Waver, 15 Hun (N. Y.) 277.

*Pennsylvania*. — Patterson v. Dushane, 115 Pa. St. 334; Flanagan v. Nash, 185 Pa. St. 41; Turner's Estate, 167 Pa. St. 609.

*Rhode Island*. — Hopkins v. Manchester, 16 R. I. 663.

*Tennessee*. — Royston v. McCulley, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

*Texas*. — James v. James, 81 Tex. 373; Turner v. Murchison, (Tex. Civ. App. 1895) 31 S. W. Rep. 428.

*Vermont*. — La Mountain v. Miller, 56 Vt. 433; Rooney v. Minor, 56 Vt. 527.

*West Virginia*. — Martin v. Smith, 25 W. Va. 579; Lee v. Patton, 50 W. Va. 20.

**Husband and Wife Joint Payees in Note.** — Where a note given for the purchase money of land sold by a married woman was made payable to the husband and wife, and the husband handed it to his wife before his death, it was held that this was not a gift within the meaning of the rule, because the note was already the property of the wife. Magee v. Burch, 108 Mo. 336.

**Cases Not Within Statute.** — Where the statute excludes one party only when the other party sues or defends as the personal representative of a person deceased, a donee, after the death of the donor, may testify in support of the gift, as against the widow of the decedent or against any other person not suing or defending as personal representative. White v. White, 71 Ga. 670; Durham v. Shannon, 116 Ind. 403.

4. **Heirs, Devisees, etc., of Decedent.** — Boykin v. Smith, 65 Ala. 294; Wertz v. Merritt, 74 Iowa 683; Overbeck v. Lecquire, (Ky. 1897) 39 S. W. Rep. 254; Diehl v. Emig, 65 Pa. St. 320; Ewing v. Ewing, 96 Pa. St. 381; Patterson v. Dushane, 115 Pa. St. 334; Keener v. Zartman, 144 Pa. St. 179.

**Claimant Not Heir or Legal Representative.** — In Texas it has been held that a son who claims real estate by parol gift from his father, since deceased, the gift having been followed by possession and improvement, is competent, as against one claiming under a conveyance from his father, to prove the transaction between himself and his deceased father, because he does not claim the land as heir or legal representative of his father. Wootters v. Hale, 83 Tex. 563.



*sui juris*,<sup>1</sup> and under such statutes a donee of real estate is a competent witness against the heirs of the deceased donor.<sup>2</sup> Again, some of the statutes exclude, not only the parties to the action, but also persons having a pecuniary interest in the result thereof;<sup>3</sup> and where the statute so provides, the heirs and distributees of the estate of a deceased donor are not competent to defeat a gift made by him, thereby increasing the assets of the estate for their own benefit.<sup>4</sup>

**Action by Donee Against Third Person.** — In an action by an alleged donee to recover personal property, where neither of the parties in any sense represents the decedent's estate, and where the judgment will not bind or conclude the estate, the case is not within the reason or the letter of the *Indiana* statute, and the plaintiff is a competent witness.<sup>5</sup>

(e) **Heirs, Devisees, etc.** — *aa. IN GENERAL.* — Heirs, devisees, legatees, assignees, and persons otherwise deriving their title or right from a decedent, who are parties to the suit or proceeding, or interested in the result, are excluded from testifying by the general provisions relating to parties and persons interested, though they are not expressly mentioned in the statutes.<sup>6</sup> Some of the statutes expressly exclude heirs, etc., of a decedent from testifying in regard to any transaction or communication with such decedent, the usual provision being that in an action by or against heirs, devisees, legatees, or assignees, neither party shall testify against the other.<sup>7</sup> Therefore, under such comprehensive statutes, in a contest among the heirs themselves concerning the distribution of the property of the estate, the parties are all incompetent as to transactions and communications with their common ancestor,<sup>8</sup> but where the statute excludes only the surviving party to the contract or thing in suit, the other party being dead, the heir and next of kin are competent witnesses in their own behalf in a contest as to the distribution of the estate.<sup>9</sup> And where parties and persons interested are, by the terms of the statute, excluded only in actions by or against the representatives of persons deceased or under disability, the rule of exclusion does not apply when the widow and heirs are parties in their own right and the legal representative of the estate is not a party.<sup>10</sup> But under statutes prohibiting persons from testifying who are interested in the result of the suit or proceeding, an heir is not admitted to testify where the result of the suit may benefit him.<sup>11</sup>

**The Widow of a Decedent Is an Heir** within the meaning of the statute, and, therefore, in an action by a creditor of the decedent to compel her to account for the value of personal property of the decedent taken and converted by

1. See *supra*, this division of this section, c. (1) *Parties to Actions or Proceedings*.

2. **Donee Competent Witness.** — *O'Neal v. Breechen*, 5 Baxt. (Tenn.) 604.

3. See *supra*, this division of this section, c. (3) *Persons Interested in Event of Action*.

4. **Heirs and Distributees Incompetent.** — *Fort v. Davis*, 67 Ala. 481.

5. **Action by Donee Against Third Person.** — *Durham v. Shannon*, 116 Ind. 403.

6. **Heirs, etc., Incompetent as Parties or Persons Interested.** — See *supra*, this division of this section, c. (1) *Parties to Actions or Proceedings*; (3) *Persons Interested in Event of Action*.

7. See generally the statutes of the several states.

8. **Contest Between Heirs.** — *Comer v. Comer*, 119 Ill. 170; *Way v. Harriman*, 126 Ill. 132; *Wolfe v. Kable*, 107 Ind. 565; *Neas v. Neas*, 61 Iowa 641; *Ellis v. Stewart*, (Tex. Civ. App. 1893) 24 S. W. Rep. 585. See also *Hillens v. Brinsfield*, 108 Ala. 605; *Renz v. Drury*, 57

Kan. 84; *Rice v. Shipley*, 159 Mo. 399; *Crothers v. Crothers*, 149 Pa. St. 201, excluding one heir from testifying against the other; under statutes not so comprehensive as stated in the text.

9. **Surviving Party Excluded.** — *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505; *Bantz v. Bantz*, 52 Md. 686; *Pendill v. Neuberger*, 67 Mich. 562, affirming 64 Mich. 220; *Tabor v. Tabor*, (Mich. 1904) 99 N. W. Rep. 4; *Smith v. Hay*, 152 Pa. St. 377.

10. **Actions By or Against Personal Representatives.** — *Howle v. Edwards*, 97 Ala. 649; *Bird v. Jones*, 37 Ark. 195; *Lawrence v. La Cade*, 46 Ark. 378; *Reget v. Bell*, 77 Ill. 593; *Johnson v. Merithew*, 80 Me. 111; *Titus v. O'Connor*, 18 Hun (N. Y.) 373, 57 How. Pr. (N. Y.) 391; *Newton v. Newton*, 77 Tex. 508.

11. **Heir Interested Party.** — *McDonald v. Harris*, 131 Ala. 359; *Brace v. Black*, 125 Ill. 33; *Keener v. Zartman*, 144 Pa. St. 179. See *supra*, this division of this section, c. (3) *Persons Interested in Event of Action*.

her after his death, the plaintiff is not a competent witness to testify as to any matter which occurred prior to the death.<sup>1</sup>

**Claim Based on Transaction with Decedent.** — When a claim to property left by a decedent is based on an alleged purchase, gift, or other transaction between the claimant and the decedent, the claim is in direct antagonism to and tends to diminish the estate. Therefore, in such a case, the claimant is not competent as a witness in his own behalf, either under a statute which forbids a party or a person interested in the result of a suit or proceeding to testify against a decedent's estate,<sup>2</sup> or under a statute which provides that when one party to the contract or thing in suit is dead, the surviving party shall not be admitted to testify concerning it.<sup>3</sup> And where both of the original parties to a transaction are dead, the heirs and next of kin of one of them may not testify to personal transactions or communications with the other.<sup>4</sup>

**Heirs as Witnesses for Personal Representatives.** — In an action by or against the personal representative of a deceased person, it is generally held that heirs and next of kin whose interest is not opposed to that of the estate are competent witnesses for the representative.<sup>5</sup>

*bb. PROBATE PROCEEDINGS.* — According to the principles stated above, when the probate of a will is contested by the heirs and next of kin on the ground of fraud, undue influence, or want of testamentary capacity, the contestants are not competent in their own behalf as to personal transactions and communications with the testator, preceding, attending, or succeeding the execution of the will;<sup>6</sup> and parties to the probate proceedings who are bene-

1. **Widow Is Heir.** — McDonald *v.* Harris, 131 Ala. 359; Larch *v.* Goodacre, 126 Ind. 224.

**Divorced Wife of Deceased.** — Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365.

2. **Claim Based on Transaction with Decedent.** — Lloyd *v.* Hollenback, 98 Mich. 203; Rusling *v.* Bray, 38 N. J. Eq. 398.

3. King *v.* Humphreys, 138 Pa. St. 310; Crothers *v.* Crothers, 149 Pa. St. 201; Saunders *v.* Greever, 85 Va. 252.

**In a Contest between the Widow and Heir,** as to the ownership of property, the former is not competent to testify as to a transaction with her deceased husband, in support of her claim. Gardner *v.* McLallen, 79 Pa. St. 398; Lancaster *v.* Blaney, 140 Ill. 203; Irwin's Estate, 1 Pa. Dist. 265; Burton *v.* Baldwin, 61 Iowa 283.

4. **Both Parties to Transaction Dead.** — McCrary *v.* Rash, 60 Ala. 374; Ebert *v.* Gerding, 116 Ill. 216; Leathers *v.* Ross, 74 Iowa 630; Manion *v.* Lambert, 10 Bush (Ky.) 295; Neblett *v.* Neblett, 70 Miss. 576; Messimer *v.* McCray, 113 Mo. 382; Rice *v.* Shipley, 159 Mo. 399; Warfield *v.* Hume, 91 Mo. App. 541; Tucker *v.* Gentry, 93 Mo. App. 655; Supreme Council Royal Arcanum *v.* Bevis, (Mo. App. 1904) 80 S. W. Rep. 739; Parks *v.* Andrews, 56 Hun (N. Y.) 391.

In a suit by the guardian of an imbecile, to set aside a deed made by him, the heirs of the grantee are not competent to testify to facts which occurred prior to the appointment of the guardian. McNichol *v.* Johnson, 29 Ohio St. 85.

**Remote Heirs.** — The protection given to heirs by the statute includes heirs of heirs. Merrill *v.* Atkin, 59 Ill. 19.

5. **Heirs as Witnesses for Personal Representatives** — Illinois. — Freeman *v.* Freeman, 62 Ill. 189; Byers *v.* Thompson, 66 Ill. 421; Douglass

*v.* Fullerton, 7 Ill. App. 102; Patterson *v.* Collar, 34 Ill. App. 632, affirmed 137 Ill. 403.

Indiana. — Denbo *v.* Wright, 53 Ind. 226; Sullivan *v.* Sullivan, 6 Ind. App. 65.

Iowa. — Swezey *v.* Collins, 40 Iowa 540; Bixley *v.* Wormly, 44 Iowa 347; Muir *v.* Miller, 82 Iowa 706.

Maryland. — Bantz *v.* Bantz, 52 Md. 686.

Michigan. — Pendill *v.* Neuberger, 67 Mich. 562.

Pennsylvania. — Toomey's Estate, 150 Pa. St. 535; Gerz *v.* Weber, 151 Pa. St. 396; Smith *v.* Hay, 152 Pa. St. 377; Watson's Estate, 11 Phila. (Pa.) 99, 32 Leg. Int. (Pa.) 404.

Tennessee. — Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83.

West Virginia. — Crothers *v.* Crothers, 40 W. Va. 169.

**Heir Incompetent to Support His Own Claim.** — Where the contest is between a representative and a son of the deceased person, concerning the title to personal property, the son may not testify to transactions with his father in support of his own claim. Chambers *v.* Hill, 34 Mich. 523.

**New York Rule.** — In New York it seems that those entitled to distributive shares of the estate are not competent witnesses for the representative. Le Clare *v.* Stewart, 8 Hun (N. Y.) 127; Holcomb *v.* Holcomb, 95 N. Y. 324. See also Lathrop *v.* Hopkins, 29 Hun (N. Y.) 608. Compare Freeman *v.* Spalding, 12 N. Y. 373.

Alabama. — The same rule applies in Alabama as in New York. McCrary *v.* Rash, 60 Ala. 374. See also Swift *v.* Martin, 19 Mo. App. 488.

6. **Probate Proceedings** — Illinois. — Brace *v.* Black, 125 Ill. 33; Baker *v.* Baker, 202 Ill. 595; Corderey *v.* Hughes, 6 Ill. App. 401.

ficiaries and trustees under the will, are not competent to testify where the opposite parties are heirs at law and are contesting the probate,<sup>1</sup> though a legatee who has released his legacy is competent as a witness in behalf of the proponent of the will.<sup>2</sup> And an executor, who is also a legatee, may testify where he has renounced his rights as executor.<sup>3</sup>

**Contest of Will Not Within Statute.** — In some jurisdictions, however, it is held that the statutes, by a fair construction, are to be limited in their spirit and reason to litigation arising on claims in favor of or against the deceased, that is, to such suits and proceedings as the deceased would have been, if living, a necessary party to, and which his heirs, devisees, legatees, personal representatives, or assigns are compelled to prosecute or defend for him in his place; and under such construction it is held that the heirs, etc., of the decedent are competent witnesses on a contest of the decedent's will.<sup>4</sup>

**Transactions or Communications with Testator.** — It has been held that where the

*Iowa.* — *Sisters of Visitation v. Glass*, 45 Iowa 154; *Smith v. James*, 72 Iowa 515; *Blake v. Rourke*, 74 Iowa 519; *Matter of Goldthorp*, 94 Iowa 336; *In re Evans*, 114 Iowa 240; *In re Wiltsey*, 122 Iowa 423.

*Kansas.* — *Wehe v. Mood*, (Kan. 1904) 75 Pac. Rep. 476.

*New York.* — *Lane v. Lane*, 95 N. Y. 494; *Matter of Smith*, 95 N. Y. 516; *Loder v. Whelpley*, 111 N. Y. 239; *Matter of Eysaman*, 113 N. Y. 62; *Matter of Lasak*, 131 N. Y. 624, 57 Hun (N. Y.) 418; *Matter of Bernsee*, 141 N. Y. 391; *Schoonmaker v. Wolford*, 20 Hun (N. Y.) 166; *Matter of Bedlow*, 67 Hun (N. Y.) 408; *Eighmie v. Taylor*, 68 Hun (N. Y.) 587; *Hatch v. Peugnet*, 64 Barb. (N. Y.) 189; *Cadmus v. Oakley*, 3 Dem. (N. Y.) 324; *In re Bartolic*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 640; *In re McArthur*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 822.

*Texas.* — *Lewis v. Aylott*, 45 Tex. 190; *Brown v. Mitchell*, 75 Tex. 9.

*West Virginia.* — *French v. French*, 14 W. Va. 458.

*Wisconsin.* — *Goerke v. Goerke*, 80 Wis. 516; *In re Laugen*, (Wis. 1904) 99 N. W. Rep. 437.

As to What Are Transactions with a decedent within the meaning of the statutes, see *infra*, this division of this section, *e. (1) Transactions and Communications with Decedents Generally*.

**Where the Probate of a Codicil Is Contested**, the residuary legatee under the will is not competent for the contestants as to transactions with the testator. *Matter of Dunham*, 121 N. Y. 575.

**Status of Legatee Before Probate.** — It has been claimed that a statute providing that no party or person interested shall be examined as a witness in regard to any personal transaction or communication between such witness and the person deceased against the legatees, devisees, etc., does not exclude an heir who is contesting the will of his ancestor from testifying as to conversations with the decedent. The ground of this contention was that persons named in a will as legatees are not legatees until the will is probated, and prior to the probate it is not certain that they ever will be legatees, and hence, the testimony could not be said to have been offered against them as such. The court, however, refused to adopt

this theory, and characterized it as "far-fetched and unnatural." *Matter of Goldthorp*, 94 Iowa 336.

**Executor Who Is Also Legatee.** — The widow who is named in the will as executrix, and is also a legatee, is not competent in support of the will when it is contested by the heirs. *Lane v. Lane*, 95 N. Y. 501.

But she is competent to prove that the will was found among the testator's valuable papers. Such evidence is not of a personal transaction with him. *Cornelius v. Brawley*, 109 N. Car. 542.

**Beneficiary under Collateral Contract.** — Where the testator has made a contract with another by which the latter is to support the testator for life in consideration of certain property conveyed, the grantee is competent to testify in a contest of the will, which recites that it confirms and approves the contract, as the establishment of the will can only affect the contract collaterally and incidentally. *Manley v. Staples*, 65 Vt. 370.

1. *Matter of Tobin*, 196 Ill. 484. See also *supra*, this division of this section, *c. (3) Persons Interested in Event of Action*.

**Executor as Proponent** — *Wisconsin.* — Under the amended Wisconsin statute no party shall be examined as a witness in his own behalf and interest. An executor who is proponent for a will is not disqualified from testifying, as he cannot be deemed to testify as a party in his own behalf or interest. *In re Laugen*, (Wis. 1904) 99 N. W. Rep. 437.

2. **Legatee Who Has Released Legacy.** — *Grimm v. Tittman*, 113 Mo. 56; *Matter of Wilson*, 103 N. Y. 374; *Loder v. Whelpley*, 111 N. Y. 239.

3. **Legatee Who Has Renounced Executorship.** — *Ethridge v. Bennett*, 9 Houst. (Del.) 295.

4. **Contest of Will Not Within Spirit of Statute** — *Alabama.* — *Kumpe v. Coons*, 63 Ala. 448; *Henry v. Hall*, 106 Ala. 84.

*Kentucky.* — *Flood v. Pragoff*, 79 Ky. 617.  
*Michigan.* — *Brown v. Bell*, 58 Mich. 58; *Schofield v. Walker*, 58 Mich. 96; *Penny v. Croul*, 87 Mich. 15; *Matter of Lambie*, 97 Mich. 49; *McHugh v. Fitzgerald*, 103 Mich. 21. But see *Matter of Lautenshlager*, 80 Mich. 285, in which the court, while following the construction previously given to the statute, intimated that if the question were open they might decide it differently.



witness is excluded only as to transactions or communications between himself and the decedent, an heir or devisee is competent to testify concerning the execution of the will, that not being a transaction or communication between the witness and the testator.<sup>1</sup>

**Cause of Action in Suit.** — A proceeding for the probate of a will is not a case "where one of the original parties to the contract or cause of action in issue and on trial is dead," because the controversy is wholly between living parties, and, therefore, such a provision does not exclude the parties to such a proceeding from testifying.<sup>2</sup>

**Probate Proceedings Excepted by Statute.** — In some states, however, it is expressly provided that heirs and legatees may testify in cases to contest the validity or to set aside a will of any ancestor under whom they may claim title.<sup>3</sup>

**Person Made Party as Heir of Deceased "Party."** — Where the statute provides that no person or party interested shall be a competent witness, where "the party prosecuting, or the party defending, or any one of them, is an executor or an administrator, or made a party as heir of a deceased party," an heir of a testator contesting the will is not excluded not being within the terms of the statute which applies only to the heirs of a party to the suit who has died pending the suit.<sup>4</sup>

(f) **Personal Representatives of Decedent — In General.** — The general rule is that personal representatives of persons deceased or under disability may testify in behalf of the estate to personal transactions and communications with the decedent or disqualified party.<sup>5</sup> In this subdivision will be found only those cases in which the personal representative has been excluded from testifying.

**Express Statutory Prohibition.** — Where the statute provides that if one party to a cause is an executor or administrator neither party shall testify to the facts which occurred in the lifetime of the deceased, the personal representative stands on the same footing as any other person and cannot testify.<sup>6</sup> Under a statute which provided that "in actions where one of the original parties to the contract or cause of action in issue and on trial is dead," the other party shall not be permitted to testify in his own favor, or in favor of any party to the action claiming under him, an executor is incompetent to testify to agreements between himself and the deceased in an action against the executor to discover assets, where the assets involved were connected with such business occurrences.<sup>7</sup>

*Nebraska.* — *McCoy v. Conrad*, 64 Neb. 150; *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705.

*New Jersey.* — *Mackin v. Mackin*, 37 N. J. Eq. 528.

*Tennessee.* — *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604; *Davis v. Davis*, 6 Lea (Tenn.) 543.

**Application for Letters of Administration Not a Suit by Personal Representative.** — *Buchanan v. Buchanan*, 103 Ga. 90.

**The Canada Statute.** R. S. (5th series), c. 107, § 16, excluding parties from giving testimony of dealings, etc., with deceased, on the trial of any issue joined, etc., has no application to an investigation of testamentary capacity in probate proceedings. *Re Farquharson*, 33 Nova Scotia 261.

**1. Legatees, etc., Competent to Testify as to Execution of Will.** — See *infra*, this division of this section, *e. (1) (c) cc. (bb) What Are Independent Facts*, paragraph *In General*.

**Devisee May Corroborate Attesting Witness.** — *In re Bernsee*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 669.

**2. Testator Not Party to Cause of Action in Suit.** — *Garvin v. Williams*, 50 Mo. 206; *Fos-*

*ter v. Foster*, 64 Vt. 233; *In re Buckman*, 64 Vt. 313.

The same result was reached under the *Massachusetts* statute while it was in force. *Shailer v. Bumstead*, 99 Mass. 112.

**3. Statutes Authorizing Heirs and Legatees to Testify.** — *Wolf v. Powner*, 30 Ohio St. 472. Compare the statutes of the other states.

**4. Heir of Deceased Party.** — *Nash v. Reed*, 46 Me. 168.

**5.** See *infra*, this division of this section, *f. (1) Admissibility of Testimony of Representative*.

**6. Express Statutory Prohibition.** — *Bowie v. Bowie*, 77 Md. 311; *Ballou v. Tilton*, 52 N. H. 605; *Tuck v. Nelson*, 62 N. H. 469; *Dow v. Merrill*, 65 N. H. 107; *Perkins v. Perkins*, 68 N. H. 264; *Tichenor v. Tichenor*, 43 N. J. Eq. 163; *Hutchinson v. Cleary*, 3 N. Dak. 270; *St. John v. Lofland*, 5 N. Dak. 140; *Thomas v. Irvin*, 90 Tenn. 512.

**After the Settlement of an Est** — the executors who retain control as executorial trustees may testify when sued as trustees. *Droop v. Metzgerott*, 18 D. C. 89.

**7.** *Tygard v. Falor*, 163 Mo. 234.

**Representative Personally Interested.** — If the personal representative is sued individually or is personally interested in the action, he is not the representative of the estate, but is present protecting his individual interests, and hence comes within the rules of exclusion, as would any other party whose claim was adverse to the estate.<sup>1</sup>

**Proceedings for Removal.** — Thus, in proceedings for the removal of an administrator, he may not testify to transactions between himself and the deceased.<sup>2</sup>

**d. PERSONS PROTECTED** — (1) *Opposing Party in General* — (a) **Who Is Opposite or Adverse Party** — An Adverse Party within the meaning of statutes protecting persons deceased or under disability from being testified against has been defined as "the actual party to the transaction, he who can himself testify as to such transaction."<sup>3</sup>

An Opposite Party is one against whose interests the evidence is sought to be used.<sup>4</sup>

The Proponent of a Will is an opposite party, when an heir is testifying for him to the execution of the will, which he attested,<sup>5</sup> and children of testator who refuse to become parties to a suit by their sister to set aside the will, and are made parties defendant, are opposite parties, although they assist the plaintiff, and wish the will to be set aside.<sup>6</sup>

**Position on Record Immaterial.** — The party prosecuting an action or proceeding stands in relation of adversary to the defending or opposing parties so far as regards the general issue involved; but this position on the record does not necessarily constitute them opposite parties as to special issues involved, and therefore, does not authorize either to call the other as a witness concerning a transaction with or statement by a person deceased. This depends not on the position on the record, but on the relation which they sustain to the issue.<sup>7</sup>

**Actions Between Personal Representatives.** — In an action by one personal representative against another, the parties are adverse, and neither may testify under a statute prohibiting a party from testifying when the adverse party is an executor or administrator.<sup>8</sup> But it has been held, under a statute which provides that where a personal representative is a party the opposite party shall not be allowed to testify as to certain facts, that in a suit by one administrator against another either administrator is competent.<sup>9</sup>

The Provisions of the Statute Cannot Be Avoided by bringing a suit against one who has no personal interest in property, although in temporary possession of it.<sup>10</sup>

(b) **Provision that Neither Party Shall Testify.** — Under statutes which provide that in actions by or against executors or administrators, neither party shall

1. **Representative Personally Interested.** — *Hullett v. Hood*, 109 Ala. 345; *Fulcher v. Mandell*, 83 Ga. 715; *Duffield v. Walden*, 102 Iowa 676; *Preble v. Preble*, 73 Me. 362; *Ela v. Edwards*, 97 Mass. 318; *McClelland v. McClelland*, 42 Mo. App. 32; *Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266; *Perkins v. Perkins*, 58 N. H. 405; *In re Heatley*, 22 Nova Scotia 302.

2. **Proceedings for Removal.** — *Henderson v. Treadway*, 69 Ill. App. 357.

3. **Adverse Party Defined.** — *Roney v. Buckland*, 4 Nev. 58. See *Dicken v. Winters*, 169 Pa. St. 126.

4. *Eslava v. Mazange*, 1 Woods (U. S.) 623.  
**Original Creditor.** — In an action against executors for the price of goods sold, the original creditor is not "an opposite or interested party to the suit," within the meaning of the Evidence Act, Rev. St. Ont., c. 62, § 10, where he has assigned his claim for money due. *Watson v. Severn*, 6 Ont. App. 559.

5. **Heir as Witness For Proponent of Will.** — Under a statute prohibiting testimony by a

party in a suit in which the opposite party derives his title, or sustains his liability to the cause of action from, through, or under a deceased or insane person, an heir who has attested the will of the decedent may testify to the execution of the will in behalf of the proponent, who is the "opposite party," as he may waive the statute. *In re Hoppe*, 102 Wis. 54.

6. **Children of Testator Parties Defendant.** — *Sanders v. Kirbie*, 94 Tex. 564.

7. **Position on Record Immaterial.** — *Dolan v. Dolan*, 89 Ala. 256; *American Invest. Co. v. Coulter*, 8 Kan. App. 841. See also *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736; *Shorten v. Judd*, 56 Kan. 43.

8. **Actions Between Personal Representatives — Adverse Party.** — *Farley v. Lisey*, 55 Ohio St. 627.

9. **Opposite Party.** — *Duryea v. Granger*, 66 Mich. 593.

10. **Provision of Statute Not Avoided.** — *Moore v. Walker*, 124 Ala. 199.

be allowed to testify against the other as to any transaction with the decedent, both parties come within the express provision of the statute protecting them from being testified against by the adverse party.<sup>1</sup>

(2) *Enumeration of Classes* — (a) *In General* — *aa. OPPOSING PARTY MUST COME WITHIN STATUTE.* — Where the statutes prohibit parties or persons interested from testifying when the adverse or opposite party sues or defends as trustee, guardian, executor, administrator, heir, legatee, devisee, etc., in order for such opposite party to be entitled to the protection of the statute, he must come within its terms, and if the suit is not by or against parties in such enumerated classes, the other may testify. The rule only applies in favor of the persons named in the various statutes.<sup>2</sup>

**1. Neither Party Allowed to Testify** — *Alabama.* — Miller *v.* Cannon, 84 Ala. 59.

*Arkansas.* — Rainwater *v.* Harris, 51 Ark. 401; Nunnally *v.* Becker, 52 Ark. 550.

*Indiana.* — Malady *v.* McEnary, 30 Ind. 273; Larch *v.* Goodacre, 126 Ind. 224.

*Indian Territory.* — James *v.* Smith, 3 Indian Ter. 447.

*New Hampshire.* — Clark *v.* Clough, 65 N. H. 43; Bean *v.* Bean, 71 N. H. 538.

*South Dakota.* — Alexander *v.* Ransom, 16 S. Dak. 302.

*Tennessee.* — Nance *v.* Collender, (Tenn. Ch. 1898) 51 S. W. Rep. 1025; Sellers *v.* Sellers, (Tenn. Ch. 1899) 53 S. W. Rep. 316; Mason *v.* Willhite, (Tenn. Ch. 1900) 61 S. W. Rep. 298.

*Texas.* — Harris *v.* Seinsheimer, 67 Tex. 356; Ellis *v.* Stewart, (Tex. Civ. App. 1893) 24 S. W. Rep. 585; Stuart *v.* Altman, 8 Tex. Civ. App. 657; Gurley *v.* Clarkson, (Tex. Civ. App. 1895) 30 S. W. Rep. 360; Tenzler *v.* Tyrrell, (Tex. Civ. App. 1903) 75 S. W. Rep. 57; Bridge *v.* Carter, (Tex. Civ. App. 1903) 77 S. W. Rep. 245; Johnson *v.* Lockhart, 16 Tex. Civ. App. 32; Williams *v.* Emberson, 22 Tex. Civ. App. 52; Leverett *v.* Wherry, 4 Tex. App. Civ. Cas., § 185.

**2. Enumeration of Classes — Opposing Party Must Come Within Statute** — *Colorado.* — Vandevier *v.* Fetta, 20 Colo. 368; Savard *v.* Herbert, 1 Colo. App. 445.

*Georgia.* — Gunn *v.* Pettygrew, 93 Ga. 327; Austin *v.* Collier, 112 Ga. 247; Whitley *v.* Hudson, 114 Ga. 668; Hudson *v.* Hudson, 119 Ga. 637; Bank of Southwestern Georgia *v.* McGarran, 120 Ga. 944.

*Illinois.* — Mester *v.* Hauser, 94 Ill. 433; Firemen's Ins. Co. *v.* Peck, 126 Ill. 493; Goelz *v.* Goelz, 157 Ill. 33; Booth *v.* Tabernor, 23 Ill. App. 173; Houston *v.* Maddux, 73 Ill. App. 203.

*Indiana.* — Hart *v.* Miller, 29 Ind. App. 222.

*Iowa.* — Drake *v.* Painter, 77 Iowa 731; Matter of Perkins, 109 Iowa 217; McClintic *v.* McClintic, 111 Iowa 615.

*Kansas.* — Reville *v.* Dubach, 60 Kan. 572; Roach *v.* Roach, (Kan. 1904) 77 Pac. Rep. 108.

*New Jersey.* — Flemington Nat. Bank *v.* Jones, 50 N. J. Eq. 244.

*New York.* — Uhlmann *v.* Brownell, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 699, *affirmed* 121 N. Y. 652.

*Pennsylvania.* — Broadrick *v.* Broadrick, 25 Pa. Super. Ct. 225.

*Rhode Island.* — Kenyon *v.* Peirce, 17 R. I. 794.

*South Carolina.* — Hutzler *v.* Phillips, 26 S. Car. 136; Macaulay *v.* Central Nat. Bank, 27 S. Car. 215; Martin *v.* Adams, 29 S. Car. 597; Jackson *v.* Lewis, 32 S. Car. 593; Martin *v.* Jennings, 52 S. Car. 371; *In re* Neubert, 58 S. Car. 469.

*Tennessee.* — Burton *v.* Farmers Building, etc., Assoc., 104 Tenn. 414; Connor *v.* Hickey, (Tenn. 1898) 48 S. W. Rep. 289; Green *v.* Huggins, (Tenn. Ch. 1898) 52 S. W. Rep. 675.

*Texas.* — Harris *v.* Seinsheimer, 67 Tex. 356; Wallace *v.* Stevens, 74 Tex. 559; Bush *v.* Barron, 78 Tex. 5; Mitchell *v.* Mitchell, 80 Tex. 101; James *v.* James, 81 Tex. 373; Harris *v.* Warlick, (Tex. Civ. App. 1897) 42 S. W. Rep. 356; Mahon *v.* Barnett, (Tex. Civ. App. 1897) 45 S. W. Rep. 24; Wagner *v.* Isensee, 11 Tex. Civ. App. 491; Wilmoth *v.* Tompkins, 22 Tex. Civ. App. 87; Mayfield *v.* Robinson, 22 Tex. Civ. App. 385; Graham *v.* Miller, 26 Tex. Civ. App. 5.

*Utah.* — Hennefer *v.* Hays, 14 Utah 324; Murphy *v.* Ganey, 23 Utah 633.

*West Virginia.* — Farmers Bank *v.* Gould, 42 W. Va. 132.

*Canada.* — *In re* Robertson, 22 Nova Scotia 402.

The death of a trustee, the *cestui que trust*, who is the real party in interest, being alive, does not exclude the other party to the transaction. Watson *v.* Russell, 18 Iowa 79.

**Administrator Not Necessary Defendant — Plaintiff Competent.** — Montgomery *v.* Clark, (Tenn. Ch. 1898) 46 S. W. Rep. 466.

**Executors Nominal Parties.** — Russell *v.* Russell, 129 Fed. Rep. 434.

**Executors Not Parties.** — Clawson *v.* Brewer, (N. J. 1904) 58 Atl. Rep. 598.

**Lunatic Not a Party to Suit.** — Elliott *v.* Keith, 102 Ga. 117.

**Texas Statutes — Legatees and Devisees.** — Thus the Texas statutes (Rev. Stat. 1897, art. 2302) rendering evidence of transactions, etc., with a decedent incompetent in actions by or against executors, heirs, or legal representatives, do not apply to actions by or against legatees or devisees. Gibony *v.* Hutcheson, 20 Tex. Civ. App. 581; Bradshaw *v.* Roberts, (Tex. Civ. App. 1899) 52 S. W. Rep. 574. Nor to actions by or against executors who are trustees for legatees or devisees. Caffey *v.* Caffey, 12 Tex. Civ. App. 616; Clark *v.* Clark, 21 Tex. Civ. App. 371.

**Under the Former Act,** Rev. Stat. Tex., art. 2248, containing similar provisions, the same rule was adopted. Newton *v.* Newton, 77 Tex. 508; Curtis *v.* Wilson, 2 Tex. Civ. App. 646.



*bb. PERSONS DERIVING TITLE FROM DECEASED PERSON.* — In some states the statutes provide that no party or person interested shall be examined as a witness in his own behalf or interest against a person who derives his title or interest "from, through, or under a deceased person."<sup>1</sup> Under such a statute the wife of a deceased mortgagor may testify in her own behalf against the assignee of the mortgage during the life of the mortgagee.<sup>2</sup>

(b) *Personal Representatives* — *aa. REPRESENTING ESTATE.* — As a rule the statutes generally provide that parties and persons interested shall not testify against the personal representatives of a deceased person, the object being to protect from the evidence of the surviving party, the estate of the decedent, whose lips are closed.<sup>3</sup>

*bb. REPRESENTING PERSONAL INTERESTS.* — Where the estate has no interest in the suit, which is by or against the personal representative as an individual, and which will affect him personally only, in some jurisdictions evidence of transactions with the decedent is competent.<sup>4</sup>

**1. Persons Deriving Title from Deceased Person** — *New York.* — *Hildick v. Williams*, (Brooklyn City Ct. Gen. T.) 21 N. Y. St. Rep. 166; *Witthaus v. Schack*, 105 N. Y. 332; *Mullins v. Chickering*, 110 N. Y. 513; *Mason v. Prendergast*, 120 N. Y. 536; *Geissmann v. Wolf*, 46 Hun (N. Y.) 289; *Kenyon v. Youlen*, 53 Hun (N. Y.) 591; *Curnan v. Delaware, etc., R. Co.*, 63 Hun (N. Y.) 628, 17 N. Y. Supp. 714; *Rice v. Daley*, 66 Hun (N. Y.) 628, 20 N. Y. Supp. 941; *Lyon v. Whittaker*, 77 Hun (N. Y.) 107; *Peters v. Peters*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 264; *Freygang v. Train*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 49; *Uhlmann v. Brownell*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 699, affirmed 121 N. Y. 652.

*North Carolina.* — *Blake v. Blake*, 120 N. Car. 177.

*Ohio.* — *Foxhever v. Order of Red Cross*, 24 Ohio Cir. Ct. 56.

*Vermont.* — *Foster v. King*, 73 Vt. 278.

*Washington.* — *Smith v. Taylor*, 2 Wash. 422; *Matter of Alfstad*, 27 Wash. 175.

*Wisconsin.* — *Lehman v. Sherger*, 68 Wis. 145; *Larsen v. Johnson*, 78 Wis. 300; *Nau v. Brunette*, 79 Wis. 664; *Begole v. Hazzard*, 81 Wis. 274; *Gross v. Gross*, 94 Wis. 14; *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4.

**Succeeding Executor Within Statute.** — *Carpenter v. Romer, etc., Steamboat Co.*, 48 N. Y. App. Div. 363.

**Assignee of Partnership Interest.** — *Sheldon v. Sheldon*, 84 Hun (N. Y.) 422.

**2.** *Holcomb v. Campbell*, 118 N. Y. 46.

**3. Personal Representatives — Estate Protected** — *Colorado.* — *Rathvon v. White*, 16 Colo. 41. *District of Columbia.* — *Nieman v. Mitchell*, 2 App. Cas. (D. C.) 195.

*Georgia.* — *Woodson v. Jones*, 92 Ga. 662; *Medlock v. Miller*, 94 Ga. 652; *Hudson v. Hudson*, 98 Ga. 147.

*Idaho.* — *Greene v. Camas Prairie Bank*, 7 Idaho 576.

*Illinois.* — *Robbins v. Moore*, 129 Ill. 30; *Waugh v. Moan*, 200 Ill. 298; *Russell v. Happ*, 76 Ill. App. 417; *Smith v. Billings*, 76 Ill. App. 454, affirmed 177 Ill. 446; *Groff v. Mutual L. Ins. Co.*, 92 Ill. App. 207.

*Indiana.* — *Hines v. Consolidated Coal, etc., Co.*, 29 Ind. App. 563.

*Maine.* — *Goulding v. Horbury*, 85 Me. 227.

*New Jersey.* — *Fairchild v. Fairchild*, (N. J. 1899) 44 Atl. Rep. 944.

*New York.* — *Abelein v. Porter*, 45 N. Y. App. Div. 307.

*North Carolina.* — *Luton v. Badham*, 129 N. Car. 7.

*Rhode Island.* — *Hopkins v. Manchester*, 16 R. I. 663.

*Texas.* — *Harrell v. Houston*, 66 Tex. 278.

**"The Term 'Estate of a Deceased Person'** is used, in its broad and popular sense, to signify all the property of every kind which one leaves at his death." *Jacks v. Bridewell*, 51 Miss. 881.

**Establishment of Claim Against Estate.** — *Jacks v. Bridewell*, 51 Miss. 881; *Love v. Stone*, 56 Miss. 449; *Combs v. Black*, 62 Miss. 831; *Jackson v. Smith*, 68 Miss. 53; *Cockrell v. Mitchell*, (Miss. 1894) 15 So. Rep. 41.

**"Executor or Administrator" Applies to All Holding in Official Representative Capacity.** — *Clark v. Clough*, 65 N. H. 43.

**Testimony in Favor of Estate.** — *Moore v. Cline*, 115 Ga. 405; *McLaughlin v. Webster*, 141 N. Y. 67; *Klock v. Brennan*, 82 Hun (N. Y.) 262; *Van Horne v. Clark*, 126 Pa. St. 411.

**Administrator May Testify in His Own Behalf.** — *Illinois Cent. R. Co. v. Reardon*, 157 Ill. 372.

**Assignee of Executor Not Excluded under Illinois Statute.** — *Goelz v. Goelz*, 157 Ill. 33; *Gage v. Eddy*, 179 Ill. 492.

**4. Suit By or Against Parties Individually — United States.** — *Goodwin v. Fox*, 129 U. S. 601.

*Alabama.* — *Butler v. Jones*, 80 Ala. 436.

*Colorado.* — *Prewitt v. Lambert*, 19 Colo. 6.

*Illinois.* — *Esterly Harvesting Co. v. Hill*, 36 Ill. App. 99.

*Indiana.* — *Hankey v. Downey*, 10 Ind. App. 500.

*Iowa.* — *Clarke v. Ross*, (Iowa 1894) 60 N. W. Rep. 627.

*Nebraska.* — *Kansas Mfg. Co. v. Wagoner*, 25 Neb. 439.

*New Hampshire.* — *Crowley v. Crowley*, 72 N. H. 241.

*New Jersey.* — *McKinley v. Coe*, (N. J. 1904) 57 Atl. Rep. 1030.

*Tennessee.* — *Connor v. Hickey*, (Tenn. 1898) 48 S. W. Rep. 289.

*Texas.* — *Wilmurth v. Tompkins*, 22 Tex.

**cc. WHO DEEMED A REPRESENTATIVE.** — Generally speaking, one who is an executor or administrator, who has possession of property cast on him by the death of the owner or takes any part of the estate of a deceased person by devise or inheritance, is deemed his legal representative within the meaning of the rule excluding the testimony of the opposing party concerning transactions with the deceased.<sup>1</sup> So also, a party who derives his title to property through a person since deceased is to be regarded as the legal representative of the deceased grantor, vendor, or assignor, as the case may be.<sup>2</sup> In an action upon a contract made with an executor or administrator, since deceased, the surviving party may not testify thereto.<sup>3</sup> The creditors of a deceased person

Civ. App. 87; *Mayfield v. Robinson*, 22 Tex. Civ. App. 385.

**No Right or Interest of Decedent Represented.** — *Myers v. Reinstein*, 67 Cal. 89; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Seymour v. Wallace*, 127 Mich. 669, 8 Detroit Leg. N. 509; *Matter of Gould*, 19 N. Y. App. Div. 352; *Matter of Brundage*, 31 N. Y. App. Div. 348; *Brown v. Carey*, 149 Pa. St. 134; *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225; *Wallace v. Stevens*, 74 Tex. 559.

**Testimony Not Against Administrator.** — *Miller v. Davis*, 60 Hun (N. Y.) 198.

**One Who Claims under a Tax Deed** does not derive his title from, through, or under the person whose property was sold for the nonpayment of taxes, and consequently cannot claim the protection of the statute, though such owner has since died. *Begole v. Hazzard*, 81 Wis. 274.

**Legatee in Appraisement Proceedings.** — Within the rule excluding a party or person interested in the event of suit from testifying in his own interest against the executor, administrator, or survivor of a deceased person or a person deriving his interest or title from, through, or under a deceased person, concerning personal transactions with the decedent, a legatee is not incompetent as a witness in a proceeding to appraise the estate of a testator under the transfer tax law, because the estate has no interest in the proceeding, which affects only the rights of the legatees. *Matter of Gould*, 19 N. Y. App. Div. 352; *Matter Bentley*, (Surrogate Ct.) 31 Misc. (N. Y.) 656.

**1. Who Deemed a Representative.** — *Lockwood v. Lockwood*, 56 Conn. 106; *Twiss v. George*, 33 Mich. 253; *Burke v. Dunn*, 117 Mich. 430.

In *Gunn v. Pettygrew*, 93 Ga. 327, the court said: "By the term 'personal representative' the statute embraces only an administrator, executor, or other person entitled to represent the decedent in the ownership or management of his general estate. It follows that one contesting with the widow the title of the decedent to property set apart or sought to be set apart for a year's support is not incompetent as a witness against her because of her husband's death."

The prohibition does not apply where the decedent's administrator is one party and the beneficiary under the will of the decedent's heir is the opposing party. *Matter of Mower*, 48 Mich. 441.

**A Widow as Personal Representative.** — *Johnson v. Champion*, 88 Ga. 527; *Austin v. Collier*, 112 Ga. 247; *Peacock v. Albin*, 39 Ind. 25;

*Fitzgerald v. Cox*, 39 Ind. 84; *French v. French*, 84 Iowa 655.

**Guardian and Ward.** — In an action by a ward against the sureties on the deceased guardian's bond, the sureties do not defend as representatives of the guardian so as to exclude the testimony of the ward. *People v. Borders*, 31 Ill. App. 426.

But a ward may not testify to personal communications between him and his deceased guardian, when the personal representative of such guardian is the opposing party. *Owens v. Watts*, 24 S. Car. 76.

**The Texas Statute** does not close the guardian's mouth in an action brought by the ward against him, after the ward becomes of age, to revise the guardian's accounts. *Jones v. Parker*, 67 Tex. 76. See *supra*, this subsection, *c. Persons Excluded*, where the reasons for their exclusion are also considered. Consult also the statutes of the United States and of the various states.

**Defendants in Ejectment**, who claim title under a devise, are not the representatives of their testator within the meaning of the statute, simply because they hold the land in dispute as legatees under the will. *Austin v. Collier*, 112 Ga. 247.

**The Committee of a Lunatic.** — *Whitney v. Traynor*, 74 Wis. 280.

**2. See *infra***, this subsection, (8) *Transactions with Opponent's Deceased Predecessor or Title*.

**Assignee in Bankruptcy Not Personal Representative of Deceased Assignor.** — *Hobbs v. McLean*, 117 U. S. 569.

**Grantee of Decedent.** — In *Mississippi* it has been held that the grantee of one since deceased does not represent the decedent's estate within the meaning of the statute of that state, and the evidence of a party contesting his title, concerning transactions with the deceased grantor, should not be excluded unless it is inadmissible for some other reason. *Love v. Stone*, 56 Miss. 449. But the rule is otherwise where the decedent's estate is still interested in the property; for example, where the decedent has simply mortgaged the property before his death. *Jackson v. Smith*, 68 Miss. 53.

**3. Waldman v. Crommelin**, 46 Ala. 580; *Redden v. Inman*, 6 Ill. App. 55; *Kaho v. King*, 19 Mo. App. 44.

But it has been held that in an action against an administrator *de bonis non*, the defendant is not precluded from testifying to statements made by the former administrator, who is dead. *Wassell v. Armstrong*, 35 Ark. 247; *Dunne v. Deery*, 10 Iowa 550; *Edmonson v. Tilden*, 10 N.

do not represent his estate within the meaning of the rule.<sup>1</sup> In *Georgia* the heirs of a decedent are held not to be his personal representatives.<sup>2</sup>

(c) **Parties in Representative Capacity.** — The *New Jersey* statute prohibits a party from testifying in certain cases where the opposite party sues or is sued in a "representative capacity." Under such statute, testimony may be admitted only where the party sues or is sued individually, and not in his representative capacity.<sup>3</sup>

Under a Prior Act, which contained substantially the same provisions as the present act, it was held that in actions against devisees or heirs for the specific performance of contracts with the decedent, or to recover money alleged to be due from him, such heirs and devisees were sued in a representative capacity and that the disabilities imposed by the statute applied.<sup>4</sup> So, where an administrator was the defendant in replevin, it was held that he was sued as an individual to account for a tort in his own person.<sup>5</sup> And in an action for dower by an alleged widow against the devisees, the latter do not stand in a representative capacity.<sup>6</sup> But in another case a widow was held a competent witness in an action against the testator's heirs to set aside a deed to them on the ground of fraud.<sup>7</sup>

Where an Executor or Administrator is a Party in His Own Right and does not act in his representative capacity, the opposing party is not precluded from testifying in his own behalf.<sup>8</sup> In *Nebraska*, no person having a direct legal interest

J. Eq. 555. And the surviving party to a transaction may testify to any relevant conversation between himself and the executor, though it contains a rehearsal of the original contract between himself and the testator. *Clark v. Bell*, 61 Ga. 147; *Fogg v. Rodgers*, 84 Ky. 558.

1. **Creditors of Decedent.** — *Champlin v. Seeber*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 46; *Matter of Le Baron*, (Surrogate Ct.) 57 How. Pr. (N. Y.) 346; *Martin v. Adams*, 29 S. Car. 597; *Jackson v. Lewis*, 32 S. Car. 593.

Where, pending garnishment proceedings, the judgment debtor died and his administrator was substituted as defendant, it was held that both the administrator and the garnishee were competent witnesses on the garnishee's behalf. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275.

In *Nesbitt v. Parrott*, 84 Ga. 142, it was held that a surety to whom a judgment against his principal was assigned upon his payment of the debt, could not testify that a conveyance to him of the land upon the purchase of which the debt arose was not in satisfaction of his claim, where the opposing parties were the administrators of judgment creditors of his deceased principal. And in *Randall v. Randall*, 64 Vt. 419, it was held that a widow who was an annuitant under a conveyance made by her husband in his lifetime, which was sought to be impeached by his creditors, was not competent for the defense.

2. **Heirs Not Representatives.** — *Boynton v. Reese*, 112 Ga. 354; *Oliver v. Powell*, 114 Ga. 592. See also in this connection *Flowers v. Flowers*, 92 Ga. 688; *Gunn v. Pettygrew*, 93 Ga. 327; *Thompson v. Cody*, 100 Ga. 771; *Heard v. Phillips*, 101 Ga. 691; *Elliott v. Keith*, 102 Ga. 117; *Buchanan v. Buchanan*, 103 Ga. 90; *Cato v. Hunt*, 112 Ga. 139; *Austin v. Collier*, 112 Ga. 247.

3. **Parties in Representative Capacity.** — *Vreeland v. Vreeland*, 53 N. J. Eq. 387; *Thompson*

*v. West*, 56 N. J. Eq. 660; *Lowry v. Tivy*, 69 N. J. L. 94.

The *New Jersey* act concerning evidence was revised in 1900 (Laws of 1900, p. 362, § 4). This act is a substantial re-enactment of the law of the Act of 1880 (P. L. of 1880, p. 52).

**Contract by Deceased Executor Not Within Act.** — *Palmtree v. Tilton*, 40 N. J. Eq. 555.

4. **Action Against Heirs of Devisees for Specific Performance.** — *Greenwood v. Ogden*, 52 N. J. Eq. 447; *Kempton v. Bartine*, 59 N. J. Eq. 149, affirmed 60 N. J. Eq. 411; *Joss v. Mohn*, 55 N. J. L. 407. As to the rule under the earlier statute, see *Colfax v. Colfax*, 32 N. J. Eq. 206.

5. **Replevin Against Administrator.** — *Hodge v. Coriell*, 44 N. J. L. 456, affirmed 46 N. J. L. 354.

6. **Action Against Devisees for Dower.** — *Smith v. Smith*, 52 N. J. L. 207.

7. **Action Against Heirs to Set Aside Deed.** — *Crimmins v. Crimmins*, 43 N. J. Eq. 86.

**Both Parties Appearing in Representative Capacity.** — Where both parties appear on the record in a representative capacity, each is qualified as a witness in his own behalf and can testify to any fact provable in the cause. *Bell v. Samuels*, 60 N. J. L. 370.

8. **Executor or Administrator Party in Own Right.** — *Prewitt v. Lambert*, 19 Colo. 6; *Douglass v. Snow*, 77 Me. 93; *Durham v. Shannon*, 116 Ind. 403; *Cahalan v. Cahalan*, 82 Iowa 416; *Hall v. Richardson*, 22 Hun (N. Y.) 444; *Titus v. O'Connor*, (Supm. Ct. Gen. T.) 57 How. Pr. (N. Y.) 391; *Hamilton v. Hamilton*, 10 R. I. 538; *Johnson v. Hall*, 9 Baxt. (Tenn.) 351.

**Tort by Personal Representative.** — The rule of exclusion does not apply in an action against an executor or administrator for a tort committed by him. *Prewitt v. Lambert*, 19 Colo. 7; *Huff v. Latimer*, 33 S. Car. 255.

**In a Contest Between an Administrator and a Judgment Debtor** as to whether certain property of the latter is subject to levy and sale



in the result of any civil action or proceeding when the adverse party is the representative of a deceased person shall be permitted to testify to any transactions or conversations between the deceased person and the witness, except in certain cases. The word "representative" as used in this statute was intended to designate the person who has succeeded to the rights of the decedent, whether by purchase, descent,<sup>1</sup> or operation of law. Thus, the word includes one claiming as heir,<sup>2</sup> or as mortgagee.<sup>3</sup>

The Officers and Members of a Benefit Society, though liable to pay assessments, are competent to testify in behalf of their society, when it is sued on an insurance policy by one who is named as a beneficiary therein. In such case, the plaintiff sues in his own right and is in no sense a representative of the decedent's estate.<sup>4</sup>

(d) Assignees. — In many of the states, parties, persons interested, etc., are prohibited from being examined as witnesses, in regard to any personal transaction or communication between such witnesses and the person deceased or under disability, against the assignee of such deceased person or persons under disability.<sup>5</sup> Within the meaning of such statutes the devisees of real estate are assignees of the testator.<sup>6</sup> On the other hand, one who acquires title to a promissory note of the decedent by mere delivery from one who likewise acquired title thereto from the decedent prior to his death,<sup>7</sup> a sheriff levying an attachment on personal property and the attaching creditor,<sup>8</sup> a trustee of the residuary assets of a receivership,<sup>9</sup> and a beneficiary of an insurance policy are held not to be assignees.<sup>10</sup> Also the alienee of the personal representative is held not to be an assignee of the decedent, within the proviso.<sup>11</sup>

Remote Assignors or Grantors. — And in some jurisdictions the protection of the statute is not confined to the immediate grantee or assignee of a deceased person, but a party is precluded from testifying to any personal transaction or communication with the remote grantor or assignor of the opposing party which would injuriously affect his title to the property in controversy.<sup>12</sup>

on execution, the debtor is a competent witness in his own behalf. *Holmes v. Chester*, 27 N. J. Eq. 423.

**Defendant Sued as Surety and Administrator.** — But where a person is sued both as surety on a note and administrator of the maker, the plaintiff's testimony should be excluded. *Dixon v. Edwards*, 48 Ga. 142.

**Where the Executor Is the Real Party in Interest,** being the sole heir and distributee, the opposing party may testify. *Chase v. Chase*, 66 N. H. 588.

And the fact that he may be entitled to commissions for his services, does not render him incompetent as to transactions and communications with the testator. *Matter of Wilson*, 103 N. Y. 374; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238.

**A Surviving Partner** is not a representative of his deceased copartner within the meaning of this rule. *Holmes v. Brooks*, 68 Me. 416.

**1. Nebraska Statute — Representative of Decedent.** — *Wamsley v. Crook*, 3 Neb. 344; *Mage-mau v. Bell*, 13 Neb. 248; *Mead v. Weaver*, 42 Neb. 149; *Kroh v. Heins*, 48 Neb. 691.

**2. Heir.** — *Brown v. Forbes*, (Neb. 1901) 96 N. W. Rep. 52.

**3. Mortgagee.** — *Housel v. Cremer*, 13 Neb. 298.

**4. Officers and Members of Benefit Society.** — *Sherret v. Royal Clan, etc.*, 37 Ill. App. 446; *Perine v. Grand Lodge, etc.*, 48 Minn. 82; *Reichenbach v. Ellerbe*, 115 Mo. 588; *Hamill*

*v. Supreme Council, etc.*, 152 Pa. St. 537. Compare *Barry v. Equitable L. Assur. Co.*, 59 N. Y. 587; *Macaulay v. Central Nat. Bank*, 27 S. Car. 219.

**5. Assignees.** — *Bailey v. Holden*, 113 Mich. 402; *Luetchford v. Lord*, 132 N. Y. 465; *Gamble v. Hepburn*, 90 Pa. St. 439; *New York, etc., Land Co. v. Weidner*, 169 Pa. St. 359; *De Coursey v. Johnston*, 134 Pa. St. 328; *Hollister v. Young*, 41 Vt. 156. See also the statutes of the various states.

**Assignee of Chose in Action Not "Grantee" Within Ohio Statute.** — *Elliott v. Shaw*, 32 Ohio St. 431.

**6. Devisees Are Assignees.** — *Buck v. Stanton*, 51 N. Y. 624; *Cornell v. Cornell*, 12 Hun (N. Y.) 314; *McMechen v. McMechen*, 17 W. Va. 683.

**7. Holder of Promissory Note.** — *White v. Jones*, 105 Ga. 26.

**8. Sheriff and Attaching Creditor.** — *Burlington Nat. Bank v. Beard*, 55 Kan. 773.

**9. Trustee of Receivership.** — *Pulsifer v. Arbuthnot*, 59 Kan. 380.

**10. Beneficiary of Insurance Policy.** — *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480.

**11. Alienee of Personal Representative.** — *Rapley v. Klugh*, 40 S. Car. 134.

**12. Remote Assignors.** — *Ripley v. Seligman*, 88 Mich. 177; *Pope v. Allen*, 90 N. Y. 301; *Littlefield v. Littlefield*, 51 Wis. 23.

The *South Carolina* statute does not exclude transactions or conversations with a deceased grantor as against his remote alienee. *Cantey*

(e) **Devisees.** — In *Iowa* the devisee of a deceased person is protected from the testimony of parties, etc., as to any personal transaction or communication with the decedent.<sup>1</sup>

(f) **Heirs.** — In many states the heirs of a decedent are protected by express statutory provision from being testified against by any party, person interested, etc., as to any transaction or communication with such deceased person, whether they sue or are sued as heirs.<sup>2</sup> Under such statutes where the party sues or is sued not as heir of the decedent, the protection of the statute is removed. Thus, where one is attempted to be held on his individual note,<sup>3</sup> and where the parties all claim under a will, the statute does not apply.<sup>4</sup>

**Resulting Trust Against Heirs.** — Plaintiff in an action to establish a resulting trust against the heirs of a decedent is not competent to testify in his own behalf as to any transaction with the defendants' ancestor tending to establish the trust.<sup>5</sup>

(g) **Infants.** — In *Kentucky* the statute provides that no person can testify for himself concerning any verbal statement of, or transaction with, or any act done or omitted to be done by, an infant under fourteen years of age. Under this statute the plaintiff, in an action to set aside a conveyance, is incompetent to give evidence which is against the interest of an infant defendant.<sup>6</sup>

(h) **Next of Kin.** — In *Iowa* no party to an action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom such party or interested person derives any interest or title, and no husband or wife of such party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person deceased, or against the next of kin of such deceased person. The words "next of kin," as used in this statute, include the relations by marriage who are entitled by law to a distributive share in the estate of the decedent.<sup>7</sup> Thus, the wife of an intestate is a next of kin of her deceased husband;<sup>8</sup> and a husband is also the next of kin of his deceased wife.<sup>9</sup>

*v. Whitaker*, 17 S. Car. 527; *Jones v. Plunkett*, 9 S. Car. 392.

In a contest between the remote grantee of a deceased person and the successors to the decedent's title to adjoining lands, concerning an alleged right of way over the plaintiff's land, the plaintiff and his immediate grantor are competent to testify to transactions between themselves and the deceased. *McFerren v. Mont Alto Iron Co.*, 76 Pa. St. 180.

1. **Devisees.** — *Nordman v. Meyer*, 118 Iowa 508. See also *supra*, this subsection, (2) *Enumeration of Classes* — (a) *In General*.

2. **Heirs** — *Illinois*. — *Pyle v. Oustatt*, 92 Ill. 209; *Lancaster v. Blaney*, 140 Ill. 203; *Stodder v. Hoffman*, 158 Ill. 486; *Laurence v. Laurence*, 164 Ill. 367; *Sayles v. Christie*, 187 Ill. 420; *Yarde v. Yarde*, 187 Ill. 636.

*Iowa*. — *Lowery v. Lowery*, 117 Iowa 704.

*Maine*. — *Wentworth v. Wentworth*, 71 Me. 74; *Hinckley v. Hinckley*, 79 Me. 320; *Wiley v. Davis*, (Me. 1887) 10 Atl. Rep. 493.

*Massachusetts*. — *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

*Michigan*. — *Pendill v. Neuberger*, 64 Mich. 220.

*Texas*. — *McCampbell v. Henderson*, 50 Tex. 601; *Crenshaw v. Harris*, 16 Tex. Civ. App. 263.

**Grantee of Heirs Included.** — *Olin v. Henderson*, 120 Mich. 149.

**The Heirs of a Grantee** are protected from

the testimony of one who claims under a subsequent conveyance from their ancestor's grantor. *Morrison v. Morrison*, 140 Ill. 573.

3. **Individual Note as Counterclaim.** — *Cahalan v. Cahalan*, 82 Iowa 416.

4. **Parties Claiming under Will.** — *Fleming v. Mills*, 182 Ill. 464.

5. **Resulting Trust Against Heirs.** — *Connelly v. Dunn*, 73 Ill. 218; *Johnston v. Johnston*, 138 Ill. 385; *Boyd v. Boyd*, 163 Ill. 611; *Noble v. Withers*, 36 Ind. 193; *Burleigh v. White*, 64 Me. 23; *Higgins v. Butler*, 78 Me. 523; *Wiley v. Davis*, (Me. 1887) 10 Atl. Rep. 493.

But where the title to land had been fraudulently taken by the husband in his own name, the wife having paid the purchase price, and the purchaser, at an execution sale of the land against the husband, since deceased, brought ejectment against the widow to recover possession, the defendant was competent to testify to all matters touching her rights in the land. *Tracy v. Kelley*, 52 Ind. 535.

6. **Infants.** — *Holtheide v. Smith*, (Ky. 1903) 74 S. W. Rep. 689.

7. **Next of Kin.** — *French v. French*, 84 Iowa 655.

8. **Wife Is Next of Kin.** — *French v. French*, 84 Iowa 655.

9. **Husband Next of Kin of Wife.** — *Campbell Banking Co. v. Cole*, 89 Iowa 211.

(i) **Survivor.** — Under the same statute in *Iowa*, the survivor of the deceased person is entitled to similar protection.<sup>1</sup>

(3) **Who May Object.** — Where the exception as to competency, mentioned in the statute, is for the protection of the estate of the deceased and those claiming under him, the adversary of the estate cannot object to the competency of witnesses called by the representatives of the deceased in such proceeding to prove transactions with, or statements made by him.<sup>2</sup> So, in a proceeding in which an administrator is a party, where the statute protects executors and administrators, the administrator is the only one who may object to testimony.<sup>3</sup>

**Objection by Judgment Creditor of Decedent.** — Under a statute which provides that no party may testify in his own behalf when any adverse party sues or defends as the heir of a deceased person, or as the guardian of such heir, although the guardian fails to object to testimony manifestly incompetent, an intervening creditor of the estate, in an action by the administrator against the heir, and who was interested in the latter's success, may object to such testimony in his own behalf.<sup>4</sup>

**e. SUBJECTS AND CHARACTER OF TESTIMONY EXCLUDED — (1) Transactions and Communications with Decedents Generally — (a) Rule Stated.** — The statutes in most of the states forbid a party to a suit, or person having an interest in the result thereof, to testify as to any personal transaction or communication between himself and a deceased person whose estate is interested in the result, or where the adverse party sues or defends as the representative or successor in interest of such decedent. There is, however, a considerable diversity as to the provisions of the statutes in this respect. In some states the statutes are not so broad in their terms, but merely forbid persons from testifying to establish their own claims or defenses against the estates of persons deceased.<sup>5</sup> The following discussion relates only to matters which do or do not constitute personal transactions or communications with persons since deceased, within the meaning of the statutes which employ such terms.

(b) **Terms Defined and Explained.** — A "Transaction" is defined as "a matter or affair either completed or in course of completion; a negotiation or dealing."<sup>6</sup>

A "Communication" is information or intelligence imparted by one person to another,<sup>7</sup> and includes all conversations with or statements made by the

1. **Survivor.** — *Gavin v. Bischoff*, 80 Iowa 605; *Salvers v. Monroe*, 104 Iowa 74.

2. **Who May Object.** — *Austin v. Bean*, 101 Ala. 133.

3. **Personal Representative Protected.** — *Pattee v. Witcomb*, 72 N. H. 249.

4. **Objection by Judgment Creditor of Decedent.** — *Vandevier v. Fetta*, 20 Colo. 368, affirming 3 Colo. App. 419.

5. **Testimony as to Transactions, etc., with Decedents Prohibited.** — See generally the statutes of the several states and the cases cited in the next following subdivisions of this section.

6. **"Transaction" Defined.** — See *TRANSACTION*, vol. 28, p. 446.

**The Word "Transaction"** means the doing or performing any business, the management of an affair, the adjustment of a dispute by mutual agreement. *Belote v. O'Brian*, 20 Fla. 139.

It is "some act done by the deceased, or in the doing of which he personally participated." *Wood v. Brewer*, 73 Ala. 262. See also *Brown v. Weaver*, 113 Ala. 228.

As used in the *Nebraska* statute, it embraces

every variety of affairs the subject of negotiations, actions, or contracts between parties. *Kroh v. Heins*, 48 Neb. 691; *Smith v. Perry*, 52 Neb. 738; *Harte v. Reichenberg*, (Neb. 1902) 92 N. W. Rep. 987.

"By a 'Personal Transaction' the statute means some business or negotiations between two or more individuals." *Martin v. Shannon*, 92 Iowa 374.

7. **Communication Defined.** — See *Cent. Dict.* The statutes generally embrace every communication, whether written or oral, direct or indirect. *McCorkendale v. McCorkendale*, 111 Iowa 314.

But the *Minnesota* statute applies only to spoken words. *Hall v. Northwestern Endowment, etc., Assoc.*, 47 Minn. 85; *Hulett v. Carey*, 66 Minn. 327.

Hence, a party may testify to the fact that a note given for money loaned included a sum exceeding the amount of the loan, because such evidence relates to facts the existence of which might be wholly independent of any conversation with or admissions by the decedent. *Parker v. Maxwell*, 51 Minn. 523.



decedent in reference to the subject of litigation,<sup>1</sup> but not the fact that a conversation on the subject took place, or the date of such conversation,<sup>2</sup> unless such fact becomes a material question of issue, as, for instance, where it is necessary to establish it in order to corroborate other witnesses whose testimony is insufficient to establish a cause of action or defense.<sup>3</sup>

**Transactions and Communications**, as the words are used in the statutes, embrace every variety of affairs which can form the subject of negotiation or interview between two persons and include every method by which one person can convey information to another.<sup>4</sup>

**Personal Knowledge of Both Witness and Decedent.** — Since the statutory provision generally relates to transactions and communications between the witness and the decedent, it is a necessary implication that the rule of exclusion applies only to matters within the personal knowledge of both parties.<sup>5</sup> The mere statement of a fact known to the witness, but not relating to anything said or done by the decedent, does not involve a transaction between the witness and the decedent,<sup>6</sup> nor does an independent act of the witness, not purporting

**1. Conversations with or Statements Made by Decedent.** — *Alabama.* — Knight v. Coleman, 117 Ala. 266; Wood v. Brewer, 73 Ala. 262.

*Delaware.* — De Ford v. Green, 1 Marv. (Del.) 316.

*Illinois.* — Brace v. Black, 125 Ill. 33.

*Iowa.* — Stolenburg v. Diercks, 117 Iowa 25.

*Kentucky.* — Mann v. Cavanaugh, 110 Ky. 776; Black v. Cox, 82 S. W. Rep. 278, 26 Ky. L. Rep. 599.

*Michigan.* — O'Neil v. Greenwood, 106 Mich. 572.

*New York.* — McKenna v. Bolger, 49 Hun (N. Y.) 259; McMillan v. Stern, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 82; McMurray v. Ennis, (Brooklyn City Ct.) 14 N. Y. Supp. 635; Ellis v. Filon, 85 Hun (N. Y.) 485.

*South Carolina.* — Rhodes v. Southern R. Co., (S. Car. 1904) 47 S. E. Rep. 689.

*Texas.* — Gilroy v. Richards, 26 Tex. Civ. App. 355.

*Virginia.* — McDevitt v. Frantz, 85 Va. 740.

*West Virginia.* — Robinson v. James, 29 W. Va. 224.

**Representations by Decedent.** — Lewis v. Whitworth, (Tex. Civ. App. 1899) 54 S. W. Rep. 1077.

**Admissions of Indebtedness by Decedent.** — Garrett v. Garrett, (Tex. Civ. App. 1898) 47 S. W. Rep. 76.

**2. Witness May Testify as to Fact of Conversation.** — Hier v. Grant, 47 N. Y. 278; Heyne v. Doerfler, 57 Hun (N. Y.) 591, 10 N. Y. Supp. 908; Richards v. Munro, 30 S. Car. 284; Williams v. Mower, 35 S. Car. 206; Trimmier v. Thomson, 41 S. Car. 125. See also *infra*, this division of this section, *cc. Independent Facts*.

A party is not precluded from testifying to the fact that he had conversations with the deceased, and when, where, and in whose presence they were had. Williams v. Mower, 35 S. Car. 206.

Where a witness for one party has testified as to a conversation with the decedent at which the other party was present, such other party may testify as to whether or not the conversation referred to did in fact take place, and whether or not the witness had testified truly concerning it. Frank v. Thompson, 105 Ala. 211. And see *infra*, this division of this section, (gg) *Denial of Transaction*.

**Date of Conversation.** — Trimmier v. Thomson, 41 S. Car. 125.

**3. Fact of Conversation a Material Fact.** — Killen v. Lide, 65 Ala. 505; Hier v. Grant, 47 N. Y. 278; Heyne v. Doerfler, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 908; Maverick v. Marvel, 90 N. Y. 656.

**Contract Inferred from Fact of Conversation.** — Ellis v. Filon, 85 Hun (N. Y.) 485.

**4. "Transactions and Communications."** — Holliday v. McKinne, 22 Fla. 163; Cunningham v. Speagle, 106 Ky. 278; Kroh v. Heins, 48 Neb. 691; Smith v. Perry, 52 Neb. 738; Holcomb v. Holcomb, 95 N. Y. 325; Van Vechten v. Van Vechten, 65 Hun (N. Y.) 215.

The Kentucky statute excludes testimony as to any verbal statements of, as well as transactions with, a person since deceased. Civ. Code Prac. Ky., § 606, subsec. 2; Witt v. Moberley, (Ky. 1897) 42 S. W. Rep. 338; Pope v. Pope. (Ky. 1900) 55 S. W. Rep. 194.

**Ownership of Note Executed by Decedent.** — In an action on a note given by defendant in renewal of a note executed by defendant's deceased husband, and made payable to plaintiff's husband, the plaintiff may testify that she had at all times been the owner of the note. Such testimony does not relate to a personal transaction or communication with defendant's deceased husband, but was merely to rebut the effect of the plaintiff's husband being named as payee in the note. French v. French, 91 Iowa 140.

**5. Personal Knowledge of Both Parties.** — Dysart v. Furrow, 90 Iowa 59; Martin v. Shannon, 92 Iowa 375; *In re Brown*, 92 Iowa 379.

A transaction with a person implies participation by him, and therefore no matter of which he had no personal knowledge could be a transaction with him. Steiner v. Eppinger, (C. C. A.) 61 Fed. Rep. 253; Lewis v. Meginness, 30 Fla. 419.

**6. Mere Statement of Fact Known to Witness.** — Denise v. Denise, 110 N. Y. 562.

**Value of Goods Converted by Decedent.** — Testimony on the part of the plaintiff as to the value of goods alleged to have been converted by the defendant's intestate does not relate to a personal transaction or communication with the intestate. Gregory v. Fichtner, (C. Pl. Gen.

to have been done pursuant to any contract or arrangement with, or at the instance of, the decedent, constitute a personal transaction with the decedent.<sup>1</sup>

**Facts Specially Known to Decedent.** — It is also generally regarded as essential to bring any matter within the prohibition of the statute as a transaction or communication with the decedent, that it should be some matter specially known to the decedent as distinguished from that which is a matter of common knowledge,<sup>2</sup> and of such a nature that the decedent would have been able, if living, to contradict the testimony of the witness.<sup>3</sup>

**Evidence in Corroboration or Rebuttal.** — The statutes excluding testimony of transactions or communications with a decedent extend to testimony whose direct office and purpose are to corroborate or weaken, strengthen, or rebut other evidence given of such transaction with or statement by the decedent. The test is whether the testimony offered relates directly to, or sheds any direct light on, some transaction with or statement by the decedent.<sup>4</sup> He may not, however, testify concerning the transaction itself.<sup>5</sup>

**Participation by Third Persons.** — The presence of a third person at the transaction or conversation between the witness and the decedent, and participation therein by such third person, does not render the witness competent to testify against the representatives of the decedent.<sup>6</sup>

(c) **What Matters Constitute Transactions and Communications** — *aa. IN GENERAL.* — It has already been stated that the phrase "transactions and communications" embraces every variety of affairs that can form the subject of negotiation and interview,<sup>7</sup> and the subject of what matters come within this phrase has been discussed in an almost infinite variety of cases. Thus, intrusting money to a person since deceased, that it might be loaned by him, involves a personal transaction or communication within the meaning of the statute.<sup>8</sup> So does the existence of a debt alleged to be owing by a deceased person;<sup>9</sup> the service of a notice on a decedent;<sup>10</sup> the state of feeling existing between the witness and the decedent;<sup>11</sup> anything done by the witness at the request of the decedent;<sup>12</sup> and generally any matter of dealing, direct or indirect, between

T.) 27 Abb. N. Cas. (N. Y.) 36, 21 Civ. Pro. (N. Y.) 1.

1. See *infra*, this division of this section, (bb) *What Are Independent Facts*.

2. **Facts Specially Known to Decedent.** — *Borum v. Bell*, 132 Ala. 85; *Trimble v. Mims*, 92 Ga. 103; *Kendall v. Hillsboro, etc.*, Turnpike Road, 67 S. W. Rep. 376, 23 Ky. L. Rep. 2372; *Berry v. McArdle*, 62 N. H. 354; *Sabre v. Smith*, 62 N. H. 663; *Hard v. Ashley*, 117 N. Y. 606; *Johnson v. Rich*, 118 N. Car. 268; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

3. **Possibility of Contradiction by Decedent, if Living.** — *Clark v. Clough*, 65 N. H. 43; *Benedict v. Jones*, 129 N. Car. 475.

4. **Corroboration or Rebuttal.** — *Tisdale v. Maxwell*, 58 Ala. 40; *McCrary v. Rash*, 60 Ala. 374; *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Boykin v. Smith*, 65 Ala. 294; *Killen v. Lide*, 65 Ala. 505; *Dismukes v. Tolson*, 67 Ala. 386; *Wood v. Brewer*, 73 Ala. 259; *Goodlett v. Kelly*, 74 Ala. 213; *Miller v. Cannon*, 84 Ala. 59; *Gamble v. Whitehead*, 94 Ala. 335; *Wadsworth v. Heermans*, 85 N. Y. 639; *Pinney v. Orth*, 88 N. Y. 448; *Lewis v. Merritt*, 98 N. Y. 206.

A dictum to the contrary is found in the case of *Frank v. Thompson*, 105 Ala. 211. But this dictum has since been declared in conflict with the previous authorities and incorrect. See *Payne v. Long*, 131 Ala. 438.

5. *Mills v. Mills*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 811, affirmed without opinion 129 N. Y. 624, 29 N. E. Rep. 1034.

6. **Participation by Third Person** — *Florida.* — *Harris v. Jacksonville Bank*, 22 Fla. 501.

*Michigan.* — *Taylor v. Bunker*, 68 Mich. 258. *New York.* — *Heyne v. Doerfler*, 124 N. Y. 505; *Holcomb v. Holcomb*, 95 N. Y. 316.

*North Dakota.* — *Hutchinson v. Cleary*, 3 N. Dak. 270.

*Wisconsin.* — *Morgan v. Henry*, 115 Wis. 27.

And see *infra*, this division of this section, (7) (a) *Transactions with Third Persons* — *Between Witness and Third Persons*.

7. See the next preceding subdivision of this section, (a) *Terms Defined and Explained*, paragraph *Transactions and Communications*.

8. **Intrusting Money to Decedent for Investment.** — *Altgelt v. Brister*, 57 Tex. 432.

9. **Existence of Debt.** — *Miller v. Mayer*, 124 Ala. 434.

10. **Service of Notice.** — *Finton v. Egelston*, 61 Hun (N. Y.) 246. See also *Hazer v. Streich*, 92 Wis. 505.

11. **State of Feeling.** — *Frick v. Kabaker*, 116 Iowa 494.

12. **Things Done by Witness at Request of Decedent.** — *Starkweather v. Bell*, 12 S. Dak. 146; *Herbert v. Herbert*, (Tex. Civ. App. 1894) 28 S. W. Rep. 250.

**Indorsing Payment on Note at Decedent's Request.** — *Erusha v. Tomash*, 98 Iowa 510.

the witness and the decedent.<sup>1</sup>

*bb. PARTICULAR INSTANCES*—(*aa. Contracts.*—It is obvious that a contract is a personal transaction between the contracting parties, and, therefore, when one has died, the testimony of the other as to what matters were within the agreement is not admissible.<sup>2</sup> Neither may such party testify as to the identity of the subject-matter of the contract,<sup>3</sup> alterations or interlineations therein,<sup>4</sup> or what, if anything, constituted the consideration.<sup>5</sup>

(*bb. Payment of Money.*—The payment of money to or by a person since deceased or insane is a transaction with him, testimony concerning which is excluded by the statute when the witness is a party to the suit, etc.,<sup>6</sup> and

**1. Whether an Assignment Was Absolute or to Secure Debts.**—*Clarke v. Adam*, 30 Tex. Civ. App. 66.

**Miscellaneous Instances of Personal Transactions**—*New York.*—*Geissmann v. Wolf*, 46 Hun (N. Y.) 289; *Boyd v. Daily*, 85 N. Y. App. Div. 581.

*North Carolina.*—*Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. Car. 150; *Buie v. Scott*, 107 N. Car. 181; *Poston v. Jones*, 122 N. Car. 536.

*South Carolina.*—*Williams v. Mower*, 29 S. Car. 332.

*Texas.*—*Glover v. Thomas*, 75 Tex. 506; *Neitch v. Hillman*, 29 Tex. Civ. App. 544.

*Washington.*—*Kline v. Stein*, 30 Wash. 189; *Thorne v. Joy*, 15 Wash. 83.

*Wisconsin.*—*Brader v. Brader*, 110 Wis. 423.

**2. Contracts**—*Illinois.*—*Way v. Harriman*, 126 Ill. 132; *Dunlop v. Lamb*, 182 Ill. 319.

*Kentucky.*—*Tobin v. South*, (Ky. 1896) 36 S. W. Rep. 1039; *Hutchinson v. Nichols*, (Ky. 1899) 53 S. W. Rep. 661.

*Minnesota.*—*Madson v. Madson*, 69 Minn. 37.

*New York.*—*Matter of Arkenburgh*, 58 N. Y. App. Div. 583.

*Texas.*—*Bartlingck v. Harriman*, 16 Tex. Civ. App. 462; *Pennybacker v. Hazlewood*, 26 Tex. Civ. App. 183.

*Utah.*—*Hennefer v. Hays*, 14 Utah 324.

**Making of Lease Is a Personal Transaction.**—*Cunningham v. Phillips*, 4 Okla. 169.

**Negotiations Preceding Contract.**—*McAyeal v. Gullett*, 105 Ill. App. 155; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**3. Identity of Land Conveyed.**—*McCaughan v. Hardy*, 78 Miss. 598.

**4. Alterations and Interlineations.**—*Mitchell v. Woodward*, 2 Marv. (Del.) 311; *Jewell v. Walker*, 109 Ga. 241; *Pease v. Barnett*, 30 Hun (N. Y.) 525; *Bay View Brewing Co. v. Grubb*, 31 Wash. 34.

**5. Consideration.**—*Luke v. Koenen*, 120 Iowa 103; *Andrews v. Hayden*, 88 Ky. 455; *Merhoff v. Merhoff*, 84 Minn. 263.

**Want of Consideration.**—When the maker is sued by the administrator of a deceased assignee of a note, he is not competent to prove a want of consideration. *Wetherbee v. Roots*, 72 Miss. 355.

**6. Payment of Money Is a Personal Transaction**—*Alabama.*—*Talladega First Nat. Bank v. Chaffin*, 118 Ala. 246.

*Georgia.*—*McWhorter v. Sell*, 66 Ga. 139; *Rudolph v. Underwood*, 88 Ga. 664.

*Illinois.*—*Ring v. Lawless*, 190 Ill. 520; *Jockisch v. Hardtke*, 50 Ill. App. 202.

*Indiana.*—*Merritt v. Straw*, 6 Ind. App. 360.

*Iowa.*—*Cochrane v. Breckenridge*, 75 Iowa 213; *In re Brown*, 92 Iowa 379; *Ridler v. Ridler*, 93 Iowa 347.

*Kentucky.*—*Cornelius v. Miles*, (Ky. 1899) 53 S. W. Rep. 517; *Garrott v. Rives*, (Ky. 1904) 80 S. W. Rep. 519.

*Minnesota.*—*Merhoff v. Merhoff*, 84 Minn. 263.

*Mississippi.*—*Cole v. Gardner*, 67 Miss. 670.

*New York.*—*Lerche v. Brasher*, 104 N. Y. 157; *In re Kellogg*, 104 N. Y. 648; *Adams v. Morrison*, 113 N. Y. 152; *Jones v. Reilly*, 174 N. Y. 97; *Myers v. Hunt*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 471; *Rowley v. Parsons*, 45 N. Y. App. Div. 174; *German-American Bank v. Slade*, (Buffalo Super. Ct. Gen. T.) 15 Misc. (N. Y.) 287; *McMurray v. McMurray*, 63 Hun (N. Y.) 183.

*North Carolina.*—*Carey v. Carey*, 104 N. Car. 171; *Simpson v. Simpson*, 107 N. Car. 552; *Gupton v. Hawkins*, 126 N. Car. 81.

*Pennsylvania.*—*Mell v. Barner*, 135 Pa. St. 151; *De Walt's Estate*, 33 Pittsb. Leg. J. N. S. (Pa.) 275.

*South Carolina.*—*Monts v. Koon*, 21 S. Car. 110.

*Utah.*—*Ewing v. White*, 8 Utah 250.

*Vermont.*—*Barnes v. Dow*, 59 Vt. 530; *Foster v. King*, 73 Vt. 278.

*West Virginia.*—*Calwell v. Prindle*, 11 W. Va. 307.

*Wisconsin.*—*Koenig v. Katz*, 37 Wis. 153; *Nau v. Brunette*, 79 Wis. 664; *Milwaukee Trust Co. v. Warren*, 112 Wis. 505.

In an action to recover from the estate of a deceased attorney money alleged to have been collected under an execution by him for the plaintiff, the execution debtor is not competent to testify that he paid the money to the decedent. *Daniel v. Burts*, 72 Ga. 143.

But if the claim against the debtor is barred by the statute of limitations he may testify as to whether or not he paid the debt to the plaintiff's attorney, because in such case the debtor has no interest in the matter. *Shepherd v. Crawford*, 71 Ga. 458.

**Credits Indorsed on a Note** by the payee thereof have been held to be transactions with the maker since deceased, though made in his absence, and therefore the payee is not competent to testify that two of the credits were for one and the same payment. *Vannatta v. Willett*, 103 Ky. 354.

So, too, the plaintiff, in an action on a note against the maker's administrator, cannot testify as to the time that he indorsed credits on the note for the purpose of taking it out of the



so, too, testimony that a debt of the decedent to the witness had not been paid is inadmissible, since the question whether or not the money had been paid necessarily involves a transaction with the decedent.<sup>1</sup> On the same principle, the plaintiff, in an action on a note made by the decedent, who was also indebted to the plaintiff on other items and had made certain payments to the plaintiff, is incompetent to testify that he never received the money on the note sued on, because the object of such testimony would be to show that the money received from the decedent was paid on the other debts.<sup>2</sup>

(cc) *Marriage*. — A party to a suit or a person interested in the result thereof as the alleged husband or wife of a deceased person is usually incompetent to testify that he or she had married the decedent, that being a personal transaction with the decedent.<sup>3</sup> Some of the statutes, however, excluding the testimony of a party as to personal transactions or communications with persons deceased, are not broad enough to exclude a widow who is asserting her rights as such to testify in regard to the alleged marriage. This is the case under a statute which excludes the surviving party to a contract or cause of action in issue and on trial;<sup>4</sup> and so, too, such testimony is competent under the *Alabama* statute forbidding persons interested in the result of suit to testify "as to any transaction with or statement by the deceased person whose estate is interested in the result of the suit or proceeding."<sup>5</sup>

(dd) *Fraud*. — Facts which constitute fraud on the part of a deceased person necessarily include a personal transaction or conversation with him.<sup>6</sup>

(ee) *Execution of Instruments*. — The execution of a note or bond is, properly speaking, a transaction between the parties thereto. Therefore it has been held that after the death of one of such parties the other is incompetent to testify regarding the fact of execution.<sup>7</sup> Within this principle it has been held that a party is not competent to deny the genuineness of what purports

operation of the statute of limitations. *Mills v. Davis*, 113 N. Y. 243.

**Payment to Insane Person.** — *Maxey v. Bethel*, 64 S. W. Rep. 746, 23 Ky. L. Rep. 1085.

**1. Denying Payment** — *Georgia*. — *Skelton v. Richardson*, 77 Ga. 546.

*New York*. — *Myers v. Hunt*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 471; *McMurray v. McMurray*, 63 Hun (N. Y.) 183; *Brayman v. Stephens*, 79 Hun (N. Y.) 28.

*North Carolina*. — *Benedict v. Jones*, 129 N. Car. 475; *McGowan v. Davenport*, 134 N. Car. 526.

**2. Explaining Payments.** — *Abbott v. Stiff*, (Tex. Civ. App. 1904) 81 S. W. Rep. 562.

**3. Marriage** — *Kansas*. — *Shorten v. Judd*, 56 Kan. 43.

*Nebraska*. — *Sorensen v. Sorensen*, 56 Neb. 729.

*North Carolina*. — *Hopkins v. Bowers*, 111 N. Car. 175.

Under the *Illinois* statute, a woman claiming as widow is incompetent to testify to her marriage until her status as such widow has been conceded or has been established by the adjudication of a court of competent jurisdiction. *In re Maher*, 210 Ill. 160.

**Survivor Not Competent to Testify to Common-law Marriage with Decedent.** — *Matter of Brush*, 25 N. Y. App. Div. 610.

**4.** *Green v. Green*, 126 Mo. 17; *Ashford v. Metropolitan L. Ins. Co.*, 80 Mo. App. 638; *Eisenlord v. Clum*, 126 N. Y. 557; *Greenawalt v. McEnelley*, 85 Pa. St. 352; *Drinkhouse's Estate*, 151 Pa. St. 294. But see *Lyons v.*

*Lyons*, 101 Mo. App. 494. Compare the statutes of other states.

**5. Alabama Statute.** — *Nolen v. Doss*, 133 Ala. 259; *Henry v. Hall*, 106 Ala. 84.

**6. Fraud.** — *Carr v. Fife*, 44 Fed. Rep. 713; *Langford v. Broadhead*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 290; *Paxton v. Paxton*, 38 W. Va. 616.

After the death of a judgment creditor, the judgment debtor is not competent to prove that the judgment was collusive for the purpose of defrauding his creditors. *Prendergast v. Wiseman*, 80 Ga. 419.

**7. Execution of Instrument.** — *Auchampaugh v. Schmidt*, 72 Iowa 656; *Watters v. McGreavy*, 111 Iowa 538; *Bryant v. Stainbrook*, 40 Kan. 356; *Cunningham v. Speagle*, 106 Ky. 278; *Wienecke v. Arbin*, 88 Md. 182; *Boughton v. Bogardus*, 35 Hun (N. Y.) 198.

Accordingly, in an action on a note brought by the payee thereof after the death of the maker, the plaintiff, though competent to prove the handwriting of a witness to the note, cannot testify that one who purports to have made his cross mark to the note as a witness, did, in fact, make his mark thereto, since that would be testifying that, at the request of the deceased maker and himself, such person was a witness to the transaction, thereby proving the transaction. *Bright v. Marcom*, 121 N. Car. 86.

**The Writing of a Promissory Note by the Maker** is not a personal transaction with the payee, and the writer may testify as to what kind of ink was used, what words he struck out, etc.,

to be his signature to a writing evidencing a communication or transaction with the decedent,<sup>1</sup> though it has been held that in an action on a note where the defense is forgery, the defendant may testify that the signature to the note was not his.<sup>2</sup>

The Execution of a Will, however, is not a transaction or communication between the testator and the legatees or devisees, and therefore such persons, as well as the heirs at law and next of kin, are competent witnesses as to the execution of a will.<sup>3</sup>

(ff) *Delivery of Instrument or Other Thing by Decedent* — The delivery by a person since deceased of a written instrument purporting to have been executed by him, such as a deed, note, bond, etc., delivery being necessary to give effect to such instrument, involves a personal transaction with the decedent within the rule of exclusion.<sup>4</sup> So, too, the delivery of any goods or other article of property by virtue of which the witness claims a right or title thereto is a personal transaction concerning which the witness may not testify after the death of the person by whom its delivery was claimed to have been made.<sup>5</sup>

(gg) *Denial of Transaction*. — A witness may testify that he never had any transaction with the deceased person.<sup>6</sup> Thus, the witness may deny that he had a conversation with the decedent,<sup>7</sup> or had entered into any contract with him.<sup>8</sup>

notwithstanding the payee is dead. Page v. Danaher, 43 Wis. 221.

**Denial that Note Was Given.** — A party is incompetent to testify that he had never given any written obligation to the decedent. Garretson v. Kinkad, 118 Iowa 383.

**1. Denial by Party of His Own Signature.** — Ford v. Holmes, 61 Ga. 419.

**2. Defense of Forgery.** — Saratoga County Bank v. Leach, 37 Hun (N. Y.) 336.

But it has been held that the grantor in a deed suing the grantee's heirs to set the deed aside may not testify that his signature was a forgery. Spivey v. Rose, 120 N. Car. 163.

**3. Execution of Will.** — See *infra*, this subdivision of this section, *cc. Independent Facts*.

**4. Delivery of Deed, etc.** — Parks v. Caudle, 58 Tex. 216.

**Delivery by Mail.** — On an issue as to whether a deed was delivered to the plaintiff by the deceased grantor, the plaintiff will not be permitted to testify that he received it by mail bearing the post mark of the grantor's place of residence, because such testimony tends to prove that the grantor transmitted the deed by mail to the plaintiff for the purpose of giving it effect by that method of delivery, which was a "transaction" between the plaintiff and the grantor. Howard v. Zimpelman, (Tex. 1890) 14 S. W. Rep. 59.

And see to the same effect, Nunnally v. Becker, 52 Ark. 550; Kroh v. Heins, 48 Neb. 691.

See *contra*, Daniels v. Foster, 26 Wis. 686, the reasoning of which, however, was said in Kroh v. Heins, 48 Neb. 691, cited *supra*, this note, to be "illogical and unsound," because the delivery of a written instrument which would be incomplete without delivery, is a part of the transaction.

**Possession as Evidence of Delivery.** — When proof of the possession of a promissory note and of the genuineness of the signature thereto are exclusively relied on to establish delivery,

the presumption is that the evidence as to possession involves a personal transaction. Richardson v. Emmett, 170 N. Y. 417; Clift v. Moses, 112 N. Y. 426.

When, however, delivery is proved by independent testimony, showing delivery to a third person for the interested witness when he was not present, proof of possession does not imply a personal transaction. Hoag v. Wright, 174 N. Y. 36. See also Smith v. Sergeant, 67 Barb. (N. Y.) 243; Mortimer v. Chambers, 63 Hun (N. Y.) 335.

**5. Delivery of Property** — *Arkansas*. — Nunnally v. Becker, 52 Ark. 550.

*Illinois*. — Walls v. Ritter, 180 Ill. 616.

*Iowa*. — Frick v. Kabaker, 116 Iowa 494.

*New York*. — Richardson v. Emmett, 170 N. Y. 412; Doolittle v. Stone, 5 Silv. Sup. (N. Y.) 412; Rogers v. Rogers, 153 N. Y. 343, affirming 90 Hun (N. Y.) 455; Parker v. Parsons, 79 N. Y. App. Div. 310.

*North Carolina*. — Lane v. Rogers, 113 N. Car. 171.

**6. Denial of Any Transaction.** — Andrews v. Hunt, 18 D. C. 311; Murphy v. Hindman, 58 Kan. 184; Egan v. Powers, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 592; Alexander v. Ransom, 16 S. Dak. 302.

**7. Denial of Conversation.** — Stolenburg v. Diercks, 117 Iowa 25; Burns v. Mullin, 42 N. Y. App. Div. 116; Griffin v. Earle, 34 S. Car. 246. Compare Walsh v. McArdle, 78 Hun (N. Y.) 411.

But he is not competent to testify that, in the course of a conversation, he did not make certain statements. Redding v. Godwin, 44 Minn. 355.

**8. Denial of Contract.** — Adam v. Sanger, (Tex. Civ. App. 1903) 77 S. W. Rep. 954. But see Chadwick v. Fonner, 69 N. Y. 404; Haughey v. Wright, 12 Hun (N. Y.) 179.

But he cannot testify as to any fact occurring in the course of the negotiation which would operate to relieve him from liability, as, for instance, that he did not know the contents

(hh) *Book Entries*. — In some states it is provided by statute that when the matter in issue and on trial is proper matter of book account the party living may be a witness in his own favor so far as to prove in whose handwriting the charges are, and when made.<sup>1</sup> Some decisions proceed on the theory that book entries do not constitute transactions with the deceased party, and hold that, even in the absence of such statutory provision, the surviving party to a book account may verify the account by his own suppletory oath that the book is his book of original entries of the contemporaneous transactions therein set out.<sup>2</sup> And for the same reason such verification may be made by a party to the suit in respect to the book accounts of a decedent who was a party to the transaction involved in the suit.<sup>3</sup> There are cases, however, which hold that such book entries do in fact constitute transactions with the deceased party, and that the testimony of the surviving party is therefore inadmissible.<sup>4</sup>

cc. *INDEPENDENT FACTS*—(aa) *Rule Stated*. — Since the statutes do not render a party wholly incompetent, when the opposing party is acting in a representative capacity, but merely forbid one party to a contract or cause of action to testify to personal transactions or communications with the opposing party who has since died or become incapacitated to testify in his own behalf, it follows that a party to an action is competent to testify to any material fact which does not involve a personal transaction with a decedent or insane person.<sup>5</sup> In other words, competency is the rule, and the surviving party to the transaction may testify to all material facts within his knowledge, except such as came to his knowledge through a personal transaction or conversation with the deceased.<sup>6</sup>

of a paper signed by him. *In re Johnson*, (Supm. Ct. App. Div.) 52 N. Y. Supp. 1081.

1. *Statutory Provisions Relating to Book Accounts*. — *Alling v. Brazee*, 27 Ill. App. 595; *Estes v. Jackson*, (Ky. 1899) 53 S. W. Rep. 271; *Proctor v. Proctor*, (Ky. 1904) 81 S. W. Rep. 272.

2. *Book Entries Held Not to Be Transactions with Decedent* — *California*. — *Roche v. Ware*, 71 Cal. 375; *City Sav. Bank v. Enos*, 135 Cal. 167.

*Colorado*. — *Haines v. Christie*, 28 Colo. 502.

*Florida*. — *Robinson v. Dibble*, 17 Fla. 457; *Deans v. King*, 20 Fla. 533; *Lewis v. Meginness*, 30 Fla. 419; *Chapin v. Mitchell*, 44 Fla. 225.

*Georgia*. — *Strickland v. Wynn*, 51 Ga. 600.

*Iowa*. — *Dysart v. Furrow*, 90 Iowa 59.

*New Hampshire*. — *Bailey v. Harvey*, 60 N. H. 152.

*North Carolina*. — *Leggett v. Glover*, 71 N. Car. 211.

*Rhode Island*. — *Cargill v. Atwood*, 18 R. I. 303.

*Vermont*. — *Wyman v. Wilcox*, 66 Vt. 26.

But where the entries in such book are not intelligible in themselves, and do not in substance set forth the facts which constitute a right of action in favor of the witness against the deceased, any explanation of the entries therein must come from disinterested witnesses. A party to the transaction may not thus, in effect, make himself a witness generally, merely refreshing his own memory by the entries, instead of verifying the books by his oath. *Silver v. Worcester*, 72 Me. 322.

3. The son and heir at law of a deceased person is competent for his father's personal representative to prove that a book produced

is one of his father's books of original entry, and that the accounts therein, charged to the opposing party's intestate, are in his father's handwriting. *Keener v. Zartman*, 144 Pa. St. 179.

4. *Book Entries Held to Be Transactions with Deceased Party*. — *Dismukes v. Tolson*, 67 Ala. 386; *Schwartz v. Stock*, 26 Nev. 128; *Davis v. Seaman*, 64 Hun (N. Y.) 572.

A party is prohibited from testifying that his account with one now deceased was correct, as such testimony is, in substance and effect, a statement that the services had been rendered under a contract or upon request. *Boyd v. Cauthen*, 28 S. Car. 72.

5. *Independent Facts in General* — *Alabama*. — *Wood v. Brewer*, 73 Ala. 262; *Miller v. Cannon*, 84 Ala. 63.

*Georgia*. — *Sheibley v. Hill*, 57 Ga. 234.

*North Carolina*. — *Dobbins v. Osborne*, 67 N. Car. 259; *Loftin v. Loftin*, 96 N. Car. 94; *McCall v. Wilson*, 101 N. Car. 598.

*Wisconsin*. — *Pritchard v. Pritchard*, 60 Wis. 375.

6. *Florida*. — *Raulerson v. Rockner*, 17 Fla. 809.

*Georgia*. — *Puryear v. Foster*, 91 Ga. 444. *Iowa*. — *Sypher v. Savery*, 39 Iowa 258; *Gable v. Hainer*, 83 Iowa 457; *Denning v. Butcher*, 91 Iowa 425.

*Minnesota*. — *Chadwick v. Cornish*, 26 Minn. 28; *Harrington v. Samples*, 36 Minn. 200; *Parker v. Maxwell*, 51 Minn. 523.

*New York*. — *Franklin v. Pinkney*, (N. Y. Super. Ct. Gen. T.) 18 Abb. Pr. (N. Y.) 186; *Taber v. Willets*, 44 Hun (N. Y.) 346; *Lobdell v. Lobdell*, 36 N. Y. 327.

*North Carolina*. — *Lockhart v. Bell*, 86 N. Car. 443, 90 N. Car. 499; *Norris v. Stewart*,



(\*) *What Are Independent Facts — In General.* — The phrase "independent facts," as employed in the connection now under discussion, is the correlative of personal transactions, and comprehends all acts, conversations, etc., not mutually participated in by the witness on the one hand, and by the deceased person, lunatic, or infant, on the other hand. Within this category are things done by such decedent, etc., not constituting a part of any dealing or negotiation with the witness;<sup>1</sup> all things done by the witness with reference to the subject-matter of the litigation, but not involving any participation by the deceased or insane persons, nor in any way making it necessary for such person to act or speak;<sup>2</sup> and all matters in general which are known to the witness independently of any information obtained from the deceased or insane person.<sup>3</sup> Thus, the witness may testify to the existence and contents of

105 N. Car. 455; *Bunn v. Todd*, 107 N. Car. 266; *Hopkins v. Bowers*, 108 N. Car. 299; *Cowan v. Layburn*, 116 N. Car. 526.

*Tennessee.* — *Jones v. Waddell*, 12 Heisk. (Tenn.) 338.

*Texas.* — *Harris v. Seinsheimer*, 67 Tex. 356.

It is error to exclude a party to the transaction on the ground that the other party is dead, unless it is clear that he can testify to no material facts which are not within the inhibition of the statute. *Card v. Card*, 39 N. Y. 317.

The presumption being in favor of the competency of the witness, the burden is on the party objecting to show his incompetency. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566; *Hendricks v. Kelly*, 64 Ala. 388; *Dismukes v. Tolson*, 67 Ala. 386; *Hill v. Helton*, 80 Ala. 528.

But in *Reynolds v. Reynolds*, 45 Mo. App. 627, it was held that where one party to a contract is dead and the other party offers himself as a witness in his own behalf, he should accompany his offer by a showing that the proposed testimony is admissible under the statute.

**Incompetency Shown on Cross-examination.** — The fact that the witness derives his information from the decedent may be brought out on cross-examination. *Moyer v. Knapp*, 9 Kan. App. 226.

**1. Act of Decedent Not Participated in by Witness.** — *McCall v. Wilson*, 101 N. Car. 598; *Brice v. Miller*, 35 S. Car. 537; *Shilling v. Shilling*, (Tex. Civ. App. 1896) 35 S. W. Rep. 420.

And see *infra*, this division of this section, (7) (b) *Transactions with Third Persons — Between Decedent and Third Persons.*

**Acts Showing Adverse Possession by Decedent.** — *Wisdom v. Reeves*, 110 Ala. 418.

**Execution of Will.** — "On the contest of a will the subject-matter of investigation is the act of the testator in executing the will, and the proceeding is directed to this matter. The execution of a will is not a transaction or communication between the testator and a legatee, and the heirs at law, next of kin, and devisees are competent witnesses as to the *factum* of the execution of the will." *Hays v. Ernest*, 32 Fla. 18.

To the same effect are *Snider v. Burks*, 84 Ala. 53; *In re Spiegelhalter*, 1 Penn. (Del.) 5; *Martin v. McAdams*, 87 Tex. 227; *Foster*

*v. Dickerson*, 64 Vt. 233; *Re Buckman*, 64 Vt. 313.

**Attestation of Will Not Personal Transaction with Testator.** — *Matter of Young*, 123 N. Car. 358.

**2. Independent Acts of Witness — Missouri.** — *Waltemar v. Schnick*, 102 Mo. App. 133.

*New York.* — *Sager v. Dorr*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 568; *Matter of Gabriel*, 44 N. Y. App. Div. 623, *affirmed* 161 N. Y. 644; *Matter of Woodward*, 69 N. Y. App. Div. 286; *Mitchell v. Hollands*, 72 N. Y. App. Div. 224; *Lerche v. Brasher*, 104 N. Y. 157.

*North Carolina.* — *Costen v. McDowell*, 107 N. Car. 546; *Carey v. Carey*, 108 N. Car. 267; *Cornelius v. Brawley*, 109 N. Car. 542; *Cowan v. Layburn*, 116 N. Car. 526; *McArter v. Rhea*, 122 N. Car. 614; *Cox v. Beaufort County Lumber Co.*, 124 N. Car. 78.

*South Carolina.* — *Brown v. Moore*, 26 S. Car. 160; *Trimmier v. Thomson*, 41 S. Car. 125.

*Texas.* — *Moores v. Wills*, 69 Tex. 109; *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581.

*West Virginia.* — *Anderson v. Jarrett*, 43 W. Va. 246.

*Wisconsin.* — *Sawyer v. Choate*, 92 Wis. 533; *Sucke v. Hutchinson*, 97 Wis. 373; *Murphy v. Quinn*, 99 Wis. 466.

And see *infra*, this division of this section, (7) (a) *Transactions with Third Persons — Between Witness and Third Persons.*

Where it has been proved that parties were induced to make an agreement by false representations of the other party, since deceased, such parties may testify that they believed and relied on such representations. *Hard v. Ashley*, 117 N. Y. 606, *reversing* 53 Hun (N. Y.) 112 *sub. nom.* *Hard v. Davison*.

**Payments of Bills by the Witness with His Own Money** while acting as agent for the decedent, when not done at the request of the decedent, are not personal transactions with him, but are independent acts of the witness. *Matter of Zinke*, 90 Hun (N. Y.) 127. See also *Mortimer v. Chambers*, 63 Hun (N. Y.) 335; *Denise v. Denise*, 110 N. Y. 562.

**Connecting Independent Act with Decedent.** — A party may testify to acts of his own with which he makes no attempt, by his own testimony, to connect the deceased, such connection being made by the testimony of other witnesses. *Foggette v. Gaffney*, 33 S. Car. 310; *Steiner v. Eppinger*, (C. C. A.) 61 Fed. Rep. 253; *Martin v. Shannon*, 92 Iowa 374.

**3. Information Not Obtained from Decedent or**

instruments purporting to have been executed by the decedent or lunatic,<sup>1</sup> and to the presence of the decedent at a certain place at a given time.<sup>2</sup> He may also testify as to the location, at a particular time, of the property involved in the action,<sup>3</sup> its condition,<sup>4</sup> value,<sup>5</sup> and the fact that either he or the decedent was in possession thereof at a particular time;<sup>6</sup> that he (the witness) was engaged in a certain business at a given time, though the cause of action arose out of such business;<sup>7</sup> his financial condition;<sup>8</sup> that he did or did not have a conversation or other transaction with the decedent;<sup>9</sup> the capacity in which he acted in reference to the subject of the litigation;<sup>10</sup> and his reasons for permitting the decedent to exercise dominion over property.<sup>11</sup>

**Handwriting.**—Testimony that a document is or is not in the handwriting of the decedent involves merely a matter of opinion and not a personal transaction or communication between the witness and the decedent, if the knowledge thereof was obtained otherwise than through the transaction undergoing investigation. Therefore, according to the great preponderance of authority, a witness may testify that he knows the decedent's handwriting, and that the signature to the document in question is genuine,<sup>12</sup> and for the same reason

**Insane Person.**—*Parker v. Salmons*, 113 Ga. 1167; *Crebbin v. Jarvis*, 64 Kan. 885, 67 Pac. Rep. 531; *Woolverton v. Van Syckel*, 57 N. J. L. 393; *Lockhart v. Bell*, 86 N. Car. 443, 90 N. Car. 499; *Holly v. Holly*, 94 N. Car. 670; *Sikes v. Parker*, 95 N. Car. 232; *Thompson v. Onley*, 96 N. Car. 9; *Charlotte Oil, etc., Co. v. Rippey*, 123 N. Car. 656; *Gordon v. McCall*, 20 Tex. Civ. App. 283; *Adams v. Allen*, 44 Wis. 93.

**Ingredients of Medicine Sold.**—Where the personal representative of a deceased person is sued for the price of medicines furnished to the decedent in his lifetime, the plaintiff is competent to prove of what ingredients such medicines were composed, as that does not involve a transaction with the deceased. *Belote v. O'Brian*, 20 Fla. 126.

**1. Existence and Contents of Documents.**—*Choate v. Huff*, 4 Tex. App. Civ. Cas., § 281; *Walker v. Pittman*, 18 Tex. Civ. App. 519.

**2. Presence of Decedent at Particular Time and Place.**—*In re Brown*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 122; *Cowan v. Davenport*, 30 N. Y. App. Div. 130; *Hamlin v. Stevens*, 59 N. Y. App. Div. 522.

**3. Location of Property.**—*Zeigler v. Clinton Mut. County F. Ins. Co.*, 84 Ill. App. 442; *Rix v. Hunt*, 16 N. Y. App. Div. 540.

**4. Condition of Property.**—*Zeigler v. Clinton Mut. County F. Ins. Co.*, 84 Ill. App. 442.

**5. Value of Property.**—*Gregory v. Fichtner*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 86.

**6. Possession of Land Is an Independent Fact.**—*Strough v. Wilder*, 49 Hun (N. Y.) 405; *Britton v. Tischmacher*, (Tex. Civ. App. 1895) 31 S. W. Rep. 241; *Killfoil v. Moore*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1024.

**Possession of Personality.**—*Gray v. Cooper*, 65 N. Car. 183.

**Acts of Ownership to Show Character of Possession.**—*Stiff v. Cobb*, 126 Ala. 381.

**Possession of Instruments.**—Within the rule stated in the text the possession by the witness at a given time of an instrument executed by the decedent is competent. *Bloss v. Morrison*, 47 Hun (N. Y.) 218; *Strough v. Wilder*, 49 Hun (N. Y.) 405; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335; *Richardson v. Emmett*,

61 N. Y. App. Div. 205; *Spicer v. Spicer*, 54 N. Y. Super. Ct. 280; *Minnis v. Abrams*, 105 Tenn. 662; *Pritchard v. Pritchard*, 69 Wis. 373.

And so is evidence as to the possession by the decedent of any instrument. *Gallagher v. Kiley*, 115 Ga. 420.

**7. Occupation of Witness.**—*Gomez v. Johnson*, 106 Ga. 513.

**8. Financial Condition of Witness.**—*Wicks v. Dean*, 103 Ky. 69.

**9.** See *supra*, this division of this section, (b) *Terms Defined and Explained*; and *bb. (gg) Denial of Transaction*.

**10. Capacity in Which Witness Acted.**—*Matter of Hull*, 117 Iowa 738.

**11. Reason for Permitting Decedent to Control Property.**—*Burdick v. Burdick*, 86 N. Y. App. Div. 383.

**12. Proof of Handwriting**—*Iowa*.—*Sankey v. Cook*, 82 Iowa 125; *Watters v. McGreavy*, 111 Iowa 538; *Britt v. Hall*, 116 Iowa 564.

*Missouri*.—*Jesse v. Davis*, 34 Mo. App. 351.

*New York*.—*Simmons v. Havens*, 101 N. Y. 427; *Wing v. Bliss*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 500, *affirmed* 138 N. Y. 643, 34 N. E. Rep. 513; *Boyd v. Boyd*, 21 N. Y. App. Div. 361, 164 N. Y. 234; *Hoag v. Wright*, 174 N. Y. 36; *Goetting v. Weber*, 71 N. Y. App. Div. 503; *Dolan v. Leary*, (Supm. Ct. Spec. T.) 68 N. Y. Supp. 91.

*North Carolina*.—*Peoples v. Maxwell*, 64 N. Car. 313; *Halyburton v. Dobson*, 65 N. Car. 88; *Sumner v. Candler*, 86 N. Car. 71; *Rush v. Steed*, 91 N. Car. 226; *Hussey v. Kirkman*, 95 N. Car. 63; *Buie v. Scott*, 107 N. Car. 181; *Ferebee v. Pritchard*, 112 N. Car. 83; *Sawyer v. Grandy*, 113 N. Car. 42. *Tennessee*.—*Minnis v. Abrams*, 105 Tenn. 662.

*Texas*.—*Martin v. McAdams*, 87 Tex. 225, *distinguishing* *Lewis v. Aylott*, 45 Tex. 190.

A widow is competent to prove the genuineness of her deceased husband's signature, on information which she received in business transactions with him before their marriage. *Stillwell v. Patton*, 108 Mo. 352.

Where a party had seen the account book of the opposing party's decedent, it was held that he might testify to an entry which he

he may state that the signature is not genuine;<sup>1</sup> but it is not competent for the witness to testify that he saw the decedent sign the paper.<sup>2</sup>

**Physical and Mental Condition of Decedent.** — It is generally held that testimony as to the physical or mental condition of a decedent, observed by the witness, does not relate to a personal transaction with the decedent, and therefore is not within the prohibition of the statute which forbids a party or person interested in the result of the litigation to testify as to any personal transaction between himself and the deceased person.<sup>3</sup> But there are some cases which hold that testimony as to the acts and condition of the decedent, observed by an interested witness, tending to show mental capacity, is within the prohibition of the statute,<sup>4</sup> though the rule of such cases does not seem to be applied as to the mere matter of physical condition.<sup>5</sup>

*dd.* **FACTS FROM WHICH PERSONAL TRANSACTIONS MAY BE INFERRED** — (aa) *In General.* — Within the principle just stated concerning independent facts, the statutes do not exclude the proof of facts, not involving personal transactions between the witness and a person deceased or insane, from which, by inference, may be found other facts which do involve such transactions.<sup>6</sup> Accordingly,

saw therein in the handwriting of the deceased. *Carroll v. Davis*, (C. Pl. Gen. T.) 9 Abb. N. Cas. (N. Y.) 60.

**Contrary Decisions.** — *Merritt v. Straw*, 6 Ind. App. 360.

In *Holliday v. McKinne*, 22 Fla. 153, which was replevin against an administrator for goods claimed by the plaintiff under a bill of sale from the intestate, it was held that the plaintiff should not be permitted to testify that the signature to the bill of sale was in the handwriting of the intestate, because, in the opinion of the court, the sale of the property and the execution of the bill of sale constituted the "transaction," and the proof of the bill of sale was proof of the transaction.

And in *Neely v. Carter*, 96 Ga. 197, it was held that in a proceeding to establish a lost deed alleged to have been executed by a decedent, the grantee was incompetent to prove the decedent's signature, because thus proving the signature would only be another method of proving the fact that the decedent actually signed his name to the paper.

**1. Denial of Decedent's Signature.** — *Morris v. Pullen*, 62 S. W. Rep. 493, 23 Ky. L. Rep. 445; *Hoes v. Nagele*, 28 N. Y. App. Div. 374. But see *Hazlewood v. Pennybacker*, (Tex. Civ. App. 1899) 50 S. W. Rep. 199.

**2.** *Sawyer v. Grandy*, 113 N. Car. 42.

**3. Testimony as to Mental Condition of Decedent Held Admissible** — *Georgia*. — *Cato v. Hunt*, 112 Ga. 139.

*Indiana*. — *Lamb v. Lamb*, 105 Ind. 456; *Staser v. Hogan*, 120 Ind. 207; *Burkhart v. Gladish*, 123 Ind. 337.

*Iowa*. — *Severin v. Zack*, 55 Iowa 28; *Sim v. Russell*, 90 Iowa 656; *Denning v. Butcher*, 91 Iowa 425.

*Kansas*. — *Grimshaw v. Kent*, 67 Kan. 463.

*Kentucky*. — *Williams v. Williams*, 90 Ky. 28.

*North Carolina*. — *Ducker v. Whitson*, 112 N. Car. 44.

*Canada*. — *Re Farquharson*, 33 Nova Scotia 261, overruled on other grounds in *Skinner v. Farquharson*, 32 Can. Sup. Ct. 58.

**Physical Condition.** — *Kosteletzky v. Scherhart*, 99 Iowa 120.

Therefore, in an action to recover for medical

services rendered to the decedent, the plaintiff may testify that the decedent was afflicted with a particular disease and that such disease caused his death. *Morrisett v. Wood*, 123 Ala. 387. See also *McDonald v. Harris*, 131 Ala. 359.

**Health of Decedent at Time of Taking Life Insurance.** — *Supreme Lodge, etc., v. Andrews*, 31 Ind. App. 422.

**4. Testimony as to Mental Condition Held Inadmissible.** — *Holcomb v. Holcomb*, 95 N. Y. 325; *Matter of Eysaman*, 113 N. Y. 62; *Matter of McArthur*, 59 Hun (N. Y.) 619, 12 N. Y. Supp. 822; *Trowbridge v. Stone*, 42 W. Va. 454.

**5. Physical Condition.** — *In re McCarthy*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 581.

**6. Proof of Facts from Which Other Facts May Be Found** — *Alabama*. — *Gamble v. Whitehead*, 94 Ala. 335; *Payne v. Long*, 131 Ala. 438.

*Georgia*. — *Horton v. Smith*, 115 Ga. 66.

*Iowa*. — *McElhenney v. Hendricks*, 82 Iowa 657; *Marietta v. Marietta*, 90 Iowa 201; *Martin v. Shannon*, 92 Iowa 374; *Walkley v. Clarke*, 107 Iowa 451; *Furenes v. Eide*, 109 Iowa 511; *Kirsher v. Kirsher*, 120 Iowa 337; *In re Townsend*, 122 Iowa 246. Compare *Benton County Sav. Bank v. Strand*, 106 Iowa 606, distinguishing *McElhenney v. Hendricks*, 82 Iowa 657.

*Pennsylvania*. — *Stephens v. Cotterell*, 99 Pa. St. 191; *Porter v. Nelson*, 121 Pa. St. 628.

On an issue as to the genuineness of the paper under which the defendant claimed title to the land in controversy, the paper purporting to have been executed by the plaintiff's testator, the defendant is competent to testify that he first saw the paper in the testator's office. Such testimony involves "no verbal statement of or any transaction with or act done or omitted by" the testator, though it may authorize an inference that the testator executed the paper and delivered it to the defendant. *Eve v. Saylor*, (Ky. 1898) 44 S. W. Rep. 355. See also *Cooper v. Jackson*, (Ky. 1900) 57 S. W. Rep. 254.

**Extreme Limit of Liberality.** — In *Curd v. Wisser*, 120 Iowa 746, it is said that "the decisions [in Iowa] have gone to the extreme limit of liberality in this respect, but the rule of the



in an action for services alleged to have been rendered by the plaintiff to the decedent, the plaintiff may testify to the fact that he rendered certain services and the nature thereof, though it might be inferred therefrom that the decedent promised to pay for the services.<sup>1</sup>

(bb) *Indirect Testimony as to Personal Transactions.* — Regard, however, is generally had to the spirit and purpose of the statutes, which is to exclude the testimony of a surviving party as to a transaction with a person who, by reason of death or insanity, cannot give his version of the affair, and therefore a witness will not be permitted to defeat the statute by indirect or negative testimony which, though apparently relating to independent facts, is in reality testimony concerning a personal transaction with a deceased person.<sup>2</sup>

(d) *Written Communications and Transactions* — *aa. IN GENERAL.* — *Testimony as to Execution, Receipt, etc.* — Written communications with persons since deceased are within the statutory inhibition as well as oral communications, and it is, therefore, not permissible for the survivor to prove by his own testimony that he wrote letters to the deceased and that they were received by the latter;<sup>3</sup> but it has been held that testimony that a witness received a certain letter through the mail, though the letter is also identified as having been written by the decedent, does not relate to a communication or transaction with the decedent so as to render the witness incompetent to testify to such fact.<sup>4</sup> So, also, testimony that the witness had in his possession a writing evidencing a transaction or communication between himself and the decedent does not necessarily relate to a transaction or communication with the decedent;<sup>5</sup> and where a writing was received by the witness from a third person, it has been held that testimony as to whether the writing bore the name of the decedent

cited cases has been so long and so frequently followed it must be regarded as the settled policy of our law until changed by legislative enactment."

1. See *infra*, this division of this section, (c) *Actions for Services.*

2. *Indirect Testimony* — *Iowa.* — *Watters v. McGreavy*, 111 Iowa 538.

*Minnesota.* — *Madson v. Madson*, 69 Minn. 37; *Reeves v. Sawyer*, 88 Minn. 218.

*New York.* — *Kochler v. Adler*, 91 N. Y. 657; *Clift v. Moses*, 112 N. Y. 435; *Boyd v. Boyd*, 164 N. Y. 234, reversing 21 N. Y. App. Div. 361; *Richardson v. Emmett*, 170 N. Y. 412; *Viall v. Leavens*, 39 Hun (N. Y.) 291; *Gregory v. Fichtner*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 86, 21 Civ. Pro. (N. Y.) 1; *Finton v. Egleston*, 61 Hun (N. Y.) 246; *Hall v. Roberts*, 63 Hun (N. Y.) 473; *Van Vechten v. Van Vechten*, 65 Hun (N. Y.) 215; *Matter of Humfreville*, 6 N. Y. App. Div. 535; *Squire v. Greene*, 38 N. Y. App. Div. 431; *O'Connor v. Ogdensburg Bank*, 51 N. Y. App. Div. 70; *Parker v. Parsons*, 79 N. Y. App. Div. 310.

*North Carolina.* — *Angel v. Angel*, 127 N. Car. 451; *Benedict v. Jones*, 129 N. Car. 475.

*Wisconsin.* — *Brader v. Brader*, 110 Wis. 423.

*Indirect Proof of Payment.* — A witness will not be permitted to prove payments made to a deceased person by testifying that he met the decedent on several occasions with certain amounts of money on his person; that he did not have the money when he left the decedent, and that he did not lose the money. *Martin v. Fowler*, 51 S. Car. 164.

In an action by the personal representative of a deceased person, the defendant is not competent to testify as to the time and place of

signing a receipt by the plaintiff's decedent in support of a plea of payment. *Sumner v. Candler*, 86 N. Car. 71.

Testimony that the witness addressed a package of money to the deceased relates to a personal transaction with him. *Stuart v. Patterson*, 37 Hun (N. Y.) 113.

*Rehearsing Conversations with Decedent.* — A witness will not be permitted to testify to statements made by him to the adverse party or another in which the witness rehearsed conversations with or statements by the decedent. *Stallings v. Hinson*, 49 Ala. 92; *Jones v. Jones*, 102 Ky. 450; *Coffin v. Loomis*, (Tex. Civ. App. 1897) 41 S. W. Rep. 511. See also *Charlotte Oil, etc., Co. v. Rippey*, 123 N. Car. 656.

3. *Written Communications.* — *Gable v. Hainer*, 83 Iowa 457; *Resseguie v. Mason*, 58 Barb. (N. Y.) 89; *Van Vechten v. Van Vechten*, 65 Hun (N. Y.) 215; *Montague v. Thomason*, 91 Tenn. 168.

*Letters and Telegrams.* — The sending or receipt of letters or telegrams to or from the deceased person is a transaction with him. *Kroh v. Heins*, 48 Neb. 691; *Smith v. Perry*, 52 Neb. 738; *Harte v. Reichenberg*, (Neb. 1902) 92 N. W. Rep. 987.

4. *Contents.* — A witness cannot testify as to the contents of a letter written by him to the decedent, though notice has been served on the administrator to produce the original. *Webster v. Le Comte*, 74 Md. 249.

5. *Receipt of Letter Through Mail.* — *Britt v. Hall*, 116 Iowa 564; *Boozer v. Teague*, 27 S. Car. 348; *Daniels v. Foster*, 26 Wis. 686; *Spear v. Evans*, 51 Wis. 42.

6. *Possession of Writing.* — *Simmons v. Havens*, 101 N. Y. 427; *Minnis v. Abrams*, 105 Tenn. 662.

was not objectionable under a statute excluding the testimony of the witness with regard to personal transactions with the decedent.<sup>1</sup> If the writing evidencing the transaction between the decedent and the witness was given directly by the one to the other, it is a personal transaction, and the witness cannot testify as to the form, contents, etc., of the writing when delivered.<sup>2</sup> And testimony as an expert or as one acquainted with the handwriting of the decedent as to the identity of the handwriting of a decedent is not objectionable as relating to a communication or transaction with the decedent,<sup>3</sup> but the testimony of a witness denying the genuineness of his signature to a writing evidencing a communication or transaction with the decedent has been held objectionable as relating to a transaction or communication with the decedent.<sup>4</sup>

**Writings Themselves Admissible in Evidence.** — The writings themselves, however, though evidencing a transaction with the decedent, such as letters written either by the witness to the decedent or by the decedent to the witness, are not subject to the objection that they constitute transactions or communications between the witness and the decedent, and therefore they are admissible in evidence.<sup>5</sup>

**bb. LOSS OF WRITTEN EVIDENCE.** — In case of the loss of a written contract or other writing, material in evidence in a contest between the survivor and the legal representative of the deceased party to a transaction, the surviving party is competent to prove such loss in order to lay a proper foundation for the introduction of secondary evidence of its contents,<sup>6</sup> unless the fact of his having had possession of such instrument is a material issue, and necessarily involves a transaction with the deceased.<sup>7</sup>

**Contents.** — A witness who is within the rule of exclusion is not competent to testify as to the contents of a lost writing evidencing a transaction or communication between the witness and decedent, because, in so doing, he would not be testifying to an independent fact, as in giving evidence of the

**1. Condition of Signatures to Writing — Letter Received from Third Person.** — *Sawyer v. Choate*, 92 Wis. 533. See also *Harnett v. Holdrege*, (Neb. 1903) 97 N. W. Rep. 443.

**2. Writings Passing Directly Between Witness and Decedent.** — Thus, in *In re Brown*, 92 Iowa 379, the testimony of a party that certain words in a check given to him by a decedent were not in the check at the time he received it was held incompetent as involving a personal transaction with the decedent.

In *Wadsworth v. Heermans*, 85 N. Y. 639, affirming 22 Hun (N. Y.) 455, *sub nom.* *Hill v. Heermans*, 17 Hun (N. Y.) 470, however, the plaintiff, as he alleged, had deposited certain bonds indorsed in blank with the defendant's assignor for safe keeping. During the plaintiff's absence in Europe, the name of the custodian of the bonds was inserted in the blanks and he assigned the bonds to the defendant and died before the commencement of the action. At the trial the plaintiff was permitted to testify that when he deposited the bonds the name of the deceased was not in the indorsements or anywhere else in the bonds, and it was held that he was competent to give such testimony.

**3.** See *supra*, this division of this section, *cc.* (*bb.*) *What Are Independent Facts*, paragraph *Handwriting*.

**4.** See *supra*, this division of this section, *bb.* (*ee.*) *Execution of Instruments*.

**5. Admissibility of Writings.** — *Locker v. Klunker*, 123 Cal. 231; *Putnam v. Lincoln Safe*

*Deposit Co.*, 87 N. Y. App. Div. 13, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 738; *Ah How v. Furth*, 13 Wash. 550; *South Branch R. Co. v. Long*, 43 W. Va. 131.

**Letters from Witness to Decedent.** — In *Master of Howe*, 112 Iowa 220, a contestant of a will was permitted to introduce letters written by her to the decedent, and the court held that they were admissible, saying that "if, instead of writing these letters, the contestant had made the same statements to the deceased in the presence of a third person, and deceased had made reply, or had remained silent, it would surely be competent for contestants to show by that third person that the statements were made to deceased, and his reply thereto, or that he made no reply. These letters are the third person."

**Letters from Decedent to Witness.** — *Britt v. Hall*, 116 Iowa 564; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See, however, *McCorkendale v. McCorkendale*, 111 Iowa 314.

**6. Loss of Writings.** — *Scarborough v. Blackman*, 108 Ala. 656; *Parker v. Edwards*, 85 Ala. 246; *Stevens v. Witter*, 88 Iowa 636; *Milam v. Milam*, 60 Ind. 58; *Choate v. Huff*, 4 Tex. App. Civ. Cas., § 280. See, however, *Robinson v. James*, 29 W. Va. 224.

**7.** *Edwards v. Parker*, 88 Ala. 356; *Nash v. Gibson*, 16 Iowa 306; *Keech v. Cowles*, 34 Iowa 261; *Calwell v. Prindle*, 11 W. Va. 307; *Messimer v. McCray*, 113 Mo. 382.

loss of the writing, but would be testifying to a transaction between himself and the deceased;<sup>1</sup> but evidence that a certain written instrument which the witness had had in his possession and which had been lost purported to be signed by the decedent has been held unobjectionable;<sup>2</sup> and it seems that under statutes excluding testimony as to personal transactions with the decedent, testimony as to the contents of a lost letter received from the decedent through the mails is not objectionable.<sup>3</sup>

(e) **Actions for Services.** — Where the statute excludes testimony as to matters or facts occurring before the death of the decedent, testimony of a witness within the rule of exclusion, in an action for services rendered to the decedent, as to the rendition of the services and their nature is objectionable,<sup>4</sup> and under the statutes excluding testimony as to transactions or communications with the decedent, testimony as to the rendition of the services at the request or with the knowledge and assent of the decedent, so as to raise an implied promise on the decedent's part to pay therefor, is objectionable;<sup>5</sup> and *a fortiori* testimony as to an express contract with the decedent for the services rendered is objectionable.<sup>6</sup> Thus, where the services were rendered to a third person, the witness cannot testify that they were rendered at the request of the decedent and under his promise to pay therefor.<sup>7</sup>

**Fact of Rendition of Services.** — Under statutes barring witnesses from testifying as to transactions and communications with a decedent, testimony of the mere fact that services were rendered and their nature in some cases has not

**1. Contents of Lost Writing.**—*Alabama.* — Parker v. Edwards, 85 Ala. 246.

*Iowa.* — Stevens v. Witter, 88 Iowa 636.

*Michigan.* — Schratz v. Schratz, 35 Mich. 485; Sheldon v. Michigan Millers' Mut. F. Ins. Co., 124 Mich. 303.

*Missouri.* — Messimer v. McCray, 113 Mo. 382.

*New Hampshire.* — Sabre v. Smith, 62 N. H. 663.

*New York.* — Hadsall v. Scott, 26 Hun (N. Y.) 617. See Simmons v. Havens, 101 N. Y. 427.

*North Carolina.* — Hussey v. Kirkman, 95 N. Car. 63.

*South Carolina.* — Boozer v. Teague, 27 S. Car. 348.

*Tennessee.* — Montague v. Thomason, 91 Tenn. 168.

*Texas.* — Britton v. Tischmacher, (Tex. Civ. App. 1895) 31 S. W. Rep. 241; Ehrenworth v. Putnam, (Tex. Civ. App. 1900) 55 S. W. Rep. 190; Blackman v. Schierman, 21 Tex. Civ. App. 517. But see Howard v. Galbraith, (Tex. Civ. App. 1894) 30 S. W. Rep. 689.

*West Virginia.* — Robinson v. James, 29 W. Va. 224.

**Date of Note.** — In Buie v. Scott, 107 N. Car. 181, it was held that the payee in a note was not, after the death of the maker and the loss of the note, competent to prove the date thereof, where that fact had become material in connection with other incidents of the execution of the note.

**The Fact that Notice Has Been Served** upon the representative of the decedent to produce a letter alleged to have been written by the witness to the decedent is immaterial as regards the competency of the witness to testify as to the contents of the letter. Blackman v. Schierman, 21 Tex. Civ. App. 517. See also Webster v. Le Compte, 74 Md. 249.

**2. Choate v. Huff,** 4 Tex. App. Civ. Cas., § 280.

**3. Sawyer v. Choate,** 92 Wis. 533.

**4. Actions for Services.**—Shain v. Forbes, 82 Cal. 557.

**5. Georgia.** — Wagner v. Robinson, 56 Ga. 47.

*Iowa.* — Peck v. McKean, 45 Iowa 18; Smith v. Johnson, 45 Iowa 308; Wilson v. Wilson, 52 Iowa 44; Cowan v. Musgrave, 73 Iowa 384.

*New York.* — Somerville v. Crook, 9 Hun (N. Y.) 664.

*West Virginia.* — Owens v. Owens, 14 W. Va. 88.

**Compare** Trimmier v. Thomson, 41 S. Car. 125.

Thus, in an action by a daughter against her father's executors for services performed while a member of his family, she is incompetent to testify that she expected compensation for services rendered. Cowan v. Musgrave, 73 Iowa 384.

**6. Express Contract.**—Hullett v. Hood, 100 Ala. 345; Tuohy v. Trail, 19 App. Cas. (D. C.) 79; Wagner v. Robinson, 56 Ga. 47; Fisher v. Verplanck, 17 Hun (N. Y.) 150; Boyd v. Cauthen, 28 S. Car. 72; Poling v. Huffman, 48 W. Va. 639.

Thus, a witness is incompetent to testify that his account for services against the decedent's estate is correct, as such testimony is in effect that the services had been rendered under a contract with the decedent. Boyd v. Cauthen, 28 S. Car. 72.

**7. Heyne v. Doerfler,** 124 N. Y. 505.

But where the defense to a claim against a decedent's estate is on the ground that the services were rendered to third persons, and that the decedent merely acted as their agent in contracting for such services, the claimant may testify that he did not render the services for the alleged principals. Trimmier v. Thomson, 41 S. Car. 125.



been regarded as objectionable;<sup>1</sup> still, testimony of the witness as to the rendition of particular services for the decedent and their nature is not of itself sufficient to show that the decedent knew of or authorized their rendition so as to render him liable to pay therefor.<sup>2</sup> In other cases testimony as to the actual rendition of the services and their nature, where they were of such a character as must have been rendered in the presence of the decedent and with the consent, knowledge, or request of the decedent, has been held objectionable as relating to a transaction or communication with the decedent,<sup>3</sup> as where the services were rendered in the presence of the decedent so as to render him, if alive, a competent witness to rebut the testimony of the witness.<sup>4</sup> Even though a witness is incompetent to testify as to the rendition of services for the decedent, and their nature, he may testify as to the circumstances surrounding the decedent from which might be inferred the nature of the services and their rendition.<sup>5</sup> So, also, though a witness cannot testify as to the rendition of the services and their nature, when rendered in the presence of the decedent, he may testify to the rendition of services and their nature when the services were not rendered in the presence of the decedent and with his immediate and personal participation,<sup>6</sup> or were not rendered directly to the decedent,<sup>7</sup> and if the contract on the part of the decedent to pay for the services rendered is established by other evidence, the witness may testify as to the nature and character of the services rendered out of the presence of the decedent.<sup>8</sup>

**Proof of Value of Services.**—Where the fact of the rendition of services has been proved by other witnesses, the claimant may, in the absence of an

**1. Actual Rendition and Nature of Services Rendered**—*District of Columbia*.—Tuohy v. Trail, 19 App. Cas. (D. C.) 79.

*South Carolina*.—Foggette v. Gaffney, 33 S. Car. 303; Sullivan v. Latimer, 38 S. Car. 158; Marshall v. Mitchell, 59 S. Car. 523.

*Washington*.—Ah How v. Furth, 13 Wash. 550; Marvin v. Yates, 26 Wash. 50.

*Wisconsin*.—Belden v. Scott, 65 Wis. 425; Pritchard v. Pritchard, 69 Wis. 373.

See also *supra*, this division of this section, *cc. Independent Facts*.

**A Physician** who presents a claim for medical services may testify to the physical condition of the deceased within the period of such services, and to the proportion of his own time required in looking after his patient's health. Sullivan v. Latimer, 38 S. Car. 158.

**Services in Presence of Decedent.**—On a claim against a decedent's estate the claimant may testify as to the rendition and nature of services rendered in the repair of the decedent's house, though such services were rendered in the presence of the deceased. Foggette v. Gaffney, 33 S. Car. 303.

**2. Effect of Testimony.**—Cash v. Kirkham, 67 Ark. 318; Matter of Humfreville, 6 N. Y. App. Div. 535; *In re Merchant*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 875.

**3. Services Necessarily Rendered in Presence of Decedent**—*Iowa*.—Peck v. McKean, 45 Iowa 18; Smith v. Johnson, 45 Iowa 308; Herring v. Herring, 94 Iowa 56. Compare Hutton v. Doxsee, 116 Iowa 13; Marietta v. Marietta, 90 Iowa 201.

*Kentucky*.—Newton v. Field, 98 Ky. 186.

*New Jersey*.—Baker v. Bancroft, 69 N. J. L. 223, following Dickerson v. Payne, 66 N. J. L. 35.

*New York*.—Taylor v. Welsh, 92 Hun (N.

Y.) 272; Heyne v. Doerfler, 124 N. Y. 505; Moses v. Hatch, 38 N. Y. App. Div. 140; Meehan v. Heffernan, 73 N. Y. App. Div. 615. See also Fisher v. Verplanck, 17 Hun (N. Y.) 150.

*North Carolina*.—Kirk v. Barnhart, 74 N. Car. 653.

*Texas*.—Garwood v. Schlichenmaier, 25 Tex. Civ. App. 176. See, however, Hamilton v. Starr, (Tex. Civ. App. 1894) 27 S. W. Rep. 587.

*West Virginia*.—Owens v. Owens, 14 W. Va. 88.

*Canada*.—*In re Condon*, 28 Nova Scotia 208.

**Services as Nurse in Last Illness.**—Baker v. Bancroft, 69 N. J. L. 223.

**4.** Dickerson v. Payne, 66 N. J. L. 35; Yates v. Root, 4 N. Y. App. Div. 439.

**5.** Marietta v. Marietta, 90 Iowa 201.

See *supra*, this subdivision, *dd. Facts from Which Personal Transactions May Be Inferred*.

**6.** Lerche v. Brasher, 104 N. Y. 157, reversing 37 Hun (N. Y.) 385. See also Provost v. Robinson, 58 N. J. L. 222; *In re Merchant*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 875.

Thus, in an action by an attorney against the executor of a deceased client to recover his fees, the plaintiff may, after competent proof of the contract of employment, testify as to his acts as such attorney, when such acts were done in the absence of the deceased and without his immediate or personal participation. Lerche v. Brasher, 104 N. Y. 157.

**7.** Shedrick v. Young, 72 N. Y. App. Div. 278 (services rendered under subscription contract for services as night watchman.)

**8.** Provost v. Robinson, 58 N. J. L. 222; Fouse v. Gilfillan, 45 W. Va. 213.

express contract, testify as to the reasonable value of the same, as such testimony does not relate to a personal transaction with the deceased.<sup>1</sup>

**Proof of Nonpayment.** — A witness within the rule of exclusion is not competent to prove that he has not been paid for services rendered to the decedent, since testimony negating a transaction with a deceased person is as clearly within the inhibition contained in the proviso to the statute as that in affirmation thereof.<sup>2</sup>

(f) **Acts and Omissions Causing Death.** — Acts and omissions causing death may constitute a transaction between the person killed and the person through whose acts or omissions the death was caused.<sup>3</sup> The statutes prohibiting certain persons from testifying in actions by executors or administrators apply to actions by executors or administrators to recover damages for the death of their decedent caused by the wrongful act of the defendant, though the damages are not general assets for the payment of the debts of the decedent, but are by the terms of the statute giving the right of action to be distributed among the decedent's heirs or next of kin;<sup>4</sup> but where the right of action is given by the statute directly to the beneficiary, and the damages recovered do not fall into the body of the decedent's estate, for distribution by the administrator, it has been held that the action is not one by the decedent's executor or administrator or by one claiming under the decedent so as to render the exclusion statutes applicable.<sup>5</sup> Where the right of action is by statute given to the administrator or executor of the decedent and the damages recoverable are to be distributed to the widow and next of kin of the decedent as in case of intestacy, it has been held that the widow and next of kin were not persons for whose immediate benefit the action was prosecuted, so as to render them incompetent as witnesses.<sup>6</sup>

(2) **Matters Occurring in Lifetime of Decedent.** — While the statutes generally limit the rule of exclusion to personal transactions and communications between the witness and the deceased person, yet in some states it is provided that the surviving party or person interested shall not be admitted to testify as to any matter which occurred in the lifetime of the decedent.<sup>7</sup>

**1. Value of Services.** — *Deans v. King*, 20 Fla. 533; *Lewis v. Meginniss*, 30 Fla. 424; *Kwiecinski v. Newman*, (Mich. 1904) 100 N. W. Rep. 391; *Burrows v. Butler*, 38 Hun (N. Y.) 157; *Belden v. Scott*, 65 Wis. 425; *Foggette v. Gaffney*, 33 S. Car. 303. See also *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176. See, however, *Somerville v. Crook*, 9 Hun (N. Y.) 664; *Meehan v. Heffernan*, 73 N. Y. App. Div. 615.

**2. Lerche v. Brasher**, 104 N. Y. 161. See also *In re Brown*, 92 Iowa 379; *Ridler v. Ridler*, 93 Iowa 347. And see *supra*, this division of this section, bb. (bb) *Payment of Money*.

But if no evidence of payment has been given by the defendant, it is harmless error that the plaintiff testifies that he has not been paid for his services, as payment is an affirmative defense, the burden of establishing which is upon the defendant. *Lerche v. Brasher*, 104 N. Y. 161.

**3. Acts and Omissions Causing Death.** — *Mayfield v. Savannah, etc., R. Co.*, 87 Ga. 374; *Abelein v. Porter*, 45 N. Y. App. Div. 307.

**Surrounding Facts and Circumstances Not Within Rule.** — *Miller v. Dayton*, 57 Iowa 424.

**The Indiana Statute** is not applicable to an action in tort for damages for the death of the decedent. *Cincinnati, etc., R. Co. v. Cregor*,

150 Ind. 625. See *Sherlock v. Alling*, 44 Ind. 184; *Hudson v. Houser*, 123 Ind. 309.

For a full discussion as to what constitutes interest within the meaning of the statute, see *supra*, this title, *Competency — Persons Interested*.

**4. Forbes v. Snyder**, 94 Ill. 378; *Abelein v. Porter*, 45 N. Y. App. Div. 307; *Quin v. Moore*, 15 N. Y. 432.

In *Hale v. Kearly*, 8 Baxt. (Tenn.) 49, however, where the widow brought her action in the name of the administrator after presenting proper proof that he refused to sue, it was held that the defendant might testify in his own behalf, as the administrator was only a nominal party, the widow being the real party in interest.

**5. Right of Action Given to Beneficiary.** — *Mann v. Weiland*, 81\* Pa. St. 256; *Wallace v. Stevens*, 74 Tex. 559.

**6. Quin v. Moore**, 15 N. Y. 432.

**7. Matters Occurring in Lifetime of Decedent — California.** — *Robinson v. Dugan*, (Cal. 1894) 35 Pac. Rep. 902; *Stuart v. Lord*, 138 Cal. 672.

**Indiana.** — *Lamb v. Lamb*, 105 Ind. 456; *McDonald v. McDonald*, 142 Ind. 87.

**Nevada.** — *Gage v. Phillips*, 21 Nev. 150.

**New Hampshire.** — *Benton v. Hopkins*, 68 N. H. 606.

**Ohio.** — *Murdock v. McNeely*, 1 Ohio Cir. Dec. 10.

**Construction of Statute.**—The construction given to this provision of the statute by the courts of the different states has not been harmonious. Some adhere strictly to the letter of the statute, and make the time of the occurrence concerning which the testimony is offered the exclusive test of admissibility.<sup>1</sup> By others regard has been given to the purpose of the statute, which is to prevent undue advantage in permitting a living person to testify as to matters known only to himself and a decedent, and they accordingly hold that the provision in question does not preclude the parties from testifying in respect to such matters as were open to the observation of all the friends and acquaintances of the decedent.<sup>2</sup> The *Indiana* statute provides that in suits or proceedings in which an executor or administrator is a party, "involving matters which occurred during the lifetime of the decedent," where judgment may be rendered for or against the estate, no person who is a necessary party to the issue or record whose interest is adverse to such estate shall be a competent witness as to such matters against the estate. This provision is construed to refer to matters occurring with the testator in his lifetime in relation to the matter of transaction on which the suit is predicated.<sup>3</sup>

(3) *Facts Equally Known to Witness and Decedent.*—Another variation from the general rule of exclusion is the provision, found in some of the statutes, that, in actions by or against persons standing in certain designated relations to a decedent, the adverse party shall not testify to any facts which

*Pennsylvania.*—*Carey v. Fairchild*, (Pa. 1887) 9 Atl. Rep. 328; *Adams v. Edwards*, 115 Pa. St. 211; *King v. Humphreys*, 138 Pa. St. 310; *Wolf v. Wolf*, 158 Pa. St. 621, 33 W. N. C. (Pa.) 505; *Reiter v. McJunkin*, 8 Pa. Super. Ct. 164.

**What Are Facts Occurring in Lifetime of Decedent.**—The following matters have been held to constitute facts occurring during the lifetime of the decedent within the prohibition of the statute:

*Whether Debt Was Unpaid at Time of Decedent's Death.*—*Robinson v. Dugan*, (Cal. 1894) 35 Pac. Rep. 902.

*Whether Witness Made Certain Statement to Third Person.*—*Stuart v. Lord*, 138 Cal. 672.

*Under What Circumstances Witness Obtained Possession of Copy of Decedent's Will.*—*McDonald v. McDonald*, 142 Ind. 55.

*Mental Condition of Decedent.*—*Pattee v. Whitcomb*, 72 N. H. 249.

*Relationship of Witness to Decedent.*—*Adams v. Edwards*, 115 Pa. St. 211.

*Genuineness of Decedent's Signature.*—*Sutherland v. Ross*, 140 Pa. St. 379, 28 W. N. C. (Pa.) 17; *Toomey's Estate*, 150 Pa. St. 535.

*Whether Certain Person Was Agent of Witness.*—*Sanborn v. Cole*, 63 Vt. 590.

**1. Strict Construction of Statute.**—Thus, in *Adams v. Edwards*, 115 Pa. St. 211, it was held that where the question of heirship was in issue those claiming to be heirs were not competent to support their claim. See also *Crothers v. Crothers*, 149 Pa. St. 205.

**Mental Capacity of Decedent.**—In ejectment by one claiming as heir of his father, against a brother or sister of the plaintiff claiming under a deed from the father, the plaintiff is not competent to prove the mental incapacity of the grantor to make the deed. *King v. Humphreys*, 138 Pa. St. 310.

**Forgery of Deed.**—In *Sutherland v. Ross*, 140 Pa. St. 379, it was held that where the

defendant in ejectment claimed under a deed purporting to be signed and acknowledged by the plaintiff and his wife, and to convey the land in dispute to a deceased assignor of the defendant, neither of the alleged grantors was a competent witness to testify that the signatures appended to the deed were forgeries, and the certificate of acknowledgment untrue; and that this was so, even though the deceased grantee in the deed was not present at its alleged execution, but was represented by an agent who was alive and competent to testify to the whole transaction.

**2. Liberal Construction of Statute.**—*Lamb v. Lamb*, 105 Ind. 456; *McDonald v. McDonald*, 142 Ind. 87.

"The general rule repeatedly laid down in this state is that 'where the deceased had personal knowledge of the matters in dispute, and might, if living, be a witness, it would be unequal and manifestly unjust to allow the survivor to testify, inasmuch as the other party, being dead, could not contradict it or explain the evidence. \* \* \* For ordinary cases, the safe guide and the decisive test is found in the inquiry whether the deceased, if alive, could testify to the same matters.'" *Chandler v. Davis*, 47 N. H. 465; *Harvey v. Hilliard*, 47 N. H. 551; *Brown v. Brown*, 48 N. H. 90; *True v. Shepard*, 51 N. H. 501; *Stearns v. Wright*, 51 N. H. 611; *Fosgate v. Thompson*, 54 N. H. 455; *Hoit v. Russell*, 56 N. H. 559; *Page v. Whidden*, 59 N. H. 511; *Bailey v. Harvey*, 60 N. H. 152; *Burns v. Madigan*, 60 N. H. 197; *Cochran v. Langmaid*, 60 N. H. 571; *English v. Porter*, 63 N. H. 206; *Welch v. Adams*, 63 N. H. 344; *Simpson v. Gafney*, 66 N. H. 261.

**Mental Capacity of Decedent.**—Therefore in a suit to contest a will, the parties are competent witnesses on the subject of the mental capacity of the testator. *Lamb v. Lamb*, 105 Ind. 456.

**3. Denny v. Denny**, 123 Ind. 240.



must have been equally known to himself and the decedent.<sup>1</sup> Thus, the witness will not be permitted to testify that there was no consideration for the contract between himself and the decedent,<sup>2</sup> or as to the terms of the contract with the decedent,<sup>3</sup> or that she was married to the decedent.<sup>4</sup>

**Transactions in Presence of Third Persons.** — Within this rule, the fact that a conversation between the witness and the decedent took place in the presence of third persons does not render the witness competent to testify concerning it.<sup>5</sup>

**Transactions with Third Persons.** — The statutory provision referred to in the text does not operate to exclude testimony as to a transaction or communication between the witness and a third person in the absence of the decedent;<sup>6</sup> but matters transpiring between the decedent and third persons in the presence and hearing of the witness are clearly "matters equally within the knowledge" of the witness and the decedent, and consequently the witness is incompetent to testify concerning them.<sup>7</sup>

**Denial of Transaction.** — The rule that a party is incompetent to testify as to any matter which must have been equally within the knowledge of the deceased does not prevent such party from denying a transaction which, if it occurred, was within the knowledge of the deceased.<sup>8</sup>

**Facts Which Are Capable of Proof by Documentary Evidence accessible to both parties**

**1. Facts Equally Known to Witness and Decedent.** — *Wheeler v. Arnold*, 30 Mich. 304; *Webster v. Sibley*, 72 Mich. 636; *Jackson v. Cole*, 81 Mich. 440; *McHugh v. Dowd*, 86 Mich. 412; *Ripley v. Seligman*, 88 Mich. 177; *Knight v. Hartman*, 93 Mich. 69; *Bailey v. Holden*, 113 Mich. 402; *Schmitz v. Beals*, 115 Mich. 112; *Shouldice v. McLeod*, 130 Mich. 444; *Gardiner v. Gardiner*, (Mich. 1903) 95 N. W. Rep. 973, 10 Detroit Leg. N. 334; *Storrie v. Grand Trunk Elevator Co.*, (Mich. 1903) 96 N. W. Rep. 569, 10 Detroit Leg. N. 454; *Miller v. Shumway*, (Mich. 1904) 98 N. W. Rep. 385, 10 Detroit Leg. N. 923; *Tabor v. Tabor*, (Mich. 1904) 99 N. W. Rep. 4; *Peirson v. McNeal*, (Mich. 1904) 100 N. W. Rep. 458, 11 Detroit Leg. N. 273; *Wood v. Fox*, 8 Utah 380, affirmed 166 U. S. 637.

The rule of exclusion under the *Michigan* statute applies only when the suit is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, and it is held that where an action on a note indorsed by a decedent is defended by a legatee under decedent's will, which appointed an executor, the rule does not apply. *Hillman v. Schwenk*, 68 Mich. 293, 301.

**Knowledge and Information Distinguished.** — *Ripley v. Seligman*, 88 Mich. 190.

**Rule Applicable to Contest Between Beneficiaries under Life-Insurance Policies.** — *Great Camp, etc. v. Savage*, (Mich. 1904) 98 N. W. Rep. 26, 10 Detroit Leg. N. 852.

**Transactions Between Partners.** — In a controversy between a surviving partner and the administrator of the deceased partner, partnership dealings are necessarily matters equally within the knowledge of the decedent. *Sparling v. Smeltzer*, 133 Mich. 454.

**Alteration of Instrument.** — In an action by an administrator on an account for services rendered by the decedent to the defendant, defendant offered in evidence a canceled check given by him to the decedent which recited that it was in full payment for the services in ques-

tion. The plaintiff offered evidence that such recital was written into the check after it had been canceled at the bank. It was held that the defendant was not competent to testify that the recital was in the check at the time of its delivery to the decedent, because that was a matter equally within the knowledge of the decedent and therefore prohibited by the statute. *Blodgett v. Vogel*, 130 Mich. 479.

**Transactions with Corporations.** — Where the transaction was with a deceased agent of a corporation, the witness is, under the *Michigan* statute, disqualified to testify only when the matter was not within the knowledge of any of the surviving officers or agent in the corporation, and, therefore, if an officer who was present is living, the rule of disqualification does not apply. *Lytle v. Chicago, etc., R. Co.*, 84 Mich. 289.

The rule in this respect is restricted to such agents as are authorized to act for the company in the matter with reference to which the testimony is offered. *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156; *Storrie v. Grand Trunk Elevator Co.*, (Mich. 1903) 96 N. W. Rep. 569.

**Executor Excluded When Real Party in Interest.** — *Peirson v. McNeal*, (Mich. 1904) 100 N. W. Rep. 458.

**2. Want of Consideration.** — *Buffum v. Porter*, 70 Mich. 623.

**3. Terms of Contract.** — *Lloyd v. Hollenback*, 98 Mich. 203.

**4. Marriage.** — *Lorimer v. Lorimer*, 124 Mich. 631, 7 Detroit Leg. N. 367.

**5. Presence of Third Persons.** — *Taylor v. Bunker*, 68 Mich. 258.

**6. Transactions in Absence of Decedent.** — *Schmitz v. Beals*, 115 Mich. 112; *Crampton v. Newton*, 132 Mich. 149, 9 Detroit Leg. N. 570; *Moore v. Machen*, 124 Ind. 216. See also *infra*, this subdivision of this section, (7) (a) *Transactions with Third Persons—Between Witness and Third Persons.*

**7. Stackable v. Stackable**, 65 Mich. 515.

**8. Denial of Transaction.** — *Pillard v. Dunn*, 108 Mich. 301.

to the action are not within the inhibition of the statute.<sup>1</sup>

**Contest of Wills.** — The statute is limited in its reason and spirit to contests or litigation on claims between other persons and the deceased existing prior to his death — that is, to such suits and proceedings as the deceased would have been if living a necessary party to, and, therefore, does not apply to the contest of a will between the heirs and legatees.<sup>2</sup>

**What Is "Equally" Within Knowledge of Deceased.** — The word "equally," as employed in the statute, does not relate to the degree of knowledge possessed by the parties, but is used in the sense of "alike," to preclude the party's evidence where the facts to which he is called were known to both.<sup>3</sup>

(4) *Matters Occurring Before Probate of Will or Appointment of Administrator.* — The *Missouri* statute provides that where an executor or administrator is a party the other party shall not be admitted to testify in his own favor except as to such acts or contracts as have been done or made since the probate of the will or the appointment of the administrator.<sup>4</sup>

(5) *Transactions with Partners and Other Joint Contractors* — (a) **Partners.** — In an action by or against a surviving partner, the opposing party is not, as a rule, competent to testify to transactions or conversations with the deceased partner. In some instances this is the result of the comprehensive language employed in the statutes, while in others it is expressly provided that in actions by or against a partner or joint contractor, the adverse party shall not testify to transactions with a partner or joint contractor since deceased.<sup>5</sup> But it has been held that the opposing party may testify where

1. *Ripley v. Seligman*, 88 Mich. 177; *Moulton v. Mason*, 21 Mich. 364.

2. **Statute Not Applicable to Contest of Will Between Heirs and Legatees.** — *Brown v. Bell*, 58 Mich. 58; *McHugh v. Fitzgerald*, 103 Mich. 21.

3. *Kimball v. Kimball*, 16 Mich. 215.

4. **Matters Occurring Before Probate, etc.** — *Wade v. Hardy*, 75 Mo. 400; *Leeper v. Taylor*, 111 Mo. 312; *Brown v. Foster*, 112 Mo. 297; *Wade v. Hardy*, 75 Mo. 400, *disapproving* *Ring v. Jamison*, 66 Mo. 424, and *Wood v. Matthews*, 73 Mo. 482, in so far as they are in conflict with this rule; *Kersey v. O'Day*, 173 Mo. 560; *Golden v. Tyer*, 180 Mo. 196; *Callahan v. Riggin*, 43 Mo. App. 130; *Merrill v. Pinney*, 43 Vt. 605.

In *Indiana* the survivor is not competent to testify in denial of admissions proved against him to have been made even after the death of the testator or intestate, unless he is required by the court to testify. *Froman v. Rous*, 83 Ind. 94.

**But if the Transaction Was with the Executor himself,** the other party may testify to it in rebuttal when the executor has proved it by a disinterested witness. *Straubher v. Mohler*, 80 Ill. 21.

5. **Transactions with Partners** — *Alabama.* — *Hussey v. Peebles*, 53 Ala. 432; *Jackson v. Clouton*, 66 Ala. 29; *Parker v. Edwards*, 85 Ala. 246; *Edwards v. Parker*, 88 Ala. 356. The rule was otherwise in *Alabama* under the earlier form of the statute, which, by its terms, applied only to "suits or proceedings by or against executors or administrators." See *Bragg v. Clark*, 50 Ala. 363; *Bradley v. Patton*, 51 Ala. 108.

*Georgia.* — *Ford v. Kennedy*, 64 Ga. 537; *Adams v. Eatherly Hardware Co.*, 78 Ga. 485; *Morgan v. Johnson*, 87 Ga. 382; *Dowdy v. Watson*, 115 Ga. 12.

*Illinois.* — *Foster v. Hart*, 29 Ill. App. 260.

*Iowa.* — *Salyers v. Monroe*, 104 Iowa 74.

*Kansas.* — *Hook v. Bixby*, 13 Kan. 164.

*Kentucky.* — *Lawhorn v. Carter*, 11 Bush (Ky.) 7; *Alexander v. Alford*, 89 Ky. 105; *Collins v. Fenley*, (Ky. 1899) 53 S. W. Rep. 667.

*Missouri.* — *Wiley v. Morse*, 30 Mo. App. 266.

*Nevada.* — *Roney v. Buckland*, 4 Nev. 45; *Gage v. Phillips*, 21 Nev. 150. It was held in *Crane v. Gloster*, 13 Nev. 279, and *Vesey v. Benton*, 13 Nev. 284, that evidence of transactions with a deceased partner might be given in actions by or against the surviving partner, but the two last-cited cases were decided under a statute differing essentially from the statute now in force.

*New York.* — *Pettit v. Geesler*, (County Ct.) 58 How. Pr. (N. Y.) 195; *Farley v. Norton*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 438; *Green v. Edick*, 56 N. Y. 613; *Clift v. Moses*, 112 N. Y. 434; *Manning v. Schmitt*, 4 N. Y. App. Div. 131. Prior to 1866, a plaintiff was not prohibited, by § 399 of the New York Code of Procedure, from testifying to a transaction with a deceased partner as against a surviving partner. *Tremper v. Conklin*, 44 N. Y. 58.

*Ohio.* — *Baxter v. Leith*, 28 Ohio St. 84.

*Pennsylvania.* — *Hanna v. Wray*, 77 Pa. St. 27; *Standbridge v. Catanach*, 83 Pa. St. 368.

*Texas.* — *Stuart v. Altman*, 8 Tex. Civ. App. 657.

*Washington.* — *Bay View Brewing Co. v. Grubb*, 31 Wash. 34.

*West Virginia.* — The provision of the present *West Virginia* statute is as stated in the text. See Code W. Va. 1899, p. 875, § 23. As to the former statute, see *Carlton v. Mays*, 8 W. Va. 245.

And see generally the statutes of the several states.

the surviving partner was present and was cognizant of the whole transaction,<sup>1</sup> especially where the surviving partner has testified with regard to the transaction and the testimony of the witness is for the purpose of rebutting such testimony,<sup>2</sup> or where the transaction or conversation proposed to be proved was had with the surviving partner, though before the death of his copartner.<sup>3</sup> In some states, however, the exceptions to the general provision removing the disability of parties and interested persons do not include actions and proceedings by or against the survivor of two or more partners or joint contractors.<sup>4</sup>

**Proof of Partnership.** — In an action to charge a decedent's estate with a partnership liability, a surviving partner is not competent to prove that the deceased was a member of the firm.<sup>5</sup> But where the action is against the surviving partner, he may testify that a deceased person was a member of the firm, for the purpose of excluding the testimony of the other party.<sup>6</sup>

**Surviving Partner as Against Deceased Partner.** — In a proceeding between a surviving partner and the personal representative of the deceased partner, *e. g.*, for an accounting, the survivor is not a competent witness in his own behalf as to the partnership affairs, and the incompetency here may be predicated on the statutory exclusion of either the adverse party to a proceeding by or against the personal representative of a decedent, or the surviving partner to the contract or thing in action.<sup>7</sup> Nor can the surviving partner testify to transactions with the deceased in an action by a creditor of the firm, for the purpose of relieving the firm from liability solely on the decedent partner's estate.<sup>8</sup>

**Partner Against Estate of Deceased Debtor or Creditor.** — Where a party is prohibited from testifying in an action where the estate of a decedent is interested, a member of a firm suing a decedent's estate or being sued by the estate is within the prohibition.<sup>9</sup>

**Whether Both Parties Are Excluded.** — The statutes sometimes provide that

#### 1. Transactions in Presence of Surviving Partner.

— *Savard v. Herbert*, 1 Colo. App. 445; *Leaptrot v. Robertson*, 37 Ga. 586; *McGehee v. Jones*, 41 Ga. 123; *Vandergrif v. Swinney*, 158 Mo. 527; *Kale v. Elliott*, 18 Hun (N. Y.) 198; *Comstock v. Hier*, 73 N. Y. 280, 29 Am. Rep. 142; *Peacock v. Stott*, 90 N. Car. 518.

#### 2. Huntley v. Goodyear, 182 Pa. St. 613.

**3. Transactions with Survivor in Lifetime of Decedent.** — *McCutchen v. Rice*, 56 Miss. 455; *Bennett v. Frary*, 55 Tex. 145.

In order to exclude the witness, it should be made to appear that the transaction was with the deceased partner. *Alabama Gold L. Ins. Co. v. Sledge*, 62 Ala. 566.

The death of a partner who is a nonresident, and is not actively engaged in the business of the firm, will not disqualify an opposing party as a witness. *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

**4. Parties Competent in Action by or Against Surviving Partner** — *Georgia*. — *Whitley v. Hudson*, 114 Ga. 668.

*Indiana*. — *Nicklaus v. Dahn*, 63 Ind. 87; *Dodds v. Rogers*, 68 Ind. 110; *Hess v. Lowrey*, 122 Ind. 231; *Wood v. Stewart*, 9 Ind. App. 321; *Hines v. Consolidated Coal, etc., Co.*, 29 Ind. App. 563.

*Mississippi*. — *Faler v. Jordan*, 44 Miss. 283; *Love v. Stone*, 56 Miss. 449; *McCutchen v. Rice*, 56 Miss. 455; *Combs v. Black*, 62 Miss. 831.

*Rhode Island*. — *Clapp v. Hull*, 18 R. I. 652.

*Texas*. — *Roberts v. Yarboro*, 41 Tex. 449.

**5. Proof of Partnership** — *Colorado*. — *Cooper v. Wood*, 1 Colo. App. 101.

*Florida*. — *Eppinger v. Canepa*, 20 Fla. 262.

*Illinois*. — *Hurlbut v. Meeker*, 104 Ill. 541.

*Indiana*. — *Leach v. Dickerson*, 14 Ind. App. 375.

*Iowa*. — *Giesecke Boot, etc., Mfg. Co. v. SeEVERS*, 85 Iowa 685.

*New York*. — *Hunter v. Herrick*, 26 Hun (N. Y.) 272, affirmed without opinion 92 N. Y. 626.

*North Carolina*. — *Sikes v. Parker*, 95 N. Car. 232; *Lyon v. Pender*, 118 N. Car. 147; *Charlotte Oil, etc., Co. v. Rippey*, 123 N. Car. 656.

*Pennsylvania*. — *Hogeboom v. Gibbs*, 88 Pa. St. 235.

**6. Spencer v. Trafford, 42 Md. 1.**

**7. Survivor as Against Deceased Partner** — *Alabama*. — *Causler v. Wharton*, 62 Ala. 358.

*Kentucky*. — *Garnett v. Wills*, (Ky. 1902) 69 S. W. Rep. 695. See also *Warren Deposit Bank v. Younglove*, 112 Ky. 767.

*New York*. — *Lyon v. Snyder*, 61 Barb. (N. Y.) 172.

*North Carolina*. — *Armfield v. Colvert*, 103 N. Car. 147.

*Tennessee*. — *Godfrey v. Templeton*, 86 Tenn. 161.

*Texas*. — *Lumpkin v. Montgomery*, (Tex. Civ. App. 1894) 25 S. W. Rep. 661.

**8. Warren Deposit Bank v. Younglove, 112 Ky. 767.** See, however, *Lancaster County Nat. Bank v. Henning*, 171 Pa. St. 390.

**9. Rogers v. McMillen, 6 Colo. App. 14.**



neither party shall testify in his own favor,<sup>1</sup> but the usual provision is that no party to an action or person interested in the result shall testify in his own behalf concerning any personal transaction or communication with a deceased person, when the adverse party is the surviving partner of or joint contractor with such deceased person.<sup>2</sup>

(b) **Joint Contractors Other than Partners.** — In some jurisdictions, other joint contractors are accorded the same protection as copartners, and after the death of one of them, with whom a transaction was had, the opposing party may not testify thereto;<sup>3</sup> but in other jurisdictions, the mouth of the opposing party is closed only when a sole party on the other side is dead, or, if there are several, when they are all dead;<sup>4</sup> and in some jurisdictions, though the testimony of the witness in an action against a surviving obligor and the estate of a deceased obligor is not competent to be used against the deceased obligor's estate, it may be used as against the surviving obligor.<sup>5</sup> Where the action is against a surviving joint obligor and the representative of his deceased co-obligor, the surviving obligor has been held not to be a competent witness in favor of the deceased obligor's estate in regard to transactions between the obligee, the decedent, and himself, under a statute which excludes parties to actions in which a decedent's estate is interested, unless the witness is called by the opposite party.<sup>6</sup>

(6) **Transactions with Agents** — (a) **Agents Generally** — aa. **COMPETENCY OF PARTY** — (aa) *Where Agent Is Living and Competent to Testify.* — Where a transaction was had with an agent of a person since deceased, it is obvious that the case does not involve any transaction with a deceased person, if the agent is alive and com-

1. **Both Parties Excluded.** — Thus, the *Minnesota* statute provides that it shall not be competent for any party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with or admission of a deceased or insane party or person relative to any matter at issue between the parties. Stat. Minn. (1896), § 5660.

2. **Surviving Partner Not Excluded.** — *Bryan v. Tooke*, 60 Ga. 437. And see generally the statutes of the several states.

3. **Joint Contractors Other than Partners** — *California.* — *Moore v. Schofield*, 96 Cal. 486.

*Florida.* — *Harris v. Jacksonville Bank*, 22 Fla. 501.

*Iowa.* — *Gavin v. Bischoff*, 80 Iowa 605.

*Pennsylvania.* — *Harnish v. Herr*, 98 Pa. St. 6; *Dean v. Warnock*, 98 Pa. St. 565; *Lacock v. Com.*, 99 Pa. St. 207.

Compare *Mead v. Weaver*, 42 Neb. 149.

**Transactions with Surviving Contractor.** — In such cases the opposing party may testify to transactions and conversations with the surviving joint contractor. *Rawson v. Cherry*, 44 Ga. 75; *Nugent v. Curran*, 77 Mo. 323.

**Matters Known to Survivor or Testified to by Him.** — The rule does not apply where the surviving joint contractor is cognizant of all matters testified to by his opponent and may contradict him if he will. *North Georgia Min. Co. v. Latimer*, 51 Ga. 47; *Harrison v. Neely*, 41 Ohio St. 334. Or where the surviving joint contractor has taken the stand and testified as to the transactions himself. *Hammond v. Drew*, 61 Ga. 189.

4. *Kentucky.* — *Worthley v. Hammond*, 13 Bush (Ky.) 510.

*Minnesota.* — *Johnson v. Coles*, 21 Minn. 108.

*Missouri.* — *Fulkerson v. Thornton*, 68 Mo.

468; *Nugent v. Curran*, 77 Mo. 323; *Wallace v. Jecko*, 25 Mo. App. 313; *Weary v. Wittmer*, 77 Mo. App. 546.

*North Carolina.* — *Johnson v. Townsend*, 117 N. Car. 338.

*Pennsylvania.* — *Palmer v. Farrell*, 129 Pa. St. 162.

*Vermont.* — *Paddock v. Potter*, 67 Vt. 360.

The rule was the same in *Massachusetts* before the repeal of the excepting clause of the statute. *Goss v. Austin*, 11 Allen (Mass.) 525; *Hayward v. French*, 12 Gray (Mass.) 459.

**Husband and Wife.** — In *Messimer v. McCray*, 113 Mo. 382, it was held that where a wife joins her husband in a conveyance of his land they are not joint contractors within the meaning of the rule, and the grantee, or one claiming under him, is not competent to prove the transaction after the death of the husband, though the wife be living.

5. *Shain v. Forbes*, 82 Cal. 577; *Turpie v. Lowe*, 158 Ind. 314.

**Where the Contract Was Several as Well as Joint,** and the survivor was liable to a separate action as well before as after the death of his co-contractor, it was held that the opposing party might testify. *Sprague v. Swift*, 28 Hun (N. Y.) 49.

Likewise, in an action by the personal representative of a deceased person against two defendants, where separate judgments may be rendered against them, one of them may testify for the other, though incompetent in his own behalf. *Ely v. Clute*, 19 Hun (N. Y.) 35.

6. *Sublett v. Hodges*, 88 Ala. 491.

In *California* the surviving joint contractor may not testify for the opposing party as to personal transactions with his deceased co-contractor. *Moore v. Schofield*, 96 Cal. 486.

petent to testify. Therefore, under the statutes which limit the rule of exclusion to personal communications and transactions between the witness and a person since deceased, the other party to the transaction with such agent is competent to testify in his own behalf concerning it.<sup>1</sup> In order that the opposing party may be competent to testify on the ground that the transaction was with the agent of the decedent, the transaction or communication must have been between himself and the agent; the mere presence of the agent of the decedent does not render the opposing party competent to testify to a conversation with the decedent,<sup>2</sup> nor can he testify as to what the agent said to him concerning statements by the decedent in regard to the transaction involved, which transaction was between the witness and the decedent.<sup>3</sup> Some of the statutes prescribe a broader rule of exclusion, and declare parties to actions by or against representatives of deceased or insane persons, and persons interested in the result of such action, to be incompetent as witnesses in their own behalf, without limiting the incompetency to communications or transactions between the witness and such deceased or insane person. The result of this is that a surviving party to a contract or cause of action, in which the decedent was represented by an agent, is not competent to testify as to such transaction with the agent, though he is alive and competent to testify at the time of the trial.<sup>4</sup> But in some instances statutes which prescribe such broad rule of exclusion expressly provide that when the contract or transaction in issue was made with an agent of the person since deceased, and the agent is alive and competent to testify, such party may testify as to the transaction;<sup>5</sup> and an exception in such statute, "unless the contract was made with a person who is living and competent to testify," includes the person through whose agency the contract was made, so as to render a party competent as a witness where the contract was made with an agent of the other contracting party who has since died.<sup>6</sup> To bring a case within the

**1. Transactions with Agents — Competency of Party** — *Georgia*. — *Freeman v. Bigham*, 65 Ga. 580.

*Illinois*. — *Jacquin v. Davidson*, 49 Ill. 82.  
*Kentucky*. — *Blood v. Herring*, (Ky. 1901) 61 S. W. Rep. 273; *Crutcher v. Stuart*, (Ky. 1904) 82 S. W. Rep. 421.

*Michigan*. — *Ward v. Ward*, 37 Mich. 253; *Smith v. Smith*, 91 Mich. 7.

*Missouri*. — *Orr v. Rode*, 101 Mo. 387; *Miller v. Wilson*, 126 Mo. 48.

*Nebraska*. — *Dodd v. Skelton*, (Neb. 1902) 89 S. W. Rep. 297.

*New York*. — *Pratt v. Elkins*, 80 N. Y. 201.

*West Virginia*. — *Voss v. King*, 33 W. Va. 236.

In *Lemon v. Hornsby*, 63 Ga. 271, it was held that one whom it was sought to make liable on a draft by reason of the acceptance of his agent was competent to prove a want of authority in the agent, notwithstanding the previous death of the drawer, the payee and the accepting agent both being alive.

**2. Mere Presence of Agent Not Sufficient.** — *Hutchinson v. Cleary*, 3 N. Dak. 270.

See also *Reherd v. Clem*, 86 Va. 374, in which it was said that, conceding the admissibility of the witness to testify as to transactions with the decedent's agent (as to which see Code Va. 1887, § 3346), yet the testimony must be confined to such portion of the transaction as was had personally with the agent.

**Transaction with Agent Participated in by Decedent.** — In *McRae v. Malloy*, 90 N. Car. 521, a

distinction was drawn between a transaction with an agent in the presence of his deceased principal, and a transaction with the principal in the presence of the agent who participated therein. In this case the plaintiff's intestate and the defendant entered into the contract sued on after negotiations between them. The attorneys of the plaintiff's intestate were present assisting in the negotiations, and the defendant undertook to prove conversations between himself and such attorneys on the ground that no transaction or communication with the decedent was involved. The court, however, considered this a misconception of the nature and character of what transpired. See also *Halyburton v. Dobson*, 65 N. Car. 88.

**3. Conversation with Agent as to Statements by Decedent.** — *Freeman v. Bigham*, 65 Ga. 580. It is apparent that such testimony is subject to the objection that it involves an attempt to do indirectly what cannot be done directly.

**4. Total Exclusion of Witness** — *Illinois*. — *Trunkay v. Hedstrom*, 131 Ill. 204.

*Mississippi*. — *Davis v. Viener*, (Miss. 1900) 27 So. Rep. 877.

*Ohio*. — See *Roberts v. Remy*, 56 Ohio St. 249.

*Pennsylvania*. — *Sutherland v. Ross*, 140 Pa. St. 379.

*Tennessee*. — *Cottrell v. Woodson*, 11 Heisk. (Tenn.) 681.

Compare the statutes in other jurisdictions.

**5.** *Warth v. Brafman*, 85 Md. 674; *Roberts v. Remy*, 56 Ohio St. 249.

**6.** *Miller v. Wilson*, 126 Mo. 48; *Roeder v.*

exception the transaction must have been in fact had with an agent of the deceased,<sup>1</sup> and where it is sought to bring a case within such exception, the question of agency has been held to be a question for the determination of the court;<sup>2</sup> and the testimony of the witness must be restricted to that which was had personally with the agent.<sup>3</sup>

**Statement to Agent of Conversation with Decedent.**—A party may testify as to a conversation with an agent of the decedent had in the decedent's lifetime, in which such party informed the agent of statements previously made by the decedent, if such conversation constitutes a part of the *res gestæ*.<sup>4</sup>

(*bb*) *Where Agent Is Dead or Not Competent to Testify.*—In some instances the statutes have expressly provided that a person within the rule of exclusion cannot testify with regard to transactions with the party against whom the evidence is sought to be introduced, where the transaction on the part of such party was had by the witness with his agent or other person acting in a representative or fiduciary capacity for him and who has since died,<sup>5</sup> or that no person shall testify for himself as to any transaction with another who is dead.<sup>6</sup> And, of course, under such a statute where the transaction was with the agent of another, and such agent is dead, the witness cannot testify with regard to the transaction with the agent. So, also, where the statute prescribes the broad rule of exclusion that no party or person interested shall testify in actions against representatives of deceased persons, etc., such a person cannot testify to transactions with the agent of such deceased person whether the agent is dead or not.<sup>7</sup> Where, however, the statute merely prohibits the

Shryock, 61 Mo. App. 485; Reed v. Crissey, 63 Mo. App. 184.

**Necessaries Furnished Wife.**—Thus, under such a statute where necessities were furnished to a wife as the agent of her husband, the person furnishing such necessities may, in an action against the husband's estate, testify with regard to the transaction. Reed v. Crissey, 63 Mo. App. 184.

1. Booth v. McJilton, 82 Va. 827.

**Who Are Agents.**—The custodian of an agreement between parties is not such an agent as will make the survivor a competent witness in his own behalf. Comer v. Comer, 24 Ill. App. 526.

**The Officer Before Whom a Deed Is Acknowledged** is not an agent of the grantee within the meaning of the rule, so as to let in the evidence of the grantor after the death of the grantee. Booth v. McJilton, 82 Va. 827.

2. Cairns v. Mooney, 62 Vt. 172.

3. Reherd v. Clem, 86 Va. 374.

4. **Res Gestæ.**—Gilmer v. McNairy, 69 N. Car. 335; State v. Morris, 69 N. Car. 444; Tredwell v. Graham, 88 N. Car. 208.

But such a conversation is not admissible, if it is not a part of the *res gestæ*. Cottrell v. Cottrell, 81 Ind. 87.

As to what constitutes *res gestæ* in general, see the title RES GESTÆ, vol. 24, p. 660.

5. **Death of Agent—Express Statutory Provision**—Alabama.—Warten v. Strane, 82 Ala. 311; Stanley v. Sheffield Land, etc., Co., 83 Ala. 260; Tabler v. Sheffield Land, etc., Co., 87 Ala. 305; Mobile Sav. Bank v. McDonnell, 87 Ala. 736; Downing v. Woodstock Iron Co., 93 Ala. 262; Burgess v. American Mortg. Co., 115 Ala. 468; Daniel v. Bradford, 132 Ala. 262.

Georgia.—Doerflinger v. Nelson, 76 Ga. 101; Parish v. Weed Sewing Mach. Co., 79 Ga. 682; Carlton v. Western, etc., R. Co., 81

Ga. 531; Johnson v. Hart, 82 Ga. 767; Mayfield v. Savannah, etc., R. Co., 87 Ga. 374; Register v. Aultman, etc., Co., 106 Ga. 331; Florida Cent., etc., R. Co. v. Usina, 111 Ga. 697.

Illinois.—Rothstein v. Siegel, 102 Ill. App. 600.

Missouri.—Stanton v. Ryan, 41 Mo. 510; Butts v. Phelps, 79 Mo. 302; Williams v. Edwards, 94 Mo. 447; St. Charles First Nat. Bank v. Payne, 111 Mo. 298; Nichols v. Jones, 32 Mo. App. 657; Aultman v. Adams, 35 Mo. App. 503; Robertson v. Reed, 38 Mo. App. 32.

Wisconsin.—Maldaner v. Smith, 102 Wis. 30; Moore v. May, 117 Wis. 192.

An executor is not a competent witness for the sureties on his bond, to prove the payment of a legacy to the agent of a legatee, such agent being dead at the time of the trial. Leach v. McFadden, 110 Mo. 584.

6. Knight v. Wilson, 58 S. W. Rep. 439, 22 Ky. L. Rep. 545; William Tarr Co. v. Kimbrough, (Ky. 1896) 34 S. W. Rep. 528; Breckinridge v. McRoberts, (Ky. 1898) 47 S. W. Rep. 454; Murray v. East End Imp. Co., (Ky. 1901) 60 S. W. Rep. 648; Mutual L. Ins. Co. v. O'Neil, (Ky. 1903) 76 N. W. Rep. 839; Harpending v. Daniel, 80 Ky. 449; Griswold v. Edison, 32 Minn. 436; Farmers' Union Elevator Co. v. Syndicate Ins. Co., 40 Minn. 152; Cornell v. Barnes, 26 Wis. 473; McIndoe v. Clarke, 57 Wis. 165; Moore v. May, 117 Wis. 192; Meyer v. Hafemeister, 119 Wis. 539.

7. Illinois.—Trunkay v. Hedstrom, 131 Ill. 204.

Mississippi.—Davis v. Viener, (Miss. 1900) 27 So. Rep. 877.

Missouri.—Williams v. Edwards, 94 Mo. 447; Leach v. McFadden, 110 Mo. 584; Banking House v. Rood, 132 Mo. 256; Hollmann v. Lange, 143 Mo. 100; Sidway v. Missouri Land,



persons within the rule of exclusion from testifying as to transactions, etc., with a decedent in an action by or against the representative, etc., of a deceased person, etc., a witness is not prohibited from testifying as to transactions with an agent who has since died, where the obligation contracted or incurred by the agent is sought to be enforced against either the principal or his estate.<sup>1</sup> Still, if the effect of the action is to impose a burden on the estate of the agent with whom the transaction was had in the name of his principal, though the action is against the principal the witness has been held incompetent to testify as to the transaction with the deceased agent.<sup>2</sup> A person contracting with another, through the agent of such other, does not derive his interest from the agent, so as to render him incompetent to testify as to the transaction with the agent, under a statute prohibiting a party to an action from testifying as to a personal transaction with a decedent from whom he derives his interest.<sup>3</sup> In the absence of any statutory prohibition, a party to an action otherwise competent may, of course, testify to transactions with the deceased agent of an adverse party.<sup>4</sup>

*bb. COMPETENCY OF AGENT.* — Where a person, since deceased, acted in the transaction in issue through an agent, or where the other party to the transaction acted through an agent, in an action against the representative of the decedent, the agent is not regarded as being interested in the event of the action so as to render him incompetent to testify against the representative of the decedent with regard to such transaction, under statutes rendering incompetent a person interested in the action.<sup>5</sup> Nor can the testimony of

etc., Co., 163 Mo. 342; *Crosno v. J. W. Bowser Milling Co.*, (Mo. App. 1904) 80 S. W. Rep. 275; *Central Bank v. Thayer*, (Mo. 1904) 82 S. W. Rep. 142; *Nichols v. Jones*, 32 Mo. App. 657; *Aultman v. Adams*, 35 Mo. App. 503; *Robertson v. Reed*, 38 Mo. App. 32; *McCormick Harvesting Mach. Co. v. Heath*, 65 Mo. App. 461; *Nelson v. Kansas City, etc., R. Co.*, 66 Mo. App. 647; *Wilden v. McAllister*, 91 Mo. App. 446; *Winter v. Supreme Lodge, etc.*, 96 Mo. App. 1.

**1. Statutes Excluding Testimony as to Transactions, etc., with Decedent** — *Iowa*. — *Reynolds v. Iowa, etc., Ins. Co.*, 80 Iowa 563; *Bellows v. Litchfield*, 83 Iowa 36.

*Kansas*. — *Missouri Pac. R. Co. v. Phelps*, 10 Kan. App. 1.

*Maryland*. — *Spencer v. Trafford*, 42 Md. 1; *South Baltimore Co. v. Muhlbach*, 69 Md. 395.

*Michigan*. — *Bullock v. Tompkins*, 125 Mich. 17.

*Nebraska*. — *German Ins. Co. v. Frederick*, 57 Neb. 538.

*New York*. — *Hildebrant v. Crawford*, 65 N. Y. 107, affirming 6 Lans. (N. Y.) 502; *Flaherty v. Herring-Hall-Marvin Safe Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 329.

*North Carolina*. — *Howerton v. Lattimer*, 68 N. Car. 370; *Morgan v. Bunting*, 86 N. Car. 66; *Sprague v. Bond*, 113 N. Car. 551; *Gevaltney v. Provident Sav. L. Assur. Soc.*, 132 N. Car. 925.

*Ohio*. — *Cochran v. Almack*, 39 Ohio St. 314; *First Nat. Bank v. Cornell*, 41 Ohio St. 401.

*Pennsylvania*. — *Hostetter v. Schalk*, 85 Pa. St. 220.

*Texas*. — *Bexar Bldg., etc., Assoc. v. Newman*, (Tex. Civ. App. 1893) 25 S. W. Rep. 461; *Davis v. Weathered*, (Tex. Civ. App. 1897) 43 S. W. Rep. 21.

*Vermont*. — *Poquet v. North Hero*, 44 Vt. 91.

*West Virginia*. — *Voss v. King*, 33 W. Va. 236.

See also *Jacksonville, etc., R., etc., Co. v. Hooper*, 160 U. S. 514.

In *Indiana* it is held that a deceased partner is an agent of the surviving partner within the meaning of the rule. *Dodds v. Rogers*, 68 Ind. 110; *Hess v. Lowrey*, 122 Ind. 231.

**2.** *McCutcheon v. Loud*, 71 Mich. 433.

**3.** *Roberts v. Richmond, etc., R. Co.*, 109 N. Car. 670; *Sprague v. Bond*, 113 N. Car. 551.

**4.** *Missouri, etc., R. Co. v. Byrne*, (C. C. A.) 100 Fed. Rep. 359 (announcing law in Indian Territory).

**5. Competency of Agent — Interest** — *Alabama*. — *Garrett v. Trabue*, 82 Ala. 227; *Davis v. Davis*, 93 Ala. 173; *Manegold v. Massachusetts L. Ins. Co.*, 131 Ala. 180.

*California*. — *Nicholson v. Randall Banking Co.*, 130 Cal. 533.

*Colorado*. — *King Shoe Co. v. Chittenden*, 16 Colo. App. 441.

*Florida*. — *Adams v. Internal Imp. Fund*, 37 Fla. 266.

*Georgia*. — *Ullman v. Brunswick Title Guarantee, etc., Co.*, 96 Ga. 625; *Jackson v. Bennett*, 98 Ga. 106; *Rosser v. Georgia Pac. R. Co.*, 102 Ga. 164; *Maxwell v. Imperial Fertilizer Co.*, 103 Ga. 108; *Cody v. Gainesville First Nat. Bank*, 103 Ga. 789; *Florida Cent., etc., R. Co. v. Usina*, 111 Ga. 697; *Skeen v. Moore*, 120 Ga. 1057.

*Illinois*. — *Bell v. Chartier*, 106 Ill. App. 140.

*Iowa*. — *Shoemaker v. Smith*, 80 Iowa 655; *O'Neill v. Wilcox*, 115 Iowa 15.

*Kentucky*. — *Lyon v. Logan County Bank*, (Ky. 1904) 78 S. W. Rep. 454.

the agent in behalf of his principal be regarded as testimony for himself;<sup>1</sup> nor is the agent regarded as a party to the transaction so as to render him incompetent under the statutes rendering incompetent a party to the contract or cause of action in issue;<sup>2</sup> nor as one through whom his principal derives his interest.<sup>3</sup> So, also, where the statutes merely render incompetent the parties to the action, an agent of one of the surviving parties to a transaction, if not a party to the action, may testify in favor of his principal, against the representative of the deceased party to the transaction.<sup>4</sup> In some jurisdictions the statutes expressly provide that no person who shall have acted as an agent in the making or continuing of a contract with any person shall be a competent witness in any suit involving such contract in behalf of his principal, as to matters occurring prior to the death of such decedent;<sup>5</sup> or

*Michigan.*—*Krause v. Equitable L. Assur. Soc.*, 105 Mich. 329.

*Minnesota.*—*Darwin v. Keigher*, 45 Minn. 64.

*Missouri.*—*Clark v. Thias*, 173 Mo. 628; *Kuhn v. Germania L. Ins. Co.*, 71 Mo. App. 305. Compare *Edwards v. Warner*, 84 Mo. App. 200.

*New York.*—*Nearpass v. Gilman*, 104 N. Y. 506, affirming 16 Hun (N. Y.) 121; *Whitman v. Foley*, 125 N. Y. 651; *Connor v. New York*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 85; *Mertens v. Wakefield*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501.

*South Carolina.*—*Blakely v. Frazier*, 11 S. Car. 122.

*Texas.*—*Lomax v. Marlow*, (Tex. Civ. App. 1896) 38 S. W. Rep. 228.

**1. Not Testimony in His Own Behalf.**—*Cobb v. Wolf*, 96 Ky. 418; *Fidelity, etc., Co. v. Goff*, (Ky. 1895) 30 S. W. Rep. 626; *Brooks v. Spain*, (Ky. 1901) 60 S. W. Rep. 184.

**2. Agent Is Not Party to Transaction**—*Alabama.*—*Garrett v. Trabue*, 82 Ala. 227.

*Missouri.*—*Stanton v. Ryan*, 41 Mo. 510; *Brim v. Fleming*, 135 Mo. 597; *Southern Commercial Sav. Bank v. Slattery*, 166 Mo. 620; *Baer v. Pfaff*, 44 Mo. App. 35; *Samuel v. Bartee*, 53 Mo. App. 587; *Dawson v. Wombles*, (Mo. App. 1904) 78 S. W. Rep. 823. See, however, *Green v. Ditsch*, 143 Mo. 1; *C. E. Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577.

*Pennsylvania.*—*Sargeant v. National L. Ins. Co.*, 189 Pa. St. 341; *Lippincott's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 219.

*Vermont.*—*Gifford v. Thomas*, 62 Vt. 34; *Smith v. Pierce*, 65 Vt. 200; *McDonald v. Webster*, 71 Vt. 392.

*Virginia.*—*Roanoke First Nat. Bank v. Terry*, 99 Va. 194; *Goodell v. Gibbons*, 91 Va. 608; *Richmond Union Pass. R. Co. v. New York, etc., R. Co.*, 95 Va. 386; *Mutual L. Ins. Co. v. Oliver*, 95 Va. 445.

**Trustee as Agent.**—*Orr v. Rode*, 101 Mo. 387.

**3. Principal Does Not Derive Interest Through Agent.**—*Whitman v. Foley*, 125 N. Y. 651; *Mertens v. Wakefield*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501; *Hanf v. Northwestern Masonic Aid Assoc.*, 76 Wis. 450. See also *Nicholson v. Randall Banking Co.*, 130 Cal. 533; *Laack v. Runge*, 104 Wis. 59.

**4. Agent of Party**—*California.*—*City Sav. Bank v. Enos*, 135 Cal. 167.

*Illinois.*—*Grafton Dolomite Stone Co. v. St. Louis, etc., R. Co.*, 199 Ill. 458.

*Michigan.*—*De Mary v. Burtenshaw*, 131 Mich. 326.

*Minnesota.*—*Darwin v. Keigher*, 45 Minn. 64.

*Ohio.*—*Shaub v. Smith*, 50 Ohio St. 648.

*Tennessee.*—*Montague v. Thomason*, 91 Tenn. 168.

*Texas.*—*Lomax v. Marlow*, (Tex. Civ. App. 1896) 38 S. W. Rep. 228; *Saunders v. Weekes*, (Tex. Civ. App. 1900) 55 S. W. Rep. 33.

*Virginia.*—*Wager v. Barbour*, 84 Va. 419.

*Wisconsin.*—*Hanf v. Northwestern Masonic Aid Assoc.*, 76 Wis. 450.

**5. Express Exclusion of Agents**—*Georgia.*—*Thompson v. Ray*, 92 Ga. 540; *Hendrick v. Daniel*, 119 Ga. 358.

*Indiana.*—*Insurance Co. of North America v. Brim*, 111 Ind. 281; *Piper v. Fosher*, 121 Ind. 412; *Devol v. Dye*, 123 Ind. 321.

*Michigan.*—*Gustafson v. Eger*, 132 Mich. 387; *Wood v. Kaufman*, (Mich. 1903) 97 N. W. Rep. 47; *Albring v. Ward*, (Mich. 1904) 100 N. W. Rep. 609. Comp. Laws Mich., § 10212 related solely to agents of corporations, and did not render incompetent the agent of a partnership. *De Mary v. Burtenshaw*, 131 Mich. 326. This statute, however, was subsequently amended by Public Acts 1901, No. 239, so as to extend to agents generally. *Gustafson v. Eger*, 132 Mich. 387. In *Wood v. Kaufman*, (Mich. 1903) 97 N. W. Rep. 47, this act was held constitutional.

**Agent of Corporation.**—In *Georgia* it has been held that the statute providing that no agent or attorney at law of a surviving or sane party shall be allowed to testify does not prohibit the agent of a corporation from testifying as a witness in an action to which it was a party concerning transactions had between him while acting in behalf of the corporation and the deceased person whose legal representative was the opposite party to the case. *Cody v. Gainesville First Nat. Bank*, 103 Ga. 789, reversing opinion on prior appeal between same parties 93 Ga. 127, and following *Ullman v. Brunswick Title Guarantee, etc., Co.*, 96 Ga. 625; *Rosser v. Georgia Pac. R. Co.*, 102 Ga. 164; *Maxwell v. Imperial Fertilizer Co.*, 103 Ga. 108. See also *Florida Cent., etc., R. Co. v. Usina*, 111 Ga. 697; *Holston v. Southern R. Co.*, 116 Ga. 656.

**Agent of Decedent.**—The *Georgia* act does not render incompetent as a witness the agent

they exclude expressly the agents of a corporation from testifying in behalf of the corporation when the other party to the transaction, in which the agent participated on behalf of the corporation, is dead.<sup>1</sup> To bring a person within such provision, his testimony must relate to a transaction in which he in fact participated as agent,<sup>2</sup> and the transaction must have been with the decedent.<sup>3</sup>

**Proof of Agency.** — An agent of one since deceased is competent to prove the fact of his agency and the scope of his authority,<sup>4</sup> and he is competent for these purposes though called to testify against the personal representative of his deceased principal.<sup>5</sup> And where the surviving party to a contract the other party to which is dead sues the latter's agent, through whom the contract was made, for fraudulent representations as to his authority, the agent is competent to testify in his own favor upon the question of his authority though his principal be dead.<sup>6</sup>

**Actual Interest of Agent in Suit.** — Though the mere relation of agency will not disqualify the agent as a witness on the ground of interest, he may be disqualified by reason of interest where he has an actual and substantive interest in the event of the action.<sup>7</sup>

**Agent of Undisclosed Principal.** — Thus, where an agent acted in his own name, without disclosing that of his principal, it has been held that he could not testify concerning the transaction after the death of the other party thereto, in his own behalf to avoid personal liability on the contract.<sup>8</sup>

(b) **Officers and Agents of Corporations.** — The question whether officers and agents of a corporation are disqualified to testify with regard to transactions conducted by them on behalf of the corporation with persons since deceased, on account of their participation in the transaction as agent, is governed, as a general rule, by the same rules applicable to agents generally.<sup>9</sup> So, also, the question

of the decedent, even though he is called to testify against the decedent's estate. *Skeen v. Moore*, 120 Ga. 1057. And this is true as to the *Indiana* statute, *Foster v. State*, 22 Ind. App. 471.

1. *Wallace v. Fraternal Mystic Circle*, 127 Mich. 387.

2. **Actual Participation as Agent.** — *Hidell v. Funkhouser*, 96 Ga. 85, *Hidell v. Dwinell*, 89 Ga. 532; *McCamy v. Cavender*, 92 Ga. 254; *Waterman Real Estate Exch. v. Stephens*, 71 Mich. 104; *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156; *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263.

In an action by the representative of the decedent's estate against the decedent's agent for neglect of duty as to a loan, the borrower did not act as the agent of the lender in communicating to the agent a direction by the lender with regard to the loan so as to render him incompetent to testify in favor of the agent with regard to such transactions. *Welsh v. Brown*, 8 Ind. App. 421.

So, also, one who signs the name of a surety at the latter's request and in his presence, the surety making his mark, does not act as the agent of the surety so as to render him incompetent to testify with regard to the transaction in an action against the surety's estate. *Treman v. Severin*, 16 Ind. App. 447.

**Depositee for Benefit of Third Person.** — A depositee with whom money is deposited to be given to third persons on the death of the depositor is the agent of the person to whom the money is to be given and not the agent of the depositor so as to render him incompe-

tent to testify in an action by the depositor's representative involving the validity of the gift. *Devol v. Dye*, 123 Ind. 321.

3. *Payne v. Miller*, 89 Ga. 73.

4. **Proof of Agency** — *Alabama*. — *Garrett v. Trabue*, 82 Ala. 227; *Davis v. Davis*, 93 Ala. 173.

*Pennsylvania*. — *Davis v. Hawkins*, 163 Pa. St. 228.

*Vermont*. — *Lytle v. Bond*, 40 Vt. 618; *Gifford v. Thomas*, 62 Vt. 34; *Smith v. Pierce*, 65 Vt. 200.

5. *Garrett v. Trabue*, 82 Ala. 227; *Davis v. Davis*, 93 Ala. 173; *Skeen v. Moore*, 120 Ga. 1057; *O'Neill v. Wilcox*, 115 Iowa 15; *Smith v. Pierce*, 65 Vt. 200.

6. *Davis v. Hawkins*, 163 Pa. St. 228.

7. **Actual Interest of Agent.** — As where he would be held personally liable to refund money paid out by him as decedent's agent. *Kroh v. Heins*, 48 Neb. 691.

8. *Standford v. Horwitz*, 49 Md. 525. See also *National Bank v. Bones*, 75 Ga. 246.

9. **Officers and Agents of Corporations** — *United States*. — *Stephens v. Bernays*, 42 Fed. Rep. 488; *Missouri, etc., R. Co. v. Byrne*, 100 Fed. Rep. 359, 40 C. C. A. 402.

*Alabama*. — *Manegold v. Massachusetts L. Ins. Co.*, 131 Ala. 181.

*Colorado*. — *King Shoe Co. v. Chittenden*, 16 Colo. App. 441.

*Georgia*. — *Central R., etc., Co. v. Papot*, 59 Ga. 342; *Southwestern R. Co. v. Papot*, 67 Ga. 675; *Planters, etc., Bank v. Neel*, 74 Ga. 576; *Gainesville First Nat. Bank v. Cody*, 93 Ga. 127; *Ullman v. Brunswick Title Guarantee*,



with regard to the competency of a party to a transaction conducted on behalf of the corporation by an agent since deceased is governed, as a general rule, by the same rules as apply where the agent of an individual is dead.<sup>1</sup> The question whether an officer or stockholder is disqualified by reason of interest or as a *quasi* party to the action has heretofore been discussed.<sup>2</sup>

(7) *Transactions with Third Persons* — (a) *Between Witness and Third Persons.* — Some of the statutes operate to exclude testimony as to transactions and communications with third persons, as well as those with a deceased or insane person;<sup>3</sup> but where the statute merely prohibits the witness from testifying as to transactions and communications with the decedent, he is not precluded from testifying with regard to transactions between himself and third persons in

etc., Co., 96 Ga. 625; *Rosser v. Georgia Pac. R. Co.*, 102 Ga. 164; *Maxwell v. Imperial Fertilizer Co.*, 103 Ga. 108; *Cody v. Gainesville First Nat. Bank*, 103 Ga. 789; *Florida Cent., etc., R. Co. v. Usina*, 111 Ga. 697; *Holston v. Southern R. Co.*, 116 Ga. 656.

*Illinois.* — *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; *Grafton Dolomite Stone Co. v. St. Louis, etc., R. Co.*, 199 Ill. 458.

*Indiana.* — *Insurance Co. of North America v. Brim*, 111 Ind. 281.

*Kentucky.* — *Fidelity, etc., Co. v. Goff*, (Ky. 1895) 30 S. W. Rep. 626; *Lyon v. Logan County Bank*, 78 S. W. Rep. 454, 25 Ky. L. Rep. 1668.

*Michigan.* — *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330; *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156; *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263, 127 Mich. 387; *Shelden v. Michigan Millers' Mut. F. Ins. Co.*, 124 Mich. 303.

*Mississippi.* — *Mitchell v. Tishomingo Sav. Inst.*, 56 Miss. 444.

*Missouri.* — *Soeding v. Bonner, etc., Iron Co.*, 35 Mo. App. 349; *Kuhn v. Germania L. Ins. Co.*, 71 Mo. App. 305; *C. E. Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577; *Williams v. Edwards*, 94 Mo. 447.

*New York.* — *Keller v. West, etc., Mfg. Co.*, 39 Hun (N. Y.) 348.

*Pennsylvania.* — *Arrott Steam-Power Mills Co. v. Way Mfg. Co.*, 143 Pa. St. 435; *Sargeant v. National L. Ins. Co.*, 189 Pa. St. 341; *Lippincott's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 219.

*Virginia.* — *Mutual L. Ins. Co. v. Oliver*, 95 Va. 445; *Roanoke First Nat. Bank v. Terry*, 99 Va. 194.

*Wisconsin.* — *Hanf v. Northwestern Masonic Aid Assoc.*, 76 Wis. 450.

See *supra*, this subdivision, *bb. Competency of Agent.*

**Rule of Exclusion Applied to Officer of Municipality.** — *Forsyth County v. Lash*, 89 N. Car. 159.

**1. Competency of Party** — *United States.* — *Jacksonville, etc., R., etc., Co. v. Hooper*, 160 U. S. 514.

*Alabama.* — *Stanley v. Sheffield Land, etc. Co.*, 83 Ala. 260; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736; *Downing v. Woodstock Iron Co.*, 93 Ala. 262; *Burgess v. American Mortg. Co.*, 115 Ala. 468.

*Georgia.* — *Parish v. Weed Sewing Mach. Co.*, 79 Ga. 682; *Mayfield v. Savannah, etc., R. Co.*, 87 Ga. 374; *Merchants' Nat. Bank v. Demere*, 92 Ga. 735; *Register v. Aultman, etc., Co.*, 106

Ga. 331; *Florida Cent., etc., R. Co. v. Usina*, 111 Ga. 697.

*Iowa.* — *Reynolds v. Iowa, etc., Ins. Co.*, 80 Iowa 563.

*Kansas.* — *Missouri Pac. R. Co. v. Phelps*, 10 Kan. App. 1.

*Kentucky.* — *William Tarr Co. v. Kimbrough*, (Ky. 1896) 34 S. W. Rep. 528; *Murray v. East End Imp. Co.*, (Ky. 1901) 60 S. W. Rep. 648, 22 Ky. L. Rep. 1477; *Mutual L. Ins. Co. v. O'Neil*, 76 S. W. Rep. 839, 25 Ky. L. Rep. 983.

*Michigan.* — *Rayburn v. Mason Lumber Co.*, 57 Mich. 273; *Lyttle v. Chicago, etc., R. Co.*, 84 Mich. 289; *Baumann v. Manistee Salt, etc., Co.*, 94 Mich. 363; *Hoskins v. Rochester Sav., etc., Assoc.*, 133 Mich. 505, 10 Detroit Leg. N. 243.

*Minnesota.* — *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 152.

*Missouri.* — *Williams v. Edwards*, 94 Mo. 447; *Sidway v. Missouri Land, etc., Co.*, 163 Mo. 342; *Central Bank v. Thayer*, (Mo. 1904) 82 S. W. Rep. 142; *Nichols v. Jones*, 32 Mo. App. 657; *McCormick Harvesting Mach. Co. v. Heath*, 65 Mo. App. 461; *Nelson v. Kansas City, etc., R. Co.*, 66 Mo. App. 647, 2 Mo. App. Rep. 1385; *Winter v. Supreme Lodge, etc.*, 96 Mo. App. 1.

*Nebraska.* — *German Ins. Co. v. Frederick*, 57 Neb. 538.

*New York.* — *Flaherty v. Herring-Hall-Martin Safe Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 329.

*North Carolina.* — *Roberts v. Richmond, etc., R. Co.*, 109 N. Car. 670.

*Ohio.* — *First Nat. Bank v. Cornell*, 41 Ohio St. 401.

*Texas.* — *Bexar Bldg., etc., Assoc. v. Newman*, (Tex. Civ. App. 1893) 25 S. W. Rep. 461.

*Virginia.* — *Kelly v. Board of Public Works*, 75 Va. 263.

See *supra*, this subdivision, *bb. Competency of Party.*

**Death of Officer or Agent of Municipal Corporation.** — In *Georgia* the rule of exclusion is held applicable where the transaction was had with the officer or agent of a public corporation, such officer or agent being dead at the time of the trial. *Langford v. Wilkinson County*, 75 Ga. 502.

**2.** See *supra*, this subsection, *c. Persons Excluded.*

**3.** See *supra*, this division of this section, (2) *Matters Occurring in Lifetime of Decedent*; (3) *Facts Equally Known to Witness and Decedent*; (4) *Matters Occurring Before Probate of Will or Appointment of Administrator.*

which the decedent did not participate;<sup>1</sup> and the fact that the decedent was in fact present when the communication or transaction between the witness and a third person took place, if he did not actually participate in the communication or transaction, does not render the testimony inadmissible under the statute excluding testimony as to communications or transactions with the decedent or testimony as to matters occurring with the decedent;<sup>2</sup> but if the decedent in fact participated in the transaction, though a third person was also a participant therein, the testimony has been held to relate to a transaction with the decedent, and, therefore, objectionable as against the decedent.<sup>3</sup> And a witness within the rule of exclusion, of course, by repeating an alleged conversation between the witness and the decedent to the personal representative of the decedent, cannot render himself competent to testify with regard to such repetition of the conversation and thereby indirectly testify as to communications and transactions with the decedent.<sup>4</sup>

If the Third Person Acts in the Transaction as an Unconscious Intermediary between the witness and the decedent, the testimony of the witness has been held objectionable as in effect testimony as to a transaction with the decedent.<sup>5</sup>

(b) **Between Decedent and Third Persons** — *aa. GENERAL RULE.* — Where the statute prohibits a witness within the rule of exclusion from testifying to personal transactions and communications with the decedent, or to transactions, etc., between the witness and the decedent, it is generally held that this does not render the witness incompetent to testify to transactions and communications between the decedent and third persons, though had in the presence of the witness, if the witness did not participate in the transaction or communication.<sup>6</sup> This rule extends not only to oral communications and transactions

**1. Transactions with Third Persons Generally.** — *United States.* — *Hinchman v. Parlin*, etc., Co., (C. C. A.) 74 Fed. Rep. 698, *affirmed* (C. C. A.) 81 Fed. Rep. 157; *Morris v. Norton*, (C. C. A.) 75 Fed. Rep. 912.

*Georgia.* — *Puryear v. Foster*, 91 Ga. 444; *Gallagher v. Kiley*, 115 Ga. 420; *Chamblee v. Pirkle*, 101 Ga. 790.

*Iowa.* — *Walkley v. Clarke*, 107 Iowa 451.

*Kentucky.* — *Dillon v. Dillon*, (Ky. 1902) 69 S. W. Rep. 1099; *Bright v. Swinebroad*, 106 Ky. 737.

*New Jersey.* — *Woolverton v. Van Syckel*, 57 N. J. L. 393.

*New York.* — *Bump v. Pratt*, 84 Hun (N. Y.) 201.

*North Carolina.* — *Isenhour v. Isenhour*, 64 N. Car. 640; *Brower v. Hughes*, 64 N. Car. 642; *Thomas v. Kelly*, 74 N. Car. 416; *Waddell v. Swann*, 91 N. Car. 105; *Watts v. Warren*, 108 N. Car. 514; *McNeely v. North Carolina Mica, etc., Co.*, 130 N. Car. 637.

*Texas.* — *McBride v. Moore*, (Tex. Civ. App. 1896) 37 S. W. Rep. 450.

Therefore, where the husband purchased land and took the deed in the name of his wife without her knowledge, this did not constitute a transaction with the wife, so as to exclude the husband from testifying concerning it after her death, because the purchase, payment, and conveyance of the land were exclusively transactions between the husband and the vendor. *Hagan v. Powers*, 103 Iowa 594.

And so, too, it has been held that a woman who believed herself to be the lawful wife of the man with whom she lived, although it was learned after his death that he had another wife living, was competent to testify that she paid the consideration for property conveyed to

her supposed husband and herself, and also paid for the improvements made thereon; these not being transactions with the deceased. *Gebel v. Weiss*, 42 N. J. Eq. 521.

**Transactions with Deceased Guardian.** — The *Texas* statutes prohibiting a witness from testifying as to transactions with or statements by the ward does not exclude testimony as to transactions with the ward's deceased guardian. *Davis v. Beall*, 21 Tex. Civ. App. 183.

**2. Presence of Decedent at Transaction.** — *Denny v. Denny*, 123 Ind. 240.

**3. Burton v. Hill**, (Ky. 1901) 64 S. W. Rep. 736.

**4. Jones v. Jones**, 102 Ky. 450. See also *Charlotte Oil, etc., Co. v. Rippey*, 123 N. Car. 656.

**5. Transaction with Third Person Acting as Unconscious Intermediary.** — *Gregory v. Fichtner*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 86. See also *Dolan v. Leary*, 69 N. Y. App. Div. 459, *affirming* 174 N. Y. 540.

**6. Transactions Between Decedent and Third Persons in Presence of Witness** — *Florida.* — *Withers v. Sandlin*, 44 Fla. 253.

*Georgia.* — *McCamy v. Cavender*, 92 Ga. 254; *Ray v. Camp*, 110 Ga. 818; *Reid v. Sewell*, 111 Ga. 880.

*Iowa.* — *Sweezy v. Collins*, 40 Iowa 542; *Dougherty v. Deeney*, 41 Iowa 19; *Johnson v. Johnson*, 52 Iowa 589; *Lines v. Lines*, 54 Iowa 600; *Mayer v. Turley*, 60 Iowa 407; *Smith v. James*, 72 Iowa 515; *Gable v. Hainer*, 83 Iowa 459; *Farmers, etc., Bank v. Creveling*, 84 Iowa 677; *Leipird v. Stotler*, 97 Iowa 169; *Albright v. Hannah*, 103 Iowa 98; *Dettmer v. Behrens*, 106 Iowa 585; *Mallow v. Walker*, 115 Iowa 238; *Wright v. Reed*, 118 Iowa 333.

between the decedent and a third person, but also to transactions and communications evidenced by writing;<sup>1</sup> and the fact that the interest of the witness, and that of the third person with whom the transaction was had, are in harmony but in conflict with the interest of the decedent is immaterial.<sup>2</sup> But if he took any part in the transaction or communication, his testimony concerning it should be excluded, as the transaction or communication then becomes one, in effect, between himself and the decedent.<sup>3</sup> Thus, where the decedent's communications were addressed to the witness as well as to the third person, the witness should not be permitted to testify concerning them,<sup>4</sup> and the testimony has been excluded where the nature of the transaction or communication between the decedent and the third person was affected by the presence of the witness.<sup>5</sup> In *New York* the courts, especially in contests of wills on the ground of undue influence, etc., have excluded a witness benefited by the will and within the rule of exclusion from testifying as to transactions and communications between the decedent and third persons at the time of the execution of the will, though he did not actively participate therein;<sup>6</sup> still it does not seem that the courts will limit the rule to such cases

*Kansas*.—Eddy *v.* O'Brien, 9 Kan. App. 882, 57 Pac. Rep. 244.

*Kentucky*.—Raison *v.* Steele, (Ky. 1895) 29 S. W. Rep. 454.

*Nebraska*.—Kroh *v.* Heins, 48 Neb. 691; Harnett *v.* Holdrege, (Neb. 1903) 97 N. W. Rep. 443.

*New York*.—Simmons *v.* Sisson, 26 N. Y. 264; Lobdell *v.* Lobdell, 36 N. Y. 327; Cary *v.* White, 59 N. Y. 336; Hildebrand *v.* Crawford, 65 N. Y. 107; Pinney *v.* Orth, 82 N. Y. 619; Holcomb *v.* Holcomb, 95 N. Y. 316; Simmons *v.* Havens, 101 N. Y. 433; O'Brien *v.* Weiler, 140 N. Y. 286; Hutton *v.* Smith, 175 N. Y. 375; 74 N. Y. App. Div. 284; Crawford *v.* Haines, 44 Hun (N. Y.) 597; Stern *v.* Eisner, 51 Hun (N. Y.) 224; Patterson *v.* Copeland, (Supm. Ct. Gen. T.) 52 How. Pr. (N. Y.) 460; Sanford *v.* Sanford, 61 Barb. (N. Y.) 293; Marsh *v.* Gilbert, 2 Redf. (N. Y.) 465; Burns *v.* Mullin, 42 N. Y. App. Div. 116; Dolan *v.* Leary, 69 N. Y. App. Div. 459, affirming 68 N. Y. Supp. 91; Farrar *v.* Farmers L. & T. Co., 85 N. Y. App. Div. 367; Conolly *v.* O'Connor, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 489; Brown *v.* Klock, 1 Silv. Sup. (N. Y.) 273; Petrie *v.* Petrie, 2 Silv. Sup. (N. Y.) 438; Matter of Budlong, 54 Hun (N. Y.) 131, 18 Civ. Pro. (N. Y.) 18, affirmed 126 N. Y. 423; *In re Brown*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 122; Matter of Andrews, 97 N. Y. App. Div. 429; Matter of Hartman, (Surrogate Ct.) 13 Misc. (N. Y.) 486.

*North Carolina*.—Dobbins *v.* Osborne, 67 N. Car. 259; McCall *v.* Wilson, 101 N. Car. 598; Norris *v.* Stewart, 105 N. Car. 455; Johnson *v.* Cameron, (N. Car. 1904) 48 S. E. Rep. 640. Compare Wilson *v.* Featherston, 122 N. Car. 747.

*Pennsylvania*.—Jackson *v.* Payne, 114 Pa. St. 67.

*South Carolina*.—Roe *v.* Harrison, 9 S. Car. 279; Hughey *v.* Eichelberger, 11 S. Car. 49; McLaurin *v.* Wilson, 16 S. Car. 402; Shaw *v.* Cunningham, 16 S. Car. 631; Colvin *v.* Phillips, 25 S. Car. 231; Kennemore *v.* Kennemore, 26 S. Car. 251; Moore *v.* Trimmier, 32 S. Car. 525; Brice *v.* Miller, 35 S. Car. 537; Sullivan

*v.* Latimer, 38 S. Car. 158; Brickle *v.* Leach, 55 S. Car. 510; Sloan *v.* Hunter, 56 S. Car. 385; Brock *v.* O'Dell, 44 S. Car. 22.

*Wisconsin*.—Goerke *v.* Goerke, 80 Wis. 520; Wollman *v.* Ruehle, 104 Wis. 607; Brader *v.* Brader, 110 Wis. 423.

Compare Wisdom *v.* Reeves, 110 Ala. 418.

**Husband and Wife.**—The fact that the transaction, with regard to which the witness testified, was had in his presence between the decedent and the witness's wife does not change the rule. Sullivan *v.* Latimer, 38 S. Car. 158. See also Dettmer *v.* Behrens, 106 Iowa 585.

1. Gable *v.* Hainer, 83 Iowa 457. And see *supra*, this subdivision of this section, (d) *Written Communications and Transactions*.

2. New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125; Mayes *v.* Turley, 60 Iowa 407. But see Wills *v.* Wood, 28 Kan. 400.

3. **Participation by Witness**—*New York*.—Kraushaar *v.* Meyer, 72 N. Y. 602; Badger *v.* Badger, 88 N. Y. 559, 42 Am. Rep. 263; Holcomb *v.* Holcomb, 95 N. Y. 325; Ross *v.* Harden, 42 N. Y. Super. Ct. 427; Gambee *v.* Gambee, 24 N. Y. App. Div. 446; Burnham *v.* Burnham, 46 N. Y. App. Div. 513; Leary *v.* Corvin, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 68, 63 N. Y. App. Div. 151; Smith *v.* Ulman, 26 Hun (N. Y.) 386; Hard *v.* Davison, 53 Hun (N. Y.) 112; Hard *v.* Ashley, 63 Hun (N. Y.) 634, 18 N. Y. Supp. 413; Eighmie *v.* Taylor, 68 Hun (N. Y.) 573. But see Stern *v.* Eisner, 51 Hun (N. Y.) 224.

*North Carolina*.—Halyburton *v.* Dobson, 65 N. Car. 88.

*Wisconsin*.—*In re Laugen*, (Wis. 1904) 99 N. W. Rep. 437.

4. Erwin *v.* Erwin, 54 Hun (N. Y.) 166; Brague *v.* Lord, 67 N. Y. 498, 2 Abb. N. Cas. (N. Y.) 1; Hard *v.* Ashley, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 413.

5. *In re Laugen*, (Wis. 1904) 99 N. W. Rep. 437.

6. **Contests of Wills**—*New York Rule*.—Matter of Eysaman, 113 N. Y. 62; Matter of Dunham, 121 N. Y. 575, affirming (Supm. Ct. Gen. T.) 1 N. Y. Supp. 120; Matter of Bera-see, 141 N. Y. 391; Gambee *v.* Gambee, 24 N. Y. App. Div. 446; Eighmie *v.* Taylor, 68 Hun



alone,<sup>1</sup> and it has been held in a very late case that a witness within the rule of exclusion cannot testify to a conversation between a third person and the decedent which took place in the presence of the witness, the other parties being aware of his presence, though he took no part in the conversation.<sup>2</sup>

**Third Person Agent of Witness.** — If the third person with whom the transaction was had in the presence of the witness was the agent of the witness, the witness has been held to be a participant in the transaction so as to render him incompetent to testify in regard thereto,<sup>3</sup> and also when the third person acted as the mere intermediary of the witness.<sup>4</sup> And, *a fortiori*, the fact that a third person was present at a transaction or conversation between two parties, one of whom has since died, and may be called to testify thereto, is not sufficient to let in the testimony of the surviving party,<sup>5</sup> but, of course, the third person, in whose presence a transaction or communication was had, if not within the rule of exclusion, may testify to such transaction, etc., though the surviving party to the transaction cannot testify thereto.<sup>6</sup>

**Testimony at Public Trial.** — Testimony of a party to an action, since deceased, at a public trial is not a communication or transaction between the opposing party present at the trial and the decedent so as to render such opposing party incompetent to testify in regard thereto.<sup>7</sup>

**66. MINORITY RULE.** — In a few jurisdictions the statutes excluding the testimony of a witness as to transactions with the decedent have been construed so liberally as to prevent an interested party from testifying to transactions or communications between the deceased and a third person, notwithstanding the witness took no active part therein, where the witness had a personal interest in the transactions or communications.<sup>8</sup>

**66. BROAD RULE OF EXCLUSION.** — Where the statute does not limit the testimony excluded to personal transactions, etc., with the decedent, but prohibits a witness within the rule of exclusion from testifying to any transaction, conversation, or act done, etc., by the decedent, the witness cannot testify as to any transactions and communications between the decedent and a third person;<sup>9</sup> and in some jurisdictions the statutes prohibit a witness within the rule of exclusion from testifying to any matters, and this, of course, prohibits such a witness from testifying to transactions, etc., between the decedent and third persons.<sup>10</sup>

(8) *Transactions with Opponent's Deceased Predecessor in Title.* — In an action involving the title to property, one party may not, as a rule, testify to

(N. Y.) 587; *Matter of Palmateer*, 78 Hun (N. Y.) 43. See, however, *Smith v. James*, 72 Iowa 515. Compare *Petrie v. Petrie*, 2 Silv. Sup. (N. Y.) 438.

1. *Herrington v. Winn*, 60 Hun (N. Y.) 235; *Stillwell v. Boyer*, 21 N. Y. App. Div. 231; *Ditmars v. Sackett*, 92 Hun (N. Y.) 384; *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756.

2. *Hutton v. Smith*, 175 N. Y. 375 (this case contains an exhaustive review of prior cases). See also *Burnham v. Burnham*, 165 N. Y. 659; *Leary v. Corvin*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 68, 63 N. Y. App. Div. 151.

In *Leary v. Corvin*, 63 N. Y. App. Div. 151, it was held that a witness could not testify that the decedent stated to a third person that the witness was the decedent's child and she wished the witness to have her property.

3. **Third Person Agent of Witness.** — *Head v. Teeter*, 10 Hun (N. Y.) 548; *Herrington v. Winn*, 60 Hun (N. Y.) 235; *McRae v. Malloy*, 90 N. Car. 521.

4. As where a deceased wife conveyed land to a third person, who immediately reconveyed

to the husband and wife jointly, the purpose of the transaction as a whole being to give the husband an interest in the wife's land, the husband was held incompetent to testify as to the transaction and communications between the wife and the third person. *Dolan v. Leary*, 69 N. Y. App. Div. 459, affirmed 174 N. Y. 540.

5. *Donnell v. Braden*, 70 Iowa 551; *Chambers v. Hill*, 34 Mich. 523; *Taylor v. Bunker*, 68 Mich. 258; *Holcomb v. Holcomb*, 95 N. Y. 325; *Heyne v. Doerfler*, 124 N. Y. 509; *Hutchinson v. Cleary*, 3 N. Dak. 270.

6. *Brickle v. Leach*, 55 S. Car. 510; *Alexander v. Ransom*, 16 S. Dak. 302.

7. *Costen v. McDowell*, 107 N. Car. 546.

8. *Gillaspie v. Murray*, 27 Tex. Civ. App. 580; *Parks v. Caudle*, 58 Tex. 221; *Seabright v. Seabright*, 28 W. Va. 463; *Robinson v. James*, 29 W. Va. 232.

9. *Hopkins v. Faerber*, 86 Ky. 223; *Witt v. Moberley*, (Ky. 1897) 42 S. W. Rep. 338.

10. *Larison v. Polhemus*, 36 N. J. Eq. 506; *Matthews v. Hoagland*, 48 N. J. Eq. 455.

a transaction or conversation with a person, since deceased, from, through, or under whom the opposing party derives title,<sup>1</sup> and where the action is brought by the heir of the party who paid the purchase money against the holder of the legal title to enforce a resulting trust, the defendant may not testify to transactions between himself and the plaintiff's ancestor,<sup>2</sup> and after the death of the grantee in a deed, which is absolute on its face, the grantor is not competent to prove that the conveyance was made in trust for himself.<sup>3</sup> A witness may, when such testimony is relevant, testify to transactions between himself and a deceased person from whom neither party to the action derives title,<sup>4</sup> and the death of the grantor of one party will not exclude the testimony of the opposing party when there is no privity of estate between the witness and such deceased grantor, and the witness is not offered to prove a personal transaction or communication between himself and the deceased.<sup>5</sup>

(9) *Post-mortem Occurrences.* — Where the statutes merely prohibit a witness within the rule of exclusion from testifying to communications and transactions with the decedent, this, of course, does not render the witness incompetent to testify to *post-mortem* occurrences<sup>6</sup> and the same, of course, is true under statutes excluding testimony as to matters occurring during the lifetime of the decedent;<sup>7</sup> but some statutes, instead of restricting the competency of the witness to particular testimony, provide that witnesses within

1. *Transactions with Opponent's Predecessor in Title* — *Florida*. — Tunno v. Robert, 16 Fla. 738; Harris v. Jacksonville Bank, 22 Fla. 506.

*Georgia*. — Muller v. Rhuman, 62 Ga. 332.

*Indiana*. — Cuthrell v. Cuthrell, 101 Ind. 375.

*Kentucky*. — Helton v. Asher, 103 Ky. 730.

*Missouri*. — Hughes v. Israel, 73 Mo. 538.

*New York*. — Mattoon v. Young, 45 N. Y. 698; Mason v. Prendergast, 120 N. Y. 536; Richards v. Crocker, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 954; Witthaus v. Schack, 105 N. Y. 332.

*Pennsylvania*. — Karns v. Tanner, 66 Pa. St. 297; Chase v. Irvin, 87 Pa. St. 286; Walton v. Hinnau, 146 Pa. St. 396; Brothers v. Mitchell, 157 Pa. St. 484.

*Virginia*. — Field v. Brown, 24 Gratt. (Va.) 74.

*Washington*. — Smith v. Taylor, 2 Wash. 425; Spencer v. Terrel, 17 Wash. 514.

*West Virginia*. — Zane v. Fink, 18 W. Va. 693.

*Wisconsin*. — Littlefield v. Littlefield, 51 Wis. 23; Mack v. Bensley, 63 Wis. 80.

2. Malady v. McEnary, 30 Ind. 273.

3. Murray v. New York, etc., R. Co., 103 Pa. St. 37; Wood v. Broliar, 40 Iowa 591.

And in an action against the grantee of the heir of a deceased person, to have a deed, absolute on its face, from the plaintiff to the deceased ancestor of the defendant's grantor, declared a deed of trust, the plaintiff is not competent to prove transactions with the deceased which tend to establish the trust. Bufum v. Porter, 70 Mich. 623.

4. Loftin v. Loftin, 96 N. Car. 94.

5. Waltman v. Herdic, 90 Pa. St. 464.

In Bradley v. West, 68 Mo. 69, it appeared that one party claimed under a deed from a person since deceased, and the opposing party claimed by adverse possession under color of title, but there was no privity of estate between such adverse claimant and the deceased grantor of the other party, and it was held that the grantee was competent to prove the execution

of the deed to himself; the estate of the deceased grantor having no interest in the event of the action.

In Bush v. Barron, 78 Tex. 9, it was held that one who claimed the property in dispute in his own right was competent to prove statements of the deceased person at whose administrator's sale the opposing party bought the property.

And see generally *supra*, this division of this section, *d. Persons Protected*.

6. *Post-mortem Occurrences* — *Georgia*. — Stanford v. Murphy, 63 Ga. 410; Moore v. Dutson, 79 Ga. 456; Walker v. Neil, 117 Ga. 733.

*New York*. — Matter of De Baun, 1 Connolly (N. Y.) 203.

*Pennsylvania*. — Schultz v. Boehme, (Pa. 1888) 16 Atl. Rep. 89.

*Tennessee*. — Hambough v. Carney, (Tenn. Ch. 1901) 62 S. W. Rep. 503.

*Texas*. — Smyth v. Caswell, 67 Tex. 567.

*Wisconsin*. — Lawrence v. Vilas, 20 Wis. 381.

The widow of a testator, who is named as a legatee in his will, is competent to prove that his will was found among his valuable papers after his death. Cornelius v. Brawley, 109 N. Car. 542.

7. *California*. — Cowdery v. McChesney, 124 Cal. 363.

*New Hampshire*. — Brown v. Brown, 48 N. H. 90.

*Pennsylvania*. — Stephens v. Cotterell, 99 Pa. St. 191; Porter v. Nelson, 121 Pa. St. 628; Hoffer's Estate, 156 Pa. St. 473; Krepps v. Carlisle, 157 Pa. St. 358; Irwin v. Patchen, 164 Pa. St. 51; Adams v. Edwards, 115 Pa. St. 211.

Testimony that a bond was found among the decedent's papers does not relate to a matter occurring before the decedent's death, so as to be incompetent, though it may tend inferentially to establish the fact that the bond was in the possession of the decedent prior to his death. Porter v. Nelson, 121 Pa. St. 628. See also Hoffer's Estate, 156 Pa. St. 473; Griffin v. Griffin, 125 Ill. 430.

the rule of exclusion shall not be allowed to testify, and, of course, under such statutes the witness is precluded from testifying even to *post-mortem* occurrences,<sup>1</sup> unless, as is sometimes the case, the statute contains a further provision expressly rendering the witness competent to testify as to *post-mortem* occurrences.<sup>2</sup>

*f. EXCEPTIONS TO RULES OF INCOMPETENCY — (1) Admissibility of Testimony of Representative — (a) In General.* — Where one of the parties to a suit is a representative of a person either deceased or under some legal disability, it does not follow that because the opposite party cannot testify to personal transactions or communications had with such person, the representative cannot so testify; and the authorities usually hold that he is a competent witness as to such transactions or communications, either because the statute under consideration expressly so provides, or because it is silent as to him.<sup>3</sup> Under a statute, however, which provides that in a suit in which a representative is a party neither party shall testify concerning transactions or communications had with the person whom he represents, the representative is held not to be a competent witness as to such transactions or communications.<sup>4</sup> The *California* statute, which provides that parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator on a claim against the estate of a deceased person shall not be competent witnesses as to any matter of fact occurring before the death of such deceased person, is held to operate only to exclude a party from testifying against the executor or administrator, and does not exclude the executor or administrator from testifying in defense of the estate.<sup>5</sup>

*Both Parties Appearing in Representative Capacity.* — Whether, where both parties to the suit appear in a representative capacity, either may testify concerning transactions or communications had with the person whom the other represents, depends on the reading of the particular statute under consideration. Thus, in several jurisdictions, the statutes are construed to make either repre-

1. *Kelton v. Hill*, 59 Me. 260; *Biggs v. McCurley*, 76 Md. 409; *Palmer v. Kellogg*, 11 Gray (Mass.) 27; *Lincoln v. Lincoln*, 12 Gray (Mass.) 45; *Cronan v. Cotting*, 99 Mass. 334; *Merrill v. Pinney*, 43 Vt. 605; *Roberts v. Lund*, 45 Vt. 82.

2. *Colorado*. — *Tourtelotte v. Brown*, 18 Colo. App. 335.

*Illinois*. — *Funk v. Eggleston*, 92 Ill. 515; *Vigus v. O'Bannon*, 118 Ill. 334; *Griffin v. Griffin*, 125 Ill. 430; *Rogers v. Tyley*, 144 Ill. 664; *Gillespie v. Gillespie*, 159 Ill. 84.

*Maine*. — *Swasey v. Ames*, 79 Me. 483.

*Mississippi*. — *Witherspoon v. Blewett*, 47 Miss. 570; *Reinhardt v. Evans*, 48 Miss. 230.

*Missouri*. — *Poe v. Domic*, 54 Mo. 119; *Martin v. Jones*, 59 Mo. 181; *McGlothlin v. Henry*, 59 Mo. 213; *Kirton v. Bull*, 168 Mo. 622.

Inability to find a deed among the decedent's papers is evidence relating to a fact occurring after the death of the decedent within the meaning of the *Illinois* statute. *Gillespie v. Gillespie*, 159 Ill. 84.

The fact that a deed was found among a decedent's papers is a fact "occurring after the death" (Ill. Rev. Stat. 1874, p. 448, §§ 1, 2) of the deceased so as to render a witness otherwise incompetent competent to testify thereto. *Griffin v. Griffin*, 125 Ill. 430.

Under the *Vermont* statute a witness may explain a letter written by him to an executrix touching matters which took place after the

death of the testator. *Gifford v. Thomas*, 62 Vt. 34.

3. *Representative Allowed to Testify — Georgia*. — *Jackson v. Jackson*, 40 Ga. 150; *McIntyre v. Meldrim*, 40 Ga. 490; *Flowers v. Flowers*, 92 Ga. 688.

*Illinois*. — *Robnett v. Robnett*, 43 Ill. App. 191.

*Indiana*. — *Bischof v. Mikels*, 147 Ind. 115.

*Iowa*. — *Bradley v. Kavanagh*, 12 Iowa 273; *Stiles v. Botkin*, 30 Iowa 60; *McNamara v. New Melleray Corp.*, 88 Iowa 502; *Frick v. Kabaker*, 116 Iowa 494.

*Kansas*. — *McCartney v. Spencer*, 26 Kan. 62.

*Maryland*. — *Johnson v. Heald*, 33 Md. 352.

*Michigan*. — *Moore v. Machen*, 124 Mich. 216.

*New Hampshire*. — *Dow v. Merrill*, 65 N. H. 107.

*New York*. — *Loder v. Whelpley*, 111 N. Y. 239; *McLaughlin v. Webster*, 141 N. Y. 76; *Mills v. Davis*, 41 Hun (N. Y.) 415; *Reeve v. Crosby*, 3 Redf. (N. Y.) 74; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238; *Klock v. Brennan*, 82 Hun (N. Y.) 262.

*North Carolina*. — *Thompson v. Humphrey*, 83 N. Car. 416; *Williams v. Cooper*, 113 N. Car. 286.

*Wisconsin*. — *In re Laugen*, (Wis. 1904) 99 N. W. Rep. 437.

4. See *supra*, this division of this section, c. (4) (f) *Personal Representatives of Decedent*.

5. *Blood v. Fairbanks*, 50 Cal. 420; *Chase v.*



representative competent so to testify,<sup>1</sup> while in other jurisdictions having different statutes it is held that neither representative is a competent witness as to such transactions or communications.<sup>2</sup>

**Representative Must Be Acting in Official Capacity.** — In order for the representative to be a competent witness to transactions and communications between the persons he represents and the opposite party, he must be acting in his official capacity in behalf of the estate. If he is acting in opposition to the estate he is not a competent witness.<sup>3</sup> Thus, it has been held that an executrix is not competent to prove a gift to her by her deceased husband.<sup>4</sup> Nor is an executor, in a proceeding to require him to disclose assets, a competent witness as to facts occurring before the testator's death.<sup>5</sup> Nor is a trustee a competent witness as to transactions between himself and his *cestui que trust*, since deceased, where their interests are opposed.<sup>6</sup> Nor is a guardian competent to testify against his ward in a proceeding involving the guardian's management of the ward's estate.<sup>7</sup>

(b) **Representative Called by Opposite Party.** — In jurisdictions where the representative in the suit is not allowed to testify concerning transactions or communications between the person he represents and the opposite party, it is usually provided that he may be called, nevertheless, by such opposite party and examined as to such transactions or communications.<sup>8</sup>

(2) **Admissibility of Testimony of Opposite Party** — (a) **Where Representative Testifies** — *aa. IN GENERAL.* — As has been seen above, statutes which prohibit the party opposed to the representative from testifying concerning transactions or communications with the person deceased or under legal disability, are usually held not to prohibit the representative from so testifying. And, if he does testify concerning such transactions or communications, he waives the incompetency of the opposite party, who may then take the stand and testify in rebuttal.<sup>9</sup>

*Evoy*, 51 Cal. 618; *Todd v. Martin*, (Cal. 1894) 37 Pac. Rep. 872.

1. **Either Representative Competent.** — *Duryea v. Granger*, 66 Mich. 593; *Penny v. Croul*, 87 Mich. 15; *Kenyon v. Peirce*, 17 R. I. 794. And see *Stearns v. Wright*, 51 N. H. 600.

In *New Jersey* a clause which provided that no party should be sworn in any case where either of the parties sued or were sued in a representative capacity was construed to apply only to those cases in which one and not both of the parties appeared on the record in such capacity. *Haines v. Watts*, 55 N. J. L. 149. This clause has been repealed. *Lodge v. Hulings*, 64 N. J. Eq. 761.

2. **Neither Representative Competent.** — *Schmid v. Kreismer*, 31 Iowa 479; *Bowie v. Bowie*, 77 Md. 311.

3. **Competent Only When Acting in Official Capacity** — *Florida.* — *Sanderson v. Sanderson*, 17 Fla. 820.

*Georgia.* — *Stanford v. Murphy*, 63 Ga. 410; *Fulcher v. Mandell*, 83 Ga. 715.

*Indiana.* — *Goodwin v. Goodwin*, 48 Ind. 584.

*Maine.* — *Preble v. Preble*, 73 Me. 362.

*Massachusetts.* — *Ela v. Edwards*, 97 Mass. 318; *Bassett v. Granger*, 103 Mass. 177; *Willey v. Thompson*, 9 Met. (Mass.) 336.

*Mississippi.* — *Troup v. Rice*, 55 Miss. 278.

*New Hampshire.* — *Perkins v. Perkins*, 58 N. H. 405; *Tuck v. Nelson*, 62 N. H. 469.

*New Jersey.* — *Smith v. Burnet*, 34 N. J. Eq. 219, 35 N. J. Eq. 314; *Tichenor v. Tichenor*, 43 N. J. Eq. 163; *Terhune v. Oldis*, 44 N. J. Eq. 146.

*New York.* — *Matter of Kellogg*, 104 N. Y. 648; *Matter of Smith*, 153 N. Y. 124; *Van Vechten v. Van Vechten*, 65 Hun (N. Y.) 215; *Matter of Weeks*, 23 N. Y. App. Div. 151; *Matter of Smith*, 75 N. Y. App. Div. 339; *Matter of Congdon*, (Surrogate Ct.) 21 Misc. (N. Y.) 568; *Matter of Neil*, (Surrogate Ct.) 35 Misc. (N. Y.) 254.

*North Carolina.* — *Whitesides v. Green*, 64 N. Car. 307; *Grier v. Cagle*, 87 N. Car. 377.

*Pennsylvania.* — *Breneman's Estate*, 65 Pa. St. 298; *Smith v. Hay*, 152 Pa. St. 377; *Hyne-man's Estate*, 11 Phila. (Pa.) 135, 33 Leg. Int. (Pa.) 172; *White's Estate*, 13 Phila. (Pa.) 287, 36 Leg. Int. (Pa.) 451.

*Tennessee.* — *Still v. Burkett*, (Tenn. Ch. 1896) 39 S. W. Rep. 347.

*West Virginia.* — *Kimmel v. Shroyer*, 28 W. Va. 505.

4. *Sherman v. Lanier*, 39 N. J. Eq. 249.

5. *Borth v. Tabernor*, 23 Ill. App. 173.

But the rule excluding the testimony of an executor does not apply in an inquiry incidental to taking an account in which no decree can be rendered. *D'Auxy v. Soutter*, 28 Fed. Rep. 733.

6. *Taylor's Appeal*, (Pa. 1887) 11 Atl. Rep. 307.

7. *Garwood v. Cooper*, 12 Heisk. (Tenn.) 101.

8. **Representative Called by Opposite Party.** — *Sanders v. Kirbie*, 94 Tex. 564; *Ivey v. Bondies*, (Tex. Civ. App. 1897) 44 S. W. Rep. 916. See also the statutes of the various states.

9. **Incompetency of Opposite Party Waived —**

**Identifying Account Books.** — It has been held that a personal representative who testifies merely for the purpose of identifying account books of the testator does not waive the incompetency of the opposite party.<sup>1</sup>

**Representative's Testimony of a Negative Character.** — So it has been held that the incompetency of the opposite party is not waived, where the representative's testimony is of a negative character, as that the transaction did not occur within his knowledge.<sup>2</sup>

**bb. SCOPE OF OPPOSITE PARTY'S TESTIMONY.** — It is usually held that where the representative testifies concerning transactions or communications between the opposite party and the person deceased or under a legal disability, the opposite party becomes a competent witness only for the purpose of testifying to such matters, and not for the purpose of testifying to other transactions or communications not related by the representative,<sup>3</sup> even though they tend

—*Florida.*—*Edwards v. Rives*, 35 Fla. 89; *Booth v. Lenox*, (Fla. 1903) 34 So. Rep. 566.

*Georgia.*—*Parkerson v. Burke*, 59 Ga. 100; *Hammond v. Drew*, 61 Ga. 189; *Hudson v. Hudson*, 87 Ga. 678.

*Illinois.*—*Blanchard v. Blanchard*, 191 Ill. 450; *Butz v. Schwartz*, 135 Ill. 180; *Robnett v. Robnett*, 43 Ill. App. 191; *Loucks v. Paden*, 63 Ill. App. 545.

*Iowa.*—*Bailey v. Keyes*, 52 Iowa 90; *Ivers v. Ivers*, 61 Iowa 721; *Cochrane v. Breckenridge*, 75 Iowa 213; *In re Brown*, 92 Iowa 379; *Ridler v. Ridler*, 103 Iowa 470; *Boardman v. Brown*, 114 Iowa 678.

*Kentucky.*—*Eaves v. Harbin*, 12 Bush (Ky.) 445; *Dowis v. Elliott*, (Ky. 1895) 29 S. W. Rep. 142; *Lebus v. Whalen*, (Ky. 1895) 30 S. W. Rep. 22; *Allensworth v. Lowdermilk*, (Ky. 1896) 35 S. W. Rep. 1030; *Carpenter v. Carpenter*, (Ky. 1902) 66 S. W. Rep. 814; *Kuhn v. Kuhn*, (Ky. 1902) 69 S. W. Rep. 1077; *Carpenter v. Rice*, (Ky. 1904) 78 S. W. Rep. 458; *Whitley v. Whitley*, (Ky. 1904) 80 S. W. Rep. 825.

*Maine.*—*Kelton v. Hill*, 59 Me. 259.

*Maryland.*—*Johnson v. Heald*, 33 Md. 352.

*Nevada.*—In Nevada an early statute was construed not to permit the opposite party to testify in rebuttal. *Vesey v. Benton*, 13 Nev. 284. This statute, however, has been repealed. See *Gage v. Phillips*, 21 Nev. 150.

*New Hampshire.*—*Ballou v. Tilton*, 52 N. H. 605; *Sheehan v. Hennessey*, 65 N. H. 101; *Dow v. Merrill*, 65 N. H. 107.

*New Jersey.*—*McCartin v. McCartin*, 45 N. J. Eq. 265; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Lodge v. Hulings*, 64 N. J. Eq. 761; *Joss v. Mohn*, 55 N. J. L. 407; *Rairdon v. Sampson*, 67 N. J. L. 346; *Greenwood v. Henry*, 52 N. J. Eq. 447.

*New York.*—*Lewis v. Merritt*, 98 N. Y. 206, 113 N. Y. 386; *Clift v. Moses*, 112 N. Y. 426; *McLaughlin v. Webster*, 141 N. Y. 76; *Lyon v. Ricker*, 141 N. Y. 225; *Matter of Callister*, 153 N. Y. 306; *Rogers v. Rogers*, 153 N. Y. 343; *Sweet v. Low*, 28 Hun (N. Y.) 432; *Wilcox v. Corwin*, 50 Hun (N. Y.) 425; *Rittenhouse v. Creveling*, 59 Hun (N. Y.) 626, 14 N. Y. Supp. 85; *Brown v. Burgett*, 61 Hun (N. Y.) 623; *Matter of Spratt*, 4 N. Y. App. Div. 1; *Funson v. Salisbury*, 15 N. Y. App. Div. 214; *Russell v. Russell*, 47 N. Y. App. Div. 144; *Hobart v. Verrault*, 74 N. Y. App. Div. 444; *Flick v. Penfield*, 82 N. Y. App. Div. 610; *Bow-*

*ers v. Smith*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 105, affirmed 124 N. Y. 645; *Egan v. Powers*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 592; *Weston v. Reich*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 784; *De Verry v. Schuyler*, 5 Silv. Sup. (N. Y.) 72; *Davis v. Gallagher*, 55 Hun (N. Y.) 593; *Mitchell v. Cochran*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 545; *Griffin v. Train*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 290, affirmed 90 N. Y. App. Div. 16.

*North Carolina.*—*Redman v. Redman*, 70 N. Car. 257; *Murphy v. Ray*, 73 N. Car. 588; *Burnett v. Savage*, 92 N. Car. 10; *Cheatham v. Bobbitt*, 118 N. Car. 343; *Wolfe v. Hampton*, 131 N. Car. 5; *Hall v. Holloman*, (N. Car. 1904) 48 S. E. Rep. 515.

*Ohio.*—*Rankin v. Hannan*, 38 Ohio St. 438; *Roberts v. Briscoe*, 44 Ohio St. 596.

*South Carolina.*—*Ellis v. Cribb*, 55 S. Car. 328; *Dyson v. Jones*, 65 S. Car. 308.

*Texas.*—*Hurley v. Lockett*, 72 Tex. 262.

*Virginia.*—*Copeland v. Copeland*, (Va. 1896) 24 S. E. Rep. 218.

*West Virginia.*—*Zane v. Fink*, 18 W. Va. 754.

*Wisconsin.*—*Campion v. Schinnick*, 93 Wis. 111; *Drinkwine v. Gruelle*, 120 Wis. 628.

**1. Identifying Account Books.**—*Sheehan v. Hennessey*, 65 N. H. 101; *Stevens v. Moulton*, 68 N. H. 254; *Benjamin v. Dimmick*, 4 Redf. (N. Y.) 7.

**2. Representative's Testimony of a Negative Character.**—*Rudolph v. Underwood*, 88 Ga. 664; *In re Edwards*, 58 Iowa 431.

**3. Scope Limited to Transactions Related by Representative.**—*Illinois.*—*Donlevy v. Montgomery*, 66 Ill. 227; *Connelly v. Dunn*, 73 Ill. 220; *Duffy v. Leavitt*, 81 Ill. App. 410.

*Indiana.*—*Copeland v. Koontz*, 125 Ind. 126.

*Iowa.*—*Clarity v. Sheridan*, 91 Iowa 304. See also *In re Brown*, 92 Iowa 379.

*Kentucky.*—*Hardin v. Taylor*, 78 Ky. 593; *Waters v. Davis*, (Ky. 1887) 2 S. W. Rep. 695.

*Maine.*—*Burleigh v. White*, 64 Me. 23; *Hall v. Otis*, 77 Me. 122.

*Maryland.*—*Johnson v. Heald*, 33 Md. 352.

*Minnesota.*—*Rhodes v. Pray*, 36 Minn. 392.

*New York.*—*Martin v. Hillen*, 142 N. Y. 140; *Rogers v. McGuire*, 90 Hun (N. Y.) 455; *Jones v. Perkins*, 29 N. Y. App. Div. 37; *Matter of Woodward*, 69 N. Y. App. Div. 286; *Flick v. Penfield*, 82 N. Y. App. Div. 610; *Motz v. Motz*, 85 N. Y. App. Div. 4; *Brown v.*

to contradict what is testified to by the representative.<sup>1</sup> In several jurisdictions, however, the opposite party becomes a competent witness as to all matters pertinent to the issue.<sup>2</sup>

**cc. REPRESENTATIVE'S TESTIMONY MUST BE VOLUNTARY.** — In order for the opposite party to be made a competent party to testify by reason of the fact that the representative has testified to personal transactions or communications, the representative must have given such testimony voluntarily.<sup>3</sup> If the opposite party elicits the testimony from the representative by calling him as a witness and examining him,<sup>4</sup> or by subjecting him to cross-examination,<sup>5</sup> the representative is an involuntary witness and there is no waiver of the incompetency of the opposite party.

(b) **Where Representative Introduces Testimony of Third Person.** — Where the representative of the person deceased or under legal disability, without testifying himself, calls a disinterested third person as a witness and examines him concerning transactions or communications between the person deceased or under legal disability and the opposite party, it is generally held that the incompetency of the opposite party is not waived so as to permit him to rebut the evidence of the third person.<sup>6</sup> There are contrary authorities, however, due to statutes expressly providing that in such a case the opposite party may testify concerning the transactions or communications related by the third person.<sup>7</sup>

**Extraneous Facts Testified to by Opposite Party.** — In jurisdictions where it is held that the testimony of the third person does not waive the incompetency of the opposite party, the latter may, nevertheless, testify to extraneous facts or circumstances which tend to show that the third person has testified falsely,

Burgett, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 942.

*North Carolina.* — Sumner v. Candler, 92 N. Car. 634; Armfield v. Colvert, 103 N. Car. 147; Hopkins v. Bowers, 108 N. Car. 298; Williams v. Cooper, 113 N. Car. 286.

*Pennsylvania.* — Roth's Estate, 150 Pa. St. 261.

*West Virginia.* — Zane v. Fink, 18 W. Va. 754.

1. Martin v. Hillen, 142 N. Y. 140.

2. **Opposite Party Competent for All Purposes.** — McCartin v. McCartin, 45 N. J. Eq. 265; Lodge v. Hulings, 64 N. J. Eq. 761; Greenwood v. Henry, 52 N. J. Eq. 447; Christopher v. Wilkins, (N. J. 1902) 51 Atl. Rep. 728; Brock v. Brock, 92 Va. 173.

3. **Representative Must Have Testified Voluntarily.** — See Ross v. Kirkwold, 123 Iowa 668.

4. **Effect if Representative Is Called by Opposite Party.** — Corning v. Walker, 100 N. Y. 547, affirming 28 Hun (N. Y.) 435; Williams v. Cooper, 113 N. Car. 286.

5. **Effect if Testimony Elicited by Cross-examination.** — Harvey v. Hilliard, 47 N. H. 551; Daw v. Vreeland, 30 N. J. Eq. 542; Joss v. Mohn, 55 N. J. L. 407; Corning v. Walker, 100 N. Y. 547; Motz v. Motz, 85 N. Y. App. Div. 4; Herrington v. Winn, 60 Hun (N. Y.) 235, 20 Civ. Pro. (N. Y.) 326; Williams v. Cooper, 113 N. Car. 286; Cake v. Cake, 162 Pa. St. 584; Terry v. Ragsdale, 33 Gratt. (Va.) 342.

6. **Introduction of Testimony of Third Person No Waiver** — *Alabama.* — Payne v. Long, 131 Ala. 438.

*Georgia.* — Skelton v. Richardson, 77 Ga. 546.

*Illinois.* — Ruckman v. Alwood, 71 Ill. 163.

*Indiana.* — Allen v. Jones, 1 Ind. App. 63.

*Iowa.* — Canaday v. Johnson, 40 Iowa 587.

*Maryland.* — Webster v. Le Compte, 74 Md. 249.

*Minnesota.* — Redding v. Godwin, 44 Minn. 355.

*Missouri.* — Ring v. Jamison, 66 Mo. 425.

*New Hampshire.* — Pattee v. Whitcomb, 72 N. H. 249.

*New Jersey.* — Fountain v. Linn, 57 N. J. L. 503.

*New York.* — McKenna v. Bolger, 49 Hun (N. Y.) 259; Hard v. Ashley, 63 Hun (N. Y.) 634, 18 N. Y. Supp. 413; Niskern v. Haydock, 23 N. Y. App. Div. 175; De Verry v. Schuyler, 5 Silv. Sup. (N. Y.) 72; Hard v. Ashley, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 413.

*North Carolina.* — Bushee v. Surles, 77 N. Car. 62; McRae v. Malloy, 90 N. Car. 521; Sumner v. Candler, 92 N. Car. 637; Hall v. Holloman (N. Car. 1904) 48 S. E. Rep. 515.

*South Carolina.* — Brice v. Hamilton, 12 S. Car. 32.

7. **Contrary Authority Due to Statutes** — *Nebraska.* — Rakes v. Brown, 34 Neb. 304; American Sav. Bank v. Harrington, 34 Neb. 597; Parrish v. McNeal, 36 Neb. 728; Tecumseh Nat. Bank v. McGee, 61 Neb. 709; Dickinson v. Columbus State Bank, (Neb. 1904) 98 N. W. Rep. 813.

*Pennsylvania.* — Roth's Estate, 150 Pa. St. 261; Cake v. Cake, 162 Pa. St. 584; Krumrine v. Grenoble, 165 Pa. St. 98; Thomas v. Miller, 165 Pa. St. 216; Kauss v. Rohner, 172 Pa. St. 481; Dumbach v. Bishop, 183 Pa. St. 602; Brumbach v. McLean, 187 Pa. St. 602; Robbins v. Farwell, 193 Pa. St. 37; Steele v. Nichols, 3 Pa. Dist. 517; Shannon v. Castner, 21 Pa. Super. Ct. 294. See Roth's Estate, 150 Pa. St. 269.



or that it is impossible that the statements made can be true.<sup>1</sup> Thus, where the third person has testified that the person deceased or under legal disability, in his presence made an agreement with the opposite party, the latter may testify that he never made such agreement in the presence of the witness,<sup>2</sup> but he will not be allowed to testify that he never made the agreement at all.<sup>3</sup>

(c) **Where Representative Introduces Evidence of Agent of Deceased.** — In *Illinois* it is provided by statute that when any agent of any deceased person shall, in behalf of any person suing or being sued as the personal representative of the deceased, testify as to any conversation between such agent and the opposite party, then such opposite party may testify concerning the same conversation or transaction. Under this statute, however, it is held that the opposite party cannot, by cross-examining the agent as to matters not related in the direct examination, make himself competent to testify concerning such matters.<sup>4</sup>

(d) **Where Testimony Is Preserved** — *aa. TESTIMONY OF REPRESENTATIVE PRESERVED* — (*aa*) *Preserved Testimony Introduced in Evidence* — **Depositions.** — Where, during the progress of a suit, the deposition of a party is taken and subsequently he dies, and his representative is admitted a party to the suit, it is held, even where the statute is silent on the subject, that if the preserved testimony is introduced in evidence the opposite party's incompetency is removed so far as to permit him to testify concerning the matters embraced in the deposition.<sup>5</sup>

**Testimony Given at Former Trial.** — So, also, it is held that where there has been a prior trial of the same cause of action, and one of the parties has died before the subsequent trial, if his representative introduces testimony of the deceased, given at the prior trial, the opposite party may testify in rebuttal as to the matters related in the testimony introduced.<sup>6</sup>

**Introduction of Book Entries of Deceased.** — It has been held that the admission in evidence of book entries of the deceased is not the admission in evidence of decedent's testimony within the meaning of a statute permitting the opposite party to testify to transactions with the deceased when the latter's testimony

**1. Extraneous Facts May Be Testified to.** — *Haverly v. Alcott*, 57 Iowa 171; *Miller v. Dayton*, 57 Iowa 423; *Wadsworth v. Heermans*, 85 N. Y. 639; *Pinney v. Orth*, 88 N. Y. 451; *Lewis v. Merritt*, 98 N. Y. 206; *Gorham v. Price*, 25 Hun (N. Y.) 11; *McKenna v. Bolger*, 37 Hun (N. Y.) 526; *Koenig v. Katz*, 37 Wis. 153.

**2. May Deny that Agreement Was Made in Presence of Witness.** — *Webster v. Sibley*, 72 Mich. 630; *Pinney v. Orth*, 88 N. Y. 448.

**3. Cannot Deny that Agreement Not Made At All.** — *Chadwick v. Fonner*, 69 N. Y. 404; *Haughey v. Wright*, 12 Hun (N. Y.) 179. But see *Adam v. Sanger*, (Tex. Civ. App. 1903) 77 S. W. Rep. 954.

**4. Evidence of Agent Introduced.** — *Loeb v. Stern*, 198 Ill. 371; *Symonds v. Caldwell*, 112 Ill. App. 347.

**5. Effect of Admitting Depositions of Deceased in Evidence** — *United States*. — *Mumm v. Owens*, 2 Dill. (U. S.) 477.

*Colorado*. — *Levy v. Dwight*, 12 Colo. 101.

*Georgia*. — *Monroe v. Napier*, 52 Ga. 385.

*Indiana*. — *Hatton v. Jones*, 78 Ind. 466.

*Missouri*. — *Allen v. Chouteau*, 102 Mo. 309.

*Nebraska*. — *Furbush v. Barker*, 38 Neb. 1; *Kroncke v. Madsen*, 56 Neb. 609; *Bangs v. Gray*, 60 Neb. 457.

*New York*. — *Potts v. Mayer*, 86 N. Y. 302; *Matter of Callister*, 153 N. Y. 294; *Miller v.*

*Adkins*, 9 Hun (N. Y.) 9; *Rice v. Motley*, 24 Hun (N. Y.) 143; *Macdonald v. Woodbury*, 30 Hun (N. Y.) 35.

*North Carolina*. — *Nixon v. McKinney*, 105 N. Car. 23.

*Tennessee*. — *Bingham v. Lavender*, 2 Lea (Tenn.) 48.

*Texas*. — *Runnels v. Belden*, 51 Tex. 48; *Shuford v. Chinski*, (Tex. Civ. App. 1894) 26 S. W. Rep. 141; *Ivey v. Bondies*, (Tex. Civ. App. 1897) 44 S. W. Rep. 916.

*Vermont*. — *Walker v. Taylor*, 43 Vt. 612.

*West Virginia*. — *Zane v. Fink*, 18 W. Va. 693.

See also the statutes of the various states.

**6. Effect of Admitting Testimony Given at Former Trial** — *Colorado*. — *Levy v. Dwight*, 12 Colo. 101.

*Indiana*. — *Hatton v. Jones*, 78 Ind. 471; *Turpie v. Lowe*, 158 Ind. 314.

*Mississippi*. — *Strickland v. Hudson*, 55 Miss. 235.

*Missouri*. — *Coughlin v. Haeussler*, 50 Mo. 126; *Allen v. Chouteau*, 102 Mo. 309; *Hayden v. Grillo*, 42 Mo. App. 1.

*Nebraska*. — *Furbush v. Barker*, 38 Neb. 1, 40 Neb. 129; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709.

*New York*. — *Robbins v. Pulz*, 48 N. Y. Super. Ct. 510.

*West Virginia*. — *Zane v. Fink*, 18 W. Va. 693.

is admitted in evidence.<sup>1</sup>

**Cures Error in Allowing Opposite Party to Testify.** — An error in allowing the opposite party to testify in his own behalf concerning transactions with the deceased is cured if the defendant afterwards gives in evidence a deposition of the deceased concerning the same transaction.<sup>2</sup>

**Preserved Testimony Not Introduced in Evidence.** — Where decedent's testimony has been preserved, but has not been introduced in evidence, in a suit by or against his representative, it is generally held that the opposite party will be allowed to testify as to matters related in such preserved testimony. He need not wait until the representative introduces the testimony in evidence.<sup>3</sup> There is contrary authority, however, to the effect that the opposite party must wait until the testimony has been introduced in evidence by the representative.<sup>4</sup> In *Colorado* a statute allows the opposite party to testify concerning matters related in decedent's deposition only where it has been read in evidence.<sup>5</sup>

**bb. TESTIMONY OF OPPOSITE PARTY PRESERVED.** — A deposition of the opposite party which was taken during the life of the decedent, and before the representative was substituted in the suit, has been held admissible in evidence on the ground that the opposite party testified within the meaning of the statute prohibiting the opposite party from testifying in a suit by or against a representative, when the deposition was taken, at which time he was a competent witness.<sup>6</sup>

**cc. TESTIMONY OF BOTH PARTIES PRESERVED.** — It has been held that where the depositions of both parties are taken before trial, each at the instance of the other party, and one of the parties subsequently dies, the opposite party may at the trial, the representative of the deceased having been substituted, introduce in evidence his deposition taken at the instance of the deceased, notwithstanding he would not be allowed to testify orally to the matters contained therein upon his own offer.<sup>7</sup> And so it has been held that where the depositions of both parties are taken and one of the parties dies and his representative is substituted, if the decedent's deposition is introduced in evidence by the representative, the surviving party may introduce in evidence his own deposition, notwithstanding a statute which provides that a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person.<sup>8</sup>

**(e) Where Opposite Party Is Examined by Representative** — **aa. IN GENERAL.** — Even though the opposite party in a suit by or against a representative of a person deceased or under some legal disability, is not allowed to testify in his own behalf concerning transactions or communications with the decedent or person disabled, still he may be called by the representative and examined as to such matters.<sup>9</sup> This right of the representative to examine the opposite party

1. *Whisler v. Whisler*, 117 Iowa 712. But see *Marsh v. Brown*, 18 Hun (N. Y.) 319.

2. *Trow v. Shannon*, 8 Daly (N. Y.) 239, affirmed 78 N. Y. 446.

3. **Opposite Party Need Not Wait Till Testimony Is Introduced.** — *Stone v. Hunt*, 114 Mo. 66; *Leahy v. Rayburn*, 33 Mo. App. 55; *Hayden v. Grillo*, 42 Mo. App. 1; *O'Neill v. Brown*, 61 Tex. 34. See also *Coble v. McClintock*, 10 Ind. App. 562.

4. **Opposite Party Must Wait Till Testimony Is Introduced.** — *Taylor v. Bunker*, 68 Mich. 258; *Ivey v. Bondies*, (Tex Civ. App. 1897) 44 S. W. Rep. 916. Compare *Park v. Lock*, 48 Ark. 133; *Monroe v. Napier*, 52 Ga. 385; *Barker v. Hebbard*, 81 Mich. 267; *Hewlett v. George*, 68 Miss. 703; *Walker v. Taylor*, 43 Vt. 612; *Zane v. Fink*, 18 W. Va. 693.

5. *Levy v. Dwight*, 12 Colo. 101.

6. **Testimony of Opposite Party Preserved.** — *Neis v. Farquharson*, 9 Wash. 508.

7. *McDonald v. Woodbury*, 65 How. Pr. (N. Y.) 226.

8. *Drewry v. Hopper*, 77 Miss. 744.

9. **Opposite Party May Be Examined by Representative** — *United States*. — *Treadwell v. Lennig*, 50 Fed. Rep. 872.

*Alabama*. — *Thomas v. Thomas*, 42 Ala. 120; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736. *California*. — *Chase v. Evoy*, 51 Cal. 618.

*Colorado*. — *Warren v. Adams*, 19 Colo. 515. *Illinois*. — *Sconce v. Henderson*, 102 Ill. 376; *Bardell v. Brady*, 172 Ill. 420; *Neish v. Gannon*, 98 Ill. App. 248, affirmed 198 Ill. 219; *Harnish v. Miles*, 111 Ill. App. 105.

*Indiana*. — *Malady v. McEnary*, 30 Ind. 273;

does not depend on any express statutory provisions, but exists even where the statutes are silent on the matter,<sup>1</sup> though as a rule it is exercised by virtue of its being expressly given by some statute.<sup>2</sup>

*bb. EFFECT OF EXAMINATION AS WAIVING OPPOSITE PARTY'S INCOMPETENCY.* — If, however, the opposite party is examined concerning transactions or communications with the person whom the other party represents, he becomes a competent witness on his own behalf to the extent of testifying fully concerning such transactions or communications as have been brought out by the questions of the representative; but it is generally held that his competency ends there,<sup>3</sup> though in several jurisdictions it has been held that the opposite party becomes a competent witness on his own behalf for all purposes.<sup>4</sup>

*Examination as to Matters Not Inhibited by the Statute.* — If the opposite party is only examined by the representative concerning matters which he could have testified to if he had taken the stand in his own behalf, he does not become competent to testify concerning matters which he could not have testified to in his own behalf,<sup>5</sup> unless such testimony is necessary to explain what has been drawn from him by the questions of the representative.<sup>6</sup>

*As to Competency at Subsequent Trial.* — Not only does the examination of the opposite party by the representative make the former a competent witness at

*Reed v. Reed*, 30 Ind. 313; *Allen v. Jones*, 1 Ind. App. 63; *Kibler v. Potter*, 11 Ind. App. 604; *Bartlett v. Burden*, 11 Ind. App. 419.

*Iowa.* — *Leasman v. Nicholson*, 59 Iowa 259.

*Maryland.* — *Whitridge v. Whitridge*, 76 Md. 54; *Duvall v. Hambleton*, 98 Md. 12.

*Minnesota.* — *Shakopee First Nat. Bank v. Strait*, 75 Minn. 396.

*Missouri.* — *Tucker v. Gentry*, 93 Mo. App. 655.

*Pennsylvania.* — *Ash v. Guie*, 97 Pa. St. 493, 39 Am. Rep. 818; *Boyd v. Conshohocken Worsted Mills*, 149 Pa. St. 363; *Bair v. Frischkorn*, 151 Pa. St. 466; *Danley v. Danley*, 179 Pa. St. 170; *White's Estate*, 2 Pa. Dist. 808.

*Tennessee.* — *Thomas v. Irvin*, 90 Tenn. 512.

*Texas.* — *James v. James*, 81 Tex. 373; *Ivey v. Bondies*, (Tex. Civ. App. 1897) 44 S. W. Rep. 916.

*Virginia.* — *Cottrell v. Watkins*, 96 Va. 783.

**1. Right Not Dependent on Express Statutory Provision.** — *Dudley v. Steele*, 71 Ala. 423; *Chase v. Evoy*, 51 Cal. 618; *Roberts v. Briscoe*, 44 Ohio St. 596. See *Young v. Montgomery*, 161 Ind. 68.

**2.** See the statutes of the various states.

**3. Effect as Waiving Opposite Party's Incompetency** — *Colorado.* — *Warren v. Adams*, 19 Colo. 515.

*Kansas.* — *Niccolls v. Esterly*, 16 Kan. 32.

*Michigan.* — *Michigan Sav. Bank v. Butler*, 98 Mich. 381; *Fox v. Barrett*, 117 Mich. 162.

*Minnesota.* — *In re Hess*, 57 Minn. 282; *Trethaway v. Carey*, 60 Minn. 457.

*Missouri.* — *Ess v. Griffith*, 139 Mo. 322; *Borgess Invest. Co. v. Vette*, 142 Mo. 560; *Edwards v. Latimer*, (Mo. 1904) 82 S. W. Rep. 109; *Tierney v. Hannon*, 81 Mo. App. 488.

*Nebraska.* — *Taylor v. Ainsworth*, 49 Neb. 696; *Cline v. Dexter*, (Neb. 1904) 101 N. W. Rep. 246.

*New Hampshire.* — *Palmer v. Bass*, 69 N. H. 300.

*New York.* — *Merritt v. Campbell*, 70 N. Y. 625; *Nay v. Curley*, 113 N. Y. 575; *Davis v. Gallagher*, 55 Hun (N. Y.) 593; *Blankman v.*

*McQueen*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 663; *Hackstaff v. Hackstaff*, 82 Hun (N. Y.) 16; *Mahoney v. Jones*, 35 N. Y. App. Div. 84; *Matter of Gabriel*, 44 N. Y. App. Div. 623, affirmed 161 N. Y. 644; *Mercantile Safe Deposit Co. v. Dimon*, 55 N. Y. App. Div. 538; *Stirling v. Kelley*, 77 N. Y. App. Div. 621; *Matter of Woodbury*, (Surrogate Ct.) 40 Misc. (N. Y.) 143.

*Texas.* — *Jackson v. Mumford*, 74 Tex. 104; *Oury v. Saunders*, 77 Tex. 278.

**Husband or Wife of Opposite Party Incompetent.**

— If an executor or administrator calls the opposing party to testify to matters within the inhibition of the statute, he does not thereby waive his right to object to the testimony of the husband or wife of such party. *Gilbert v. Swain*, 9 Ind. App. 88.

**4. Becomes Competent Witness for All Purposes.**

— *Warren v. Adams*, 19 Colo. 515; *Jerome v. Bohm*, 21 Colo. 322; *Young v. Montgomery*, 161 Ind. 68.

**5. Effect of Examination as to Matters Not Inhibited by the Statute.** — *Tisdale v. Maxwell*, 58 Ala. 40; *Causler v. Wharton*, 62 Ala. 358; *Perry v. Mulligan*, 58 Ga. 470; *Trethaway v. Carey*, 60 Minn. 457; *Lyon v. Snyder*, 61 Barb. (N. Y.) 172; *Sumner v. Candler*, 92 N. Car. 634; *Armfield v. Colvert*, 103 N. Car. 147; *Hopkins v. Bowers*, 108 N. Car. 298; *Lahey v. Heenan*, 81 Pa. St. 185.

**6. Effect of Prohibited Testimony Is Necessary to Explain Matters Drawn from Opposite Party** — *Kansas.* — *Niccolls v. Esterly*, 16 Kan. 32.

*Michigan.* — *Matter of Bennett*, 52 Mich. 419; *Beardslee v. Reeves*, 76 Mich. 661; *Lilley v. Mutual Ben. L. Ins. Co.*, 92 Mich. 153; *Michigan Sav. Bank v. Butler*, 98 Mich. 381.

*Minnesota.* — *In re Hess*, 57 Minn. 282.

*New York.* — *Hackstaff v. Hackstaff*, 82 Hun (N. Y.) 16, 24 Civ. Pro. (N. Y.) 208.

*Ohio.* — *Roberts v. Briscoe*, 44 Ohio St. 596.

*Texas.* — *Jackson v. Mumford*, 74 Tex. 104.

*West Virginia.* — *Meez v. Snodgrass*, 9 W. Va. 190.



that trial to explain transactions brought out by the questions of the representative, but it also makes him a competent witness at any subsequent trial for the same purpose.<sup>1</sup>

**Where Representative Misuses Right of Cross-examination.** — If the opposite party, after testifying on his own behalf, is improperly cross-examined by the representative on matters not referred to in the direct examination and about which he would not be allowed to testify on his own behalf, the representative is deemed to have called the opposite party as his witness, and the latter becomes a competent witness to explain fully such matters.<sup>2</sup>

**(f) Opposite Party Allowed or Required to Testify by Court.** — By some statutes it is expressly provided that the opposite party in a suit by or against the representative of a person deceased or under certain legal disabilities, may be allowed or required even to testify by the court concerning transactions or communications with such person.<sup>3</sup>

**(g) Where Action or Proceeding Involves Validity of Deed, Will, or Codicil.** — In *Ohio* the opposite party may testify to transactions between himself and the person whom the other party represents, when the action or proceeding is one involving the validity of a deed, will, or codicil.<sup>4</sup> It has been held that an action to enforce a trust deed is not an action involving the validity of a deed within the meaning of the exception,<sup>5</sup> but an action by the administrator of an insolvent estate to recover of a fraudulent grantee the value of lands conveyed by decedent in fraud of creditors and by such grantee conveyed to a *bona fide* purchaser, is an action involving the validity of a deed.<sup>6</sup>

**VII. CREDIBILITY AND IMPEACHMENT OF WITNESSES — 1. In General — Modes of Impeaching Credit.** — As a general rule, the credibility of a witness is always open to attack by such methods as are authorized by law for the purpose;<sup>7</sup> while, on the other hand, a person who is not called or examined as a witness in a cause cannot be assailed therein by evidence going only to credit and not to establish or disprove the substantial issues, though he may be active in its prosecution or interested in the result.<sup>8</sup> Of the various modes

1. As to Competency at Subsequent Trial. — *Tierney v. Hannon*, 81 Mo. App. 488; *Corning v. Walker*, 100 N. Y. 547; *Bair v. Frischkorn*, 151 Pa. St. 466. See *Miller v. Montgomery*, 78 N. Y. 285.

2. *Stevens v. Brown*, 12 Ill. App. 619.

3. Allowed or Required to Testify. — *Mumm v. Owens*, 2 Dill. (U. S.) 477; *Goldman v. Sotelo*, (Ariz. 1900) 60 Pac. Rep. 696; *Malady v. McEnary*, 30 Ind. 273; *Noble v. Withers*, 36 Ind. 193; *Talbott v. Barber*, 11 Ind. App. 1; *Thornburg v. Buck*, 13 Ind. App. 446; *Payne v. Goldbach*, 14 Ind. App. 100; *Schlemmer v. Schendorf*, 20 Ind. App. 447.

In *New Hampshire* it is provided that where it clearly appears to the court that injustice may be done without the testimony of the opposite party, he may be allowed to testify, and the ruling of the court admitting or rejecting his testimony may be excepted to and revised. N. H. Pub. Stat. & Sess. Laws, c. 224, § 17; *Chandler v. Davis*, 47 N. H. 462; *Harvey v. Hilliard*, 47 N. H. 551; *Stearns v. Wright*, 51 N. H. 600; *Fosgate v. Thompson*, 54 N. H. 455; *Hoit v. Russell*, 56 N. H. 559; *Burns v. Madigan*, 60 N. H. 197; *Berry v. McArdle*, 62 N. H. 354; *Welch v. Adams*, 63 N. H. 348; *Weston v. Elliott*, 72 N. H. 433.

It is held that the discretion conferred on the court is limited to the admission, and not to the exclusion, of testimony. *Dow v. Merrill*, 65 N. H. 107.

4. *Bates's Annot. Stat. Ohio* (1903), § 5242.

5. *Paddock v. Adams*, 56 Ohio St. 242.

6. *Doney v. Clark*, 55 Ohio St. 294.

7. For Various Exceptions to the Rule, see *infra*, this title, VII. *Corroboration of Witnesses* — 1. *Corroborative Evidence*. See also *Flash v. Ferri*, 34 Ala. 186.

**Witness Called in Rebuttal.** — A witness called for the first time in rebuttal is subject to impeachment as well as one who was examined on the main issue. *Argabright v. State*, 56 Neb. 363; *State v. Staley*, 45 W. Va. 792.

**Witnesses Absent at Trial**, whose testimony is given by deposition or in other ways. *Gregory v. State*, (Ala. 1904) 37 So. Rep. 259; *Vandyke v. Thompson*, 1 Harr. (Del.) 109; *Johnson v. Com.*, 94 Ky. 578; *Crouse v. Miller*, 10 S. & R. (Pa.) 155. See *infra*, this section, 9. (4) *Witness Testifying by Deposition, Affidavit, or the Like*.

**Dying Declarations.** — *Dunn v. People*, 172 Ill. 582; *Nordgren v. People*, 211 Ill. 425. See also the title DYING DECLARATIONS, vol. 10, p. 384.

8. **Credibility of Person Not a Witness.** — *Bracegirdle v. Bailey*, 1 F. & F. 536; *Lodge v. State*, 122 Ala. 97; *Hall v. People*, 19 Colo. 254; *Hoffman v. State*, 93 Md. 388; *Lent v. Shear*, 160 N. Y. 462, *reversing* 20 N. Y. App. Div. 624; *State v. Chenute*, 65 Kan. 862, 70 Pac. Rep. 870.

by which a witness may be impeached or his credit impaired, the principal ones are by cross-examination; by disproving the facts stated by him, by the testimony of other witnesses; by evidence of bad character or reputation, conviction of an infamous crime, bias for or against a party, or former statements contradictory of his testimony.<sup>1</sup>

**2. Definitions** — *a. CREDIBILITY.* — Credibility and competency are sometimes applied to a witness as if the words were synonymous in meaning. This is not strictly correct. Credibility relates to whether a person who is a witness is such a one as is entitled to credit or belief.<sup>2</sup>

*b. IMPEACHMENT.* — The word "impeach," strictly speaking, imports a successful attempt to establish want of veracity in a witness; importing destruction of his testimony. But the jury being the exclusive judge of the credibility of witnesses, the word is generally used to mean an attempt to establish such a charge, whether successful or unsuccessful, in whole or in part. It not only means destruction, but it means attack, and includes disparagement and discredit, which may be considered degrees of impeachment.<sup>3</sup> In impeaching a witness a distinction is sometimes made between his character and his credibility.<sup>4</sup>

**3. Province of Court and Jury** — *a. GENERAL RULES* — (1) *Province of Jury or Other Triers of Facts.* — The credibility of witnesses, the effect and weight to be given to conflicting and contradictory oral evidence, are all questions of fact to be determined by the triers of the facts, whether court or jury, and not questions of law for the court. Where a cause is tried before a jury, therefore, it is peculiarly within their province to weigh the testimony of witnesses, as well as all the facts and circumstances tending to corroborate or discredit them, and determine the case according to the preponderance of

**1. Various Modes of Impeaching Credit of Witness.** — See *Rex v. Watson*, 2 Stark. 149, 3 E. C. L. 354; *White v. Fussell*, 1 Ves. & B. 153; *Piggott v. Croxhall*, 1 Sim. & St. 467; *U. S. v. Hughes*, 34 Fed. Rep. 732; *Stamper v. Griffin*, 12 Ga. 450; *Cannon v. State*, 57 Miss. 147; *Krewson v. Purdom*, 13 Oregon 563; *State v. Wallace*, 44 S. Car. 357; *Sweet v. Gilmore*, 52 S. Car. 530.

**Impeaching Evidence Bearing on Issues in Cause.** — The fact that evidence admissible only to discredit a witness bears on the issues involved is no objection if it is otherwise competent for the purpose for which it is introduced. *People v. Flechter*, 44 N. Y. App. Div. 199, 14 N. Y. Crim. 328, Barrett, J., *doubting*.

**A Witness Cannot Be Impeached by calling other witnesses merely to characterize his testimony as false.** *Llewellyn v. Pace*, 1 W. R. 28; *People v. Buckley*, 91 N. Y. App. Div. 586; or to prove that, although the party against whom he was called had made diligent search before the trial to discover all persons who were qualified to testify thereat, he was not found. *Coker v. State*, 35 Tex. Crim. 57.

**2. "Credibility" Defined and Distinguished from Competency.** — *Smith v. Jones*, 68 Vt. 132. See also *People v. Compton*, 123 Cal. 403; *Kennedy v. Upshaw*, 66 Tex. 442; *Kitchen v. State*, 29 Tex. App. 45. See generally the titles CREDIBLE, vol. 8, p. 229; WILLS, *ante*, p. 537; *supra*, this title, IV. Competency.

**"Discredit" Defined.** — See DISCREDIT, vol. 9, p. 473; *Howard v. State*, 25 Tex. App. 686.

**3. "Impeach" Defined.** — *Com. v. Welch*, 111 Ky. 530, 23 Ky. L. Rep. 151. To similar effect, *Duncan v. State*, 97 Ga. 180; *Huff v. State*, 104 Ga. 521; *Smith v. State*, 109 Ga.

479; *White v. McLean*, 57 N. Y. 670, (Ct. App.) 47 How. Pr. (N. Y.) 193. And see IMPEACH, vol. 15, p. 1060.

**Impeachment, in Evidence,** is an allegation, supported by proof, that a witness who has been examined is unworthy of credit. It is the allegation supported by proof. *Powell v. State*, 101 Ga. 9, *citing* 1 Bouv. L. Dict.; *Black L. Dict.*

**The Term "Impeached"** goes not only to what the witness testifies to, but to the credibility of the witness. *Beedle v. People*, 204 Ill. 197.

**The Word "Impeach"** extends to attack or impeachment by the cross-examination of the witness himself, or, as it is usually termed, "cross-examination as to credibility," as well as to attack or impeachment by the testimony of other witnesses. *Com. v. Welch*, 111 Ky. 530, 23 Ky. L. Rep. 151.

**Contradictory Evidence.** — Evidence impeaches a witness when it assails his general credit or otherwise weakens the force of his testimony and detracts from its weight, without having of itself probative value as original evidence upon the matter at issue. Where it merely tends to show a different state of facts from that testified to by the witness, it contradicts but does not impeach. *Hagen v. New York Cent. R. Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 540. To similar effect, *Baker v. Robinson*, 49 Ill. 299; *Beedle v. People*, 204 Ill. 197.

**4. Distinction Between Character and Credit of Witness.** — *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43; *Chapman v. Cooley*, 12 Rich. L. (S. Car.) 654; *State v. Jones*, 29 S. Car. 201; *Stevenson v. Gunning*, 64 Vt. 609.



evidence.<sup>1</sup> If there is one question more peculiarly and exclusively within the province of the jury than any other, it is that of the credibility of witnesses. The right or duty to decide this question must never be divided between the court and the jury, and much less taken away from the jury and decided wholly by the court.<sup>2</sup> It is ordinarily for the triers of the facts to determine whether and to what extent witnesses shall be believed, not only when there is a conflict of evidence merely, but also when the credibility of witnesses has been substantially impeached or discredited by evidence of bias, bad character, contradictory statements, or the like; and this is true though

### 1. Credibility of Witnesses a Question of Fact

— *United States*. — *U. S. v. Hughes*, 34 Fed. Rep. 732.

*Alabama*. — *Moore v. Jones*, 13 Ala. 296; *Moore v. State*, 68 Ala. 360; *Tait v. Murphy*, 80 Ala. 440; *Finch v. State*, 81 Ala. 41; *Skeggs v. Horton*, 82 Ala. 352; *Stix v. Keith*, 85 Ala. 465; *Smith v. State*, 92 Ala. 69.

*Arkansas*. — *Richardson v. State*, 47 Ark. 562.

*California*. — *People v. Compton*, 123 Cal. 493.

*Georgia*. — *Western, etc., R. Co. v. Carlton*, 28 Ga. 180; *Whitten v. State*, 47 Ga. 297; *Rateree v. State*, 78 Ga. 335; *McCoy v. State*, 78 Ga. 490; *Nolen v. Heard*, 87 Ga. 293; *Hodgkins v. State*, 89 Ga. 761; *Mills v. State*, 104 Ga. 502.

*Illinois*. — *Bowers v. People*, 74 Ill. 418; *Paton v. Stewart*, 78 Ill. 481; *Stampofski v. Steffens*, 79 Ill. 303; *Union R., etc., Co. v. Kalaher*, 114 Ill. 325; *Kean v. West Chicago St. R. Co.*, 75 Ill. App. 38; *Kornazsewska v. West Chicago St. R. Co.*, 76 Ill. App. 366; *Quincy Gas, etc., Co. v. Bauman*, 104 Ill. App. 600, *affirmed* 203 Ill. 295; *Supreme Tent, etc. v. Stensland*, 105 Ill. App. 267, *affirmed* 206 Ill. 124; *Peterson v. Fullerton*, 106 Ill. App. 237.

*Indiana*. — *Terry v. State*, 13 Ind. 70; *Hollingsworth v. Pickering*, 24 Ind. 435; *Eggers v. Eggers*, 57 Ind. 461.

*Iowa*. — *State v. McGlothlen*, 56 Iowa 544; *State v. McClintic*, 73 Iowa 663.

*Kentucky*. — *Hammill v. Louisville, etc., R. Co.*, 93 Ky. 343; *Brown v. Com.*, (Ky. 1891) 17 S. W. Rep. 220; *Louisville, etc., R. Co. v. Hurst*, (Ky. 1892) 20 S. W. Rep. 817.

*Michigan*. — *Tallon v. Grand Portage Copper Min. Co.*, 55 Mich. 147; *People v. O'Brien*, 68 Mich. 468; *Payne v. Union Life Guards*, (Mich. 1904) 99 N. W. Rep. 376, 11 Detroit Leg. N. 59.

*Mississippi*. — *Rucks v. Great Southern Telephone, etc., Co.*, (Miss. 1898) 23 So. Rep. 454.

*Missouri*. — *Moore v. Pieper*, 51 Mo. 157; *Gregory v. Chambers*, 78 Mo. 294; *State v. Kinney*, 81 Mo. 101; *Meyers v. Union Trust Co.*, 82 Mo. 237; *Rosecrans v. Wabash, etc., R. Co.*, 83 Mo. 678; *Coudy v. St. Louis, etc., R. Co.*, 85 Mo. 79; *State v. Patrick*, 107 Mo. 147; *Haynes v. Trenton*, 123 Mo. 326; *Dalton v. Poplar Bluff*, 173 Mo. 39; *Hill v. Sutton*, 8 Mo. App. 353; *Hitchler v. Voelker*, 8 Mo. App. 492; *Greenwood v. Harris*, 8 Mo. App. 603; *Mechanics' Sav. Inst. v. Potthoff*, 9 Mo. App. 574; *Downing v. Missouri, etc., R. Co.*, 70 Mo. App. 657; *Cravens v. Hunter*, 87 Mo. App. 456; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1904) 80 S. W. Rep. 364, *reversing*

on other grounds on rehearing (Mo. App. 1903) 74 S. W. Rep. 1039.

*Nebraska*. — *Howell Lumber Co. v. Campbell*, 38 Neb. 567; *Parker v. State*, (Neb. 1903) 93 N. W. Rep. 1037.

*New Jersey*. — *Acolia v. Elizabeth, etc., R. Co.*, (N. J. 1904) 57 Atl. Rep. 257.

*New York*. — *National Bank v. Mills*, 99 N. Y. 656; *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *Van Tassell v. New York, etc., R. Co.*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 299, *affirmed* without opinion 142 N. Y. 634; *Durkee v. Delaware, etc., Canal Co.*, 88 Hun (N. Y.) 471; *People v. Flechter*, 44 N. Y. App. Div. 199, 14 N. Y. Crim. 328; *Cullinan v. Furthmann*, 70 N. Y. App. Div. 110; *Bjerrum v. Springfield Breweries Co.*, 83 N. Y. App. Div. 172; *Van Gaasbeek v. Staples*, 85 N. Y. App. Div. 271, *affirmed* without opinion 177 N. Y. 524; *Fisher v. Union R. Co.*, 86 N. Y. App. Div. 365.

*North Carolina*. — *Cogdell v. Southern R. Co.*, 129 N. Car. 398; *Hinson v. Postal Tel. Cable Co.*, 132 N. Car. 460; *State v. Hall*, 132 N. Car. 1094; *State v. Wilcox*, 132 N. Car. 1120.

*Pennsylvania*. — *Curry v. Curry*, 114 Pa. St. 367; *Parry v. Parry*, 130 Pa. St. 94; *Kelly v. McGehee*, 137 Pa. St. 443; *Fulton v. Lancaster County*, 162 Pa. St. 306; *Mewes v. Crescent Pipe Line Co.*, 170 Pa. St. 369; *Bassett v. Easton*, 200 Pa. St. 514; *Berger v. Hatton*, 7 Pa. Super. Ct. 414.

*South Carolina*. — *Rykard v. Davenport*, 61 S. Car. 215.

*Texas*. — *Seal v. State*, 8 Tex. 491; *Texas, etc., R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *International, etc., R. Co. v. Ives*, (Tex. Civ. App. 1903) 78 S. W. Rep. 36; *Dill v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 950.

*Utah*. — *People v. Peacock*, 5 Utah 237.

*Virginia*. — *Harrison v. Brock*, 1 Munf. (Va.) 22; *Lyles v. Com.*, 88 Va. 396.

*West Virginia*. — *Young v. West Virginia, etc., R. Co.*, 44 W. Va. 218.

*Wisconsin*. — *Kellogg v. Nelson*, 5 Wis. 131; *Mechelke v. Bramer*, 59 Wis. 57; *Kenney v. State*, 74 Wis. 260; *Roberts v. State*, 84 Wis. 361.

*Canada*. — *Reg. v. Jones*, 28 U. C. Q. B. 416; *Smith v. Andrews*, 17 N. Bruns. 541.

And see generally the cases cited in this subsection.

2. *Roberts v. State*, 84 Wis. 361.

**The Function of the Trial Court** in such cases is strictly limited to determining whether there is or is not any evidence legally tending to prove the fact or facts affirmed. *Richardson v. State*, 47 Ark. 562; *Kean v. West Chicago St. R. Co.*, 75 Ill. App. 38.



the witnesses of the adverse party have not been thus attacked. Whether a witness has been successfully impeached is a question of fact and not of law.<sup>1</sup>

**1. Whether Witness Has Been Impeached or Discredited a Question of Fact—United States.**  
—U. S. v. Hall, 44 Fed. Rep. 863.

*Alabama.*—Finch v. State, 81 Ala. 41; Louisville, etc., R. Co. v. Watson, 90 Ala. 68; Smith v. State, 92 Ala. 69; Louisville, etc., R. Co. v. Hurt, 101 Ala. 34; Sanders v. State, 134 Ala. 74.

*Arkansas.*—St. Louis, etc., R. Co. v. Faisst, 68 Ark. 587.

*California.*—Schneider v. Market St. R. Co., 134 Cal. 482.

*Florida.*—Leslie v. State, 35 Fla. 171; Peaden v. State, (Fla. 1903) 35 So. Rep. 204.

*Georgia.*—Macon City Bank v. Kent, 57 Ga. 283; McTyier v. State, 91 Ga. 254; Central R., etc., Co. v. Phinazee, 93 Ga. 488; Duncan v. State, 97 Ga. 180; Powell v. State, 101 Ga. 9; Huff v. State, 104 Ga. 521; Smith v. State, 109 Ga. 479; Hargrove v. State, 117 Ga. 706.

*Illinois.*—Bressler v. People, 117 Ill. 422; Loehr v. People, 132 Ill. 504; Matthews v. Granger, 196 Ill. 164, affirming 96 Ill. App. 536; East St. Louis Connecting R. Co. v. Altgen, 210 Ill. 213, affirming 112 Ill. App. 471; Kornzsewska v. West Chicago St. R. Co., 76 Ill. App. 366; Royal Ins. Co. v. Crowell, 77 Ill. App. 544; Lieserowitz v. West Chicago St. R. Co., 80 Ill. App. 248; Metropolitan West Side El. R. Co. v. Fortin, 107 Ill. App. 157.

*Indiana.*—Huntingburgh v. First, 22 Ind. App. 66.

*Iowa.*—Green v. Cochran, 43 Iowa 544; State v. Mylor, 46 Iowa 192; State v. Ormiston, 66 Iowa 143; Henry v. Sioux City, etc., R. Co., 75 Iowa 84; State v. Farrell, 82 Iowa 553; State v. Larson, 85 Iowa 659; Asbach v. Chicago, etc., R. Co., 86 Iowa 101; State v. Bradbury, 92 Iowa 512; State v. Van Vliet, 97 Iowa 387; State v. Hossack, 116 Iowa 194.

*Kansas.*—State v. Barber, 2 Kan. App. 679.

*Kentucky.*—Sapp v. Com., (Ky. 1899) 48 S. W. Rep. 984.

*Maine.*—Dunning v. Maine Cent. R. Co., 91 Me. 87.

*Massachusetts.*—Kingman v. Lynn, etc., R. Co., 181 Mass. 387.

*Michigan.*—Hitchcock v. Moore, 70 Mich. 112; People v. Gallagher, 75 Mich. 512; Ball-Barnhart-Putman Co. v. Lane, (Mich. 1903) 97 N. W. Rep. 727, 10 Detroit Leg. N. 724.

*Minnesota.*—Kennedy v. McQuaid, 56 Minn. 450; In re Hess, 57 Minn. 282; Higgins v. Wren, 79 Minn. 462; Hahn v. Bettingen, 84 Minn. 512.

*Mississippi.*—Dean v. State, 78 Miss. 360.

*Missouri.*—Cravens v. Hunter, 87 Mo. App. 456.

*Nebraska.*—Heldt v. State, 20 Neb. 492; Watson v. Roode, 30 Neb. 264; Bankers' Union v. Schiverin, (Neb. 1903) 92 N. W. Rep. 158.

*New York.*—Canajoharie Nat. Bank v. Dieffendorf, 123 N. Y. 191; Volkmar v. Manhattan R. Co., 134 N. Y. 418, reversing 58 N. Y. Super. Ct. 125; Wendt v. Craig, 147 N. Y. 697, reversing 63 Hun (N. Y.) 627, 17 N. Y. Supp. 748; Reid v. New York, 68 Hun (N. Y.) 110, affirmed on other grounds 139 N. Y. 534; Kings-

land Co. v. Newman, 1 N. Y. App. Div. 1; Connolly v. Central Vermont R. Co., 4 N. Y. App. Div. 221; Doyle v. Albany R. Co., 32 N. Y. App. Div. 87; O'Flaherty v. Nassau Electric R. Co., 34 N. Y. App. Div. 74, affirmed without opinion 165 N. Y. 624; Bradley v. Second Ave. R. Co., 34 N. Y. App. Div. 284; Quill v. New York, 36 N. Y. App. Div. 476; Murr v. Western Assur. Co., 50 N. Y. App. Div. 4; Cullinan v. Furthmann, 70 N. Y. App. Div. 110; McCoy v. Munro, 76 N. Y. App. Div. 435; Shortsleeve v. Stebbins, 77 N. Y. App. Div. 588; Bell v. Mills, 78 N. Y. App. Div. 42; O'Connor v. National Ice Co., 56 N. Y. Super. Ct. 410; Schwabland v. Holahan, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 176; Newcombe v. Hyman, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 25; Delise v. Palladino, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 74; Lowey v. Fidelity Printing Co., (Supm. Ct. App. T.) 16 Misc. (N. Y.) 549, reversing (N. Y. City Ct. Gen. T.) 12 Misc. (N. Y.) 551, citing 29 Am. & Eng. Ency. L. (1st ed.) 774; Finn v. Peterson, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 737; Lazarus v. Spencer, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 767; Bickford v. Menier, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 775; Matter of Brown, 59 Hun (N. Y.) 628, 14 N. Y. Supp. 122; Crosby v. Delaware, etc., Canal Co., 66 Hun (N. Y.) 628, 21 N. Y. Supp. 83, affirmed without opinion 141 N. Y. 589; Upington v. Keenan, 67 Hun (N. Y.) 648, 21 N. Y. Supp. 699; Pease Piano Co. v. Waterloo Organ Co., (Supm. Ct. App. T.) 54 N. Y. Supp. 838; Gair v. Cohen, (Supm. Ct. App. T.) 56 N. Y. Supp. 180; Sternaman v. Metropolitan L. Ins. Co., 94 N. Y. App. Div. 610.

*North Carolina.*—State v. Mitchener, 98 N. Car. 688; Cogdell v. Southern R. Co., 129 N. Car. 398.

*Ohio.*—Dilcher v. State, 39 Ohio St. 130; Spaulding v. Toledo Consol. St. R. Co., 10 Ohio Cir. Dec. 660, 20 Ohio Cir. Ct. 99; Stacy v. Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67.

*Pennsylvania.*—Sandford v. Hestonville, etc., R. Co., 136 Pa. St. 84, 26 W. N. C. (Pa.) 401.

*South Dakota.*—Elrod v. Ashton, 14 S. Dak. 350, reversing on rehearing sub nom. Ashton v. Ashton, 11 S. Dak. 610.

*Tennessee.*—Kinchelov v. State, 5 Humph. (Tenn.) 9; Whiteside v. State, 4 Coldw. (Tenn.) 175.

*Texas.*—Howard v. State, 25 Tex. App. 686; International, etc., R. Co. v. Ives, (Tex. Civ. App. 1903) 78 S. W. Rep. 36; Galveston, etc., R. Co. v. Butchek, (Tex. Civ. App. 1904) 78 S. W. Rep. 740; Chester v. State, 1 Tex. App. 707; Trotter v. State, 37 Tex. Crim. 468; Bradshaw v. State, 44 Tex. Crim. 222, explaining Rider v. State, 26 Tex. App. 334; Douglass v. State, (Tex. Crim. 1895) 33 S. W. Rep. 228.

*Wisconsin.*—Mack v. State, 48 Wis. 286; Welty v. Lake Superior Terminal, etc., R. Co., 100 Wis. 128.

*Canada.*—Gates v. Lohnes, 31<sup>st</sup> Nova Scotia 221, criticising Faulkner v. Brine, 1 F. & F. 351.

It is undoubtedly true that where the determination of the nature of a fact depends on the credibility of witnesses, and where a jury would be justified in coming to a conclusion either way, as credence be given to the witnesses on the one side or the other, it is the duty of the court to submit such an issue to the jury, however firmly convinced it may be that there is no doubt where the truth lies.<sup>1</sup>

(2) *Province of Court.*—Since the probative value of the testimony of a witness depends on the credit to which the jury thinks it entitled,<sup>2</sup> it necessarily follows that the court has no right to lay down for the jury rules whereby they shall determine the force of the evidence, irrespective of the credence they actually give it in their own minds.<sup>3</sup> Nor is it less repre-

**Same Rule at Law and in Equity.**—*Wimer v. Smith*, 22 Oregon 469.

1. *Blumenthal v. Boston, etc.*, R. Co., 97 Me. 255.

**Though a Witness Contradicts Himself, or a Party's Own Witnesses Contradict Each Other,** it is for the jury and not for the court to say which statements shall be believed. That the witness who contradicts himself is a party to the litigation constitutes no exception to the rule, whether he is called by the adverse party or in his own behalf. *Swift v. Short*, 92 Fed. Rep. 567; *Sappington v. Bell*, 115 Ga. 856; *Chicago, etc.*, R. Co. v. *Raidy*, 203 Ill. 310; *Hall v. Murdock*, 114 Mich. 233; *Johnson v. Blell*, 61 Mo. App. 37; *State v. Potts*, 9 N. J. L. 31, 17 Am. Dec. 449; *Quill v. New York*, 36 N. Y. App. Div. 476; *Crossman v. Lurman*, 57 N. Y. App. Div. 393; *Schwabeland v. Holahan*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 176; *Sandford v. Hestonville, etc.*, R. Co., 136 Pa. St. 84, 26 W. N. C. (Pa.) 401; *Garney v. Katz*, 89 Wis. 230; *Wortman v. Marter*, 8 N. Bruns. 309, *Weldon, J.*, dissenting. But see *Guinney v. Hand*, 2 Pa. Dist. 67.

**Parties as Witnesses—One Witness on Each Side.**—Where the evidence in an action consists of the evidence of the adverse parties, or of one witness on each side, who testify squarely against each other, and there is no corroboration of either one, it is for the jury to weigh the testimony and determine which is entitled to the greater credit. *White v. Ross*, 35 Fla. 377; *Stampofski v. Steffens*, 79 Ill. 303; *State v. Ginger*, 80 Iowa 574; *Clement v. Congress Spring Co.*, 91 Hun (N. Y.) 636; *Kuehn v. Wilson*, 13 Wis. 104; *Roberts v. State*, 84 Wis. 361.

**Varying Former Testimony to Meet Objections Sustained to Former Judgment.**—The court cannot withdraw a case from the jury because the testimony of witnesses contradicts that given by them on a former trial of the cause, though the testimony seems to have been varied for the purpose of meeting objections sustained to the proof made on a former trial. It is for the jury to determine which statements are to be believed. *Williams v. Delaware, etc.*, R. Co., 155 N. Y. 158, *reversing* 92 Hun (N. Y.) 219; *Doyle v. Albany R. Co.*, 32 N. Y. App. Div. 87; *Bradley v. Second Ave. R. Co.*, 34 N. Y. App. Div. 284; *Murr v. Western Assur. Co.*, 50 N. Y. App. Div. 4.

**Failure of Evidence.**—Where a witness called to prove the case of a party persists in making positive though very improbable statements disproving it, the court, in the absence of any

other witnesses, will not allow the case to go to the jury. The jury cannot found a verdict affirming a certain fact upon the mere disbelief of the witness who denies it. *Vicent v. Sprague*, 3 U. C. Q. B. 283, *Macaulay, J.*, *doubting*. See also *Barber v. Armstrong*, 6 U. C. Q. B. O. S. 543; *Lane v. Jarvis*, 5 U. C. Q. B. 127; *Mickle v. Oliver*, 11 U. C. C. P. 363.

2. See *supra*, this subsection, *Province of Jury or Other Triers of the Facts*.

3. **Province of Court—In General—Alabama.**—*Corley v. State*, 28 Ala. 22; *Moore v. State*, 68 Ala. 360; *Ex p. Warrick*, 73 Ala. 57; *Skeggs v. Horton*, 82 Ala. 352; *Stix v. Keith*, 85 Ala. 465; *Norris v. State*, 87 Ala. 85; *Smith v. State*, 92 Ala. 69.

*Arkansas.*—*Jones v. State*, 59 Ark. 417; *Gill v. State*, 59 Ark. 422.

*California.*—*People v. Fong Ching*, 78 Cal. 169; *People v. Wallace*, 89 Cal. 167; *People v. Compton*, 123 Cal. 403.

*District of Columbia.*—*Metropolitan R. Co. v. Jones*, 1 App. Cas. (D. C.) 200.

*Florida.*—*Newberry v. State*, 26 Fla. 334; *Gantling v. State*, 40 Fla. 237; *Sumpter v. State*, (Fla. 1903) 33 So. Rep. 981.

*Georgia.*—*Durham v. Holeman*, 30 Ga. 627; *Phillips v. Williams*, 39 Ga. 597; *McCoy v. State*, 78 Ga. 490.

*Illinois.*—*Otmer v. People*, 76 Ill. 149; *Clevenger v. Curry*, 81 Ill. 432; *Haines v. People*, 82 Ill. 430; *Dick v. Marble*, 155 Ill. 137, *reversing* 51 Ill. App. 353; *Schoen v. Schoen*, 48 Ill. App. 382; *Hays v. Johnson*, 92 Ill. App. 80.

*Indiana.*—*Kintner v. State*, 45 Ind. 175; *Duvall v. Kenton*, 127 Ind. 178.

*Iowa.*—*Delvee v. Boardman*, 20 Iowa 446.

*Kentucky.*—*Holloway v. Com.*, 11 Bush (Ky.) 344.

*Michigan.*—*People v. Schweitzer*, 23 Mich. 301; *People v. Wallin*, 55 Mich. 497; *Michigan Pipe Co. v. North British, etc.*, *Ins. Co.*, 97 Mich. 493.

*Missouri.*—*Paulette v. Brown*, 40 Mo. 52, *explaining* *State v. Stout*, 31 Mo. 406; *State v. Patrick*, 107 Mo. 147.

*New York.*—*National Bank v. Mills*, 99 N. Y. 656; *Soltan v. Lowenthal*, 48 Hun (N. Y.) 620, 1 N. Y. Supp. 168; *Uransky v. Dry-Dock, etc.*, R. Co., (Supm. Ct. Gen. T.) 13 N. Y. Supp. 670; *People v. Dickerson*, 58 N. Y. App. Div. 202; *Lawrence v. Maxwell*, 58 Barb. (N. Y.) 511; *People v. New York*, 5 Wend. (N. Y.) 126.

*North Carolina.*—*Willey v. Gatling*, 70 N. Car. 410.

hensible and erroneous for a trial judge, during the examination of a witness, to impose on a jury, by words or conduct, his own belief as to the credibility of the witness.<sup>1</sup> The court may, however, and it is sometimes its duty to caution the jury as to the testimony of certain witnesses, for example, accomplices, and instruct them concerning the rules of law for weighing testimony and impeaching or discrediting witnesses.<sup>2</sup>

(3) *Scope of General Rules* — (a) *In General*. — Though the jury and the trial court are the judges of the credibility of witnesses, they have no right arbitrarily or capriciously to disbelieve their testimony, whether the witnesses are impeached or unimpeached. They must exercise judgment, and not will merely, in reaching a verdict; and if they exercise their right unreasonably the verdict may be set aside.<sup>3</sup> It is also true that witnesses may be so impeached and discredited, that a verdict based on their testimony would be contrary to the weight of evidence and call for the intervention of the court.<sup>4</sup>

*Tennessee*. — Kinchelov v. State, 5 Humph. (Tenn.) 9; Whiteside v. State, 4 Coldw. (Tenn.) 175.

*Texas*. — Dwyer v. Bassett, 63 Tex. 277; Willis v. Whitsitt, 67 Tex. 673; Butler v. State, 3 Tex. App. 48; Howard v. State, 25 Tex. App. 686; Winn v. State, 34 Tex. Crim. 37; Crockett v. State, 40 Tex. Crim. 173; Poyner v. State, 40 Tex. Crim. 640.

*Wisconsin*. — Roberts v. State, 84 Wis. 361; Schmitt v. Milwaukee St. R. Co., 89 Wis. 195; Lanphere v. State, 114 Wis. 193.

And see the title INSTRUCTIONS, ENCYC. OF PL. AND PR., vol. 11, p. 47.

**Singling Out Witnesses in Instructions.** — See the title INSTRUCTIONS, ENCYC. OF PL. AND PR., vol. 11, p. 316; Matthews v. Granger, 196 Ill. 164, affirming 96 Ill. App. 536.

**1. Words and Conduct of Court.** — McMinn v. Whelan, 27 Cal. 300; Barlow Bros. Co. v. Parsons, 73 Conn. 696; State v. Lucas, 24 Oregon 168. See also Com. v. Ward, 157 Mass. 482. See the title TRIAL, ENCYC. OF PL. AND PR., vol. 21, pp. 997, 998.

**Impropriety of Insinuations of Prosecuting Attorney.** — State v. Irwin, (Idaho 1903) 71 Pac. Rep. 608; People v. Cahoon, 88 Mich. 456.

**2. Cautionary Instructions.** — Central Warehouse Co. v. Sargeant, 40 Ill. App. 438; State v. Martin, 124 Mo. 514; State v. Hoxsie, 15 R. I. 1; Mack v. State, 48 Wis. 271.

**Artificial Rules** for determining the credibility of testimony should generally be avoided. Jurors, who observe the witness while he is testifying, his manner, his intelligence, his appearance, his bias, or the absence of it, and other nameless indicia, are, as a rule, the best determiners of the truth or falsity of parol testimony. Dick v. State, 87 Ala. 61.

**Subscribing Witnesses — Family Physician as Witness.** — The law attaches peculiar importance to the testimony of subscribing witnesses and family physicians, and it is proper so to charge. Smith v. Smith, 108 N. Car. 365.

**3. Jury Not to Arbitrarily or Capriciously Disbelieve Testimony** *United States*. — Sonnenheil v. Christian Moerlein Brewing Co., 172 U. S. 401; Craft v. Northern Pac. R. Co., 62 Fed. Rep. 735; Woey Ho v. U. S., (C. C. A.) 109 Fed. Rep. 888.

*District of Columbia*. — McDaniel v. Parish, 4 App. Cas. (D. C.) 213.

*Georgia*. — Haynes v. State, 17 Ga. 465; Duncan v. State, 97 Ga. 180.

*Illinois*. — Crabtree v. Hagenbaugh, 25 Ill. 233; Robertson v. Dodge, 28 Ill. 161; Wickliffe v. Lynch, 36 Ill. 210; Blanchard v. Pratt, 37 Ill. 243; Peak v. People, 76 Ill. 289; Hartford L., etc., Ins. Co. v. Gray, 80 Ill. 28; Evans v. George, 80 Ill. 51; McMahon v. People, 120 Ill. 584; North Chicago St. R. Co. v. Anderson, 176 Ill. 635; Gibson v. Troutman, 9 Ill. App. 94; Shove v. Rowe, 42 Ill. App. 150; Meyer v. McCumber, 75 Ill. App. 119.

*Iowa*. — Callanan v. Shaw, 24 Iowa 441; Wilson v. Patrick, 34 Iowa 362; Green v. Cochran, 43 Iowa 544; McMurrin v. Rigby, 80 Iowa 322.

*Michigan*. — Darling v. Hurst, 39 Mich. 765; Hendrickson v. Voss, 115 Mich. 57; Preuschoff v. B. Stroh Brewing Co., 132 Mich. 107.

*Missouri*. — Farwell v. Meyer, 67 Mo. App. 566.

*New Jersey*. — Adams v. Adams, 17 N. J. Eq. 334.

*New York*. — Newton v. Pope, 1 Cow. (N. Y.) 109; Stilwell v. Carpenter, (Ct. App.) 2 Abb. N. Cas. (N. Y.) 238.

*Oregon*. — Wimer v. Smith, 22 Oregon 469.

*Pennsylvania*. — Lonzer v. Lehigh Valley R. Co., 196 Pa. St. 610; Cobb v. Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 228.

*South Dakota*. — Drew v. Watertown F. Ins. Co., 6 S. Dak. 335.

*Texas*. — Clark v. McGrath, (Tex. Civ. App. 1893) 22 S. W. Rep. 527.

*Wisconsin*. — Engmann v. Immel, 59 Wis. 249; Lanphere v. State, 114 Wis. 193.

*Canada*. — Lane v. Jarvis, 5 U. C. Q. B. 127. See *infra*, this subsection, *Falsus in Uno*, *Falsus in Omnibus*.

**The Veracity, or Even the Accuracy, of an Ignorant or Illiterate Person** is not to be conclusively tested by comparing an affidavit which he has made, with his *viva voce* testimony given upon an oral examination in open court. Johnston v. Todd, 5 Beav. 597.

**4. Verdict Based on Testimony Thoroughly Impeached and Discredited.** — Conklin v. Dubuque, 54 Iowa 571, cited Hill v. Denslinger, 61 Iowa 240; Stewart v. Dunlap, 61 Iowa 248; Becker v. Manhattan R. Co., 87 Hun (N. Y.) 317; Streicher v. Third Ave. R. Co., 39 N. Y. App. Div. 658; Bell v. Mills, 78 N. Y. App. Div. 42; Clark v. Mechanics' Nat. Bank, 11 Daly (N.



(b) **Unimpeached and Uncontradicted Witnesses.** — It cannot be laid down as a rule of law, that a jury must in all cases believe whatever an unimpeached witness swears, so long as they have no evidence to the contrary. A witness may be contradicted by circumstances as well as by statements of others contrary to his own; and in such cases neither courts nor juries are bound to refrain from exercising their own judgment as to the probative value of his testimony.<sup>1</sup> Indeed, in some jurisdictions a case depending on oral testimony must be submitted to the jury, though sustained by unimpeached and uncontradicted witnesses, on the ground that their demeanor on the stand and like collateral circumstances, which the jury are empowered to consider in arriving at a verdict, may discredit them; and especially so where they are interested in the result of the suit or connected in any way with the party for whom they are called.<sup>2</sup> In other jurisdictions, however, a case sustained by unimpeached and uncontradicted evidence may be withdrawn from the jury if, in the judgment of the trial court, there are no such extrinsic circumstances casting discredit upon it; and the mere fact that the witnesses are relatives of the party for whom they testify, or under contractual relations with him, or are interested in the result of the suit, does not alter the rule.<sup>3</sup> Verdicts contrary to such evidence have been set aside, also, not only by trial courts but by appellate tribunals.<sup>4</sup>

Y.) 239; *Nutting v. Kings County El. R. Co.*, 62 Hun (N. Y.) 621, 16 N. Y. Supp. 673; *Boyd v. Colt*, (Supm. Ct. Gen. T.) 20 How. Pr. (N. Y.) 384. See also *Supreme Tent, etc. v. Stensland*, 105 Ill. App. 267, *affirmed* 206 Ill. 124.

**1. Unimpeached and Uncontradicted Witnesses — In General.** — *U. S. v. Lee Huen*, 118 Fed. Rep. 442; *Wait v. McNeil*, 7 Mass. 261; *Harding v. Brooks*, 5 Pick. (Mass.) 248; *Hawkins v. Sauby*, 48 Minn. 69; *Anderson v. Libjengren*, 50 Minn. 3; *Lovell v. Davis*, 52 Mo. App. 342; *Murphey v. Virgin*, 47 Neb. 692; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Stilwell v. Carpenter*, (Ct. App.) 2 Abb. N. Cas. (N. Y.) 238; *Thompson v. Welde*, 10 N. Y. App. Div. 125; *Streicher v. Third Ave. R. Co.*, 39 N. Y. App. Div. 658; *Van Gaasbeek v. Staples*, 85 N. Y. App. Div. 271, *affirmed* without opinion 177 N. Y. 524; *Noland v. McCracken*, 1 Dev. & B. L. (18 N. Car.) 594; *State v. Smallwood*, 75 N. Car. 104; *Lane v. Jarvis*, 5 U. C. Q. B. 127. See also *Cobb v. Metropolitan L. Ins. Co.*, 19 Pa. Super. Ct. 228.

**2. Rule that Oral Testimony Must Be Submitted to Jury.** — See the title **DIRECTING VERDICT**, ENCYC. OF PL. AND PR., vol. 6, p. 694 *et seq.* See also the following cases: *Jacobs v. Jolley*, 29 Ind. App. 25; *Poplar Bluff v. Hill*, 92 Mo. App. 17; *Hugumin v. Hinds*, 97 Mo. App. 346; *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. Car. 280; *Hinson v. Postal Tel. Cable Co.*, 132 N. Car. 460; *Grambs v. Lynch*, 4 Penny. (Pa.) 243, 20 W. N. C. (Pa.) 376; *Reel v. Elder*, 62 Pa. St. 316; *Lehigh Coal, etc., Co. v. Evans*, 176 Pa. St. 28, 38 W. N. C. (Pa.) 286; *Kircher v. Sprenger*, 4 Pa. Super. Ct. 38, 39 W. N. C. (Pa.) 572; *Cobb v. Metropolitan L. Ins. Co.*, 19 Pa. Super. Ct. 228; *International, etc., R. Co. v. Johnson*, 23 Tex. Civ. App. 160; *Heierman v. Robinson*, 26 Tex. Civ. App. 491.

**3. Directing Verdict on Unimpeached and Uncontradicted Testimony.** — See the title **DIRECTING VERDICT**, ENCYC. OF PL. AND PR., vol. 6,

p. 694 *et seq.* See also the following cases: *Davis v. Hardy*, 6 B. & C. 225, 13 E. C. L. 152; *Hauss v. Lake Erie, etc., R. Co.*, (C. C. A.) 105 Fed. Rep. 733; *Preuschoff v. B. Stroh Brewing Co.*, 132 Mich. 107; *Kelly v. Burroughs*, 102 N. Y. 95, *affirming* 33 Hun (N. Y.) 349; *Hull v. Littauer*, 162 N. Y. 569, *affirming* 8 N. Y. App. Div. 227; *Morgantown Second Nat. Bank v. Weston*, 172 N. Y. 250, *affirming* (Supm. Ct. App. Div.) 61 N. Y. Supp. 1147; *Van Nostrand v. Hubbard*, 35 N. Y. App. Div. 201; *Lincoln Nat. Bank v. Kirk*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 45; *Denton v. Carroll*, 4 N. Y. App. Div. 532; *Hamilton v. Forsyth*, 77 Hun (N. Y.) 578. Compare *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401; *Sigua Iron Co. v. Greene*, 88 Fed. Rep. 207.

**How Evidence to Be Weighed.** — It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have rendered, and the other to have contradicted. *Per Lord Mansfield*, in *Blatch v. Archer*, 1 Cowp. 63, *quoted* with approval *Ex p. Birmingham*, 18 N. Bruns. 564.

**Relations, Feelings, and Prejudices** of witnesses towards a party, or between him and the witnesses, can only be considered when it appears that the relations, feelings, or prejudices have been such as to influence the testimony. *U. S. v. Post*, 128 Fed. Rep. 950. To similar effect *Preston v. Dills*, (Ky. 1895) 32 S. W. Rep. 945.

**4. Setting Aside Verdict Contrary to Unimpeached and Uncontradicted Evidence.** — *Grover v. Bach*, 82 Minn. 299; *Plyer v. German American Ins. Co.*, 121 N. Y. 689, 3 Silv. App. (N. Y.) 46, *reversing* 48 Hun (N. Y.) 618, 1 N. Y. Supp. 395; *Morgantown Second Nat. Bank v. Weston*, 172 N. Y. 250, *affirming* judgment (Supm. Ct. App. Div.) 61 N. Y. Supp. 1147; *Denton v. Carroll*, 4 N. Y. App. Div. 532; *Trudden v. Metropolitan L. Ins. Co.*, 69 N. Y. App. Div. 393; *Littlefield v. Lawrence*, 83 N. Y. App. Div. 327. See also *Dickinson v. Bentley*, 80 Iowa 482.

**Contra by Appellate Tribunals.** — *Lacey v.*

Volume XXX.

**b. RULES FOR GUIDANCE OF COURT AND JURY — (1) *In General.*** — In weighing the testimony of witnesses a court or jury should, of course, take into consideration evidence disclosing their means of knowledge and relation to the parties and issues, or introduced for the purpose of impeaching or supporting their credibility. In addition they should consider how far their testimony is confirmed by other evidence; their intelligence; the nature, probability, and consistency of their story; their manner of telling it, and all the ordinary circumstances which impress the mind with its truth or untruth.<sup>1</sup>

(2) *Personal Knowledge of Juror.* — Personal knowledge of a juror of facts bearing on the credibility of a witness, not disclosed during the progress of the trial, should not be made use of by him or by his fellow jurymen in reaching a verdict. As in other cases, if a juror has any material information or knowledge respecting facts proper to be proved, of which either of the parties desires to take the benefit, it must be communicated from the

Forrester, 3 Dowl. 668; *Richardson v. State*, 47 Ark. 562; *Loomis v. Gillett*, 75 Conn. 298, citing *McGann v. Sloan*, 74 Conn. 726; *Supreme Tent, etc., v. Stensland*, 105 Ill. App. 267, affirmed 206 Ill. 124; *Peterson v. Fullerton*, 106 Ill. App. 237. See also *Woey Ho v. U. S.*, (C. C. A.) 109 Fed. Rep. 888.

**1. Rules for the Guidance of the Jury — In General** — *United States.* — *Quock Ting v. U. S.*, 140 U. S. 417; *The General Rucker*, 35 Fed. Rep. 152; *U. S. v. Reeves*, 38 Fed. Rep. 409; *U. S. v. Ybanez*, 53 Fed. Rep. 536; *In re Jew Wong Loy*, 91 Fed. Rep. 240; *U. S. v. O'Brien*, 75 Fed. Rep. 900; *Shelp v. U. S.*, (C. C. A.) 81 Fed. Rep. 694; *Lee Sing Far v. U. S.*, (C. C. A.) 94 Fed. Rep. 834; *Woey Ho v. U. S.*, (C. C. A.) 109 Fed. Rep. 888; *U. S. v. Kessler*, *Baldw.* (U. S.) 15, 26 Fed. Cas. No. 15,528.

*Alabama.* — *Stix v. Keith*, 85 Ala. 465; *Dick v. State*, 87 Ala. 61.

*California.* — *People v. Milner*, 122 Cal. 171; *Sonoma County v. Stofen*, 125 Cal. 32.

*Colorado.* — *Salazar v. Taylor*, 18 Colo. 538.

*Georgia.* — *Durham v. Holeman*, 30 Ga. 619; *Hodgkins v. State*, 89 Ga. 761; *Central R., etc., Co. v. Attaway*, 90 Ga. 656; *Duncan v. State*, 97 Ga. 180.

*Illinois.* — *Mendota First Nat. Bank v. Haight*, 55 Ill. 191; *Stampofski v. Steffens*, 79 Ill. 303; *Hartford L., etc., Ins. Co. v. Gray*, 80 Ill. 28; *Bevelot v. Lestrade*, 153 Ill. 625; *La Salle v. Kostka*, 190 Ill. 130, affirming 92 Ill. App. 91.

*Iowa.* — *McCraney v. Crandall*, 1 Iowa 118; *Brown v. Jefferson County*, 16 Iowa 346; *Callanan v. Shaw*, 24 Iowa 441; *State v. Archer*, 73 Iowa 320. See also *Stewart v. Dunlap*, 61 Iowa 248.

*Massachusetts.* — *Com. v. Ingersoll*, 145 Mass. 231.

*Mississippi.* — *Fox v. Matthews*, 33 Miss. 433.

*Nebraska.* — *Howell Lumber Co. v. Campbell*, 38 Neb. 567.

*New York.* — *Cowan v. Third Ave. R. Co.*, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 610, affirmed without opinion 132 N. Y. 598.

*North Carolina.* — *McRae v. Lawrence*, 75 N. Car. 289; *State v. Mitchener*, 98 N. Car. 689; *Cogdell v. Southern R. Co.*, 129 N. Car. 398.

*Wisconsin.* — *Garney v. Katz*, 89 Wis. 230.

*Canada.* — *Reg. v. Jones*, 28 U. C. Q. B. 416.

**The Conduct of a Defendant in a Criminal**

**Prosecution, or of a Party to a Civil Action**, during the trial, is more or less potential, and has necessarily more or less influence with the court and jury upon the question of his credibility; and his conduct may properly be considered not only while he is on the stand testifying as a witness but throughout the trial. *Boykin v. People*, 22 Colo. 496. To the same effect *Hirschman v. People*, 101 Ill. 568; *Rider v. People*, 110 Ill. 11. *Contra*, *Purdy v. People*, 140 Ill. 46; *Vale v. People*, 161 Ill. 309.

**Occupation of Witness Not Considered as to Credibility.** — *Wiedemann v. Ryan*, 34 Ill. App. 568.

**Race Distinctions Not to Be Regarded.** — *The General Rucker*, 35 Fed. Rep. 152. To similar effect *Woey Ho v. U. S.*, (C. C. A.) 109 Fed. Rep. 888.

**Similarity in Testimony.** — The fact that several witnesses testify pretty much in the same words will not necessarily discredit them, where they were deeply interested in the matter and had talked it over a great deal among themselves. *Fatjo v. Seidel*, 109 La. 699.

**Demeanor of Witness an Important Element.** — *Reg. v. Jones*, 28 U. C. Q. B. 416.

**Hesitancy and Deliberation in Testifying.** — Where a witness is concededly an honest and fair man, the mere fact that he hesitated and that he only spoke after deliberation and thought ought not to be accepted as evidence of the falsity of his answer. *Matter of Donohue*, 97 N. Y. App. Div. 205.

**Deposition Entitled to Same Consideration as Oral Testimony.** — *Works v. Stevens*, 76 Ind. 181, overruling *Carver v. Louthain*, 38 Ind. 530.

**Veracity Presumed.** — *Crane v. State*, 111 Ala. 45; *State v. Ormiston*, 66 Iowa 143; *Comstock v. Rayford*, 12 Smed. & M. (Miss.) 369; *State v. Jones*, 77 N. Car. 520.

**Presumption of Veracity One of Fact.** — *Stix v. Keith*, 85 Ala. 465, overruling *Rowland v. Plummer*, 50 Ala. 182; *State v. Smallwood*, 75 N. Car. 104; *State v. Jones*, 77 N. Car. 521; *Isely v. Illinois Cent. R. Co.*, 88 Wis. 453.

**Reasonable Doubt as to Credibility of Witness.** — *Miller v. Richardson*, 2 Ired. L. (24 N. Car.) 250.

**Irreconcilable Conflict in Testimony of Credible Witnesses.** — *Durham v. Holeman*, 30 Ga. 619. To the same effect *Shove v. Rowe*, 42 Ill. App. 150.

witness stand.<sup>1</sup>

(3) *Memory of Witness.* — The fact that a witness remembers some occurrences and fails to remember others connected therewith is not of itself sufficient to discredit him, unless they are so inseparably connected that he must remember all or none; especially where some time has elapsed since the happening of the event.<sup>2</sup> On the other hand, a witness may very seriously impair his credibility by swearing positively and minutely to occurrences long past, and which were not of such a nature as to impress themselves forcibly on his memory.<sup>3</sup>

(4) *Means of Knowledge.* — The weight to be given to the testimony of a witness frequently depends on the opportunity he had to observe the facts to which he has testified;<sup>4</sup> and, as a general rule, when witnesses are equally credible, and some had means of knowledge superior to others, the evidence of the former should be given the greater weight.<sup>5</sup> Where an unimpeached witness swears to a fact as of his knowledge, it must be taken that he had competent means of information and knowledge, unless the contrary appears.<sup>6</sup> But if a witness swears to a fact without actual knowledge or recollection, he is guilty of legal false swearing, even though the fact be actually true;<sup>7</sup> and where it appears that he has so testified he is unworthy of belief.<sup>8</sup>

(5) *Improbability.* — A mere abstract improbability of the facts stated by an otherwise unimpeached witness is not sufficient to discredit him where no impossibility is shown.<sup>9</sup> But there may be such an inherent improbability

1. **Personal Knowledge of Juror.** — *Chattanooga, etc., R. Co. v. Owen*, 90 Ga. 265, *explaining Rogers v. King*, 12 Ga. 229, *overruling Anderson v. Tribble*, 66 Ga. 584; *Head v. Bridges*, 67 Ga. 227, and *Howard v. State*, 73 Ga. 83; *Pettyjohn v. Liebscher*, 92 Ga. 149; *Collins v. State*, 94 Ga. 394; *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Wharton v. State*, 45 Tex. 2; *Anschicks v. State*, 6 Tex. App. 524; *McKissick v. State*, 26 Tex. App. 673; *Johnson v. Superior Rapid Transit R. Co.*, 91 Wis. 233. See also *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50. *Compare Livingston v. Heck*, 122 Iowa 74; *O'Donnell v. Confederation L. Assoc.*, 21 Nova Scotia 169, *affirmed* 16 Can. Sup. Ct. 717. *Contra, McKain v. Love*, 2 Hill L. (S. Car.) 507, 27 Am. Dec. 401, *distinguished State v. Gaymon*, 44 S. Car. 333; *State v. Jacob*, 30 S. Car. 131, *citing State v. Jones*, 29 S. Car. 233, the court saying: "We suppose that it rarely if ever happens that the character of at least some of the witnesses is not known to some or all of the jurors, and we do not see how any rule of law can prevent such knowledge from having its weight." \* \* \* The constitution of the human mind renders such a rule as that contended for utterly impracticable."

**Relations and Experience Among Men.** — The value of relations and experience among men is not to be given up when the man becomes a juror and is required to apply the tests of credit to the heart and mind of the witness; but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon. *Jenney Electric Co. v. Branham*, 145 Ind. 314, *distinguishing Densmore v. State*, 67 Ind. 306.

2. **Failure of Recollection.** — *McClaskey v. Barr*, 54 Fed. Rep. 781; *Jacobsen v. Dalles, etc., Nav. Co.*, 106 Fed. Rep. 428; *Bugbee v. Howard*, 32 Ala. 713; *Moran v. Societe Catholique D'Education, etc.*, 107 La. 286; *Gibbons v. Potter*, 30

N. J. Eq. 204, *affirmed* in opinion below 31 N. J. Eq. 374; *Jackson v. M'Vey*, 18 Johns. (N. Y.) 330; *Boyd v. Gorman*, 29 N. Y. App. Div. 428, *appeal dismissed* 157 N. Y. 365; *Hogan v. Mutual Aid Assoc.*, 75 Hun (N. Y.) 271; *State v. Cowan*, 7 Ired. L. (29 N. Car.) 239; *State v. Jacobs*, 107 N. Car. 873; *State v. Moran*, 15 Oregon 262.

3. **Positive Recollection of Long-past Transactions.** — *Willett v. Fister*, 18 Wall. (U. S.) 91; *Parker v. Chambers*, 24 Ga. 518; *Austin v. Kuehn*, 21 Ill. 113, *affirming* 111 Ill. App. 506; *Chandler v. Hough*, 7 La. Ann. 441; *Van Tassel v. New York, etc., R. Co.*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 592, *affirmed* 142 N. Y. 634.

4. *Barrett v. Williamson*, 4 McLean (U. S.) 589, 2 Fed. Cas. No. 1051, *affirmed* 13 How. (U. S.) 101; *Hitt v. Rush*, 22 Ala. 563.

5. *Crane v. State*, 111 Ala. 45; *Jacksonville, etc., R. Co. v. Caldwell*, 21 Ill. 75; *Tucker v. Williams*, 2 Hilt. (N. Y.) 562.

6. *Kottwitz v. Bagby*, 16 Tex. 656; *Willey v. Portsmouth*, 35 N. H. 303.

**The Contrary May Appear** from the nature of the facts testified to. *McNally v. Meyer*, 5 Ben. (U. S.) 239, 16 Fed. Cas. No. 8,909.

7. *Carroll v. Charter Oak Ins. Co.*, 1 Abb. App. Dec. (N. Y.) 316; *Com. v. Cornish*, 6 Binn. (Pa.) 249. *Compare U. S. v. Shellmire, Baldw.* (U. S.) 370, 27 Fed. Cas. No. 16,271.

8. *Slade v. Joseph*, 5 Daly (N. Y.) 187.

9. **Mere Abstract Improbability Insufficient to Discredit** — *Illinois.* — *Dunn v. Weir*, 34 Ill. App. 612; *Bunn v. Third Nat. Bank*, 38 Ill. App. 76.

*Iowa.* — *Asbach v. Chicago, etc., R. Co.*, 86 Iowa 101.

*Kentucky.* — *Davis v. Meaux*, (Ky. 1893) 22 S. W. Rep. 324.

*Louisiana.* — *Barrett's Succession*, 43 La. Ann. 61.

*Maine.* — *Shaw v. Emery*, 42 Me. 59; *Blumenthal v. Boston, etc., R. Co.*, 97 Me. 255.



in the statements of a witness as to induce the judge or jury to disregard his evidence, even in the absence of any direct conflicting testimony.<sup>1</sup> A mere abstract improbability in order to discredit the witness must arise from facts appearing on the trial, and must not rest wholly in the minds of the court and jury.<sup>2</sup>

(6) *Relative Value of Positive and Negative Testimony.* — It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*; because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.<sup>3</sup> For the rule to have any application, however, it must be possible to attribute the negative testimony to inattention, defective memory, or inadequate means of knowledge. Consequently, evidence may be negative in form though not so in fact within the meaning of the rule.<sup>4</sup> Furthermore, the rule has reference only to the weight of testi-

*New York.* — *Newton v. Pope*, 1 Cow. (N. Y.) 110; *Stilwell v. Carpenter*, (Ct. App.) 2 Abb. N. Cas. (N. Y.) 257; *Lomer v. Meeker*, 25 N. Y. 361; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 553, 6 Am. Rep. 140.

*Pennsylvania.* — *Callahan v. Philadelphia Traction Co.*, 184 Pa. St. 425; *Breunniger v. Pennsylvania R. Co.*, 9 Pa. Super. Ct. 461, 43 W. N. C. (Pa.) 523.

*Wisconsin.* — *Welty v. Lake Superior Terminal, etc.*, R. Co., 100 Wis. 128.

1. **Gross Inherent Improbability Sufficient to Discredit** — *United States.* — *Quock Ting v. U. S.*, 140 U. S. 417.

*California.* — *Blankman v. Vallejo*, 15 Cal. 639.

*Maine.* — *Blumenthal v. Boston, etc.*, R. Co., 97 Me. 255.

*New York.* — *Pharo v. Beadleston*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 424; *Stilwell v. Carpenter*, (Ct. App.) 2 Abb. N. Cas. (N. Y.) 238; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Schnitzer v. Gordon*, 28 N. Y. App. Div. 341.

*Wisconsin.* — *Bourda v. Jones*, 110 Wis. 52; *Badger v. Janesville Cotton Mills*, 95 Wis. 599; *Roth v. S. E. Barrett Mfg. Co.*, 96 Wis. 615; *Flaherty v. Harrison*, 98 Wis. 559; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331. See dissenting opinion in *Welty v. Lake Superior Terminal, etc.*, R. Co., 100 Wis. 128.

**Inherent Improbability Is as Potent as Direct Evidence** in discrediting a witness. *In re Leslie*, 119 Fed. Rep. 406.

2. **When Mere Abstract Improbability Discredits.** — *Payne v. Chicago, etc.*, R. Co., 39 Iowa 523; *Thompson v. Pioneer-Press Co.*, 37 Minn. 285; *Winona Second Nat. Bank v. Donald*, 56 Minn. 491; *Clark v. McGrath*, (Tex. Civ. App. 1893) 22 S. W. Rep. 527.

3. **Relative Value of Positive and Negative Testimony** — *United States.* — *Stitt v. Huidekoper*, 17 Wall. (U. S.) 384; *Lookout Mountain R. Co. v. Houston*, 44 Fed. Rep. 449; *Griffith v. Baltimore, etc.*, R. Co., 44 Fed. Rep. 574; *Horn v. Baltimore, etc.*, R. Co., (C. C. A.) 54 Fed. Rep. 301; *The Michigan*, (C. C. A.) 63 Fed. Rep. 280; *The Richmond*, 114 Fed. Rep. 208.

*Alabama.* — *Pool v. Devers*, 30 Ala. 672. See also *Kennedy v. Kennedy*, 2 Ala. 616; *Todd v. Hardie*, 5 Ala. 698.

*Georgia.* — *Johnson v. State*, 14 Ga. 55. See also *Matthews v. Poythress*, 4 Ga. 287.

*Illinois.* — *Gorham v. Peyton*, 3 Ill. 363; *Chicago, etc.*, R. Co. v. *Still*, 19 Ill. 499, 71 Am. Dec. 236.

*Indiana.* — *Allen v. Bond*, 112 Ind. 523.

*Kansas.* — *Chicago, etc.*, R. Co. v. *Stafford County*, 36 Kan. 127; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507; *Missouri Pac. R. Co. v. Pierce*, 39 Kan. 391; *Missouri Pac. R. Co. v. Moffatt*, 56 Kan. 667.

*Louisiana.* — *Hepburn v. Citizens' Bank*, 2 La. Ann. 1007, 46 Am. Dec. 564; *Auld v. Walton*, 12 La. Ann. 129.

*Missouri.* — *Henze v. St. Louis, etc.*, R. Co., 71 Mo. 636. See also *Sullivan v. Hannibal, etc.*, R. Co., 72 Mo. 195.

*New York.* — *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; *Culhane v. New York Cent., etc.*, R. Co., 60 N. Y. 133; *McKeever v. New York Cent., etc.*, R. Co., 88 N. Y. 668; *Durkee v. Delaware, etc., Canal Co.*, 88 Hun (N. Y.) 471. See also *Jackson v. Loomis*, 12 Wend. (N. Y.) 27.

*North Carolina.* — *Henderson v. Crouse*, 7 Jones L. (52 N. Car.) 623.

*Tennessee.* — See *Delk v. State*, 3 Head (Tenn.) 79.

*Vermont.* — *Hine v. Pomeroy*, 39 Vt. 211.

*Wisconsin.* — *Ralph v. Chicago, etc.*, R. Co., 32 Wis. 177, 14 Am. Rep. 725; *Cook v. Racine*, 49 Wis. 243; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208; *Pennoyer v. Allen*, 56 Wis. 502; *Bohan v. Milwaukee, etc.*, R. Co., 61 Wis. 391; *Draper v. Baker*, 61 Wis. 450; *Hinton v. Cream City R. Co.*, 65 Wis. 323; *Smith v. Milwaukee Builders', etc., Exchange*, 91 Wis. 360; *Wickham v. Chicago, etc.*, R. Co., 95 Wis. 23; *Sutton v. Chicago, etc.*, R. Co., 98 Wis. 157; *Hildman v. Phillips*, 106 Wis. 611; *Ryan v. La Crosse City R. Co.*, 108 Wis. 122.

*Canada.* — *Lefeunteum v. Beaudoin*, 28 Can. Supm. Ct. 89.

4. **Scope of Rule** — *United States.* — *Hawes v. Antisdel*, 2 B. & A. Pat. Cas. 10, 11 Fed. Cas. No. 6,234.

*Alabama.* — *Harris v. Bell*, 27 Ala. 520.

*Connecticut.* — *Johnson v. Scribner*, 6 Conn 185.

*Georgia.* — *Matthews v. Poythress*, 4 Ga. 287.

*Illinois.* — *Coughlin v. People*, 18 Ill. 266, 68 Am. Dec. 541; *Chicago, etc.*, R. Co. v. *Cauff-*

mony and does not make the determination of the fact a question of law for the court.<sup>1</sup>

(7) *Falsus in Uno, Falsus in Omnibus*.—It is a maxim recognized by a long line of decisions, that if a witness wilfully and corruptly swears falsely to any material fact in the case, the jury are at liberty to disregard the whole of his testimony.<sup>2</sup> The tendency of modern authority is to relax and restrict the maxim in its application, and the jury are not bound to wholly discredit a witness, if his testimony as to material facts is corroborated by other credible and unimpeached witnesses.<sup>3</sup> To authorize the application of the maxim it

man, 38 Ill. 425; Rockford, etc., R. Co. v. Hillmer, 72 Ill. 236; Chicago, etc., R. Co. v. Lee, 87 Ill. 454; Chicago, etc., R. Co. v. Pelligreen, 65 Ill. App. 333.

Kansas.—Kansas City, etc., R. Co. v. Lane, 33 Kan. 702; Missouri Pac. R. Co. v. Johnson, 44 Kan. 660; Union Pac. R. Co. v. Geary, 52 Kan. 308.

Maine.—Johnson v. Whidden, 32 Me. 230.

Missouri.—State v. Gates, 20 Mo. 405; Henze v. St. Louis, etc., R. Co., 71 Mo. 636.

New York.—Greany v. Long Island R. Co., 101 N. Y. 419.

North Carolina.—Reeves v. Poindexter, 8 Jones L. (53 N. Car.) 308.

Wisconsin.—Elkins v. Kenyon, 34 Wis. 93; Sobey v. Thomas, 39 Wis. 317; Urbanek v. Chicago, etc., R. Co., 47 Wis. 59; Eilert v. Green Bay, etc., R. Co., 48 Wis. 606; Berg v. Chicago, etc., R. Co., 50 Wis. 419; Shekey v. Eldredge, 71 Wis. 538; Joannes v. Millerd, 90 Wis. 68; Steinhofel v. Chicago, etc., R. Co., 92 Wis. 123.

1. **Rule One Relating to Weight of Evidence.**—Griffith v. Baltimore, etc., R. Co., 44 Fed. Rep. 574.

2. **Falsus in Uno, Falsus in Omnibus**—*United States*.—The Santissima Trinidad, 7 Wheat. (U. S.) 338; Mann v. Arkansas Valley Land, etc., Co., 24 Fed. Rep. 261; Strauss v. Abrahams, 32 Fed. Rep. 310; The Strathdon, (C. C. A.) 101 Fed. Rep. 600, affirming 94 Fed. Rep. 206.

Alabama.—Alabama G. S. R. Co. v. Frazier, 93 Ala. 45; Edmondson v. Anniston City Land Co., 128 Ala. 589; Jackson v. State, 136 Ala. 22.

Arizona.—Follett v. Territory, (Ariz. 1893) 33 Pac. Rep. 869.

Arkansas.—Frazier v. State, 56 Ark. 242.

California.—People v. Flynn, 73 Cal. 511; People v. Lon Yeck, 123 Cal. 246; People v. Stevens, 141 Cal. 488.

Colorado.—Minich v. People, 8 Colo. 452.

Florida.—Gantling v. State, 40 Fla. 237.

Georgia.—Speight v. State, 80 Ga. 512; Port Royal, etc., R. Co. v. Griffin, 86 Ga. 172; Smith v. State, 109 Ga. 479.

Illinois.—U. S. Express Co. v. Hutchins, 58 Ill. 44; Reynolds v. Greenbaum, 80 Ill. 416; Gullihier v. People, 82 Ill. 145; Sandwich v. Dolan, 141 Ill. 430; Bevelot v. Lestrade, 153 Ill. 625; Anderson v. People, 34 Ill. App. 86; North Chicago St. R. Co. v. Fitzgibbons, 79 Ill. App. 632; Druecker v. Sandusky Portland Cement Co., 93 Ill. App. 406; Johnston v. Sochurek, 104 Ill. App. 350.

Indiana.—White v. New York, etc., R. Co., 142 Ind. 648.

Iowa.—Winter v. Central Iowa R. Co., 80 Iowa 443; Judge v. Jordan, 81 Iowa 519; Blotcky v. Caplan, 91 Iowa 352; State v. Baker, 89 Iowa 188; Wapello County v. Brady, 118 Iowa 482.

Michigan.—Hamilton v. People, 29 Mich. 173; O'Rourke v. O'Rourke, 43 Mich. 58; Hillman v. Schwenk, 68 Mich. 293; Fraser v. Haggerty, 86 Mich. 521; Cole v. Lake Shore, etc., R. Co., 95 Mich. 77; Badder v. Keefer, 100 Mich. 272.

Mississippi.—Miller v. State, (Miss. 1904) 35 So. Rep. 690.

Missouri.—State v. Mix, 15 Mo. 153; Gillett v. Wimer, 23 Mo. 77; State v. Dwire, 25 Mo. 553; Paulette v. Brown, 40 Mo. 52; Kelly v. U. S. Express Co., 45 Mo. 428; Brown v. Hannibal, etc., R. Co., 66 Mo. 588; State v. Gee, 85 Mo. 647; State v. Beauleigh, 92 Mo. 490; State v. Buchler, 103 Mo. 203; Henry v. Wabash Western R. Co., 109 Mo. 488; Seligman v. Rogers, 113 Mo. 642; Church v. Chicago, etc., R. Co., 119 Mo. 203; State v. Adair, 160 Mo. 391.

Nebraska.—Dell v. Oppenheimer, 9 Neb. 454; Denney v. Stout, 59 Neb. 731.

New Hampshire.—Sanborn v. Sanborn, 65 N. H. 179.

New Jersey.—Sinclair v. Sinclair, 57 N. J. Eq. 222; Weigel v. Weigel, 60 N. J. Eq. 322.

New York.—Welke v. Welke, 63 Hun (N. Y.) 625, 17 N. Y. Supp. 298; Morgenthau v. Walker, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 245; Demond v. Brooklyn City R. Co., (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 610; Cibulski v. Hutton, 47 N. Y. App. Div. 107; Cullinan v. Furthmann, 70 N. Y. App. Div. 110.

Pennsylvania.—Com. v. Greason, 204 Pa. St. 64.

South Carolina.—James v. Mickey, 26 S. Car. 270.

South Dakota.—Hurlbut v. Leper, 12 S. Dak. 321.

Virginia.—Hash v. Com., 88 Va. 172.

Washington.—State v. Freidrich, 4 Wash. 204.

West Virginia.—State v. Thompson, 21 W. Va. 746; Ward v. Brown, 53 W. Va. 227.

Wisconsin.—Allen v. Murray, 87 Wis. 41.

Canada.—Chevalier v. Wilson, 10 Quebec Super. Ct. 59.

3. **Corroboration by Other Evidence**—Alabama.—Jordan v. State, 81 Ala. 20.

Florida.—Compare Gantling v. State, 40 Fla. 237.

Georgia.—Skipper v. State, 59 Ga. 63; Pierce v. State, 53 Ga. 365; Williams v. State, 69 Ga. 34; Jackson v. State, 64 Ga. 348; Day v. Crawford, 13 Ga. 508.

is not sufficient that the testimony of the witness is in some particular simply untrue, or that he has even wilfully sworn falsely to an immaterial fact; it must appear that he has wilfully and knowingly sworn falsely to a material fact.<sup>1</sup> The mere contradiction of a witness does not warrant the disregarding of his whole testimony for want of corroboration. The truthful testimony of an honest witness may be contradicted, and the maxim does not apply in such a case.<sup>2</sup> By virtue of this maxim no presumption arises regarding the witness

*Illinois*.—*Sandwich v. Dolan*, 141 Ill. 430; *Beedle v. People*, 204 Ill. 197; *Chicago, etc., R. Co. v. Kelly*, 210 Ill. 449; *Mantonga v. Reilly*, 184 Ill. 183; *Bevelot v. Lestrade*, 153 Ill. 625; *Loehr v. People*, 132 Ill. 504; *Johnston v. Sochurek*, 104 Ill. App. 350; *Druecker v. Sandusky Portland Cement Co.*, 93 Ill. App. 406; *Hill v. Montgomery*, 184 Ill. 220, *affirming* 84 Ill. App. 300; *North Chicago St. R. Co. v. Fitzgibbons*, 79 Ill. App. 632; *Schanzenbach v. Brough*, 58 Ill. App. 526; *Shove v. Rowe*, 42 Ill. App. 150; *Hutchinson Nat. Bank v. Crow*, 56 Ill. App. 558; *Anderson v. People*, 34 Ill. App. 86. See also *Steward v. West Chicago St. R. Co.*, 67 Ill. App. 496.

*Indiana*.—*White v. New York, etc., R. Co.*, 142 Ind. 648.

*Iowa*.—*Blotcky v. Caplan*, 91 Iowa 352. *Compare Judge v. Jordan*, 81 Iowa 519.

*Pennsylvania*.—*Com. v. Greason*, 204 Pa. St. 64.

*Wisconsin*.—*Hart v. Godkin*, (Wis. 1904) 100 N. W. Rep. 1057.

**1. Prerequisites to Application of Maxim—United States.**—*Louisville, etc., R. Co. v. Kelly*, (C. C. A.) 63 Fed. Rep. 407; *Singer Mfg. Co. v. Cramer*, (C. C. A.) 109 Fed. Rep. 652.

*Alabama*.—*Childs v. State*, 76 Ala. 93.

*Arkansas*.—*Frazier v. State*, 56 Ark. 242; *Bloom v. State*, 68 Ark. 336; *Lee v. State*, (Ark. 1904) 81 S. W. Rep. 385.

*Arizona*.—*Follett v. Territory*, (Ariz. 1893) 33 Pac. Rep. 869; *Schultz v. Territory*, (Ariz. 1898) 52 Pac. Rep. 352.

*California*.—*People v. Strong*, 30 Cal. 151; *People v. Sprague*, 53 Cal. 491; *People v. Luchetti*, 119 Cal. 501.

*Colorado*.—*Gottlieb v. Hartman*, 3 Colo. 53; *Last Chance Min., etc., Co. v. Ames*, 23 Colo. 167.

*District of Columbia*.—*Compare Huber v. Teuber*, 3 McArthur (D. C.) 484, 36 Am. Rep. 110.

*Georgia*.—*Day v. Crawford*, 13 Ga. 508; *Ivey v. State*, 23 Ga. 576; *Fishel v. Lockard*, 52 Ga. 632; *Pierce v. State*, 53 Ga. 365; *Skipper v. State*, 59 Ga. 65; *Central R., etc., Co. v. Phinazee*, 93 Ga. 488; *Duncan v. State*, 97 Ga. 180.

*Illinois*.—*Pope v. Dodson*, 58 Ill. 360; *Otmer v. People*, 76 Ill. 149; *Gullihier v. People*, 82 Ill. 146; *Swan v. People*, 98 Ill. 610; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93; *Chicago City R. Co. v. Allen*, 169 Ill. 287; *Matthews v. Granger*, 196 Ill. 164, *affirming* 96 Ill. App. 536; *Beedle v. People*, 204 Ill. 197; *Chicago, etc., R. Co. v. Boger*, 1 Ill. App. 472; *Quinn v. Rawson*, 5 Ill. App. 130; *Spencer v. Dougherty*, 23 Ill. App. 399; *Murtaugh v. Murphy*, 30 Ill. App. 59; *Linck v. Whipple*, 31 Ill. App. 155; *Kerr v. Hodge*, 39 Ill. App. 546; *Shove v.*

*Rowe*, 42 Ill. App. 150; *Hutchinson Nat. Bank v. Crow*, 56 Ill. App. 558; *Martensen v. Arnold*, 78 Ill. App. 336; *McDavid v. Ellis*, 78 Ill. App. 381; *North Chicago St. R. Co. v. Fitzgibbons*, 79 Ill. App. 632; *Littlejohn v. Arbogast*, 95 Ill. App. 605; *Chicago, etc., R. Co. v. Huston*, 95 Ill. App. 350, *affirmed* 196 Ill. 480; *Perkins v. Knisely*, 102 Ill. App. 562.

*Iowa*.—*Callanan v. Shaw*, 24 Iowa 444; *Winter v. Central Iowa R. Co.*, 80 Iowa 443; *Doyle v. Burns*, 123 Iowa 488.

*Kansas*.—*Barney v. Dudley*, 40 Kan. 247.

*Kentucky*.—*Hall v. Renfro*, 3 Met. (Ky.) 52.

*Michigan*.—*Hillman v. Schwenk*, 68 Mich. 293. See also *Badder v. Keefer*, 100 Mich. 272. *Mississippi*.—*Peoples v. State*, (Miss. 1903) 33 So. Rep. 289.

*Missouri*.—*State v. Mix*, 15 Mo. 153; *Gillet v. Wimer*, 23 Mo. 78; *State v. Elkins*, 63 Mo. 159; *State v. Beaucleigh*, 92 Mo. 490; *State v. Buchler*, 103 Mo. 203, *distinguishing* 86 Mo. 623; *Henry v. Wabash Western R. Co.*, 109 Mo. 488; *Shenuit v. Breuggestradt*, 8 Mo. App. 46; *Blitt v. Heinrich*, 33 Mo. App. 243; *White v. Lowenberg*, 55 Mo. App. 69; *Becker v. Schutte*, 85 Mo. App. 57.

*Montana*.—*Bonnie v. Earll*, 12 Mont. 239; *Cameron v. Wentworth*, 23 Mont. 70; *Ashley v. Rocky Mountain Bell Telephone Co.*, 25 Mont. 286.

*Nebraska*.—*Buffalo County v. Van Sickle*, 16 Neb. 363; *Kay v. Noll*, 20 Neb. 380; *Stoppert v. Nierle*, 45 Neb. 105; *Omaha, etc., R. Co. v. Krayenbuhl*, 48 Neb. 553; *McCormick Harvesting Mach. Co. v. Seeman*, 49 Neb. 312; *Holdrege v. Watson*, (Neb. 1901) 96 N. W. Rep. 67; *Nielson v. Cedar County*, (Neb. 1903) 97 N. W. Rep. 826.

*Nevada*.—*Moresi v. Swift*, 15 Nev. 216.

*New Jersey*.—*In re Willford*, (N. J. 1902) 51 Atl. Rep. 501.

*New Mexico*.—*Pacific Gold Co. v. Skillicorn*, 8 N. Mex. 8.

*New York*.—*Schaffer v. Second Ave. R. Co.*, 1 N. Y. App. Div. 48; *Boyd v. Gorman*, 29 N. Y. App. Div. 428, *appeal dismissed* 157 N. Y. 365; *Kopetzky v. Metropolitan El. R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 311.

*North Dakota*.—*McPherrin v. Jones*, 5 N. Dak. 261.

*Washington*.—*State v. Freidrich*, 4 Wash. 204.

*Wisconsin*.—*Little v. Superior Rapid Transit R. Co.*, 88 Wis. 402; *Schmitt v. Milwaukee St. R. Co.*, 80 Wis. 195; *Suckow v. State*, (Wis. 1904) 99 N. W. Rep. 440; *Geñl v. Milwaukee Produce Co.*, 116 Wis. 263.

**2. Mere Contradiction Insufficient.**—*Louisville, etc., R. Co. v. Kelly*, (C. C. A.) 63 Fed. Rep. 407; *Chicago, etc., R. Co. v. Huston*, 95 Ill. App. 350, *affirmed* 196 Ill. 480.



and no rule of law is created by which the judge is empowered to withdraw the testimony. The most that he can do is to leave the evidence with its discrepancies for the consideration of the jury, who may, in their discretion, disregard it.<sup>1</sup> And where a case is tried without a jury the court does not abuse its discretion in not applying the maxim.<sup>2</sup>

**4. Attacking Reputation of Witness**—*a.* IN GENERAL. — A witness is liable to direct impeachment by proof that his general reputation for truth and veracity, in the community where he lives, is bad.<sup>3</sup> Much contrariety of opinion prevails as to the extent of the inquiry permissible into the character of the witness sought to be impeached. In some jurisdictions it is held that the impeaching party is not confined to evidence of the general reputation of the witness for truth and veracity, but may also offer proof in derogation of his general moral character.<sup>4</sup> In several states this rule has been adopted

**1. No Rule of Law or Presumption by Virtue of**

*Maxim*. — *England*. — *Rex v. Teal*, 11 East 307.

*Alabama*. — *Jordan v. State*, 81 Ala. 20; *Grimes v. State*, 63 Ala. 166.

*California*. — *People v. Oldham*, 111 Cal. 648; *People v. Soto*, 59 Cal. 369; *People v. Hicks*, 53 Cal. 354; *People v. Sprague*, 53 Cal. 494; *People v. Strong*, 30 Cal. 156.

*Colorado*. — *Jones v. People*, 2 Colo. 351.

*Florida*. — *Gantling v. State*, 40 Fla. 237.

*Illinois*. — *Reynolds v. Greenbaum*, 80 Ill. 416; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93; *Otmer v. People*, 76 Ill. 149; *Pollard v. People*, 69 Ill. 148; *Blanchard v. Pratt*, 37 Ill. 243; *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324; *Clapp v. Bullard*, 23 Ill. App. 609.

*Kansas*. — *Russell v. State*, 11 Kan. 322; *Gannon v. Stevens*, 13 Kan. 461; *Shellabarger v. Nafus*, 15 Kan. 547, *overruling Campbell v. State*, 3 Kan. 488.

*Kentucky*. — *Hall v. Renfro*, 3 Met. (Ky.) 52; *Letton v. Young*, 2 Met. (Ky.) 559.

*Louisiana*. — *State v. Washington*, 107 La. 298.

*Maine*. — *Lewis v. Hodgdon*, 17 Me. 267.

*Massachusetts*. — *Root v. Boston El. R. Co.*, 183 Mass. 418; *Hill v. West End St. R. Co.*, 158 Mass. 460; *Com. v. Billings*, 97 Mass. 405; *Com. v. Wood*, 11 Gray (Mass.) 85.

*Michigan*. — *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77; *Fisher v. People*, 20 Mich. 147; *Knowles v. People*, 15 Mich. 408.

*Mississippi*. — *Finley v. Hunt*, 56 Miss. 221.

*New Hampshire*. — *Senter v. Carr*, 15 N. H. 351.

*New York*. — *Williams v. Delaware, etc., R. Co.*, 155 N. Y. 158, *reversing 92 Hun* (N. Y.) 219; *People v. Chapleau*, 121 N. Y. 276; *People v. O'Neil*, 109 N. Y. 251; *Place v. Minster*, 65 N. Y. 103; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *White v. McLean*, 57 N. Y. 670; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655; *Pease v. Smith*, 61 N. Y. 477; *Warren v. Haight*, 62 Barb. (N. Y.) 490; *Smith v. Smith*, (C. Pl. Gen. T.) 13 N. Y. Supp. 817; *Demond v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 610.

*North Carolina*. — *State v. Williams*, 2 Jones L. (47 N. Car.) 257.

*Ohio*. — *Mead v. McGraw*, 19 Ohio St. 55.

*South Carolina*. — See *James v. Mickey*, 26 S. Car. 270.

*Wisconsin*. — *Little v. Superior Rapid Tran-*

*sit R. Co.*, 88 Wis. 402; *Mack v. State*, 48 Wis. 271; *Mercer v. Wright*, 3 Wis. 645.

In some early New York cases, before the matter was regulated by statute, there was a tendency to allow the court to withdraw from the consideration of the jury the testimony of witnesses who contradicted themselves on material points. *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243; *People v. Evans*, 40 N. Y. 5. See also *Deering v. Metcalf*, 74 N. Y. 501; *People v. Petmecky*, 99 N. Y. 423.

**2. Trial Without Jury**. — *Axiom Min. Co. v. White*, 10 S. Dak. 198.

**3. Attacking Reputation of Witness**—In General. — *Knobe v. Williamson*, 17 Wall. (U. S.) 586; *U. S. v. Hughes*, 34 Fed. Rep. 732; *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225; *People v. Markham*, 64 Cal. 163, 49 Am. Rep. 700; *Hodge v. State*, 26 Fla. 11; *Stevens v. Blake*, 5 Kan. App. 124; *Bates v. Barber*, 4 Cush. (Mass.) 107; *State v. Barrett*, 40 Minn. 65; *Watson v. Roode*, 30 Neb. 264; *White v. Houston, etc., R. Co.*, (Tex. Civ. App. 1898) 46 S. W. Rep. 382; *Browder v. State*, 30 Tex. App. 614.

**4. General Moral Character**—*England*. — *Rex v. Bispham*, 4 C. & P. 392, 19 E. C. L. 437.

*Alabama*. — *White v. State*, 114 Ala. 10; *Ross v. State*, 139 Ala. 144; *McCutchen v. Loggins*, 109 Ala. 457; *Davenport v. State*, 85 Ala. 336; *Lodge v. State*, 122 Ala. 97; *Yarbrough v. State*, 105 Ala. 43; *Byers v. State*, 105 Ala. 31; *McInerney v. Irvin*, 90 Ala. 275; *Motes v. Bates*, 80 Ala. 382; *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *De Kalb County v. Smith*, 47 Ala. 407; *Ward v. State*, 28 Ala. 53. There is a dictum to the contrary in the early case of *Nugent v. State*, 18 Ala. 521.

*Dakota*. — *U. S. v. Wood*, 4 Dak. 455.

*Indiana*. — *Rawles v. State*, 56 Ind. 433.

*Kentucky*. — *Helm v. Com.*, (Ky. 1904) 81 S. W. Rep. 270; *Barnes v. Com.*, (Ky. 1902) 70 S. W. Rep. 827; *Smith v. Com.*, 109 Ky. 685; *Com. v. Wilson*, (Ky. 1895) 32 S. W. Rep. 166; *Turner v. King*, 98 Ky. 253; *Hume v. Scott*, 3 A. K. Marsh. (Ky.) 260; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74; *Tackett v. May*, 3 Dana (Ky.) 79; *Noel v. Dickey*, 3 Bibb (Ky.) 268; *Blue v. Kibby*, 1 T. B. Mon. (Ky.) 195, 15 Am. Dec. 95.

*Louisiana*. — *State v. Hobgood*, 46 La. Ann. 855. See *State v. Jackson*, 44 La. Ann. 160.

*Missouri*. — *State v. Pollard*, 174 Mo. 607

by statute.<sup>1</sup> The better and safer rule, however, appears to be that impeaching evidence of this kind, except where it comes from the witness himself on cross-examination, should be confined to proof of his general reputation for truth and veracity at his present or recent place of residence. This view is well supported by authority as well as by reason.<sup>2</sup>

*b. EXAMINATION OF IMPEACHING WITNESSES* — (1) *Direct Examination* — *Inquiry if Impeaching Witness Knows Reputation.* — Before a witness can give evidence to impeach the credit of another he must know what is generally said of the witness whose credit is sought to be impeached, by those among whom the latter resides, in order that he may be able to answer the inquiry, either as to his general character in the broad sense, or as to his general reputation for truth and veracity. It is, therefore, a necessary preliminary step in the

(the judge writing the opinion stating this as the settled rule in the state, but personally adhering to the opinion that the investigation should be restricted to truth and veracity); *State v. Raven*, 115 Mo. 419; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344; *State v. Rider*, 95 Mo. 486; *State v. Grant*, 76 Mo. 236; *State v. Miller*, 71 Mo. 590; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *State v. Breeden*, 58 Mo. 507; *State v. Hamilton*, 55 Mo. 520; *State v. Shields*, 13 Mo. 236, 53 Am. Dec. 147; *Day v. State*, 13 Mo. 422; *State v. Ragsdale*, 59 Mo. App. 590; *State v. Rugan*, 5 Mo. App. 592. And the rule was applied in a civil case. *Sitton v. Grand Lodge*, etc., 84 Mo. App. 208. *North Carolina.* — *State v. Boswell*, 2 Dev. L. (13 N. Car.) 209; *State v. Stallings*, 2 Hayw. (3 N. Car.) 300.

*Tennessee.* — *Peck v. State*, 86 Tenn. 259; *Ford v. Ford*, 7 Humph., (Tenn.) 92; *Gilliam v. State*, 1 Head (Tenn.) 38, 73 Am. Dec. 161. 1. *Statute* — *Arkansas.* — *Hollingsworth v. State*, 53 Ark. 387; *Cline v. State*, 51 Ark. 143; *Anderson v. State*, 34 Ark. 262; *Lawson v. State*, 32 Ark. 220; *Majors v. State*, 29 Ark. 112; *Hughes v. State*, 70 Ark. 420.

*California.* — In California it is provided by statute that the inquiry may extend to general reputation for truth, honesty, and integrity. *People v. Hickman*, 113 Cal. 86; *People v. Silva*, 121 Cal. 668; *Heath v. Scott*, 65 Cal. 548; *People v. Markham*, 64 Cal. 163, 49 Am. Rep. 700.

*Indiana.* — *Morrison v. State*, 76 Ind. 335.

*Iowa.* — *State v. Froelick*, 70 Iowa 213; *State v. Hart*, 67 Iowa 142; *State v. Kirkpatrick*, 63 Iowa 554; *Kilburn v. Mullen*, 22 Iowa 503; *State v. Prins*, 117 Iowa 505.

*Contra.* — The early case of *Carter v. Cavenaugh*, 1 Greene (Iowa) 171.

2. *Confined to Truth and Veracity* — *United States.* — *Teese v. Huntington*, 23 How. (U. S.) 2; *Gass v. Stinson*, 2 Sumn. (U. S.) 610; *U. S. v. Vansickle*, 2 McLean (U. S.) 219; *U. S. v. Masters*, 4 Cranch (C. C.) 479; *U. S. v. White*, 5 Cranch (C. C.) 38; *Patriotic Bank v. Coote*, 3 Cranch (C. C.) 169.

*Connecticut.* — *Dore v. Babcock*, 74 Conn. 425; *State v. Randolph*, 24 Conn. 368.

*Florida.* — *Mercer v. State*, 40 Fla. 216.

*Illinois.* — *Spies v. People*, 122 Ill. 1; *Dimick v. Downs*, 82 Ill. 570; *Crabtree v. Kile*, 21 Ill. 180; *Frye v. Illinois Bank*, 11 Ill. 367.

*Kansas.* — *Taylor v. Clendening*, 4 Kan. 524.

*Maine.* — *Shaw v. Emery*, 42 Me. 59; *State*

*v. Bruce*, 24 Me. 71; *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760.

*Maryland.* — *Hoffman v. State*, 93 Md. 388. *Massachusetts.* — *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 257; *Com. v. Moore*, 3 Pick. (Mass.) 194.

*Michigan.* — *Calkins v. Ann Arbor R. Co.*, 119 Mich. 312; *People v. Abbott*, 97 Mich. 484; *Michigan Pipe Co. v. North British*, etc., Ins. Co., 97 Mich. 493; *Leonard v. Pope*, 27 Mich. 145.

*Minnesota.* — *Rudsdill v. Slingerland*, 18 Minn. 380.

*Mississippi.* — *Smith v. State*, 58 Miss. 867; *Newman v. Mackin*, 13 Smed. & M. (Miss.) 383.

*Nevada.* — *State v. Larkin*, 11 Nev. 314.

*New Hampshire.* — *State v. Howard*, 9 N. H. 485.

*New Jersey.* — *Atwood v. Impson*, 20 N. J. Eq. 150.

*New York.* — *Gilbert v. Sheldon*, 13 Barb. (N. Y.) 623; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504. See also *Davey v. Lohrmann*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 317. But see *contra*, *Wright v. Paige*, 3 Keyes (N. Y.) 581, *affirmed* 36 Barb. (N. Y.) 438; *Wehrkamp v. Willet*, 4 Abb. App. Dec. (N. Y.) 556; *Carlson v. Winterson*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 388; *Osborne v. Seligman*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 811, and the dictum in *Bakeman v. Rose*, 18 Wend. (N. Y.) 146.

*Ohio.* — *Craig v. State*, 5 Ohio St. 605; *Perkins v. Mobley*, 4 Ohio St. 668.

*Pennsylvania.* — *Com. v. Payne*, 205 Pa. St. 101.

*South Carolina.* — *State v. Robertson*, 26 S. Car. 117; *State v. Alexander*, 2 Mill (S. Car.) 171; *Clark v. Bailey*, 2 Strobb. Eq. (S. Car.) 143.

*Texas.* — *Belt v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 933; *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305; *White v. Houston*, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 382; *Houston*, etc., R. Co. *v. Runnels*, (Tex. Civ. App. 1898) 46 S. W. Rep. 394; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Moore v. Moore*, 73 Tex. 382; *Kennedy v. Upshaw*, 66 Tex. 442; *Boon v. Weathered*, 23 Tex. 675; *Tipton v. Thompson*, 21 Tex. Civ. App. 143.

*Utah.* — *State v. Marks*, 16 Utah 204.

*Vermont.* — *State v. Smith*, 7 Vt. 141.

*Virginia.* — *Rixey v. Bayse*, 4 Leigh (Va.) 330; *Uhl v. Com.*, 6 Gratt. (Va.) 706.

examination of such a witness to inquire if he is in possession of this knowledge.<sup>1</sup> The question should in all cases be as to the "general" reputation of the witness.<sup>2</sup> If the witness says he has no knowledge of such general reputation his examination should go no further.<sup>3</sup>

**Question as to What Reputation Is.**—If the witness answers in the affirmative, he should then be asked what the witness's general reputation for morality or for truth and veracity is.<sup>4</sup>

**Question of Believable on Oath.**—If the witness answers that the reputation is bad, he may next be asked whether, from his knowledge of such general reputation, he would believe under oath the witness sought to be impeached.<sup>5</sup>

*Wisconsin.*—Ketchingman v. State, 6 Wis. 426; Wilson v. Young, 31 Wis. 574.

**1. Direct Examination—Inquiry if Impeaching Witness Knows Reputation—United States.**

—Teese v. Huntingdon, 23 How. (U. S.) 13. *Alabama.*—Kilgore v. State, 124 Ala. 24; Ross v. State, 139 Ala. 144; McAlpine v. State, 117 Ala. 93; Hadjo v. Gooden, 13 Ala. 721; Ward v. State, 28 Ala. 53; Sorrelle v. Craig, 9 Ala. 534.

*Arkansas.*—Cole v. State, 59 Ark. 50.

*California.*—People v. Rodrigo, 69 Cal. 601.

*Florida.*—Nelson v. State, 32 Fla. 244.

*Illinois.*—Doner v. People, 92 Ill. App. 43; Hays v. Johnson, 92 Ill. App. 80; Spies v. People, 122 Ill. 1; Foulk v. Eckert, 61 Ill. 318; Cook v. Hunt, 24 Ill. 536; Easton v. Chapman, 21 Ill. 33; Gifford v. People, 148 Ill. 173.

*Iowa.*—State v. Hart, 67 Iowa 142.

*Kentucky.*—Young v. Com., 6 Bush (Ky.) 312.

*Louisiana.*—Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596; Stanton v. Parker, 5 Rob. (La.) 108.

*Massachusetts.*—Wetherbee v. Norris, 103 Mass. 566; Bates v. Barber, 4 Cush. (Mass.) 107.

*Michigan.*—Webber v. Hanke, 4 Mich. 198.

*New Hampshire.*—Kelley v. Proctor, 41 N. H. 139.

*New Jersey.*—State v. Polhemus, 65 N. J. L. 387.

*New York.*—Sturmwald v. Schreiber, 69 N. Y. App. Div. 476; Carlson v. Winterson, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 388, affirmed 147 N. Y. 652.

*North Carolina.*—State v. Speight, 69 N. Car. 75; State v. Parks, 3 Ired. L. (25 N. Car.) 296; State v. O'Neale, 4 Ired. L. (26 N. Car.) 88.

*Tennessee.*—Ford v. Ford, 7 Humph. (Tenn.) 92.

*Texas.*—Houston, etc., R. Co. v. White, 23 Tex. Civ. App. 280.

*Utah.*—State v. Marks, 16 Utah 204.

**2. Question Should Be as to "General" Reputation.**—White v. Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 382; Gifford v. People, 148 Ill. 173. And it has been held improper to omit the word "general" in the question. Bucklin v. State, 20 Ohio 18; State v. Hilberg, 22 Utah 27; State v. Marks, 16 Utah 204.

Where the answers show that the questions are understood in the general sense by the witnesses, and the answers themselves are sufficiently general, the fact that the word "gen-

eral" is omitted in framing the question will not render the evidence incompetent. Coates v. Sulau, 46 Kan. 341; White v. Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 382.

**No Set Form of Questions.**—State v. Prater, 26 S. Car. 198.

**3. Denial of Knowledge of Reputation.**—Sorrelle v. Craig, 9 Ala. 534; Overstreet v. Dunlap, 56 Ill. App. 486; Gifford v. People, 148 Ill. 173; Redden v. Tefft, 48 Kan. 302; Stanton v. Parker, 5 Rob. (La.) 109; Com. v. Lawler, 12 Allen (Mass.) 585; Pickens v. State, 61 Miss. 563; Sturmwald v. Schreiber, 69 N. Y. App. Div. 476; State v. Wheeler, 104 N. Car. 893; State v. Perkins, 66 N. Car. 126.

**4. McAlpine v. State, 117 Ala. 93; Jones v. State, 104 Ala. 30; Sorrelle v. Craig, 9 Ala. 534; Spies v. People, 122 Ill. 1; Doner v. People, 92 Ill. App. 43; State v. Polhemus, 65 N. J. L. 387; Bogle v. Kreitzer, 46 Pa. St. 465; Ford v. Ford, 7 Humph. (Tenn.) 92; State v. Marks, 16 Utah 204.**

**5. If Believable on Oath—England.**—Mawson v. Hartsink, 4 Esp. 104; Carlos v. Brook, 10 Ves. Jr. 50; Reg. v. Brown, 10 Cox C. C. 453; Anonymous, 3 Ves. & B. 93.

*United States.*—U. S. v. Masters, 4 Cranch (C. C.) 479; U. S. v. Vansickle, 2 McLean (U. S.) 219.

*Alabama.*—Crawford v. State, 112 Ala. 1; Hadjo v. Gooden, 13 Ala. 721; Sorrelle v. Craig, 9 Ala. 534; M'Cutchten v. M'Cutchten, 9 Port. (Ala.) 650.

*Arkansas.*—Cole v. State, 59 Ark. 50; Hudspeth v. State, 50 Ark. 534.

*California.*—Wise v. Wakefield, 118 Cal. 107; People v. Tyler, 35 Cal. 553; Stevens v. Irwin, 12 Cal. 306.

*Florida.*—Robinson v. State, 16 Fla. 835; Nelson v. State, 32 Fla. 244.

*Georgia.*—Stokes v. State, 18 Ga. 17; Taylor v. Smith, 16 Ga. 7.

*Illinois.*—Massey v. Farmers' Nat. Bank, 104 Ill. 327; Eason v. Chapman, 21 Ill. 33; Doner v. People, 92 Ill. App. 43.

*Kansas.*—State v. Johnson, 40 Kan. 266.

*Kentucky.*—Mobley v. Hamit, 1 A. K. Marsh. (Ky.) 590.

*Louisiana.*—State v. Christian, 44 La. Ann. 950; Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596.

*Maryland.*—Knight v. House, 29 Md. 194, 96 Am. Dec. 515.

*Michigan.*—Keator v. People, 32 Mich. 486; Hamilton v. People, 29 Mich. 173.

*New Hampshire.*—Titus v. Ash, 24 N. H. 319; State v. Howard, 9 N. H. 485.



It has been held that bad character may be proved against a witness for the purpose of impeaching his credibility, though the witnesses who testify as to his character fail to state that his character or reputation is such that he would not be believed when testifying under his oath.<sup>1</sup>

(2) *Cross-examination.* — The impeaching witness may be required to answer on cross-examination such questions as are proper for the purpose of ascertaining the extent of his information and the source of his knowledge, and for this purpose he may be questioned as to the names of the persons whom he has heard speak disparagingly of the other witness, what they said about him, etc.<sup>2</sup> The impeachment of the general character and reputation of a witness being a matter collateral to the main issue on trial it must be governed by the principles applicable to all other collateral inquiries, and the statements of the impeaching witness as to the names of the persons from whom they had heard the reports are conclusive, and such persons cannot be called as witnesses in rebuttal.<sup>3</sup>

c. REQUISITE KNOWLEDGE OF IMPEACHING WITNESS — *General Reputation.* — The legal evidence of the character of the witness is his general reputation in the community where he resides; that is, what is generally said about him by those among whom he dwells or with whom he is chiefly associated.<sup>4</sup>

*New Jersey.* — *State v. Polhemus*, 65 N. J. L. 387.

*New York.* — *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *People v. Davis*, 21 Wend. (N. Y.) 309; *People v. Rector*, 19 Wend. (N. Y.) 569; *People v. Mather*, 4 Wend. (N. Y.) 229.

*North Carolina.* — *State v. Boswell*, 2 Dev. (13 N. Car.) 209.

*Ohio.* — *Hillis v. Wylie*, 26 Ohio St. 574.

*Pennsylvania.* — *Lyman v. Philadelphia*, 56 Pa. St. 488.

*Tennessee.* — *Gilliam v. State*, 1 Head (Tenn.) 38; *Ford v. Ford*, 7 Humph. (Tenn.) 92.

*Texas.* — *Ware v. State*, 36 Tex. Crim. 597; *Griffin v. State*, 26 Tex. App. 157; *Mayes v. State*, 33 Tex. Crim. 33.

*Utah.* — *State v. Marks*, 16 Utah 204.

*Virginia.* — *Uhl v. Com.*, 6 Gratt. (Va.) 706.

*West Virginia.* — *State v. Meadows*, 18 W. Va. 658.

*Wisconsin.* — *Wilson v. State*, 3 Wis. 798.

But see *contra*, *Willard v. Goodenough*, 30 Vt. 393; *State v. Coates*, 22 Wash. 601; *State v. Miles*, 15 Wash. 534.

**Answer Must Be Based on Knowledge of General Reputation.** — *Rex v. Bispham*, 4 C. & P. 392, 19 E. C. L. 437; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Stanton v. Parker*, 5 Rob. (La.) 108; *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280.

Therefore, a question, "From what you know of his truth and veracity, would you believe him under oath?" is incompetent. *Benesch v. Waggner*, 12 Colo. 534; *Benesch v. Mitchellson*, 12 Colo. 539; *Wike v. Lightner*, 11 S. & R. (Pa.) 198.

On the other hand, a witness may testify that he would not believe another under oath where he has stated that he knows his general reputation, though he cannot state this particular reputation for veracity. *State v. Murphy*, 48 S. Car. 1.

1. *Mitchell v. State*, 94 Ala. 68.

2. *Cross-examination* — *England.* — *Mawson v. Hartsink*, 4 Esp. 102.

*Alabama.* — *Bohlman v. State*, 135 Ala. 45;

*Moulton v. State*, 88 Ala. 116; *Bullard v. Lambert*, 40 Ala. 204; *Hadjo v. Gooden*, 13 Ala. 721; *Sorrelle v. Craig*, 9 Ala. 534.

*Arkansas.* — *Hollingsworth v. State*, 53 Ark. 387.

*California.* — *People v. Mayes*, 113 Cal. 618.

*Connecticut.* — *Weeks v. Hull*, 19 Conn. 379.

*Florida.* — *Nelson v. State*, 32 Fla. 244; *Robinson v. State*, 16 Fla. 835.

*Indiana.* — *Robbins v. Spencer*, 121 Ind. 594; *Hutts v. Hutts*, 62 Ind. 215.

*Iowa.* — *State v. Allen*, 100 Iowa 7.

*Kentucky.* — *Jackson v. Com.*, (Ky. 1896) 34 S. W. Rep. 901. But see *Fox v. Com.*, (Ky. 1886) 1 S. W. Rep. 396.

*Maine.* — *Phillips v. Kingfield*, 19 Me. 381. *Massachusetts.* — *Bates v. Barber*, 4 Cush. (Mass.) 107.

*Michigan.* — *People v. Annis*, 13 Mich. 517.

*Mississippi.* — *Pickens v. State*, 61 Miss. 563; *Benson v. State*, 79 Miss. 538.

*Missouri.* — *State v. Miller*, 71 Mo. 89.

*New Hampshire.* — *State v. Howard*, 9 N. H. 485.

*New York.* — *People v. Mather*, 4 Wend. (N. Y.) 232; *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Fulton Bank v. Benedict*, 1 Hall (N. Y.) 480. See also *Davis v. Willis*, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 339.

*North Carolina.* — *State v. Perkins*, 66 N. Car. 126.

*South Carolina.* — *State v. Merriman*, 34 S. Car. 16.

*Texas.* — *Clapp v. Engledow*, 72 Tex. 252; *Kellogg v. McCabe*, 92 Tex. 199.

*West Virginia.* — *State v. Meadows*, 18 W. Va. 658.

3. *Robbins v. Spencer*, 121 Ind. 594; *Welch v. State*, 104 Ind. 347; *Brower v. Ream*, 15 Ind. App. 51.

4. **Requisite Knowledge of Impeaching Witness — General Reputation.** — *Magee v. People*, 139 Ill. 138; *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324; *Crabtree v. Kile*, 21 Ill. 180; *Hays v. Johnson*, 92 Ill. App. 80; *State v. Allen*, 100 Iowa 7; *Dance v. McBride*, 43 Iowa 624; *Coates v. Sulau*, 46 Kan. 341; *Bates v. Barber*,

Though the reputation must be general it need not be unanimous<sup>1</sup> nor the expressed opinion of a majority,<sup>2</sup> but the estimate of a few<sup>3</sup> or of a class of the community<sup>4</sup> is not sufficient.

**Opinion Based on Personal Knowledge Not Admissible.** — Not only is the impeaching witness not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the other witness has been derived, but it is error to allow him to do so.<sup>5</sup> He must speak from his knowledge of the witness's general reputation, of what is generally said of him by those among whom the latter resides, and with whom he is chiefly conversant; and any question which does not call for such knowledge is an improper one and ought to be rejected.<sup>6</sup>

**Hearing Reputation Discussed.** — It is not necessary to enable the witness to testify to the reputation that he should have heard it discussed, if he says he knows the reputation.<sup>7</sup>

**Among Business Associates Not Enough.** — It is not enough that the witness knows the reputation of the witness sought to be impeached among his business

4 Cush. (Mass.) 107; *Boynton v. Kellogg*, 3 Mass. 189; *Pickens v. State*, 61 Miss. 563; *State v. Boyd*, 178 Mo. 2; *Douglass v. Tousey*, 2 Wend. (N. Y.) 354; *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 337, 8 Am. Dec. 655; *Ford v. Ford*, 7 Humph. (Tenn.) 92.

1. *Winter v. Central Iowa R. Co.*, 80 Iowa 443; *State v. Reed*, 41 La. Ann. 581.

2. **Opinion of Majority Not Necessary.** — *Cunningham v. Underwood*, 53 C. C. A. 99; *Dave v. State*, 22 Ala. 23; *Robinson v. State*, 16 Fla. 835; *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324; *Crabtree v. Kile*, 21 Ill. 180; *Pickens v. State*, 61 Miss. 563; *State v. Meadows*, 18 W. Va. 658.

3. **Opinion of Two or Three Not Enough.** — *Vickers v. People*, 31 Colo. 491; *Pickens v. State*, 61 Miss. 563; *Taylor v. Ryan*, 15 Neb. 573; *Matthewson v. Burr*, 6 Neb. 312; *Harrison v. Garrett*, 132 N. Car. 172.

4. **Opinion of Class of Community Not Enough.** — *Cole v. State*, 59 Ark. 50.

And the witness's reputation among the police officers of a small town is not sufficient to establish his reputation in the community. *People v. Markham*, 64 Cal. 157.

**Reputation of Neighborhood Insufficient.** — *White v. Com.*, 96 Ky. 180.

5. **Opinion Based on Personal Knowledge.** — *Teese v. Huntingdon*, 23 How. (U. S.) 2; *People v. Ward*, 134 Cal. 301; *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700; *Gifford v. People*, 148 Ill. 173; *State v. Woodworth*, 65 Iowa 141; *State v. Egan*, 59 Iowa 636; *Kitteringham v. Dance*, 58 Iowa 632; *State v. Boyd*, 178 Mo. 2; *Sturmwald v. Schreiber*, 69 N. Y. App. Div. 476; *Fulton Bank v. Benedict*, 1 Hall (N. Y.) 550; *State v. Boswell*, 2 Dev. L. (13 N. Car.) 209; *Cowan v. Kinney*, 33 Ohio St. 422; *Bucklin v. State*, 20 Ohio 18; *Oberholtzer v. Heist*, (Pa. 1889) 16 Atl. Rep. 804; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Galveston, etc., R. Co. v. Burnett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 314; *Ayres v. Duprey*, 27 Tex. 593.

6. **Knowledge of General Reputation.** — *United States.* — *Teese v. Huntingdon*, 23 How. (U. S.) 13; *Cunningham v. Underwood*, 53 C. C. A. 99.

*Alabama.* — *Hadjio v. Gooden*, 13 Ala. 718; *Martin v. Martin*, 25 Ala. 211; *Holmes v. State*,

88 Ala. 26, 16 Am. St. Rep. 17; *Jones v. State*, 104 Ala. 30.

*California.* — *People v. Webster*, 89 Cal. 572; *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225.

*Colorado.* — *Benesch v. Waggner*, 12 Colo. 534; *Benesch v. Mitchelson*, 12 Colo. 539.

*Delaware.* — *State v. Jones*, (Del. 1902) 53 Atl. Rep. 858.

*Florida.* — *Nelson v. State*, 32 Fla. 244.

*Kentucky.* — *White v. Com.*, 96 Ky. 180.

*Minnesota.* — *State v. Barrett*, 40 Minn. 65.

*Texas.* — *Boon v. Weathered*, 23 Tex. 675; *Griffin v. State*, 26 Tex. App. 157.

**Personal Acquaintance with Witness Not Necessary.** — *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 336; *State v. Turner*, 36 S. Car. 539.

**Hearsay of Reputation Insufficient.** — *Haley v. State*, 63 Ala. 86; *White v. Com.*, 96 Ky. 180; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *Meyer v. Suburban Home Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 686; *Douglass v. Tousey*, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616; *Harrison v. Garrett*, 132 N. Car. 172; *Wike v. Lightner*, 11 S. & R. (Pa.) 198.

**Person Not Living in Neighborhood Not Competent.** — *Buchanan v. State*, 109 Ala. 7; *Vickers v. People*, 31 Colo. 491.

But the impeaching witness need not live in the immediate neighborhood of the other. *Hadjio v. Gooden*, 13 Ala. 718; *Dupree v. State*, 33 Ala. 380; *State v. McLaughlin*, 149 Mo. 19; *Wallis v. White*, 58 Wis. 26.

**Person Sent into Neighborhood to Inquire Held Incompetent.** — *Sorrelle v. Craig*, 9 Ala. 534; *Reid v. Reid*, 17 N. J. Eq. 101; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *Douglass v. Tousey*, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616.

7. **Hearing Reputation Discussed.** — *Childs v. State*, 55 Ala. 28; *Ward v. State*, 28 Ala. 53; *Hadjio v. Gooden*, 13 Ala. 718; *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69; *Wood v. State*, 31 Fla. 221; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Gifford v. People*, 148 Ill. 173; *Reid v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 662; *Henderson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 116; *Boon v. Weathered*, 23 Tex. 675. See *Wood v. State*, 31 Fla. 221; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110. Compare *Tyler v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 558.

associates, if he does not also know his reputation among his general associates.<sup>1</sup>

**The Identity** of the person sought to be impeached with the person regarding whose reputation the witness proposes to testify must be properly established.<sup>2</sup>

**Extent and Source of Knowledge for Jury.** — The amount of information and means of knowledge of a witness to reputation are matters for the consideration of the jury.<sup>3</sup>

**Number of Witnesses.** — The limitation of the number of witnesses as to credibility is within the discretion of the trial court.<sup>4</sup>

**d. TIME AND PLACE OF ACQUIRING REPUTATION.** — Evidence affecting the credibility of the witness must, as a rule, be confined to his general reputation for truth and veracity, or general moral character, where that is admissible, in the neighborhood or place of his present or recent residence.<sup>5</sup> A man's neighborhood or place of residence extends for these purposes as far as he is well known, as far as people are acquainted with him and his character.<sup>6</sup> But it does not include a distant place where he visited for a few months.<sup>7</sup>

**Former Residence, if Not Too Remote.** — It is competent to impeach a witness by proof of his reputation in a neighborhood where he formerly resided, if the residence be not too remote in point of time.<sup>8</sup> If the witness has left

1. *Bonaparte v. Thayer*, 95 Md. 548; *Sloan v. Edwards*, 61 Md. 102; *Healey v. Terry*, 16 Daly (N. Y.) 117. See *Atlantic, etc., R. Co. v. Reynolds*, 117 Ga. 47.

2. **Identity.** — *People v. Smiler*, (N. Y. 1891) 26 N. E. Rep. 312.

3. *Spies v. People*, 122 Ill. 1; *Bates v. Barber*, 4 Cush. (Mass.) 108; *Oberholtzer v. Heist*, (Pa. 1889) 16 Atl. Rep. 804.

4. **Number of Witnesses — Discretion of Court.** — *Larned v. Platt*, 26 Ill. App. 278; *Browder v. State*, 30 Tex. App. 614.

**General Rule of Court Limiting Number Unlawful.** — *Larned v. Platt*, 26 Ill. App. 278.

**Impeachment May Be by Single Witness.** — *Rider v. State*, 26 Tex. App. 334; *Butler v. State*, 3 Tex. App. 48; *Wafford v. State*, 44 Tex. 439; *Holmes v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 979.

5. **Confined to Place of Present or Recent Residence.** — *United States.* — *Teese v. Huntingdon*, 23 How. (U. S.) 2.

*Alabama.* — *Moulton v. State*, 88 Ala. 116; *Sorrelle v. Craig*, 9 Ala. 534.

*California.* — *Heath v. Scott*, 65 Cal. 548. *Indiana.* — *Meyncke v. State*, 68 Ind. 401; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43; *Rawles v. State*, 56 Ind. 433; *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 475; *Aurora v. Cobb*, 21 Ind. 492.

*Iowa.* — *McGuire v. Kenefick*, 111 Iowa 147. *Kentucky.* — *Combs v. State*, 97 Ky. 24.

*Louisiana.* — *State v. Taylor*, 45 La. Ann. 605; *State v. Johnson*, 41 La. Ann. 574.

*Minnesota.* — *Swanson v. Andrus*, 84 Minn. 168.

*Missouri.* — *State v. Cushenberry*, 157 Mo. 168; *Waddingham v. Hulett*, 92 Mo. 528.

*Nebraska.* — *Faulkner v. Gilbert*, 61 Neb. 602; *Sun Fire Office of London v. Ayerst*, 37 Neb. 184; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825.

*Texas.* — *Clapp v. Engledow*, 72 Tex. 252; *Ramsey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 187.

*Vermont.* — *Willard v. Goodenough*, 30 Vt. 393.

*Wisconsin.* — *Wallis v. White*, 58 Wis. 26.

6. **Extent of "Neighborhood."** — *People v. Lyons*, 51 Mich. 215; *Kelley v. Proctor*, 41 N. H. 146; *Chess v. Chess*, 1 P. & W. (Pa.) 39.

It has been held that an inquiry as to the general reputation of a witness in the county of his residence is not too broad. *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 336, 8 Am. Dec. 655; *Boswell v. Blackman*, 12 Ga. 591.

7. *Waddingham v. Hulett*, 92 Mo. 528.

8. **Former Residence — Alabama.** — *Kelly v. State*, 61 Ala. 19 (three years not too remote). *Arkansas.* — *Holliday v. Cohen*, 34 Ark. 707; *Lawson v. State*, 32 Ark. 220 (two years not too remote).

*Delaware.* — *State v. Pucca*, (Del. 1902) 55 Atl. Rep. 831.

*Georgia.* — *Watkins v. State*, 82 Ga. 231 (seven or eight years not too remote where it appears that proof of the witness's reputation in his subsequent domicile was not procurable).

*Illinois.* — *Holmes v. Stateler*, 17 Ill. 453; *Blackburn v. Mann*, 85 Ill. 222; *Brown v. Luehrs*, 1 Ill. App. 74.

*Indiana.* — *Hauk v. State*, 148 Ind. 238; *Gemmill v. State*, 16 Ind. App. 154; *Pape v. Wright*, 116 Ind. 509; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43.

*Iowa.* — *Schoep v. Bankers Alliance Ins. Co.*, 104 Iowa 354; *State v. Prins*, 117 Iowa 505.

*Kansas.* — *Coates v. Sulau*, 46 Kan. 341.

*Maryland.* — *Wagor v. Wagoner*, (Md. 1887) 10 Atl. Rep. 221.

*Massachusetts.* — *Com. v. Billings*, 97 Mass. 405 (eighteen months not too remote).

*Michigan.* — *Keator v. People*, 32 Mich. 486; *Hamilton v. People*, 29 Mich. 173.

*Mississippi.* — *Norwood, etc., Co. v. Andrews*, 71 Miss. 641 (two years not too remote).

*Missouri.* — *State v. McLaughlin*, 140 Mo. 19.

*New York.* — *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431 (four years not too remote).

*North Carolina.* — *State v. Lanier*, 79 N. Car. 622.

*Texas.* — *Mynatt v. Hudson*, 66 Tex. 66 (four years not too remote); *Thurmond v. State*, 27 Tex. App. 347.



his former residence and acquired no fixed and known residence sufficient to make a reputation, evidence of his reputation at his former residence may be introduced though at a time remote from the trial,<sup>1</sup> but it has been held that it must be shown that he has not since maintained a residence elsewhere.<sup>2</sup> Evidence of reputation at a former domicile is not altogether inadmissible because a later domicile has been shown where his reputation might be proved,<sup>3</sup> even although there is some evidence of the witness's reputation at the latter place.<sup>4</sup>

**Time.** — It is the witness's reputation for truth and veracity at the time of testifying, not at or before the events in issue, which is in question.<sup>5</sup> The evidence must, therefore, be limited to such a period as will show that the witness's reputation is good or bad at the time he testified,<sup>6</sup> but some latitude must be allowed in this regard, and evidence as to the witness's reputation at a prior date is sometimes allowed to throw light on his reputation at the time he testifies, the weight of such evidence going to the jury.<sup>7</sup> It is sometimes stated that the limit of time which shall be allowed within which the witness's reputation may be shown is within the discretion of the trial court.<sup>8</sup>

**Where Time Held Too Remote.** — *Kirkham v. People*, 170 Ill. 9; *Turner v. King*, 98 Ky. 253 (sixteen years too remote); *Wood v. Matthews*, 73 Mo. 482 (three years too remote); *Sun Fire Office of London v. Ayerst*, 37 Neb. 184 (two and one-half years too remote); *Faulkner v. Gilbert*, 61 Neb. 602 (several years too remote); *Shuster v. State*, 62 N. J. L. 521 (eighteen years too remote), *affirmed* 63 N. J. L. 355; *Robbins v. Ginnochio*, (Tex. Civ. App. 1898) 45 S. W. Rep. 34 (eighteen or nineteen years too remote).

**Where the Witness Has Been Confined in Prison** up to the time of the trial, it is his reputation at the time and place of his residence prior to his imprisonment which must be proved. *Sage v. State*, 127 Ind. 15; *Keyes v. State*, 122 Ind. 527.

**1. If Witness Has Acquired No Subsequent Reputation.** — *Snow v. Grace*, 29 Ark. 131; *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *Blackburn v. Mann*, 85 Ill. 222; *Holmes v. Stateler*, 17 Ill. 453; *Douglass v. Agne*, (Iowa 1904) 99 N. W. Rep. 550; *Brown v. Perez*, 89 Tex. 282.

There is no rule of law governing the length of time a person must reside in a community to acquire a reputation. Eight months has been held enough. *State v. McLaughlin*, 149 Mo. 19.

**2.** *McGuire v. Kenefick*, 111 Iowa 147. But see *Schoep v. Bankers Alliance Ins. Co.*, 104 Iowa 354.

**3.** *State v. Knight*, 118 Wis. 473.

**4. Where Evidence of Reputation at Later Place of Residence.** — *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164; *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Stratton v. State*, 45 Ind. 468; *Honk v. Brancon*, 17 Ind. App. 119; *State v. Prins*, 117 Iowa 505; *Hamilton v. People*, 29 Mich. 187; *People v. Abbot*, 19 Wend. (N. Y.) 192. But see *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472; *Kirkham v. People*, 170 Ill. 9, *distinguishing* *Holmes v. Stateler*, 17 Ill. 453, and *Blackburn v. Mann*, 85 Ill. 222.

Where a witness has resided in a jurisdiction five years and is well known, it is not permissible to attack his credibility by proof of his general reputation in the place of his former abode.

*Webber v. Hanke*, 4 Mich. 198; *State v. Potts*, 78 Iowa 656.

**5. Time of Testifying** — *Indiana*. — *Thrawley v. State*, 153 Ind. 375; *Meyncke v. State*, 68 Ind. 401; *Rawles v. State*, 56 Ind. 439; *Stratton v. State*, 45 Ind. 468; *Abshire v. Mather*, 27 Ind. 381; *Aurora v. Cobb*, 21 Ind. 492; *Rogers v. Lewis*, 19 Ind. 405; *Walker v. State*, 6 Blackf. (Ind.) 1; *Rucker v. Beaty*, 3 Ind. 70.

*Kansas*. — *Fisher v. Conway*, 21 Kan. 25.

*Kentucky*. — *Young v. Com.*, 6 Bush (Ky.) 312.

*Mississippi*. — *Mask v. State*, 36 Miss. 77.

*Missouri*. — *State v. Summar*, 143 Mo. 220.

*Nebraska*. — *Long v. State*, 23 Neb. 34; *Marion v. State*, 20 Neb. 233.

*New Jersey*. — *State v. Sprague*, 64 N. J. L. 419.

*North Carolina*. — *State v. Spurling*, 118 N. Car. 1250.

*Ohio*. — *Pratt v. State*, 19 Ohio St. 277.

*Pennsylvania*. — *Smith v. Hine*, 179 Pa. St. 203.

*Texas*. — *Renfro v. State*, 42 Tex. Crim. 393; *Fossett v. State*, 41 Tex. Crim. 400; *Robbins v. Ginnochio*, (Tex. Civ. App. 1898) 45 S. W. Rep. 34.

*Vermont*. — *Willard v. Goodenough*, 30 Vt. 393.

**6.** *Bergstrand v. Townsend*, 70 Ark. 600; *Beatty v. Larzelere*, 15 Montg. Co. Rep. (Pa.) 67.

In *Miller v. Miller*, 187 Pa. St. 572, four years, and in *Rucker v. Beaty*, 3 Ind. 70, five years were held too remote.

**7.** *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *Stratton v. State*, 45 Ind. 468; *Davis v. Com.*, 95 Ky. 19; *Manion v. Lambert*, 10 Bush (Ky.) 295; *State v. Knight*, 118 Wis. 473. See also *Martin v. Martin*, 25 Ala. 210.

It is not necessary that evidence of reputation have reference to the precise time of the examination. *State v. Miller*, 156 Mo. 76.

**8. Within Discretion of Court.** — *Teese v. Huntingdon*, 23 How. (U. S.) 2; *Holliday v. Cohen*, 34 Ark. 707; *Snow v. Grace*, 29 Ark. 131; *Watkins v. State*, 82 Ga. 231, 14 Am. St. Rep. 155; *Walker v. State*, 6 Blackf. (Ind.) 1; *Stratton v. State*, 45 Ind. 473; *Buse v. Page*, 32

**Presumption as to Continuance of Existing Conditions.** — The principle that the existence of a state of things once established by proof is presumed to continue the same until the contrary is shown has been applied to the character of a witness proved to have once sustained a bad reputation for truth and veracity,<sup>1</sup> but it is questionable if this doctrine has been extensively adopted.<sup>2</sup>

**Reputation Post Litem Motam.** — It is error to confine the inquiry as to the reputation of a witness to the time prior to the commencement of the prosecution or suit<sup>3</sup> or the event on trial,<sup>4</sup> unless the testimony touching his reputation is founded on opinions expressed *post litem motam*.<sup>5</sup> And even in that case it has been held that the impeaching testimony should be received, leaving it to the party who called the impeached witness to show by cross-examination or by direct testimony that a conspiracy had been formed after the institution of the prosecution or suit, to destroy the credit of his witness,<sup>6</sup> the weight of such evidence to be guarded by proper instructions to the jury.<sup>7</sup>

**e. PARTICULAR ACTS OF MISCONDUCT.** — Whether the inquiry into the character of the witness be confined to his reputation for truth and veracity, or extend to his general moral character, the rule is uniform that evidence of specific crimes or of particular acts of misconduct on his part, is not admissible for the purpose of impeaching his credit. The impeaching evidence must be confined to the general reputation of the witness.<sup>8</sup>

Minn. 111; *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 434.

1. See the title **PRESUMPTIONS**, vol. 22, p. 1238 *et seq.*; *Rathbun v. Ross*, 46 Barb. (N. Y.) 127; *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431; *State v. Lanier*, 79 N. Car. 622.

2. *Faulkner v. Gilbert*, 61 Neb. 602.

3. **Reputation After Commencement of Trial.** — *Smith v. Hine*, 179 Pa. St. 203; *Long v. State*, 23 Neb. 33. But see *contra*, *State v. Marks*, 16 Utah 204.

**Distinction Between Impeaching Evidence and Evidence as to Guilt.** — *Lea v. State*, 94 Tenn. 495. See also *State v. Forshner*, 43 N. H. 89.

**The Fact that Testimony Was Taken by Commission** some time before the trial, is no objection to proof of the bad reputation of the witness for truth and veracity at the time of the trial. *Dollner v. Lintz*, 84 N. Y. 669.

4. **Reputation After Event on Trial.** — *Mask v. State*, 36 Miss. 77.

5. **Reputation Founded on Subsequent Opinions.** — *Reid v. Reid*, 17 N. J. Eq. 101; *Johnson v. Brown*, 51 Tex. 76.

6. *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419; *State v. Howard*, 9 N. H. 485.

7. *Amidon v. Hosley*, 54 Vt. 25; *Sterling v. Sterling*, 41 Vt. 80.

8. **Particular Acts of Misconduct — England.** — *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; Anonymous, 3 Ves. & B. 93; *Watson's Case*, 32 How. St. Tr. 496; *Layer's Case*, 16 How. St. Tr. 285.

**Alabama.** — *Crawford v. State*, 112 Ala. 1; *McAlpine v. State*, 117 Ala. 93; *Feibelman v. Manchester F. Assur. Co.*, 108 Ala. 180; *Browder v. State*, 102 Ala. 164; *Lowery v. State*, 98 Ala. 45; *Smith v. State*, 88 Ala. 73; *Moulton v. State*, 88 Ala. 116; *DeArman v. State*, 71 Ala. 351; *Nugent v. State*, 18 Ala. 521.

**Arkansas.** — *Stanley v. Aetna Ins. Co.*, 70 Ark. 107; *McArthur v. State*, 59 Ark. 431; *Holder v. State*, 58 Ark. 473; *Pleasant v. State*, 15 Ark. 624.

**California.** — *Clements v. McGimm*, (Cal. 1893) 33 Pac. Rep. 920; *People v. Bowers*, (Cal. 1888) 18 Pac. Rep. 660; *People v. Warren*, 134 Cal. 202; *People v. Harlan*, 133 Cal. 16; *People v. Benc*, 130 Cal. 159; *Steen v. Santa Clara Valley Mill, etc., Co.*, 134 Cal. 355; *People v. Silva*, 121 Cal. 668; *People v. O'Brien*, 96 Cal. 171; *Jones v. Duchow*, 87 Cal. 109; *Barkly v. Copeland*, 86 Cal. 483; *People v. Sherman*, (Cal. 1893) 32 Pac. Rep. 879; *Sharon v. Sharon*, 79 Cal. 633.

**Connecticut.** — *Smith v. Brockett*, 69 Conn. 492.

**Florida.** — *Roberson v. State*, 40 Fla. 509; *Reddick v. State*, 25 Fla. 112.

**Georgia.** — *Ratteree v. Chapman*, 79 Ga. 574; *Johnson v. State*, 61 Ga. 305.

**Idaho.** — *State v. Anthony*, 6 Idaho 383.

**Illinois.** — *Gifford v. People*, 87 Ill. 210; *Dimick v. Downs*, 82 Ill. 570; *Hansell v. Erickson*, 28 Ill. 257; *Crabtree v. Kile*, 21 Ill. 180; *Eason v. Chapman*, 21 Ill. 33; *Sheahan v. Collins*, 20 Ill. 326, 71 Am. Dec. 271; *Frye v. State Bank*, 11 Ill. 367.

**Indiana.** — *Dunn v. State*, 162 Ind. 174; *Blough v. Parry*, 144 Ind. 463; *Griffith v. State*, 140 Ind. 163; *Rawles v. State*, 56 Ind. 433; *Wilson v. State*, 16 Ind. 392; *Walker v. State*, 6 Blackf. (Ind.) 3; *Whitney v. State*, 154 Ind. 573.

**Iowa.** — *Matter of Myers*, 111 Iowa 584.

**Kentucky.** — *List v. List*, (Ky. 1904) 82 S. W. Rep. 446; *Roberts v. Johnson*, 64 S. W. Rep. 526, 23 Ky. L. Rep. 938; *Com. v. Wilson*, (Ky. 1895) 32 S. W. Rep. 166; *Fox v. Com.*, (Ky. 1886) 1 S. W. Rep. 396; *Young v. Com.*, 6 Bush (Ky.) 312; *Taylor v. Com.*, 3 Bush (Ky.) 508; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

**Louisiana.** — *State v. Frank*, 109 La. 131; *State v. Jackson*, 44 La. Ann. 160.

**Maine.** — *Halley v. Webster*, 21 Me. 461.

**Massachusetts.** — *Com. v. Smith*, 162 Mass. 508; *Holbrook v. Dow*, 12 Gray (Mass.) 358;

**On Cross-examination.** — It has been held in some cases that the rule does not apply in full force in cross-examination of the witness himself, where it is held to be allowable to bring particular acts from the witness's own mouth,<sup>1</sup> but there is always a limitation to the relevancy of the particular acts to the witness's character for truthfulness,<sup>2</sup> or to their materiality to the matter in issue<sup>3</sup> and their admissibility is within the discretion of the court;<sup>4</sup> and the answer of the witness is conclusive and beyond attack by independent witnesses.<sup>5</sup>

**f. PARTICULAR TRAITS OF CHARACTER** — (1) *When Not Material to the Issue.* — It is also a general rule that particular traits of moral character, aside from that of lack of truth and veracity, shall not be made the subject of inquiry for the purpose of impeaching a witness when evidence of such traits is not material to the issue.<sup>6</sup> Thus, it is not permissible, as a rule, to impeach a female

Utley v. Merrick, 11 Met. (Mass.) 302; Com. v. Kennon, 130 Mass. 39.

Michigan. — Clink v. Gunn, 90 Mich. 135.

Minnesota. — Swanson v. Andrus, 84 Minn. 168; State v. Barrett, 40 Minn. 65; Matthews v. Hershey Lumber Co., 65 Minn. 372; Warner v. Lockerby, 31 Minn. 421.

Missouri. — State v. Sibley, 131 Mo. 519; State v. Gesell, 124 Mo. 531; State v. Houx, 109 Mo. 654; State v. Rogers, 108 Mo. 202; State v. Bulla, 89 Mo. 595; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218.

New Jersey. — State v. Hendrick, (N. J. 1903) 56 Atl. Rep. 247.

New York. — Gates v. Bowers, 169 N. Y. 14; Carlson v. Winterson, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 388; Ford v. Jones, 62 Barb. (N. Y.) 484; People v. Herrick, 13 Johns. (N. Y.) 84, 7 Am. Dec. 364; Gilpin v. Daly, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 91, 58 Hun (N. Y.) 610; Bakeman v. Rose, 14 Wend. (N. Y.) 110, 18 Wend. (N. Y.) 146; People v. Rector, 19 Wend. (N. Y.) 580; Macdonald v. Garrison, 2 Hilt. (N. Y.) 510; Davey v. Lohrmann, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 317; Wehrkamp v. Willet, 4 Abb. App. Dec. (N. Y.) 556; Varona v. Socarras, (C. Pl. Spec. T.) 8 Abb. Pr. (N. Y.) 302; Corning v. Corning, 6 N. Y. 97.

North Carolina. — State v. Bullard, 100 N. Car. 486; State v. Garland, 95 N. Car. 671; State v. Boswell, 2 Dev. L. (13 N. Car.) 209; Barton v. Morphes, 2 Dev. L. (13 N. Car.) 520; State v. Jefferson, 6 Ired. L. (28 N. Car.) 305; Luther v. Skeen, 8 Jones L. (53 N. Car.) 356.

North Dakota. — State v. Kent, 5 N. Dak. 516.

Oregon. — Leverich v. Frank, 6 Oregon 212.

Pennsylvania. — Wike v. Lightner, 11 S. & R. (Pa.) 198.

Rhode Island. — Kolb v. Union R. Co., 23 R. I. 72.

South Carolina. — Sweet v. Gilmore, 52 S. Car. 530.

Tennessee. — Hetterman Bros. Co. v. Young, (Tenn. Ch. 1898) 52 S. W. Rep. 532; Merri-man v. State, 3 Lea (Tenn.) 393.

Texas. — Houston, etc., R. Co. v. Bulger, (Tex. Civ. App. 1904) 80 S. W. Rep. 557; Houston, etc., R. Co. v. Runnels, (Tex. Civ. App. 1898) 46 S. W. Rep. 394; Smith v. State, (Tex. Crim. 1903) 77 S. W. Rep. 801 (violating local option law); Barkman v. State, (Tex. Crim. 1899) 52 S. W. Rep. 69; Fields v. State, 39 Tex. Crim. 488; Cooper Grocer Co. v. Britton, (Tex. Civ. App. 1903) 74 S. W. Rep. 91;

Gulf, etc., R. Co. v. Johnson, 83 Tex. 628; Kruger v. Spachek, 22 Tex. Civ. App. 307; Crawleigh v. Galveston, etc., R. Co., 28 Tex. Civ. App. 260; Dillingham v. Ellis, 86 Tex. 447; Moore v. Moore, 73 Tex. 383; Johnson v. Brown, 51 Tex. 76; Boon v. Weathered, 23 Tex. 675.

Vermont. — Bishop v. Wheeler, 46 Vt. 409; Crane v. Thayer, 18 Vt. 162.

Virginia. — Vance v. Com., (Va. 1894) 19 S. E. Rep. 785; Rixey v. Bayse, 4 Leigh (Va.) 330.

Wisconsin. — Goodwin v. State, 114 Wis. 318; Muetze v. Tuteur, 77 Wis. 236; Ketching-man v. State, 6 Wis. 426.

**Rule in Equity Same as at Law.** — Purcell v. M'Namara, 8 Ves. Jr. 324; Wood v. Hamerton, 9 Ves. Jr. 145; Carlos v. Brook, 10 Ves. Jr. 49; Watmore v. Dickinson, 2 Ves. & B. 267; Anonymous, 3 Ves. & B. 93; White v. Fussell, 1 Ves. & B. 151; Troup v. Sherwood, 3 Johns. Ch. (N. Y.) 558; Sweet v. Gilmore, 52 S. Car. 530.

**1. On Cross-examination.** — People v. Turney, 124 Mich. 542; Zophi v. Smith, 55 Hun (N. Y.) 547; Allen v. Dry Dock, etc., R. Co., (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 738; State v. Kent, 5 N. Dak. 516. And see Hollingsworth v. State, 53 Ark. 390. But see Pyle v. Piercy, 122 Cal. 383; Hinkle v. San Francisco, etc., R. Co., 55 Cal. 627; Smith v. Brockett, 69 Conn. 492; People v. Ryan, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 241.

**2.** Houston, etc., R. Co. v. Bulger, (Tex. Civ. App. 1904) 80 S. W. Rep. 557.

**3.** Evans v. De Lay, 81 Cal. 105; McSparran v. Southern Mut. Ins. Co., 193 Pa. St. 184; Gulf, etc., R. Co. v. Johnson, 83 Tex. 628.

**4.** Plinsky v. Germania F. & M. Ins. Co., 32 Fed. Rep. 47; Houston, etc., R. Co. v. Bulger, (Tex. Civ. App. 1904) 80 S. W. Rep. 557.

**5. Witness's Answer Is Conclusive.** — Matter of James, 124 Cal. 653; Evans v. De Lay, 81 Cal. 105; Pullen v. Pullen, 43 N. J. Eq. 136.

**6. Particular Traits, Not Material to Issue.** — Hollingsworth v. State, 53 Ark. 387; Cline v. State, 51 Ark. 142; State v. Randolph, 24 Conn. 363; Mercer v. State, 40 Fla. 216; State v. Parker, 7 La. Ann. 84; Phillips v. Kingfield, 19 Me. 375; Kolb v. Union R. Co., 23 R. I. 72; Hudson v. State, 41 Tex. Crim. 453.

**Various Particular Traits of Character of Which Evidence Inadmissible.** — While the law "so far recognizes the affinity of vice as not to regard the testimony of a witness of bad moral character as above all exception, it rejects the



witness by attacking her reputation for chastity,<sup>1</sup> or showing that she is a common prostitute.<sup>2</sup> In a few cases, however, it has been held that a female witness may be impeached by evidence of her general character for unchastity, or that she was a prostitute, excluding evidence of single acts of unchastity.<sup>3</sup>

conclusion that a person guilty of one immoral habit is necessarily disposed to practice all others." *Bakeman v. Rose*, 18 Wend. (N. Y.) 146. A witness may not be impeached by proof that he is a confidence man and a thief, *Conway v. State*, 33 Tex. Crim. 327; *McCutchen v. Loggins*, 109 Ala. 457, or that he is "given to rows, and to putting them off on others," *Briggs v. Com.*, 82 Va. 554, or that he is a counterfeiter, *Crane v. Thayer*, 18 Vt. 162, or that he has a general reputation as a turbulent, violent, boisterous man, *Ross v. State*, 139 Ala. 144, or as a rash, dangerous, and turbulent man when in liquor, *State v. Nelson*, 101 Mo. 464, or as a violent, quarrelsome, and dangerous character, *Padron v. State*, 41 Tex. Crim. 548, or as an habitual litigant, *Palmer v. Manhattan R. Co.*, 133 N. Y. 261, *affirming* (Supm. Ct. Gen. T.) 14 N. Y. Supp. 468, or that a minor witness has had to be chastised by the defendant for unruly conduct, *State v. Deputy*, 3 Penn. (Del.) 19.

**Honesty.**—In those jurisdictions which limit the inquiry to truth and veracity, the witness's reputation for honesty is not open to inquiry for the purpose of impeachment. See *Leonard v. Pope*, 27 Mich. 145, and *supra*, this subsection, *a. In General*.

**1. Reputation for Chastity**—*England.*—*Macbride v. Macbride*, 4 Esp. 242; *Rex v. Hodgson*, R. & R. C. C. 211.

*Alabama.*—*Holland v. Barnes*, 53 Ala. 86; *Crawford v. State*, 112 Ala. 1; *Spicer v. State*, 105 Ala. 123.

*California.*—*People v. Yslas*, 27 Cal. 630; *People v. Sherman*, (Cal. 1893) 32 Pac. Rep. 879; *Pyle v. Piercy*, 122 Cal. 383.

*Connecticut.*—*State v. Randolph*, 24 Conn. 363.

*Iowa.*—*Kilburn v. Mullen*, 22 Iowa 502.

*Louisiana.*—*State v. Hobgood*, 46 La. Ann. 855.

*Massachusetts.*—*Com. v. Churchill*, 11 Met. (Mass.) 538.

*Michigan.*—*People v. Whitson*, 43 Mich. 419; *People v. Harrison*, 93 Mich. 594; *People v. Mills*, 94 Mich. 630; *People v. Abbott*, 97 Mich. 487.

*Mississippi.*—*Smith v. State*, 58 Miss. 867; *Mackmasters v. State*, 81 Miss. 374.

*Nevada.*—*State v. Larkin*, 11 Nev. 314.

*New Jersey.*—*State v. Hendrick*, (N. J. 1903) 56 Atl. Rep. 247.

*New York.*—*Bakeman v. Rose*, 14 Wend. (N. Y.) 110; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504. But see *Osborne v. Seligman*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 811.

*Oregon.*—*Leverich v. Frank*, 6 Oregon 212.

*Pennsylvania.*—*Gilchrist v. McKee*, 4 Watts (Pa.) 380; *Com. v. Williams*, (Pa. 1904) 58 Atl. Rep. 922.

*Rhode Island.*—*Kolb v. Union R. Co.*, 23 R. I. 72.

*South Carolina.*—*Kennington v. Catoe*, (S. Car. 1904) 47 S. E. Rep. 719.

*Tennessee.*—*Merriman v. State*, 3 Lea (Tenn.) 393.

*Texas.*—*Jones v. State*, 13 Tex. 168; *Tip-ton v. Thompson*, 21 Tex. Civ. App. 143; *Hall v. State*, 43 Tex. Crim. 479; *Richardson v. State*, 44 Tex. Crim. 211; *Woodward v. State*, 42 Tex. Crim. 188. See also *Exon v. State*, 33 Tex. Crim. 461; *Ingersol v. McWillie*, 9 Tex. Civ. App. 543; *Thompson v. State*, 35 Tex. Crim. 511; *McCray v. State*, 38 Tex. Crim. 613.

*Utah.*—*State v. Hilberg*, 22 Utah 27.

*Vermont.*—*Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435.

*Wisconsin.*—*Goodwin v. State*, 114 Wis. 318.

**2. Reputation as Common Prostitute**—*United States.*—*U. S. v. Masters*, 4 Cranch (C. C.) 479.

*Alabama.*—*Birmingham Union R. Co. v. Hale*, 90 Ala. 8; *McInerny v. Irvin*, 90 Ala. 275; *Rhea v. State*, 100 Ala. 119.

*California.*—*People v. Chin Hane*, 108 Cal. 597.

*Connecticut.*—*State v. Randolph*, 24 Conn. 363.

*Louisiana.*—*State v. Hobgood*, 46 La. Ann. 855.

*Massachusetts.*—*Com. v. Churchill*, 11 Met. (Mass.) 538, 45 Am. Dec. 229, *overruling* *Com. v. Murphy*, 14 Mass. 387. See also *Com. v. Moore*, 3 Pick. (Mass.) 196.

*Michigan.*—*People v. O'Hare*, 124 Mich. 515.

*Mississippi.*—*Newman v. Mackin*, 13 Smed. & M. (Miss.) 383; *Smith v. State*, 58 Miss. 867, *overruling* *Head v. State*, 44 Miss. 731; *Tucker v. Tucker*, 74 Miss. 93.

*New York.*—*Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Bakeman v. Rose*, 18 Wend. (N. Y.) 146. But see *Osborne v. Seligman*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 811.

*Texas.*—*Stayton v. State*, 32 Tex. Crim. 33; *McCray v. State*, 38 Tex. Crim. 609; *Richardson v. State*, 44 Tex. Crim. 211. But as to the extent of the rule in Texas, see *Hall v. State*, 43 Tex. Crim. 479.

*Vermont.*—*State v. Smith*, 7 Vt. 141; *Morse v. Pineo*, 4 Vt. 281; *Spears v. Forrest*, 15 Vt. 435.

**3. Georgia.**—*Weathers v. Barksdale*, 30 Ga. 888.

*Missouri.*—*State v. Shields*, 13 Mo. 236; *State v. Grant*, 79 Mo. 133; *Sitton v. Grand Lodge, etc.*, 84 Mo. App. 208. See also *State v. Sibley*, 131 Mo. 519.

*Nebraska.*—*McVey v. State*, 55 Neb. 777.

*Washington.*—*State v. Coella*, 3 Wash. 99, holding that a witness may be asked if she is a prostitute, but that she may claim her privilege of refusing to answer on the ground that the answer would incriminate her.

In *State v. Boyd*, 178 Mo. 2, it was held that a witness might be asked on cross-examination as to her child having been born out

A male witness may not be impeached by evidence of unchastity or that he is in the habit of associating with lewd and unchaste women.<sup>1</sup> It is not competent to attack the reputation of a witness by proof that he or she is the keeper of a house of ill fame.<sup>2</sup>

**Occupation.** — It is always competent to ask a witness what his occupation is, and if the question elicits the answer that he is engaged in an unlawful or criminal occupation, it is held that there is no ground for complaint.<sup>3</sup> In some cases it has been held that a question as to the particular immoral or unlawful occupation of the witness is admissible on cross-examination.<sup>4</sup> In other cases such questions have been disallowed where not material otherwise than as affecting credibility.<sup>5</sup> A witness may not be impeached by proof that he is a common drunkard;<sup>6</sup> or that he is in the habit of drinking beer;<sup>7</sup> or that he is in the habit of eating opium.<sup>8</sup>

(2) *When Material to the Issue.* — In cases where reputation for chastity has a direct bearing on the probability of the facts stated by the witness, it may be proved for the purpose of impeachment. Such reputation is material in cases of rape or attempt to commit rape,<sup>9</sup> seduction,<sup>10</sup> and bastardy.<sup>11</sup> It has been held that a witness in a civil case may be discredited by proof that he has been guilty of base, dishonorable, and criminal conduct in connection with the identical case on trial.<sup>12</sup>

of wedlock, the court stating that the extent of such cross-examination is largely in the discretion of the trial court.

**1. Male Witness's Reputation for Chastity.** — *Cline v. State*, 51 Ark. 140; *State v. Parker*, 7 La. Ann. 84; *State v. Jackson*, 44 La. Ann. 160; *State v. Grant*, 76 Mo. 236, 79 Mo. 133; *State v. Sibley*, 131 Mo. 519; *State v. Clawson*, 30 Mo. App. 144; *State v. Coffey*, 44 Mo. App. 455; *Hudson v. State*, 41 Tex. Crim. 453; *Herod v. State*, 41 Tex. Crim. 597.

In *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, it was said that the rule applied to male as well as female witnesses, but this was, in effect, overruled by *State v. Sibley*, 131 Mo. 519.

**2. Keeper of House of Ill Fame.** — *Birmingham Union R. Co. v. Hale*, 90 Ala. 9 (unless on cross-examination); *Wilson v. State*, 16 Ind. 392; *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111; *Tipton v. Thompson*, 21 Tex. Civ. App. 143; *State v. Fournier*, 68 Vt. 262; *Vance v. Com.*, (Va. 1894) 19 S. E. Rep. 785. Compare *State v. Cagle*, 114 N. Car. 835.

But a witness may be asked on cross-examination if she has not kept girls for the purpose of prostitution, on the ground that the prosecution had a right to know her vocation. *State v. Hack*, 118 Mo. 92. See also *Birmingham Union R. Co. v. Hale*, 90 Ala. 8.

**3. General Question as to Occupation.** — *State v. Pugsley*, 75 Iowa 742; *McLeod v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 522.

**4. Question Whether Witness Engaged in Gambling.** — *Cicero*, etc., St. R. Co. v. Priest, 89 Ill. App. 304, affirmed 190 Ill. 592, since the occupation of a witness may be shown to affect his credibility, although in *Illinois* affirmative evidence of general bad character cannot be introduced for the purpose of impeachment. See *supra*, this subsection, *a. In General*.

**Whether Witness Kept Dance House.** — *Flores v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 808.

**5. Questions Not Allowed.** — *People v. Un*

*Dong*, 106 Cal. 83; *Com. v. Williams*, (Pa. 1904) 58 Atl. Rep. 922; *Meehan v. State*, 119 Wis. 621.

Exclusion of evidence on cross-examination of vocation is not reversible error where it would not affect the witness's credibility as showing the vocation to be immoral or unlawful. *Carter v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 437.

**Associations of Witness.** — While witnesses may be impeached by cross-examination as to their associations tending to affect their credibility, *People v. Howard*, 73 Mich. 10, such associations must be voluntary. They are not responsible for acts of their kin with which acts they are not connected, and evidence that a witness is the mother of persons who have been convicted of felonies is not admissible to impeach her. *Lee v. State*, 66 Ark. 286.

**6. Brindle v. McIlvaine**, 10 S. & R. (Pa.) 282.

**7. People v. Kahler**, 93 Mich. 625. See *State v. Grant*, 79 Mo. 133, 49 Am. Rep. 218.

**8. Eldridge v. State**, 27 Fla. 162.

**9. In Prosecutions for Rape.** — See the title RAPE, vol. 23, p. 870.

**Prosecutrix under Age of Consent.** — See the title RAPE, vol. 23, p. 872. See also *People v. Harlan*, 133 Cal. 16.

**10. In Action for Seduction.** — See the title SEDUCTION, vol. 25, p. 240 *et seq.* See also *Shattuck v. Myers*, 13 Ind. 46; *Hogan v. Cregan*, 6 Robt. (N. Y.) 138. Compare *Ford v. Jones*, 62 Barb. (N. Y.) 484.

**11. In Bastardy Cases.** — See the title BASTARDY, vol. 3, p. 882 *et seq.* See also *People v. Wilson*, (Mich. 1904) 99 N. W. Rep. 6; *State v. Giles*, 103 N. Car. 391.

On the trial of an indictment for seduction, under a promise of marriage, the general character of the complainant for chastity is open to inquiry. *McTyier v. State*, 91 Ga. 254. See generally the title BASTARDY, vol. 3, p. 871.

**12. In Civil Cases.** — *Georgia R., etc., Co. v. Lybrend*, 99 Ga. 421.

**g. CONVICTION OF INFAMOUS CRIME.**—Although, in many jurisdictions, the common-law disability of a person to testify as a witness resulting from his conviction of an infamous crime has been removed by statute,<sup>1</sup> such conviction may still be proved for the purpose of impeaching the witness,<sup>2</sup> though an appeal is pending,<sup>3</sup> or the witness has been pardoned.<sup>4</sup> The authorities are not in accord as to what convictions may be admitted in evidence to impeach a witness. In some jurisdictions only convictions of felonies or other crimes which would have rendered the witness infamous at common law are admissible,<sup>5</sup> while in others, the language of the statute is broad enough to let in the record of conviction of any crime, whether a felony or a misdemeanor.<sup>6</sup> An intermediate rule is that the crime must be of such a nature as to imply moral turpitude in the person committing it.<sup>7</sup> In general,

1. See the title **INFAMY AND INFAMOUS CRIMES**, vol. 16, p. 245.

2. **Conviction of Infamous Crime—England.**—*Rex v. Watson*, 2 Stark. 149, 3 E. C. L. 354.

*United States.*—*Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Baltimore, etc., R. Co. v. Rambo*, (C. C. A.) 59 Fed. Rep. 75.

*Alabama.*—*Deal v. State*, 136 Ala. 52; *Gordon v. State*, (Ala. 1904) 36 So. Rep. 1009.

*Georgia.*—*Shaw v. State*, 102 Ga. 660; *Coleman v. State*, 94 Ga. 85; *Ford v. State*, 91 Ga. 162; *Georgia R. Co. v. Homer*, 73 Ga. 251; *McGruder v. State*, 71 Ga. 864.

*Illinois.*—*McKevitt v. People*, 208 Ill. 460.

*Indiana.*—*Glenn v. Clore*, 42 Ind. 60.

*Massachusetts.*—*O'Connell v. Dow*, 182 Mass. 541.

*Missouri.*—*State v. Chappell*, 179 Mo. 324; *State v. Lochr*, 93 Mo. 103; *State v. Kelsoe*, 76 Mo. 507.

*Nebraska.*—*Reed v. State*, 66 Neb. 184.

*Ohio.*—*Coble v. State*, 31 Ohio St. 100.

*Texas.*—*Arcia v. State*, 26 Tex. App. 193.

**A Verdict of Guilty is Sufficient**, though the witness has not been sentenced. *People v. Ward*, 134 Cal. 301. *Contra*, under the *Texas* statute. *Arcia v. State*, 26 Tex. App. 193; *Jones v. State*, 32 Tex. Crim. 135.

Under the *Iowa* statute (Code 1873, § 3648) there must be both a verdict of guilty and judgment thereon. *Hackett v. Freeman*, 103 Iowa 296.

**A Conviction of Felony in Another State or Territory Not Admissible** in a civil action to impeach the witness. *Missouri, etc., R. Co. v. De Bord*, 21 Tex. Civ. App. 691.

3. **Appeal Immaterial.**—*Viberg v. State*, 138 Ala. 100; *Hackett v. Freeman*, 103 Iowa 296, *distinguishing* *Card v. Foot*, 57 Conn. 427, where the state, in the Superior Court, had entered a *nolle prosequi* in the case; and *Arcia v. State*, 26 Tex. App. 193, and *Jones v. State*, 32 Tex. Crim. 135, which were decided on special statutes.

4. **Pardon Immaterial.**—*O'Donnell v. People*, 110 Ill. App. 250, *affirmed* in *Gallagher v. People*, 211 Ill. 158; *Long v. State*, 23 Neb. 33; *Curtis v. Cochran*, 50 N. H. 244; *Baum v. Clause*, 5 Hill (N. Y.) 196; *Dudley v. State*, 24 Tex. App. 163; *Bennett v. State*, 24 Tex. App. 73. See also the title **INFAMY AND INFAMOUS CRIMES**, vol. 16, p. 251, and cases there cited in note 2.

5. **Only Infamous Crimes—Alabama.**—*Gordon v. State*, (Ala. 1904) 36 So. Rep. 1009.

*Arkansas.*—*Bims v. Collier*, 60 Ark. 245.

*California.*—*People v. White*, 142 Cal. 292.

*Connecticut.*—*Card v. Foot*, 57 Conn. 427. See *State v. Randolph*, 24 Conn. 363.

*Illinois.*—*Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97; *Burke v. Stewart*, 81 Ill. App. 506; *Daxanbeklar v. People*, 93 Ill. App. 553; *McKivitt v. People*, 208 Ill. 460.

*Iowa.*—*Germinder v. Machinery Mut. Ins. Assoc.*, 120 Iowa 614.

*Missouri.*—Formerly the rule stated in the text was followed in *Missouri*. *Gardner v. St. Louis, etc., R. Co.*, 135 Mo. 90; *State v. Donnelly*, 130 Mo. 642; *State v. Taylor*, 98 Mo. 240; *State v. Warren*, 57 Mo. App. 502. But the later decisions are to the contrary effect. See the cases cited in the next following note.

*New York.*—*Newcomb v. Griswold*, 24 N. Y. 300; *Arhart v. Stark*, (Buffalo Super. Ct. Gen. T.) 6 Misc. (N. Y.) 579; *Carpenter v. Nixon*, 5 Hill (N. Y.) 260. See *People v. Dorthy*, 156 N. Y. 237.

*Ohio.*—*Coble v. State*, 31 Ohio St. 100.

*South Carolina.*—*State v. Wyse*, 33 S. Car. 582.

*Texas.*—*Goode v. State*, 32 Tex. Crim. 505.

**Nothing Less than Conviction of Felony Admissible.**—*Palmer v. Cedar Rapids, etc., R. Co.*, 113 Iowa 442; *Hanners v. McClelland*, 74 Iowa 318; *Young Men's Christian Assoc. v. Rawlings*, 60 Neb. 377; *Pitner v. State*, 23 Tex. App. 366.

**Conviction of Misdemeanor Insufficient.**—*People v. White*, 142 Cal. 292; *People v. Carolan*, 71 Cal. 196; *Card v. Foot*, 57 Conn. 427; *State v. Payne*, 6 Wash. 563.

A witness may be asked on cross-examination if he is working out a fine for theft. *Sentell v. State*, 34 Tex. Crim. 260.

6. **Any Crime.**—*Com. v. Ford*, 146 Mass. 131; *Quigley v. Turner*, 150 Miss. 138; *McClelland v. Sauer*, 42 Minn. 258; *Helm v. State*, 67 Miss. 562; *State v. Blitz*, 171 Mo. 530; *Chouteau Land, etc., Co. v. Chrisman*, 172 Mo. 610; *State v. Thornhill*, 174 Mo. 364; *State v. Chappell*, 170 Mo. 324.

But a judgment under a city ordinance for a penalty for an offense which might be also punished as a misdemeanor is not a conviction of a misdemeanor which can be introduced as evidence to impeach a witness under the *New York* statute (Code Civ. Pro., § 832). *Arhart v. Stark*, (Buffalo Super. Ct. Gen. T.) 6 Misc. (N. Y.) 579.

7. **Crime Must Imply Moral Turpitude.**—*Georgia.*—*Andrews v. State*, 118 Ga. 1.

*Texas.*—*Whitley v. State*, (Tex. Crim. 1900)



the fact that a witness is or has been under indictment may not be proved for the purpose of impeaching him,<sup>1</sup> neither is evidence of his arrest on a criminal charge admissible for that purpose.<sup>2</sup>

The Record Is the Best Evidence, and, in many cases, is held to be the only admissible evidence of conviction.<sup>3</sup> In many jurisdictions it is permissible to

56 S. W. Rep. 69; Williford v. State, 36 Tex. Crim. 414; Brittain v. State, 36 Tex. Crim. 406; Fitzpatrick v. State, 37 Tex. Crim. 20; Young v. State, (Tex. Crim. 1901) 60 S. W. Rep. 767; Chambers v. State, (Tex. Crim. 1901) 65 S. W. Rep. 192; Curtis v. State, (Tex. Crim. 1904) 81 S. W. Rep. 29; Preston v. State, 41 Tex. Crim. 300; Lewis v. Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747; Hill v. Dons, (Tex. Civ. App. 1896) 37 S. W. Rep. 638. See also Hays v. State, (Tex. Crim. 1904) 82 S. W. Rep. 511, and Stewart v. State, (Tex. Crim. 1897) 38 S. W. Rep. 1144.

Virginia. — Langhorne v. Com., 76 Va. 1012; Uhl v. Com., 6 Gratt. (Va.) 706.

In Vermont it is held that it is not a matter of legal right to show the conviction where moral turpitude is not involved, but it rests in the sound discretion of the trial court. McGovern v. Hays, 75 Vt. 104; State v. Shaw, 73 Vt. 149; State v. Slack, 69 Vt. 486.

1. **Indictment** — Alabama. — Ross v. State, 139 Ala. 144; Titus v. State, 117 Ala. 16; Campbell v. State, 23 Ala. 81, where pending indictments for libel were not allowed to be introduced on the ground that a witness may be impeached by general evidence only and not by proof of particular facts.

California. — People v. Elster, (Cal. 1884) 5 Crim. L. Mag. 687.

Georgia. — McKillian v. Georgia R., etc., Co., 97 Ga. 727.

Iowa. — Germinder v. Machinery Mut. Ins. Assoc., 120 Iowa 614.

Kentucky. — Hensley v. Com., (Ky. 1903) 74 S. W. Rep. 677; Hendrickson v. Com., (Ky. 1901) 64 S. W. Rep. 954; Lewis v. Com., (Ky. 1897) 42 S. W. Rep. 1127; Leslie v. Com., (Ky. 1897) 42 S. W. Rep. 1095; Ashcraft v. Com., (Ky. 1902) 68 S. W. Rep. 847; Welsh v. Com., (Ky. 1901) 60 S. W. Rep. 185.

Maryland. — Bonaparte v. Thayer, 95 Md. 548.

Massachusetts. — See Com. v. Gorham, 99 Mass. 420.

New York. — Van Bokkelen v. Berdell, 130 N. Y. 141, reversing (Supm. Ct. Gen. T.) 3 N. Y. Supp. 333; Burroughs v. Strauss, 48 N. Y. App. Div. 584; Hirschman v. Cohn, 38 N. Y. App. Div. 351; Lipe v. Eisenlerd, 32 N. Y. 229; Jackson v. Osborn, 2 Wend. (N. Y.) 555, where the witness was indicted for perjury and forgery, but was never tried, having absconded; West v. Lynch, 7 Daly (N. Y.) 245, where a *nolle prosequi* was entered by the prosecution; Sullivan v. Newman, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 424, where the witness had been indicted but no conviction followed; Willson v. Eveline, 35 N. Y. App. Div. 92.

Texas. — In Texas the rule stated in the text is followed in the Court of Civil Appeals. Kruger v. Spacke, 22 Tex. Civ. App. 307; Hill v. Dons, (Tex. Civ. App. 1896) 37 S. W. Rep. 638; Houston, etc., R. Co. v. Bulger, (Tex. Civ. App. 1904) 80 S. W. Rep. 557; Freedman v.

Bonner, (Tex. Civ. App. 1897) 40 S. W. Rep. 47; Lewis v. Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747; Crawleigh v. Galveston, etc., R. Co., 28 Tex. Civ. App. 260. *Contra*, Linz v. Skinner, 11 Tex. Civ. App. 512; Texas, etc., Coal Co. v. Lawson, 10 Tex. Civ. App. 491. A contrary view is taken in the Court of Criminal Appeals where cross-examination of the witness as to prior indictment is admissible. Carroll v. State, 32 Tex. Crim. 431; Scoville v. State, (Tex. Crim. 1903) 77 S. W. Rep. 792; Powell v. State, (Tex. Crim. 1902) 70 S. W. Rep. 218; Matkins v. State, 33 Tex. Crim. 605; Clark v. State, 38 Tex. Crim. 30; Cannon v. State, 41 Tex. Crim. 467; Bearden v. State, 44 Tex. Crim. 578; Combs v. State, (Tex. Crim. 1899) 49 S. W. Rep. 585; Bolton v. State, (Tex. Crim. 1897) 39 S. W. Rep. 672; Bratt v. State, (Tex. Crim. 1897) 41 S. W. Rep. 624. But see Bennett v. State, (Tex. Crim. 1904) 81 S. W. Rep. 30; Hays v. State, (Tex. Crim. 1904) 82 S. W. Rep. 511.

Utah. — See People v. Hite, 8 Utah 461.

In Indian Territory the contrary is held and the witness may be impeached on cross-examination by showing arrest or indictment for offenses involving moral turpitude. Oats v. U. S., 1 Indian Ter. 152; Oxier v. U. S., 1 Indian Ter. 85, where it was held that the witness could not be contradicted and that he might claim his privilege not to answer.

2. **Evidence of Arrest Not Admissible.** — People v. Hamblin, 68 Cal. 103; State v. Brown, 100 Iowa 50; Hendrickson v. Com., (Ky. 1901) 64 S. W. Rep. 954; Mullins v. Com., (Ky. 1904) 79 S. W. Rep. 258; Welch v. Com., 110 Ky. 105, denying rehearing Welsh v. Com., (Ky. 1901) 60 S. W. Rep. 185; State v. Howard, 102 Mo. 142; Pullen v. Pullen, 43 N. J. Eq. 136; V. Loewer's Gambrinus Brewery Co. v. Bachman, (C. Pl. Gen. T.) 18 N. Y. Supp. 138; Brown v. People, 8 Hun (N. Y.) 562; State v. Prater, 26 S. Car. 198, 613.

In State v. Bacon, 13 Oregon 143, it was held that in the absence of a claim of privilege by the witness it was in the discretion of the court to allow or exclude questions as to whether he had been arrested or imprisoned for a crime, the purpose of such interrogation being to impeach his credibility.

In Texas it appears that the witness may be asked in a criminal case if he has been arrested or charged for an offense involving moral turpitude. Whitley v. State, (Tex. Crim. 1900) 56 S. W. Rep. 69; Jones v. State, 44 Tex. Crim. 405. But not for a violation of the local option law. Stewart v. State, (Tex. Crim. 1897) 38 S. W. Rep. 1144.

Where Material to Issue. — The witness may be impeached by evidence of a charge relating to the transaction under trial. Livingston v. Heck, 122 Iowa 74; State v. Reed, 50 La. Ann. 990.

3. **Record of Conviction Best Evidence** — United States. — U. S. v. Biebusch, 1 Fed. Rep. 213;

ask the witness on cross-examination if he has ever been convicted of a felony, and it is not necessary to produce the record of his conviction.<sup>1</sup> In some cases it has been held that the witness may be asked if he has been in prison, although it was indicated that he could not have been asked regarding his conviction without production of the record.<sup>2</sup>

**Time of Conviction.** — A conviction, or, where it is admissible, an indictment, must not be too remote.<sup>3</sup>

Baltimore, etc., R. Co. *v.* Rambo, (C. C. A.) 59 Fed. Rep. 75.

Connecticut. — Hall *v.* Brown, 30 Conn. 551.

Georgia. — Johnson *v.* State, 48 Ga. 116; Killian *v.* Georgia, etc., R. Co., 97 Ga. 727.

Iowa. — State *v.* Brown, 100 Iowa 50; Palmer *v.* Cedar Rapids, etc., R. Co., 113 Iowa 442.

Massachusetts. — Com. *v.* Green, 17 Mass. 515; Com. *v.* Gorham, 99 Mass. 420; Com. *v.* Sullivan, 161 Mass. 59; Com. *v.* Quinn, 5 Gray (Mass.) 478.

Missouri. — Berman *v.* Hoke, 61 Mo. App. 376.

New York. — Newcomb *v.* Griswold, 24 N. Y. 298.

Tennessee. — Boyd *v.* State, 94 Tenn. 505.

Washington. — State *v.* Payne, 6 Wash. 563.

The record of the witness's conviction may be introduced in evidence after he has admitted an indictment of the crime, or has denied a conviction; and it need not be produced until he does so deny or fail to admit the conviction. Moore *v.* State, 96 Tenn. 209; Wilson *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 232; Robertson *v.* State, 40 Fla. 509. The record is not conclusive and the witness may show that he was in fact innocent. Reed *v.* State, 66 Neb. 184.

In *Illinois* in criminal cases the conviction can only be shown by the record. Daxanbeklar *v.* People, 93 Ill. App. 553; Burke *v.* Stewart, 81 Ill. App. 506; McKevitt *v.* People, 208 Ill. 460; Bartholomew *v.* People, 104 Ill. 601; Kirby *v.* People, 123 Ill. 436; Simons *v.* People, 150 Ill. 66.

**Identity.** — An authenticated record showing a conviction of a person of the same name as witness is admissible without other proof of identity. Bayha *v.* Mumford, 58 Kan. 445, or testimony may be introduced showing his identity with the person convicted. Eifert *v.* Lytle, 172 Pa. St. 356; O'Connell *v.* Dow, 182 Mass. 541.

**The Whole Record** should be introduced in evidence. Baltimore, etc., R. Co. *v.* Rambo, (C. C. A.) 59 Fed. Rep. 75; Doggett *v.* Simms, 79 Ga. 253; Kirby *v.* People, 123 Ill. 436; Com. *v.* Gorham, 99 Mass. 420; Norton *v.* Perkins, 67 Vt. 203.

1. *California.* — People *v.* Chin Hane, 108 Cal. 597; People *v.* Putman, 129 Cal. 258.

*Illinois.* — Gage *v.* Eddy, 167 Ill. 102; Looney *v.* People, 81 Ill. App. 370.

*Iowa.* — State *v.* O'Brien, 81 Iowa 95; Noteboom *v.* Watkins, 103 Iowa 580, holding that since the witness may be asked the direct question it is proper to exclude preliminary questions referring to a conviction.

*Kansas.* — State *v.* Pfefferle, 36 Kan. 90; State *v.* Probasco, 46 Kan. 310.

*Kentucky.* — Mitchell *v.* Com., (Ky. 1901) 64 S. W. Rep. 751.

*Maryland.* — McLaughlin *v.* Mencke, 80 Md. 83.

*Massachusetts.* — Production of the record of conviction as best evidence may be waived. Com. *v.* Bonner, 97 Mass. 587.

*Mississippi.* — Jackson *v.* State, 75 Miss. 145, wherein it was held under the statute allowing the witness to be examined as to his conviction, that the question may be put whether he has not confessed that he has been in the penitentiary.

*New Jersey.* — State *v.* Fox, (N. J. 1904) 57 Atl. Rep. 270.

*North Carolina.* — State *v.* Lawhorn, 88 N. Car. 634; State *v.* Patterson, 2 Ired. L. (24 N. Car.) 346; State *v.* Garrett, Busb. L. (44 N. Car.) 357.

*Rhode Island.* — State *v.* Ellwood, 17 R. I. 763.

*Texas.* — McNeal *v.* State, (Tex. Crim. 1897) 43 S. W. Rep. 792; Kipper *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 611; Stanley *v.* State, (Tex. Crim. 1898) 44 S. W. Rep. 519.

*Washington.* — State *v.* Ripley, 32 Wash. 182; State *v.* Champoux, 33 Wash. 339.

2. *Maryland.* — Smith *v.* State, 64 Md. 25.

*Michigan.* — In Wilbur *v.* Flood, 16 Mich. 40, it was held that a witness might be asked on cross-examination whether he had been confined in a state's prison, without producing the record of his conviction. See also Clemens *v.* Conrad, 19 Mich. 170; People *v.* Cummins, 47 Mich. 334.

*Missouri.* — State *v.* Taylor, 118 Mo. 159; State *v.* Miller, 100 Mo. 606; State *v.* Martin, 124 Mo. 514; State *v.* Pratt, 121 Mo. 566, holding that the witness may be asked on cross-examination whether he has been in jail for theft or other like offenses.

*New York.* — Real *v.* People, 42 N. Y. 270; Perham *v.* Noel, 20 N. Y. App. Div. 516, where it was held that under the statute allowing cross-examination as to conviction, the witness might be asked how many times he had been in state's prison or in jail.

*Texas.* — Lights *v.* State, 21 Tex. App. 308, overruling State *v.* Ezell, 41 Tex. 38; Woodson *v.* State, 24 Tex. App. 162.

*West Virginia.* — State *v.* Hill, 52 W. Va. 296.

*Wisconsin.* — Cullen *v.* Hanisch, 114 Wis. 24.

**3. Conviction or Indictment Must Not Be Too Remote.** — A conviction eight or nine years before was held to be too remote. Herring *v.* Patten, 18 Tex. Civ. App. 147; Scoville *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 792; Marks *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 512. Twenty years before held too remote. Dyer *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 456. Ten years too remote. Linz *v.* Skinner, 11 Tex. Civ. App. 512. Five years not too remote,

**Nature and Circumstances of Crime.** — It has been held that evidence of the name and nature, and the circumstances of the crime, is not admissible, the conviction itself having been proved.<sup>1</sup>

**5. Bias of Witness — a. GENERAL RULE.** — The situation of a witness, his relations with the party calling him, his zeal or bias as shown by his conduct, as by improper efforts to influence jurors or other witnesses in the case, are all matters affecting the credibility of the witness and are material elements to be considered by the jury in weighing the testimony.<sup>2</sup>

**b. IN FAVOR OF PARTY CALLING HIM — (1) In General.** — The fact that a witness manifests a bias or partiality for the party who calls him is a proper matter for the consideration of the jury in estimating the value of his testimony, and it is a general rule that on cross-examination any fact may be elicited which tends to show such bias or partiality.<sup>3</sup> If the witness denies

Bolton v. State, (Tex. Crim. 1897) 39 S. W. Rep. 672.

"If a party has been recently charged with a felony, or has recently been a witness in behalf of an accused in a criminal prosecution, these matters might and should be inquired into, going to the credibility and as tending to impeach the credibility of the witness; but, if the testimony elicited is a fact that occurred fifteen or seventeen years before, it is too remote to be considered." Bowers v. State, (Tex. Crim. 1902) 71 S. W. Rep. 284.

**Contra.** — Wolff v. Van Housen, 55 Ill. App. 295, where it was held that the lapse of time of twenty-six years did not make evidence of the conviction of the witness for forgery inadmissible, its effect upon his credibility being a question for the jury.

**1. Proof of Name, Nature, and Circumstances of Crime Not Admissible.** — Lamoureux v. New York, etc., R. Co., 169 Mass. 338; Flournoy v. State, (Tex. Crim. 1900) 59 S. W. Rep. 902; State v. Gottfreedson, 24 Wash. 398.

The conviction being proved is conclusive on both parties. It can neither be explained away nor can the witness be cross-examined on it for the purpose of impeachment. Cole v. Lake Shore, etc., R. Co., 95 Mich. 77.

So, on admitting the fact of his disbarment, it was held not competent to go further and require an attorney to answer or explain all charges that had been made against him in the proceedings for his removal. People v. Dorthy, 156 N. Y. 237.

**Contra — Proof of Name and Nature of Crime Admissible.** — People v. Putman, 129 Cal. 258; People v. Chin Hane, 108 Cal. 597.

**2. Bias of Witness — General Rule.** — People v. Gregory, 120 Cal. 16; Purdee v. State, 118 Ga. 798; State v. Crea, (Idaho 1904) 76 Pac. Rep. 1013; State v. Keys, 53 Kan. 674; Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431; Teets v. Middletown, 106 N. Y. 651; Hamilton v. Manhattan R. Co., 58 N. Y. Super. Ct. 17; Beck v. Hood, 185 Pa. St. 32; Vermont Farm Mach. Co. v. Batchelder, 68 Vt. 430. See also Boulden v. State, 102 Ala. 78. But see Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 53, 40 Am. Rep. 453.

**A Ruling Sustaining an Objection to a Question,** viz., "Are you willing to tell what you know, Mr. A.?" is not a refusal to allow an inquiry into the feelings of the witness toward either

of the parties. Evans-Snyder-Buell Co. v. Turner, 143 Mo. 638.

**3. In Favor of Party Calling Him — In General — England.** — Thomas v. David, 7 C. & P. 350, 32 E. C. L. 537; Atty.-Gen. v. Hitchcock, 11 Jur. 478; Goddard v. Parr, 24 L. J. Ch. 783. See also Rex v. Rudge, 2 Peake 232.

**United States.** — U. S. v. Schindler, 10 Fed. Rep. 547; King v. U. S. (C. C. A.) 112 Fed. Rep. 988.

**Alabama.** — Estes v. State, (Ala. 1904) 37 So. Rep. 85; Burger v. State, 83 Ala. 36; Drum v. Harrison, 83 Ala. 384; England v. State, 89 Ala. 76; Jones v. State, 104 Ala. 30; Long v. Booe, 106 Ala. 570; Scott v. State, 113 Ala. 64; Suther v. State, 118 Ala. 88; Martin v. State, 125 Ala. 64; Louisville, etc., R. Co. v. Tegner, 125 Ala. 593; Alabama G. S. R. Co. v. Johnston, 128 Ala. 283; Southern R. Co. v. Crowder, 130 Ala. 256.

**Arkansas.** — Crumpton v. State, 52 Ark. 273; Vaughan v. State, 57 Ark. 1.

**California.** — People v. Dillwood, (Cal. 1895) 39 Pac. Rep. 438; People v. Murray, 85 Cal. 350; People v. Gardner, 98 Cal. 127; People v. Wong Chuey, 117 Cal. 624.

**Florida.** — Sylvester v. State, (Fla. 1903) 35 So. Rep. 142.

**Georgia.** — Futch v. State, 90 Ga. 472; Daniel v. State, 103 Ga. 202; Purdee v. State, 118 Ga. 798; Brown v. State, 19 Ga. 572.

**Idaho.** — State v. Crea, (Idaho 1904) 76 Pac. Rep. 1013.

**Illinois.** — Aurora v. Scott, 82 Ill. App. 616; Butler Ballast Co. v. Hoshaw, 94 Ill. App. 68.

**Indiana.** — Wabash R. Co. v. Ferris, 6 Ind. App. 30; Sage v. State, 127 Ind. 15; Smith v. State, 143 Ind. 685.

**Iowa.** — State v. McKinstry, 100 Iowa 82.

**Kansas.** — State v. Keys, 53 Kan. 674.

**Kentucky.** — Holly v. Com., (Ky. 1896) 36 S. W. Rep. 532; Powers v. Com., (Ky. 1901) 63 S. W. Rep. 976; Morrison v. Com., (Ky. 1903) 74 S. W. Rep. 277; Breckinridge v. Com., 97 Ky. 267.

**Maine.** — Davis v. Roby, 64 Me. 427.

**Maryland.** — Wise v. Ackerman, 76 Md. 375; Richardson v. State, 90 Md. 109.

**Massachusetts.** — O'Neill v. Lowell, 6 Allen (Mass.) 110.

**Michigan.** — Mears v. Cornwall, 73 Mich. 78; Jones v. Portland, 88 Mich. 604; People v. Row, (Mich. 1904) 98 N. W. Rep. 13; Fulton v. Priddy, 123 Mich. 298.



the facts showing bias the cross-examining party may call other witnesses to contradict him.<sup>1</sup> The rule is not changed by the fact that the circumstances that tend to create bias may prejudice the jury against the party calling the witness.<sup>2</sup> The fact elicited, however, must clearly authorize the inference of such bias or partiality; it must not be collateral to the issue, and should not be extended beyond reasonable limits.<sup>3</sup>

(2) *Kinship Between Witness and Party.*—With the exception of the rela-

*Minnesota.*—State *v.* Tall, 43 Minn. 273.

*Missouri.*—State *v.* Turlington, 102 Mo. 642; State *v.* Hack, 118 Mo. 92; State *v.* McLaughlin, 149 Mo. 19, *Carp v. Queen Ins. Co.*, (Mo. App. 1904) 79 S. W. Rep. 757.

*New Hampshire.*—Pearson *v.* Dover Beef Co., 69 N. H. 584.

*New Mexico.*—Territory *v.* Chavez, 8 N. Mex. 528.

*New York.*—Gilpin *v.* Daly, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 91, 58 Hun (N. Y.) 610; People *v.* Christie, 2 Park. Crim. (N. Y.) 579; William McShane Co. *v.* Heilner, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 720; Zimmerman *v.* Third Ave. R. Co., 36 N. Y. App. Div. 265, 273; Miles *v.* Sackett, 30 Hun (N. Y.) 68; Green *v.* Metropolitan St. R. Co., 60 N. Y. App. Div. 317; Hardy *v.* Main, 56 Hun (N. Y.) 221; People *v.* Keating, 61 Hun (N. Y.) 260; Taylor *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 282; Brown *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 43 Misc. (N. Y.) 374; Matter of Steenwerth, 97 N. Y. App. Div. 116; People *v.* Webster, 139 N. Y. 73; People *v.* Glennon, 175 N. Y. 45. See also Teets *v.* Middletown, 106 N. Y. 651.

*North Carolina.*—Edwards *v.* Sullivan, 8 Ired. L. (30 N. Car.) 302.

*North Dakota.*—State *v.* McGahey, 3 N. Dak. 293; State *v.* Kent, 4 N. Dak. 577.

*Ohio.*—Connecticut F. Ins. Co. *v.* Carnahan, 10 Ohio Cir. Dec. 186; Hayes *v.* Smith, 62 Ohio St. 161.

*Oregon.*—State *v.* Brown, 28 Oregon 147.

*Pennsylvania.*—Cameron *v.* Montgomery, 13 S. & R. (Pa.) 131; Fitzpatrick *v.* Riley, 163 Pa. St. 65; Enright *v.* Pittsburg Junction R. Co., 204 Pa. St. 543; Glenn *v.* Philadelphia, etc., Traction Co., 206 Pa. St. 135.

*South Carolina.*—State *v.* Merriman, 34 S. Car. 16; State *v.* Kelley, 46 S. Car. 55.

*South Dakota.*—State *v.* Mulch, (S. Dak. 1903) 96 N. W. Rep. 101.

*Texas.*—Daffin *v.* State, 11 Tex. App. 76; Ashlock *v.* State, 16 Tex. App. 13; Cox *v.* Missouri, etc., R. Co., 20 Tex. Civ. App. 250; Crist *v.* State, 21 Tex. App. 361; Blum *v.* Jones, (Tex. Civ. App. 1893) 23 S. W. Rep. 844; Donahoo *v.* Scott, (Tex. Civ. App. 1895) 30 S. W. Rep. 385; Jenkins *v.* State, 34 Tex. Crim. 201; Magruder *v.* State, 35 Tex. Crim. 214; Forrester *v.* State, 38 Tex. Crim. 245; Sims *v.* State, 38 Tex. Crim. 637; Clark *v.* State, (Tex. Crim. 1897) 43 S. W. Rep. 522; Smith *v.* State, 44 Tex. Crim. 53; Reese *v.* State, 44 Tex. Crim. 34; Sims *v.* State, (Tex. Crim. 1898) 45 S. W. Rep. 705; White *v.* Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 382; Webb *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 82; Wooley *v.* Bell, (Tex. Civ. App. 1903) 76 S. W. Rep. 797; Pace *v.*

State, (Tex. Crim. 1904) 79 S. W. Rep. 531; Blum *v.* Jones, 86 Tex. 492.

*Vermont.*—State *v.* Burpee, 65 Vt. 1.

*Wisconsin.*—Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641.

**A Witness Having Shown an Active Interest in the Prosecution**, it is unnecessary to show that he has contributed nothing to the defense. State *v.* Roller, 30 Wash. 692.

**Where the Interest of the Witness Is Apparent** the details of such interest are of no consequence and a question relating thereto may be ruled out. Parrish *v.* State, 139 Ala. 16.

**The Fact that a Witness Is Indebted to a Party** to an action has been held not an indication of bias in such party's favor. State *v.* Henderson, 29 W. Va. 147.

**1. Other Witnesses to Show Bias.**—Schuster *v.* State, 80 Wis. 107.

**2. Facts Tending to Prejudice Jury.**—State *v.* McGahey, 3 N. Dak. 293; Crist *v.* State, 21 Tex. App. 366.

**3. Elements of Facts Showing Bias or Partiality**—*Alabama.*—Gordon *v.* State, (Ala. 1904) 36 So. Rep. 1009; Wilkerson *v.* State, (Ala. 1904) 37 So. Rep. 265; McAlpine *v.* State, 117 Ala. 93; Hall *v.* State, 137 Ala. 44; Parrish *v.* State, 139 Ala. 16.

*California.*—People *v.* Lynch, 122 Cal. 501.

*Colorado.*—Barr *v.* People, 30 Colo. 522.

*Illinois.*—Kammann *v.* People, 26 Ill. App. 48; Chicago, etc., R. Co. *v.* Huston, 196 Ill. 480, affirming 95 Ill. App. 350.

*Kentucky.*—Powers *v.* Com., 110 Ky. 386.

*Massachusetts.*—Aldworth *v.* Lynn, 153 Mass. 53.

*Michigan.*—People *v.* Considine, 105 Mich. 149.

*Mississippi.*—Lea *v.* State, 64 Miss. 294; Cheatham *v.* State, 67 Miss. 335.

*Missouri.*—See also Coats *v.* Lynch, 152 Mo. 161.

*New York.*—Webber *v.* Hoag, 55 Hun (N. Y.) 605, 8 N. Y. Supp. 76.

*Texas.*—Owens *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1898) 45 S. W. Rep. 399; Barry *v.* State, 37 Tex. Crim. 302; Garcia *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 916; McCoy *v.* State, 27 Tex. App. 416; Collins *v.* State, (Tex. Crim. 1902) 66 S. W. Rep. 840; Vann *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 813.

*Vermont.*—Hobart *v.* Young, 63 Vt. 363.

**The Voluntary Appearance of a Witness** without a subpoena is not of itself sufficient to discredit him. State *v.* Keys, 53 Kan. 674. But the fact that he attends voluntarily may, under some circumstances, betray his feeling in the case, and it is in the discretion of the court to permit him to be cross-examined as to that matter. Wabash R. Co. *v.* Ferris, 6 Ind. App. 30.

tion of husband and wife, the mere relationship of a witness to the party who called him is no ground of disqualification at common law. Nevertheless the testimony of near relatives in behalf of a party is to be weighed with great caution, as they are usually prompted by feelings of natural affection, and may reasonably be regarded as strongly biased in favor of a kinsman, whose liberty, character, or property are in jeopardy.<sup>1</sup> But as the relatives of a party are not, on that account, incompetent as witnesses in his behalf, the court has no right to withdraw their testimony from the consideration of the jury. It is certainly not the law that because the witness is a kinsman of a party to an action such witness may not testify the truth, the whole truth, and nothing but the truth touching the matter in controversy, and if such is the character of the testimony given, it cannot be said, as matter of law, that such testimony is not entitled to as much weight as the testimony of any other witness.<sup>2</sup> It is also true that kinsmen who are not interested in a case and who will not be benefited by its result are not to be discredited merely because of such kinship.<sup>3</sup>

**Mere National Kinship** is not a sufficient reason for discrediting a witness. No discredit can legally attach to the testimony of a person because he gives his evidence in behalf of a party belonging to his own nationality.<sup>4</sup>

(3) *Contractual Relationship with Party.* — As a General Rule any contractual relationship tends to create bias between the parties in favor of each other, and it is proper to show such bias between a witness and a party for whom he testifies.<sup>5</sup>

**Where Testimony Is in Its Nature Incredible,** and is given under circumstances calculated to create a strong bias, it is not necessarily to be believed, although the witness is otherwise unimpeached. The *Helen R. Cooper*, 7 Blatchf. (U. S.) 384; *U. S. v. Borger*, 7 Fed. Rep. 198.

**1. Kinship Between Witness and Party** — *United States.* — *U. S. v. Ford*, 33 Fed. Rep. 861.

*Alabama.* — *Jernigan v. Flowers*, 94 Ala. 508.

*Arkansas.* — *Wallace v. State*, 28 Ark. 531.

*California.* — *People v. Bush*, 71 Cal. 602; *People v. Worthington*, 122 Cal. 583.

*Delaware.* — See also *State v. Miller*, 9 Houst. (Del.) 564.

*Georgia.* — *Simpson v. State*, 78 Ga. 91.

*Illinois.* — *Brown v. Walker*, 32 Ill. App. 199.

*Missouri.* — *State v. Parker*, 39 Mo. App. 116; *State v. Lingle*, 128 Mo. 528.

*New York.* — See also *Coyle v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 5 Misc. (N. Y.) 586.

*North Carolina.* — *State v. Ellington*, 7 Ired. L. (29 N. Car.) 66; *State v. Nash*, 8 Ired. L. (30 N. Car.) 35; *State v. Byers*, 100 N. Car. 512. See also *Martin v. Buffalo*, 121 N. Car. 34.

*South Carolina.* — *State v. Petsch*, 43 S. Car. 132.

*Texas.* — *Mercer v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 555.

*West Virginia.* — *State v. Prater*, 52 W. Va. 132.

*Canada.* — *Lefeunteum v. Beaudoin*, 28 Can. Sup. Ct. 89.

**Marriage Must Be Proved by Direct Evidence** and not by mere hearsay or admission of those not parties to the action. *Barton v. Bruley*, 119 Wis. 326.

**In Iowa**, where the wife of the accused tes-

tifies in a criminal case in his behalf, her credibility is to be tested by the same rules which apply to other witnesses, and it is error to instruct the jury that her testimony should be examined with peculiar care. *State v. Guyer*, 6 Iowa 263; *State v. Rankin*, 8 Iowa 355; *State v. Collins*, 20 Iowa 85; *State v. Bernard*, 45 Iowa 234. Compare *State v. Nash*, 10 Iowa 81.

**2. Testimony of Kinsmen Not to Be Withdrawn from Jury.** — *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Nelson v. Vorce*, 55 Ind. 455; *In re Gangwere*, 14 Pa. St. 417, 53 Am. Dec. 554.

**3. Kinsmen Not Interested in Case.** — *Richardson v. Smart*, 152 Mo. 623.

**4. National Kinship.** — *U. S. v. Lee Huen*, 118 Fed. Rep. 442.

**5. Contractual Relationship — In General.** — *Alabama.* — *Louisville, etc., R. Co. v. Tegner*, 125 Ala. 593; *Hereford v. Combs*, 126 Ala. 369; *Costello v. State*, 130 Ala. 143.

*Illinois.* — *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250; *Chicago City R. Co. v. Carroll*, 206 Ill. 318.

*Indiana.* — *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634, 55 N. E. Rep. 861.

*Iowa.* — *State v. Calkins*, 73 Iowa 128; *Aultman v. Nilson*, 112 Iowa 634.

*Michigan.* — *Jones v. Portland*, 88 Mich. 598; *Totten v. Burhans*, 103 Mich. 6.

*New York.* — *Plyer v. German American Ins. Co.*, 121 N. Y. 680, 24 N. E. Rep. 929.

*North Carolina.* — *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

*Pennsylvania.* — *Beck v. Hood*, 185 Pa. St. 32; *Glenn v. Philadelphia, etc., Traction Co.*, 206 Pa. St. 135.

*Texas.* — *Missouri, etc., R. Co. v. Smith*, 31 Tex. Civ. App. 332.

Employees of a party, although they may not be affected by the verdict pecuniarily, are, by the great weight of authority, to be deemed interested witnesses. This is especially true in actions against a master for the negligence of his servants, for while the latter are competent witnesses for the former, their incentive to exonerate themselves from blame goes to their credit and should be carefully considered in weighing their testimony.<sup>1</sup> But where there is no evidence that an employee who is a witness for his master entertains any fear of being discharged or is influenced by such fear, the court should not instruct the jury that they are to consider whether such witness has testified under the influence of fear of being discharged by his employer.<sup>2</sup> The situation is altered, however, if the employee has stated that the employing company will blacklist him if he testifies according to the facts. In such a case the employee may properly be asked on cross-examination if he made the statement.<sup>3</sup>

c. AGAINST OPPOSITE PARTY. — It is always competent to show that a witness is hostile to the party against whom he is called, as that he has threatened revenge, or that a quarrel exists between him and such party, and a jury should scrutinize the evidence of a hostile witness more closely and doubtingly than that of an indifferent witness.<sup>4</sup>

1. *United States*. — *Hostetter Co. v. Bower*, 74 Fed. Rep. 235; *Tennessee Coal, etc., R. Co. v. Haley*, (C. C. A.) 85 Fed. Rep. 534.

*Alabama*. — *Prince v. State*, 100 Ala. 144; *Glover v. Gentry*, 112 Ala. 500; *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193; *Louisville, etc., R. Co. v. York*, 128 Ala. 305.

*Colorado*. — *United Oil Co. v. Miller*, (Colo. App. 1903) 73 Pac. Rep. 627.

*Georgia*. — *Central R., etc., Co. v. Maltsby*, 90 Ga. 630.

*Illinois*. — *Cicero, etc., St. R. Co. v. Rollins*, 95 Ill. App. 497, *affirmed* 195 Ill. 219; *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300; *Kerfoot v. Chicago*, 195 Ill. 229. See also *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 483.

*Indiana*. — *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634, 55 N. E. Rep. 861.

*Kentucky*. — *Louisville, etc., R. Co. v. Munford*, (Ky. 1902) 68 S. W. Rep. 635.

*Michigan*. — *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431. But see *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 53, 40 Am. Rep. 453.

*Mississippi*. — *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604.

*Missouri*. — *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413.

*New Jersey*. — *Haver v. Central R. Co.*, 64 N. J. L. 312.

*New York*. — *Anderson v. Standard Gas Light Co.*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 625; *A. B. Cleveland Co. v. A. C. Nellis Co.*, (C. Pl. Gen. T.) 18 N. Y. Supp. 448; *Pyne v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 19 N. Y. Supp. 217; *O'Flaherty v. Nassau Electric R. Co.*, 165 N. Y. 624.

*Ohio*. — *Toledo R., etc., Co. v. Ward*, 25 Ohio Cir. Ct. 399.

*Pennsylvania*. — *Ellis v. Lake Shore, etc., R. Co.*, 138 Pa. St. 506, 21 Am. St. Rep. 914.

*Texas*. — *International, etc., R. Co. v. Johnson*, 23 Tex. Civ. App. 160; *Texas, etc., R. Co. v. Scott*, 30 Tex. Civ. App. 496; *Missouri, etc., R. Co. v. Smith*, 31 Tex. Civ. App. 332; *Dina v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 229.

2. *Fear of Discharge*. — *St. Louis, etc., R. Co. v. Walker*, 39 Ill. App. 388. See also the title INSTRUCTIONS, 11 ENCYC. OF PL. AND PR. 159.

3. *Fear of Blacklisting Declared by Witness*. — *Pyne v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 19 N. Y. Supp. 217, *affirmed* 138 N. Y. 627.

4. *Hostility* — *United States*. — *Fla-Koo-Yel-Lee v. U. S.*, 167 U. S. 274.

*Alabama*. — *Martin v. Martin*, 25 Ala. 201; *McHugh v. State*, 31 Ala. 317; *Vann v. State*, (Ala. 1904) 37 So. Rep. 158; *Couch v. Couch*, (Ala. 1904) 37 So. Rep. 405; *Polk v. State*, 62 Ala. 237; *Yarbrough v. State*, 71 Ala. 376; *Haralson v. State*, 82 Ala. 47; *Salm v. State*, 89 Ala. 56; *Bessemer Land, etc., Co. v. Jenkins*, 111 Ala. 135; *Lodge v. State*, 122 Ala. 97; *Paradise v. State*, 131 Ala. 26; *Sanders v. State*, 134 Ala. 74; *Bennefield v. State*, 134 Ala. 157; *Shepherd v. State*, 135 Ala. 9; *Rarden v. Cunningham*, 136 Ala. 263; *Beal v. State*, 138 Ala. 94; *Loveman v. Brown*, 138 Ala. 608.

*Arkansas*. — *Butler v. State*, 34 Ark. 480.

*California*. — *People v. Kilvington*, (Cal. 1894) 36 Pac. Rep. 13; *People v. Goldenson*, 76 Cal. 328; *People v. Gillis*, 97 Cal. 542; *People v. Gardner*, 98 Cal. 127; *People v. Anderson*, 105 Cal. 32; *People v. Worthington*, 105 Cal. 166; *Lange v. Schoettler*, 115 Cal. 388; *People v. Worthington*, 122 Cal. 583.

*Colorado*. — *Stewart v. Kindel*, 15 Colo. 539.

*Connecticut*. — *Daggett v. Tallman*, 8 Conn. 168.

*Florida*. — *Eldridge v. State*, 27 Fla. 162.

*Georgia*. — *Bishop v. State*, 9 Ga. 121; *Shaw v. State*, 102 Ga. 660; *Purdee v. State*, 118 Ga. 798.

*Illinois*. — *John Morris Co. v. Burgess*, 44 Ill. App. 27.

*Indiana*. — *Robertson v. McPherson*, 4 Ind. App. 595; *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; *Lauter v. Duckworth*, 19 Ind. App. 535; *Stone v. State*, 97 Ind. 345; *Staser v. Hogan*, 120 Ind. 207; *Pettit v. State*, 135 Ind. 393.



In a Criminal Prosecution it is competent to show the hostility of a witness for the defendant towards the prosecuting witness.<sup>1</sup> And in a trial for homicide the bias of the defendant's witness against the deceased may be brought out.<sup>2</sup> But the fact that a witness for the prosecution was a customer of a deceased person does not, of itself, indicate hostility or prejudice against a defendant on trial for the murder of such person.<sup>3</sup>

**Hostility Proved by Any Competent Evidence.** — Hostility may be shown by cross-examination of the witness, or by witnesses who can swear to facts showing it,<sup>4</sup> and while the rule is that the answer of a witness to a collateral question, drawn out on cross-examination, is ordinarily conclusive, it is subject to the exception that when the impeaching or collateral question is as to declarations, acts, or feelings of the witness and is asked to show the temper, bias, or disposition of the witness, and he is given the time and place of the alleged declaration, the opposite party is not bound by the answer, but may contradict him by other evidence.<sup>5</sup> However, the matter is so far collateral that a

*Kansas.* — *State v. Hamilton*, 65 Kan. 183.

*Kentucky.* — *Strange v. Com.*, (Ky. 1901) 64 S. W. Rep. 980; *Louisville, etc., R. Co. v. Berry*, 96 Ky. 604; *Howard v. Com.*, 110 Ky. 330.

*Louisiana.* — *State v. McFarlain*, 41 La. Ann. 686.

*Massachusetts.* — *Com. v. Putnam*, 2 Allen (Mass.) 301; *Com. v. Downing*, 4 Gray (Mass.) 29; *Brewer v. Crosby*, 11 Gray (Mass.) 29; *Com. v. Byron*, 14 Gray (Mass.) 31; *Day v. Stickney*, 14 Allen (Mass.) 255; *Swett v. Shumway*, 102 Mass. 369.

*Michigan.* — *Denton v. Smith*, 61 Mich. 431; *Hitchcock v. Moore*, 70 Mich. 112; *Burt v. Long*, 106 Mich. 210; *People v. Turney*, 124 Mich. 542.

*Mississippi.* — *Gibson v. State*, (Miss. 1894) 16 So. Rep. 298; *Mackmasters v. State*, 81 Miss. 371.

*Missouri.* — *State v. Montgomery*, 28 Mo. 594; *State v. Jones*, 106 Mo. 302; *State v. Pruett*, 144 Mo. 92.

*Montana.* — *In re Wellcome*, 23 Mont. 450.

*Nebraska.* — *Consaul v. Sheldon*, 35 Neb. 247.

*New York.* — *Starks v. People*, 5 Den. (N. Y.) 106; *Nation v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 258; *Haas v. Brown*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 434; *Starr v. Cragin*, 24 Hun (N. Y.) 177; *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82, affirmed 164 N. Y. 602; *Morgan v. Wood*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 739; *Wallach v. Kalcheim*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 171; *People v. Keating*, 61 Hun (N. Y.) 260; *People v. Milks*, 70 N. Y. App. Div. 438; *Collins v. McGuire*, 76 N. Y. App. Div. 443; *People v. Brooks*, 131 N. Y. 321; *Garnsey v. Rhodes*, 138 N. Y. 461; *People v. Webster*, 139 N. Y. 73, affirming 68 Hun (N. Y.) 11; *Gumby v. Metropolitan St. R. Co.*, 171 N. Y. 65.

*North Carolina.* — *State v. Mace*, 118 N. Car. 241.

*Oregon.* — *State v. Ellsworth*, 30 Oregon 145.

*Pennsylvania.* — *Com. v. Bell*, 4 Pa. Super. Ct. 187; *Philadelphia v. Reeder*, 173 Pa. St. 281.

*South Carolina.* — *State v. Merriman*, 34 S. Car. 16.

*Texas.* — *Ingersol v. McWillie*, 9 Tex. Civ. App. 543; *Sager v. State*, 11 Tex. App. 110;

*Daffin v. State*, 11 Tex. App. 76; *Lyle v. State*, 21 Tex. App. 153; *Bonnard v. State*, 25 Tex. App. 173; *Bennett v. State*, 28 Tex. App. 539; *Missouri, etc., R. Co. v. McGlamory*, (Tex. Civ. App. 1896) 34 S. W. Rep. 359; *Lyon v. State*, 42 Tex. Crim. 506; *Reddick v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 993; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1898) 49 S. W. Rep. 265, affirmed 92 Tex. 380; *Jackson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 497; *Sapp v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 456.

*Utah.* — *People v. Thiede*, 11 Utah 241.

*Vermont.* — *Pierce v. Gilson*, 9 Vt. 216. See also *Bertoli v. Smith*, 69 Vt. 425.

*Virginia.* — *Wadley v. Com.*, 98 Va. 803.

*Washington.* — *Stossel v. Van De Vanter*, 16 Wash. 9. See also *State v. McCann*, 16 Wash. 249.

**1. Hostility Towards Prosecuting Witness.** — *Patman v. State*, 61 Ga. 379.

**2. Hostility Towards Deceased.** — *Bishop v. State*, 9 Ga. 124; *Necomb v. State*, 37 Miss. 383; *Com. v. Weber*, 167 Pa. St. 153.

**3. Hostility of Customer of Deceased.** — *Williams v. State*, (Ala. 1904) 37 So. Rep. 228.

**4. Hostility Proved by Any Competent Evidence.** — *Whitney v. State*, 154 Ind. 573; *People v. Brooks*, 131 N. Y. 321, reversing on this point 61 Hun (N. Y.) 619, 15 N. Y. Supp. 362; *People v. Webster*, 139 N. Y. 73, affirming 68 Hun (N. Y.) 11.

**5. Opposite Party Not Bound by Cross-examination** — *England.* — *Reg. v. Shaw*, 16 Cox C. C. 503.

*Alabama.* — *McHugh v. State*, 31 Ala. 317.

*California.* — *People v. Kilvington*, (Cal. 1894) 36 Pac. Rep. 13.

*Connecticut.* — *Atwood v. Welton*, 7 Conn. 66; *Beardsley v. Wildman*, 41 Conn. 515.

*Florida.* — *Selph v. State*, 22 Fla. 537; *Eldridge v. State*, 27 Fla. 162.

*Georgia.* — *Daniel v. State*, 103 Ga. 202.

*Illinois.* — *John Morris Co. v. Burgess*, 44 Ill. App. 27; *Phenix v. Castner*, 108 Ill. 207.

*Indiana.* — *Robertson v. McPherson*, 4 Ind. App. 595; *Scott v. State*, 64 Ind. 400; *Johnson v. Wiley*, 74 Ind. 233; *Stone v. State*, 97 Ind. 345; *Ford v. State*, 112 Ind. 373; *Skinner v. State*, 120 Ind. 127; *Staser v. Hogan*, 120 Ind. 220; *Whitney v. State*, 154 Ind. 573.

*Iowa.* — *Lucas v. Flinn*, 35 Iowa 14.

witness will not be permitted to state the cause of his hostility. The question for the jury to determine is not what it is that constitutes the basis or foundation of the feeling or prejudice that may be entertained by the witness towards the accused, but, on the contrary, it is as to the existence of such prejudice, to be derived, as a matter of legal inference, from particular acts or expressions.<sup>1</sup>

**The Extent to Which an Examination May Go** for the purpose of proving the hostility of a witness must be, to some extent at least, within the discretion of the trial judge,<sup>2</sup> although sufficient latitude should be allowed in the examination to develop the nature and intensity of his animosity.<sup>3</sup>

**Nature of Facts Sought to Be Proved.** — The questions propounded to a witness on cross-examination, calling for independent facts intended to show hostility on the part of such witness towards the opposite party, must call for facts which of themselves imply a bad or revengeful feeling. Mere conclusions of one witness as to the animus of another witness are insufficient.<sup>4</sup>

*Massachusetts.* — *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *McGuire v. McDonald*, 99 Mass. 49.

*Missouri.* — *State v. Jones*, 106 Mo. 311.

*New Hampshire.* — *Titus v. Ash*, 24 N. H. 319; *Folsom v. Brawn*, 25 N. H. 114; *Martin v. Farnham*, 25 N. H. 195; *Drew v. Wood*, 26 N. H. 363.

*New York.* — *Newton v. Harris*, 6 N. Y. 345; *Nation v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 258; *Effray v. Masson*, (C. Pl. Gen. T.) 28 Abb. N. Cas. (N. Y.) 207; *Gumby v. Metropolitan St. R. Co.*, 65 N. Y. App. Div. 38; *Gale v. New York Cent., etc., R. Co.*, 76 N. Y. 594; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 249.

*North Carolina.* — *Cathey v. Shoemaker*, 119 N. Car. 424.

*Texas.* — *McFarlin v. State*, 41 Tex. 23; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397.

*Vermont.* — *Hutchinson v. Wheeler*, 35 Vt. 330.

*Virginia.* — *Langhorne v. Com.*, 76 Va. 1012.

**If the Witness Answers Evasively or Refuses** to answer because he does not wish to criminate himself, the hostility may be established by other witnesses. *State v. McFarlain*, 41 La. Ann. 686.

**1. Cause of Hostility Not Admissible** — *Alabama.* — *Polk v. State*, 62 Ala. 237; *Munden v. Bailey*, 70 Ala. 63.

*Arkansas.* — *Cornelius v. State*, 12 Ark. 782; *Butler v. State*, 34 Ark. 480.

*California.* — *People v. Goldenson*, 76 Cal. 328.

*Florida.* — *Eldridge v. State*, 27 Fla. 162.

*Georgia.* — *Bishop v. State*, 9 Ga. 121; *Conyers v. Field*, 61 Ga. 258; *Patman v. State*, 61 Ga. 379.

*Kansas.* — *Atchison, etc., R. Co. v. Briggs*, 2 Kan. App. 154.

*Kentucky.* — *Strange v. Com.*, (Ky. 1901) 64 S. W. Rep. 980.

*Maryland.* — *Chelton v. State*, 45 Md. 564.

*Michigan.* — *Helwig v. Lascowski*, 82 Mich. 619.

*Vermont.* — *State v. Glynn*, 51 Vt. 577; *Bertoli v. Smith*, 69 Vt. 425.

**2. Extent of Examination — Discretion of Court.** — *State v. May*, 172 Mo. 630; *Davis v. State*, 51 Neb. 301; *People v. Brooks*, 131 N. Y. 321, reversing on this point 61 Hun (N. Y.) 619, 15

N. Y. Supp. 362; *Bertoli v. Smith*, 69 Vt. 425. See also *Creelman v. Tupper*, 25 Nova Scotia 338.

**3. Witness Having Admitted His Animus**, the court may refuse to allow the opposite party to pursue the inquiry by impeaching the witness about some declaration which he may have made that would merely show the animus. *Jennings v. State*, 42 Tex. Crim. 78.

**3. Nature and Intensity of Animosity.** — *People v. Bird*, 124 Cal. 32; *Stewart v. Kindel*, 15 Colo. 541; *Blanchard v. Blanchard*, 191 Ill. 450; *State v. Collins*, 33 Kan. 77; *State v. Dee*, 14 Minn. 35; *State v. Broadbent*, 27 Mont. 342; *Batdorff v. Farmer's Nat. Bank*, 61 Pa. St. 179; *McFarlin v. State*, 41 Tex. 23.

**4. Nature of Facts Sought to Be Proved** — *Alabama.* — *Vann v. State*, (Ala. 1904) 37 So. Rep. 158; *Gregory v. State*, (Ala. 1904) 37 So. Rep. 259; *Moore v. State*, 68 Ala. 360; *Morgan v. State*, 88 Ala. 223; *Carpenter v. State*, 98 Ala. 31; *O'Neal v. Curry*, 134 Ala. 216.

*California.* — *People v. Fong Ah Sing*, 70 Cal. 8; *People v. Breen*, 130 Cal. 72.

*Delaware.* — *Chielinsky v. Hoopes, etc., Co.*, 1 Marv. (Del.) 273.

*Florida.* — *Jacksonville, etc., R. Co. v. Lockwood*, 33 Fla. 573.

*Idaho.* — *State v. Corcoran*, 7 Idaho 220.

*Indiana.* — *Whitney v. State*, 154 Ind. 573.

*Iowa.* — *Noble v. White*, 103 Iowa 352.

*Kentucky.* — *South Covington, etc., St. R. Co. v. Constans*, (Ky. 1903) 74 S. W. Rep. 705.

*Maryland.* — *Rippelmeyer v. P. Hanson Hiss Mfg. Co.*, 90 Md. 386.

*Massachusetts.* — *Cooley v. Norton*, 4 Cush. (Mass.) 93.

*Minnesota.* — *Holston v. Boyle*, 46 Minn. 432; *Wischstadt v. Wischstadt*, 47 Minn. 358.

*Missouri.* — *State v. Punshon*, 133 Mo. 44.

*Montana.* — *Bonnie v. Earll*, 12 Mont. 239; *State v. Jackson*, 9 Mont. 508.

*New York.* — *Gale v. New York Cent., etc., R. Co.*, 76 N. Y. 594; *McCallan v. Brooklyn City R. Co.*, 48 Hun (N. Y.) 340; *Franklin v. Third Ave. R. Co.*, 52 N. Y. App. Div. 512.

*Pennsylvania.* — *Com. v. Craig*, 19 Pa. Super. Ct. 81.

*Texas.* — *Missouri, etc., R. Co. v. St. Clair*, 21 Tex. Civ. App. 345; *Surrell v. State*, 29 Tex. App. 321; *Forrester v. State*, 38 Tex. Crim. 245; *Red v. State*, 39 Tex. Crim. 414; *Spangler*

**The Hostility Must Exist at the Trial.** — The witness may have been angry at the opposite party years before the trial and the anger may have entirely disappeared. Accordingly, unless it is made to appear that the animus exists when the evidence is given, or has arisen so recently that it can be assumed to continue, it is incompetent.<sup>1</sup>

**d. INTEREST IN EVENT OF SUIT** — (1) *Parties to Civil Actions.* — While the testimony of a party in interest, as that of any other witness, must be submitted to the jury,<sup>2</sup> the interest which such party may have in the result of the trial may be shown by cross-examination, and is a matter to be considered by the jury in weighing the testimony and determining what force it shall have.<sup>3</sup> The jury are not bound to give credit to the statements of a party, though he is uncontradicted and unimpeached,<sup>4</sup> and while it cannot be affirmed as a matter of law that the jury are bound to give more weight to the testimony of one witness than they accord to that of another, on the ground of interest in the one and a lack of it in the other,<sup>5</sup> it is error for the court to refuse to instruct the jury that they have a right to consider the interest of a party when weighing his testimony.<sup>6</sup>

*v. State*, 42 Tex. Crim. 233; *Jackson v. State*, 44 Tex. Crim. 259.

*Vermont.* — See also *Bertoli v. Smith*, 69 Vt. 425.

*Washington.* — *State v. McCann*, 16 Wash. 249.

**Hostility of a Witness's Children** cannot be shown for the purpose of proving the animus of the witness. *State v. Welch*, 33 Oregon 33; *State v. Ogden*, 39 Oregon 195.

**1. When Hostility Must Exist.** — *Consaul v. Sheldon*, 35 Neb. 247; *Higham v. Gault*, 15 Hun (N. Y.) 383; *State v. McCann*, 43 Oregon 155; *Houston, etc., R. Co. v. Patterson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 675. See also *Fredericks v. Sault*, 19 Ind. App. 604. Compare *State v. Dee*, 14 Minn. 35.

**2. Interest in Event of Suit — Parties Litigant.** — *Honegger v. Wettstein*, 94 N. Y. 261; *Prowattain v. Tindall*, 80 Pa. St. 295.

**3. Interest to Be Considered by Jury — England.** — *Henman v. Lester*, 9 Jur. N. S. 601.

*United States.* — *Curtice v. Crawford County Bank*, 110 Fed. Rep. 830.

*Alabama.* — *Houston Biscuit Co. v. Dial*, 135 Ala. 168.

*Colorado.* — *Stewart v. Kindel*, 15 Colo. 539.

*Connecticut.* — *Dore v. Babcock*, 72 Conn. 408.

*District of Columbia.* — *Metropolitan R. Co. v. Jones*, 1 App. Cas. (D. C.) 200.

*Michigan.* — *Schloss v. Estey*, 114 Mich. 429.

*Minnesota.* — *Klason v. Rieger*, 22 Minn. 59.

*Missouri.* — *Lovell v. Davis*, 52 Mo. App. 342.

*Nebraska.* — *Barmby v. Wolfe*, 44 Neb. 77.

*New York.* — *Ract v. Duviard-Dime*, 51 Hun (N. Y.) 639, 4 N. Y. Supp. 156; *Nicholson v. Conner*, 8 Daly (N. Y.) 212; *Strawbridge v. Vandenburg*, 57 Hun (N. Y.) 589, 10 N. Y. Supp. 610; *Uransky v. Dry Dock, etc., R. Co.*, 57 Hun (N. Y.) 626, 13 N. Y. Supp. 670; *Heimerdinger v. Lehigh Valley R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 374; *Olsen v. Frisign*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 682; *Meeteer v. Manhattan R. Co.*, 63 Hun (N. Y.) 535; *Goldsmith v. Coverly*, 75 Hun (N. Y.) 48; *Vanmater v. Burns*, 76 Hun (N. Y.) 3; *O'Neill v. Third Ave. R. Co.*, 78 Hun (N. Y.) 183; *Cady v. Bradshaw*, 116 N. Y. 188.

*North Carolina.* — Compare *Carr v. Smith*, 129 N. Car. 232.

*Pennsylvania.* — *Cornelius v. Hambay*, 150 Pa. St. 359.

*Texas.* — *Pridgen v. Walker*, 40 Tex. 135.

*Vermont.* — *McKindley v. Drew*, 69 Vt. 210.

*Washington.* — *Shoemaker v. Bryant, etc., Mill Co.*, 27 Wash. 637.

**A Referee May Reject Part of the Testimony** given by a party to a suit and retain other portions. *Chester v. Jumel*, 53 Hun (N. Y.) 629, 5 N. Y. Supp. 822.

**4. Jury Not Bound to Credit Party** — *New York.* — *Nicholson v. Conner*, 8 Daly (N. Y.) 215; *Wolf v. Farley*, (C. Pl. Gen. T.) 16 N. Y. Supp. 168; *Reid v. New York*, (Supm. Ct.) 68 Hun (N. Y.) 110, affirmed 139 N. Y. 534, 34 N. E. Rep. 1102; *Dean v. Van Nostrand*, 23 N. Y. Wkly. Dig. 97; *Wilson v. Wyandance Springs Imp. Co.*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 605; *Olsen v. Ensign*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 682; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Ract v. Duviard-Dime*, 51 Hun (N. Y.) 639, 4 N. Y. Supp. 156; *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609; *Goldsmith v. Coverly*, 75 Hun (N. Y.) 50; *Van Mater v. Burns*, 76 Hun (N. Y.) 3; *Kearney v. New York*, 92 N. Y. 621.

*Pennsylvania.* — *Prowattain v. Tindall*, 80 Pa. St. 295.

*Washington.* — *Reeder v. Trader's Nat. Bank*, 28 Wash. 139.

Compare the title DIRECTING VERDICT, vol. 6 ENCYC. OF PL. AND PR., p. 694 *et seq.*

**5. Jury Not Bound to Discredit Party.** — *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68; *Metropolitan R. Co. v. Jones*, 1 App. Cas. (D. C.) 208; *Reid v. New York*, 68 Hun (N. Y.) 110, affirmed 139 N. Y. 534, 34 N. E. Rep. 1102. See also *Greer v. State*, 53 Ind. 420; *Sullivan v. Collins*, 18 Iowa 228; *Bonnell v. Smith*, 53 Iowa 281.

**6. Refusal to Instruct Regarding Interest of Party.** — *Meeteer v. Manhattan R. Co.*, 63 Hun (N. Y.) 533; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540; *Hill v. Sprinkle*, 76 N. Car. 353.



(2) *Other Persons.*—The fact that a witness is directly interested in the event of the suit in which he is called to testify, is a circumstance which the opposite party has the right to bring out on cross-examination, and he may ask the witness anything that will show his interest and anything he has done in aid of the party for whom he testifies, for the purpose of enabling the jury properly to weigh his evidence, and to pass intelligently upon his credibility.<sup>1</sup> Thus, where an attorney testifies as a witness for his client, he should be allowed to testify as to what financial interest he has in the suit,<sup>2</sup> and if it appears that the fee of such attorney is contingent upon his success in the cause he cannot be considered a disinterested witness.<sup>3</sup> And the same is true of a witness whose testimony tends to shield him from a criminal prosecution, or is given under a promise of leniency.<sup>4</sup>

**A Vested Interest in the Event of the Suit** is essential to affect the credibility of the witness. It must be an interest that the judgment or verdict of the case would operate upon. If by the result of the suit he would neither acquire nor lose a right, nor incur a responsibility which the law recognizes, he is not legally interested.<sup>5</sup>

**1. Other Parties—England.**—Needham v. Smith, 2 Vern. 463.

*United States.*—Sidenberg v. Robertson, 41 Fed. Rep. 763. See also Taylor v. U. S., (C. C. A.) 89 Fed. Rep. 954.

*Alabama.*—Wilkerson v. State, (Ala. 1904) 37 So. Rep. 265; Drum v. Harrison, 83 Ala. 384; Jernigan v. Flowers, 94 Ala. 508; Alabama G. S. R. Co. v. Burgess, 114 Ala. 587; Preferred Acc. Ins. Co. v. Gray, 123 Ala. 482; Stahmer v. State, 125 Ala. 72; McCormack v. State, 133 Ala. 202.

*Arkansas.*—Hollingsworth v. State, 53 Ark. 387.

*California.*—Gould v. Stafford, 91 Cal. 146. *Connecticut.*—Nesbit v. Crosby, 74 Conn. 554.

*Florida.*—Eldridge v. State, 27 Fla. 162.

*Illinois.*—Brown v. Walker, 32 Ill. App. 199; Marshall v. Laughran, 47 Ill. App. 29; Kennedy v. Murphy, 112 Ill. App. 607.

*Indiana.*—Litten v. Wright School Tp., 127 Ind. 81; Dailey v. State, 28 Ind. 285.

*Iowa.*—State v. Calkins, 73 Iowa 128; Shannon v. Tama City, 74 Iowa 22.

*Kentucky.*—Mullins v. Com., (Ky. 1902) 67 S. W. Rep. 824.

*Louisiana.*—Mathilde v. Levy, 24 La. Ann. 421.

*Massachusetts.*—See also Israel v. Baker, 170 Mass. 12.

*Michigan.*—Hitchcock v. Davis, 87 Mich. 629; Styles v. Decatur, 131 Mich. 443.

*Mississippi.*—Archer v. Helm, 70 Miss. 874.

*Missouri.*—Lovell v. Davis, 52 Mo. App. 342; Waddingham v. Hulett, 92 Mo. 528; State v. Lingle, 128 Mo. 528.

*Nebraska.*—Lane v. Harlan County, 51 Neb. 64.

*New Jersey.*—Snyder v. Harris, 61 N. J. Eq. 480.

*New York.*—Coyle v. Metropolitan L. Ins. Co., (C. Pl. Gen. T.) 5 Misc. (N. Y.) 586; Goodman v. Myers, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 360; A. B. Cleveland Co. v. A. C. Nellis Co., (C. Pl. Gen. T.) 18 N. Y. Supp. 448; Sis-sinch v. Bernhardt, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 652; Renoux v. Geney, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 702; People v.

Fletcher, 44 N. Y. App. Div. 199, 14 N. Y. Crim. 328; Cady v. Bradshaw, 116 N. Y. 188; People v. Parker, 137 N. Y. 535.

*Oregon.*—State v. Olds, 18 Oregon 440.

*Pennsylvania.*—Ruddy v. Repp, 19 Pa. Super. Ct. 437; Ellis v. Lake Shore, etc., R. Co., 138 Pa. St. 506; Braden v. McCleary, 183 Pa. St. 192.

*South Dakota.*—Hanson v. Red Rock Tp., 7 S. Dak. 38; Hedlun v. Holy Terror Min. Co., 16 S. Dak. 261.

*Texas.*—Chicago, etc., R. Co. v. Longbottom, (Tex. Civ. App. 1904) 80 S. W. Rep. 542; Trinity County Lumber Co. v. Denham, 88 Tex. 203.

*Utah.*—State v. Haworth, 24 Utah 398.

*Vermont.*—State v. Burpee, 65 Vt. 1.

*Wisconsin.*—State v. Williams, (Wis. 1904) 100 N. W. Rep. 1048.

**Whether a Witness Is Influenced by a Matter** brought out in cross-examination which indicates his interest in the event of the suit may be brought out by the party for whom such witness is called. State v. Anslinger, 171 Mo. 600.

**2. Attorney Testifying for Client.**—Koenig v. Union Depot R. Co., 173 Mo. 698; New Omaha Thomson-Houston Electric Light Co. v. Johnson, (Neb. 1903) 93 N. W. Rep. 778; Cohn v. Kahn, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 255.

**3.** Stewart v. Kindel, 15 Colo. 539; Harrington v. Hamburg, 85 Iowa 272.

**4. Witness Shielded from Prosecutions by Testimony.**—Thong's Case, J. Kel. 18; Robinson v. New York Cent., etc., R. Co., 20 Blatchf. (U. S.) 340; Vaughan v. State, 57 Ark. 1; People v. Langtree, 64 Cal. 256; People v. Hare, 57 Mich. 505; Coyle v. Metropolitan L. Ins. Co., (C. Pl. Gen. T.) 5 Misc. (N. Y.) 586; Wohlfahrt v. Beckert, 92 N. Y. 490, 44 Am. Rep. 406; Elwood v. Western Union Tel. Co., 45 N. Y. 540, 6 Am. Rep. 140; People v. Christy, 65 Hun (N. Y.) 349; State v. Kent, 4 N. Dak. 577; Allen v. State, 10 Ohio St. 287; State v. Burpee, 65 Vt. 1; Black v. State, 59 Wis. 471.

**5. Vested Interest in Event of Suit.**—Wolf v. Carothers, 3 S. & R. (Pa.) 240; Bevan v. Atlanta Nat. Bank, 142 Ill. 302; Rix v. Hunt, 16 N. Y. App. Div. 540; Levey v. Dennett, (N.

**6. Powers of Mind and Memory.** — Incapacity or immaturity of mind in a witness at the time of the occurrences of which he testifies or at the trial, due to drunkenness,<sup>1</sup> the use of narcotics,<sup>2</sup> insanity or mental hallucinations,<sup>3</sup> infancy,<sup>4</sup> or other cause, are proper matters for consideration in passing on his credibility, though he has been adjudged competent by the court.<sup>5</sup> The fact of incapacity of mind is not a collateral matter merely, and therefore open to inquiry only on the cross-examination of the witness himself, but is a fact that may be shown by other evidence.<sup>6</sup> The intelligence and memory of a witness are also important considerations in weighing his testimony; and collateral matters tending to test him in these particulars may be inquired into on cross-examination.<sup>7</sup> It is not permissible, however, to show by other evidence that a witness not affected by mental derangement is of a low order of intelligence or powers of mind.<sup>8</sup>

**7. Religious Belief.** — Laws providing that no person shall be incompetent to testify on account of religious belief, that no control of or interference with rights of conscience shall be permitted, or the like, have been held not only to make persons competent to testify without regard to religious belief or unbelief, but also to prevent any inquiry into that belief for the purpose of affecting credibility.<sup>9</sup>

Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 307, *appeal dismissed* (Supm. Ct. App. T.) 25 Misc. (N. Y.) 768; *Lustig v. New York, etc., R. Co.*, 65 Hun (N. Y.) 547; *Merchants, etc., Bank v. Pizor*, 24 Pa. Co. Ct. 273.

**1. Drunkenness.** — *State v. Castello*, 62 Iowa 404; *State v. Walton*, 92 Iowa 455; *Com. v. Brady*, 147 Mass. 583; *Willis v. State*, 43 Neb. 102; *State v. Rollins*, 113 N. Car. 722; *Fleming v. State*, 5 Humph. (Tenn.) 564; *International, etc., R. Co. v. Dyer*, 76 Tex. 156; *Meyers v. State*, 37 Tex. Crim. 208; *Mace v. Reed*, 89 Wis. 440; *Kuenster v. Woodhouse*, 101 Wis. 216. See also *Woods v. Dailey*, 211 Ill. 495.

**2. Use of Narcotics.** — *People v. Webster*, 139 N. Y. 73, *affirming* 68 Hun (N. Y.) 11; *State v. White*, 10 Wash. 611. See also *Eldridge v. State*, 27 Fla. 162; *McDowell v. Preston*, 26 Ga. 528; *Botkin v. Cassady*, 106 Iowa 334; *State v. King*, 88 Minn. 175; *State v. Gleim*, 17 Mont. 17.

**3. Insanity or Mental Hallucinations.** — *Reg. v. Hill*, 2 Den. C. C. 254, 5 Cox C. C. 259, 15 Jur. 470; *District of Columbia v. Armes*, 107 U. S. 519; *Worthington v. Mencer*, 96 Ala. 310, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 144; *Walker v. State*, 97 Ala. 85; *Holcomb v. Holcomb*, 28 Conn. 177; *Wilson v. Com.*, (Ky. 1900) 54 S. W. Rep. 946; *Kendall v. May*, 10 Allen (Mass.) 59; *People v. Evans*, 72 Mich. 367; *State v. Hayward*, 62 Minn. 474; *Hendricks v. Mechanics' Bank*, (Supm. Ct. App. T.) 88 N. Y. Supp. 176; *Coleman v. Com.*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711. See also *State v. Spotted Hawk*, 22 Mont. 33.

**4. Infancy.** — *Carter v. State*, 63 Ala. 53; *Kelly v. State*, 75 Ala. 21; *State v. Todd*, 110 Iowa 631; *White v. Com.*, 96 Ky. 180. See also *State v. King*, 117 Iowa 484; *title INFANTS*, vol. 16, p. 270.

**5. Witness Excited by Occurrence of Which He Testifies.** — Evidence that a witness was excited by the occurrence of which he testifies tends to show that he was not in a proper frame of mind to observe correctly what took place and

is admissible. *Cooper v. Hopkins*, 70 N. H. 271.

**6. Evidence of Incapacity of Mind.** — *Holcomb v. Holcomb*, 28 Conn. 177; *State v. Hayward*, 62 Minn. 474, *disapproving* *Campbell v. State*, 23 Ala. 44; *People v. Webster*, 139 N. Y. 73, *affirming* 68 Hun (N. Y.) 11. *Compare State v. King*, 88 Minn. 175; *State v. Spotted Hawk*, 22 Mont. 33.

**7. Cross-examination to Test Intelligence and Memory of Witness.** — *Seale v. Chambliss*, 35 Ala. 19; *State v. Hall*, 132 N. Car. 1094; *State v. Moran*, 15 Oregon 262; *Sloan v. Courtenay*, 54 S. Car. 314. See also *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508. See generally *infra*, this title, VII. 8. a. *Contradiction of Witness — Materiality of Evidence.*

**That a Person Cannot Read or Write** would, according to common experience, tend to create in him a more accurate and retentive memory, because it would be upon that faculty, he would have to rely in the conduct of his affairs. *Matter of Cross*, 85 Hun (N. Y.) 343.

**8. Evidence of Intelligence and Memory of Witness Confined to Cross-examination.** — *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679; *Goodwyn v. Goodwyn*, 20 Ga. 600; *Bell v. Rinner*, 16 Ohio St. 46. See also *Chicago City R. Co. v. Biederman*, 102 Ill. App. 617. *Compare State v. Hall*, 132 N. Car. 1094; *Wren v. Howland*, (Tex. Civ. App. 1903) 75 S. W. Rep. 894.

**Medical Examination of Witness.** — The court has no power to compel a witness to submit to a medical examination, physical or mental, as a basis for evidence bearing on his credibility. *Goodwin v. State*, 114 Wis. 318.

**9. Inquiry into Religious Belief Inadmissible to Affect Credibility.** — *People v. Copsey*, 71 Cal. 548; *Dickinson v. Beal*, 10 Kan. App. 233; *Bush v. Com.*, 80 Ky. 244; *White v. Com.*, 96 Ky. 180; *Louisville, etc., R. Co. v. Mayes*, (Ky. 1904) 80 S. W. Rep. 1097; *People v. Jenness*, 5 Mich. 305; *Free v. Buckingham*, 59 N. H. 219; *Brink v. Stratton*, 176 N. Y. 150, 13 N. Y. Ann. Cas. 435, *reversing* 62 N. Y. App. Div. 331; *Clinton v. State*, 33 Ohio St. 27.

8. Contradiction of Witness — *α*. MATERIALITY OF EVIDENCE — (1) *Cross-examination* — (a) *Direct Contradiction — Irrelevant Matters.* — On cross-examination considerable latitude is allowed for the purpose of sifting the conscience of the witness, testing his accuracy of statement, veracity, and credibility; and even specific extraneous offenses and other matters not material to the issues may be inquired into, if they have any bearing thereon. Where the matters inquired of are wholly irrelevant, however, the extent to which the inquiry may go is within the sound discretion of the trial court; and the cross-examining party is concluded by the answers of the witness, and cannot contradict them by other evidence.<sup>1</sup> Proof of particular facts tending to

But see *Stanbro v. Hopkins*, 28 Barb. (N. Y.) 265.

1. *Contradiction of Irrelevant Facts Elicited on Cross-examination — England.* — *Rex v. Rudge*, 2 Peake 232; *Rex v. Watson*, 2 Stark. 116, 3 E. C. L. 341; *Thomas v. David*, 7 C. & P. 350, 32 E. C. L. 537; *Reg. v. Burke*, 8 Cox C. C. 44; *Spenceley v. De Willott*, 7 East 108; *Atty.-Gen. v. Hitchcock*, 1 Exch. 91; *Reg. v. Holmes*, L. R. 1 C. C. 334; *Ex p. Palmer*, 1 Deac. & C. 373; *Goddard v. Parr*, 24 L. J. Ch. 783, 3 W. R. 633; *Ex p. Bardwell*, 1 Mont. & A. 206.

*Canada.* — *Laliberte v. Reg.*, 1 Can. Sup. Ct. 117; *Gray v. Coucher*, 15 Grant Ch. (U. C.) 419; *Hamilton Bank v. Isaacs*, 16 Ont. 450.

*United States.* — *Goldsbey v. U. S.*, 160 U. S. 70; *U. S. v. Dickinson*, 2 McLean (U. S.) 325, 25 Fed. Cas. No. 14,958; *Union Pac. R. Co. v. Reese*, 15 U. S. App. 92, (C. C. A.) 56 Fed. Rep. 288; *Safer v. U. S.*, (C. C. A.) 87 Fed. Rep. 329.

*Alabama.* — *Rosenbaum v. State*, 33 Ala. 354; *Haley v. State*, 63 Ala. 83; *Lang v. State*, 84 Ala. 1; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Hussey v. State*, 87 Ala. 121; *Amos v. State*, 96 Ala. 120; *Payne v. Crawford*, 102 Ala. 387; *Bunzel v. State*, 116 Ala. 68; *Bessemer Land, etc., Co. v. Dubose*, 125 Ala. 442.

*Arkansas.* — *Butler v. State*, 34 Ark. 480; *Hollingsworth v. State*, 53 Ark. 387; *Jones v. Malvern Lumber Co.*, 58 Ark. 125; *Bergstrand v. Townsend*, 70 Ark. 600; *Long v. State*, (Ark. 1904) 81 S. W. Rep. 387; *Plunkett v. State*, (Ark. 1904) 82 S. W. Rep. 845.

*California.* — *People v. Bell*, 53 Cal. 119; *People v. Tiley*, 84 Cal. 651; *Barkley v. Copeland*, 86 Cal. 483; *People v. Collins*, 105 Cal. 504; *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317; *People v. Lee Dick Lung*, 129 Cal. 491; *People v. Harlan*, 133 Cal. 16, cited *People v. Wilmot*, 139 Cal. 108; *People v. Smith*, 134 Cal. 453; *People v. Storke*, (Cal. 1900) 60 Pac. Rep. 420, reversed on other grounds 128 Cal. 486.

*Connecticut.* — *Winton v. Meeker*, 25 Conn. 456; *Barlow Bros. Co. v. Parsons*, 73 Conn. 696.

*Florida.* — *Wallace v. State*, 41 Fla. 547.

*Georgia.* — *Allgood v. State*, 87 Ga. 668; *Western, etc., R. Co. v. Vaughan*, 113 Ga. 354.

*Illinois.* — *Moore v. People*, 108 Ill. 484; *Hronek v. People*, 134 Ill. 139; *Lake Erie, etc., R. Co. v. Morain*, 140 Ill. 117, affirming 36 Ill. App. 632; *Chicago City R. Co. v. Allen*, 169 Ill. 287, affirming 68 Ill. App. 472; *East Dubuque v. Burhyte*, 173 Ill. 553, affirming 74

Ill. App. 99; *Toledo, etc., R. Co. v. Bailey*, 43 Ill. App. 292; *Cicero, etc., St. R. Co. v. Priest*, 89 Ill. App. 304, affirmed 190 Ill. 592; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265; *Chicago, etc., R. Co. v. Stewart*, 104 Ill. App. 37, affirmed 203 Ill. 223; *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415.

*Indiana.* — *Horne v. Williams*, 12 Ind. 324; *Simons v. Busby*, 119 Ind. 13; *Robbins v. Spencer*, 121 Ind. 594; *Elkhart v. Witman*, 122 Ind. 538; *Stalcup v. State*, 146 Ind. 270; *Reynolds v. State*, 147 Ind. 3; *Shears v. State*, 147 Ind. 51; *Barton v. State*, 154 Ind. 670; *Dunn v. State*, (Ind. 1904) 70 N. E. Rep. 521, reversing on other grounds 67 N. E. Rep. 940; *Brower v. Ream*, 15 Ind. App. 51; *Citizens' St. R. Co. v. Heath*, 29 Ind. App. 395; *Cabell v. McKinney*, 31 Ind. App. 548.

*Indian Territory.* — *Oxier v. U. S.*, 1 Indian Ter. 85; *Oats v. U. S.*, 1 Indian Ter. 152.

*Iowa.* — *State v. Cokely*, 4 Iowa 477; *Madden v. Koester*, 52 Iowa 692; *State v. Falconer*, 70 Iowa 416; *Leiber v. Chicago, etc., R. Co.*, 84 Iowa 97; *Hoover v. Cary*, 86 Iowa 494; *State v. Davis*, 110 Iowa 746; *State v. Roscum*, 119 Iowa 330.

*Kansas.* — *State v. Pfefferle*, 36 Kan. 90; *Atchison, etc., R. Co. v. Townsend*, 39 Kan. 115; *State v. Blakesley*, 43 Kan. 250; *State v. Greensburg*, 59 Kan. 404; *State v. Abbott*, 65 Kan. 139.

*Kentucky.* — *Radford v. Com.*, (Ky. 1887) 5 S. W. Rep. 343; *Roberts v. Com.*, (Ky. 1892) 20 S. W. Rep. 267; *Justice v. Com.*, (Ky. 1898) 46 S. W. Rep. 499; *Wilson v. Com.*, (Ky. 1900) 54 S. W. Rep. 946; *Nicely v. Com.*, 58 S. W. Rep. 995, 22 Ky. L. Rep. 900; *Feltner v. Com.*, 64 S. W. Rep. 959, 23 Ky. L. Rep. 1110; *O'Daniel v. Smith*, 66 S. W. Rep. 284, 23 Ky. L. Rep. 1822; *Trabue v. Com.*, 66 S. W. Rep. 718, 23 Ky. L. Rep. 2135; *Morgan v. Com.*, 72 S. W. Rep. 1098, 24 Ky. L. Rep. 2117.

*Louisiana.* — *State v. Hobgood*, 46 La. Ann. 855; *State v. Collins*, 48 La. Ann. 1454; *State v. Higgins*, 50 La. Ann. 330; *State v. Haab*, 105 La. 230; *State v. Dalcourt*, 112 La. 420.

*Maine.* — *State v. Reed*, 60 Me. 550; *Davis v. Roby*, 64 Me. 427.

*Maryland.* — *Wolfe v. Hauver*, 1 Gill (Md.) 84; *Sloan v. Edwards*, 61 Md. 105; *Smith v. State*, 64 Md. 25, 54 Am. Rep. 752; *McLaughlin v. Mencke*, 80 Md. 83; *Baltimore City Pass. R. Co. v. Tanner*, 90 Md. 315; *Berry v. Safe Deposit, etc., Co.*, 96 Md. 45; *Joseph Joseph Bros. Co. v. Schonthal Iron, etc., Co.*, (Md. 1904) 58 Atl. Rep. 205.

*Massachusetts.* — *Com. v. Buzzell*, 16 Pick.



impair the credibility of a witness, made independently of his own examination, is excluded for the reason that its admission would engender a multiplicity of collateral issues, and would frequently surprise a witness with matter which he could not be prepared to disprove; but these reasons do not apply to his cross-examination as to the same facts, because the witness, better than any one else, can explain the impeaching matter, and protect himself to the extent that explanation will protect him; the cross-examining party being bound by his replies, and the abuse of the cross-examination being guarded against by the privilege of the witness to decline to answer any collateral question which might disgrace him or charge him as a criminal, and by the

(Mass.) 153; *Com. v. Farrar*, 10 Gray (Mass.) 6; *Brockett v. Bartholomew*, 6 Met. (Mass.) 396; *Davis v. Keyes*, 112 Mass. 436; *Kaler v. Builders' Mut. F. Ins. Co.*, 120 Mass. 333; *Alexander v. Kaiser*, 149 Mass. 321; *Com. v. Schaffner*, 146 Mass. 512; *Com. v. Jones*, 155 Mass. 170; *Carr v. West End St. R. Co.*, 163 Mass. 360; *Chalmers v. Whitmore Mfg. Co.*, 164 Mass. 532; *Lewis v. Boston Gaslight Co.*, 165 Mass. 411; *Merrigan v. Hall*, 175 Mass. 508; *Burnside v. Everett*, (Mass. 1904) 71 N. E. Rep. 82.

*Michigan*.—*People v. Hillhouse*, 80 Mich. 580; *Helwig v. Lascowski*, 82 Mich. 619; *People v. Cahoon*, 88 Mich. 456; *Hart v. Walker*, 100 Mich. 406; *Kennett v. Engle*, 105 Mich. 693; *Kingston v. Ft. Wayne, etc.*, R. Co., 112 Mich. 40; *People v. Gotshall*, 123 Mich. 474; *People v. Rice*, (Mich. 1904) 99 N. W. Rep. 860, 11 Detroit Leg. N. 133; *People v. Farrell*, (Mich. 1904) 100 N. W. Rep. 264.

*Minnesota*.—*Brace v. St. Paul City R. Co.*, 87 Minn. 292; *Malone v. Stephenson*, (Minn. 1905) 102 N. W. Rep. 372.

*Mississippi*.—*Madden v. State*, 65 Miss. 176; *Garman v. State*, 66 Miss. 196; *Dean v. State*, 78 Miss. 360.

*Missouri*.—*Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Goins v. Moberly*, 127 Mo. 116; *State v. Grant*, 144 Mo. 56; *Roe v. Versailles Bank*, 167 Mo. 406; *State v. Caudle*, 174 Mo. 388; *Newcomb v. New York Cent., etc.*, R. Co., 182 Mo. 687; *Manget v. O'Neill*, 51 Mo. App. 35; *Scharff v. Grossman*, 59 Mo. App. 199; *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445; *O'Connor v. St. Louis Transit Co.*, 106 Mo. App. 215.

*Montana*.—*Bullard v. Smith*, 28 Mont. 387.

*Nebraska*.—*Elliot v. State*, 34 Neb. 48; *Hill v. State*, 42 Neb. 503; *Myers v. State*, 51 Neb. 517; *Burlingim v. State*, 61 Neb. 276; *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

*New Hampshire*.—*Hersom v. Henderson*, 23 N. H. 498; *Gutterson v. Morse*, 58 N. H. 165; *Free v. Buckingham*, 59 N. H. 219; *Merrill v. Perkins*, 59 N. H. 343; *Perkins v. Towle*, 59 N. H. 583; *Perkins v. Roberge*, 69 N. H. 171; *Willard v. Sullivan*, 69 N. H. 491; *Challis v. Lake*, 71 N. H. 90; *Guertin v. Hudson*, 71 N. H. 505.

*New Jersey*.—*State v. Sprague*, 64 N. J. L. 419; *Bullock v. State*, 65 N. J. L. 557; *State v. Hendrick*, (N. J. 1903) 56 Atl. Rep. 247.

*New York*.—*Lawrence v. Barker*, 5 Wend. (N. Y.) 302; *Plato v. Reynolds*, 27 N. Y. 586; *Chapman v. Brooks*, 31 N. Y. 75; *Third G. W. Turnpike Road Co. v. Loomis*, 32 N. Y. 127; *Real v. People*, 42 N. Y. 270; *Gandolfo v.*

*Appleton*, 40 N. Y. 533; *People v. Greenwall*, 108 N. Y. 296; *Morris v. Atlantic Ave. R. Co.*, 116 N. Y. 552; *People v. Murphy*, 135 N. Y. 450, *affirming* (Supm. Ct. Gen. T.) 17 N. Y. Supp. 427; *Lowenstein v. Lombard*, 164 N. Y. 324, *reversing* on other grounds 17 N. Y. App. Div. 408; *Smith v. Lehigh Valley R. Co.*, 177 N. Y. 379, *reversing* 86 N. Y. App. Div. 628; *Rosenweig v. People*, 63 Barb. (N. Y.) 634; *People v. Ware*, 29 Hun (N. Y.) 473, *affirmed* without opinion 92 N. Y. 653; *Hilsley v. Palmer*, 32 Hun (N. Y.) 472; *Hansee v. Brooklyn El. R. Co.*, 66 Hun (N. Y.) 384; *Tallman v. Kimball*, 74 Hun (N. Y.) 279; *Doolittle v. Gambee*, 88 Hun (N. Y.) 364; *People v. Williams*, 92 Hun (N. Y.) 354; *Lindsley v. Miller*, 3 N. Y. App. Div. 127; *People v. Dorothy*, 20 N. Y. App. Div. 318, *affirmed* 156 N. Y. 237; *Hall v. U. S. Radiator Co.*, 76 N. Y. App. Div. 504, 12 N. Y. Annot. Cas. 109; *Berner v. Mittnacht*, 2 Sweeney (N. Y.) 582; *Praeger v. Mestauer*, 54 N. Y. Super. Ct. 100; *Goldberg v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 211; *Kramer v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 33.

*North Carolina*.—*Radford v. Rice*, 2 Dev. & B. L. (19 N. Car.) 39; *Clark v. Clark*, 65 N. Car. 655; *State v. Patterson*, 74 N. Car. 157; *Cox v. Brookshire*, 76 N. Car. 314; *State v. Ballard*, 97 N. Car. 443; *State v. Gay*, 94 N. Car. 814; *State v. Bullard*, 100 N. Car. 486; *Byrd v. Hudson*, 113 N. Car. 203; *Russell v. Hearne*, 113 N. Car. 361; *Cecil v. Henderson*, 119 N. Car. 422.

*North Dakota*.—*State v. McGahey*, 3 N. Dak. 293.

*Ohio*.—*Wroe v. State*, 20 Ohio St. 460; *Shelby v. Clagett*, 46 Ohio St. 549.

*Oregon*.—*State v. Bacon*, 13 Oregon 143; *State v. Chee Gong*, 17 Oregon 635.

*Pennsylvania*.—*Hester v. Com.*, 85 Pa. St. 139; *Reading Second Nat. Bank v. Wentzell*, 151 Pa. St. 143, 31 W. N. C. (Pa.) 33; *Glenn v. Philadelphia, etc., Traction Co.*, 206 Pa. St. 135; *Com. v. Stanley*, 19 Pa. Super. Ct. 58; *Trussell v. Western Pennsylvania Gas Co.*, 20 Pa. Super. Ct. 423.

*Rhode Island*.—*Kolb v. Union R. Co.*, 23 R. I. 72; *Lancaster v. Alden*, 26 R. I. 170.

*South Carolina*.—*State v. Wyse*, 33 S. Car. 582; *State v. Adams*, 49 S. Car. 414; *State v. Summer*, 55 S. Car. 32.

*Tennessee*.—*Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *Franklin v. Franklin*, 90 Tenn. 44; *Hill v. State*, 91 Tenn. 521; *Zanone v. State*, 97 Tenn. 101.

*Texas*.—*Gulf, etc., R. Co. v. Coon*, 69 Tex.

power of the court, on its own motion, to interpose and protect him.<sup>1</sup> How far counsel may go into matters irrelevant to the issues, on the cross-examination of witnesses, for the purpose of affecting their credibility, is a matter on which the authorities vary in the different jurisdictions.<sup>2</sup> The questions themselves asked the witness are properly excluded, if the facts sought to be elicited thereby are irrelevant for the purpose of discrediting him and for any other purpose.<sup>3</sup>

730; *Loftus v. Maxey*, 73 Tex. 242; *Sutor v. Wood*, 76 Tex. 403; Texas, etc., R. Co. v. Phillips, 91 Tex. 278, reversing (Tex. Civ. App. 1897) 40 S. W. Rep. 344; Gulf, etc., R. Co. v. Johnson, (Tex. 1904) 78 S. W. Rep. 224; Galveston, etc., R. Co. v. Porfert, 1 Tex. Civ. App. 716; Pennsylvania F. Ins. Co. v. Faires, 13 Tex. Civ. App. 111; Batcheller v. Besancon, 19 Tex. Civ. App. 137; Halsell v. Neal, 23 Tex. Civ. App. 26; Winn v. Winn, 23 Tex. Civ. App. 617; Harrington v. Claflin, 28 Tex. Civ. App. 100; Denison, etc., Suburban R. Co. v. Foster, 28 Tex. Civ. App. 578; Cleveland v. Higginbotham, (Tex. Civ. App. 1897) 41 S. W. Rep. 404; Smye v. Groesbeck, (Tex. Civ. App. 1902) 73 S. W. Rep. 972; McCarty v. Hartford F. Ins. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 934; Casey-Swasey Co. v. Virginia State Ins. Co., (Tex. Civ. App. 1903) 75 S. W. Rep. 911; Atchison, etc., R. Co. v. Keller, (Tex. Civ. App. 1903) 76 S. W. Rep. 801; Drumm-Flato Commission Co. v. Union Meat Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 634; Brite v. State, 10 Tex. App. 368; Lights v. State, 21 Tex. App. 309; Johnson v. State, 27 Tex. App. 163; McCoy v. State, 27 Tex. App. 415; Drake v. State, 29 Tex. App. 265; Surrell v. State, 29 Tex. App. 321; Carroll v. State, 32 Tex. Crim. 431, 40 Am. St. Rep. 786; Conway v. State, 33 Tex. Crim. 327; Willford v. State, 36 Tex. Crim. 414; Fossett v. State, 41 Tex. Crim. 400; Rupe v. State, 42 Tex. Crim. 477; Reed v. State, 42 Tex. Crim. 572; Messer v. State, 43 Tex. Crim. 97; Poyner v. State, (Tex. Crim. 1898) 48 S. W. Rep. 516, reversing on other grounds (Tex. Crim. 1898) 47 S. W. Rep. 977; Dickey v. State, (Tex. Crim. 1900) 56 S. W. Rep. 627; Baldrige v. State, (Tex. Crim. 1903) 74 S. W. Rep. 916; Carter v. State, (Tex. Crim. 1903) 76 S. W. Rep. 437; Curtis v. State, (Tex. Crim. 1904) 81 S. W. Rep. 29; Miller v. State, (Tex. Crim. 1904) 83 S. W. Rep. 393.

*Utah*.—Fenstermaker v. Tribune Pub. Co., 12 Utah 439.

*Vermont*.—Stevens v. Beach, 12 Vt. 585; State v. Thibeau, 30 Vt. 100; Fairchild v. North Eastern Mut. L. Assoc., 51 Vt. 613; Neal v. Thornton, 67 Vt. 221; State v. Fournier, 68 Vt. 262; State v. Slack, 69 Vt. 486; Gregg v. Willis, 71 Vt. 313; State v. Shaw, 73 Vt. 149; State v. Bean, 74 Vt. 111; McGovern v. Hays, 75 Vt. 104.

*Virginia*.—Langhorne v. Com., 76 Va. 1012; Robertson v. Com., (Va. 1895) 22 S. E. Rep. 359.

*Washington*.—State v. Payne, 6 Wash. 563.

*Wisconsin*.—Holtz v. State, 76 Wis. 99; Buel v. State, 104 Wis. 132; Cullen v. Hanisch, 114 Wis. 24; Standard Mfg. Co. v. Slot, (Wis. 1904) 98 N. W. Rep. 923.

#### 1. Reasons for Rule—Limitations of Right to

**Cross-examine.**—*Oxier v. U. S.*, 1 Indian Ter. 85, approved *Oats v. U. S.*, 1 Indian Ter. 152. To similar effect *Harris v. Tippet*, 2 Campb. 637; *Reg. v. Holmes*, L. R. 1 C. C. 334; *Wallace v. State*, 41 Fla. 547; *People v. Dorthy*, 20 N. Y. App. Div. 308, affirmed 156 N. Y. 237; *Radford v. Rice*, 2 Dev. & B. L. (19 N. Car.) 39; *State v. Bullard*, 100 N. Car. 486; *State v. Bacon*, 13 Oregon 143, approved *State v. Chee Gong*, 17 Oregon 635; *Hildeburn v. Curran*, 65 Pa. St. 59; *Nuckol v. Jones*, 8 Gratt. (Va.) 267.

**Refusal of Witness to Answer.**—Where the witness refuses to answer the question put for the purpose of eliciting evidence to his discredit, it has been held that the discrediting fact may be proved by other evidence, *Lee v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 407; *Henderson, J., dissenting*; or the testimony of the witness given on his examination in chief may be ruled out. *Pinkard v. State*, 30 Ga. 757; *McElhannon v. State*, 99 Ga. 672.

**2. In New York** it has been held that the inquiry is confined to the acts and declarations of the witness, and does not extend to the acts or declarations of others. *Lindsley v. Miller*, 3 N. Y. App. Div. 127; *People v. Dorthy*, 20 N. Y. App. Div. 308, affirmed 156 N. Y. 237; *Hall v. U. S. Radiator Co.*, 76 N. Y. App. Div. 504, 12 N. Y. Annot. Cas. 109; *Berner v. Mitnacht*, 2 Sweeny (N. Y.) 582. See Cicero, etc., *St. R. Co. v. Priest*, 89 Ill. App. 304, affirmed 190 Ill. 592; *Kolb v. Union R. Co.* 23 R. I. 72; *Carroll v. State*, 32 Tex. Crim. 431; and see for an inquiry into particular traits of character and specific extraneous offenses *supra*, this section, 4. *Attacking Reputation of Witness*; *infra*, this section, 11. *Impeachment of Defendant in Criminal Case*.

**3. Exclusion of Questions on Cross-examination**—*England*.—*Tennant v. Hamilton*, 7 Cl. & F. 122.

*United States*.—*Thiede v. Utah*, 159 U. S. 510, affirming 11 Utah 241.

*Alabama*.—*Mitchell v. State*, 94 Ala. 68.

*California*.—*People v. Rodriguez*, 134 Cal. 140.

*Delaware*.—*State v. Pucca*, (Del. 1902) 55 Atl. Rep. 831.

*Florida*.—*Wallace v. State*, 41 Fla. 547.

*Georgia*.—*Allgood v. State*, 87 Ga. 668.

*Illinois*.—*Chicago v. Lonergan*, 196 Ill. 518; *Danville v. Mabin*, 57 Ill. App. 23.

*Iowa*.—*Livingston v. Heck*, 122 Iowa 74.

*Massachusetts*.—*Roberts v. Boston*, 149 Mass. 346.

*Michigan*.—*People v. Cahoon*, 88 Mich. 456; *People v. Gotshall*, 123 Mich. 474; *People v. Rice*, (Mich. 1904) 99 N. W. Rep. 860.

*Missouri*.—*Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

**Relevant Matters.** — If the facts sought to be elicited on cross-examination are relevant to the issues in the case, the cross-examining party is, of course, entitled to contradict and disprove them by the testimony of opposing witnesses.<sup>1</sup>

(b) **Former Statements of Witness.** — Former statements of a witness relevant to the transaction about which he testified are mere hearsay and incompetent as original evidence; and to be admissible to impeach or discredit the witness they must be inconsistent with testimony given by him on his examination in chief. A party on cross-examination cannot question a witness about an incompetent, irrelevant, or immaterial matter for the purpose of discrediting him by evidence of contradictory statements; and, if he is allowed to do so, the answers of the witness are conclusive.<sup>2</sup> The same is true, though the

*New Hampshire.* — *Seavy v. Dearborn*, 19 N. H. 351; *Combs v. Winchester*, 39 N. H. 13; *Cooper v. Hopkins*, 70 N. H. 271.

*New York.* — *Lawrence v. Barker*, 5 Wend. (N. Y.) 302; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *Hanse v. Brooklyn El. R. Co.*, 66 Hun (N. Y.) 384.

*North Carolina.* — *Cox v. Brookshire*, 76 N. Car. 314; *Russell v. Hearne*, 113 N. Car. 361; *Cecil v. Henderson*, 119 N. Car. 422.

*Rhode Island.* — *Lake v. Weaver*, 20 R. I. 46.

*Vermont.* — *Neal v. Thornton*, 67 Vt. 221.

*West Virginia.* — *State v. Prater*, 52 W. Va. 132.

*Wisconsin.* — *Crawford v. Christian*, 102 Wis. 51.

**Question Whether Witness Has Borne Alias Names.** — *Livingston v. Heck*, 122 Iowa 74. *Contra*, *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

**Witness Impeached in Another Action.** — It is improper to ask a witness whether he had not been impeached in another action by proof of bad character or reputation, or to introduce evidence to that effect. *Cockrill v. Hall*, 76 Cal. 192; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Cullen v. Hanisch*, 114 Wis. 24.

1. See *infra*, this subdivision of this section, (c) *Interest and Bias*; b. *Direct Contradiction*. *Radford v. Rice*, 2 Dev. & B. L. (19 N. Car.) 39. *Compare Smith v. Lehigh Valley R. Co.*, 177 N. Y. 379, reversing 86 N. Y. App. Div. 628.

**Evidence of Means of Knowledge and Reasons for Recollection** — **Cross-examination and Contradiction.** — *Seale v. Chambliss*, 35 Ala. 19; *Cox v. State*, 76 Ala. 66; *Birmingham Electric R. Co. v. Clay*, 108 Ala. 233; *Southern R. Co. v. Brantley*, 132 Ala. 655; *Ontario-Colorado Gold Min. Co. v. MacKenzie*, (Colo. App. 1903) 74 Pac. Rep. 791; *State v. Falconer*, 70 Iowa 416; *State v. Fox*, 25 N. J. L. 566; *People v. Rohl*, 138 N. Y. 616; *State v. Moran*, 15 Oregon 262; *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318; *Jefferson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 88; *McKindley v. Drew*, 69 Vt. 210.

**Facts Not Otherwise Relevant** are deemed to be relevant, if they support or are inconsistent with the opinions of experts when such opinions are deemed to be relevant. *Kennett v. Engle*, 105 Mich. 693.

2. **Materiality of Former Statements of Witness** — *England.* — *Elton v. Larkins*, 5 C. & P. 385, 24 E. C. L. 372; *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737.

*Canada.* — *McCulloch v. Gore Dist. Mut. F.*

*Ins. Co.*, 34 U. C. Q. B. 384, affirming 32 U. C. Q. B. 610; *Gilbert v. Gooderham*, 6 U. C. C. P. 39; *Reg. v. Chasson*, 16 N. Bruns. 546.

*United States.* — *McKinney v. Neil*, 1 McLean (U. S.) 540, 16 Fed. Cas. No. 8,865.

*Alabama.* — *Blakey v. Blakey*, 33 Ala. 611; *Seale v. Chambliss*, 35 Ala. 19; *Marx v. Bell*, 48 Ala. 497; *Washington v. State*, 63 Ala. 189; *Burney v. Torrey*, 100 Ala. 157; *Orr v. State*, 107 Ala. 35; *Louisville Jeans Clothing Co. v. Lischkoff*, 109 Ala. 136; *Crawford v. State*, 112 Ala. 1; *Morrow v. Campbell*, 118 Ala. 330; *Beall v. Folmar*, 122 Ala. 414; *Ragland v. State*, 125 Ala. 12; *Parnell v. State*, 129 Ala. 6; *Carter v. State*, 133 Ala. 160.

*Arizona.* — *Territory v. Clanton*, (Ariz. 1889) 20 Pac. Rep. 94.

*California.* — *People v. Devine*, 44 Cal. 458; *People v. McKeller*, 53 Cal. 65; *People v. Furtado*, 57 Cal. 345; *Pierce v. Schaden*, 59 Cal. 540; *People v. Webb*, 70 Cal. 120; *People v. Dye*, 75 Cal. 108; *Young v. Brady*, 94 Cal. 128; *Faulkner v. Rondoni*, 104 Cal. 140; *People v. Worthington*, 105 Cal. 166; *People v. Dice*, 120 Cal. 189; *Trabing v. California Nav., etc., Co.*, 121 Cal. 137; *Crusoe v. Clark*, 127 Cal. 341; *Steen v. Santa Clara Valley Mill, etc., Co.*, 134 Cal. 355.

*Colorado.* — *McKeone v. People*, 6 Colo. 346; *Torris v. People*, 19 Colo. 438; *Denver Tramway Co. v. Owens*, 20 Colo. 107; *Muller v. McKim*, 22 Colo. 468; *Askew v. People*, 23 Colo. 446.

*Florida.* — *Stewart v. State*, 42 Fla. 591; *Myers v. State*, 43 Fla. 500; *Peaden v. State*, (Fla. 1903) 35 So. Rep. 204.

*Georgia.* — *Futch v. State*, 90 Ga. 472; *Evans v. State*, 95 Ga. 468; *Hudgins v. Bloodworth*, 109 Ga. 197.

*Idaho.* — *State v. Irwin*, (Idaho 1903) 71 Pac. Rep. 608.

*Illinois.* — *North Chicago St. R. Co. v. Southwick*, 165 Ill. 494, affirming 66 Ill. App. 241.

*Indiana.* — *Paxton v. Dye*, 26 Ind. 393; *Fogleman v. State*, 32 Ind. 145; *Brown v. Owen*, 94 Ind. 31; *Seller v. Jenkins*, 97 Ind. 430; *Johnson v. Brown*, 130 Ind. 534; *Blough v. Parry*, 144 Ind. 463; *Miller v. Coulter*, 156 Ind. 290; *Hinkle v. State*, 157 Ind. 237; *Williams v. State*, 3 Ind. App. 350; *Patrons Mut. Aid Soc. v. Hall*, 19 Ind. App. 118; *Dehler v. State*, 22 Ind. App. 383.

*Iowa.* — *Swanson v. French*, 92 Iowa 695; *Laird v. Equitable L. Assur. Soc.*, 98 Iowa 495; *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535; *State v. Sheridan*, 121 Iowa 164.



matter is relevant, if the witness was not examined in chief concerning it. In such case the cross-examining party makes the witness his own as to such new and independent matter, and is precluded from impeaching him by the

*Kansas*.—*State v. Ray*, 54 Kan. 160; *Butler v. Cooper*, 3 Kan. App. 145; *State v. Zimmerman*, 3 Kan. App. 172; *Buckhalter v. Nuzum*, 9 Kan. App. 885, 61 Pac. Rep. 310.

*Kentucky*.—*Com. v. Hourigan*, 89 Ky. 305; *Louisville, etc., R. Co. v. Webb*, 99 Ky. 332; *Randolph v. Com.*, (Ky. 1889) 11 S. W. Rep. 813; *Com. v. Bright*, 66 S. W. Rep. 604, 23 Ky. L. Rep. 1921; *Howe v. Skidmore*, 72 S. W. Rep. 792, 24 Ky. L. Rep. 2048.

*Louisiana*.—*State v. Spencer*, 45 La. Ann. 1; *State v. Donelon*, 45 La. Ann. 744; *State v. Conerly*, 48 La. Ann. 1561; *State v. Harris*, 51 La. Ann. 1105.

*Maine*.—*State v. Benner*, 64 Me. 267; *Woodroffe v. Jones*, 83 Me. 21.

*Maryland*.—*Goodhand v. Benton*, 6 Gill & J. (Md.) 481.

*Massachusetts*.—*Harrington v. Lincoln*, 2 Gray (Mass.) 133; *Farnum v. Farnum*, 13 Gray (Mass.) 508; *Eames v. Whittaker*, 123 Mass. 342, cited *Com. v. Smith*, 162 Mass. 508; *Jordan v. McKinney*, 144 Mass. 438; *Pierce v. Boston*, 164 Mass. 92.

*Michigan*.—*People v. Knapp*, 42 Mich. 267, 36 Am. Rep. 438; *Howard v. Patrick*, 43 Mich. 121; *McDonald v. McDonald*, 67 Mich. 122; *Gates v. Rife Boom Co.*, 70 Mich. 309; *Adams v. Detroit Electric R. Co.*, 129 Mich. 291, 8 Detroit Leg. N. 950.

*Minnesota*.—*Paddock v. Kappahan*, 41 Minn. 528; *Murphy v. Backer*, 67 Minn. 510.

*Mississippi*.—*Williams v. State*, 73 Miss. 820; *Garner v. State*, 76 Miss. 515; *Jeffries v. State*, 77 Miss. 757.

*Missouri*.—*Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567, 4 Am. Rep. 353; *Goltz v. Griswold*, 113 Mo. 144; *McFadin v. Catron*, 120 Mo. 252; *State v. Taylor*, 134 Mo. 109; *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94; *Caskey v. La Belle*, 101 Mo. App. 590.

*Montana*.—*State v. Hurst*, 23 Mont. 484.

*Nebraska*.—*Smith v. State*, 5 Neb. 181; *Curran v. Percival*, 21 Neb. 434; *McDuffie v. Bentley*, 27 Neb. 380; *Carter v. State*, 36 Neb. 481; *Carpenter v. Lingenfelter*, 42 Neb. 728; *Johnston v. Spencer*, 51 Neb. 198; *George Burke Co. v. Fowler*, (Neb. 1903) 93 N. W. Rep. 760.

*New Hampshire*.—*Tibbets v. Flanders*, 18 N. H. 284; *Seavy v. Dearborn*, 19 N. H. 351; *Combs v. Winchester*, 39 N. H. 13; *Dewey v. Williams*, 43 N. H. 384; *Sumner v. Crawford*, 45 N. H. 416; *Cooper v. Hopkins*, 70 N. H. 271.

*New Jersey*.—*Pullen v. Pullen*, 43 N. J. Eq. 136.

*New York*.—*Carpenter v. Ward*, 30 N. Y. 243; *Sherman v. Delaware, etc., R. Co.*, 106 N. Y. 542; *People v. Cox*, 21 Hun (N. Y.) 47, affirmed without opinion 83 N. Y. 610; *McCallan v. Brooklyn City R. Co.*, 48 Hun (N. Y.) 340; *Wiley v. Goodsell*, 3 N. Y. App. Div. 452, appeal dismissed 150 N. Y. 580; *Leinkauf v. Lombard*, 12 N. Y. App. Div. 302; *People v.*

*Gibson*, 24 N. Y. App. Div. 12; *People v. Van Tassel*, 26 N. Y. App. Div. 445, affirmed 156 N. Y. 561; *Pfeffer v. Stein*, 26 N. Y. App. Div. 535; *Crossman v. Lurman*, 57 N. Y. App. Div. 393; *Lumley v. Torsiello*, 69 N. Y. App. Div. 76; *Wimmer v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 258; *McNeill v. Metropolitan St. R. Co.*, (N. Y. City Ct.) 20 Misc. (N. Y.) 426; *Green v. Rice*, 33 N. Y. Super. Ct. 292; *Surdam v. Ingraham*, 59 Hun (N. Y.) 620, 12 N. Y. Supp. 798; *People v. Fleming*, 60 Hun (N. Y.) 576, 14 N. Y. Supp. 200.

*North Carolina*.—*State v. Elliott*, 68 N. Car. 124; *State v. Roberts*, 81 N. Car. 605; *Hinton v. Pritchard*, 98 N. Car. 355; *State v. Hawn*, 107 N. Car. 810; *State v. Norris*, 109 N. Car. 820; *Carr v. Smith*, 129 N. Car. 232.

*North Dakota*.—*Becker v. Cain*, 8 N. Dak. 615.

*Oregon*.—*Goodall v. State*, 1 Oregon 333; *Williams v. Culver*, 39 Oregon 337; *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 564; *State v. Deal*, 43 Oregon 17.

*Pennsylvania*.—*Hildeburn v. Curran*, 65 Pa. St. 59; *Coates v. Chapman*, 195 Pa. St. 109; *Com. v. Craig*, 19 Pa. Super. Ct. 81.

*South Carolina*.—*State v. Sullivan*, 43 S. Car. 205, explaining *State v. Bodie*, 33 S. Car. 118.

*Texas*.—*Dimmitt v. Robbins*, 74 Tex. 441; *Missouri, etc., R. Co. v. Moore*, 24 Tex. Civ. App. 489; *Croft v. Smith*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1089; *Henderson v. State*, 1 Tex. App. 432; *Britt v. State*, 21 Tex. App. 215; *Turner v. State*, 33 Tex. Crim. 103; *Hamilton v. State*, 36 Tex. Crim. 372; *Merritt v. State*, 39 Tex. Crim. 70; *Hoy v. State*, 39 Tex. Crim. 340; *Red v. State*, 39 Tex. Crim. 414; *Merritt v. State*, 40 Tex. Crim. 359; *Boatright v. State*, 42 Tex. Crim. 442; *Welch v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 812; *Flournoy v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 902; *Lankster v. State*, (Tex. Crim. 1902) 72 S. W. Rep. 388; *Mason v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 718.

*Utah*.—*Rogers v. Cook*, 8 Utah 123; *State v. Haworth*, 24 Utah 398.

*Vermont*.—*Alger v. Castle*, 61 Vt. 53; *Rudd v. Rounds*, 64 Vt. 432; *Perry v. Moore*, 66 Vt. 519; *Redding v. Redding*, 69 Vt. 500.

*Virginia*.—*Nuckols v. Jones*, 8 Gratt. (Va.) 267.

*Washington*.—*Bailey v. Seattle, etc., R. Co.*, 32 Wash. 640.

*West Virginia*.—*State v. Goodwin*, 32 W. Va. 177.

*Wisconsin*.—*Barton v. Bruley*, 119 Wis. 326.

**Opinion of Witness.**—*Hendley v. Globe Refinery Co.*, 106 Mo. App. 20; *Continental Nat. Bank v. Nashville First Nat. Bank*, 108 Tenn. 374; *Cogdell v. State*, 43 Tex. Crim. 178. See *infra*, this division of this section, c. (6) *Former Statement of Opinion*.

**Representations as to Financial Standing.**—*Harris v. Sledge*, (Miss. 1897) 21 So. Rep. 783. *Contra*, *Cahn v. Ladd*, 94 Wis. 134.

rule that a party cannot impeach his own witness.<sup>1</sup>

(c) **Interest and Bias.** — Disparaging evidence of matters otherwise collateral may be received when it tends to show the temper, disposition, or conduct of the witness in relation to the cause or parties; and not only is this evidence admissible on cross-examination of the witness, but other witnesses may be questioned by the opposite party in relation thereto.<sup>2</sup> It is accordingly competent to prove that he attempted to suborn another witness in the cause to give false testimony,<sup>3</sup> or attempted to dissuade him from attending the trial.<sup>4</sup> So, also, it is competent to prove that a witness proposed, for a certain consideration, to suppress his testimony in the case. Such a proposal is not a collateral matter; it goes directly to show that the witness is corrupt.<sup>5</sup>

(d) **Test of Collateral Matter.** — A test of whether a matter inquired into on cross-examination is collateral to the issues and therefore not subject to contradiction, which has been often approved by the courts, is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?<sup>6</sup>

1. See generally the cases cited in the preceding note, and *infra*, this section, 10. *Impeaching One's Own Witness*.

2. **Interest and Bias.** — See *infra*, this section, 9. *b. Bias of Witness*. And see the following cases:

*England.* — *Atty.-Gen. v. Hitchcock*, 1 Exch. 91, 11 Jur. 478.

*Canada.* — *Reg. v. Chasson*, 16 N. Bruns. 546.

*Alabama.* — *Clark v. Zeigler*, 85 Ala. 154.

*California.* — *Barkly v. Copeland*, 86 Cal. 483.

*Connecticut.* — *Sayles v. Fitz Gerald*, 72 Conn. 391.

*Florida.* — *Eldridge v. State*, 27 Fla. 162; *Bryan v. State*, 41 Fla. 643.

*Georgia.* — *Georgia R., etc., Co. v. Lybrend*, 99 Ga. 421.

*Illinois.* — *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415.

*Iowa.* — *State v. McKinstry*, 100 Iowa 82; *State v. Heacock*, 106 Iowa 191; *State v. Bysong*, 112 Iowa 419. But see *State v. Townsend*, 66 Iowa 741.

*Maryland.* — *Wise v. Ackerman*, 76 Md. 375. *Michigan.* — *Swift Electric Light Co. v. Grant*, 90 Mich. 469.

*Mississippi.* — *Dean v. State*, 78 Miss. 360. *New Hampshire.* — *Cooper v. Hopkins*, 70 N. H. 271.

*New Jersey.* — *Pullen v. Pullen*, 43 N. J. Eq. 136.

*New York.* — *Effray v. Masson*, (C. Pl. Gen. T.) 28 Abb. N. Cas. (N. Y.) 207.

*North Carolina.* — *State v. Roberts*, 81 N. Car. 605; *Cathey v. Shoemaker*, 119 N. Car. 424.

*Oregon.* — *State v. McCann*, 43 Oregon 155.

*Pennsylvania.* — *Gaines v. Com.*, 50 Pa. St. 319; *Beck v. Hood*, 185 Pa. St. 32.

*Utah.* — *Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

**General Credit of Witness and Particular Credit in Action Distinguished.** — *McHugh v. State*, 31 Ala. 317; *Effray v. Masson*, (C. Pl. Gen. T.) 28 Abb. N. Cas. (N. Y.) 207.

**Character of Evidence.** — Testimony offered in cases permitting the bias of a witness to be shown relates to acts, conduct, or statement of the witness tending to show bias or prejudice. *People v. Rice*, (Mich. 1904) 99 N. W. Rep. 860, 11 Detroit Leg. N. 133.

3. **Attempt to Suborn Another Witness.** — *Stafford's Case*, 7 How. St. Tr. 1400; *Queen's Case*, 2 Brod. & B. 312, 6 E. C. L. 160; *People v. Wong Chuey*, 117 Cal. 624; *Williams v. Dickenson*, 28 Fla. 108; *Skinner v. State*, 120 Ind. 127; *Bates v. Holladay*, 31 Mo. App. 169; *Morgan v. Frees*, 15 Barb. (N. Y.) 352; *O'Connor v. National Ice Co.*, 56 N. Y. Super. Ct. 410. See also *Lewis v. Steiger*, 68 Cal. 200; *State v. Harris*, 51 La. Ann. 1105; *Proffer v. Miller*, 69 Mo. App. 501.

**An Attempt to Bribe in Another Case.** — *Cooley v. Norton*, 4 Cush. (Mass.) 93. To similar effect *Hester v. Com.*, 85 Pa. St. 139.

4. **Attempt to Prevent Attendance of Another Witness.** — *State v. Hack*, 118 Mo. 92; *Fitzpatrick v. Riley*, 163 Pa. St. 65. But see *contra*, *Harris v. Tippet*, 2 Camb. 637, criticised in *Morgan v. Frees*, 15 Barb. (N. Y.) 354.

5. **Offer to Suppress Testimony.** — *Barkly v. Copeland*, 86 Cal. 483.

**Offer to Leave Jurisdiction.** — *Barkly v. Copeland*, 86 Cal. 483; *Alward v. Oakes*, 63 Minn. 190; *State v. Downs*, 91 Mo. 19; *Jenkins v. State*, 34 Tex. Crim. 201; *Richards v. State*, 34 Tex. Crim. 277.

6. **Test of Collateral Matter** — *England.* — *Atty.-Gen. v. Hitchcock*, 1 Exch. 91, 11 Jur. 478.

*Arkansas.* — *Butler v. State*, 34 Ark. 480.

*Colorado.* — *Askew v. People*, 23 Colo. 446.

*Indiana.* — *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792; *Welch v. State*, 104 Ind. 347; *Staser v. Hogan*, 120 Ind. 207.

*Louisiana.* — *State v. Donelon*, 45 La. Ann. 744.

*Mississippi.* — *Williams v. State*, 73 Miss. 820; *Garner v. State*, 76 Miss. 515.

*Nebraska.* — *Carter v. State*, 36 Neb. 481; *Johnston v. Spencer*, 51 Neb. 198; *George Burke Co. v. Fowler*, (Neb. 1903) 93 N. W. Rep. 760; *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

*Oregon.* — *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 564.

*Pennsylvania.* — *Hildeburn v. Curran*, 65 Pa. St. 63.

*Texas.* — *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Johnson v. State*, 22 Tex. App. 206; *Drake v. State*, 29 Tex. App. 265; *Davis v. State*, (Tex. Crim. 1893) 20 S. W. Rep. 923;

(2) *Direct Examination*.—The rule that the answer of a witness on a collateral matter cannot be contradicted is confined to answers on cross-examination. Where illegal evidence is introduced on the direct examination of a witness, it is proper to rebut it by testimony either to disprove the fact or to discredit the witness.<sup>1</sup> A party who draws from his own witness irrelevant testimony prejudicial to the opposing party ought not to be heard to object to its contradiction or impeachment on the ground of irrelevancy.<sup>2</sup>

*b. DIRECT CONTRADICTION*—(1) *In General*.—It is scarcely necessary to state that a litigant is entitled to interrogate an adverse witness, and to introduce independent evidence, for the purpose of contradicting material testimony given by him. As bearing on the credit of the witness, it is also permissible to produce evidence in contradiction of his statement as to any fact or circumstance which tends to corroborate or strengthen his testimony, though such statement does not relate directly to the subject-matter of the litigation.<sup>3</sup> The credibility of a witness is always in issue, and evidence of

Lankster *v.* State, (Tex. Crim. 1902) 72 S. W. Rep. 388.

*West Virginia*.—State *v.* Goodwin, 32 W. Va. 177; State *v.* Sheppard, 49 W. Va. 582.

**Test of Irrelevancy of Former Statements of Witness**.—Marx *v.* Bell, 48 Ala. 497; Combs *v.* Winchester, 39 N. H. 13, *approved* Williams *v.* State, 73 Miss. 820.

**1. Materiality of Evidence on Direct Examination**—*United States*.—See Merchants' L. Assoc. *v.* Yoakum, (C. C. A.) 98 Fed. Rep. 251.

*Alabama*.—Sharp *v.* Hall, 86 Ala. 110; Morgan *v.* State, 88 Ala. 223.

*Arkansas*.—McArthur *v.* State, 59 Ark. 431.

*California*.—McKenna *v.* Heinlen, 128 Cal. 97.

*Colorado*.—Grimes *v.* Hill, 15 Colo. 359.

*Illinois*.—Craig *v.* Rohrer, 63 Ill. 325.

*Kentucky*.—Davis *v.* Com., 95 Ky. 19.

*Louisiana*.—State *v.* Donelon, 45 La. Ann. 744.

*Maine*.—State *v.* Sargent, 32 Me. 429.

*Missouri*.—State *v.* McLain, 159 Mo. 340.

*New York*.—Van Tassel *v.* New York, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 299, 2 Misc. (N. Y.) 592, *affirmed* without opinion 142 N. Y. 634.

*Pennsylvania*.—Batdorf *v.* Farmers' Nat. Bank, 61 Pa. St. 179.

*Texas*.—Red *v.* State, 39 Tex. Crim. 414; Battaglia *v.* Thomas, 5 Tex. Civ. App. 563; De Lucenay *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 796. See also Carmona *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 928.

*Virginia*.—Forde *v.* Com., 16 Gratt. (Va.) 547.

*West Virginia*.—State *v.* Goodwin, 32 W. Va. 177.

*Canada*.—D'Avignon *v.* Jones, 9 British Columbia 350.

*Compare* State *v.* Hendrick, (N. J. 1903) 56 Atl. Rep. 247.

Where one party is allowed to put in illegal evidence tending to impeach a witness, he cannot be heard to say that the adverse party could not impeach a witness in that way. This is a just application of the rule that he is not to be heard who alleges things contradictory to each other. State *v.* Slack, 69 Vt. 486.

**Facts Admitted or Established by Other Witnesses**.—Where the facts testified to by a witness, though relevant, have been admitted or

established by other witnesses, it is not error to refuse to allow evidence to be admitted for the purpose of impeaching or discrediting him. People *v.* Shaw, 111 Cal. 171, three judges dissenting; Hardy *v.* U. S., 3 App. Cas. (D. C.) 35.

**Re-examination**.—It has been held that where a witness makes a statement on a collateral matter on re-examination, without objection, his answers cannot be contradicted by other witnesses. State *v.* Blakesley, 43 Kan. 250.

**2.** Craig *v.* Rohrer, 63 Ill. 325. See also Grimes *v.* Hill, 15 Colo. 359; Forde *v.* Com., 16 Gratt. (Va.) 547.

**3. Direct Contradiction**.—Barry *v.* People, 29 Colo. 395; Chicago City R. Co. *v.* Allen, 169 Ill. 287, *affirming* 68 Ill. App. 472; Frank *v.* Manny, 2 Daly (N. Y.) 92; Hardy *v.* Main, 56 Hun (N. Y.) 221; Chesebrough *v.* Conover, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 566, *affirmed* 140 N. Y. 382, 35 N. E. Rep. 633; Younger *v.* State, (Wyo. 1903) 73 Pac. Rep. 551.

**Miscellaneous Illustrations—Evidence Held Admissible**—*United States*.—Southern Bell Telephone, etc., Co. *v.* Watts, 66 Fed. Rep. 460, *affirming* 66 Fed. Rep. 453.

*Alabama*.—Evans *v.* State, 109 Ala. 11; James *v.* State, 133 Ala. 208.

*California*.—Davis *v.* California Powder Works, 84 Cal. 617; People *v.* Freeman, 92 Cal. 359; People *v.* Ward, 105 Cal. 652; People *v.* Piggott, 126 Cal. 509; People *v.* Clarke, 130 Cal. 642; People *v.* Kilvington, (Cal. 1894) 36 Pac. Rep. 13; People *v.* Evans, (Cal. 1895) 41 Pac. Rep. 444.

*Colorado*.—Grimes *v.* Hill, 15 Colo. 359; Pueblo Electric St. R. Co. *v.* Sherman, 25 Colo. 114; Globe Smelting, etc., Co. *v.* Spann, 6 Colo. App. 146; Roberts *v.* Greig, 15 Colo. App. 378.

*Connecticut*.—State *v.* Stockford, 77 Conn. 227.

*District of Columbia*.—Ofenstein *v.* Bryan, 20 App. Cas. (D. C.) 1.

*Georgia*.—East Tennessee, etc., R. Co. *v.* Daniel, 91 Ga. 768; Tiller *v.* State, 111 Ga. 840.

*Illinois*.—Butler *v.* Cornell, 148 Ill. 276.

*Indiana*.—State *v.* Taylor, 4 Ind. App. 296.

*Iowa*.—State *v.* Allen, 100 Iowa 7; State *v.* Watson, 102 Iowa 651; State *v.* Hibner, 115 Iowa 48.



any fact which tends to impeach it, or to demonstrate the improbability of the truth of his assertions, is relevant to the issue and admissible.<sup>1</sup> As has been well said, if a witness fabricate a story with circumstances, the disproof of the circumstances is generally the only possible way of disproving the material facts.<sup>2</sup>

(2) *Cross-examination and Contradiction.* — A party may put almost any question which he considers important to test the accuracy or veracity of a witness, and if the answer is not of a collateral fact the party may contradict it. The rule applied is stated thus: When a party, in cross-examination of a witness, asks irrelevant questions or examines him as to collateral matters, the party is bound by the answers that the witness may give, but when the examination is relevant the party is not thus bound.<sup>3</sup>

c. FORMER CONTRADICTORY STATEMENTS — (1) *General Rule — Oral Statements* — Former statements of a witness inconsistent with or contradictory

*Kentucky.* — *Logan v. Com.*, (Ky. 1895) 29 S. W. Rep. 632; *Sturgeon v. Com.*, (Ky. 1896) 37 S. W. Rep. 679; *Stephens v. Com.*, (Ky. 1898) 47 S. W. Rep. 229.

*Massachusetts.* — *Whitney v. Boston*, 98 Mass. 312; *Riddell v. Thayer*, 127 Mass. 487; *Com. v. Goodnow*, 154 Mass. 487; *Cloutier v. Grafton*, etc., R. Co., 162 Mass. 471.

*Michigan.* — *Butterfield v. Gilchrist*, 63 Mich. 155; *Van Dusen v. Letellier*, 78 Mich. 492; *Fraser v. Haggerty*, 86 Mich. 521; *People v. De France*, 104 Mich. 563; *People v. McDonald*, 133 Mich. 366, 10 Detroit Leg. N. 175.

*Minnesota.* — *Pierce v. Brennan*, 88 Minn. 50. See also *Brace v. St. Paul City R. Co.*, 87 Minn. 292.

*Missouri.* — *State v. Foley*, 130 Mo. 482; *State v. Goddard*, 162 Mo. 198.

*New Hampshire.* — *Cooper v. Hopkins*, 70 N. H. 271; *Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292.

*New York.* — *People v. Christy*, 65 Hun (N. Y.) 349, 8 N. Y. Crim. 480; *Campbell v. Campbell*, 54 N. Y. Super. Ct. 381; *Birnbaum v. Lord*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 535, affirmed (C. Pl. Gen. T.) 7 Misc. (N. Y.) 493; *New York v. Roller*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 324; *William McShane Co. v. Heilner*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 720; *Mautner v. Pike*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 500; *Lurie v. Levy*, (Supm. Ct. App. T.) 86 N. Y. Supp. 174.

*North Carolina.* — *Edwards v. Sullivan*, 8 Ired. L. (30 N. Car.) 302.

*Ohio.* — *Mt. Adams*, etc., R. Co. v. *Isaacs*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 177.

*Pennsylvania.* — *Com v. Weber*, 167 Pa. St. 153, 36 W. N. C. (Pa.) 193; *Com v. Craig*, 19 Pa. Super. Ct. 81.

*Rhode Island.* — *Benson v. New York*, etc., R. Co., 23 R. I. 147.

*Texas.* — *McCamant v. Roberts*, 80 Tex. 316; *Gilmour v. Heinze*, 85 Tex. 76; *Glasgow v. Henbree*, (Tex. Civ. App. 1898) 44 S. W. Rep. 679; *Houston*, etc., R. Co. v. *Turner*, (Tex. Civ. App. 1904) 78 S. W. Rep. 712; *Easterwood v. State*, 34 Tex. Crim. 400; *Davis v. State*, 36 Tex. Crim. 548; *Fretwell v. State*, 43 Tex. Crim. 501; *McAneer v. State*, 43 Tex. Crim. 518; *Smith v. State*, 44 Tex. Crim. 53; *Druse v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 803; *Blanco v. State*, (Tex. Crim. 1900)

57 S. W. Rep. 828; *Fletcher v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 173.

*Vermont.* — *Baker v. Sherman*, 71 Vt. 439; *Lynds v. Plymouth*, 73 Vt. 216.

*Evidence Held Inadmissible or Insufficient to Affect Credit.* — *Felker v. State*, 54 Ark. 489; *Carter v. Clark*, 92 Me. 225; *Com. v. Hughes*, 183 Mass. 221; *Plyer v. German-American Ins. Co.*, 3 Silv. App. (N. Y.) 46, has fully reported 121 N. Y. 689, reversing 48 Hun (N. Y.) 618. 1 N. Y. Supp. 396; *McCoy v. Munro*, 76 N. Y. App. Div. 435; *Simon v. Manning*, 99 N. Car. 327; *Re Silvius*, 3 Lack. Leg. N. (Pa.) 84; *Patterson v. Smith*, 73 Vt. 360.

That a witness has to put on glasses when reading or writing has no tendency to show that his testimony as to acts seen by him when not wearing them is untrue. *Com. v. Hughes*, 183 Mass. 221.

**Scientific Books as Contradictory Evidence.** — While, by the weight of authority, medical and other books on the inductive sciences are inadmissible as independent, substantive, or affirmative evidence, if opinions to which a witness testifies are based on the teachings of particular books and the books do not sustain his views, they may be introduced to contradict him. *Eggart v. State*, 40 Fla. 527; *Pinney v. Cahill*, 48 Mich. 584; *Ripon v. Bittell*, 30 Wis. 614.

**The Original Field Book of a Survey**, referred to by a witness as authority for testimony given by him, may be introduced in evidence to contradict him. *Baker v. Sherman*, 71 Vt. 439.

**Hotel Register as Contradictory Evidence.** — *Gilmour v. Heinze*, 85 Tex. 76.

1. *Tiller v. State*, 111 Ga. 840; *Pharo v. Beadleston*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 424, affirming (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 816.

**A Witness May Be Contradicted by Circumstances** as well as by the statements of other witnesses contrary to his own. *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Streicher v. Third Ave. R. Co.*, 39 N. Y. App. Div. 658.

2. *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179, per Thompson, C. J.

3. **Cross-examination and Contradiction.** — *Lynds v. Plymouth*, 73 Vt. 216. See also *State v. Intoxicating Liquors*, 85 Me. 304. See *supra*, this division of this section, a. *Materiality of Evidence*.

of his testimony may be given in evidence to discredit him, provided that, in jurisdictions where it is necessary, the proper foundation has been laid and the making of the statement has been denied by the witness,<sup>1</sup> and, of

**1. When Witness Denies Having Made Statement.**—*England.*—Long *v.* Hitchcock, 9 C. & P. 619, 38 E. C. L. 255.

*Canada.*—Reg. *v.* Sanderson, 15 Ont. 106.

*United States.*—Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469; Ludtke *v.* Hertzog, (C. C. A.) 72 Fed. Rep. 142; *In re* Wong Sing, 83 Fed. Rep. 147; *In re* Ho Quai Sin, 84 Fed. Rep. 310; National Bank *v.* Fidelity, etc., Co., 89 Fed. Rep. 819; Chicago, etc., R. Co. *v.* De Clow, (C. C. A.) 124 Fed. Rep. 142.

*Alabama.*—Cotton *v.* State, 87 Ala. 75; Allen *v.* State, 87 Ala. 107; Burney *v.* Torrey, 100 Ala. 157; Holley *v.* State, 105 Ala. 100; Henson *v.* State, 120 Ala. 316; Alabama Mineral R. Co. *v.* Jones, 121 Ala. 113; St Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451; Ray *v.* State, 126 Ala. 9; Paradise *v.* State, 131 Ala. 26; Stevens *v.* State, 133 Ala. 28; Parrish *v.* State, 139 Ala. 16; Jones *v.* State, (Ala. 1904) 37 So. Rep. 390.

*Arizona.*—Tamborino *v.* Territory, (Ariz. 1901) 64 Pac. Rep. 492, *affirming* (Ariz. 1900) 62 Pac. Rep. 693.

*Arkansas.*—Billings *v.* State, 52 Ark. 303; Magness *v.* State, 67 Ark. 594; Little Rock, etc., R. Co. *v.* Voss, (Ark. 1892) 18 S. W. Rep. 172.

*California.*—People *v.* Murray, 85 Cal. 350; People *v.* Rushing, 130 Cal. 449; Schneider *v.* Market St. R. Co., 134 Cal. 482; Thomas *v.* Northwestern Mut. L. Ins. Co., 142 Cal. 79; Gasquet *v.* Pechin, 143 Cal. 515.

*Connecticut.*—State *v.* Bradnack, 69 Conn. 212; Palmer *v.* Hartford Dredging Co., 73 Conn. 182.

*Florida.*—Stewart *v.* State, 42 Fla. 591.

*Georgia.*—Evans *v.* State, 95 Ga. 468; Columbus R. Co. *v.* Peddy, 120 Ga. 589; Jordan *v.* State, 120 Ga. 864.

*Idaho.*—State *v.* Crea, (Idaho 1904) 76 Pac. Rep. 1013.

*Illinois.*—Phillips *v.* Kesterson, 154 Ill. 572; Lochnitz *v.* Stockon, 31 Ill. App. 217; Dick *v.* People, 47 Ill. App. 223; Consolidated Coal Co. *v.* Seniger, 79 Ill. App. 456.

*Indiana.*—Staser *v.* Hogan, 120 Ind. 207; Hess *v.* Redding, 2 Ind. App. 199.

*Indian Territory.*—Wilson *v.* U. S., (Indian Ter. 1904) 82 S. W. Rep. 924.

*Iowa.*—Moeller *v.* Karhoff, 98 Iowa 726; State *v.* Wright, 112 Iowa 436; State *v.* Carter, 121 Iowa 135; Gregory *v.* Wabash R. Co., (Iowa 1904) 101 N. W. Rep. 761.

*Kentucky.*—Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496; Franklin *v.* Com., 105 Ky. 237; Joseph *v.* Com., (Ky. 1886) 1 S. W. Rep. 4; Draughan *v.* Com., (Ky. 1900) 56 S. W. Rep. 18; Powers *v.* Com., (Ky. 1902) 70 S. W. Rep. 644, 1050.

*Louisiana.*—State *v.* Lewis, 44 La. Ann. 958; State *v.* Scott, 48 La. Ann. 1418.

*Maine.*—Milford *v.* Veazie, (Me. 1888) 14 Atl. Rep. 730.

*Maryland.*—Turnbull *v.* Maddux, 68 Md. 579; Caledonian Ins. Co. *v.* Traub, 83 Md. 524.

*Massachusetts.*—Hathaway *v.* Crocker, 7

Met. (Mass.) 262; Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338; Brigham *v.* Clark, 100 Mass. 430; Parkenson *v.* Bemis, 153 Mass. 280; Tyler *v.* Old Colony R. Co., 157 Mass. 336; Liddle *v.* Old Lowell Nat. Bank, 158 Mass. 15; Com. *v.* Smith, 163 Mass. 411; Jones *v.* New York L. Ins. Co., 168 Mass. 245; Mullins *v.* Peaslee, 180 Mass. 161.

*Michigan.*—Stackable *v.* Stackable, 65 Mich. 515; Tolbert *v.* Burke, 89 Mich. 132; Johnston Harvester Co. *v.* Miller, 72 Mich. 265; Swift Electric Light Co. *v.* Grant, 90 Mich. 469; Langworthy *v.* Green Tp., 95 Mich. 93; Culver *v.* Smith, 131 Mich. 359; McClellan *v.* Ft. Wayne, etc., R. Co., 105 Mich. 101.

*Minnesota.*—State *v.* Barrett, 40 Minn. 65.

*Mississippi.*—Williams *v.* State, 73 Miss. 820; McCall *v.* State, (Miss. 1901) 29 So. Rep. 1003.

*Missouri.*—Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165; Spohn *v.* Missouri Pac. R. Co., 101 Mo. 417; State *v.* Taylor, 136 Mo. 66; State *v.* Burns, 148 Mo. 167; Trauerman *v.* Lippincott, 39 Mo. App. 478; State *v.* Higgins, 124 Mo. 640.

*Montana.*—State *v.* Hurst, 23 Mont. 484; State *v.* Broadbent, 27 Mont. 342; Michener *v.* Fransham, 29 Mont. 240.

*Nebraska.*—Bartlett *v.* Cheesebrough, 32 Neb. 339; Stratton *v.* Dole, 45 Neb. 472; Tatum *v.* State, 61 Neb. 229.

*New Hampshire.*—Judd *v.* Claremont, 66 N. H. 418; Guertin *v.* Hudson, 71 N. H. 505.

*New Jersey.*—Dimmick *v.* W. Fred Quimby Co., (N. J. 1898) 41 Atl. Rep. 101.

*New York.*—People *v.* Cox, 21 Hun (N. Y.) 47, *affirmed* 83 N. Y. 610; Quincy *v.* Warner, 78 Hun (N. Y.) 286; Humes *v.* Proctor, 73 Hun (N. Y.) 265; People *v.* Brackett, 85 Hun (N. Y.) 138; Fluhr *v.* Manhattan R. Co., 51 N. Y. App. Div. 627; Schilling *v.* Smith, 76 N. Y. App. Div. 464; Union Trust Co. *v.* Seelig, 83 N. Y. App. Div. 568; Brunner *v.* Cook, etc., Co., 89 N. Y. App. Div. 406; Tripp *v.* Kirmes, (C. Pl. Gen. T.) 2 N. Y. Supp. 19; Palmeri *v.* Manhattan R. Co., (Supm. Ct. Gen. T.) 14 N. Y. Supp. 468; Barrett *v.* Manhattan R. Co., (Supm. Ct. Gen. T.) 18 N. Y. Supp. 71; Frankel *v.* Wolf, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 190; Dudley *v.* Satterlee, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 538; Patterson Gas Governor Co. *v.* Lichtenstein Bros. Co., (C. Pl. Gen. T.) 9 Misc. (N. Y.) 126; Patchin *v.* Astor Mut. Ins. Co., 13 N. Y. 268; Carpenter *v.* Ward, 30 N. Y. 243; Schell *v.* Plumb, 55 N. Y. 592; Sitterly *v.* Gregg, 90 N. Y. 686; People *v.* McCallam, 103 N. Y. 587; People *v.* Schuyler, 106 N. Y. 298; Ankersmit *v.* Tuch, 114 N. Y. 51; Matter of Snelling, 136 N. Y. 515; Woodrick *v.* Woodrick, 141 N. Y. 457; Squier *v.* Hanover F. Ins. Co., 162 N. Y. 552, *affirmed* 18 N. Y. App. Div. 575; Jamieson *v.* New York, etc., R. Co., 162 N. Y. 630, *affirming* 11 N. Y. App. Div. 50; People *v.* Werner, 174 N. Y. 132, *reversing* (Supm. Ct. App. Div.) 66 N. Y. Supp. 1130.

*North Carolina.*—Ellis *v.* Harris, 106 N.

course, that such statement is material, and not merely collateral, to the issue.<sup>1</sup> The time of the making of the contradictory statement is immaterial.<sup>2</sup> The statement may be proved, though made after the witness to be discredited had testified and been discharged.<sup>3</sup>

(2) *Written Statements*—(a) *In General*.—It is competent to impeach a witness by putting in evidence, in contradiction of a material portion of his testimony, any written statement which he may have made out of court.<sup>4</sup>

Car. 395; *State v. Crane*, 110 N. Car. 530; *State v. Robertson*, 121 N. Car. 551.

*Ohio*.—*Mimms v. State*, 16 Ohio St. 221; *Heintz v. Caldwell*, 9 Ohio Cir. Dec. 412, 16 Ohio Cir. Ct. 630.

*Oregon*.—*Joseph v. Furnish*, 27 Oregon 260; *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 564.

*Pennsylvania*.—*Baldi v. Metropolitan L. Ins. Co.*, 24 Pa. Super. Ct. 275; *Wilson v. Wilson*, 137 Pa. St. 269; *Com. v. Wertz*, 161 Pa. St. 591; *Track v. Gerber*, 167 Pa. St. 316; *Akin v. McKeown*, 189 Pa. St. 39; *Dampman v. Pennsylvania R. Co.*, 166 Pa. St. 520.

*South Carolina*.—*Duckett v. Pool*, 34 S. Car. 311; *Stapp v. National L., etc., Assoc.*, 37 S. Car. 417; *Mason v. Southern R. Co.*, 58 S. Car. 582.

*Texas*.—*Texas, etc., Coal Co. v. Lawson*, 10 Tex. Civ. App. 491; *Missouri, etc., R. Co. v. Sanders*, 12 Tex. Civ. App. 5; *Houston, etc., R. Co. v. Harris*, 30 Tex. Civ. App. 179; *Luke v. El Paso, (Tex. Civ. App. 1900)* 60 S. W. Rep. 363; *McCarty v. Hartford F. Ins. Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 934; *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1903) 76 S. W. Rep. 794; *Bailey v. Fly*, (Tex. Civ. App. 1904) 80 S. W. Rep. 675; *Johnson v. State*, 22 Tex. App. 206; *Hawkins v. State*, 27 Tex. App. 273; *Levy v. State*, 28 Tex. App. 203; *Phipps v. State*, 36 Tex. Crim. 216; *Red v. State*, 39 Tex. Crim. 414; *Cecil v. State*, 44 Tex. Crim. 450; *Smith v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 520; *Ryan v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 599; *Bean v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 946; *Webb v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 493; *Landers v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 557; *Shaffer v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1072; *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305; *Jenkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 312; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397; *Cross v. McKinley*, 81 Tex. 332.

*Utah*.—*Shaw v. Salt Lake City R. Co.*, 27 Utah 76.

*Vermont*.—*Manley v. Delaware, etc., Canal Co.*, 69 Vt. 101.

*Washington*.—*State v. Walters*, 7 Wash. 246.

*West Virginia*.—*Welch v. Franklin Ins. Co.*, 23 W. Va. 303; *State v. Sheppard*, 49 W. Va. 582.

*Wisconsin*.—*Welch v. Abbott*, 72 Wis. 512; *Heddles v. Chicago, etc., R. Co.*, 74 Wis. 239; *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652.

**The Intentional Falsity** of the contradictory statement of the witness need not be shown in order to affect his credibility. *Craig v. Rohrer*, 63 Ill. 325.

**Presence of Parties**.—It is not necessary that

either of the parties be present to render contradictory statements made by a witness out of court admissible to discredit him. *Briggs v. Wheeler*, 16 Hun (N. Y.) 583, *approved* *Frankel v. Wolf*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 190.

**Explaining Testimony of Witness Called for Purpose of Impeachment**.—The answer of the witness called on to give discrediting testimony, that he did not hear the first witness make the statements in regard to which he was questioned, is final, and it is not permissible to call other witnesses to show that the impeaching witness had previously left the place where the supposed statements were made. *State v. Morse*, 35 Oregon 462.

**The Witness to Be Impeached Must Be Definitely Known** in order to authorize the introduction of the impeaching evidence; and where two of a party's witnesses are asked whether they made a certain statement at a designated time and place, for the purpose of laying a predicate for their impeachment, and the witnesses deny that such statement was made, the testimony of the impeaching witness that such statement was made by one of said witnesses in the presence of the other, without being able to specify which of the two witnesses made the statement, is incompetent, and neither of the witnesses can be impeached by such testimony. *Southern R. Co. v. Williams*, 113 Ala. 620.

1. See *supra*, this section 8. a. (1) (b) *Former Statements of Witness*.

2. **Time of Making Statement Immaterial**.—*Masterton v. Boyce*, 2 Silv. Sup. (N. Y.) 205.

3. *Thompson v. Ish*, 99 Mo. 160.

4. **Impeachment by Former Written Statements**—*California*.—*Nichol v. Laumeister*, 102 Cal. 658.

*Illinois*.—*Illinois Cent. R. Co. v. Wade*, 206 Ill. 523.

*Iowa*.—*Rosenthal v. Bilger*, 86 Iowa 246; *State v. Wright*, 112 Iowa 436; *State v. Trusty*, 122 Iowa 82.

*Maine*.—*Milford v. Veazie*, (Me. 1888) 14 Atl. Rep. 730.

*Maryland*.—*Pentz v. Pennsylvania F. Ins. Co.*, 92 Md. 444.

*Massachusetts*.—*Barker v. Lawrence Mfg. Co.*, 176 Mass. 203.

*Missouri*.—*Goldstein v. Royal Cigar Co.*, 51 Mo. App. 584; *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471.

*Nebraska*.—*Continental Bldg., etc., Assoc. v. Aulgur*, 54 Neb. 115.

*New York*.—*Hanlon v. Ehrich*, 80 N. Y. App. Div. 359, 86 N. Y. App. Div. 441, *affirmed* 178 N. Y. 474, 71 N. E. Rep. 12.

*North Dakota*.—*Baumer v. French*, 8 N. Dak. 319.

*Ohio*.—*Spaulding v. Toledo Consol. St. R. Co.*, 10 Ohio Cir. Dec. 660, 20 Ohio Cir. Ct. 99.



This is most frequently done by the introduction of letters written by the witness,<sup>1</sup> or of affidavits made by him,<sup>2</sup> but any other form of written statement is equally admissible. In the notes will be found specific instances of written statements made by witnesses which were held admissible for the purpose of discrediting them.<sup>3</sup>

(b) **Secondary Evidence of Written Statements.** — When the party seeking to impeach the witness is unable to obtain possession of the writing containing contradictory statements, he may prove its contents, subject, of course, to the rules governing the introduction of secondary evidence.<sup>4</sup>

*Pennsylvania.* — Dawson v. Pittsburgh, 159 Pa. St. 317; Frack v. Gerber, 167 Pa. St. 316, 36 W. N. C. (Pa.) 230; Hartley v. Weideman, 175 Pa. St. 309; Hughes v. Delaware, etc., Canal Co., 176 Pa. St. 254.

*Texas.* — Bernheim v. Lyon, 5 Tex. Civ. App. 716; Matula v. Lane, 22 Tex. Civ. App. 391; St. Louis South Western R. Co. v. Patterson, (Tex. Civ. App. 1903) 73 S. W. Rep. 987.

**Obituary Notice Inadmissible.** — In proceedings to contest a will, where it was sought to impeach the testimony of the contestants by the introduction of an obituary notice of the testatrix, published with the sanction of one of the contestants, it was held that it was inadmissible for that purpose. Matter of Hull, 117 Iowa 738.

**1. Contradiction by Letters of Witness** — *England.* — Queen's Case, 2 Brod. & B. 288, 6 E. C. L. 149; De Saily v. Morgan, 2 Esp. 691.

*Alabama.* — Sharp v. Hall, 86 Ala. 110.  
*Florida.* — Florida Cent., etc., R. Co. v. Mooney, (Fla. 1903) 33 So. Rep. 1010.

*Illinois.* — Western Manufacturers' Mut. Ins. Co. v. Boughton, 136 Ill. 317, affirming 37 Ill. App. 183; Perishable Freight Transp. Co. v. O'Neill, 41 Ill. App. 423.

*Kansas.* — Anthony v. Jones, 39 Kan. 529; Southern Kansas R. Co. v. Painter, 53 Kan. 414; Gregg v. Berkshire, 10 Kan. App. 579, 62 Pac. Rep. 550.

*Maryland.* — De Sobry v. De Laistre, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535.

*Massachusetts.* — Foster v. Worthing, 146 Mass. 607; Buffum v. York Mfg. Co., 175 Mass. 471.

*Michigan.* — Prentiss v. Bates, 88 Mich. 567.

*Minnesota.* — State v. Tall, 43 Minn. 273.

*Mississippi.* — Bacot v. Hazlehurst Lumber Co., (Miss. 1898) 23 So. Rep. 481.

*New Hampshire.* — Tabor v. Judd, 62 N. H. 288; Illinois University v. Spalding, 71 N. H. 163.

*New York.* — Baker v. Arnold, 3 Cai. (N. Y.) 279; People v. Hayes, 140 N. Y. 484; People v. Cassidy, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 349, affirmed in 133 N. Y. 612; People v. Flechter, 44 N. Y. App. Div. 199, 14 N. Y. Crim. 328; Jacoby v. Fox, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 767.

*Rhode Island.* — Barrett v. Dodge, 16 R. I. 740.

*Texas.* — Dooley v. Miller, 2 Tex. Civ. App. 132; White v. Epperson, (Tex. Civ. App. 1903) 73 S. W. Rep. 851; Boatright v. State, 42 Tex. Crim. 442.

**Memoranda in a Witness's Handwriting,** attached to letters written by the witness, may

be introduced for the purpose of impeachment. Anthony v. Jones, 39 Kan. 529.

**2. Contradiction by Affidavits** — *England.* — *Ex p.* Marjoribanks, 1 De G. 466.

*United States.* — Tucker v. U. S., 151 U. S. 164; U. S. v. Pagliano, 53 Fed. Rep. 1001; People's Saving Inst. v. Miles, (C. C. A.) 76 Fed. Rep. 252.

*Alabama.* — Cotton v. State, 87 Ala. 75.

*Arkansas.* — St. Louis, etc., R. Co. v. Faist, 68 Ark. 587.

*California.* — People v. Samonset, 97 Cal. 448.

*Georgia.* — Georgia R., etc., Co. v. Lybrend, 99 Ga. 421.

*Illinois.* — Fein v. Covenant Mut. Ben. Assoc., 60 Ill. App. 274.

*Iowa.* — Walrod v. Webster County, 110 Iowa 349.

*Minnesota.* — Le May v. Brett, 81 Minn. 506; Yoki v. First State Bank, 87 Minn. 295.

*Missouri.* — Sullivan v. Jefferson Ave. R. Co., 133 Mo. 1.

*New York.* — Hine v. Cushing, 53 Hun (N. Y.) 519; Carter White Lead Co. v. Pounds, 65 N. Y. Div. 476; Benedict v. Deshel, 77 N. Y. App. Div. 276. Compare Leggett v. Watertown, 93 N. Y. App. Div. 80.

*Texas.* — Trinity County Lumber Co. v. Denham, 88 Tex. 203.

And see *infra*, this section, (3) *Former Testimony of Witness.*

**3. Allegations in Verified Pleadings.** — Fisher v. Denver Nat. Bank, 22 Colo. 373; Floyd v. Thomas, 108 N. Car. 93; Com. v. Mosier, 135 Pa. St. 231; Smith v. Traders Nat. Bank, 74 Tex. 457. Compare State v. Brown, 100 Iowa 50.

**Petition for New Trial.** — People v. Samonset, 97 Cal. 448; Bellows v. Sowles, 59 Vt. 63.

**Physician's Certificate.** — Smith v. Standard L., etc., Ins. Co., 80 Minn. 291; Deutschmann v. Third Ave. R. Co., 87 N. Y. App. Div. 503.

**Written Report of the Employees of a Corporation.** — Chicago, etc., R. Co. v. Artery, 137 U. S. 507; Freel v. Market St. Cable R. Co., 97 Cal. 40; Illinois Cent. R. Co. v. Wade, 206 Ill. 523, reversing 108 Ill. App. 423. Compare Kellyville Coal Co. v. Witt, 99 Ill. App. 344.

**The Prosecuting Witness in a Criminal Case** may be impeached by the statements in his sworn complaint against the defendant. Com. v. Snee, 145 Mass. 351. Compare Com. v. Acton, 165 Mass. 11.

**4. Secondary Evidence of Written Statements.** — Weston v. Weston, 86 N. Y. App. Div. 159; Lewandowski v. State, 44 Tex. Crim. 511. See generally the title SECONDARY EVIDENCE, vol. 25, p. 161.

(c) **Extent to Which Statements Admissible.** — Where the former statements, by which it is sought to impeach a witness, are embodied in a writing, and such writing contains nothing except what is clearly contradictory of material testimony given by the witness, the whole of the writing must be offered in evidence before it is allowed to be read. But where the writing contains irrelevant or incompetent matter, in addition to some parts that are material, competent, and contradictory of the witness, only the latter parts should be received and read in evidence.<sup>1</sup> Likewise, in laying the foundation for the introduction of impeaching evidence, the questions put to the witness concerning his previous oral or written statements should be confined to the material and contradictory parts thereof.<sup>2</sup>

(d) **Authentication of Writing.** — A written contradictory statement, not admitted by the witness, is unavailable as impeaching evidence, unless properly authenticated.<sup>3</sup> But where the genuineness of the statement is acknowledged by the witness, it is admissible for the purpose of impeachment without further proof, though it was not, in fact, signed by the witness.<sup>4</sup>

(3) **Former Testimony of Witness** — (a) **Rule Stated.** — A witness may be impeached by showing that his testimony differs materially from that given by him at a previous time, relative to the same matter. And this is true whether the previous testimony was given in a former trial of the same action;<sup>5</sup> in another action<sup>6</sup> at a preliminary hearing or

**1. Extent to Which Former Statements Admissible.** — *People v. Cole*, 127 Cal. 545; *Miller v. Preble*, 142 Ind. 632; *Hanlon v. Ehrich*, 178 N. Y. 474, affirming 80 N. Y. App. Div. 359; *Donaldson v. Alexander*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 356; *Conway v. Stevens*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 243; *Saranac, etc., R. Co. v. Arnold*, 41 N. Y. App. Div. 482.

**2.** *Ragland v. State*, 125 Ala. 12; *People v. Lambert*, 120 Cal. 170. Compare *People v. Glaze*, 139 Cal. 154.

**3. Necessity for Authentication.** — *Burton v. State*, (Ala. 1904) 37 So. Rep. 435; *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169; *Omaha L. & T. Co. v. Douglas County*, 62 Neb. 1; *Terry v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 382. See also *Solari v. Snow*, 101 Cal. 387.

**Proof of the Signature Held Sufficient Authentication.** — *Illinois Cent. R. Co. v. Wade*, 206 Ill. 523; *Pennsylvania F. Ins. Co. v. Carnahan*, 10 Ohio Cir. Dec. 225, 19 Ohio Cir. Ct. 97.

**Mere Receipt of Letter Not Sufficient.** — *Baird Lumber Co. v. Devlin*, 124 Ala. 245; *State v. Tolliver*, 47 La. Ann. 1099.

**When Unsigned Paper Admissible.** — In *Faseler v. Kothman*, (Tex. Civ. App. 1902) 70 S. W. Rep. 321, it was held that where a witness swore that he did not ask for an extension of time for the payment of a note, it was competent, for the purpose of contradicting him, to introduce in evidence an unsigned instrument purporting to be such an extension, which the payee of the note had previously sworn the witness brought to him to sign.

**4.** *Cross v. McKinley*, 81 Tex. 332.

**5. Testimony at Former Trial** — *United States*. — *People's Sav. Inst. v. Miles*, (C. C. A.) 76 Fed. Rep. 252.

*Georgia*. — *Williams v. State*, 69 Ga. 11; *Lewis v. State*, 91 Ga. 168.

*Illinois*. — *Gates v. Gilmour*, 86 Ill. App. 215.

*Iowa*. — *Henry v. Sioux City, etc., R. Co.*,

75 Iowa 84; *Wacha v. Brown*, 78 Iowa 432; *Hibbard v. Zenor*, 82 Iowa 505; *Rosenthal v. Bilger*, 86 Iowa 246; *Klotz v. James*, 96 Iowa 1; *State v. Forsythe*, 99 Iowa 1; *Cullison v. Lindsay*, 108 Iowa 124.

*Kentucky*. — *Hendron v. Robinson*, 9 B. Mon. (Ky.) 503.

*Maine*. — *State v. McDonald*, 65 Me. 466.

*Massachusetts*. — *Elmer v. Fessenden*, 154 Mass. 427; *Clogston v. Martin*, 182 Mass. 469.

*Michigan*. — *Pelton v. Schmidt*, 104 Mich. 345.

*Minnesota*. — *Bennett v. Syndicate Ins. Co.*, 43 Minn. 45.

*Missouri*. — *Kreibohm v. Yancey*, 154 Mo. 67.

*Nebraska*. — *Bartlett v. Cheesebrough*, 32 Neb. 339.

*New Jersey*. — *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316.

*New York*. — *Birnbaum v. Lord*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 535.

*Ohio*. — *Pennsylvania Co. v. Trainer*, 5 Ohio Cir. Dec. 519, 12 Ohio Cir. Ct. 66.

*Texas*. — *Galveston, etc., R. Co. v. Porfert*, 1 Tex. Civ. App. 716; *Allen v. Conn*, (Tex. Civ. App. 1896) 37 S. W. Rep. 192.

*Vermont*. — *Bellows v. Sowles*, 59 Vt. 63.

*Washington*. — *Klepsch v. Donald*, 8 Wash. 162.

*Wisconsin*. — *Waterman v. Chicago, etc., R. Co.*, 82 Wis. 613.

**6. Testimony in Another Action** — *United States*. — *Toplitz v. Hedden*, 146 U. S. 252.

*Indiana*. — *McAfee v. Montgomery*, 21 Ind. App. 196.

*Massachusetts*. — *Riley v. Tolman*, 181 Mass. 335; *Clogston v. Martin*, 182 Mass. 469.

*Michigan*. — *Graham v. Myers*, 67 Mich. 277.

*Mississippi*. — *Magee v. State*, (Miss. 1897) 21 So. Rep. 130.

*New York*. — *Donaldson v. Alexander*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 356.

examination;<sup>4</sup> at a coroner's inquest;<sup>2</sup> before the grand jury;<sup>3</sup> or in any other judicial proceeding.<sup>4</sup>

(b) **Mode of Proof**—*aa.* BY PERSONS WHO HEARD TESTIMONY.—The former testimony of a witness may be proved by any other person, competent as a witness, who heard it and recollects it.<sup>5</sup> Thus, if the former testimony was given in a previous trial of the same action, it may be proved by other witnesses;<sup>6</sup> if before the grand jury, by members thereof;<sup>7</sup> if at a coroner's inquest, by the coroner,<sup>8</sup> or by members of the coroner's jury;<sup>9</sup> and if before a court of preliminary inquiry, by the presiding judge thereof.<sup>10</sup>

*bb.* BY STENOGRAPHER.—After being duly sworn, the stenographer who took

*Pennsylvania.*—*Tisch v. Utz*, 142 Pa. St. 186.

*South Carolina.*—*Sherard v. Richmond*, etc., R. Co., 35 S. Car. 467.

**1. Testimony at Preliminary Hearing**—*Canada.*—*Reg. v. Troop*, 30 Nova Scotia 339; *Reg. v. Ciarlo*, 6 Quebec Q. B. 144.

*United States.*—*U. S. v. Ford*, 33 Fed. Rep. 861.

*Alabama.*—*Floyd v. State*, 82 Ala. 16; *Morris v. State*, 124 Ala. 44; *Angling v. State*, 137 Ala. 17.

*California.*—*People v. Hawley*, 111 Cal. 78; *People v. Chrisman*, 135 Cal. 282; *People v. Leung Ock*, 141 Cal. 323.

*Georgia.*—*Brown v. State*, 76 Ga. 623; *Klug v. State*, 77 Ga. 734.

*Michigan.*—*People v. Oblaser*, 104 Mich. 579.

*Texas.*—*Hudson v. State*, 28 Tex. App. 323; *Jackson v. State*, 33 Tex. Crim. 281; *Copeland v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 589.

*Compare State v. Parker*, 132 N. Car. 1014.

**2. Testimony at Coroner's Inquest**—*England.*—*Rex v. Oldroyd*, R. & R. C. C. 88.

*Alabama.*—*Jones v. State*, 120 Ala. 303.

*California.*—*People v. Devine*, 44 Cal. 452; *People v. Bushton*, 80 Cal. 160; *People v. Smith*, 134 Cal. 453.

*Delaware.*—*Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199.

*Illinois.*—*Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; *Knights' Templars*, etc., *L. Indemnity Co. v. Crayton*, 209 Ill. 550, affirming 110 Ill. App. 648; *Cox v. Chicago*, etc., R. Co., 92 Ill. App. 15.

*Kentucky.*—*Wren v. Louisville*, etc., R. Co., (Ky. 1892) 20 S. W. Rep. 215.

*Missouri.*—*State v. Gatlin*, 170 Mo. 354.

*Montana.*—*Mulville v. Pacific Mut. L. Ins. Co.*, 19 Mont. 95.

*New York.*—*Stephens v. People*, 19 N. Y. 549; *Lustiz v. New York*, etc., R. Co., 65 Hun (N. Y.) 547.

*North Carolina.*—*State v. Dixon*, 131 N. Car. 808.

*South Carolina.*—*State v. Jones*, 29 S. Car. 201.

*Virginia.*—*Wormeley v. Com.*, 10 Gratt. (Va.) 658; *New York*, etc., R. Co. *v. Kellam*, 83 Va. 851.

**3. Testimony Before Grand Jury**—*United States.*—*U. S. v. Smith*, 47 Fed. Rep. 501.

*Kentucky.*—*Dean v. Com.*, (Ky. 1904) 78 S. W. Rep. 1112.

*Missouri.*—*State v. Ragsdale*, 59 Mo. App. 590.

*Texas.*—*Clanton v. State*, 13 Tex. App. 139; *Scott v. State*, 23 Tex. App. 521; *Ripsey v. State*, 29 Tex. App. 37; *Morton v. State*, 43 Tex. Crim. 533; *Wooley v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1054; *Parker v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1066; *Gibson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 812.

**4. Testimony in Supplementary Proceedings.**—*Boyd v. Boyd*, 164 N. Y. 234, reversing 21 N. Y. App. Div. 361; *Desbecker v. Cauffman*, 169 N. Y. 547. And see *Arnold v. Caldwell*, 1 Manitoba 81, 155.

But where it is provided by statute that a wife shall not testify for or against her husband without his consent, her testimony cannot be impeached by proof of former testimony given in supplementary proceedings without her husband's consent. *Aldous v. Olverson*, (S. Dak. 1903) 95 N. W. Rep. 917.

**Testimony Before United States Commissioner.**—*U. S. v. Pagliano*, 53 Fed. Rep. 1001.

**Testimony Before Auditor.**—*Tobin v. Jones*, 143 Mass. 448. And see *supra*, this division of this section, (2) *Written Statements*.

**5. Proof by Another Person Who Heard Testimony.**—*Reg. v. Troop*, 30 Nova Scotia 339; *Payne v. State*, 66 Ark. 545; *Williams v. State*, 69 Ga. 11; *Brown v. State*, 76 Ga. 623; *McKinney v. Carmack*, 119 Ga. 467; *State v. McDonald*, 65 Me. 466; *Donaldson v. Alexander*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 356. See also *Rex v. Howe*, 6 Esp. 124.

**6. Proof by Other Witnesses.**—*Wacha v. Brown*, 78 Iowa 432; *State v. McDonald*, 65 Me. 466.

**7. Proof by Grand Jurors.**—*Thrawley v. State*, 153 Ind. 375; *Dean v. Com.*, (Ky. 1904) 78 S. W. Rep. 1112; *State v. Ragsdale*, 59 Mo. App. 590; *Morton v. State*, 43 Tex. Crim. 533; *Gibson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 812. And the district attorney is a competent witness for this purpose. *Gibson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 812.

**8. Proof by Coroner.**—*State v. Jones*, 29 S. Car. 201. See also *McKinney v. Carmack*, 119 Ga. 467.

*Compare Cole v. State*, 59 Ark. 50, holding that the coroner's written statement of the testimony is the best evidence thereof and should be produced.

**9. Proof by Coroner's Juror.**—*Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199.

**10. Proof by Presiding Judge.**—*Payne v. State*, 66 Ark. 545; *Brown v. State*, 76 Ga. 623.

**Record of Conviction Inadmissible.**—*Rex v. Howe*, 6 Esp. 124.



the former testimony relied on to discredit the witness is a competent witness as to such testimony;<sup>1</sup> and for the purpose of refreshing his memory he may refer to, and read from, his shorthand notes.<sup>2</sup> It seems that the stenographer may so testify after swearing that his notes are true and complete, though aside from his notes he has no recollection of what the witness said.<sup>3</sup>

*cc.* BY STENOGRAPHER'S TRANSCRIPT OF NOTES. — As a general rule, the stenographer's transcript of his notes is inadmissible for the purpose of impeachment, the proper course being to lay the foundation for contradictory evidence, and if the witness denies having made the contradictory statements, to call the stenographer to prove them.<sup>4</sup> In some jurisdictions, however, such transcripts are admissible, under statutes providing that they shall be legal evidence.<sup>5</sup>

*dd.* BY BILLS OF EXCEPTION OR MINUTES OF EVIDENCE. — The general rule is that the witness's former testimony cannot be proved either by minutes thereof in the nature of a private memorandum,<sup>6</sup> by the charge of the court at the former trial,<sup>7</sup> or by the bill of exceptions or case made,<sup>8</sup> it being necessary to intro-

**1. Testimony of Stenographer**—*Connecticut*. — Sayles v. Fitz Gerald, 72 Conn. 391.

*Illinois*. — Anglo-American Packing, etc., Co. v. Baier, 31 Ill. App. 653.

*Indiana*. — Stayner v. Joyce, 120 Ind. 99; Miller v. Preble, 142 Ind. 632; Higgins v. State, 157 Ind. 57.

*Michigan*. — Toohey v. Plummer, 69 Mich. 345.

*Missouri*. — Kreibohm v. Yancey, 154 Mo. 67. *New York*. — Trenkman v. Schneider, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 695.

*Ohio*. — Pennsylvania Co. v. Trainer, 5 Ohio Cir. Dec. 519, 12 Ohio Cir. Ct. 66.

*South Carolina*. — Sherard v. Richmond, etc., R. Co., 35 S. Car. 467.

*Texas*. — Stringfellow v. State, 42 Tex. Crim. 588.

*Washington*. — Klepsch v. Donald, 8 Wash. 162.

*Wisconsin*. — Waterman v. Chicago, etc., R. Co., 82 Wis. 613.

See also State v. Forsythe, 99 Iowa 1; Bennett v. Syndicate Ins. Co., 43 Minn. 45.

**Incomplete Notes.** — The stenographer's notes of former testimony are inadmissible when they are admittedly incomplete. Beavers v. Bowen, (Ky. 1904) 80 S. W. Rep. 1165.

**Secondary Evidence.** — Where the statute required the testimony at a coroner's inquest to be written out and signed by the witness, and filed and preserved in the coroner's office, it was held that the stenographer's notes were inadmissible. Overtom v. Chicago, etc., R. Co., 181 Ill. 323, reversing 80 Ill. App. 515.

**2. Stenographer May Read Notes.** — Miller v. Preble, 142 Ind. 632; Higgins v. State, 157 Ind. 63; Toohey v. Plummer, 69 Mich. 345; Pennsylvania Co. v. Trainer, 5 Ohio Cir. Dec. 519, 12 Ohio Cir. Ct. 66; Stringfellow v. State, 42 Tex. Crim. 588. See also State v. Forsythe, 99 Iowa 1.

**3. When Stenographer Has No Independent Recollection.** — Higgins v. State, 157 Ind. 57; Pennsylvania Co. v. Trainer, 5 Ohio Cir. Dec. 519, 12 Ohio Cir. Ct. 66; Stringfellow v. State, 42 Tex. Crim. 588; Klepsch v. Donald, 8 Wash. 162. Compare Miller v. Preble, 142 Ind. 632; Beavers v. Bowen, (Ky. 1904) 80 S. W. Rep. 1165.

**4. Transcript Alone Inadmissible.** — Stayner v. Joyce, 120 Ind. 99; Toohey v. Plummer, 69 Mich. 345; Redford v. Spokane St. R. Co., 15 Wash. 419. See also Phares v. Barber, 61 Ill. 271; Portsmouth St. R. Co. v. Peed, (Va. 1904) 47 S. E. Rep. 850.

**5. Stenographer's Transcript Admissible under Statute.** — Hibbard v. Zenor, 82 Iowa 505; State v. Frederic, 69 Me. 400. See also Anderson v. Tribble, 66 Ga. 584. But the abstract of testimony taken on a former trial which fails to note by whom it was made, is incompetent evidence to show contradictory statements of witnesses, especially where no showing is made why the original notes of the reporter, which should be produced for the purpose, were not so produced. State v. Maloy, 44 Iowa 104. And a transcript is inadmissible if the certification fails to show that it contains "the whole of the shorthand notes of the evidence" as required by statute. Connell v. Connell, 119 Iowa 602.

**6. Minutes of Testimony Incompetent.** — Payne v. State, 66 Ark. 545; Phares v. Barber, 61 Ill. 271; State v. Ostrander, 18 Iowa 435; State v. Hayden, 45 Iowa 14; State v. Adams, 78 Iowa 293; State v. Thomas, 99 Mo. 235; Cohn v. Heimbauch, 86 Wis. 176. See also State v. Reinheimer, 109 Iowa 624; Brown v. State, 42 Tex. Crim. 176.

**7. Charge of Court Incompetent.** — McCamant v. Roberts, 80 Tex. 316; Burkitt v. McDonald, 26 Tex. Civ. App. 426.

**8. Bill of Exceptions Incompetent**—*Indiana*. — Pennsylvania Co. v. Marion, 123 Ind. 415.

*Iowa*. — Boyd v. Oskaloosa First Nat. Bank, 25 Iowa 255; State v. Hayden, 45 Iowa 11; State v. Row, 81 Iowa 138.

*Kentucky*. — Boner v. Com., (Ky. 1897) 40 S. W. Rep. 700.

*New York*. — Neilson v. Columbian Ins. Co., 1 Johns. (N. Y.) 301; Trenkman v. Schneider, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 695.

*Pennsylvania*. — Edwards v. Gimbel, 202 Pa. St. 30.

*Contra*, Baylor v. Smithers, 1 T. B. Mon. (Ky.) 6; Hendrons v. Robinson, 9 B. Mon. (Ky.) 503. Compare Owen v. Palmour, 111 Ga. 885.

**A Statement of the Facts testified to at the**

duce living witnesses for that purpose,<sup>1</sup> who may, however, refer to the minutes or bills of exceptions for the purpose of refreshing their recollection.

*ee.* BY INTRODUCTION OF FORMER DEPOSITION. — If the former testimony is in the form of a deposition, regularly taken, signed, and certified, it is undoubtedly the best evidence of what the testimony was and is admissible for the purpose of impeaching the witness.<sup>2</sup>

(4) *Where Witness Admits Discrediting Fact.* — Where a witness on cross-examination categorically admits a discrediting fact, such as the making of former statements contradictory of his testimony, bias for or against a party to the action, or the like, further evidence of the fact is rendered unnecessary and is inadmissible. Former contradictory written as well as oral statements have been held to be within the rule.<sup>3</sup>

(5) *Where Witness Neither Admits Nor Denies Discrediting Fact.* — There has been some conflict of English authority as to whether it is admissible to prove a previous statement of the witness in conflict with his testimony, where he does not unequivocally deny having made the statement. There is some authority to the effect that the statement may not be proved in such a case;<sup>4</sup> but the better opinion is that, where the statement in regard to which the witness is questioned is a contradiction of his testimony, it may be proved, unless he admits that he made it, provided such statement is material to the matter at issue.<sup>5</sup> The latter doctrine is established in the *United States* by an almost unanimous concurrence of authority holding that neither an equivocal

former trial is incompetent whether it was agreed on by counsel or made up by the court. *McCamant v. Roberts*, 80 Tex. 316; *Houston, etc., R. Co. v. Strycharski*, (Tex. Civ. App. 1896) 35 S. W. Rep. 851.

In *Kentucky* a distinction is drawn between civil and criminal cases, the rule being that the bill of exceptions is competent in civil cases but incompetent in criminal cases. *Boner v. Com.*, (Ky. 1897) 40 S. W. Rep. 700.

1. **Proof Must Be by Living Witnesses.** — *Boner v. Com.*, (Ky. 1897) 40 S. W. Rep. 700.

2. **Contradiction by Former Deposition** — *England*. — *Rex v. Oldroyd*, R. & R. C. C. 88.

*California*. — *People v. Devine*, 44 Cal. 452; *People v. Hawley*, 111 Cal. 78.

*Georgia*. — *Maynard v. Cleveland*, 76 Ga. 52.

*Illinois*. — *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481.

*Kansas*. — *Southern Kansas R. Co. v. Painter*, 53 Kan. 414.

*Maryland*. — *Ecker v. McAllister*, 45 Md. 291.

*New York*. — *Stephens v. People*, 19 N. Y. 549.

*Texas*. — *Jarvis-Conklin Mortg. Trust Co. v. Harrell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 447; *Galveston, etc., R. Co. v. Thompson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 8.

*Virginia*. — *Wormeley v. Com.*, 10 Gratt. (Va.) 658.

3. **Contradictory Statements.** — *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737; *Toplitz v. Hedden*, 146 U. S. 252; *Atchison, etc., R. Co. v. Feehan*, 149 Ill. 202; *Swift v. Madden*, 165 Ill. 41, *affirming* 63 Ill. App. 341; *State v. Baldwin*, 36 Kan. 1; *State v. Goodbier*, 48 La. Ann. 770; *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471; *State v. Baker*, 136 Mo. 74; *State v. Tickel*, 13 Nev. 502; *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657; *Walker v. State*, 17 Tex. App. 17; *Rodriguez v. State*, 23 Tex. App. 503. See also *Smith v. State*, 92 Ala. 69; *Hannon v. St. Louis Transit Co.*, 102 Mo. App.

216. Compare as to statement in writing *Reg. v. Jerrett*, 22 U. C. Q. B. 499, *Hagarty, J., dissenting*. See also *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147, 22 Rev. Rep. 662; *Lightfoot v. People*, 16 Mich. 508. See generally *infra*, this section, 9. *Laying Foundation for Discrediting Evidence.*

**Omission of Material Facts.** — *Spaulding v. Toledo Consol. St. R. Co.*, 10 Ohio Cir. Dec. 660, 20 Ohio Cir. Ct. 99; *Williams v. State*, 24 Tex. App. 637.

**Acts Inconsistent with Testimony.** — *Winter v. Judkins*, 106 Ala. 259; *Conner v. Littlefield*, 79 Tex. 76.

**Bias of Witness.** — *Hooks v. Pafford*, (Tex. Civ. App. 1904) 78 S. W. Rep. 991.

**Where a Witness Does Not Directly Admit** that he made the statement, the impeaching proof is admissible; as where he admits his signature to a written statement, alleged to contain contradictory declarations, but says there is a mistake in it, of which he spoke at the time. *Illinois Cent. R. Co. v. Wade*, 206 Ill. 523, *reversing* 108 Ill. App. 423. To similar effect *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1. So, also, where the witness says that he probably made the statement, evidence that he did make the statement in question is admissible. *Wyatt v. State*, 38 Tex. Crim. 256.

**Admission by Witness that He Has Been Indicted for Crime.** — *Titus v. State*, 117 Ala. 16.

**Cross-examination After Admission.** — Though the witness admits the making of the former contradictory statement, he may be further asked on the cross-examination as to his reason for making it. *People v. Payne*, 131 Mich. 474, 9 Detroit Leg. N. 417.

4. **Denial of Making Statement Necessary Predicate to Contradictory Proof.** — *Long v. Hitchcock*, 9 C. & P. 619, 38 E. C. L. 255; *Pain v. Beeston*, 1 M. & Rob. 20.

5. **Denial Unnecessary.** — *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737.

answer by the witness, without affirming or denying that he made the statement in regard to which he is questioned, nor professions of ignorance or forgetfulness as to whether he made the statement or not, will deprive the opposite party of the right to prove that the statement was in fact made.<sup>1</sup> The same rule obtains where the witness declines to answer, and is relieved by the court of the necessity of answering, on the ground that his answer might incriminate him.<sup>2</sup>

(b) *Former Statement of Opinion*—(a) *In General*.—It has been frequently held that a former statement of a witness, to be admissible to discredit his testimony, must be a statement of fact, and not merely an expression of the opinion of the witness inconsistent with a different opinion which the facts to which he testifies tend to establish. Many of the decisions which seem to support this doctrine, however, are distinguishable on the ground that the opinion of the witness sought to be given in evidence was not in any degree inconsistent with or contradictory of his testimony in any material particular;<sup>3</sup>

**1. Contradictory Proof Admissible**—*Alabama*.—Payne v. State, 60 Ala. 80; Henson v. State, 120 Ala. 316; Thornton v. Savage, 120 Ala. 449.

*Arkansas*.—Billings v. State, 52 Ark. 303.

*Georgia*.—Sealy v. State, 1 Ga. 213.

*Illinois*.—Ray v. Bell, 24 Ill. 444; Wood v. Shaw, 48 Ill. 273; Bressler v. People, 117 Ill. 422; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481.

*Iowa*.—Sheldon v. Bigelow, 118 Iowa 586.

*Kentucky*.—Wren v. Louisville, etc., R. Co., (Ky. 1892) 20 S. W. Rep. 215.

*Louisiana*.—State v. Johnson, 47 La. Ann. 1225.

*Massachusetts*.—Chapman v. Coffin, 14 Gray (Mass.) 454; Elmer v. Fassenden, 154 Mass. 428.

*Michigan*.—Gibbs v. Linabury, 22 Mich. 479; Pringle v. Miller, 111 Mich. 663.

*Missouri*.—Peck v. Ritchey, 66 Mo. 114.

*Nebraska*.—O'Donnell v. Chicago, etc., R. Co., 65 Neb. 612.

*New Hampshire*.—Nute v. Nute, 41 N. H. 60.

*New York*.—People v. Jackson, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 590; Palmeri v. Manhattan R. Co., (Supm. Ct. Gen. T.) 14 N. Y. Supp. 468, *affirmed* 133 N. Y. 261; Weeks v. Fox, 3 Thomp. & C. (N. Y.) 354.

*Pennsylvania*.—Gregg Tp. v. Jamison, 55 Pa. St. 468.

*South Carolina*.—State v. Sullivan, 43 S. Car. 205, *citing* 7 AM. AND ENG. ENCYC. OF LAW 109, *distinguishing* State v. Bodie, 33 S. Car. 118; State v. Sanders, 52 S. Car. 580.

*Tennessee*.—Janeway v. State, 1 Head (Tenn.) 130.

*Texas*.—Levy v. State, 28 Tex. App. 203; Fuller v. State, 30 Tex. App. 559; Edwards v. Osman, 84 Tex. 656; Galveston, etc., R. Co. v. Jackson, 93 Tex. 262; Smith v. State, (Tex. Crim. 1892) 20 S. W. Rep. 554; Gonzales v. State, 35 Tex. Crim. 33; Newman v. State, (Tex. Crim. 1902) 70 S. W. Rep. 951; Pitman v. Holmes, (Tex. Civ. App. 1904) 78 S. W. Rep. 961.

*Utah*.—State v. Haworth, 24 Utah 398.

*Vermont*.—Holbrook v. Holbrook, 30 Vt. 432.

*Virginia*.—Forde v. Com., 16 Gratt. (Va.) 547.

*Wisconsin*.—Heddles v. Chicago, etc., R. Co., 74 Wis. 239; Heddles v. Chicago, etc., R. Co., 77 Wis. 228.

*Contra*.—Wiggins v. Holman, 5 Ind. 502; McVey v. Blair, 7 Ind. 590; Mendenhall v. Banks, 16 Ind. 284; Robinson v. Pitzer, 3 W. Va. 335. But see Ohio, etc., R. Co. v. Stein, 140 Ind. 61.

**A Denial by a Witness of Any Recollection** of having made the statement and of being able to say on oath whether he made it, may sometimes have almost the force and effect of admissions, and justify the jury in concluding that the statements were made. Whitaker v. Staten Island R. Co., 72 N. Y. App. Div. 468.

**2. State v. Haworth**, 24 Utah 398.

**3. Former Statements of Opinion Held Inadmissible**—*England*.—Elton v. Larkins, 5 C. & P. 385, 24 E. C. L. 372.

*Florida*.—Myers v. State, 43 Fla. 500.

*Idaho*.—State v. Crea, (Idaho 1904) 76 Pac. Rep. 1043.

*Indiana*.—Rucker v. Beaty, 3 Ind. 70.

*Iowa*.—State v. Maxwell, 42 Iowa 208.

*Kentucky*.—Kennedy v. Com., 14 Bush (Ky.) 340; Ross v. Com., (Ky. 1900) 55 S. W. Rep. 4.

*Maryland*.—Sloan v. Edwards, 61 Md. 90.

*Massachusetts*.—Lane v. Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282; Com. v. Mooney, 110 Mass. 99; Com. v. Nelson, 180 Mass. 83.

*Michigan*.—People v. Stackhouse, 49 Mich. 76.

*Minnesota*.—Alward v. Oakes, 63 Minn. 190.

*Missouri*.—Harper v. Indianapolis, etc., R. Co., 47 Mo. 567; McFadin v. Catron, 120 Mo. 252; Sweeney v. Kansas City Cable R. Co., 150 Mo. 385; Hamburger v. Rinkel, 164 Mo. 398.

*Nebraska*.—Smith v. State, 5 Neb. 181; Johnston v. Spencer, 51 Neb. 198.

*New Hampshire*.—Hall v. Young, 37 N. H. 134; Nute v. Nute, 41 N. H. 60; City Bank v. Young, 43 N. H. 457.

*New York*.—Holmes v. Anderson, 18 Barb. (N. Y.) 420; Bickford v. Menier, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 775.

*South Dakota*.—State v. Davidson, 9 S. Dak. 564.

*Tennessee*.—Saunders v. City, etc., R. Co., 99 Tenn. 130, *citing* 29 AM. AND ENG. ENCYC. OF LAW (1st ed.) 793, 796; Brown v. Odill, 104 Tenn. 250.



and there are several well-considered cases supporting the admissibility of evidence of former opinions of witnesses for the purpose of impeaching their credibility.<sup>1</sup> Where the opinion tends to show bias of the witness in favor of the party for whom he testifies or against the adverse party, it is unquestionably admissible in evidence for that purpose.<sup>2</sup>

(b) **To Discredit Opinion Evidence.** — In cases where opinion evidence is properly introduced as original evidence to sustain the cause of action or the defense, evidence of former contradictory declarations of opinion by the witness who thus testifies is admissible.<sup>3</sup>

(7) *Statements of Persons Other than Witness.* — Verbal statements or writings of persons other than the witness sought to be discredited, for which the witness is not responsible, and which have not been approved by him, are inadmissible in evidence to contradict his testimony.<sup>4</sup> But a statement made by another in the presence of a witness, assented to and adopted by him, or heard by him without objection or contradiction, may be proved where the statement contradicts his testimony in a material respect and the witness denies that the statement was made.<sup>5</sup> Similarly, a writing shown a witness and assented to by him,<sup>6</sup> or for which the witness is responsible, may be

*Texas.* — *Drake v. State*, 29 Tex. App. 265; *Phipps v. State*, 34 Tex. Crim. 608; *Wilson v. State*, 37 Tex. Crim. 64; *Taylor v. State*, 38 Tex. Crim. 552; *Morton v. State*, 43 Tex. Crim. 533; *Davis v. State*, (Tex. Crim. 1893) 20 S. W. Rep. 923; *Jenkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 312; *Parker v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 1008.

1. **Former Statements of Opinion Held Admissible.** — *Combs v. Com.*, (Ky. 1900) 56 S. W. Rep. 425; *Mullins v. Com.*, (Ky. 1902) 67 S. W. Rep. 824, 23 Ky. L. Rep. 2433; *State v. Lewis*, 44 La. Ann. 958; *Com. v. Wood*, 111 Mass. 408; *Bonnemort v. Gill*, 165 Mass. 493, *criticising* *Hubbell v. Bissell*, 2 Allen (Mass.) 196; *Handy v. Canning*, 166 Mass. 107; *Whipple v. Rich*, 180 Mass. 477; *Matter of Hardy*, 59 Mich. 352; *McClellan v. Ft. Wayne, etc., R. Co.*, 105 Mich. 101, two justices dissenting; *Patchin v. Astor Mut. Ins. Co.*, 13 N. Y. 268; *Schell v. Plumb*, 55 N. Y. 592, *affirming* (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 11; *Lowe v. State*, 118 Wis. 641; *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432; *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548; *Central of Georgia R. Co. v. Trammell*, 114 Ga. 312; *State v. Wright*, 112 Iowa 436; *Ware v. Ware*, 8 Me. 42; *Culver v. Smith*, 131 Mich. 359, 9 Detroit Leg. N. 389; *Quincy v. Warner*, 78 Hun (N. Y.) 286; *Sharp v. Emmet*, 5 Whart. (Pa.) 288; *Bonner v. Mayfield*, 82 Tex. 234; *Black v. Rocky Mountain Bell Telephone Co.*, 26 Utah 451.

2. **Former Opinion Tending to Show Bias.** — *O'Neill v. Lowell*, 6 Allen (Mass.) 110; *Dudley v. Satterlee*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 538.

3. **To Discredit Opinion Evidence.** — *San Diego Land, etc., Co. v. Neale*, 88 Cal. 50; *Cochran v. Amsden*, 104 Ind. 282; *Myers v. Manlove*, (Ind. 1904) 71 N. E. Rep. 893; *Beaubien v. Cicotte*, 12 Mich. 459; *Nute v. Nute*, 41 N. H. 60; *City Bank v. Young*, 43 N. H. 457; *Dawson v. Pittsburgh*, 159 Pa. St. 317, 34 W. N. C. (Pa.) 69; *Daniels v. Conrad*, 4 Leigh (Va.) 401. See also *Smith v. State*, 5 Neb. 181; *Phifer v. Erwin*, 100 N. Car. 59; *Ray v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 446.

**Contradictory Opinion as to Mental Capacity.** — *Burney v. Torrey*, 100 Ala. 157; *Parrish v. State*, 139 Ala. 16; *Bims v. Collier*, 69 Ark. 245; *Staser v. Hogan*, 120 Ind. 207; *Owens v. Jenkins*, 78 S. W. Rep. 212, 25 Ky. L. Rep. 1567; *Stirling v. Stirling*, 64 Md. 138; *Brooks v. Rochester R. Co.*, 156 N. Y. 244, *reversing* *mem. judgment* 88 Hun (N. Y.) 614.

**Opinion on Value of Real Estate Contained in Tax Statement.** — *Williams v. Brown*, (Mich. 1904) 100 N. W. Rep. 786, 11 Detroit Leg. N. 365.

4. **Statements Not Acquiesced in Not Admissible.** — *O'Keeffe v. Allen*, 1 Ir. Eq. R. 382; *Com. v. Sullivan*, 146 Mass. 142; *Field v. Delaware, etc., R. Co.*, 69 N. J. L. 433; *Denison, etc., Suburban R. Co. v. Foster*, 28 Tex. Civ. App. 578; *Buel v. State*, 104 Wis. 132.

**The Value Placed on Witness's Property by Tax Assessor.** — *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 564.

**Omission in Letters of Husband Inadmissible to Discredit Wife.** — *Prentis v. Bates*, 93 Mich. 234, *reversing* on this point on rehearing 88 Mich. 567.

**Affidavit Drawn by an Attorney but Executed by Another Person Not Admissible to Impeach the Attorney.** — *Bigham v. Coleman*, 71 Ga. 176.

**Argument of Counsel Not Admissible to Impeach Him.** — *Becker v. Cain*, 8 N. Dak. 615.

**Contradiction of Partner.** — The evidence of one member of a firm cannot be impeached by the introduction of a letter of the firm written by the other partner. *Owen v. Rothermel*, 21 Pa. Super. Ct. 561.

**The Application of a Party for a Continuance is incompetent for the purpose of impeaching one of the party's witnesses.** *Wilburn v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 3.

5. **Statements of Others Assented to by Witness.** — *State v. McGaffin*, 36 Kan. 315; *Easterwood v. State*, 34 Tex. Crim. 400; *Patterson v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 557.

**Statements of Persons Engaged in Common Enterprise.** — *Blum v. Jones*, (Tex. Civ. App. 1893) 23 S. W. Rep. 841.

6. *McKnight v. Detroit, etc., R. Co.*, (Mich. 1904) 97 N. W. Rep. 772.

introduced to contradict his testimony.<sup>1</sup> This rule applies with additional force when the witness is also a party and the statement made in his presence imputes fault to him in respect to the transaction in controversy. Here assent is implied from silence.<sup>2</sup>

(8) *Purpose and Effect of Contradictory Evidence — By Witness.* — Statements made out of court by a witness who is not a party, and not made in the presence of a party, are not evidence in chief to prove the facts stated, but are only competent for the purpose of discrediting the testimony of the witness on the trial, when at variance with such testimony.<sup>3</sup> And it has been held that a witness who fails to testify to substantive facts cannot be asked if he did not make statements to others, out of court, that such facts existed,

1. *Paper Drawn by Attorney.* — *In re Townsend*, 122 Iowa 246.

**A Complaint in Another State for the Same Cause of Action** verified by the plaintiff's guardian *ad litem* and signed by his attorney, though not verified and signed by the plaintiff himself, is admissible in evidence to impeach the testimony of the plaintiff. *Lee v. Chicago*, etc., R. Co., 101 Wis. 352.

2. **Witness Also a Party.** — *Kirby v. State*, 89 Ala. 63; *Turnbull v. Maddux*, 68 Md. 579.

3. **Competent Only for Purpose of Impeachment** — *England.* — *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147.

*Alabama.* — *Jernigan v. State*, 81 Ala. 58; *Hester v. State*, 103 Ala. 83; *Jones v. State*, (Ala. 1904) 37 So. Rep. 390; *Paradise v. State*, 131 Ala. 26.

*Arkansas.* — *Magness v. State*, 67 Ark. 594; *Little Rock*, etc., R. Co. v. *Voss*, (Ark. 1892) 18 S. W. Rep. 172.

*California.* — *Schneider v. Market St. R. Co.*, 134 Cal. 482; *Thomas v. Northwestern Mut. L. Ins. Co.*, 142 Cal. 79; *Gasquet v. Pechin*, 143 Cal. 515.

*Delaware.* — *Smith v. Roe*, 3 Penn. (Del.) 233.

*Georgia.* — *Columbus R. Co. v. Peddy*, 120 Ga. 589; *Jordan v. State*, 120 Ga. 864.

*Illinois.* — *Phillips v. Kesterson*, 154 Ill. 572; *Belt R. Co. v. Confrey*, 209 Ill. 344; *Lochnitt v. Stockton*, 31 Ill. App. 217; *Dick v. People*, 47 Ill. App. 223; *Craig v. Rohrer*, 63 Ill. 325; *Kerr v. Hodge*, 39 Ill. App. 546.

*Indiana.* — *Davis v. Hardy*, 76 Ind. 272; *Seller v. Jenkins*, 97 Ind. 430; *Hess v. Redding*, 2 Ind. App. 199; *Dehler v. State*, 22 Ind. App. 383.

*Iowa.* — *Gregory v. Wabash R. Co.*, (Iowa 1904) 101 N. W. Rep. 761.

*Kentucky.* — *Franklin v. Com.*, 105 Ky. 237; *Hudspeth v. Tyler*, 108 Ky. 520; *Combs v. Com.*, (Ky. 1900) 56 S. W. Rep. 425; *Nussbaum v. Louisville R. Co.*, (Ky. 1900) 57 S. W. Rep. 249; *Mullins v. Com.*, (Ky. 1902) 67 S. W. Rep. 824; *Cox v. Com.*, (Ky. 1902) 69 S. W. Rep. 799.

*Massachusetts.* — *Tyler v. Old Colony R. Co.*, 157 Mass. 336; *Liddle v. Old Lowell Nat. Bank*, 158 Mass. 15; *Com. v. Smith*, 163 Mass. 411; *Manning v. Carberry*, 172 Mass. 432.

*Michigan.* — *Tisman v. School-Dist.* No. 10, 90 Mich. 510; *Jensen v. Michigan Cent. R. Co.*, 102 Mich. 176; *McClellan v. Ft. Wayne*, etc., R. Co., 105 Mich. 101; *People v. Case*, 105 Mich. 92; *Van Alstine v. Kaniecki*, 109 Mich.

318; *Culver v. Smith*, 131 Mich. 359; *McKnight v. Detroit*, etc., R. Co., (Mich. 1904) 97 N. W. Rep. 772; *People v. Row*, (Mich. 1904) 98 N. W. Rep. 13.

*Minnesota.* — *Hicks v. Stone*, 13 Minn. 434.

*Missouri.* — *Trauerman v. Lippincott*, 39 Mo. App. 478.

*Montana.* — *State v. Broadbent*, 27 Mont. 342.

*Nebraska.* — *Zimmerman v. Kearney County Bank*, 59 Neb. 23, reversing 57 Neb. 800; *Tatum v. State*, 61 Neb. 229.

*New Jersey.* — *Dimmick v. W. Fred Quimby Co.*, (N. J. 1898) 41 Atl. Rep. 101.

*New York.* — *Hine v. Cushing*, 53 Hun (N. Y.) 519; *Humes v. Proctor*, 73 Hun (N. Y.) 265; *Briggs v. Wheeler*, 16 Hun (N. Y.) 583, approved *Frankel v. Wolf*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 190; *Patterson Gas Governor Co. v. Lichtenstein Bros. Co.*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 126; *Maher v. New York Cent.*, etc., R. Co., 20 N. Y. App. Div. 161, affirmed without opinion 162 N. Y. 633; *Barrett v. Manhattan R. Co.*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 71; *McCabe v. Brayton*, 38 N. Y. 196.

*North Carolina.* — *Lamb v. Ward*, 114 N. Car. 255.

*Oregon.* — *State v. Jarvis*, 18 Oregon 360; *Farmers' Bank v. Saling*, 33 Oregon 394.

*Pennsylvania.* — *Frack v. Gerber*, 167 Pa. St. 316; *Morris v. Guffey*, 188 Pa. St. 534.

*Texas.* — *Missouri*, etc., R. Co. v. *Sanders*, 12 Tex. Civ. App. 5; *McFarlane v. Howell*, 16 Tex. Civ. App. 246; *D'Arrigo v. Texas Produce Co.*, 18 Tex. Civ. App. 41; *Hawkins v. State*, 27 Tex. App. 273; *Drake v. State*, 25 Tex. App. 293; *Galveston*, etc., R. Co. v. *Jackson*, (Tex. Civ. App. 1899) 53 S. W. Rep. 81, affirmed 93 Tex. 262; *Bailey v. Fly*, (Tex. Civ. App. 1904) 80 S. W. Rep. 675; *Ryan v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 599; *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305; *Durham v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 563.

*Vermont.* — *Law v. Fairfield*, 46 Vt. 425; *Sowles v. Carr*, 70 Vt. 630; *In re Clafin*, 75 Vt. 19.

*Wisconsin.* — *Welcome v. Mitchell*, 81 Wis. 566.

**Testimony on Preliminary Examination Is Within Rule.** — *Kennedy v. State*, 85 Ala. 326.

**Immaterial Whether Statements Admitted or Proven by Others.** — *Smith v. State*, 92 Ala. 60.

**Impeaching Wife by Proof of Statements Incriminating Husband.** — *Ficken v. State*, 97 Ga. 813.

in order to prove that he made such statements, as the effect of that would be to transform declarations made out of court and not under the sanction of an oath into substantive testimony.<sup>1</sup> But the mere fact that the testimony is negative in character, does not preclude the introduction of the contradictory testimony, though such testimony must be rigidly confined to the purpose of the impeachment.<sup>2</sup> In jurisdictions where a party is allowed to impeach his own witnesses who have given material evidence prejudicial to their side, it is not competent to introduce the impeaching testimony where there has been a total failure of proof, since the contradictory testimony, being only competent for the purpose of impeachment, could not possibly aid in the solution of the case in the absence of substantive evidence.<sup>3</sup>

**By Party.** — The material statements of a party who is also a witness may be shown for the purpose of discrediting his testimony in court.<sup>4</sup> And if the statement out of court amounts to a confession or to an admission against interest, such statement may be introduced both as substantive and impeaching evidence;<sup>5</sup> but the failure to use the admissions as evidence in chief affords no ground of objection to their reception for the purpose of impeaching the party as a witness.<sup>6</sup>

(9) *Statements Must Be Inconsistent or Contradictory* — (a) **General Rule.** — It is a well-settled rule that statements of a witness sought to be introduced in evidence to discredit him are inadmissible for that purpose, unless they are inconsistent with or contradictory of his testimony on the stand, in some material particular.<sup>7</sup> It is unnecessary that the contradiction should be in

**1. Pretence of Discrediting Witness.** — *Champ v. Com.*, 2 Met. (Ky.) 17; *Loving v. Com.*, 80 Ky. 511; *Saylor v. Com.*, (Ky. 1895) 33 S. W. Rep. 185; *Nicholson v. Dunn*, (Ky. 1899) 52 S. W. Rep. 935; *Stevenson v. Com.*, (Ky. 1897) 44 S. W. Rep. 634.

**2. Impeaching Negative Testimony.** — *Jones v. Harrell*, 110 Ga. 373; *Hathaway v. Crocker*, 7 Met. (Mass.) 262; *Com. v. Smith*, 163 Mass. 411; *Dockarty v. Tillotson*, 64 Neb. 432; *Gibson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 812.

**3. Impeaching Testimony Incompetent Where Proof Totally Fails.** — *Batchelder v. Batchelder*, 139 Mass. 1; *Dunagain v. State*, 38 Tex. Crim. 614; *Finley v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 1015; *Knight v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 88; *Hanna v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 544.

**4. Discrediting Party by Statements Out of Court.** — *Naugher v. State*, 116 Ala. 463; *McAfee v. Montgomery*, 21 Ind. App. 196; *State v. Philpot*, 97 Iowa 365; *Connors v. Chingren*, 111 Iowa 437; *State v. Crane*, 110 N. Car. 530; *Townsend v. Felthousen*, 156 N. Y. 618; *Gonzales v. State*, 35 Tex. Crim. 33; *Galveston, etc., R. Co. v. Washington*, 94 Tex. 510, *affirming* 25 Tex. Civ. App. 600; *Horn v. State*, (Wyo. 1903) 73 Pac. Rep. 705.

**5. Confessions and Admissions Competent Both as Substantive and Impeaching Testimony.** — *Rose v. Otis*, 18 Colo. 59; *Bottom v. Barton*, 12 Colo. App. 53; *McConnell v. Osage*, 80 Iowa 293; *Milligan v. Butcher*, 23 Neb. 683; *Winchell v. Winchell*, 100 N. Y. 159; *Ankersmit v. Tuch*, 114 N. Y. 51; *Ellis v. Harris*, 106 N. Car. 395; *State v. Burton*, 27 Wash. 528; *State v. Sheppard*, 49 W. Va. 582.

**6. Milligan v. Butcher**, 23 Neb. 683; *Winchell v. Winchell*, 100 N. Y. 159; *Ankersmit v. Tuch*, 114 N. Y. 51.

**7. Statement Must Be Inconsistent or Contradictory** — *United States*. — *Tinsley v. Jemison*, (C. C. A.) 74 Fed. Rep. 177.

*Alabama*. — *Cotton v. State*, 87 Ala. 75.

*Arkansas*. — *McNeill v. Arnold*, 22 Ark. 477.

*California*. — *People v. Kalkman*, 72 Cal. 212; *Evans v. De Lay*, 81 Cal. 103; *Matter of O'Connor*, 118 Cal. 69; *People v. Collum*, 122 Cal. 186; *People v. Machado*, 130 Cal. xviii, 63 Pac. Rep. 66.

*Colorado*. — *Holy Cross Gold Min., etc., Co. v. O'Sullivan*, 27 Colo. 237.

*Connecticut*. — *State v. Main*, 75 Conn. 55.

*Florida*. — *Myers v. State*, 43 Fla. 500.

*Georgia*. — *Harrison v. Langston*, 100 Ga. 394; *Phoenix Ins. Co. v. Gray*, 107 Ga. 110.

*Idaho*. — *State v. Crea*, (Idaho 1904) 76 Pac. Rep. 1013.

*Illinois*. — *Chicago City R. Co. v. Allen*, 169 Ill. 287, *affirming* 68 Ill. App. 472; *Clemens v. Kaiser*, 211 Ill. 460; *Fessenden v. Doane*, 188 Ill. 228, *affirming* 89 Ill. App. 229.

*Indiana*. — *Paxton v. Dye*, 26 Ind. 393; *Seller v. Jenkins*, 97 Ind. 430; *Wagner v. State*, 116 Ind. 181; *Huber v. State*, 125 Ind. 185; *Blough v. Parry*, 144 Ind. 463; *Williams v. State*, 3 Ind. App. 350; *Myers v. Manlove*, (Ind. 1904) 71 N. E. Rep. 893.

*Iowa*. — *Morrison v. Myers*, 11 Iowa 538; *State v. Weems*, 96 Iowa 426; *Reizenstein v. Clark*, 104 Iowa 287; *State v. Fogerty*, 105 Iowa 32; *State v. Worthen*, 111 Iowa 267; *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535. See also *Severson v. Gremm*, (Iowa 1904) 100 N. W. Rep. 862.

*Kentucky*. — *Nicholson v. Dunn*, (Ky. 1899) 52 S. W. Rep. 935; *Yelton v. Black*, (Ky. 1904) 82 S. W. Rep. 634.

*Maine*. — *Halley v. Webster*, 21 Me. 461; *Royal v. Chandler*, 81 Me. 118.



terms. All that is required is that the statement previously made by the witness be substantially inconsistent with his testimony while on the stand.<sup>1</sup>

(b) *Province of Court and Jury.* — It is for the trial court to determine whether there is any evidence at all of an inconsistent or contradictory nature.<sup>2</sup> The admissibility of the discrediting evidence, however, does not depend on the degree of variance between it and the testimony of the witness against whom it is directed, however much that consideration may affect its potency. If it differs in any material particular, it is for the jury to determine what effect such difference in statements shall have on the witness's credit.<sup>3</sup>

(10) *Time to Introduce Impeaching Evidence.* — In respect to the time when impeaching evidence of contradictory statements may be offered, the orderly and proper course is for the cross-examining party to introduce the same as part of his own case.<sup>4</sup> But the order in which evidence shall be received is discretionary with the trial court, and the impeaching evidence may, in a proper case, and for the convenient administration of justice, be admitted in connection with the cross-examination of the party sought to be impeached, as part of the evidence of the party so proposing it, and subject

*Michigan.* — Kennett *v.* Engle, 105 Mich. 693.

*Minnesota.* — Ganser *v.* Fireman's Fund Ins. Co., 38 Minn. 74; State *v.* Hayward, 62 Minn. 474; State *v.* Gallehugh, 89 Minn. 212.

*Montana.* — Territory *v.* Clayton, 8 Mont. 1; State *v.* Pugh, 16 Mont. 343.

*Nebraska.* — Daly *v.* Melendy, 32 Neb. 852, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 109; Smith *v.* State, 61 Neb. 296.

*New Hampshire.* — Hall *v.* Young, 37 N. H. 134.

*New York.* — Beyer *v.* Consolidated Gas Co., 44 N. Y. App. Div. 158; Surdam *v.* Ingraham, 59 Hun (N. Y.) 620, 12 N. Y. Supp. 798; Travis *v.* Stewart, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 240, reversing (City Ct. Gen. T.) 29 Misc. (N. Y.) 606.

*North Carolina.* — Lamb *v.* Ward, 114 N. Car. 255.

*Oregon.* — State *v.* Deal, 43 Oregon 17.

*Pennsylvania.* — Com. *v.* Scouton, 20 Pa. Super. Ct. 503.

*Rhode Island.* — Stone *v.* Langworthy, 20 R. I. 602.

*South Carolina.* — Jerkowski *v.* Marco, 57 S. Car. 402.

*South Dakota.* — Elrod *v.* Ashton, 14 S. Dak. 350, reversing on rehearing *sub nom.* Ashton *v.* Ashton, 11 S. Dak. 610.

*Texas.* — Hall *v.* Simmons, 24 Tex. 227; Houston, etc., R. Co. *v.* Bath, 17 Tex. Civ. App. 697; Gulf, etc., R. Co. *v.* Southwick, (Tex. Civ. App. 1895) 30 S. W. Rep. 592; Taylor *v.* State, 38 Tex. Crim. 552.

*Vermont.* — Hine *v.* Pomeroy, 39 Vt. 211.

**When a Series of Letters Give the Required Result,** they may be all taken together for the purpose, and are not inadmissible because, singly, they would be insufficient. Each letter might contain an admission of some fact, and all the facts thus admitted might be a contradiction. The effect of them is for the jury. Jackson *v.* Thomason, 1 B. & S. 745, 101 E. C. L. 745, 8 Jur. N. S. 134.

**1. Contradictions Need Not Be in Terms.** — Myers *v.* Manlove, (Ind. 1904) 71 N. E. Rep. 893; State *v.* Kingsbury, 58 Me. 238, cited Ruggles *v.* Coffin, 70 Me. 468; Foster *v.* Worth-

ing, 146 Mass. 607; Martin *v.* Farnham, 25 N. H. 195.

**2. Province of Court.** — St. Louis, etc., R. Co. *v.* Faisst, 68 Ark. 587. To similar effect, Jackson *v.* Thomason, 1 B. & S. 745, 101 E. C. L. 745, *per* Blackburn, J.

**3. Province of Jury.** — St. Louis, etc., R. Co. *v.* Faisst, 68 Ark. 587; Craig *v.* Rohrer, 63 Ill. 325; Seller *v.* Jenkins, 97 Ind. 430; Williams *v.* State, 3 Ind. App. 350; Elmer *v.* Fessenden, 154 Mass. 428; Tinklepaugh *v.* Rounds, 24 Minn. 298; Cannon *v.* State, 57 Miss. 147; Williams *v.* State, 73 Miss. 820; State *v.* Gray, 43 Oregon 446.

**Motive in Making Contradictory Statement Not Material to Inquiry.** — Cannon *v.* State, 57 Miss. 147.

**Statement Capable of Different Constructions.** — If the former statement of the witness is capable of different constructions, one of which would be consistent with the truth of his testimony, it is for the jury to give the right one. The discrediting evidence is not to be excluded if in any aspect it tends to contradict. Dilcher *v.* State, 39 Ohio St. 130; Spaulding *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Dec. 660, 20 Ohio Cir. Ct. 99. *Contra*, People *v.* Collum, 122 Cal. 186.

**4. Time to Introduce Impeaching Evidence.** — *England.* — Queen's Case, 2 Brod. & B. 299, 6 E. C. L. 154.

*Arkansas.* — St. Louis, etc., R. Co. *v.* Faisst, 68 Ark. 587.

*Illinois.* — Peyton *v.* Morgan Park, 172 Ill. 102; Illinois Cent. R. Co. *v.* Wade, 206 Ill. 523, reversing 108 Ill. App. 423.

*Iowa.* — State *v.* Adams, 78 Iowa 292.

*Kansas.* — Williams *v.* Miller, 6 Kan. App. 626.

*Michigan.* — People *v.* Oblaser, 104 Mich. 579.

*Missouri.* — Prewitt *v.* Martin, 59 Mo. 325; State *v.* Stein, 79 Mo. 330.

*Nebraska.* — Fremont Butter, etc., Co. *v.* Peters, 45 Neb. 356.

*New York.* — Hanlon *v.* Ehrich, 86 N. Y. App. Div. 441, 80 N. Y. App. Div. 359.

*Ohio.* — National Ben. Assoc. *v.* Harding, 4 Ohio Cir. Dec. 668, 7 Ohio Cir. Ct. 438.

to all the consequences of its being so considered.<sup>1</sup>

(11) *Examination of Impeaching Witnesses* — (a) *Questions*. — The proper course, when the impeaching witness is produced, is simply to ask him whether or not the witness to be impeached made the statement in regard to which he has been questioned, at the time and place mentioned.<sup>2</sup> It is true that the question to the impeaching witness need not be in the exact words of the question asked of the witness sought to be impeached, but it should be identical as to time, place, and substance, and should be so framed as to admit of a negative or an affirmative answer.<sup>3</sup> In fairness to the witness to be impeached, and in order that the testimony may be of any value for impeachment purposes, and for the further reason of keeping from the jury irrelevant and incompetent matter, this course should be pursued.<sup>4</sup> It is improper to ask the witness to relate the entire conversation or to put the question in such a general form as to be calculated to elicit more than the statement made by the first witness in contradiction of his testimony,<sup>5</sup> unless the statement to be proved is made intelligible only by a narration of the entire conversation.<sup>6</sup>

(b) *Testimony*. — The testimony of the impeaching witness must be responsive to the subject-matter of the inquiry, and fix the time at which the supposed contradictory statement was made.<sup>7</sup> It is not competent to show that the statement was made at any other time or place,<sup>8</sup> or differed in substance from that inquired about.<sup>9</sup> However, where the statement proved is substantially

**1. Introduction During Cross-examination** — *England*. — Queen's Case, 2 Brod. & B. 299, 6 E. C. L. 154.

*California*. — Nichol v. Laumeister, 102 Cal. 658; Matter of Scott, 128 Cal. 57.

*Massachusetts*. — Barker v. Laurence Mfg. Co., 176 Mass. 203.

*Missouri*. — Prewitt v. Martin, 59 Mo. 325; State v. Stein, 79 Mo. 330.

*Nebraska*. — Fremont Butter, etc., Co. v. Peters, 45 Neb. 356.

*New Hampshire*. — Illinois University v. Spalding, 71 N. H. 163.

*New York*. — Wilder v. Peabody, 21 Hun (N. Y.) 376; Plyer v. German American Ins. Co., 1 N. Y. Supp. 395.

*Rhode Island*. — Barrett v. Dodge, 16 R. I. 740.

*Texas*. — Bernheim v. Lyon, 5 Tex. Civ. App. 716.

*Contra*. — National Ben. Assoc. v. Harding, 4 Ohio Cir. Dec. 668, 7 Ohio Cir. Ct. 438.

**A Verified Answer in Another Case** cannot be introduced during the cross-examination of a witness who filed the same. Williams v. Miller, 6 Kan. App. 626.

**2. Usual Form of Question**. — People v. Nonella, 99 Cal. 333; Lowry v. Com., (Ky. 1901) 63 S. W. Rep. 977.

**No Particular Form of Question Ordinarily Required**. — Day v. Stickney, 14 Allen (Mass.) 255; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338; Parkenson v. Bemis, 153 Mass. 280. See also Mullins v. Peaslee, 180 Mass. 161.

**Form of Question Discretionary with Court**. — Hotchkiss v. Germania F. Ins. Co., 5 Hun (N. Y.) 590; Sloan v. New York Cent. R. Co., 45 N. Y. 125. See also Miller v. Jurczyk, 109 Mich. 637.

**3. Conformity of Question to that Put to Witness to Be Impeached**. — Jackson v. Swope, 134 Ind. 111; Pence v. Waugh, 135 Ind. 143; Roller v. Kling, 150 Ind. 159; Stancliff v.

U. S., (Indian Ter. 1904) 82 S. W. Rep. 882; Armstead v. Mendenhall, 83 Minn. 136; Wallace v. State, (Tex. Crim. 1899) 49 S. W. Rep. 395; Missouri, etc., R. Co. v. Criswell, (Tex. Civ. App. 1904) 78 S. W. Rep. 388; State v. Haworth, 24 Utah 398.

**Must Admit of Simple Negative or Affirmative Answer**. — Coates v. Chapman, 195 Pa. St. 100.

**Sufficient Definiteness**. — In Bernardis v. Allen, 136 Cal. 7, it was held that a question whether the witness to be discredited had not made a certain statement, "or words to that effect," was not objectionable for indefiniteness.

**4. Reason of Rule**. — People v. Monella, 99 Cal. 333; Gormley v. Hartray, 105 Ill. App. 625; Sloan v. New York Cent. R. Co., 45 N. Y. 125.

**5. Entire Conversation Not to Be Asked for**. — Manchester F. Assur. Co. v. Insurance Co., 91 Ill. App. 609; Pence v. Waugh, 135 Ind. 143; Roller v. Kling, 150 Ind. 159; McCoy v. Munro, 76 N. Y. App. Div. 435; Hertz v. Minzesheimer, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 58.

**6. Langworthy v. Green Tp.**, 95 Mich. 93; Wysocki v. Wisconsin Lakes Ice, etc., Co., (Wis. 1904) 98 N. W. Rep. 950.

**7. Answers Must Be Responsive to Inquiry**. — Spohn v. Missouri Pac. R. Co., 116 Mo. 617; Tague v. John Caplice Co., 28 Mont. 51.

**Impeachment May Be on Other Matters at Same Time**. — Missouri, etc., R. Co. v. Milam, 20 Tex. Civ. App. 688.

In Massachusetts, when no foundation for impeachment has to be laid, the impeaching testimony must still be confined to the contradiction of the former witness on points within the issue. Brockett v. Bartholomew, 6 Met. (Mass.) 396.

**8. Quincy Horse R., etc., Co. v. Gnuse**, 137 Ill. 264. And see *infra*, this section, *g. a.* (1) *Rule that Foundation Must Be Laid*.

**9. Peterson v. State**, 83 Md. 194.

the same as that which the impeached witness denied making,<sup>1</sup> the entire statement for the introduction of which a foundation is laid, when essential to the effectiveness of the impeachment, should be admitted;<sup>2</sup> but it is not necessary that the impeaching witness should be able to state all that the impeached witness said. It is sufficient if he is able to prove the particular fact with regard to which a repugnancy is alleged to exist.<sup>3</sup>

*d. ACTS AND CONDUCT OF WITNESS INCONSISTENT WITH TESTIMONY.*

Acts and conduct of a witness relating to the matter in controversy inconsistent with his testimony may be inquired into on his cross-examination for the purpose of discrediting him; and if he denies or fails to admit the imputed act or conduct, it may be shown by independent evidence.<sup>4</sup>

*e. FORMER STATEMENT OF WITNESS OMITTING MATERIAL FACTS —*

(1) *In General.* — Where, on a former occasion, whether in or out of court, it was the duty of a witness to speak the whole truth concerning the transaction about which he testifies, it is permissible to show that he omitted to state material facts. That he did not then state such facts affords some presumption against their existence and thus tends to contradict his testimony.<sup>5</sup>

(2) *Former Testimony.* — With respect to the omission of material facts in former testimony, it has been held in several cases that evidence of the omission is inadmissible to discredit the witness, in the absence of a showing that he was either specifically interrogated as to such facts or cautioned to tell all he knew about the matters under investigation. This is placed upon

1. **Substantial Proof of Statement.** — *Morin v. Robarge*, 132 Mich. 337; *Donahoo v. Scott*, (Tex. Civ. App. 1895) 30 S. W. Rep. 385.

**Statement Partly Contradictory Is Admissible.** — *State v. Gray*, 43 Oregon 446.

**Words Synonymous.** — A denial by a witness on cross-examination that he has previously stated to counsel that plaintiff did not tell him the "particulars" of the case, is sufficient foundation to let in evidence that he stated that plaintiff had not told him the "details," the words being, in fact, synonymous, or in ordinary parlance conveying the same meaning. *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77.

**Slight Discrepancy in Time Disregarded.** — *State v. Crook*, 133 N. Car. 672.

2. *Dean v. State*, 78 Miss. 360.

3. **Unnecessary to Remember Entire Statement.** — *Ingram v. Watkins*, 1 Dev. & B. L. (18 N. Car.) 442; *Edwards v. Sullivan*, 8 Ired. L. (30 N. Car.) 302.

4. **Acts and Conduct of Witness Inconsistent with Testimony** — *Alabama*. — *Alabama G. S. R. Co. v. Brooks*, 135 Ala. 401; *Western R. Co. v. Arnett*, 137 Ala. 414.

*California*. — *People v. Lem You*, 97 Cal. 224.

*Florida*. — *Stewart v. State*, 42 Fla. 591.

*Georgia*. — *Whitney v. Butts*, 91 Ga. 124.

*Indiana*. — *Hyland v. Milner*, 99 Ind. 308.

*Massachusetts*. — *Fitzgerald v. Williams*, 148 Mass. 462.

*Michigan*. — *Daniels v. Weeks*, 90 Mich. 199.

*New Hampshire*. — *Judd v. Claremont*, 66 N. H. 418; *Spalding v. Merrimack*, 67 N. H. 382; *Cooper v. Hopkins*, 70 N. H. 271.

*New Jersey*. — *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316.

*New York*. — *National Bank v. Scriven*, 63 Hun (N. Y.) 375; *Blumberg v. Bezosi*, (Supm.

Ct. App. T.) 20 Misc. (N. Y.) 286, reversing (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 424.

*Oregon*. — *Krewson v. Purdom*, 13 Oregon 563.

*Pennsylvania*. — *Miller v. Baker*, 160 Pa. St. 172, 166 Pa. St. 414; *Philadelphia v. Howell*, 19 Pa. Super. Ct. 76; *Philadelphia v. Dobbins*, 24 Pa. Super. Ct. 136, 142, citing *German Fruit Co. v. Roberts*, 8 Pa. Super. Ct. 500.

*Rhode Island*. — *Yeaw v. Williams*, 15 R. I. 20.

*Texas*. — *Gulf, etc., R. Co. v. Hepner*, 83 Tex. 136.

*Vermont*. — *Lander v. Seaver*, 32 Vt. 114; *Nye v. Merriam*, 35 Vt. 438; *Hotchkiss v. Ladd*, 43 Vt. 346; *Bridgman v. Corey*, 62 Vt. 1; *Stillwell v. Farewell*, 64 Vt. 286; *Bagley v. Mason*, 69 Vt. 179.

See generally cases cited *supra*, this division of this section, *b. Direct Contradiction*.

5. **Former Statement Omitting Material Facts**

— **In General.** — *Becker v. Haynes*, 29 Fed. Rep. 441; *Gilliland v. Dunn*, 136 Ala. 327; *Reid v. Foster*, 37 Ill. App. 76; *Hayden v. Stone*, 112 Mass. 346; *Perry v. Breed*, 117 Mass. 155; *Brigham v. Fayerweather*, 140 Mass. 411; *Com. v. Harrington*, 152 Mass. 488; *Alward v. Oakes*, 63 Minn. 190; *Steen v. Friend*, 11 Ohio Cir. Dec. 235, 20 Ohio Cir. Ct. 459; *Spaulding v. Toledo Consol. St. R. Co.*, 10 Ohio Cir. Dec. 660, 20 Ohio Cir. Ct. 99; *Katafiasz v. Toledo Consol. Electric Co.*, 24 Ohio Cir. Ct. 127; *Williams v. State*, 24 Tex. App. 637; *Pennybacker v. Hazlewood*, 26 Tex. Civ. App. 183; *Briggs v. Taylor*, 35 Vt. 57. See also *Stewart v. Stewart*, 56 N. J. Eq. 761, 57 N. J. Eq. 664; *People v. Chapleau*, 121 N. Y. 266; *Cowan v. Third Ave. R. Co.*, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 610, affirmed without opinion 132 N. Y. 598; *Bickford v. Menier*, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 775.



the ground that it is not the duty of witnesses to volunteer evidence.<sup>1</sup>

**9. Laying Foundation for Discrediting Evidence** — *a. CONTRADICTIONARY STATEMENTS* — (1) *Rule that Foundation Must Be Laid* — (*a*) *Oral Statements*. — Before a witness can be impeached by evidence of contradictory statements made by him, it is necessary to prepare the way for the reception of such evidence by cross-examining the witness concerning the supposed contradictions which are to be brought forward against him. Such cross-examination must extend not only to the particulars of the conversation on which it is intended to contradict the witness,<sup>2</sup> but also to the time when, the place where, and the

**1. Omission to State Facts About Which No Inquiry Was Made.** — *Com. v. Hawkins*, 3 Gray (Mass.) 463; *Wheeler v. Van Sickle*, 37 Neb. 651; *Huebner v. Roosevelt*, 7 Daly (N. Y.) 111; *State v. Ogden*, 39 Oregon 195; *Lewis v. State*, 15 Tex. App. 647; *Hyden v. State*, 31 Tex. Crim. 401. *Contra*, *State v. Rosa*, (N. J. 1904) 58 Atl. Rep. 1010; *Anderson v. Dickinson*, 88 Hun (N. Y.) 614, 34 N. Y. Supp. 510, *affirmed* without opinion 157 N. Y. 698. See also the cases cited in the next preceding note.

**Person Present in Court and Failing to Disclose Important Information.** — *People v. Wirth*, 108 Mich. 307. *Compare* *People v. Flechter*, 44 N. Y. App. Div. 199, 14 N. Y. Crim. 328, *Barrett, J., dissenting*.

**Refusal to Testify on Ground of Privilege.** — Where a witness testifies fully and without reserve and there is nothing in his evidence that in the least degree would subject him to a criminal prosecution, his deposition on a former trial, in which he refuses to answer on the ground of privilege, is inadmissible to discredit him. *Tennent Shoe Co. v. Birdseye*, 105 Mo. App. 696.

**2. Foundation for Discrediting Evidence** — *England.* — *Carpenter v. Wall*, 11 Ad. & El. 803, 39 E. C. L. 234; *Angus v. Smith, M. & M.* 473, 22 E. C. L. 360; *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737; *Queen's Case*, 2 Brod. & B. 299, 6 E. C. L. 154; *Browne v. Dunn*, 6 Reports 67.

*Canada.* — *Reg. v. Mailloux*, 16 N. Bruns. 493.

*United States.* — *Conrad v. Griffey*, 16 How. (U. S.) 38; *U. S. v. Dickinson*, 2 McLean (U. S.) 325, 25 Fed. Cas. No. 14,958; *Chapin v. Siger*, 4 McLean (U. S.) 378, 5 Fed. Cas. No. 2,600. *Contra*, *Howland v. Conway*, Abb. Adm. 281, 12 Fed. Cas. No. 6,793.

*Alabama.* — *Payne v. State*, 60 Ala. 80; *Cooper v. State*, 90 Ala. 641; *Gilyard v. State*, 98 Ala. 59; *Little v. Lichkoff*, 98 Ala. 321; *Hester v. State*, 103 Ala. 83; *Suther v. State*, 118 Ala. 88; *Ragland v. State*, 125 Ala. 12; *Alabama G. S. R. Co. v. Brooks*, 135 Ala. 401; *Deal v. State*, 136 Ala. 52; *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432; *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548; *De Yampert v. State*, 139 Ala. 53.

*Arizona.* — *Abernathy v. Reynolds*, (Ariz. 1903) 71 Pac. Rep. 914; *Tamborino v. Territory*, (Ariz. 1900) 62 Pac. Rep. 693, (Ariz. 1901) 64 Pac. Rep. 492.

*Arkansas.* — *Drennen v. Lindsey*, 15 Ark. 359; *Jones v. State*, 58 Ark. 390; *Bims v. Collier*, 69 Ark. 245; *Little Rock, etc., R. Co. v. Voss*, (Ark. 1892) 18 S. W. Rep. 172.

*California.* — *Barkly v. Copeland*, 74 Cal. 1; *Salle v. Mayer*, 91 Cal. 165; *Young v. Brady*, 94

Cal. 128; *Birch v. Hale*, 99 Cal. 299; *People v. Nonella*, 99 Cal. 333; *People v. Chin Hane*, 108 Cal. 597; *People v. Prather*, 120 Cal. 660; *Rowe v. Hibernia Sav., etc., Soc.*, 134 Cal. 403; *Sinkler v. Siljan*, 136 Cal. 356; *People v. Glover*, 141 Cal. 233; *Mutter v. I. X. L. Lime Co.*, (Cal. 1895) 42 Pac. Rep. 1068; *People v. Machado*, 130 Cal. xviii, 63 Pac. Rep. 66; *People v. Brady*, 133 Cal. xx, 65 Pac. Rep. 823; *People v. Scalamiero*, 143 Cal. 343; *People v. Howard*, 143 Cal. 316. See *People v. Levy*, 71 Cal. 618.

*Colorado.* — *Mullen v. McKim*, 22 Colo. 468; *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409; *Lowenstein v. Alexander*, 18 Colo. App. 22.

*Delaware.* — *State v. Deputy*, 3 Penn. (Del.) 19.

*Florida.* — *Montgomery v. Knox*, 23 Fla. 595; *Brown v. State*, (Fla. 1903) 35 So. Rep. 82.

*Georgia.* — *Gardner v. State*, 81 Ga. 144; *Georgia, etc., R. Co. v. Smith*, 85 Ga. 530; *Christian v. Columbus, etc., R. Co.*, 90 Ga. 124.

*Illinois.* — *Root v. Wood*, 34 Ill. 286; *Miner v. Phillips*, 42 Ill. 130; *Richardson v. Kelly*, 85 Ill. 491; *Aneals v. People*, 134 Ill. 401; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688; *Quincy Horse R. Co., etc., Co. v. Gnuse*, 137 Ill. 264, *reversing* 38 Ill. App. 212; *Momence Stone Co. v. Groves*, 197 Ill. 88; *Waller v. People*, 209 Ill. 284; *Boeker v. Hess*, 34 Ill. App. 332; *Travelers Preferred Acc. Assoc. v. McKinney*, 57 Ill. App. 141; *Matter of Noble*, 124 Ill. 266.

*Indiana.* — *Diffenderfer v. Scott*, 5 Ind. App. 243; *Martz v. Cook*, 24 Ind. App. 432; *Famous Mfg. Co. v. Harmon*, 28 Ind. App. 117.

*Indian Territory.* — *Stancliff v. U. S.*, (Ind. Ter. 1904) 82 S. W. Rep. 882.

*Iowa.* — *Richmond v. Sundburg*, 77 Iowa 255; *Kreuger v. Sylvester*, 100 Iowa 647; *State v. Watson*, 102 Iowa 651; *State v. Wright*, 112 Iowa 436; *Trumble v. Happy*, 114 Iowa 624; *Browning v. Gosnell*, 91 Iowa 448; *Neeb v. McMillan*, 92 Iowa 200.

*Kansas.* — *Howe Mach. Co. v. Clark*, 15 Kan. 492; *State v. Cleary*, 40 Kan. 287; *Southern Kansas R. Co. v. Michaels*, 49 Kan. 398.

*Kentucky.* — *Robinson v. Com.*, (Ky. 1889) 11 S. W. Rep. 81; *Louisville, etc., R. Co. v. Alumbaugh*, (Ky. 1899) 51 S. W. Rep. 18; *Harris v. Com.*, (Ky. 1903) 74 S. W. Rep. 1044; *Barclay v. Com.*, (Ky. 1903) 76 S. W. Rep. 4.

*Louisiana.* — *State v. O'Kean*, 35 La. Ann. 901; *State v. Johnson*, 35 La. Ann. 871; *State v. Johnson*, 41 La. Ann. 574; *State v. Callegari*, 41 La. Ann. 578; *State v. Jones*, 44 La. Ann. 960; *State v. Delaneville*, 48 La. Ann. 502; *State v. Conerly*, 48 La. Ann. 1561.

*Maryland.* — *Waters v. Waters*, 35 Md. 532;

person or persons to whom the witness is supposed to have made such statement.<sup>1</sup>

*Brown v. State*, 72 Md. 468; *Peterson v. State*, 83 Md. 104.

*Michigan*.—*Johnston Harvester Co. v. Miller*, 72 Mich. 265; *Kent v. Cole*, 84 Mich. 579; *People v. Pyckett*, 99 Mich. 613; *Skelton v. Fenton Electric Light, etc., Co.*, 100 Mich. 87; *Connell v. McNett*, 109 Mich. 329; *People v. Riede*, 121 Mich. 700; *Henrich v. Saier*, 124 Mich. 86; *Adams v. Detroit Electric R. Co.*, 129 Mich. 291; *Weeks v. Hutchinson*, (Mich. 1903) 97 N. W. Rep. 695.

*Minnesota*.—*Horton v. Chadbourn*, 31 Minn. 322; *Watson v. St. Paul City R. Co.*, 42 Minn. 46; *Hoye v. Chicago, etc., R. Co.*, 46 Minn. 269; *Granning v. Swenson*, 49 Minn. 381.

*Mississippi*.—*Clark v. State*, (Miss. 1891) 9 So. Rep. 820.

*Missouri*.—*State v. Parker*, 96 Mo. 382; *Hamilton v. Rich Hill Coal Min. Co.*, 108 Mo. 364; *Spohn v. Missouri Pac. R. Co.*, 122 Mo. 1; 116 Mo. 617; *State v. Smith*, 125 Mo. 2; *State v. Blitz*, 171 Mo. 530; *Carder v. Primm*, 52 Mo. App. 102; *Kelly v. Stewart*, 93 Mo. App. 47.

*Montana*.—*Tague v. John Caplice Co.*, 28 Mont. 51.

*Nebraska*.—*Wood River Bank v. Kelley*, 29 Neb. 590; *Bartlett v. Cheesebrough*, 32 Neb. 339; *Thompson v. Wertz*, 41 Neb. 31; *Davison v. Cruse*, 47 Neb. 829; *Draper v. Taylor*, 58 Neb. 787; *Dunafon v. Barber*, (Neb. 1902) 92 N. W. Rep. 198; *Barton v. Shull*, (Neb. 1903) 97 N. W. Rep. 292.

*New Mexico*.—*U. S. v. Fuller*, 4 N. Mex. 358; *Kirchner v. Laughlin*, 6 N. Mex. 300.

*New York*.—*Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *McCulloch v. Dobson*, 133 N. Y. 114, *affirming* 60 Hun (N. Y.) 586, 15 N. Y. Supp. 602; *Woodrick v. Woodrick*, 141 N. Y. 457; *Beuerlien v. O'Leary*, 149 N. Y. 33, *reversing* (Supm. Ct. Gen. T.) 28 N. Y. Supp. 1133; *Stewart v. Long Island R. Co.*, 166 N. Y. 604, *affirming* 54 N. Y. App. Div. 623; *Briggs v. Wheeler*, 16 Hun (N. Y.) 583; *People v. Thornton*, 46 Hun (N. Y.) 643; *Lee v. Chadsey*, 2 Keyes (N. Y.) 543; *Sprague v. Cadwell*, 12 Barb. (N. Y.) 518; *Budlong v. Van Nostrand*, 24 Barb. (N. Y.) 25; *Rice v. Rice*, 43 N. Y. App. Div. 458; *Seipp v. Dry-Dock, etc., R. Co.*, 45 N. Y. App. Div. 489; *Geiser Mfg. Co. v. Thomas Taylor Co.*, 55 N. Y. App. Div. 638; *Bouton v. Welch*, 59 N. Y. App. Div. 288; *Schilling v. Smith*, 76 N. Y. App. Div. 464, 12 N. Y. Annot. Cas. 99; *Brunnermer v. Cook, etc., Co.*, 89 N. Y. App. Div. 406; *Boyd v. Boyd*, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 428; *Plyer v. German-American Ins. Co.*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 395; *Durfee v. Knowles*, 50 Hun (N. Y.) 601, 2 N. Y. Supp. 466; *Sandford v. Shafer*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 357; *Provost v. New York*, (C. Pl. Gen. T.) 3 N. Y. Supp. 531; *Weymouth v. Broadway, etc., R. Co.*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 506; *Boyd v. Boyd*, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 428; *Gorgen v. Balzhouser*, 2 N. Y. Wkly. Dig. 529.

*North Carolina*.—*State v. Wright*, 75 N. Car. 439; *Blake v. Broughton*, 107 N. Car. 220; *Hooper v. Moore*, 3 Jones L. (48 N. Car.) 428;

*State v. Patterson*, 2 Ired. L. (24 N. Car.) 352, 38 Am. Dec. 699.

*Oregon*.—*State v. Hunsaker*, 16 Oregon 497; *Smitson v. Southern Pac. R. Co.*, 37 Oregon 74; *Oldenburg v. Oregon Sugar Co.*, 39 Oregon 564; *State v. Deal*, 41 Oregon 437; *State v. McCann*, 43 Oregon 155.

*South Carolina*.—*State v. Henderson*, 52 S. Car. 470.

*South Dakota*.—*State v. Hughes*, 8 S. Dak. 338.

*Texas*.—*Clapp v. Engledow*, 72 Tex. 252; *International, etc., R. Co. v. Dyer*, 76 Tex. 156; *Cabell v. Holloway*, 10 Tex. Civ. App. 307; *Smith v. Jones*, 11 Tex. Civ. App. 18; *Miller v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 996; *Ledbetter v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 1084; *Martinez v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 634; *Cauthern v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 96; *Cogdell v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 311; *Connell v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 512.

*Utah*.—*Olson v. Oregon Short Line R. Co.*, 24 Utah 460; *Black v. Rocky Mountain Bell Telephone Co.*, 26 Utah 451.

*Virginia*.—*Unis v. Charlton*, 12 Gratt. (Va.) 484.

*Washington*.—*Allen v. Swerdfger*, 14 Wash. 461; *Shoemaker v. Bryant Lumber etc., Co.*, 27 Wash. 637.

*West Virginia*.—*State v. Goodwin*, 32 W. Va. 177.

*Wisconsin*.—*Baker v. State*, 69 Wis. 40; *Stacy v. Milwaukee, etc., R. Co.*, 72 Wis. 331; *Welch v. Abbot*, 72 Wis. 512; *Sieber v. Amunson*, 78 Wis. 679; *Hunter v. Gibbs*, 79 Wis. 70; *Cohn v. Heimbauch*, 86 Wis. 176; *Lowe v. State*, 118 Wis. 641.

*Wyoming*.—*Toms v. Whitmore*, 6 Wyo. 220.

**Intention to Impeach Must Be Disclosed.**—*McDowell v. U. S.*, (C. C. A.) 74 Fed. Rep. 403.

**Fishing Questions Not Permissible.**—*Sylvester v. State*, (Fla. 1903) 35 So. Rep. 142. See also *Reg. v. Mailloux*, 16 N. Bruns. 493.

**Absence of Foundation Cured by Subsequent Denial.**—*Hartsfield v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 777.

**A Witness May Be Recalled After Cross-examination** for the purpose of laying a foundation for his impeachment on the ground of contradictory statements. *State v. Nixon*, 47 La. Ann. 836; *State v. Goodbier*, 48 La. Ann. 770; *State v. Brown*, 111 La. 696; *State v. Reed*, 89 Mo. 168; *Crawleigh v. Galveston, etc., R. Co.*, 28 Tex. Civ. App. 260; *Bennett v. State*, 28 Tex. App. 539.

**Court May Recall Witness.**—*Queen's Case*, 2 Brod. & B. 299, 6 E. C. L. 154.

**1. Time, Place, etc., to Be Specified.**—*United States*.—*Standard Oil Co. v. Van Etten*, 107 U. S. 325.

*Alabama*.—*Floyd v. State*, 82 Ala. 16.

*California*.—*Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413; *Birch v. Hale*, 99 Cal. 299; *Plass v. Plass*, 122 Cal. 3; *Green v. Southern Pac. R. Co.*, 122 Cal. 563; *Norris v. Crandall*,

**Reason of Rule.**—The direct tendency of the evidence being to impeach the veracity of the witness by contrasting his present statement with that supposed to have been made by him to some other person, common justice requires that he be given an opportunity of declaring whether he ever made such a statement to that person, and of explaining, in the re-examination, the nature and particulars of the conversation, under what circumstances the statement was made, from what motive, and with what design.<sup>1</sup>

**Former Testimony.**—The rule is equally applicable where the alleged contradictory statements were made by the witness in the giving of testimony in the same or another proceeding at some prior time, and the foundation for impeachment must be laid with the same particularity of inquiry as to time, place, and other details.<sup>2</sup>

133 Cal. xix, 65 Pac. Rep. 568; *People v. Glover*, 141 Cal. 233.

*Florida.*—*Montgomery v. Knox*, 23 Fla. 595; *Brown v. State*, (Fla. 1903) 35 So. Rep. 82.

*Georgia.*—*Whitaker v. State*, 79 Ga. 87.

*Illinois.*—*Aneals v. People*, 134 Ill. 401; *Quincy Horse R., etc., Co. v. Gnuse*, 137 Ill. 264; *Looney v. People*, 81 Ill. App. 370.

*Indiana.*—*Hill v. Gust*, 55 Ind. 45; *Jackson v. Swope*, 134 Ind. 111; *Pence v. Waugh*, 135 Ind. 143; *Skaggs v. Martinsville*, 140 Ind. 476.

*Indian Territory.*—*Stancliff v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 882.

*Iowa.*—*Esterly v. Eppelsheimer*, 73 Iowa 260; *Neeb v. McMillan*, 92 Iowa 200.

*Kansas.*—*Da Lee v. Blackburn*, 11 Kan. 190.

*Kentucky.*—*Helfrich Lumber, etc., Co. v. Bland*, (Ky. 1900) 54 S. W. Rep. 728.

*Louisiana.*—*State v. Jones*, 44 La. Ann. 960.

*Maryland.*—*Brown v. State*, 72 Md. 468.

*Michigan.*—*Koehler v. Buhl*, 94 Mich. 496.

*Mississippi.*—*Fulton v. Hughes*, 63 Miss. 61; *Dunlap v. Richardson*, 63 Miss. 447; *Jones v. State*, 65 Miss. 179; *Bonelli v. Bowen*, 70 Miss. 142; *Clark v. State*, (Miss. 1891) 9 So. Rep. 820.

*Missouri.*—*Mahaney v. St. Louis, etc., R. Co.*, 108 Mo. 191; *Hamilton v. Rich Hill Coal Min. Co.*, 108 Mo. 364; *State v. Baldwin*, 56 Mo. App. 423; *State v. Ragsdale*, 59 Mo. App. 590; *Krup v. Corley*, 95 Mo. App. 640.

*Nebraska.*—*Wood River Bank v. Kelley*, 29 Neb. 590; *Bartlett v. Cheesebrough*, 32 Neb. 339; *Daly v. Melendy*, 32 Neb. 852; *Hanscom v. Burmood*, 35 Neb. 504; *Davison v. Cruse*, 47 Neb. 829; *McVey v. State*, 55 Neb. 777; *Zimmerman v. Kearney County Bank*, 59 Neb. 23; *Dunafon v. Barber*, (Neb. 1902) 92 N. W. Rep. 198.

*Nevada.*—*Reno Mill, etc., Co. v. Westfield*, 26 Nev. 332.

*New York.*—*Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. 13; *Bogart v. Delaware, etc., R. Co.*, 72 Hun (N. Y.) 412; *Rice v. Rice*, 43 N. Y. App. Div. 458.

*North Carolina.*—*State v. Dickerson*, 98 N. Car. 708.

*Oregon.*—*State v. Hunsaker*, 16 Oregon 497; *State v. Gray*, 43 Oregon 446.

*Pennsylvania.*—*Zebbley v. Storey*, 117 Pa. St. 478.

*South Carolina.*—*Stepp v. National L., etc., Assoc.*, 37 S. Car. 417; *State v. Henderson*, 52 S. Car. 470.

*South Dakota.*—*State v. Hughes*, 8 S. Dak. 338.

*Texas.*—*Henderson v. State*, 1 Tex. App. 432; *Treadway v. State*, 1 Tex. App. 668; *Ledbetter v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 1084.

*Utah.*—*Olson v. Oregon Short Line R. Co.*, 24 Utah 460.

*Washington.*—*State v. Walters*, 7 Wash. 246.

**Identification of Time, Place, and Person Held Sufficient.**—*People v. Bosquet*, 116 Cal. 75; *People v. Lambert*, 120 Cal. 170; *Kirshbaum v. Hanover F. Ins. Co.*, 16 Ind. App. 606; *State v. Bysong*, 112 Iowa 419; *Ross v. Com.*, (Ky. 1900) 55 S. W. Rep. 4; *Strudgeon v. Sand Beach*, 107 Mich. 496; *State v. Spotted Hawk*, 22 Mont. 33; *Musfelt v. State*, 64 Neb. 445; *Ashton v. Ashton*, 11 S. Dak. 610; *International, etc., R. Co. v. Dyer*, 76 Tex. 156.

**Identification of Time, Place, and Person Held Insufficient.**—*Peterson v. State*, 83 Md. 194.

**1. Reason of Rule—England.**—*Angus v. Smith*, 1 M. & M. 473, 22 E. C. L. 360; *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737; *Queen's Case*, 2 Brod. & B. 299, 6 E. C. L. 154.

*United States.*—*Steamboat Charles Morgan v. Kouns*, 115 U. S. 69.

*Alabama.*—*Lewis v. Post*, 1 Ala. 65; *Powell v. State*, 19 Ala. 577; *Henderson v. State*, 70 Ala. 29; *Johnson v. State*, 102 Ala. 1.

*Colorado.*—*Ryan v. People*, 21 Colo. 119.

*Louisiana.*—*State v. Goodbier*, 48 La. Ann. 770.

*Missouri.*—*State v. Reed*, 89 Mo. 168; *Spohn v. Missouri Pac. R. Co.*, 116 Mo. 617; *Carder v. Primm*, 52 Mo. App. 108.

**2. Former Oral Testimony—Alabama.**—*Burton v. State*, 115 Ala. 1; *Mitchell v. State*, (Ala. 1904) 37 So. Rep. 76.

*Arkansas.*—*Carpenter v. State*, 62 Ark. 286.

*California.*—*People v. Kruger*, 100 Cal. 523; *People v. Turner*, 118 Cal. 324; *Scheerer v. Goodwin*, 125 Cal. 154; *People v. Adams*, 137 Cal. 580; *People v. Glaze*, 139 Cal. 154.

*Colorado.*—*Babcock v. People*, 13 Colo. 515.

*Georgia.*—*Taylor v. Morgan*, 61 Ga. 46; *Cox v. Prater*, 67 Ga. 588; *Reid v. State*, 81 Ga. 760; *Georgia R., etc., Co. v. Smith*, 85 Ga. 530; *Merritt v. State*, 107 Ga. 675; *Taylor v. State*, 110 Ga. 150; *Owen v. Palmour*, 111 Ga. 885.

*Illinois.*—*Looney v. People*, 81 Ill. App. 370.

*Iowa.*—*State v. Ostrander*, 18 Iowa 435; *Martin v. Orndorff*, 22 Iowa 504; *State v. Collins*, 32 Iowa 36; *State v. Cater*, 100 Iowa 501; *State v. Carpenter*, (Iowa 1904) 98 N. W. Rep. 775.



**Statements by Party's Own Witness.** — Where a party is allowed by statute to impeach his own witness by proof of previous contradictory statements made by him, the foundation for such impeachment must be laid as in other cases, and the attention of the witness called to the occasion and the particulars of the alleged statements.<sup>1</sup>

(b) **Written Statements.** — Though the alleged contradictory statements were reduced to writing by the witness, or written by another and signed by the witness, it is none the less necessary to lay the proper foundation for impeachment. But in such case the mere questioning of the witness is not sufficient. It is necessary that the writing be exhibited to him and that he be given an opportunity to read or examine the same; then, if he admit the genuineness thereof, the writing may, at the proper season, be received in evidence.<sup>2</sup>

*Kansas.* — *State v. Cleary*, 40 Kan. 287. Compare *Hughes v. Ward*, 38 Kan. 452.

*Michigan.* — *Seligman v. Ten Eyck*, 53 Mich. 285; *Toohy v. Plummer*, 69 Mich. 345; *Zibbell v. Grand Rapids*, 129 Mich. 659.

*Minnesota.* — *Wommer v. Segelbaum*, 78 Minn. 182.

*Missouri.* — *Buckman v. Missouri*, etc., R. Co., 100 Mo. App. 30. Compare *Plummer v. Milan*, 79 Mo. App. 439.

*Nebraska.* — *Hanscom v. Burmood*, 35 Neb. 504; *Palmer v. Burleigh*, (Neb. 1903) 93 N. W. Rep. 1049.

*New Jersey.* — *Union Square Nat. Bank v. Simmons*, (N. J. 1899) 42 Atl. Rep. 489.

*New York.* — *Oderkirk v. Fargo*, 61 Hun (N. Y.) 418.

*Oregon.* — *State v. Bartmess*, 33 Oregon 110; *State v. Ogden*, 39 Oregon 195.

*Pennsylvania.* — *Zebley v. Storey*, 117 Pa. St. 478.

*Texas.* — *Fuller v. State*, 30 Tex. App. 559; *Turner v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 366.

*Vermont.* — *McKinstry v. Collins*, (Vt. 1904) 56 Atl. Rep. 985.

*Wisconsin.* — *Waterman v. Chicago*, etc., R. Co., 82 Wis. 613.

1. See *infra*, this section, 10. c. (2) (b) *Impeaching One's Own Witness—Statutory Rule.*

2. **Written Statements—England.** — *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147; *McDonnell v. Evans*, 16 Jur. 103, 10 Eng. L. & Eq. 484; *Hemming v. Maddick*, L. R. 7 Ch. 65.

*United States.* — *Toplitz v. Hedden*, 146 U. S. 252.

*Alabama.* — *Gunter v. State*, 83 Ala. 96.

*California.* — *People v. Ching Hing Chang*, 74 Cal. 389.

*Florida.* — *Simmons v. State*, 32 Fla. 387.

*Georgia.* — *Stamper v. Griffin*, 12 Ga. 450; *Georgia R., etc., Co. v. Smith*, 85 Ga. 530.

*Illinois.* — *Matter of Noble*, 124 Ill. 266; *Illinois Cent. R. Co. v. Wade*, 206 Ill. 523, reversing 108 Ill. App. 423; *Boeker v. Hess*, 34 Ill. App. 332; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423; *North Chicago St. R. Co. v. Cottingham*, 44 Ill. App. 46; *Seckel v. York Nat. Bank*, 57 Ill. App. 579.

*Iowa.* — *Morrison v. Myers*, 11 Iowa 538; *Richmond v. Sundburg*, 77 Iowa 255.

*Kentucky.* — *Murphy v. May*, 9 Bush (Ky.) 11.

*Maine.* — *Drew v. Wadleigh*, 7 Me. 94.

*Maryland.* — *Ecker v. McAllister*, 45 Md. 291.

*Michigan.* — *Lightfoot v. People*, 16 Mich. 511; *Maxted v. Fowler*, 94 Mich. 106.

*Minnesota.* — *Hammond v. Dike*, 42 Minn. 273; *McDonald v. Bayha*, (Minn. 1904) 100 N. W. Rep. 679.

*Missouri.* — *Norris v. Brunswick*, 73 Mo. 256; *State v. Stein*, 79 Mo. 330; *State v. Gonce*, 87 Mo. 627; *Ely-Walker Dry Goods Co. v. McLaughlin*, 87 Mo. App. 105.

*Nebraska.* — *Thompson v. Wertz*, 41 Neb. 31; *Omaha L. & T. Co. v. Douglas County*, 62 Neb. 1.

*Nevada.* — *State v. Tickel*, 13 Nev. 502.

*New Jersey.* — *Daum v. North Jersey St. R. Co.*, 69 N. J. L. 1, affirmed (N. J. 1904) 57 Atl. Rep. 1132.

*New Mexico.* — *U. S. v. Fuller*, 4 N. Mex. 358; *Kirchner v. Laughlin*, 6 N. Mex. 300.

*New York.* — *Newcomb v. Griswold*, 24 N. Y. 208; *Romertze v. East River Nat. Bank*, 49 N. Y. 577; *Gaffney v. People*, 50 N. Y. 416; *Root v. Borst*, 142 N. Y. 62, reversing 65 Hun (N. Y.) 622, 20 N. Y. Supp. 189; *Beyer v. Consolidated Gas Co.*, 44 N. Y. App. Div. 158; *Honstine v. O'Donnell*, 5 Hun (N. Y.) 472; *Clapp v. Wilson*, 5 Den. (N. Y.) 287; *Belinger v. People*, 8 Wend. (N. Y.) 595; *Doud v. Donnelly*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 396; *Weymouth v. Broadway*, etc., R. Co., (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 506. See also *Hanlon v. Ehrich*, 178 N. Y. 474, affirming 80 N. Y. App. Div. 359. And compare *Perine v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 70.

*Ohio.* — *Pennsylvania F. Ins. Co. v. Carnahan*, 10 Ohio Cir. Dec. 225, 19 Ohio Cir. Ct. 97.

*Oregon.* — *State v. Steeves*, 29 Oregon 85.

*Texas.* — *Clapp v. Engledow*, 72 Tex. 252; *Burleson v. Collins*, (Tex. Civ. App. 1895) 28 S. W. Rep. 898.

**Questions as to Contents Inadmissible.** — *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147; *Lightfoot v. People*, 16 Mich. 508; *Cropsey v. Averill*, 8 Neb. 151; *Newcomb v. Griswold*, 24 N. Y. 298; *Gaffney v. People*, 50 N. Y. 416, affirming *Sheld.* (N. Y.) 304. Compare *Randolph v. Woodstock*, 35 Vt. 291. And see *Morrison v. Myers*, 11 Iowa 538, holding that a proper foundation for impeachment was not laid where a letter was shown to and identified by the witness, but it did not appear that he read the same or that his attention was called to the part thereof which it was claimed was in

**Former Testimony.** — The weight of authority seems to be that where the contradictory written statements are contained in a deposition, affidavit, or other paper duly subscribed and sworn to by the witness, the same rule as to laying the foundation for impeachment applies as in the case of other written instruments. The paper should be exhibited to the witness and his attention called to the particular matters involved in the supposed contradiction, in order that he may have an opportunity to explain.<sup>1</sup> But detached or garbled extracts from the writing cannot be alone read to the witness. He is entitled to hear or read his entire former testimony,<sup>2</sup> and to hear or read it before being subjected to cross-examination in regard thereto.<sup>3</sup>

(c) **Laying Foundation as Matter of Right.** — The cross-examining party has a right to lay a foundation for the impeachment of a witness who has given material evidence against him, and it is reversible error to deny him the privilege.<sup>4</sup> But where no injury results from the exclusion of the preliminary questions and answers, because of the fact that the impeaching evidence is subsequently admitted, there is no reversible error.<sup>5</sup>

(d) **How Failure to Lay Foundation Cured.** — The failure to lay the proper foundation for impeaching evidence is rendered immaterial by the subsequent recalling of the witness and his examination in reference thereto,<sup>6</sup> or by the subsequent introduction of the evidence without objection.<sup>7</sup>

(2) **Rule that Foundation Need Not Be Laid.** — In a few states the rule

conflict with his testimony on the stand, so as to give him an opportunity to explain it.

1. **Former Written Testimony.** — *Alabama.* — Howell v. Reynolds, 12 Ala. 128; Powell v. State, 19 Ala. 577; Floyd v. State, 82 Ala. 16; Sanders v. State, 105 Ala. 4.

*California.* — People v. Le Chuck, 78 Cal. 317; People v. Lambert, 120 Cal. 170. See also McGraw v. Friend, etc., Lumber Co., 133 Cal. 589.

*Florida.* — Simmons v. State, 32 Fla. 387.

*Illinois.* — Matter of Noble, 124 Ill. 266.

*Iowa.* — Samuels v. Griffith, 13 Iowa 103; State v. Phillips, 118 Iowa 660.

*Louisiana.* — State v. Callegari, 41 La. Ann. 578.

*Minnesota.* — Hammond v. Dike, 42 Minn. 273.

*Missouri.* — State v. West, 95 Mo. 139; Wilkerson v. Eilers, 114 Mo. 245. See also State v. Crow, 107 Mo. 341.

*Montana.* — State v. Pugh, 16 Mont. 343; State v. O'Brien, 18 Mont. 1.

*New Mexico.* — U. S. v. Fuller, 4 N. Mex. 358.

*New York.* — Stephens v. People, 19 N. Y. 549. But see Clapp v. Wilson, 5 Den. (N. Y.) 285.

*Oregon.* — State v. Crockett, 39 Oregon 76.

*Texas.* — Grosse v. State, 11 Tex. App. 364.

**In Georgia** the code dispenses with the necessity of calling the attention of the witness to his former testimony as a preliminary to impeachment, where the statements of the witness are written and have been made under oath in connection with some judicial proceeding. Gardner v. Grannis, 57 Ga. 553; Smith v. Page, 72 Ga. 539; Georgia R., etc., Co. v. Smith, 85 Ga. 530. See also Taylor v. State, 110 Ga. 150; Robinson v. State, 120 Ga. 311.

A bill of exceptions in another case cannot be used to impeach a witness without having first been read over to and approved by him. Reid v. State, 81 Ga. 760.

2. **Detached Portions of Writing Not Properly Read.** — Carden v. State, 84 Ala. 417; Kennedy v. State, 85 Ala. 326; Norris v. Brunswick, 73 Mo. 256; State v. Talbott, 73 Mo. 347; State v. Matthews, 88 Mo. 121.

3. **Cross-examination Before Testimony Read Improper.** — Gunter v. State, 83 Ala. 96; Lightfoot v. People, 16 Mich. 507; People v. McArron, 121 Mich. 1; State v. Tickel, 13 Nev. 502; Bellinger v. People, 8 Wend. (N. Y.) 595. See also Cropsey v. Averill, 8 Neb. 151; Thompson v. Gregor, 11 Colo. 531.

4. **Matter of Right.** — Pruitt v. Brockman, 46 Ind. 56; People v. Thornton, 46 Hun (N. Y.) 643; McFarlin v. State, 41 Tex. 23; Turney v. State, 9 Tex. App. 192; Stacy v. Milwaukee, etc., R. Co., 72 Wis. 331. See also Hannon v. St. Louis Transit Co., 102 Mo. App. 216; Chase v. Senn, (C. Pl. Gen. T.) 13 N. Y. Supp. 266; Miller v. Baker, 160 Pa. St. 179.

In Miller v. Barth, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 810, it was held that the refusal to allow preliminary questions as to former testimony of the witness was not ground for reversal where it was apparent that the cross-examining party was not prepared to contradict whatever answer might be given.

5. State v. Winter, 72 Iowa 627; Plummer v. Milan, 79 Mo. App. 439.

6. **Subsequent Recalling of Witness.** — Houston Biscuit Co. v. Dial, 135 Ala. 168; Reid v. Foster, 37 Ill. App. 76; Johnson v. Chicago, etc., R. Co., 58 Iowa 348; Easterly v. Eppelsheimer, 73 Iowa 260; Lewis v. Tapman, 90 Md. 294; Tooker v. Gormer, 2 Hilt. (N. Y.) 71; Patterson v. Wilson, 101 N. Car. 594; Hartfield v. State, (Tex. Crim. 1895) 29 S. W. Rep. 777; Martineau v. May, 18 Wis. 54.

7. **Introduction of Evidence Without Objection.** — Cool v. Roche, 20 Neb. 550; Mead v. Shea, 92 N. Y. 122; Briggs v. Wheeler, 16 Hun (N. Y.) 583; Frankel v. Wolf, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 190.

requiring a predicate to be laid before evidence of contradictory statements is admissible, either does not obtain or may be dispensed with in the discretion of the trial court. It is entirely proper, however, to cross-examine the witness for the purpose; and some cases have held it advisable where no obstacle exists.<sup>1</sup>

(3) *When Witness Is Party to Litigation.* — Statements contradictory of a material portion of his testimony, made out of court by a witness who is also a party to the action, may be proved by the opposing party, either as admissions against interest<sup>2</sup> or for the purpose of discrediting the witness.<sup>3</sup> When the statements are admissions against interest, they are admissible as original evidence, and the laying of a foundation for their reception is unnecessary,<sup>4</sup> even though they also tend to impeach the

**1. Rule that Foundation Need Not Be Laid —**  
*Connecticut.* — Hedge v. Clapp, 22 Conn. 263; McGinnis v. Grant, 42 Conn. 77; Tolinson v. Derby, 43 Conn. 562.

*Maine.* — Ware v. Ware, 8 Me. 42; New Portland v. Kingfield, 55 Me. 172.

*Massachusetts.* — Tucker v. Welsh, 17 Mass. 160, 9 Am. Dec. 137; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338; Harrington v. Lincoln, 2 Gray (Mass.) 133; Com. v. Hawkins, 3 Gray (Mass.) 463; Hastings v. Livermore, 15 Gray (Mass.) 10; Day v. Stickney, 14 Allen (Mass.) 260; Blake v. Stoddard, 107 Mass. 111; Day v. Cooley, 118 Mass. 524; Brooks v. Weeks, 121 Mass. 433; Com. v. Moinehan, 140 Mass. 463; Hosmer v. Groat, 143 Mass. 16; Tobin v. Jones, 143 Mass. 448; Weeks v. Needham, 156 Mass. 289; Com. v. Smith, 163 Mass. 411; Carville v. Westford, 163 Mass. 544; Whipple v. Rich, 180 Mass. 477; Sirk v. Emery, 184 Mass. 22.

*New Hampshire.* — Cook v. Brown, 34 N. H. 460.

*Pennsylvania.* — Sharp v. Emmet, 5 Whart. (Pa.) 288; Stearns v. Merchants' Bank, 53 Pa. St. 490; Hester v. Com., 85 Pa. St. 139; Monongahela Water Co. v. Stewartson, 96 Pa. St. 436; Miller v. Baker, 160 Pa. St. 172, 34 W. N. C. (Pa.) 249; Cronkrite v. Trexler, 187 Pa. St. 100; Coates v. Chapman, 195 Pa. St. 109; Com. v. Cowan, 4 Pa. Super. Ct. 579; Jacoby v. North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 W. N. C. (Pa.) 226; Thomas v. Butler, 16 Pa. Super. Ct. 268; Shannon v. Castner, 21 Pa. Super. Ct. 294.

*Vermont.* — State v. Glynn, 51 Vt. 578. See also Downer v. Dana, 19 Vt. 338; Robinson v. Hutchinson, 31 Vt. 444. But see Pierce v. Gilson, 9 Vt. 216; Randolph v. Woodstock, 35 Vt. 291; Ellsworth v. Potter, 41 Vt. 685; Bridgman v. Corey, 62 Vt. 1.

**2. Proof of Admissions Against Interest —**  
*Alabama.* — Moore v. Crosthwait, 135 Ala. 272.

*Arkansas.* — Collins v. Mack, 31 Ark. 684.

*California.* — White v. White, 82 Cal. 427.

*Colorado.* — Rose v. Otis, 18 Colo. 59.

*Idaho.* — Coffin v. Bradbury, 3 Idaho 770.

*Illinois.* — McCoy v. People, 71 Ill. 111; Second Borrowers, etc., Bldg. Assoc. v. Cochran, 103 Ill. App. 29.

*Iowa.* — Conway v. Nicol, 34 Iowa 533; Lucas v. Flinn, 35 Iowa 9.

*Nebraska.* — Churchill v. White, 58 Neb. 22; Dunafon v. Barber, (Neb. 1902) 92 N. W. Rep. 198; Palmer v. Burleigh, (Neb. 1903) 93 N. W. Rep. 1049.

*New York.* — Kennedy v. Wood, 52 Hun (N. Y.) 46; Robbins v. Downey, (C. Pl. Gen. T.) 18 N. Y. Supp. 100, affirming (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 205.

*Pennsylvania.* — Kreiter v. Bomberger, 82 Pa. St. 59; Wilson v. Wilson, 137 Pa. St. 269.

*Texas.* — McBroom v. State, (Tex. Crim. 1901) 61 S. W. Rep. 481.

*Wisconsin.* — Wisconsin Planing Mill Co. v. Schuda, 72 Wis. 277.

*Wyoming.* — Keffer v. State, (Wyo. 1903) 73 Pac. Rep. 556.

**3. Impeaching Party by Proof of Contradictory Statements —**  
*Alabama.* — Smith v. State, 137 Ala. 22.

*California.* — People v. Pete, 123 Cal. 373.

*Colorado.* — Rose v. Otis, 18 Colo. 59.

*Delaware.* — Chielinsky v. Hoopes, 1 Marv. (Del.) 273.

*Georgia.* — Whitaker v. State, 79 Ga. 87.

*Iowa.* — State v. Forsythe, 99 Iowa 1; State v. Chingren, 105 Iowa 169.

*Louisiana.* — State v. Robinson, 52 La. Ann. 541.

*Minnesota.* — State v. Barrett, 40 Minn. 65.

*Missouri.* — Owens v. Kansas City, etc., R. Co., 95 Mo. 169; Sanders v. Clifford, 72 Mo. App. 548.

*Montana.* — State v. Broadbent, 27 Mont. 342.

*Nebraska.* — Palmer v. Burleigh, (Neb. 1903) 93 N. W. Rep. 1049.

*New York.* — Meyer v. Campbell, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 283.

*Pennsylvania.* — Wilson v. Wilson, 137 Pa. St. 269; Com. v. Mosier, 26 W. N. C. (Pa.) 182.

**4. Admissions Competent as Original Evidence —**  
*Alabama.* — Moore v. Crosthwait, 135 Ala. 272.

*Arkansas.* — Collins v. Mack, 31 Ark. 684.

*California.* — White v. White, 82 Cal. 427.

*Colorado.* — Rose v. Otis, 18 Colo. 59.

*Idaho.* — Coffin v. Bradbury, 3 Idaho 770.

*Illinois.* — McCoy v. People, 71 Ill. 111; Second Borrowers, etc., Bldg. Assoc. v. Cochran, 103 Ill. App. 29.

*Iowa.* — Lucas v. Flinn, 35 Iowa 9; State v. Chingren, 105 Iowa 169.

*Missouri.* — Owens v. Kansas City, etc., R. Co., 95 Mo. 169.

*Nebraska.* — Churchill v. White, 58 Neb. 22; Dunafon v. Barber, (Neb. 1902) 92 N. W. Rep. 198.

*New York.* — Kennedy v. Wood, 52 Hun (N. Y.) 46; Robbins v. Downey, (C. Pl. Gen. T.) 18 N. Y. Supp. 100, affirming (N. Y. City Ct.



witness.<sup>1</sup> But when the statements are introduced merely as impeaching evidence, the weight of authority is that a foundation is necessary.<sup>2</sup>

(4) *Witness Testifying by Deposition, Affidavit, or the Like* — (a) **Rule that Foundation Must Be Laid** — *aa. IN GENERAL.* — In states where the rule obtains that a witness cannot be discredited on the trial by proof of former statements contradictory of his testimony, unless his attention has been called to such statements, and an opportunity for explanation afforded him, it is generally applied, although the evidence is not given *viva voce*, but by deposition or affidavit, or by reproducing what the witness testified to on a preliminary examination or former trial.<sup>3</sup> That the statements were made subsequent to the giving of the testimony, or, if made before, were unknown to the party seeking to discredit the witness at the time of the examination, does not, according to

Gen. T.) 16 N. Y. Supp. 205; *Meyer v. Campbell*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 283.

*Pennsylvania.* — *Kreiter v. Bomberger*, 82 Pa. St. 59.

*South Carolina.* — *State v. Freeman*, 43 S. Car. 105.

*Texas.* — *McBroom v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 481.

*Wisconsin.* — *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277.

*Wyoming.* — *Keffer v. State*, (Wyo. 1903) 73 Pac. Rep. 556.

See also *State v. Forsythe*, 99 Iowa 1.

**1. When Original Evidence Tends to Impeach Witness** — *Colorado.* — *Rose v. Otis*, 18 Colo. 50.

*Missouri.* — *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169.

*Nebraska.* — *Churchill v. White*, 58 Neb. 22; *Dunafon v. Barber*, (Neb. 1902) 92 N. W. Rep. 198.

*New York.* — *Kennedy v. Wood*, 52 Hun (N. Y.) 46; *Robbins v. Downey*, (C. Pl. Gen. T.) 18 N. Y. Supp. 100, *affirming* (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 205; *Meyer v. Campbell*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 283.

*Pennsylvania.* — *Kreiter v. Bomberger*, 82 Pa. St. 59.

*Wisconsin.* — *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277.

*Wyoming.* — *Keffer v. State*, (Wyo. 1903) 73 Pac. Rep. 556.

See also *Collins v. Mack*, 31 Ark. 684; *White v. White*, 82 Cal. 427. Compare *State v. Hamilton*, 32 Iowa 574; *Conway v. Nicol*, 34 Iowa 535.

**2. Foundation Necessary for Mere Impeaching Evidence** — *Alabama.* — *Cooper v. State*, 90 Ala. 641; *Moore v. Crosthwait*, 135 Ala. 272.

*California.* — *Salle v. Mayer*, 91 Cal. 165; *Young v. Brady*, 94 Cal. 128.

*Georgia.* — *Whitaker v. State*, 79 Ga. 91.

*Illinois.* — *Phillips v. Vermillion*, 91 Ill. App. 133.

*Indiana.* — *Pape v. Lathrop*, 18 Ind. App. 633.

*Iowa.* — *State v. Hamilton*, 32 Iowa 574; *Conway v. Nicol*, 34 Iowa 533; *Browning v. Gosnell*, 91 Iowa 448.

*Missouri.* — *Ely-Walker Dry Goods Co. v. McLaughlin*, 87 Mo. App. 105.

*Montana.* — *State v. Broadbent*, 27 Mont. 342.

*Nebraska.* — *Dunafon v. Barber*, (Neb. 1902) 92 N. W. Rep. 198.

*South Carolina.* — *State v. White*, 15 S. Car. 381.

See also *State v. Robinson*, 52 La. Ann. 541.

**3. Witness Testifying by Deposition, Affidavit, or the Like** — **In General** — *United States.* — *Conrad v. Griffey*, 16 How. (U. S.) 38; *The Steamer J. W. Everman*, 2 Hughes (U. S.) 17, 14 Fed. Cas. No. 7,591. *Contra*, *Howland v. Conway*, Abb. Adm. (U. S.) 281, 12 Fed. Cas. No. 6,793.

*Alabama.* — *Doe v. Wilkinson*, 35 Ala. 453, *overruling* dictum in *Holman v. Norfolk Bank*, 21 Ala. 370; *Pruitt v. State*, 92 Ala. 41; *Baird Lumber Co. v. Devlin*, 124 Ala. 245.

*Arkansas.* — *Carpenter v. State*, 62 Ark. 286.

*Georgia.* — *Johnson v. Kinsey*, 7 Ga. 428.

*Illinois.* — *Matter of Noble*, 124 Ill. 266; *Travelers Preferred Acc. Assoc. v. McKinney*, 57 Ill. App. 141; *Seckel v. York Nat. Bank*, 57 Ill. App. 579.

*Indiana.* — *Jenkins v. Lutz*, 26 Ind. App. 150.

*Kansas.* — *Greer v. Higgins*, 20 Kan. 420.

*Kentucky.* — *Murphy v. May*, 9 Bush (Ky.) 33.

*Louisiana.* — *Fletcher v. Fletcher*, 5 La. Ann. 406. See also *Fletcher v. Henley*, 13 La. Ann. 101.

*Maryland.* — *Matthews v. Dare*, 20 Md. 248.

*Ohio.* — *Monroe v. Wehl*, 6 Ohio Cir. Dec. 188, 13 Ohio Cir. Ct. 689.

*Tennessee.* — *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Story v. Saunders*, 8 Humph. (Tenn.) 663.

*Texas.* — *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395; *Joy v. Liverpool, etc., Ins. Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 822. See also *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515.

*Washington.* — *Brown v. Gillett*, 33 Wash. 264.

*Contra.* — *Harvey v. Mount*, 7 Beav. 517; *Penny v. Watts*, 2 De G. & Sm. 501.

**Successive Depositions in Same Cause.** — Where the deposition of a witness is taken more than once in the same cause, and only one of them is given in evidence, it has been held in some jurisdictions that those previously taken may be referred to for the purpose of showing contradictory statements, without laying any predicate for the admission of the evidence. *Hester v. Lumpkin*, 4 Ala. 509; *Carville v. Stout*, 10 Ala. 796; *Doe v. Wilkinson*, 35 Ala. 453; *Williams v. Chapman*, 7 Ga. 467; *Bryan v. Walton*, 14 Ga. 185. See also *Thompson v. Gregor*, 11 Colo. 531; *Thomasson v. Driskell*, 13 Ga. 253. *Contra*, *Samuels v. Griffith*, 13 Iowa 103.

the weight of authority, warrant an exception to the rule;<sup>1</sup> nor does the fact that no opportunity could be afforded either at or before the trial, by reason of the death of the witness, mental incapacity, absence from the jurisdiction, or the like.<sup>2</sup> Where a witness whose evidence has been taken under a commission is still accessible, a second commission may be sued out to afford him an opportunity to explain contradictory statements made subsequent to the taking of his testimony, or which were unknown to the party seeking to prove such statements at the time the testimony was taken.<sup>3</sup>

*bb. WITNESS TESTIFYING BY AFFIDAVIT FOR CONTINUANCE.*—Where a continuance is sought to procure the attendance of an absent witness, and the adverse party, to avoid the postponement, admits that the witness will testify as stated in the affidavit filed for the purpose, the evidence thus given cannot be discredited on the trial by proof of contradictory statements.<sup>4</sup> The party

**1. Statements Made or Discovered After Testimony Taken—In General—***United States.*—Conrad v. Griffey, 16 How. (U. S.) 38.

*Arkansas.*—Griffith v. State, 37 Ark. 324.

*California.*—People v. Compton, 132 Cal. 484; People v. Witty, 138 Cal. 576.

*Colorado.*—Ryan v. People, 21 Colo. 119.

*Georgia.*—Johnson v. Kinsey, 7 Ga. 428; Williams v. Chapman, 7 Ga. 467; Killian v. Augusta, etc., R. Co., 79 Ga. 234; Georgia R., etc., Co. v. Smith, 85 Ga. 530; Raleigh, etc., R. Co. v. Bradshaw, 113 Ga. 862.

*Missouri.*—Gregory v. Cheatham, 36 Mo. 155; State v. Grant, 79 Mo. 113.

*New York.*—Kimball v. Davis, 19 Wend. (N. Y.) 437, reversed on other grounds 25 Wend. (N. Y.) 259; Stacy v. Graham, 14 N. Y. 492, affirming 3 Duer (N. Y.) 444; Van Ness v. Bush, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 33, 22 How. Pr. (N. Y.) 481; Fitch v. Kennard, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 468, reversed on other grounds (C. Pl. Gen. T.) 2 Misc. (N. Y.) 95.

*Ohio.*—Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.

*Texas.*—Galveston, etc., R. Co. v. Briggs, 4 Tex. Civ. App. 515.

*Virginia.*—Unis v. Charlton, 12 Gratt. (Va.) 484.

*Contra.*—Howell v. Reynolds, 12 Ala. 128; Roberts v. Collins, 6 Ired. L. (28 N. Car.) 223; Hooper v. Moore, 3 Jones L. (48 N. Car.) 428.

**2. Statements Made Before Testimony Taken.**—Ayers v. Watson, 132 U. S. 394; Sharp v. Hicks, 94 Ga. 624; Eppert v. Hall, 133 Ind. 417; Hubbard v. Briggs, 31 N. Y. 518; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.

**Statements Made After Testimony Taken.**—Mattox v. U. S., 156 U. S. 237, three justices dissenting; State v. Johnson, 35 La. Ann. 871; State v. Wiggins, 50 La. Ann. 330; Stewart v. State, (Tex. Crim. 1894) 26 S. W. Rep. 203. But see Hamblin v. State, 34 Tex. Crim. 368.

**Subscribing Witnesses to Deeds, Wills, and Other Writings.**—An exception to this rule has been allowed where the attestation of written instruments by subscribing witnesses, deceased at the time of the trial, is proved by secondary evidence or by reproducing testimony given by them at an examination before trial. Losee v. Losee, 2 Hill (N. Y.) 609; Matter of Hesdra, 119 N. Y. 615, 2 Silv. App. (N. Y.) 488; Harden v. Hays, 9 Pa. St. 151; M'Elwee v. Sutton, 2 Bailey L. (S. Car.) 128.

See also Doe v. Ridgway, 4 B. & Ald. 53, 6 E. C. L. 387. *Contra*, Stobart v. Dryden, 1 M. & W. 615, disapproving Wright v. Littler, 3 Burr. 1244, 1 W. Bl. 346; Aveson v. Kinnaird, 6 East 188, and Durham v. Beaumont, 1 Campb. 207.

**Witness Who Refuses to Be Cross-examined.**—Where a witness, after having been examined in chief, refused to be cross-examined, it was held that contradictory statements might be proved without first laying a foundation for the admission of the evidence. People v. Moore, 15 Wend. (N. Y.) 419, criticised Stacy v. Graham, 14 N. Y. 492.

**Testimony by Dying Declarations an Exception to Rule.**—See the title DYING DECLARATIONS, vol. 10, p. 384. See also State v. O'Shea, 60 Kan. 772; State v. Crawford, 31 Wash. 260.

**Ex-parte Deposition Taken Without the Knowledge of the Adverse Party.**—Where a deposition was taken *ex parte*, by authority of statute, and the taking of it was not known to the adverse party until it was opened at the trial, evidence of contradictory statements made by the witness was held admissible. McKinney v. Neil, 1 McLean (U. S.) 540, 16 Fed. Cas. No. 8,865.

**3. Suing Out Second Commission to Afford Opportunity.**—Gregory v. Marychurch, 12 Beav. 275; Conrad v. Griffey, 16 How. (U. S.) 38; Johnson v. Kinsey, 7 Ga. 428; Williams v. Chapman, 7 Ga. 467; Killian v. Augusta, etc., R. Co., 79 Ga. 234; Georgia R., etc., Co. v. Smith, 85 Ga. 530; Raleigh, etc., R. Co. v. Bradshaw, 113 Ga. 862; Kimball v. Davis, 19 Wend. (N. Y.) 437, reversed on other grounds 25 Wend. (N. Y.) 259; Stacy v. Graham, 14 N. Y. 492, affirming 3 Duer (N. Y.) 444; Fitch v. Kennard, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 468, reversed on other grounds (C. Pl. Gen. T.) 2 Misc. (N. Y.) 95.

**4. Testimony by Affidavit for Continuance—***Alabama.*—Pool v. Devers, 30 Ala. 672; Gafford v. State, 125 Ala. 1.

*Arkansas.*—St. Louis, etc., R. Co. v. Sweet, 57 Ark. 287.

*Illinois.*—Chicago, etc., R. Co. v. Lammert, 19 Ill. App. 135; North Chicago St. R. Co. v. Cottingham, 44 Ill. App. 46.

*Iowa.*—State v. Shannehan, 22 Iowa 435; Williamson v. Peel, 29 Iowa 458.

*Kansas.*—State v. Bartley, 48 Kan. 421; State v. Morton, 59 Kan. 338.

making the admission cannot be allowed to extricate himself from a situation created by his own voluntary act, in disregard of fixed rules of practice and evidence.<sup>1</sup> Statutes regulating continuances, however, sometimes expressly authorize proof of any contradictory statement made by the absent witness in relation to the matter in issue and on trial.<sup>2</sup>

(b) **Rule that Foundation Need Not Be Laid.** — In states where the rule requiring a predicate to be laid before evidence of contradictory statements is admissible, either does not obtain or may be dispensed with in the discretion of the trial court, such evidence may be given for the purpose of discrediting a witness testifying by deposition, affidavit, or the like, without any preliminary examination, especially where such examination cannot be had. So, also, in several states, of evidence tending to show bias on the part of the witness for or against a party to the litigation.<sup>3</sup>

(5) **Refreshing Memory of Witness.** — It is proper to interrogate a witness as to former statements made or former testimony given by him, for the mere purpose of refreshing his memory or testing his sincerity, entirely apart from any purpose of laying a foundation for his impeachment.<sup>4</sup>

b. **BIAS OF WITNESS.** — In some states evidence showing that a witness is interested in the result of the litigation, or otherwise biased in favor of or against one of the parties, is admissible without first examining the witness on the subject.<sup>5</sup> The weight of authority is to the contrary, however, at least where the bias is sought to be shown by the declarations of the witness himself.<sup>6</sup>

*Kentucky.* — See *Lindle v. Com.*, 111 Ky. 866.

*Louisiana.* — *State v. Guy*, 107 La. 573.

*Mississippi.* — *Fulton v. Hughes*, 63 Miss. 61.

*Washington.* — *State v. Carter*, 8 Wash. 272.

**Reserving Right to Discredit Witness.** — It has been held that a party in making the admission to avoid a continuance may expressly reserve the right to impeach the witness. *State v. Gibbs*, 10 Mont. 213.

1. **Situation the Result of Voluntary Act of Party.** — *Pool v. Devers*, 30 Ala. 672; *Gafford v. State*, 125 Ala. 1; *Chicago, etc., R. Co. v. Lammert*, 19 Ill. App. 135; *Williamson v. Peel*, 29 Iowa 458; *Fulton v. Hughes*, 63 Miss. 61.

2. **Statutory Authority.** — *State v. Miller*, 67 Mo. 604; *State v. Hickman*, 75 Mo. 416; *Ely-Walker Dry Goods Co. v. McLaughlin*, 87 Mo. App. 105.

A provision that the facts which it is admitted the witness would swear to, if present, may be contradicted by other evidence, does not confer such authority. *St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287; *State v. Hickman*, 75 Mo. 416; *State v. Carter*, 8 Wash. 272.

3. **Evidence of Contradictory Statements.** — *Tucker v. Welsh*, 17 Mass. 161, 9 Am. Dec. 137; *Patterson v. Dushane*, 137 Pa. St. 23, 27 W. N. C. (Pa.) 41; *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599; *Shannon v. Castner*, 21 Pa. Super. Ct. 294; *Downer v. Dana*, 19 Vt. 338; *Robinson v. Hutchinson*, 31 Vt. 444.

**Evidence of Bias of Witness** — *Daggett v. Tallman*, 8 Conn. 169; *Aurora v. Scott*, 82 Ill. App. 616, affirmed 185 Ill. 539.

4. **Refreshing Memory of Witness.** — *Taylor v. State*, 110 Ga. 150; *Consolidated Coal Co. v.*

*Seniger*, 79 Ill. App. 456; *Pickard v. Bryant*, 92 Mich. 430; *Brown v. State*, 42 Tex. Crim. 176.

5. **Foundation Not Required.** — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *Aurora v. Scott*, 82 Ill. App. 616, affirmed 185 Ill. 539; *Whitney v. State*, 154 Ind. 573; *People v. Brooks*, 131 N. Y. 321, reversing on this point 61 Hun (N. Y.) 619, 15 N. Y. Supp. 362; *Pierce v. Gilson*, 9 Vt. 216; *Ellsworth v. Potter*, 41 Vt. 685; *Martin v. Barnes*, 7 Wis. 239. See also *Atty.-Gen. v. Hitchcock*, 1 Exch. 91, per *Alderson, B.*; *State v. Glynn*, 51 Vt. 578. Compare *Sanford v. Shafer*, 50 Hun (N. Y.) 600, 2 N. Y. Supp. 357, *Martineau v. May*, 18 Wis. 54.

6. **Foundation Required** — *England.* — *Queen's Case*, 2 Brod. & B. 299, 6 E. C. L. 154, 22 Rev. Rep. 662.

*United States.* — *McKnight v. U. S.*, (C. C. A.) 97 Fed. Rep. 208.

*California.* — *People v. Gardner*, 98 Cal. 127.

*Delaware.* — *State v. Deputy*, 3 Penn. (Del.) 19.

*Georgia.* — *Gardner v. State*, 81 Ga. 144.

*Kentucky.* — *Horner v. Com.*, (Ky. 1897) 41 S. W. Rep. 561.

*Louisiana.* — *State v. Goodbier*, 48 La. Ann. 770.

*Minnesota.* — *State v. Dee*, 14 Minn. 35.

*Missouri.* — *Bates v. Holladay*, 31 Mo. App. 162.

*Nebraska.* — *Davis v. State*, 51 Neb. 301.

*North Carolina.* — *State v. Patterson*, 2 Ired. L. (24 N. Car.) 346; *Pipkin v. Bond*, 5 Ired. Eq. (40 N. Car.) 91; *Edwards v. Sullivan*, 8 Ired. L. (30 N. Car.) 302; *State v. Dickerson*, 98 N. Car. 708.

*Oregon.* — *State v. Stewart*, 11 Oregon 52.

*Texas.* — *Galveston, etc., R. Co. v. La Prelle*, 22 Tex. Civ. App. 593; *Barry v. State*, 37 Tex.



*c.* **DIRECT CONTRADICTION OF FACTS IN ISSUE.** — No foundation need be laid for the admission of evidence competent as original evidence, to disprove or contradict testimony of a witness having material bearing on the issues involved in the litigation.<sup>1</sup>

*d.* **OMISSIONS IN FORMER STATEMENTS.** — Evidence that a witness on a former occasion, when it was his duty to speak, omitted material facts to which he testifies, is inadmissible, without laying a predicate therefor.<sup>2</sup>

**10. Impeaching One's Own Witness** — *a.* **IN GENERAL.** — A party who voluntarily calls a witness in support of his case thereby so far vouches for his credibility that he will not, as a general rule, be permitted to impeach him either by proof of his general reputation, or of his contradictory statements made out of court at another time.<sup>3</sup> But the rule does not apply

Crim. 302; *Mitchell v. State*, 38 Tex. Crim. 170; *Nite v. State*, 41 Tex. Crim. 340.

*Virginia.* — *Davis v. Franke*, 33 Gratt. (Va.) 413; *Langhorne v. Com.*, 76 Va. 1,012.

**1. Direct Contradiction of Facts in Issue.** — *U. S. v. Taylor*, 35 Fed. Rep. 484; *State v. Guy*, 107 La. 573; *Barry v. People*, 29 Colo. 395; *Bernard v. Guidry*, 109 La. 451; *Burris v. Court*, 48 Neb. 179; *Stribley v. Welz*, 4 Ohio Cir. Dec. 520, 8 Ohio Cir. St. 571; *Younger v. State*, (Wyo. 1903) 73 Pac. Rep. 551. See also *People v. Evans*, (Cal. 1895) 41 Pac. Rep. 444; *Central R., etc., Co. v. Skellie*, 86 Ga. 686; *State v. Morton*, 59 Kan. 338.

**Evidence to Contradict Description or Identification of Person or Property.** — *Stiasny v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 172, affirmed without opinion 172 N. Y. 656; *State v. Ellwood*, 18 R. I. 234.

**2. Omissions in Former Statements.** — *Wheeler v. Van Sickle*, 37 Neb. 651; *Bridgman v. Corey*, 62 Vt. 1.

**3. Impeachment Not Allowed** — *England.* — *Ewer v. Ambrose* 3 B. & C. 746, 10 E. C. L. 220; *The Lochlibo*, 14 Jur. 792; *Reg. v. Farr*, 8 C. & P. 768, 34 E. C. L. 627.

*United States.* — *Hickory v. U. S.*, 151 U. S. 303; *Ashley v. Isle County*, (C. C. A.) 83 Fed. Rep. 534.

*Alabama.* — *Winston v. Moseley*, 2 Stew. (Ala.) 137; *Bradford v. Bush*, 10 Ala. 386; *Griffin v. Wall*, 32 Ala. 149.

*Colorado.* — *Babcock v. People*, 13 Colo. 515; *Moffatt v. Tenney*, 17 Colo. 189; *Tourtellotte v. Brown*, 4 Colo. App. 377.

*Connecticut.* — *Wheeler v. Thomas*, 67 Conn. 577; *Carpenter's Appeal*, 74 Conn. 431; *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152.

*Georgia.* — *Dixon v. State*, 86 Ga. 754.

*Illinois.* — *Rockwood v. Poundstone*, 38 Ill. 199.

*Iowa.* — *Thorn v. Moore*, 21 Iowa 285; *Hall v. Chicago, etc., R. Co.*, 84 Iowa 311; *Smith v. Dawley*, 92 Iowa 312.

*Kansas.* — *State v. Keefe*, 54 Kan. 197.

*Kentucky.* — *Helm v. Handley*, 1 Litt. (Ky.) 219; *Pryor v. Warford*, (Ky. 1900) 54 S. W. Rep. 838.

*Louisiana.* — *State v. Vickers*, 47 La. Ann. 1574.

*Massachusetts.* — *Com. v. Starkweather*, 10 Cush. (Mass.) 59; *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

*Michigan.* — *Westphal v. St. Joseph, etc., St. R. Co.*, (Mich. 1903) 96 N. W. Rep. 19.

*Mississippi.* — *Fairly v. Fairly*, 38 Miss. 280.

*Missouri.* — *Dunn v. Dunnaker*, 87 Mo. 600; *Price v. Lederer*, 33 Mo. App. 426; *State v. Burks*, 132 Mo. 363; *Fearcy v. O'Neill*, 149 Mo. 467; *Caldwell v. Farmers', etc., Bank*, 100 Mo. App. 23; *King v. Phoenix Ins. Co.*, 101 Mo. App. 163.

*Nebraska.* — *Nathan v. Sands*, 52 Neb. 660.

*New Jersey.* — *Brewer v. Porch*, 17 N. J. L. 377.

*New York.* — *Bullard v. Pearsall*, 53 N. Y. 230; *Thompson v. Blanchard*, 4 N. Y. 303; *People v. Safford*, 5 Den. (N. Y.) 118; *Sanchez v. People*, 22 N. Y. 147; *Hunt v. Fish*, 4 Barb. (N. Y.) 324; *Thalheimer v. Klapetzy*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 941; *Pollock v. Pollock*, 71 N. Y. 137; *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564; *Hankinson v. Vantine*, 152 N. Y. 20; *Craft v. Brandow*, 61 N. Y. App. Div. 247; *Fleischer v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 44; *Mason v. Corbin*, 88 Hun (N. Y.) 540; *Harlam v. Green*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 261; *Conklan v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 619; *Matter of Mellen*, 56 Hun (N. Y.) 553; *Kern v. De Castro, etc., Sugar Refining Co.*, (Brooklyn City Ct. Gen. T.) 5 N. Y. Supp. 548; *Morris v. Wells*, 4 Silv. Sup. (N. Y.) 34; *Kellum v. Mission of Immaculate Virgin*, 82 N. Y. App. Div. 523; *Noster v. Metropolitan St. R. Co.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 722.

*Ohio.* — *Hurley v. State*, 46 Ohio St. 320; *Katafiasz v. Toledo Consol. Electric Co.*, 24 Ohio Cir. Ct. 127.

*Pennsylvania.* — *Stockton v. Demuth*, 7 Watts (Pa.) 39; *Smith v. Price*, 8 Watts (Pa.) 447; *Stearns v. Merchants' Bank*, 53 Pa. St. 490; *Rapp v. Le Blanc*, 1 Dall. (Pa.) 63; *Dickson's Estate*, 20 Pa. Co. Ct. 152.

*Rhode Island.* — *Hildreth v. Aldrich*, 15 R. I. 163.

*South Carolina.* — *Farr v. Thompson*, Cheves L. (S. Car.) 37.

*South Dakota.* — *State v. Callahan*, (S. Dak. 1904) 99 N. W. Rep. 1099.

*Tennessee.* — *Roundtree v. Tibbs*, 4 Hayw. (Tenn.) 108; *Story v. Saunders*, 8 Humph. (Tenn.) 663.

*Texas.* — *Casey-Swasey Co. v. Virginia State Ins. Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 911; *Goree v. Goree*, 22 Tex. Civ. App. 470; *Erwin v. State*, 32 Tex. Crim. 519.

*Wisconsin.* — *Richards v. State*, 82 Wis. 172; *Collins v. Hoehle*, 99 Wis. 639. See also *Perkins v. State*, 78 Wis. 551.

Where the party who took a deposition re-

where the witness is put on the stand to prove his own fraud, as in such case it cannot be said that he is given credit for honesty.<sup>1</sup>

**b. CONTRADICTION ONE'S OWN WITNESS.** — It must not be understood, however, that a party, by calling a witness who unexpectedly gives evidence against him, is concluded by such evidence. He may call other witnesses to prove that the facts are otherwise than as stated, and it is no objection to any relevant evidence of the material facts on which he relies to support his case or defense, that it may incidentally contradict and discredit one or more of his own witnesses.<sup>2</sup>

fuses to put it in evidence, and the other party does so, the former is then at liberty to impeach the witness, as the act of putting the deposition in evidence makes the witness that of the party who does so. *Cudworth v. South Carolina Ins. Co.*, 4 Rich. L. (S. Car.) 416, 55 Am. Dec. 692; *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343.

**Cannot Prove Witness Insane.** — *Montgomery v. Hunt*, 5 Cal. 366.

**A Bill of Sale Is Not a Witness and May Be Impeached.** — *Henny Buggy Co. v. Patt*, 73 Iowa 485.

**1. Witness to Prove Own Fraud.** — *Webber v. Jackson*, 79 Mich. 175; *Becker v. Koch*, 104 N. Y. 394. See also *Roberts v. Miles*, 12 Mich. 297; *Cross v. Cross*, 108 N. Y. 628; *Arms v. Arms*, 113 N. Y. 646, 21 N. E. Rep. 147.

**2. Proof by Other Witnesses** — *England.* — *Melhuish v. Collier*, 15 Q. B. 878, 69 E. C. L. 878; *Lowe v. Jolliffe*, 1 W. Bl. 365; *Alexander v. Gibson*, 2 Campb. 555; *Ewer v. Ambrose*, 3 B. & C. 746, 10 E. C. L. 220; *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193, 24 E. C. L. 47; *Bradley v. Ricardo*, 8 Bing. 57; *The Lochlilo*, 14 Jur. 792.

*Canada.* — *Stanley Piano Co. v. Thomson*, 32 Ont. 341; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 135; *Robinson v. Reynolds*, 23 U. C. Q. B. 560; *Almon v. Law*, 26 Nova Scotia 340.

*United States.* — *Peters v. U. S.*, (C. C. A.) 94 Fed. Rep. 127; *Swift v. Short*, (C. C. A.) 92 Fed. Rep. 567; *Hickory v. U. S.*, 151 U. S. 303; *U. S. v. Hall*, 44 Fed. Rep. 864; *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *St. Louis Fourth Nat. Bank v. Albaugh*, 188 U. S. 734.

*Alabama.* — *Winston v. Moseley*, 2 Stew. (Ala.) 137; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659; *Bradford v. Bush*, 10 Ala. 386. See also *McLendon v. Grice*, 119 Ala. 513.

*California.* — *Norwood v. Kenfield*, 30 Cal. 393.

*Colorado.* — *Babcock v. People*, 13 Colo. 515; *Moffatt v. Tenney*, 17 Colo. 189; *Brown v. Tourtelotte*, 24 Colo. 204.

*Connecticut.* — *Olmstead v. Winsted Bank*, 32 Conn. 278; *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152.

*Georgia.* — *Burkhalter v. Edwards*, 16 Ga. 593; *Skipper v. State*, 50 Ga. 63; *Cronan v. Roberts*, 65 Ga. 678; *Hollingsworth v. State*, 79 Ga. 605; *Moultrie Repair Co. v. Hill*, 120 Ga. 730; *Merchants' Bank v. Rawls*, 7 Ga. 191.

*Illinois.* — *Rockwood v. Poundstone*, 38 Ill. 199; *McFarland v. Ford*, 32 Ill. App. 173; *U. S. Brewing Co. v. Ruddy*, 203 Ill. 306; *Sauter v. Anderson*, 112 Ill. App. 580; *Rindskoph v. Kuder*, 145 Ill. 607.

*Iowa.* — *Thorn v. Moore*, 21 Iowa 285; *Gardner v. Connelly*, 75 Iowa 205; *Smith v. Utesch*,

85 Iowa 381; *Benton County Sav. Bank v. Strand*, 106 Iowa 606.

*Kansas.* — *Wallach v. Wylie*, 28 Kan. 138; *Deering v. Cunningham*, 63 Kan. 174.

*Kentucky.* — *Gray v. Gray*, 3 Litt. (Ky.) 465.

*Louisiana.* — See *State v. Vickers*, 47 La. Ann. 1574.

*Maine.* — *Brown v. Osgood*, 25 Me. 505; *Hall v. Houghton*, 37 Me. 411.

*Maryland.* — See *Berry v. Safe Deposit, etc., Co.*, 96 Md. 45.

*Massachusetts.* — *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Com. v. Starkweather*, 10 Cush. (Mass.) 59; *Com. v. Devaney*, 182 Mass. 33.

*Michigan.* — *Snell v. Gregory*, 37 Mich. 500; *Pickard v. Bryant*, 92 Mich. 430; *Darling v. Thompson*, 108 Mich. 215; *Smith v. Smith*, 125 Mich. 234.

*Mississippi.* — See *Fairly v. Fairly*, 38 Miss. 280.

*Missouri.* — *Brown v. Wood*, 19 Mo. 475; *Price v. Lederer*, 33 Mo. App. 426; *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *Edwards v. Crenshaw*, 30 Mo. App. 510; *Spurgin Grocer Co. v. Frick*, 73 Mo. App. 128; *Holland v. St. Louis, etc., R. Co.*, 105 Mo. App. 117.

*Nebraska.* — *Blackwell v. Wright*, 27 Neb. 260.

*New Hampshire.* — *Seavy v. Dearborn*, 19 N. H. 351; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457.

*New Jersey.* — *Skellinger v. Howell*, 8 N. J. L. 310; *Ingersoll v. English*, 66 N. J. L. 463; *Thorp v. Leibrecht*, 56 N. J. Eq. 499.

*New York.* — *Thompson v. Blanchard*, 4 N. Y. 303; *People v. Safford*, 5 Den. (N. Y.) 112; *Coulter v. American Merchants Union Express Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 549; *Lawrence v. Barker*, 5 Wend. (N. Y.) 301; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Hunt v. Fish*, 4 Barb. (N. Y.) 324; *Steinbach v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 129; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *People v. Skeehan*, 49 Barb. (N. Y.) 217; *Parsons v. Suydam*, 3 E. D. Smith (N. Y.) 276; *Bemis v. Kyle*, (Buffalo Super. Ct. Gen. T.) 5 Abb. Pr. N. S. (N. Y.) 232; *Bullard v. Pearsall*, 53 N. Y. 230; *Pollock v. Pollock*, 71 N. Y. 137; *Bob v. Vincent*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 137; *Jackson v. Leek*, 12 Wend. (N. Y.) 105; *Williams v. Sargeant*, 46 N. Y. 481; *Vollkommer v. Cody*, 177 N. Y. 124; *Salamanca First Nat. Bank v. Weston*, 24 N. Y. App. Div. 230; *Gray v. Brooklyn Heights R. Co.*, 72 N. Y. App. Div. 424; *Cruse v. Findlay*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 576; *Kumberger v. Miller*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 204; *Hetzel v. Easterly*, 96 N. Y. App. Div. 517; *Bannon v. Levy*, (Supm. Ct. App. T.) 20

**C. PARTY ENTRAPPED BY HOSTILE WITNESS — (1) Refreshing Recollection.** — It frequently happens that a party is entrapped into calling a hostile and unscrupulous witness, who has given one account of a state of facts before the trial, but gives a materially different account on the witness stand. This circumstance has given rise to much discussion, and no little contrariety of opinion, as to how far a party thus surprised and deceived may impeach such a witness by proving his statements out of court. If a witness unexpectedly gives material evidence against the party who called him, such party may, for the purpose of refreshing the memory of the witness and awakening his conscience, ask him if he did not, on a particular occasion, make a contrary statement.<sup>1</sup>

**(2) Proof of Prior Inconsistent Statements — (a) Rule at Common Law.** — Thus far the authorities are agreed, but the question is, should the inquiry stop here. If the witness admits that he has made a contrary statement, there is, of course, no necessity for other evidence of it, and according to many weighty decisions, if he denies making the imputed statement, the party cannot be allowed to prove it by other witnesses where it would not be admissible as independent evidence, and can therefore have no effect but to impair the credit of the witness with the jury.<sup>2</sup> On the other hand, it has

Misc. (N. Y.) 581; *Fitch v. Kennard*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 95.

*North Carolina.* — *State v. Mace*, 118 N. Car. 1244; *Kendrich v. Dillinger*, 117 N. Car. 491; *Hice v. Cox*, 12 Ired. L. (34 N. Car.) 315; *Spencer v. White*, 1 Ired. L. (23 N. Car.) 236; *Shelton v. Hampton*, 6 Ired. L. (28 N. Car.) 216; *Chester v. Wilhelm*, 111 N. Car. 314.

*Ohio.* — *Hurley v. State*, 46 Ohio St. 320.

*Pennsylvania.* — *Stockton v. Demuth*, 7 Watts (Pa.) 39; *De Lisle v. Priestman*, 1 Browne (Pa.) 176; *Lewis v. Baker*, 162 Pa. St. 510; *Eastern Lumber Co. v. Gill*, 9 Pa. Co. Ct. 630.

*South Carolina.* — *Perry v. Massey*, 1 Bailey L. (S. Car.) 32; *Farr v. Thompson*, Cheves L. (S. Car.) 37.

*Texas.* — *Pitman v. Holmes*, (Tex. Civ. App. 1904) 78 S. W. Rep. 961.

*Wisconsin.* — *Richards v. State*, 82 Wis. 172; *Kennedy v. Lincoln*, (Wis. 1904) 99 N. W. Rep. 1038.

**Proof Must Be of Material Fact.** — *Harlam v. Green*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 261.

**1. Refreshing Recollection — England.** — *Melhuish v. Collier*, 15 Q. B. 878, 69 E. C. L. 878; *Reg. v. Williams*, 6 Cox C. C. 343. See also *Faulkner v. Brine*, 1 F. & F. 254; *Martin v. Traveller's Ins. Co.*, 1 F. & F. 505.

*Canada.* — *Davidson v. Arsineau*, 10 N. Bruns. 289; *Rex v. Laurin*, 6 Can. Crim. Cas. (Quebec) 135.

*United States.* — See *Hickory v. U. S.*, 151 U. S. 303.

*Alabama.* — *Hemingway v. Garth*, 51 Ala. 530; *Campbell v. State*, 23 Ala. 44; *Griffith v. State*, 90 Ala. 583; *White v. State*, 87 Ala. 24; *Thomas v. State*, 117 Ala. 178.

*Colorado.* — *Babcock v. People*, 13 Colo. 515.

*Connecticut.* — *Carpenter's Appeal*, 74 Conn. 431.

*Illinois.* — *National Syrup Co. v. Carlson*, 42 Ill. App. 178.

*Indiana.* — *Oldfather v. Zent*, 21 Ind. App. 307.

*Iowa.* — *Hall v. Chicago*, etc., R. Co., 84 Iowa 311; *State v. Cummins*, 76 Iowa 133; *Humble v. Shoemaker*, 70 Iowa 223.

*Kansas.* — *State v. Sorter*, 52 Kan. 531; *Johnson v. Leggett*, 28 Kan. 590; *State v. Hughes*, 8 Kan. App. 631.

*Louisiana.* — *State v. Vickers*, 47 La. Ann. 1574; *State v. Williams*, 111 La. 179.

*Maryland.* — *Smith v. Briscoe*, 65 Md. 565.

*Michigan.* — *People v. Gillespie*, 111 Mich. 241; *People v. Payne*, 131 Mich. 474.

*Missouri.* — *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378.

*New York.* — *Bullard v. Pearsall*, 53 N. Y. 230; *People v. Ricker*, (Supm. Ct. Gen. T.) 7 N. Y. Crim. 19; *Maloney v. Martin*, 81 N. Y. App. Div. 432.

*North Dakota.* — *George v. Triplett*, 5 N. Dak. 50.

*Ohio.* — *Hurley v. State*, 46 Ohio St. 320.

*Pennsylvania.* — *Northern Liberties Bank v. Davis*, 6 W. & S. (Pa.) 285.

*Rhode Island.* — *Hildreth v. Aldrich*, 15 R. I. 163.

*South Dakota.* — See *State v. Callahan*, (S. Dak. 1904) 99 N. W. Rep. 1099.

*West Virginia.* — *State v. Hatfield*, 48 W. Va. 561.

*Compare Putnam v. U. S.*, 162 U. S. 687.

**English Practice.** — As to the power of an examiner in chancery to allow a witness to be treated as hostile, see *Wright v. Wilkin*, 4 Jur. N. S. 804; *Ohlsen v. Terrero*, L. R. 10 Ch. 127; *Buckley v. Cooke*, 1 Kay & J. 29.

**2. Proof Not Allowed — England.** — *Reg. v. Ball*, 8 C. & P. 745, 34 E. C. L. 616; *Holdsworth v. Dartmouth*, 2 M. & Rob. 153; *Winter v. Butt*, 2 M. & Rob. 357.

*United States.* — *Hickory v. U. S.*, 151 U. S. 309.

*Alabama.* — *Griffin v. Wall*, 32 Ala. 149. *Southern Bell Telephone, etc., Co. v. Mayo*, 134 Ala. 641.

*California.* — *Matter of Kennedy*, 104 Cal. 429.

*Massachusetts.* — *Adams v. Wheeler*, 97 Mass.



been urged with much reason that a party should not thus be placed at the mercy of a designing witness, and there are many cases in which it is held that where a party has been surprised and entrapped by his own witness, the court may, in its discretion, allow him to call other witnesses to prove that such treacherous witness had previously made statements contrary to his testimony, not for the purpose of proving the truth of such previous statements, but to show the treachery of the witness and to set the party right before the jury. To this effect is the great weight of modern authority.<sup>1</sup>

(b) **Statutory Rule.**—In a large and increasing number of jurisdictions the question has been set at rest by the passage of statutes permitting, with certain restrictions, the proof of prior contradictory statements, not as establishing the truth thereof, but merely to discredit the witness. But in no case may evidence of the reputation or character of the witness be given by the party putting him on the stand.<sup>2</sup> In some jurisdictions surprise is not a condition

67; *Com. v. Starkweather*, 10 Cush. (Mass.) 59.

*Missouri.*—*Creighton v. Modern Woodmen of America*, 90 Mo. App. 378.

*New York.*—*Bullard v. Pearsall*, 53 N. Y. 230; *Conkran v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 619.

*North Carolina.*—*State v. Taylor*, 88 N. Car. 694.

*Ohio.*—*Hurley v. State*, 46 Ohio St. 320.

*Rhode Island.*—*Hildreth v. Aldrich*, 15 R. I. 163.

*Tennessee.*—*Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657.

*Vermont.*—*Cox v. Eayres*, 55 Vt. 24.

*Wisconsin.*—*Collins v. Hoehle*, 99 Wis. 639.

**No Distinction Between Civil and Criminal Cases.**—*State v. Taylor*, 88 N. Car. 697, overruling *State v. Norris*, 1 Hayw. (2 N. Car.) 429, 1 Am. Dec. 564. But compare *infra*, this section, *d. Party Bound to Call Witness*.

**1. Proof of Prior Statements Allowed.**—*United States.*—*Tacoma R., etc., Co. v. Hays*, (C. C. A.) 110 Fed. Rep. 496.

*Arkansas.*—See *Drennen v. Lindsey*, 15 Ark. 359.

*Delaware.*—*State v. Quinn*, 2 Penn. (Del.) 339; *State v. Wright*, 2 Penn. (Del.) 228.

*Illinois.*—*National Syrup Co. v. Carlson*, 42 Ill. App. 178.

*Kansas.*—*St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412. See also *Johnson v. Leggett*, 28 Kan. 605; *State v. Sorter*, 52 Kan. 531.

*Maryland.*—*Smith v. Briscoe*, 65 Md. 561.

*Michigan.*—See *McGee v. Baumgartner*, 121 Mich. 287.

*Minnesota.*—*Selover v. Bryant*, 54 Minn. 434.

*Mississippi.*—*Moore v. Chicago, etc., R. Co.*, 59 Miss. 243; *Bacot v. Hazlehurst Lumber Co.*, (Miss. 1898) 23 So. Rep. 481.

*Missouri.*—See *Dunn v. Dunnaker*, 87 Mo. 600.

*Pennsylvania.*—*McNerney v. Reading*, 150 Pa. St. 611; *Com. v. Wickett*, 20 Pa. Super. Ct. 350. See also *De Lisle v. Priestman*, 1 Browne (Pa.) 176.

*Texas.*—*Southwestern Coal, etc., Co. v. Rohr*, 15 Tex. Civ. App. 404; *Hord v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 227. But see *Hall v. Clountz*, 26 Tex. Civ. App. 348.

Compare *Rex v. Oldroyd*, R. & R. C. C. 88.

**Matter Peculiarly Within Discretion of Court.**—*St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; *Tacoma R., etc., Co. v. Hays*, (C. C. A.) 110 Fed. Rep. 496.

**Contradictory Facts Must Be Relevant to Issue.**—*Madden v. State*, 65 Miss. 176; *Dunk v. State*, (Miss. 1904) 36 So. Rep. 609. Compare *Owens v. State*, 82 Miss. 18.

**Statement Must Be Contradictory.**—*State v. Robinson*, 52 La. Ann. 616.

**2. Statutes Allowing Proof of Previous Statements.**—*England.*—*Greenough v. Eccles*, 5 C. B. N. S. 786, 94 E. C. L. 786; *Rice v. Howard*, 16 Q. B. D. 681; *Buckley v. Cooke*, 1 Kay & J. 29; *Amstell v. Alexander*, 16 L. T. N. S. 830.

*Arkansas.*—*Ward v. Young*, 42 Ark. 542.

*California.*—*People v. De Witt*, 68 Cal. 586; *People v. Kruger*, 100 Cal. 523; *Hyde v. Buckner*, 108 Cal. 522.

*Florida.*—*Williams v. Dickenson*, 28 Fla. 90; *Bryan v. State*, (Fla. 1903) 34 So. Rep. 243.

*Georgia.*—*Dixon v. State*, 86 Ga. 754; *Skipper v. State*, 59 Ga. 63.

*Idaho.*—*State v. Corcoran*, 7 Idaho 220.

*Indiana.*—*Conway v. State*, 118 Ind. 482; *Miller v. Cook*, 127 Ind. 339; *Crocker v. Agnew*, 122 Ind. 585; *Schofield v. Myers*, 27 Ind. App. 375; *Schnuer v. State*, 18 Ind. App. 226; *Oldfather v. Zent*, 21 Ind. App. 307; *Ohio, etc., R. Co. v. Stein*, 140 Ind. 61.

*Kentucky.*—*Champ v. Com.*, 2 Met. (Ky.) 23; *Blackburn v. Com.*, 12 Bush (Ky.) 181.

*Massachusetts.*—*Ryerson v. Abington*, 102 Mass. 526; *Brooks v. Weeks*, 121 Mass. 433; *Com. v. Donahoe*, 133 Mass. 407; *Com. v. Chance*, 174 Mass. 245; *Manning v. Carberry*, 172 Mass. 432; *Day v. Cooley*, 118 Mass. 524.

*Montana.*—*State v. Bloor*, 20 Mont. 574.

*Oregon.*—*State v. McDaniel*, 39 Oregon 161.

*Texas.*—*Davis v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 369; *Thompson v. State*, 29 Tex. App. 208; *Williams v. State*, 25 Tex. App. 76; *Bennett v. State*, 24 Tex. App. 73; *White v. State*, 10 Tex. App. 381; *Williford v. State*, 36 Tex. Crim. 414; *Self v. State*, 28 Tex. App. 398; *Kirk v. State*, 35 Tex. Crim. 224; *Storms v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 439; *Young v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 835; *Ross v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 808; *White v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 749; *Sapp*

precedent to the introduction of such proof;<sup>1</sup> in others it is.<sup>2</sup> In nearly all a predicate must be laid by calling the attention of the witness to the contradictory statement intended to be proved, and the particular occasion when he made it.<sup>3</sup>

(c) **Limitations of Rule.** — In order, however, to justify the application of this rule, whether statutory or at common law, it is not sufficient that the witness has merely failed to give evidence which he was expected to give. In such case, his credibility is immaterial, as he has done no damage; he must have actually testified against the party who called him, and in favor of the opposing party, in some material matter, before he may be thus impeached.<sup>4</sup>

d. **PARTY BOUND TO CALL WITNESS.** — Where a party is bound by law to produce a certain witness, such as a subscribing witness to a will, deed, or other paper, he is not deemed to vouch for his credit, and if such witness gives damaging evidence against him, he may contradict the witness or impeach him by proof of his previous declarations at variance with his testimony.<sup>5</sup>

*v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 456.

*Vermont.* — *Hurlburt v. Hurlburt*, 63 Vt. 667; *Davis v. Buchanan*, 73 Vt. 67.

*Wyoming.* — *Horn v. State*, (Wyo. 1903) 73 Pac. Rep. 705.

Code *Virginia* (1904), § 3351, allowing a party to show prior inconsistent statements of an adverse witness, applies to criminal as well as to civil cases. *McCue v. Com.*, (Va. 1905) 49 S. E. Rep. 623.

1. *Brooks v. Weeks*, 121 Mass. 433; *Blake v. State*, 38 Tex. Crim. 377; (but see *Ross v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 808). See also *Horn v. State*, (Wyo. 1903) 73 Pac. Rep. 705.

2. *McDaniel v. State*, 53 Ga. 253; *Chism v. State*, 70 Miss. 742; *Dunk v. State*, (Miss. 1904) 36 So. Rep. 609; *Ernhart v. Hiller*, 16 Lanc. L. Rev. 51; *Parlin, etc., Co. v. Miller*, 25 Tex. Civ. App. 190.

3. **Laying Predicate** — *Arkansas.* — *Ward v. Young*, 42 Ark. 542.

*California.* — *People v. Wade*, 118 Cal. 672.

*Florida.* — *Williams v. Dickenson*, 28 Fla. 90.

*Indiana.* — *Diffenderfer v. Scott*, 5 Ind. App. 243.

*Louisiana.* — *State v. Vickers*, 47 La. Ann. 1574; *State v. Robinson*, 52 La. Ann. 616.

*Massachusetts.* — *Ryerson v. Abington*, 102 Mass. 526; *Batchelder v. Batchelder*, 139 Mass. 1; *Newell v. Homer*, 120 Mass. 277; *Com. v. Thyng*, 134 Mass. 191; *Crawford v. Weston*, 131 Mass. 283; *Com. v. Smith*, 163 Mass. 411; *Allin v. Whittemore*, 171 Mass. 259; *Com. v. Chance*, 174 Mass. 245; *Wilton v. Humphreys*, 176 Mass. 253.

*Virginia.* — *Gordon v. Funkhouser*, 100 Va. 675.

*Wyoming.* — *Horn v. State*, (Wyo. 1903) 73 Pac. Rep. 705.

4. **Limitations of Rule** — *California.* — *People v. Jacobs*, 49 Cal. 384; *People v. Mitchell*, 94 Cal. 556; *People v. Creeks*, 141 Cal. 529; *Matter of Kennedy*, 104 Cal. 429; *People v. Godwin*, 123 Cal. 374; *People v. Crespi*, 115 Cal. 50. See also *People v. De Witt*, 68 Cal. 584.

*Florida.* — *Mercer v. State*, 41 Fla. 279; *Adams v. State*, 34 Fla. 185; *Sylvester v. State*, (Fla. 1903) 35 So. Rep. 142.

*Georgia.* — *Rickerson v. State*, 106 Ga. 391.

*Indiana.* — *Blough v. Parry*, 144 Ind. 463.

*Kentucky.* — *Champ v. Com.*, 2 Met. (Ky.) 22; *Com. v. Bavarian Brewing Co.*, (Ky. 1904) 80 S. W. Rep. 772; *Feltner v. Com.*, (Ky. 1901) 64 S. W. Rep. 959.

*Massachusetts.* — *Com. v. Welsh*, 4 Gray (Mass.) 535; *Batchelder v. Batchelder*, 139 Mass. 1; *Ryerson v. Abington*, 102 Mass. 526.

*Mississippi.* — *Moore v. Chicago, etc., R. Co.*, 59 Miss. 243.

*Oregon.* — *Langford v. Jones*, 18 Oregon 307; *State v. Steeves*, 29 Oregon 85.

*Texas.* — *Erwin v. State*, 32 Tex. Crim. 520; *Thomas v. State*, 14 Tex. App. 70; *Bennett v. State*, 24 Tex. App. 77; *Scott v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 549; *Gibson v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 471; *Dunagain v. State*, 38 Tex. Crim. 614; *Dawson v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 912; *Gill v. State*, 36 Tex. Crim. 589; *Bailey v. State*, 37 Tex. Crim. 579; *Finley v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 1015; *Cooksey v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 103; *Smith v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 519; *Owens v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 575; *Hanna v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 544; *Shackelford v. State*, (Tex. Crim. 1894) 27 S. W. Rep. 8; *Lankster v. State*, (Tex. Crim. 1902) 72 S. W. Rep. 388.

5. **Where Witness Must Be Called** — *England* — *Coles v. Coles*, L. R. 1 P. 70, 35 L. J. P. 40. *United States.* — See *U. S. v. Hall*, 44 Fed. Rep. 864.

*Illinois.* — *Thompson v. Owen*, 174 Ill. 229.

*Indiana.* — See *Diffenderfer v. Scott*, 5 Ind. App. 243.

*Louisiana.* — *Olinde v. Saizan*, 10 La. Ann. 153.

*Maine.* — *Dennett v. Dow*, 17 Me. 19; *Shorey v. Hussey*, 32 Me. 579.

*Massachusetts.* — See *Brown v. Bellows*, 4 Pick. (Mass.) 179.

*Michigan.* — *People v. Case*, 105 Mich. 92.

*North Carolina.* — See *Crowell v. Kirk*, 3 Dev. L. (14 N. Car.) 355.

*Pennsylvania.* — *Cowden v. Reynolds*, 12 S. & R. (Pa.) 281; *Harden v. Hays*, 9 Pa. St. 151; *Morris v. Guffey*, 188 Pa. St. 534.

*South Carolina.* — *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291; *Jerkowski v. Marco*, 57 S. Car. 402.

**Right of Prosecution in Criminal Cases.** — In two jurisdictions at least the exception is extended to the prosecution in criminal cases. Since the state is obliged to call all the witnesses who know anything about the case, it is only right that it should be allowed to impeach them.<sup>1</sup>

**e. WHERE PARTY CALLS OPPOSING WITNESS.** — If, after a witness has been examined and cross-examined, the cross-examining party calls him in support of his own case, he thereby makes him his own witness and will not be allowed to impeach him as the witness of the opposing party.<sup>2</sup> But he may, of course, prove the facts by other witnesses, in accordance with the general rule.<sup>3</sup> Neither may a party impeach his own witness who is called by the opposing party at a subsequent stage of the trial,<sup>4</sup> though it has been held that where the party calling a witness is not able to prove anything by him, and, on cross-examination, the witness gives damaging testimony against him, such witness is, for the purpose of impeachment, to be deemed the witness of the cross-examining party.<sup>5</sup>

**New Matter Brought Out on Cross-examination.** — In jurisdictions where the cross-examination is confined to the matters inquired of in the examination in chief, a party who travels beyond the legitimate bounds of cross-examination and thereby elicits new and material matter, to that extent, at least, makes the witness his own and should not be allowed to impeach him.<sup>6</sup> But if the

*Vermont.* — *Thornton v. Thornton*, 39 Vt. 122.

In *Massachusetts* a party being under the necessity of calling a subscribing witness may contradict his statement of facts. *Brown v. Bellows*, 4 Pick. (Mass.) 179. But he cannot impeach his general character for truth and veracity. *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

In *New Jersey* it has been held that the complainant in a suit in equity cannot impeach the general character of the defendant for truth and veracity, though he cannot avoid taking his answer under oath, thus making it evidence in the case. *Brown v. Bulkley*, 14 N. J. Eq. 294.

**The Exception** does not hold good when the witness is called for another purpose. *Wilton v. Humphreys*, 176 Mass. 253.

1. *State v. Slack*, 69 Vt. 486; *People v. Elco*, 131 Mich. 523.

2. **Calling Opposing Witness.** — *Craig v. Grant*, 6 Mich. 447; *Tourtelotte v. Brown*, 4 Colo. App. 377; *Richards v. State*, 82 Wis. 172; *Gaines v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 623; *Gandy v. State*, 81 Ala. 68. Compare *People v. McFarlane*, 134 Cal. 618.

A party recalling a witness after cross-examination for further cross-examination, by permission of court, does not thereby make him his own witness, and may impeach him. *State v. Jones*, 64 Mo. 391; *Perkins v. State*, 78 Wis. 551.

3. **Contradicting Witness as to Facts.** — *Pickard v. Bryant*, 92 Mich. 430; *Jones v. State*, 115 Ala. 67. See generally *supra*, this section, *b. Contradicting One's Own Witness*.

4. **Impeaching Own Witness Called by Adversary.** — *Smith v. Provident Sav. L. Assur. Soc.* (C. C. A.) 65 Fed. Rep. 765; *White v. State*, 87 Ala. 24; *Com. v. Hudson*, 11 Gray (Mass.) 66; *Coulter v. American Merchants Union Express Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531. See also *Ellicott v. Pearl*, 10 Pet.

(U. S.) 412. *Contra*, *Hord v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 227. Compare *State v. Branch*, 151 Mo. 622.

5. **Nothing Brought Out on Direct Examination.** — *Bebee v. Tinker*, 2 Root (Conn.) 160; *Milton v. State*, 40 Fla. 251; *Artz v. Chicago, etc., R. Co.*, 44 Iowa 286; *Hall v. Manson*, 99 Iowa 698; *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150; *Hubner v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 290. See also *Mueller v. Tenth, etc., St. Ferry Co.*, 46 N. Y. App. Div. 560.

6. **Cross-examination on New Matter — California.** — See *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 31.

*Florida.* — *Livingston v. Roberts*, 18 Fla. 70; *Eldridge v. State*, 27 Fla. 162.

*Illinois.* — *Chicago, etc., R. Co. v. Stewart*, 104 Ill. App. 37.

*Iowa.* — *Deere v. Bagley*, 80 Iowa 197; *Sheldon v. Bigelow*, 118 Iowa 586.

*Missouri.* — *Anderson v. Union Terminal R. Co.*, 161 Mo. 411; *State v. Branch*, 151 Mo. 622.

*New Jersey.* — *Kohl v. State*, 59 N. J. L. 445.

*New York.* — *People v. Moore*, 15 Wend. (N. Y.) 419; *Hill v. Froehlick*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 610; *Brooklyn First Baptist Church v. Brooklyn F. Ins. Co.*, (Supm. Ct. Gen. T.) 23 How. Pr. (N. Y.) 448; *People v. De Garmo*, 179 N. Y. 130; *Deutschmann v. Third Ave. R. Co.*, 78 N. Y. App. Div. 413; *People v. Holfelder*, (Supm. Ct. Gen. T.) 5 N. Y. Crim. 179; *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447.

*Texas.* — *Shackelford v. State*, (Tex. Crim. 1894) 27 S. W. Rep. 8; *Woodward v. State*, 42 Tex. Crim. 188; *Hodge v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 242.

*Vermont.* — *Fairchild v. Bascomb*, 35 Vt. 398.

**Previous Declarations as Evidence.** — Where the declarations of the witness are put in, not merely to contradict him, but as evidence of facts in the case, the rule does not apply. *St.*



witness volunteers a statement not responsive to the question, the party cross-examining may contradict him as to this statement.<sup>1</sup> Where the cross-examination may properly extend to all matters material to the issue, the witness remains the witness of the party who called him, and the other party's right to impeach him is not jeopardized by the extent of the cross-examination.<sup>2</sup>

**ONE PARTY CALLED BY THE OTHER.** — Where a party calls the opposing party to the witness stand, he is, of course, no more concluded by his testimony than he would be by that of any other witness. He may prove the facts as they exist by other witnesses, if he can, though he thereby incidentally discredits the opposing party as a witness; but by calling him as such, he precludes himself from attacking him for the mere purpose of impeachment.<sup>3</sup> And he will not, as a rule, be heard, in argument to the court or jury, to question his veracity.<sup>4</sup> But the fact that a party calls the opposing party as a witness does not preclude him from proving material admissions made by such party at other times. Such admissions are admissible as independent evidence, notwithstanding they may contradict the testimony given by the witness.<sup>5</sup>

**11. Impeachment of Defendant in Criminal Case — a. IN GENERAL.** — It is well settled that, when the defendant becomes a witness in his own behalf, he is subject to impeachment the same as any other witness.<sup>6</sup>

*Louis Fourth Nat. Bank v. Albaugh*, 188 U. S. 734.

**1. Statement Volunteered.** — *Colwell v. Colwell*, 14 N. Y. App. Div. 80. See also *U. S. Brewing Co. v. Ruddy*, 203 Ill. 306.

**2. Cross-examination Not Limited.** — *Johnson v. Armstrong*, 97 Ala. 731; *Lewis v. Hodgdon*, 17 Me. 267; *Sawrey v. Murrell*, 2 Hayw. (3 N. Car.) 397. See also *Darragh v. Ross*, 5 Silv. Sup. (N. Y.) 323; *McGovern v. Smith*, 73 Vt. 52.

**3. One Party Called by the Other** — *United States*. — *Dravo v. Fabel*, 132 U. S. 487; *Tarsney v. Turner*, 2 Flipp. (U. S.) 735; *McLean v. Clark*, 31 Fed. Rep. 501; *Swift v. Short*, (C. C. A.) 92 Fed. Rep. 567; *Graves v. Davenport*, 50 Fed. Rep. 881.

*Alabama*. — *Warren v. Gabriel*, 51 Ala. 235.

*Arkansas*. — See *Drennen v. Lindsey*, 15 Ark. 359.

*Illinois*. — *Highley v. American Exch. Nat. Bank*, 185 Ill. 565; *Rindskoph v. Kuder*, 145 Ill. 607; *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567.

*Iowa*. — *Gardner v. Connelly*, 75 Iowa 205; *Thorn v. Moore*, 21 Iowa 285; *Hunt v. Coe*, 15 Iowa 197.

*Kansas*. — *Wallach v. Wylie*, 28 Kan. 138.

*Michigan*. — *Snell v. Gregory*, 37 Mich. 500.

*Missouri*. — *Claffin v. Dodson*, 111 Mo. 195; *Bensberg v. Harris*, 46 Mo. App. 404; *Chandler v. Fleeman*, 50 Mo. 239; *Imhoff v. McArthur*, 146 Mo. 371; *Campbell v. McCaskill*, 88 Mo. App. 44.

*New Jersey*. — *Thorpe v. Leibrecht*, 56 N. J. Eq. 499.

*New York*. — *Hunter v. Wetsell*, 84 N. Y. 555; *Becker v. Koch*, 104 N. Y. 394; *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154; *De Meli v. De Meli*, 120 N. Y. 485; *Cross v. Cross*, 108 N. Y. 628; *Polykranas v. Krausz*, 73 N. Y. App. Div. 583; *Mack v. Austin*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 198; *Ruhl v. Heintze*, 97 N. Y. App. Div. 442.

*North Carolina*. — *Helms v. Green*, 105 N. Car. 251; *Chester v. Wilhelm*, 111 N. Car. 314.

*Texas*. — *Paxton v. Boyce*, 1 Tex. 317; *Cook v. Carroll Land, etc., Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1006; *Goree v. Goree*, 22 Tex. Civ. App. 470.

*Vermont*. — *Good v. Knox*, 64 Vt. 97.

*Wisconsin*. — *Garny v. Katz*, 89 Wis. 230.

*Canada*. — *Mair v. Culy*, 10 U. C. Q. B. 321.

**Where a Party Entraps His Opponent.** — If a party relies on what his adversary swore at a former trial and calls him as a witness and is surprised and deceived by a material change in his testimony, he may impeach him in jurisdictions where he would be allowed to impeach another witness called by him in such case. *Cox v. Prater*, 67 Ga. 588.

**Statutory Extension of Rule.** — By statute in *New York* and *Pennsylvania* a party who has called the adverse party may contradict him by proof of his previous declarations. *Kelly v. Jay*, 79 Hun (N. Y.) 535; *Engel v. Dieter*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 793; *Brubaker v. Taylor*, 76 Pa. St. 83.

**4.** *Tarsney v. Turner*, 48 Fed. Rep. 818, 2 Flipp. (U. S.) 735; *Graves v. Davenport*, 50 Fed. Rep. 881; *Hankinson v. Vantine*, 152 N. Y. 20. Compare *Schmidt v. Durnam*, 50 Minn. 96.

**5. Proof of Admissions.** — *Jamison v. Bagot*, 106 Mo. 240; *Thomas v. McDanel*, 88 Iowa 374; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Salt Springs Nat. Bank v. Fancher*, 92 Hun (N. Y.) 327; *Griffis v. Whitson*, 3 Kan. App. 437.

**6. Defendant Subject to Impeachment Like Any Other Witness** — *England*. — *Rex v. Hadwen*, (1902) 1 K. B. 882.

*Alabama*. — *Buchanan v. State*, 109 Ala. 7.

*Arkansas*. — *Williams v. State*, 66 Ark. 264.

*California*. — *People v. Beck*, 58 Cal. 212.

*Kansas*. — *State v. Greenburg*, 59 Kan. 404; *State v. Probasco*, 46 Kan. 310; *State v. Pfefferle*, 36 Kan. 90.

*b. ATTACKING REPUTATION OF WITNESS.* — Therefore it may always be shown that his general reputation for truth and veracity is bad.<sup>1</sup> As in the case of other witnesses, the authorities are not in harmony as to the limit of the inquiry into the general reputation of a defendant who testifies on his own behalf. In some jurisdictions it is held that his general moral character is subject to attack.<sup>2</sup>

*c. CONVICTION OF CRIME.* — Conviction of an infamous crime was an absolute disqualification at common law, and it is generally provided by the

*Kentucky.* — *Com. v. Welch*, 111 Ky. 530; *Justice v. Com.*, (Ky. 1898) 46 S. W. Rep. 499; *Trusty v. Com.*, (Ky. 1897) 41 S. W. Rep. 766; *Pace v. Com.*, 89 Ky. 204; *Lockard v. Com.*, 87 Ky. 201.

*Louisiana.* — *State v. Taylor*, 45 La. Ann. 605; *State v. Murphy*, 45 La. Ann. 958.

*Massachusetts.* — *Com. v. Smith*, 163 Mass. 411; *Com. v. Gorham*, 99 Mass. 420.

*Michigan.* — *People v. Gray*, (Mich. 1904) 98 N. W. Rep. 261; *People v. Howard*, 73 Mich. 10.

*Missouri.* — *State v. McLain*, 92 Mo. App. 456; *State v. Manning*, 87 Mo. App. 78.

*Montana.* — *State v. Schnepel*, 23 Mont. 523. *Nebraska.* — *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

*Nevada.* — *State v. Huff*, 11 Nev. 19. *New Jersey.* — *State v. Hendrick*, (N. J. 1903) 56 Atl. Rep. 247.

*New York.* — *People v. McCormick*, 135 N. Y. 663; *Burdick v. People*, 58 Barb. (N. Y.) 58.

*North Carolina.* — *State v. Goff*, 117 N. Car. 755.

*Oklahoma.* — *Asher v. Territory*, 7 Okla. 188.

*Pennsylvania.* — *Beck v. Hood*, 185 Pa. St. 32; *Huoncker v. Merkey*, 102 Pa. St. 462.

*Rhode Island.* — *State v. McGuire*, 15 R. I. 23.

*Texas.* — *Bearden v. State*, 44 Tex. Crim. 578; *Herod v. State*, 41 Tex. Crim. 597; *Ware v. State*, 36 Tex. Crim. 597.

*Utah.* — *People v. Hite*, 8 Utah 461.

*Vermont.* — *State v. Broderick*, 61 Vt. 421.

**1. General Reputation for Truth and Veracity** — *United States.* — *U. S. v. Brown*, 40 Fed. Rep. 457.

*California.* — *People v. Reed*, (Cal. 1898) 52 Pac. Rep. 835; *People v. Bentley*, 77 Cal. 7.

*Florida.* — *Hodge v. State*, 26 Fla. 11.

*Indiana.* — *Keyes v. State*, 122 Ind. 527; *Morrison v. State*, 76 Ind. 335; *State v. Beal*, 68 Ind. 345; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Mershon v. State*, 51 Ind. 14.

*Kentucky.* — *McDonald v. Com.*, 86 Ky. 10.

*Montana.* — *State v. Schnepel*, 23 Mont. 523.

*South Carolina.* — *State v. Robertson*, 26 S. Car. 117.

*Tennessee.* — *Peck v. State*, 86 Tenn. 263; *Morgan v. State*, 86 Tenn. 473.

*Texas.* — *Holmes v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 979.

And for this purpose a defendant may be asked if he had refused to testify before the grand jury. *Com. v. Smith*, 163 Mass. 411.

**Religious Belief.** — For the purpose of discrediting him as a witness it is allowable to interrogate him concerning his religious belief as a matter affecting his credibility. *State v. Turner*, 36 S. Car. 534.

**2. General Moral Character** — *Alabama.* — *Davenport v. State*, 85 Ala. 336; *Kilgore v. State*, 124 Ala. 24; *Fields v. State*, 121 Ala. 16; *Byers v. State*, 105 Ala. 31; *Jones v. State*, 96 Ala. 102; *McDaniel v. State*, 97 Ala. 14; *Mitchell v. State*, 94 Ala. 68.

*Arkansas.* — *Williams v. State*, 66 Ark. 264.

*California.* — *People v. Walker*, 140 Cal. 153; *People v. Prather*, 120 Cal. 660; *People v. Mayes*, 113 Cal. 618; *People v. Hickman*, 113 Cal. 80; *People v. Beck*, 58 Cal. 212.

*Indiana.* — *Shears v. State*, 147 Ind. 51; *Morrison v. State*, 76 Ind. 337. It was formerly held otherwise. See *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *State v. Beal*, 68 Ind. 346.

*Iowa.* — *State v. Prins*, 117 Iowa 505; *State v. Kirkpatrick*, 63 Iowa 554; *State v. Hardin*, 46 Iowa 623, 26 Am. Rep. 174.

*Kentucky.* — *Helm v. Com.*, (Ky. 1904) 81 S. W. Rep. 270; *Barnes v. Com.*, (Ky. 1902) 70 S. W. Rep. 827; *Justice v. Com.*, (Ky. 1898) 46 S. W. Rep. 499; *Trusty v. Com.*, (Ky. 1897) 41 S. W. Rep. 766; *Crump v. Com.*, (Ky. 1892) 20 S. W. Rep. 390.

*Louisiana.* — *State v. Taylor*, 45 La. Ann. 605; *State v. Guy*, 106 La. 8.

*Missouri.* — *State v. Vandiver*, 149 Mo. 502; *State v. May*, 142 Mo. 135; *State v. Dyer*, 139 Mo. 199; *State v. Weeden*, 133 Mo. 70; *State v. Day*, 100 Mo. 242; *State v. Bulla*, 89 Mo. 598; *State v. Palmer*, 88 Mo. 568; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *State v. McLain*, 92 Mo. App. 456.

*Montana.* — *State v. Schnepel*, 23 Mont. 523.

*New Mexico.* — *Territory v. De Gutman*, 8 N. Mex. 92.

*North Carolina.* — *State v. Spurling*, 118 N. Car. 1250.

*South Dakota.* — *State v. Phelps*, 5 S. Dak. 480.

*Tennessee.* — *Pech v. State*, 86 Tenn. 260.

**Limited to Matters Tending to Impair Credibility.**

— *Dolan v. State*, 81 Ala. 11; *Drew v. State*, 124 Ind. 9; *State v. Rainsbarger*, 79 Iowa 745; *Atwood v. Impson*, 20 N. J. Eq. 157; *State v. Robertson*, 26 S. Car. 117; *State v. Marks*, 16 Utah 204.

**Particular Acts of Misconduct Not Admissible.**

— *Holder v. State*, 58 Ark. 473; *Gifford v. People*, 87 Ill. 210; *Com. v. Welch*, 111 Ky. 530; *People v. Dorothy*, 156 N. Y. 237; *Sweet v. Gilmore*, 52 S. Car. 530; *Bain v. State*, 38 Tex. Crim. 635.

**Particular Traits of Character Not Admissible.**

— *Drew v. State*, 124 Ind. 9 (drinking and swearing); *State v. Guy*, 106 La. 8 (dishonesty, lewdness, insobriety, evil associations, and the like). See also *Haulish v. Boller*, 72 N. Y. App. Div. 559.

statutes removing this disability that such conviction may be proved and left to the consideration of the jury in determining the credibility of the witness.<sup>1</sup> It is accordingly proper, on the cross-examination of the defendant in a criminal case, to ask him if he has ever been in prison,<sup>2</sup> or convicted of an infamous crime,<sup>3</sup> unless it is objected that the record is the best evidence. In some jurisdictions the conviction must have been for felony or other infamous crime;<sup>4</sup> in others convictions for mere misdemeanors are admissible,<sup>5</sup> and a third rule requires the crime to be one involving moral turpitude.<sup>6</sup>

**Record of Conviction.**—The record of the defendant's conviction of an infamous offense may always be introduced in evidence to affect his credibility as a witness where he testifies in his own behalf.<sup>7</sup> The complete record must be produced.<sup>8</sup>

**Identity.**—A defendant may be asked questions tending to identify him with the record.<sup>9</sup> The conviction must not be too remote.<sup>10</sup> The fact that

1. *State v. McGuire*, 15 R. I. 23. See also the title INFAMY AND INFAMOUS CRIMES, vol. 16, p. 245.

2. **Cross-examination as to Imprisonment**—*Arkansas*.—*Baker v. State*, 58 Ark. 513; *Holder v. State*, 58 Ark. 473.

*Kentucky*.—*Williams v. Com.*, (Ky. 1899) 52 S. W. Rep. 843.

*Louisiana*.—*State v. McCoy*, 109 La. 682.

*Massachusetts*.—*Com. v. Bonner*, 97 Mass. 587.

*New York*.—*People v. Hovey*, 29 Hun (N. Y.) 382, affirmed 92 N. Y. 554; *People v. Courtney*, 31 Hun (N. Y.) 199, affirmed 94 N. Y. 490.

*North Dakota*.—*Territory v. O'Hara*, 1 N. Dak. 30.

*Oklahoma*.—*Asher v. Territory*, 7 Okla. 188.

*Oregon*.—*State v. Bacon*, 13 Oregon 143, 57 Am. Rep. 8.

*Texas*.—*Elmore v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 520; *Keaton v. State*, 41 Tex. Crim. 621; *Darbyshire v. State*, 36 Tex. Crim. 547.

3. **Cross-examination as to Conviction of Felony**—*Alabama*.—*Deal v. State*, 136 Ala. 52; *Wells v. State*, 131 Ala. 48.

*California*.—*People v. Sears*, 119 Cal. 267; *People v. Chin Hane*, 108 Cal. 597; *People v. Crowley*, 100 Cal. 478; *People v. Johnson*, 57 Cal. 571.

*Florida*.—*Squires v. State*, 42 Fla. 251.

*Illinois*.—*McKevitt v. People*, 208 Ill. 460.

*Indiana*.—*Vancleave v. State*, 150 Ind. 273.

*Iowa*.—*State v. O'Brien*, 81 Iowa 95.

*Kansas*.—*State v. Probasco*, 46 Kan. 310; *State v. Pfefferle*, 36 Kan. 90.

*Kentucky*.—*Morgan v. Com.*, (Ky. 1903) 72 S. W. Rep. 1098; *Com. v. Welch*, 111 Ky. 530; *Burdette v. Com.*, 93 Ky. 76.

*Louisiana*.—*State v. Alexis*, 45 La. Ann. 973.

*Montana*.—*State v. Black*, 15 Mont. 143.

*Nebraska*.—See *Leo v. State*, 63 Neb. 723.

*North Carolina*.—*State v. Lawhorn*, 88 N. Car. 634.

*Oklahoma*.—*Hyde v. Territory*, 8 Okla. 69.

*Texas*.—*Scoville v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 792; *McDonald v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 383; *Keith v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 628; *Gass v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 73; *Hargrove v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1123; *Ray v. State*, (Tex. Crim. 1897) 43

S. W. Rep. 77; *McCrays v. State*, 38 Tex. Crim. 609; *Bratton v. State*, 34 Tex. Crim. 477; *Thompson v. State*, 33 Tex. Crim. 217; *Hargrove v. State*, 33 Tex. Crim. 431; *Clayton v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 404; *Childs v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 1039.

*Canada*.—*King v. D'Aoust*, 5 Can. Crim. Cas. (Ont.) 407.

*Contra*.—*Charnock v. Merchant*, (1900) 1 Q. B. 474; *Lewis v. Territory*, (Ariz. 1900) 60 Pac. Rep. 694.

4. **Limited to Infamous Crimes.**—*People v. White*, 142 Cal. 292; *Card v. Foot*, 57 Conn. 427; *Young Men's Christian Assoc. v. Rawlings*, 60 Neb. 377; *State v. Payne*, 6 Wash. 563.

5. **Conviction of Misdemeanor**—*Michigan*.—*Pratt v. Wickham*, (Mich. 1903) 94 N. W. Rep. 1059.

*Missouri*.—*State v. Thornhill*, 174 Mo. 364; *State v. Chappell*, 179 Mo. 324.

*New Jersey*.—*State v. Henson*, 66 N. J. L. 601.

*Rhode Island*.—*State v. Babcock*, 25 R. I. 224.

*Vermont*.—*State v. Shaw*, 73 Vt. 149.

*Wisconsin*.—*Thornton v. State*, 117 Wis. 338.

6. **Crime Involving Moral Turpitude.**—*Fitzpatrick v. State*, 37 Tex. Crim. 20; *Williford v. State*, 36 Tex. Crim. 414; *Brittain v. State*, 36 Tex. Crim. 406.

7. **Record of Conviction.**—*Prior v. State*, 99 Ala. 196; *State v. Farmer*, 84 Me. 436; *Com. v. Sullivan*, 150 Mass. 315; *Com. v. Morgan*, 107 Mass. 199; *State v. Minor*, 117 Mo. 302; *State v. Loehr*, 93 Mo. 103; *People v. Paschal*, 68 Hun (N. Y.) 344; *People v. Satterlee*, 5 Hun (N. Y.) 167; *Com. v. Barry*, 8 Pa. Co. Ct. 216; *State v. McGuire*, 15 R. I. 23.

**Civil Case.**—*Card v. Foot*, 57 Conn. 427, holding that the judgment of conviction must be final, and the fact that the record was also admissible for other purposes did not make its admission harmless error.

8. *Com. v. Gorham*, 99 Mass. 420.

9. **Identity.**—*Com. v. Sullivan*, 150 Mass. 315.

10. **Conviction Must Not Be Too Remote.**—*Scoville v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 792, where nine years was held too remote; *Dyer v. State*, (Tex. Crim. 1903) 77



an appeal is pending is immaterial.<sup>1</sup> A plea of guilty is not admissible unless followed by judgment or sentence,<sup>2</sup> nor is an indictment to which the witness has pleaded *nolo contendere*.<sup>3</sup> The conviction being proved or admitted, details and circumstances comprising the offense should not be inquired into.<sup>4</sup>

**d. CROSS-EXAMINATION.**—It is also permissible to cross-examine the defendant concerning his commission of particular offenses which are relevant on the question of credibility.<sup>5</sup> The cross-examination must relate to matters pertinent to the issue, or to specific facts which tend to discredit the defendant as a witness or impeach his moral character,<sup>6</sup> and he cannot be impeached by proof of particular acts having no connection with the offense on trial,<sup>7</sup> or offenses which are too remote.<sup>8</sup>

**Indictment.**—As in the case of other witnesses, it is held in some jurisdictions that a defendant cannot be impeached by asking him if he has been indicted or is under indictment for a particular offense, because an indictment is merely an accusation and the accused is entitled to the presumption of innocence until he is legally convicted.<sup>9</sup> In other jurisdictions the rule is otherwise and the defendant may be asked if he has not been indicted for other crimes.<sup>10</sup> Neither should he be compelled to state if or how many

S. W. Rep. 456, where twenty years was held too remote.

**1. Appeal Pending Immaterial.**—Viberg v. State, 138 Ala. 100, but this rule does not apply where the case has been dismissed by the state pending the appeal. Card v. Foot, 57 Conn. 427.

And where the judgment of conviction has been reversed and a new trial ordered, a defendant may not, at the second trial, be asked if he was convicted on the first trial. Richardson v. State, 33 Tex. Crim. 518.

**2. Plea of Guilty Not Followed by Judgment.**—Marion v. State, 16 Neb. 349.

**3. Plea of Nolo Contendere.**—Rogers v. Hill, 22 R. I. 496; State v. Conway, 20 R. I. 270.

**Contra.**—The defendant on cross-examination may be asked whether he has pleaded *nolo contendere* to an indictment for petty larceny. State v. Henson, 66 N. J. L. 601.

**4. Details of Crime Should Not Be Inquired into.**—People v. Chin Hane, 108 Cal. 597; State v. Gottfreedson, 24 Wash. 398.

**5. Particular Offenses Relative to Credibility.**—People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128, affirming 29 Hun (N. Y.) 461; People v. Irving, 95 N. Y. 541; People v. Hooghkerk, 96 N. Y. 149; People v. Eckert, (Supm. Ct. Gen. T.) 2 N. Y. Crim. 470; People v. Reavey, 38 Hun (N. Y.) 418; People v. Webster, 139 N. Y. 73; People v. Casey, 72 N. Y. 393; People v. Giblin, 115 N. Y. 196; State v. Ekanger, 8 N. Dak. 559. See also Shears v. State, 147 Ind. 51. But see People v. Hamblin, 68 Cal. 101.

**6. People v. Oyer, etc., Ct.,** 83 N. Y. 460; Byrd v. Hudson, 113 N. Car. 203.

**7. Particular Acts Having No Connection with Offense on Trial.**—People v. Clarke, 130 Cal. 642; Fuller v. Fuller, 108 Ga. 256; Seaborn v. Com., (Ky. 1904) 80 S. W. Rep. 223; Leslie v. Com., (Ky. 1897) 42 S. W. Rep. 1095; State v. Carson, 66 Me. 116; Holbrook v. Dow, 12 Gray (Mass.) 358; State v. Vandiver, 149 Mo. 502; Elliott v. State, 34 Neb. 48; Barkman v. State, (Tex. Crim. 1899) 52 S. W. Rep. 69.

Thus, it is improper to ask the defendant if

he did not belong to the Jesse James gang. Clarke v. State, 78 Ala. 474.

**8. Too Remote.**—Offenses occurring more than thirty-two years before the trial, People v. Gotshall, 123 Mich. 474, or even fifteen years before the trial, were held too remote. Baker v. Com., 106 Ky. 212; Bowers v. State, (Tex. Crim. 1902) 71 S. W. Rep. 284.

Though a defendant in a prosecution for homicide may be impeached on cross-examination by asking him as to his connection with the killing of other persons a few days after the homicide on trial. Borrego v. Territory, 8 N. Mex. 446.

**9. Cannot Be Asked as to Indictment.**—Smith v. State, 79 Ala. 21; Bates v. State, 60 Ark. 450; Ashcraft v. Com., (Ky. 1901) 60 S. W. Rep. 931; Ryan v. People, 79 N. Y. 594, affirming 19 Hun (N. Y.) 188.

And the same rule obtains in civil cases. Van Bokkelen v. Berdell, 130 N. Y. 145.

The defendant's answer in the affirmative will not cure the error. Bates v. State, 60 Ark. 450.

An accused on trial for fraudulent use of the mails may not be asked if his former partner was not under indictment for a similar offense. Tingle v. U. S., (C. C. A.) 87 Fed. Rep. 320.

**10. May Be Asked as to Indictment—Indiana.**—Vancleave v. State, 150 Ind. 273.

**Louisiana.**—State v. Callian, 109 La. 346; State v. Southern, 48 La. Ann. 628.

**Michigan.**—People v. Foote, 93 Mich. 38.

**South Carolina.**—State v. Williamson, 65 S. Car. 242.

**Tennessee.**—Ryan v. State, 97 Tenn. 206.

**Texas.**—Scoville v. State, (Tex. Crim. 1903)

77 S. W. Rep. 792; Powell v. State, (Tex. Crim. 1902) 70 S. W. Rep. 218; Click v. State, (Tex. Crim. 1902) 66 S. W. Rep. 1104; Wilborn v. State, (Tex. Crim. 1901) 64 S. W. Rep. 1058; Combs v. State, (Tex. Crim. 1899) 49 S. W. Rep. 585; Bolton v. State, (Tex. Crim. 1897) 39 S. W. Rep. 672; Floyd v. State, (Tex. Crim. 1896) 35 S. W. Rep. 969; Rutherford v. State, (Tex. Crim. 1896) 34 S. W. Rep. 271; Warren v. State, 33 Tex.

times he has been arrested, if it be objected that such evidence is not material on the question of veracity, because an arrest proves nothing and no inference of guilt can be drawn therefrom.<sup>1</sup> In some jurisdictions, however, such questions are permissible.<sup>2</sup>

c. **CONTRADICTORY STATEMENTS OF WITNESS.** — In the absence of statutory restriction a defendant who testifies on his own behalf may, in the same way as any other witness, be asked questions on cross-examination intended to lay the foundation for his impeachment by contradicting the statements he makes in answer thereto, by proof of contradictory statements made previous to the trial.<sup>3</sup> And the material testimony of the accused may be contradicted by showing by other witnesses that he had made different statements on a previous occasion.<sup>4</sup> But here the rule is the same as in the impeachment of other witnesses, and the prosecution is bound by his answer to any question which is not material to the issue on trial and will not be permitted to call other witnesses to contradict him as to such matter.<sup>5</sup> In such case, if the question, were it put to a witness for the prosecution on his direct examination, would be objectionable as being no part of the state's

Crim. 502; *Hutchins v. State*, 33 Tex. Crim. 298; *Bearden v. State*, 44 Tex. Crim. 578; *Keaton v. State*, 41 Tex. Crim. 621; *Bruce v. State*, 39 Tex. Crim. 26; *Clark v. State*, 38 Tex. Crim. 30; *Oliver v. State*, 33 Tex. Crim. 541.

Evidence of remote indictments, eight or nine years previously, for violations of the local option law, were held inadmissible. *Marks v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 512.

1. **Cannot Be Asked as to Arrest.** — *People v. Hamblin*, 68 Cal. 103; *Leslie v. Com.*, (Ky. 1897) 42 S. W. Rep. 1095; *State v. Huff*, 11 Nev. 26; *People v. Crapo*, 76 N. Y. 288; *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183. In *People v. McCauley*, 45 Cal. 146, it was held that the objection must be taken on the ground that the question was inadmissible to impeach the defendant's credibility and not on the ground that it was inadmissible to show his guilt.

2. **Contrary Doctrine.** — *Parker v. State*, 136 Ind. 288; *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 871; *State v. Casey*, 110 La. 712; *State v. Murphy*, 45 La. Ann. 958; *People v. Foote*, 93 Mich. 38; *State v. Rozum*, 8 N. Dak. 548; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496; *Jackson v. State*, 33 Tex. Crim. 281; *Jones v. State*, 44 Tex. Crim. 405; *People v. Larsen*, 10 Utah 143.

An accused may be asked for the purpose of impeachment how many times he has been before the court. *State v. Callian*, 109 La. 346.

3. **Impeachment by Showing Contradictory Statements** — *Alabama*. — *Hicks v. State*, 99 Ala. 169.

*Iowa*. — *State v. Red*, 53 Iowa 69.

*Louisiana*. — *State v. Walsh*, 44 La. Ann. 1122.

*Massachusetts*. — *Com. v. Harrington*, 152 Mass. 488; *Com. v. Tolliver*, 119 Mass. 315.

*Missouri*. — *State v. Kennade*, 121 Mo. 405; *State v. Avery*, 113 Mo. 475.

*Montana*. — *State v. Cadotte*, 17 Mont. 315.

*New York*. — *People v. Eckert*, (Supm. Ct. Gen. T.) 2 N. Y. Crim. 482.

*North Carolina*. — *State v. Crane*, 110 N. Car. 530.

*Oregon*. — *State v. Abrams*, 11 Oregon 169.

*South Carolina*. — *State v. Taylor*, 54 S. Car. 174; *State v. Merriman*, 34 S. Car. 16.

*South Dakota*. — *State v. Phelps*, 5 S. Dak. 480.

*Texas*. — *May v. State*, 33 Tex. Crim. 74; *Bell v. State*, 31 Tex. Crim. 276; *Huffman v. State*, 28 Tex. App. 174.

**Statutory Restriction.** — Where, under statute, a confession made in jail, without warning cannot be used against the accused, he cannot be cross-examined as to such a confession for the purpose of laying the foundation for his impeachment by showing the confession by other witnesses (*Davidson, J., dissenting*). *Morales v. State*, 36 Tex. Crim. 234, *distinguishing* *Quintana v. State*, 29 Tex. App. 401, and *Ferguson v. State*, 31 Tex. Crim. 93, in which two cases the statement made in jail was not a confession, but a denial, and *overruling* *Phillips v. State*, 35 Tex. Crim. 480. See also *Parker v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 668.

*Contra*. — *Thompson v. State*, 35 Tex. Crim. 511.

**The Defendant May Be Recalled** for the purpose of laying a predicate for his impeachment by another witness. *Chapman v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 225.

4. **Material Statements May Be Contradicted.** — *Logan v. Com.*, (Ky. 1895) 29 S. W. Rep. 632; *State v. Taylor*, 54 S. Car. 174; *Moffatt v. State*, 35 Tex. Crim. 257.

5. **Witness's Answer Conclusive Where Not Material to Issue.** — *People v. Rodriguez*, 134 Cal. 140; *McKeone v. People*, 6 Colo. 346; *Dunn v. State*, (Ind. 1904) 70 N. E. Rep. 521; *State v. Roscum*, 119 Iowa 330; *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800; *George v. State*, 16 Neb. 318; *State v. Hendrick*, (N. J. 1903) 56 Atl. Rep. 247; *People v. Webster*, 68 Hun (N. Y.) 19, *affirmed* 139 N. Y. 73; *Marx v. People*, 63 Barb. (N. Y.) 619; *Rosenweig v. People*, 63 Barb. (N. Y.) 639; *People v. Ware*, 29 Hun (N. Y.) 473, *affirmed* without opinion 92 N. Y. 653; *Coble v. State*, 31 Ohio St. 100; *Hill v. State*, 91 Tenn. 521; *State v. Payne*, 6 Wash. 563.

case, it is collateral and the prosecution is bound by the defendant's answer.<sup>1</sup>

*f.* INSTRUCTIONS ON CREDIBILITY. — It is proper for the court to instruct the jury that they may consider the fact that the defendant is a witness testifying in his own behalf, and the interest which he has at stake in the event of the trial, when they are determining the credibility of his testimony.<sup>2</sup> But it is error to instruct the jury that they are not bound to believe the defendant in a criminal case or treat his testimony the same as that of other witnesses.<sup>3</sup> It is error for the court to tell the jury, or even intimate to them, that they are at liberty to disregard the defendant's testimony. He has a right to have his testimony go before the jury without any suggestion from the bench that they may disregard it.<sup>4</sup> Thus, an instruction that the defendant is a competent witness in his own behalf and his evidence should not be disregarded by the jury for the reason alone that he is the defendant on trial, is erroneous in that it tells the jury, by implication, to discard the defendant's testimony on some ground.<sup>5</sup> So, also, it is improper to instruct the jury that they may believe the testimony of the defendant if it is corroborated, and disbelieve it if it is contradicted;<sup>6</sup> but such error is harmless where all the facts testified to by the defendant were not only corroborated but uncontradicted.<sup>7</sup> It is error to so instruct the jury that evidence introduced to shake the credit of the defendant may be used to show his guilt.<sup>8</sup>

*g.* COMMENT ON DEFENDANT'S FAILURE TO TESTIFY. — Statutes making defendants in criminal cases competent to testify in their own behalf either merely provide that the fact that the defendant does not elect to testify shall raise no presumption against him, or, further, forbid all allusion to the fact by court or counsel.<sup>9</sup>

**12. Accomplices and Detectives as Witnesses.** — The admissibility of evidence that a witness is an accomplice in the commission of a crime concerning which he testifies, or that he was acting as a detective when he acquired his knowl-

1. *George v. State*, 16 Neb. 321.

**Where a Defendant Does Not Testify**, his testimony at a former trial of the case may not be contradicted for the purpose of discrediting him. *State v. Brownson*, 42 La. Ann. 186.

And where he does testify, it is error to permit him, over his objection, to be cross-examined as to whether, at a former trial for a similar offense, he testified as to his absence and was contradicted by other witnesses as preliminary to proof of such contradiction. *Com. v. Lannan*, 155 Mass. 169.

Where the question is not permissible except for the purpose of impeaching the witness, the prosecuting attorney should announce its purpose when it is asked. *State v. Kennon*, 45 La. Ann. 1192.

**2. Court May Instruct Jury as to Defendant's Interest.** — *Connecticut*. — *State v. Fiske*, 63 Conn. 388.

*Illinois*. — *Lambert v. People*, 34 Ill. App. 637.

*Iowa*. — *State v. Sterrett*, 71 Iowa 386.  
*Missouri*. — *State v. Pratt*, 121 Mo. 566; *State v. Maguire*, 113 Mo. 670; *State v. Noeninger*, 108 Mo. 166; *State v. Ihrig*, 106 Mo. 267; *State v. Young*, 105 Mo. 634; *State v. Brown*, 104 Mo. 365; *State v. Morrison*, 104 Mo. 638; *State v. Brent*, 100 Mo. 531; *State v. Brooks*, 99 Mo. 142; *State v. Miller*, 93 Mo. 263; *State v. Cook*, 84 Mo. 40; *State v. McGinnis*, 76 Mo. 328; *State v. Zorn*, 71 Mo. 415; *State v. Maguire*, 69 Mo. 107.

*Nebraska*. — *Davis v. State*, 31 Neb. 247; *St. Louis v. State*, 8 Neb. 405.

*New Mexico*. — *Faulkner v. Territory*, 6 N. Mex. 464; *Territory v. Baker*, 4 N. Mex. 117; *Territory v. Romine*, 2 N. Mex. 114.

*Pennsylvania*. — *Com. v. Orr*, 138 Pa. St. 276.

**Defendant's Situation and Temptations.** — *People v. Cronin*, 34 Cal. 191; *People v. Morrow*, 60 Cal. 142; *People v. Nichols*, 62 Cal. 518.

**3. Instructions that Jury Not Bound to Believe Defendant Improper.** — *Hall v. Brown*, 30 Conn. 551; *Sullivan v. People*, 114 Ill. 24; *Chambers v. People*, 105 Ill. 409; *Lambert v. People*, 34 Ill. App. 637. Compare *People v. Cowgill*, 93 Cal. 598. See *Nelson v. Vorce*, 55 Ind. 455.

**4. Disregarding Defendant's Testimony.** — *Andrews v. State*, 21 Fla. 598; *Lambert v. People*, 34 Ill. App. 637; *Townsend v. State*, (Miss. 1892) 12 So. Rep. 209; *Woods v. State*, 67 Miss. 575; *Buckley v. State*, 62 Miss. 705; *State v. Elliott*, 90 Mo. 350.

**5. Purdy v. People**, 140 Ill. 46; *State v. Hobbs*, 117 Mo. 620; *State v. Austin*, 113 Mo. 538.

**6. Improper to Instruct Jury to Believe Defendant Only if Corroborated.** — *Hicks v. U. S.*, 150 U. S. 450; *State v. Seaton*, 106 Mo. 198; *State v. Sanders*, 106 Mo. 188. See *Faulkner v. Territory*, 6 N. Mex. 464.

**7. State v. Sanders**, 106 Mo. 188.

**8. State v. Broderick**, 61 Vt. 421.

**9. See the titles ARGUMENTS OF COUNSEL**, 2 ENCYC. OF PL. AND PR. 718 *et seq.*, and INSTRUCTIONS, 11 ENCYC. OF PL. AND PR. 350 *et seq.*, where the subject is treated in detail, and the cases there cited.



edge of facts in litigation, for the purpose of discrediting him, and the weight to be given to the testimony of such witnesses, have been elsewhere discussed.<sup>1</sup>

**13. Impeaching and Supporting an Impeaching Witness.**—The credibility of a witness may be drawn in question by the party against whom he is called, although the witness is not offered to give evidence on the substantial issues of the case, but merely for the purpose of discrediting other witnesses. And when this has been done, rebutting evidence may be introduced in his support.<sup>2</sup> How far this recrimination may be carried, however, does not seem to be authoritatively settled.<sup>3</sup>

**VIII. CORROBORATION OF WITNESSES — 1. Corroborative Evidence — a. IN GENERAL.**—In several instances by force of statute or judicial decision, the evidence of a single witness is insufficient to establish a crime or sustain a civil cause of action or defense. Thus, either two witnesses or one witness supported by evidence of corroborative circumstances have been required, because of the corrupt source of evidence; the lack of preponderance of proof; the difficulty of disproving certain criminal charges or civil claims; interest of the witness in the result of the action, and other like cases.<sup>4</sup>

**b. DEFINED, AND DISTINGUISHED FROM EVIDENCE IN SUPPORT OF CREDIT.**—Evidence which is admissible only in support of the credit of witnesses is not within the legal meaning of the term corroborative evidence as used in this connection.<sup>5</sup> The corroboration must be by original evidence

**1. Accomplices.**—See the title ACCOMPLICES, vol. 1, p. 393 *et seq.*; *infra*, this title, *Corroboration of Witnesses — Corroborative Evidence*.

**Detectives.**—See the title DETECTIVES, vol. 9, pp. 412, 413.

**2. Impeaching and Supporting an Impeaching Witness.**—*Starks v. People*, 5 Den. (N. Y.) 106; *Brink v. Stratton*, 176 N. Y. 150, *reversing* 64 N. Y. App. Div. 331; *State v. Cherry*, 63 N. Car. 493. See also for illustrations, *Barnett v. State*, 89 Ala. 165; *Fitzgerald v. State*, 112 Ala. 34; *State v. Farrell*, 82 Iowa 553; *Wilson v. Com.*, (Ky. 1900) 54 S. W. Rep. 946; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *In re Wellcome*, 23 Mont. 450; *Matter of Snelling*, 136 N. Y. 515.

**Rebutting Explanation by Witness of Former Contradictory Statement.**—Evidence is inadmissible to disprove an explanation of a contradictory statement given by a witness who is charged with making it. The explanation is neither relevant to the issue tried, nor does it alter the fact that he has contradicted himself. *State v. Goodbier*, 48 La. Ann. 770; *Beemer v. Kerr*, 23 U. C. Q. B. 557. *Contra*, *Reg. v. Jerrett*, 22 U. C. Q. B. 499, *Hagarty, J., dissenting*; *State v. Wright*, 112 Iowa 436.

**3. The Rule of the Civil Law** is that a discrediting witness may himself be discredited by other witnesses, but no further witnesses may be called to attack the credibility of these last; and the practice of the common law has been said to conform to this rule. *Stafford's Case*, 7 How. St. Tr. 1484, *cited* 2 Tayl. Ev., § 1473. See *State v. Cherry*, 63 N. Car. 493.

**4. Corroborative Evidence — In General.**—See the next following subdivision, *b. Defined, and Distinguished from Evidence in Support of Credit*. See also the following cases for the reasons for the requirement and various miscellaneous illustrations: *Parish v. Parish*, 32 Beav. 207; *Ginger v. Ginger*, L. R. 1 P. & D. 37; *Moberly v. Brooks*, 27 Grant Ch. (U. C.)

270; *Aldrich v. Aldrich*, 21 Ont. 447; *U. S. v. Wood*, 14 Pet. (U. S.) 430; *State v. Callahan*, 47 La. Ann. 444; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Com. v. Holmes*, 127 Mass. 424; *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492.

**Witness to Whom Suspicion of Fraud Attaches.**—*McKay v. McKay*, 31 U. C. C. P. 1; *Mercantile Bank v. Clarke*, 18 Grant Ch. (U. C.) 594; *Morton v. Nihan*, 5 Ont. App. 20.

**Proceeding for Sale of Decedent's Real Estate.**—*Thompson v. Boswell*, 97 Ala. 570, *overruling* *Stevenson v. Murray*, 87 Ala. 442, *followed* *Kent v. Mansel*, 101 Ala. 336.

**Probate of Will.**—*Hogg v. Maguire*, 11 Ont. App. 507. See also *Sugden v. St. Leonards*, 1 P. D. 154.

**Claims Against Decedent's Estate.**—*Hill v. Wilson*, L. R. 8 Ch. 888; *Orr v. Orr*, 21 Grant Ch. (U. C.) 397, *cited* *Parker v. Parker*, 32 U. C. C. P. 113; *Rankin v. McKenzie*, 3 Manitoba 323. See also *In re Finch*, 23 Ch. D. 267.

**Infant as Witness.**—While Blackstone seems to have been of the opinion that a child's evidence must be corroborated (see 4 Bl. Com. 214), such is not the rule in the United States (1 Phill. Ev., 9th ed., pp. 6, 7). If he is adjudged a competent witness, it is not necessary that his evidence be corroborated. *State v. Todd*, 110 Iowa 631.

**In a Case Where Corroboration Is Required by Law**, it is always permissible to strengthen the testimony of the witness, by proof of connected incidents showing its consistency and reasonableness, irrespective of whether any attack has been made upon his credibility by the adverse party. *Bruton v. State*, 21 Tex. 337.

**Corroboration in Treason Cases.**—See the title TREASON, vol. 28, p. 467 *et seq.*

**5. Credit Evidence Not Corroborative Evidence.**—*State v. Maney*, 54 Conn. 178; *Middleton v. State*, 52 Ga. 527; *State v. Callahan*, 47 La. Ann. 444; *Com. v. Holmes*, 127 Mass. 424; *Gildersleeve v. Atkinson*, 6 N. Mex. 250, *cited*

tending to prove or disprove the substantial issues involved in the litigation. The necessity for it and the requisite kind and *quantum* of proof have been discussed elsewhere, both generally and in connection with particular subject-matters.<sup>1</sup> Indeed, it has been held that evidence going only to the credibility of the witness is rendered irrelevant and immaterial, and hence incompetent, by the requirement that his testimony must be corroborated.<sup>2</sup> In the case of an accomplice, however, evidence attacking and supporting his credibility has been very generally allowed.<sup>3</sup> When his evidence is corroborated, he occupies the same attitude as any other witness so far as the method of contradicting or impeaching him is concerned.<sup>4</sup>

**2. Evidence in Support of Credit** — *a. NOT ALLOWED UNTIL CREDIBILITY OF WITNESS IS ATTACKED.* — It is a well-settled rule of law that evidence which goes only in affirmance of the credibility of a witness, and not to sustain the substantial issues in the case, is inadmissible unless and until his credibility has been put in issue by an attempt to impeach his character or otherwise discredit his testimony in some of the modes recognized by the law as proper for the purpose.<sup>5</sup> The rule does not, of course, preclude a litigant

Byerts *v.* Robinson, 9 N. Mex. 427. See also Conway *v.* State, 33 Tex. Crim. 327; Com. *v.* Hazlett, 14 Pa. Super. Ct. 352.

**The Term "Corroborate the accusing witness"** means to make strong; to strengthen; to support; to tend to establish the truth of the statement of the accusing witness. U. S. *v.* Hall, 44 Fed. Rep. 864.

1. See the titles ABDUCTION, vol. 1, p. 182; ACCOMPLICES, vol. 1, p. 399 *et seq.*; ANSWERS IN EQUITY PLEADING, 1 ENCYC. OF PL. AND PR. 932 *et seq.*; BASTARDY, vol. 3, p. 886 *et seq.*; CONFESSIONS, vol. 6, p. 581 *et seq.*; CORROBORATIVE EVIDENCE, vol. 7, p. 866; DIVORCE, vol. 9, pp. 847, 848; EVIDENCE, vol. 11, p. 491; GAMING, vol. 14, p. 691; PERJURY, vol. 22, p. 694 *et seq.*; RAPE, vol. 23, p. 885; SEDUCTION, vol. 25, p. 243 *et seq.*

**Claims Against Decedent's Estates.** — See *supra*, this title, VI. 3. *Incompetency Removed by Statutes — Death or Disability of Opposing Party.* See also Gildersleeve *v.* Atkinson, 6 N. Mex. 250.

**Actions for Breach of Promise of Marriage.** — Bessela *v.* Stern, 2 C. P. D. 265; Hickey *v.* Campion, 1r. R. 6 C. L. 557; Costello *v.* Hunter, 12 Ont. 333; Yarwood *v.* Hart, 16 Ont. 23; Cockerill *v.* Harrison, 14 Manitoba 366.

**Prosecutions for Forgery.** — By statute in some jurisdictions, the evidence of any person interested, or supposed to be interested, in any deed, writing, instrument, or other matter given in evidence on a trial for forgery, shall not be sufficient to sustain a conviction, unless the same is corroborated by other legal evidence in support of such prosecution. Reg. *v.* Bannerman, 43 U. C. Q. B. 547; Reg. *v.* Hegerman, 15 Ont. 598; Reg. *v.* Selby, 16 Ont. 255; Reg. *v.* Rhodes, 22 Ont. 480; Reg. *v.* McBride, 26 Ont. 639; Reg. *v.* Samo, 8 Can. L. T. 202; Reg. *v.* Deegan, 6 Manitoba 81; Reg. *v.* Farell, 1 N. W. Ter. 166. The provision is said to have no application to an investigation into the commission of a forgery for the purpose of extraditing the person accused. *In re Lee*, 5 Ont. 583; *In re Garbutt*, 21 Ont. 465.

2. Butler *v.* Catling, 1 Root (Conn.) 310; State *v.* Callahan, 47 La. Ann. 444; Brown *v.*

Bulkley, 14 N. J. Eq. 294; Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610; Clark *v.* Bailey, 2 Strobbh. Eq. (S. Car.) 145; Miller *v.* Tollison, Harp. Eq. (S. Car.) 145; Fant *v.* Miller, 17 Gratt. (Va.) 187; Winne *v.* Nickerson, 1 Wis. 1; Nickerson *v.* Morin, 3 Wis. 243; Winner *v.* Bauman, 28 Wis. 563.

**3. Impeaching and Supporting Credit Evidence Admissible — Accomplices.** — State *v.* Maney, 54 Conn. 178; Craft *v.* Com., 81 Ky. 250, 50 Am. Rep. 160; Com. *v.* Bosworth, 22 Pick. (Mass.) 397; People *v.* Vane, 12 Wend. (N. Y.) 78; People *v.* McCallam, 103 N. Y. 587; State *v.* Twitty, 2 Hawks (9 N. Car.) 449; State *v.* Pulley, 63 N. Car. 8; State *v.* Williams, 129 N. Car. 581; Allen *v.* State, 10 Ohio St. 287; Lee *v.* State, 21 Ohio St. 151; Anderson *v.* State, 34 Tex. Crim. 546; Wyatt *v.* State, 38 Tex. Crim. 256; Reese *v.* State, 43 Tex. Crim. 539, 44 Tex. Crim. 34. See also U. S. *v.* Wilson, Baldw. (U. S.) 78, 28 Fed. Cas. No. 16,730; *supra*, this title, VII. 5. *Credibility and Impeachment of Witnesses — Bias of Witness.*

4. Craft *v.* Com., 81 Ky. 250, 50 Am. Rep. 160.

**5. Not Allowed until Credibility Is Attacked — United States.** — Woey Ho *v.* U. S., (C. C. A.) 109 Fed. Rep. 888; U. S. *v.* Holmes, 1 Cliff. (U. S.) 98, 26 Fed. Cas. No. 15,382.

**Alabama.** — Morgan *v.* State, 88 Ala. 223; Funderberg *v.* State, 100 Ala. 36; Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433.

**Georgia.** — Hamilton *v.* Conyers, 28 Ga. 276; Savannah, etc., R. Co. *v.* Harrigan, 80 Ga. 602; Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751.

**Illinois.** — Magee *v.* People, 139 Ill. 138.

**Indiana.** — Clackner *v.* State, 33 Ind. 412.

**Iowa.** — State *v.* Rorabacher, 19 Iowa 154.

**Massachusetts.** — Bryant *v.* Tidgewell, 133 Mass. 86. See also Howe *v.* Thayer, 17 Pick. (Mass.) 91.

**Missouri.** — Fulkerson *v.* Murdock, 53 Mo. App. 151, affirmed on other grounds 123 Mo. 292; State *v.* Thomas, 78 Mo. 327; State *v.* Grant, 79 Mo. 133, 49 Am. Rep. 218.

**New York.** — Jackson *v.* Etz, 5 Cow. (N. Y.) 314; People *v.* Vane, 12 Wend. (N. Y.) 78; People *v.* Rector, 19 Wend. (N. Y.) 579; Adams *v.* Greenwich Ins. Co., 70 N. Y. 170;



from introducing additional or corroborative evidence, or evidence proper in rebuttal, to sustain his cause of action or defense, in reply to the case made by the adverse party, whether his witnesses are impeached or unimpeached; though he does thereby indirectly support their credibility. The extent to which this may be done, however, is generally discretionary with the trial court, subject to any limitations in the particular jurisdiction, established by the rules of evidence relating to the order of proof.<sup>1</sup> Nor does it prevent him from questioning his witnesses, as preliminary to their examination in chief, as to their occupations, places of residence, positions then or previously held by them, their situation as to the parties and issues, and the like, in order that the triers of fact may estimate the weight to be given to their evidence.<sup>2</sup>

**b. ALLOWED WHEN CREDIBILITY OF WITNESS IS ATTACKED — (1) In General.** — On the other hand, an attack on the credibility of a witness by

*Young v. Johnson*, 123 N. Y. 226; *Houghtaling v. Kelderhouse*, 2 Barb. (N. Y.) 149, *affirmed* *Pratt v. Andrews*, 4 N. Y. 493; *Williams v. Metropolitan L. Ins. Co.*, 35 N. Y. App. Div. 82. See also *Davis v. Evans*, (Brooklyn City Ct. Gen. T.) 14 N. Y. Supp. 636.

*Oregon*. — *Osmun v. Winters*, 25 Oregon 260; *Portland First Nat. Bank v. Commercial Union Assur. Co.*, 33 Oregon 43.

*Pennsylvania*. — *Wertz v. May*, 21 Pa. St. 274; *Braddee v. Brownfield*, 9 Watts (Pa.) 124; *Com. v. Hazlett*, 14 Pa. Super. Ct. 352.

*Texas*. — *Conway v. State*, 33 Tex. Crim. 327; *Morrison v. State*, 37 Tex. Crim. 601; *Green v. State*, (Tex. App. 1889) 12 S. W. Rep. 872; *Mercer v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 555; *Morton v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 281; *Davis v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 451; *Fox v. Robbins*, (Tex. Civ. App. 1902) 70 S. W. Rep. 597. See also *Smith v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 556.

*Virginia*. — *Danville Bank v. Waddill*, 31 Gratt. (Va.) 469; *Reynolds v. Richmond, etc., R. Co.*, 92 Va. 400. See also *infra*, this subdivision, c. (2) *Evidence of Prior Consistent Statements; After Attack on Credibility of Witness.*

**Rule Applies to Accused Testifying as Witness.** — *Morgan v. State*, 88 Ala. 223; *Funderberg v. State*, 100 Ala. 36; *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433.

**On Exclusion of Discrediting Evidence.** — Where evidence offered for the purpose of discrediting a witness is excluded by the court, testimony for the purpose of supporting his credit is inadmissible. *Felker v. State*, 54 Ark. 489.

**1. Corroborative and Rebuttal Evidence — Unimpeached Witnesses.** — *Jacobs v. Tarleton*, 11 Q. B. 421, 63 E. C. L. 421; *Whelpley v. Riley*, 7 N. Bruns. 275; *Heavy v. Odell*, 10 N. Bruns. 524; *Whittaker v. Welch*, 15 N. Bruns. 436; *Royal Canadian Bank v. Brown*, 27 U. C. Q. B. 41; *State v. Desforges*, 48 La. Ann. 73; *Green v. Gould*, 3 Allen (Mass.) 465; *Outlaw v. Hurdle*, 1 Jones L. (45 N. Car.) 150; *Clarke v. Ohio River R. Co.*, 39 W. Va. 749. See also *State v. Claire*, 41 La. Ann. 1067; *Fry v. Leslie*, 87 Va. 269. Compare *State v. Nelson*, 13 Wash. 523.

**Impeached Witnesses.** — *John v. State*, 16 Ga. 200; *Stevenson v. State*, 69 Ga. 68; *Bray v. Latham*, 81 Ga. 640, *citing Bryan v. Watson*,

20 Ga. 480; *Davidson v. Overhulser*, 3 Greene (Iowa) 196; *Com. v. Merriam*, 14 Pick. (Mass.) 518. *Contra*, in criminal cases under the Iowa statute regulating the order of proof, *State v. Parish*, 22 Iowa 284.

**For Various Illustrations of corroborative and rebuttal evidence, see the following cases:**

*Alabama*. — *Costello v. State*, 130 Ala. 143; *Nevill v. State*, 133 Ala. 99.

*California*. — *People v. Evans*, (Cal. 1895) 41 Pac. Rep. 444.

*Connecticut*. — *Allis v. Hall*, 76 Conn. 322.

*Kentucky*. — *Illinois Cent. R. Co. v. Stewart*, 63 S. W. Rep. 596, 23 Ky. L. Rep. 637; *Dean v. Com.*, (Ky. 1904) 78 S. W. Rep. 1112.

*Massachusetts*. — *Coleman v. Lewis*, 183 Mass. 485.

*New York*. — *Losee v. Mathews*, 61 N. Y. 627; *People v. Barberi*, 149 N. Y. 256; *National L. Assoc. v. Thompson*, 38 N. Y. App. Div. 445; *Lincoln Nat. Bank v. Fischer-Hansen*, 92 N. Y. App. Div. 318.

*Pennsylvania*. — *Akin v. McKeown*, 189 Pa. St. 39.

*Texas*. — *Watson v. Boswell*, 25 Tex. Civ. App. 379; *Bruce v. State*, 31 Tex. Crim. 590; *Messer v. State*, 43 Tex. Crim. 97.

**Evidence of Contemporaneous Acts, Documents, and the Like.** — *Wiggins v. Guthrie*, 101 N. Car. 661.

**Explanation, Correction, or Reiteration of Former Testimony.** — *McLendon v. Grice*, 119 Ala. 513; *Plumb v. Curtis*, 66 Conn. 154; *Walker v. Walker*, 14 Ga. 242; *Pulliam v. Cantrell*, 77 Ga. 563; *Hendron v. Robinson*, 9 B. Mon. (Ky.) 503; *State v. Claire*, 41 La. Ann. 1067; *McLean v. Paine*, 181 Mass. 287; *Oberfelder v. Kavanaugh*, 21 Neb. 483; *Sloan v. Courtenay*, 54 S. Car. 314. See also *Brook v. State*, 26 Tex. App. 121; *Heavy v. Odell*, 10 N. Bruns. 524. And see ENCYC. OF PL. AND PR., vol. 8, p. 128; vol. 15, p. 405.

**Corroborating Collateral Facts Sometimes Allowed in Aid of Recollection.** — *Stewart v. Anderson*, 111 Iowa 329.

**2. Inquiry as to Standing of Witnesses.** — *Carson v. Smith*, 133 Mo. 606; *Williams v. Metropolitan L. Ins. Co.*, 35 N. Y. App. Div. 82. See also *Snodgrass v. Com.*, 89 Va. 679. But see *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521.

**Inquiring As to Which Party Summoned Witness.** — *Richmond, etc., Electric R. Co. v. Rubin*, (Va. 1904) 47 S. E. Rep. 834.



direct evidence of bad character or reputation may be rebutted by evidence of his good character; and other discrediting testimony by evidence in explanation or contradiction, given by the witness himself, or in many instances, by other witnesses called for the purpose.<sup>1</sup> It is a well-settled rule that a party, the credibility of whose witnesses is sought to be impeached by evidence competent for no other purpose, may support their credibility by rebutting evidence.<sup>2</sup>

(2) *Evidence in Rebuttal of Testimony Showing Bias.* — Thus, a witness against whom evidence has been introduced tending to show bias in favor of the party calling him or against the adverse party may be supported by evidence in rebuttal which tends to disprove the fact.<sup>3</sup>

(3) *Evidence in Rebuttal of Testimony Showing Contradictory Statements.* — So, also, a witness against whom evidence has been introduced for the purpose of proving that he has made statements contradictory of the testimony given by him on the trial is entitled to explain such statements, if he can, on being examined for the purpose of laying a foundation for the admission of the evidence, or to explain or contradict them by way of rebuttal, on re-examination.<sup>4</sup> In this connection it is well settled that where an effort is

**1. Evidence of Good Character in Rebuttal of Evidence of Bad Character.** — *State v. Parish*, 22 Iowa 284; *State v. Fahey*, 35 La. Ann. 9; *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166, 2 Mo. App. Rep. 188; *State v. Jones*, 29 S. Car. 201; *Payne v. State*, 40 Tex. Crim. 290; *Howard v. Galbraith*, (Tex. Civ. App. 1894) 30 S. W. Rep. 689. See generally *infra*, this section, 2. (d) *Evidence of Good Character.*

**Evidence in Rebuttal of Discrediting Testimony Other than That of Bad Character.** — *U. S. v. 18 Barrels High Wines*, 8 Blatchf. (U. S.) 475, 25 Fed. Cas. No. 15,033; *Golson v. State*, 124 Ala. 8; *Wade v. Thayer*, 40 Cal. 578; *Howland v. Oakland Consol. St. R. Co.*, 115 Cal. 487; *Fussell v. State*, 93 Ga. 450; *Cook Brewing Co. v. Ball*, 22 Ind. App. 656; *Carter v. Com.*, (Ky. 1890) 13 S. W. Rep. 921; *State v. Monceaux*, 48 La. Ann. 101; *Com. v. Storti*, 177 Mass. 339; *State v. Smith*, 78 Minn. 362; *State v. Kaiser*, 124 Mo. 651; *Valley v. Concord, etc.*, R. Co., 68 N. H. 546; *State v. Saidell*, 70 N. H. 174; *State v. Morton*, 107 N. Car. 890; *Oyler v. Dautoff*, 36 Oregon 357; *Kinchelow v. State*, 5 Humph. (Tenn.) 9; *Gay v. State*, 40 Tex. Crim. 242.

**Explaining Omissions in Former Statements of Witness.** — *Campbell v. State*, 23 Ala. 44; *People v. Shaver*, 120 Cal. 354; *Printup v. James*, 73 Ga. 583; *Miller v. State*, 97 Ga. 653; *Bickford v. Menier*, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 775; *People v. Milks*, 70 N. Y. App. Div. 438; *Spaulding v. Toledo Consol. St. R. Co.*, 10 Ohio Cir. Dec. 660, 20 Ohio Cir. Ct. 99; *State v. Turner*, 36 S. Car. 534; *Kunde v. State*, 22 Tex. App. 65; *Missouri, etc.*, R. Co. v. *Walden*, (Tex. Civ. App. 1898) 46 S. W. Rep. 87. See also *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1.

**2. Wade v. Thayer**, 40 Cal. 578; *State v. Waggoner*, 39 La. Ann. 919; *State v. Jones*, 29 S. Car. 201, holding that when the character of a witness is attacked, a new issue is then raised, and upon such new issue the party calling the witness has the right to offer testimony in his support, as it could not before have been offered.

**Rebutting Evidence to Rebutting Evidence.** —

This is one of the cases where rebutting evidence is allowed to rebutting evidence; otherwise a party would be deprived of the right to sustain the credit of his witnesses when they are attacked by the adverse party. *Clackner v. State*, 33 Ind. 412.

**3. Rebutting Testimony Showing Bias — Alabama.** — *Martin v. Martin*, 25 Ala. 201; *Postal Tel. Cable Co. v. Hulsey*, 115 Ala. 193; *McAlpine v. State*, 117 Ala. 93. *Compare Gainey v. State*, (Ala. 1904) 37 So. Rep. 355.

*California.* — *People v. Johnson*, 106 Cal. 289; *People v. Kuches*, 120 Cal. 566.

*Connecticut.* — *Sayles v. Fitz Gerald*, 72 Conn. 391.

*Georgia.* — *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751.

*Mississippi.* — *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604.

*New York.* — *Gilbert v. Sage*, 57 N. Y. 639, affirming 5 Lans. (N. Y.) 287; *People v. Ziguoras*, 163 N. Y. 250; *Gray v. Metropolitan St. R. Co.*, 165 N. Y. 457, reversing on this point 39 N. Y. App. Div. 536; *Clapp v. Wilson*, 5 Den. (N. Y.) 285; *Marsullo v. Metropolitan St. R. Co.*, 30 N. Y. App. Div. 505.

*Oregon.* — *State v. Warren*, 41 Oregon 348.

*Pennsylvania.* — *Richardson v. Stewart*, 4 Binn. (Pa.) 198.

*Texas.* — *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114; *Oxsheer v. State*, 38 Tex. Crim. 499; *Merritt v. State*, 39 Tex. Crim. 70; *Hedrick v. State*, 40 Tex. Crim. 532; *Reese v. State*, 43 Tex. Crim. 539, 44 Tex. Crim. 34; *Mercer v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 469; *Kipper v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 611; *Missouri, etc.*, R. Co. v. *Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Denison, etc.*, R. Co. v. *Powell*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1054.

*West Virginia.* — *Ward v. Brown*, 53 W. Va. 227.

**Evidence Held Insufficient for the Purpose.** — *McQuillan v. Willimantic Electric Light Co.*, 70 Conn. 715; *Hefner v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 841.

**4. Rebutting Testimony as to Contradictory**

made to discredit a witness by proving a former contradictory statement, made in a conversation, written instrument, or while testifying under oath, it is competent for the party calling the witness to support him by bringing out all that was said by the witness at the time, so far as it is relevant to the matter of credibility. The effect is to be gathered from all that the witness said; and it would be unjust to subject him to suspicion by admitting a part only, and excluding other portions which tend to rebut the contradiction.<sup>1</sup>

**Statements — England.** — *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147.

**Alabama.** — *Campbell v. State*, 23 Ala. 44; *Henderson v. State*, 70 Ala. 29; *Haralson v. State*, 82 Ala. 47; *Johnson v. State*, 102 Ala. 1; *Thomas v. State*, 103 Ala. 18; *Anderson v. State*, 104 Ala. 83. See also *Couch v. Couch*, (Ala. 1904) 37 So. Rep. 405.

**California.** — *People v. Wessel*, 98 Cal. 352; *People v. Lambert*, 120 Cal. 170; *People v. Smith*, 134 Cal. 453; *People v. Glover*, 141 Cal. 233.

**Colorado.** — *Fisher v. Denver Nat. Bank*, 22 Colo. 373; *Lee-Clark-Andreesen Hardware Co. v. Yankee*, 9 Colo. App. 443.

**Connecticut.** — *Judson v. Blanchard*, 4 Conn. 557.

**Georgia.** — *Jesse v. State*, 20 Ga. 156.

**Idaho.** — *Douglas v. Douglas*, 4 Idaho 293.

**Illinois.** — *Dick v. Marble*, 155 Ill. 137, *reversing* 51 Ill. App. 351; *Fidelity, etc., Co. v. Weise*, 80 Ill. App. 513, *citing* *Travelers Preferred Acc. Assoc. v. McKinney*, 57 Ill. App. 141, *reversed* on other grounds, *Fidelity, etc., Co. v. Weise*, 182 Ill. 496. See also *Bressler v. People*, 117 Ill. 422.

**Iowa.** — *Hoover v. Cary*, 86 Iowa 494; *In re Townsend*, (Iowa 1904) 97 N. W. Rep. 1108.

**Kentucky.** — *Powers v. Com.*, 110 Ky. 386.

**Massachusetts.** — *Francis v. Rosa*, 151 Mass. 532. See also *Chase v. Perley*, 148 Mass. 289.

**Michigan.** — *McDonald v. McDonald*, 55 Mich. 155; *Bronson v. Leach*, 74 Mich. 713; *Jourdan v. Patterson*, 102 Mich. 602.

**Missouri.** — *State v. Reed*, 89 Mo. 168; *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1.

**Montana.** — *Kennelly v. Savage*, 18 Mont. 119.

**New Hampshire.** — *State v. Winkley*, 14 N. H. 480.

**New York.** — *Ferris v. Hard*, 135 N. Y. 354; *Clapp v. Wilson*, 5 Den. (N. Y.) 285; *O'Donnell v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1016. See also *Hopler v. Hunter Arms Co.*, 64 N. Y. App. Div. 80; *Elsterman v. Kahlen*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 795.

**North Carolina.** — *Phifer v. Erwin*, 100 N. Car. 59.

**Oregon.** — *State v. Howard*, 43 Oregon 166.

**Pennsylvania.** — *Acklin v. McCalmont Oil Co.*, 201 Pa. St. 257; *Enright v. Pittsburg Junction R. Co.*, 204 Pa. St. 543.

**Texas.** — *Schmick v. Noel*, 72 Tex. 1, 64 Tex. 406; *Smith v. State*, 44 Tex. Crim. 53; *Gibbs v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 919; *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515; *Weaver v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 39.

**Vermont.** — *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

**Washington.** — *Wheeler v. Buck*, 23 Wash.

679; *Bailey v. Seattle, etc.*, R. Co., 32 Wash. 640.

**Wisconsin.** — *Dufresne v. Weise*, 46 Wis. 290.

**Fear of Personal Violence or Duress as Explanation.** — *U. S. v. Hall*, 44 Fed. Rep. 864; *Lewis v. State*, 35 Ala. 380; *People v. Smith*, 134 Cal. 453; *People v. Glover*, 141 Cal. 233; *Hunter v. State*, 43 Ga. 483; *McCoy v. State*, 78 Ga. 490; *Burns v. State*, 89 Ga. 527; *Huff v. State*, 104 Ga. 521; *Armstrong v. Com.*, (Ky. 1895) 29 S. W. Rep. 342; *Hendrickson v. Com.*, 64 S. W. Rep. 954, 23 Ky. L. Rep. 1191; *People v. Loomis*, 76 N. Y. App. Div. 243; *Thompson v. State*, 35 Tex. Crim. 511. See also *State v. Barrett*, 40 Minn. 65; *State v. Howard*, 43 Oregon 166.

**Motive and Inducement for Contradictory Statements.** — *Queen's Case*, 2 Brod. & B. 284, 6 E. C. L. 147; *Campbell v. State*, 23 Ala. 44; *Johnson v. State*, 102 Ala. 1; *Dick v. Marble*, 155 Ill. 137, *reversing* on other grounds 51 Ill. App. 351; *State v. Winkley*, 14 N. H. 480.

**A Want of Familiarity with the English Language** making it difficult for a witness to understand the questions asked him, or his mental or physical condition on the former occasion, is admissible in evidence in explanation of contradictory statements. *Enright v. Pittsburg Junction R. Co.*, 204 Pa. St. 543; *Gibbs v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 919; *Weaver v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 39; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

**Denial of the Discrediting Evidence.** — Within the discretion of the court, a witness may be recalled merely for the purpose of denying the facts introduced in evidence to discredit him, although he had already done so when questioned as to their existence on cross-examination by the adverse party. *People v. Glover*, 141 Cal. 233; *Sayles v. Fitz Gerald*, 72 Conn. 397; *Stirling v. Stirling*, 64 Md. 138; *Francis v. Rosa*, 151 Mass. 532. See also *Bick v. Reese*, 51 Hun (N. Y.) 639, 3 N. Y. Supp. 757; *State v. Winkley*, 14 N. H. 480, holding that the witness is entitled to be heard, either by way of express denial of contradictory statements given in evidence, or by explaining or qualifying them. *Approved*, *Glines v. Smith*, 48 N. H. 259.

**Explaining Statements in Pleadings.** — *Fisher v. Denver Nat. Bank*, 22 Colo. 373.

**Contradictions in Identifying Persons Accused of Crime.** — *Henry v. State*, 107 Ala. 22; *State v. Bedard*, 65 Vt. 278.

**Mode of Conducting Re-examination of Witness in Rebuttal.** — *State v. Winkley*, 14 N. H. 480; *Glines v. Smith*, 48 N. H. 259.

**1. Evidence of Other Portions of Former Statement in Rebuttal.** — *United States v. Wright v. Bragg*, (C. C. A.) 96 Fed. Rep. 729.

This doctrine is not violative of that other, which obtains in many jurisdictions, to the effect that evidence of former statements of a witness consistent with his testimony is not, as a general rule, admissible to support or sustain his credit.<sup>1</sup>

(4) *Witness Charged with or Convicted of Crime.* — Where it is shown on cross-examination or otherwise that a witness has been charged with or convicted of crime, he may be supported by evidence in explanation or contradiction.<sup>2</sup>

c. EVIDENCE OF PRIOR CONSISTENT STATEMENTS — (1) *Before Attack on Credibility of Witness* — (a) *In General.* — Evidence of prior statements of a witness, consistent with his testimony, is not admissible until such an attempt has been made to impeach or otherwise discredit him as entitles him, in the particular jurisdiction, to be thus supported.<sup>3</sup>

*Connecticut.* — *Harrison's Appeal*, 48 Conn. 202.

*Georgia.* — *Savannah, etc., R. Co. v. Holland*, 82 Ga. 257; *Lowe v. State*, 97 Ga. 792; *Carroll v. State*, 99 Ga. 36; *Smalls v. State*, 105 Ga. 669.

*Illinois.* — *Beasley v. People*, 89 Ill. 571; *Chicago City R. Co. v. Bundy*, 210 Ill. 39, affirming 109 Ill. App. 637.

*Kentucky.* — *O'Donnell v. Louisville Electric Light Co.*, (Ky. 1900) 55 S. W. Rep. 202; *Clymer v. Com.*, 64 S. W. Rep. 409, 23 Ky. L. Rep. 1041.

*Michigan.* — *Dunbar v. McGill*, 69 Mich. 297. See also *Lightfoot v. People*, 16 Mich. 507; *Culver v. South Haven, etc., R. Co.*, (Mich. 1904) 101 N. W. Rep. 663.

*Missouri.* — *State v. Phillips*, 24 Mo. 475; *Prewitt v. Martin*, 59 Mo. 325; *Norris v. Brunswick*, 73 Mo. 256; *State v. Talbot*, 73 Mo. 347; *State v. Matthews*, 88 Mo. 121; *Korte v. Hoffman*, 97 Mo. 284, citing *State v. West*, 95 Mo. 139; *Wilkerson v. Eilers*, 114 Mo. 245; *State v. Punshon*, 133 Mo. 44; *Edwards v. Crenshaw*, 30 Mo. App. 510.

*New Hampshire.* — *State v. Winkley*, 14 N. H. 480; *Glines v. Smith*, 48 N. H. 259; *Wentworth v. McDuffie*, 48 N. H. 402; *Whitman v. Morey*, 63 N. H. 448; *State v. Saidell*, 70 N. H. 174.

*North Carolina.* — *Hopkins v. Hopkins*, 132 N. Car. 22.

*Oklahoma.* — *Huntley v. Territory*, 7 Okla. 60.

*Oregon.* — *State v. Mims*, 36 Oregon 315.

*Pennsylvania.* — *Rudy v. Myton*, 19 Pa. Super. Ct. 312.

*Texas.* — *Jones v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 634; *Ball v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 448; *Thornton v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1105; *Wilson v. Wilson*, (Tex. Civ. App. 1904) 79 S. W. Rep. 839. See also *Ford v. State*, 41 Tex. Crim. 1, citing Code Crim. Pro. Tex., art. 791.

*Wisconsin.* — *Holtz v. State*, 76 Wis. 99.

1. *State v. Winkley*, 14 N. H. 480, cited *Glines v. Smith*, 48 N. H. 259; *State v. Mims*, 36 Oregon 315. For a discussion of evidence of prior consistent statements, see *infra*, this division of this section, (c) *Evidence of Prior Consistent Statements*.

2. *Evidence in Explanation or Contradiction* — *In General.* — *Tennessee Coal, etc., R. Co. v. Haley*, (C. C. A.) 85 Fed. Rep. 534; *Thorpe*

*v. Wray*, 68 Ga. 359; *Roberts v. Com.*, 94 Ky. 499; *South Covington, etc., R. Co. v. Beatty*, (Ky. 1899) 50 S. W. Rep. 239; *State v. Ezell*, 41 Tex. 35. See the cases cited *infra*, this note.

*Showing Acquittal of Crime Charged.* — *People v. Chin Hane*, 108 Cal. 597; *People v. Milks*, 70 N. Y. App. Div. 438; *Jackson v. State*, 33 Tex. Crim. 281.

*Showing Innocence of Crime Charged.* — *Tippett v. State*, 37 Tex. Crim. 186. See also *Ware v. State*, 36 Tex. Crim. 597. Compare *Whitley v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 69.

*Rebutting Evidence of Conviction by Showing Innocence.* — *Reed v. State*, 66 Neb. 184; *Sims v. Sims*, 75 N. Y. 466, reversing 12 Hun (N. Y.) 231, overruling *Gardner v. Bartholomew*, 40 Barb. (N. Y.) 325 (which was cited in *Cole v. Lake Shore, etc., R. Co.*, 95 Mich. 77); *Sacia v. Decker*, 10 Daly (N. Y.) 204, 1 Civ. Pro. (N. Y.) 57, affirming 1 Civ. Pro. (N. Y.) 47; *Houston, etc., R. Co. v. Runnels*, (Tex. Civ. App. 1898) 46 S. W. Rep. 394, reversed on other grounds, 92 Tex. 305; *McKinstry v. Collins*, (Vt. 1904) 56 Atl. Rep. 985. See also *Scott v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 531. *Contra*, *Com. v. Galligan*, 155 Mass. 54; *Lamoureux v. New York, etc., R. Co.*, 169 Mass. 338.

*Rebutting Evidence of Conviction by Showing Pardon.* — *Sisson v. Yost*, 58 Hun (N. Y.) 609, 12 N. Y. Supp. 373. See also *Bennett v. State*, 24 Tex. App. 73, quoting *Stark. Ev.* (7th Am. ed.) 99; *St. Louis, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 186. *Contra*, *Gallagher v. People*, 211 Ill. 158, reversing on this point *sub nom. O'Donnell v. People*, 110 Ill. App. 250.

3. *Prior Consistent Statements* — *United States.* — *Wright v. Deklyne*, 1 Pet. (C. C.) 199, 30 Fed. Cas. No. 18,076.

*Indiana.* — *Coffin v. Anderson*, 4 Blackf. (Ind.) 396; *Hobbs v. State*, 133 Ind. 404.

*Louisiana.* — *State v. Carter*, 51 La. Ann. 442.

*Maine.* — *Pulsifer v. Crowell*, 63 Me. 22; *Powers v. Cary*, 64 Me. 9.

*Massachusetts.* — *Deshon v. Merchants' Ins. Co.*, 11 Met. (Mass.) 199; *Com. v. Harper*, 7 Allen (Mass.) 539.

*Mississippi.* — *Johnson v. State*, 80 Miss. 798.

*Missouri.* — *State v. Hendricks*, 172 Mo. 654.

*Pennsylvania.* — *Craig v. Craig*, 5 Rawle (Pa.) 91; *Quigley v. Swank*, 11 Pa. Super.



(b) **Rape or Assault with Intent to Commit Rape.**—In prosecutions for rape or assault with intent to commit rape, it is well settled that evidence that the prosecutrix made complaint, as soon as a suitable opportunity presented itself, that the alleged crime had been committed on her, is admissible, not only to sustain her credibility when attacked, but as original evidence to corroborate her testimony.<sup>1</sup>

(2) *After Attack on Credibility of Witness*—(a) **Rule that Evidence Is Admissible.**—It was held in an old *English* case that a witness whose credibility was in issue might be supported by evidence that “he did, at several times, discourse and declare the same things, and to like purposes, that he testified;” that while such evidence was hearsay and not to be allowed as direct evidence, yet it was admissible to show that the witness was constant to himself, whereby his testimony was corroborated. On the strength of this decision, the law was so declared in several *English* treatises on legal subjects.<sup>2</sup> Early cases in the *United States* involving the point followed this decision; and in several states prior consistent declarations are admissible in evidence, to a greater or less extent, to support the credibility of a witness, if made at a time when no motive existed which might prompt him to misrepresent the facts; just to what extent is rendered doubtful in some instances by a conflict of opinion and a tendency apparent in recent decisions to confine the rule within very narrow limits. In some jurisdictions the rule has received a very liberal interpretation; the supporting evidence is admitted to rebut an inference of discredit arising from unequivocal contradictions in testimony between opposing witnesses, as well as to rebut a direct assault on credibility.<sup>3</sup> In others,

Ct. 602; *Com. v. Kay*, 14 Pa. Super. Ct. 376; *White v. Black*, 14 Pa. Super. Ct. 459; *Leitz v. Hohman*, 16 Pa. Super. Ct. 276; *Sinsheimer v. Hartman*, 19 Pa. Super. Ct. 494.

*Texas*.—*Moody v. Gardner*, 42 Tex. 411; *Ætna Ins. Co. v. Eastman*, 95 Tex. 34; *McKensie v. Watson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1017; *Bailey v. State*, 9 Tex. App. 98; *Thurmond v. State*, 27 Tex. App. 347; *Conway v. State*, 33 Tex. Crim. 327; *Ma Riojas v. State*, 36 Tex. Crim. 182; *Batson v. State*, 36 Tex. Crim. 606; *Red v. State*, 39 Tex. Crim. 414; *Poyner v. State*, 40 Tex. Crim. 640; *White v. State*, 42 Tex. Crim. 567; *Owens v. State*, 43 Tex. Crim. 249; *Parker v. State*, 43 Tex. Crim. 526; *Reese v. State*, 43 Tex. Crim. 539, 44 Tex. Crim. 34; *Doucette v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 800; *Scott v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 531; *Morton v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 281.

**It Is Not Ground for Reversal**, however, if the impeaching evidence is subsequently introduced. *Barkly v. Copeland*, 74 Cal. 1; 5 Am. St. Rep. 413; *State v. George*, 8 Ired. L. (30 N. Car.) 324.

**Prior Consistent Identification of Person Accused of Crime.**—*Reddick v. State*, 35 Tex. Crim. 463, 60 Am. St. Rep. 56; *Moore v. State*, 40 Tex. Crim. 439; *Murphy v. State*, 41 Tex. Crim. 120; *Bowen v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 520.

**1. Rape or Assault with Intent to Commit Rape.**—See the title **RAPE**, vol. 23, p. 873 *et seq.* See also *People v. O'Sullivan*, 104 N. Y. 481; *People v. Terwilliger*, 74 Hun (N. Y.) 310, *affirmed* without opinion 142 N. Y. 629; *Ma Riojas v. State*, 36 Tex. Crim. 182; *Owens v. State*, 43 Tex. Crim. 249.

**2. Lutterell v. Reynell**, 1 Mod. 283; *Gilb.*

*Ev.* 135, *cited* 2 *Phil. Ev.* 973. See also *Harrison's Case*, 12 How. St. Tr. 860; *Freind's Case*, 13 How. St. Tr. 32; *Digby v. Stedman*, 1 Esp. 328.

**3. Rule Liberally Applied**—*District of Columbia*.—*U. S. v. Neverson*, 1 Mackey (D. C.) 152.

*Kansas*.—*State v. Hendricks*, 32 Kan. 559. *Compare State v. Petty*, 21 Kan. 59; *Cloud County v. Vickers*, 62 Kan. 25; *Stirn v. Nelson*, 65 Kan. 419.

*Maryland*.—*Cooke v. Curtis*, 6 Har. & J. (Md.) 93; *Washington F. Ins. Co. v. Davison*, 30 Md. 91; *McAleer v. Horsey*, 35 Md. 439; *Bloomer v. State*, 48 Md. 521; *Mallonee v. Duff*, 72 Md. 283; *Gill v. Staylor*, 93 Md. 453. See also *Stocksdale v. Cullison*, 35 Md. 322; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540. *Compare Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77.

*New York*.—*Lincoln Nat. Bank v. Fischer Hansen*, 92 N. Y. App. Div. 318.

*North Carolina*.—*Johnson v. Patterson*, 2 Hawks (9 N. Car.) 183, 11 Am. Dec. 756; *State v. Twitty*, 2 Hawks (9 N. Car.) 449; *State v. George*, 8 Ired. L. (30 N. Car.) 324, 49 Am. Dec. 392; *Hoke v. Fleming*, 10 Ired. L. (32 N. Car.) 263; *State v. Dove*, 10 Ired. L. (32 N. Car.) 469; *March v. Harrell*, 1 Jones L. (46 N. Car.) 331; *State v. Laxton*, 78 N. Car. 564; *Davenport v. McKee*, 98 N. Car. 500; *State v. Brewer*, 98 N. Car. 607; *State v. Rowe*, 98 N. Car. 629; *State v. Ward*, 103 N. Car. 419; *State v. Jacobs*, 107 N. Car. 873; *State v. Morton*, 107 N. Car. 890; *State v. McKinney*, 111 N. Car. 683; *Wallace v. Grizzard*, 114 N. Car. 488; *State v. Staton*, 114 N. Car. 813; *Burnett v. Wilmington, etc., R. Co.*, 120 N. Car. 517; *Rittenhouse v. Wilmington St. R. Co.*, 120 N. Car. 544; *State v. Mc-*

evidence of prior consistent statements is only admissible to rebut an attempt to discredit the witness by proof that he had made statements inconsistent with or contradictory of his testimony.<sup>1</sup>

(b) *Rule that Evidence Is Inadmissible.* — In *England* the rule that evidence of prior statements of a witness consistent with his testimony is admissible to support his credit, established by early authority,<sup>2</sup> was subsequently discarded; and it is now well settled in that jurisdiction, that what a witness said not on oath cannot be received to confirm what he said on oath.<sup>3</sup> Since the rule was thus changed in England, or from being doubtful became well established against the admissibility of such evidence, the practice in most of the states and in the federal courts has been settled so as to correspond, and, subject to certain exceptions hereinafter discussed,<sup>4</sup> prior consistent statements of a witness, whether made in or out of court, are incompetent evidence for any purpose.<sup>5</sup>

*Courry*, 128 N. Car. 594; *State v. Maulsby*, 130 N. Car. 664; *Ratliff v. Ratliff*, 131 N. Car. 425.

*Tennessee.* — *Dossett v. Miller*, 3 Sneed (Tenn.) 72; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123; *Hayes v. Cheatham*, 6 Lea (Tenn.) 10; *Nashville Third Nat. Bank v. Robinson*, 1 Baxt. (Tenn.) 479; *Glass v. Bennett*, 89 Tenn. 478; *Graham v. McReynolds*, 90 Tenn. 697; *Green v. State*, 97 Tenn. 69. *Compare* *Story v. Saunders*, 8 Humph. (Tenn.) 663; *Legere v. State*, 111 Tenn. 368.

**The Witness Sought to Be Thus Supported** is himself competent to testify to his prior consistent statements. *Hobbs v. State*, 133 Ind. 404; *State v. Sharp*, (Mo. 1904) 82 S. W. Rep. 134; *State v. George*, 8 Ired. L. (30 N. Car.) 324; *Burnett v. Wilmington, etc., R. Co.*, 120 N. Car. 517.

**Dying Declarations.** — Prior consistent statements of the declarant have been held admissible in evidence to corroborate testimony given by dying declarations. *State v. Thomason*, 1 Jones L. (46 N. Car.) 274; *State v. Blackburn*, 80 N. Car. 474; *State v. Craine*, 120 N. Car. 601. *Contra*, *State v. Hendricks*, 172 Mo. 654.

**1. Rebutting Evidence of Contradictory Statements** — *Indiana.* — *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Perkins v. State*, 4 Ind. 222; *Dailey v. State*, 28 Ind. 285; *Brookbank v. State*, 55 Ind. 169; *Dodd v. Moore*, 92 Ind. 397; *Ramey v. State*, 127 Ind. 243; *Hobbs v. State*, 133 Ind. 404; *Hinshaw v. State*, 147 Ind. 334.

*Missouri.* — *State v. Sharp*, (Mo. 1904) 82 S. W. Rep. 134. See also *State v. Whelehon*, 102 Mo. 17. *Compare* *Riney v. Vanlandingham*, 9 Mo. 817; *State v. Taylor*, 134 Mo. 109, *limiting* *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Hendricks*, 172 Mo. 654; *State v. Levy*, 90 Mo. App. 643.

*South Dakota.* — *State v. Caddy*, 15 S. Dak. 167.

*Texas.* — *Williams v. State*, 24 Tex. App. 637; *Goode v. State*, 32 Tex. Crim. 505; *Stanford v. State*, 34 Tex. Crim. 89; *English v. State*, 34 Tex. Crim. 190; *Sentell v. State*, 34 Tex. Crim. 260; *Easterwood v. State*, 34 Tex. Crim. 400; *Bozeman v. State*, 34 Tex. Crim. 503; *Campbell v. State*, 35 Tex. Crim. 160; *Kirk v. State*, 35 Tex. Crim. 224; *Sims v.*

*State*, 36 Tex. Crim. 154; *Ma Riojas v. State*, 36 Tex. Crim. 182; *Mitchell v. State*, 36 Tex. Crim. 278; *Kimball v. State*, 37 Tex. Crim. 230; *Jones v. State*, 38 Tex. Crim. 87; *Ballow v. State*, 42 Tex. Crim. 263; *Johnson v. State*, 42 Tex. Crim. 377; *White v. State*, 42 Tex. Crim. 567; *Kelly v. State*, 44 Tex. Crim. 390; *Lee v. State*, 44 Tex. Crim. 460; *Bell v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 362; *Stephens v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 728; *Dicker v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 541; *Parker v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 265; *Ball v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 448; *Keith v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 849; *Kipper v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 611; *Louder v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 552; *Simpson v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 320; *Wallace v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 966.

**Merely Laying the Foundation** for the admission of evidence showing fabrication of testimony or contradictory statements, is insufficient to let in evidence of prior consistent statements, unless the proof is supplied by admissions drawn from the witness. In other cases the discrediting evidence must be actually introduced. *Martin v. State*, 119 Ala. 1; *Mulligan v. Third Ave. R. Co.*, 61 N. Y. App. Div. 214, *Patterson, J., dissenting*; *State v. Dill*, 48 S. Car. 249; *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515; *Morton v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 281. *Compare* *Schmick v. Noel*, 72 Tex. 1, 64 Tex. 406.

**2.** See the next preceding subdivision (a) *Rule that Evidence Is Admissible.*

**3.** *Rex v. Parker*, 3 Dougl. 242, 26 E. C. L. 95; *Berkley Peerage Case*, cited 2 Phil. Ev. 974. See also *Bull. N. P.* (7th ed.) 294b.

**4.** See the next following subdivision (c) *Witness Testifying under Influence of Bias or Other Motive Prompting False Testimony.*

**5. Prior Consistent Statements Generally Inadmissible** — *United States.* — *Ellicott v. Pearl*, 14 Pet. (U. S.) 440, *affirming* 1 McLean (U. S.) 206; *Conrad v. Griffey*, 11 How. (U. S.) 480, 16 How. (U. S.) 38; *U. S. v. Holmes*, 1 Cliff. (U. S.) 98, 26 Fed. Cas. No. 15,382; *Jones v. Wetherill*, 1 MacA. Pat. Cas. 409, 13 Fed. Cas. No. 7,508. *Compare* *Wright v. Deklyne*, 1 Pet. (C. C.) 199, 30 Fed. Cas. No. 18,076.

*Alabama.* — *Nichols v. Stewart*, 20 Ala. 358;



## (c) Witness Testifying under Influence of Bias or Other Motive Prompting False Testimony.

—The authorities generally agree that where the witness is charged with giving his testimony under the influence of some motive which might prompt him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be proved, in support of his credibility, that the same account was given by him prior to the occasion or circumstance prompting the manufacturing of the testimony.<sup>1</sup>

*Adams v. Thornton*, 82 Ala. 260; *Fallin v. State*, 83 Ala. 7; *McKelton v. State*, 86 Ala. 594, *overruling* *Sonneborn v. Bernstein*, 49 Ala. 168; *Smith v. State*, 103 Ala. 40; *Jones v. State*, 107 Ala. 93; *James v. State*, 115 Ala. 83.

*California*.—*People v. Doyell*, 48 Cal. 85; *Mason v. Vestal*, 88 Cal. 396. See also *People v. Rodley*, 131 Cal. 240. Compare *People v. West*, 73 Cal. 345.

*Colorado*.—*Connor v. People*, 18 Colo. 373, cited *Murphy v. Gumaer*, 12 Colo. App. 472; *Davis v. Graham*, 2 Colo. App. 210.

*Connecticut*.—*Builders Supply Co. v. Cox*, 68 Conn. 380; *Baxter v. Camp*, 71 Conn. 245. Compare *Lockwood v. Betts*, 8 Conn. 130.

*Georgia*.—*Georgia R., etc., Co. v. Oaks*, 52 Ga. 410; *Middleton v. State*, 52 Ga. 527; *Fussell v. State*, 93 Ga. 456; *Knight v. State*, 114 Ga. 48; *Atlanta, etc., R. Co. v. Strickland*, 116 Ga. 439. See also *Evans v. State*, 95 Ga. 468. *Contra*, *Jesse v. State*, 20 Ga. 156.

*Illinois*.—*Stolp v. Blair*, 68 Ill. 541; *Browning v. Jones*, 52 Ill. App. 597.

*Iowa*.—*State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753, *distinguishing* *State v. Cruise*, 19 Iowa 312; *Boyd v. Oskaloosa First Nat. Bank*, 25 Iowa 255.

*Louisiana*.—*State v. Cady*, 46 La. Ann. 1346; *State v. Dudoussat*, 47 La. Ann. 977; *State v. Fondenot*, 48 La. Ann. 283. Compare *State v. Waggoner*, 39 La. Ann. 919.

*Maine*.—*Ware v. Ware*, 8 Me. 42; *Powers v. Cary*, 64 Me. 9; *Sidelinger v. Bucklin*, 64 Me. 371.

*Massachusetts*.—*Com. v. Jenkins*, 10 Gray (Mass.) 485, *distinguishing* *Com. v. Wilson*, 1 Gray (Mass.) 337; *Com. v. James*, 99 Mass. 438; *Murchie v. Cornell*, 155 Mass. 60; *Loomis v. New York, etc., R. Co.*, 159 Mass. 39. See also *Chase v. Perley*, 148 Mass. 289.

*Michigan*.—*Kinney v. Folkerts*, 78 Mich. 687. But see *Aulls v. Young*, 98 Mich. 231.

*Mississippi*.—*Madden v. State*, 65 Miss. 176; *Johnson v. State*, 80 Miss. 798; *Owens v. State*, 82 Miss. 18; *Boyd v. State*, (Miss. 1904) 36 So. Rep. 525.

*Missouri*.—*State v. Hendricks*, 172 Mo. 654. *Montana*.—*Kipp v. Silverman*, 25 Mont. 296.

*New Hampshire*.—*Reed v. Spaulding*, 42 N. H. 114.

*New York*.—*Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *People v. Finnegan*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 147; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *Jenkins v. Hudson*, 40 Hun (N. Y.) 424; *Train v. Taylor*, 51 Hun (N. Y.) 215; *Schatman v. American Credit Indemnity Co.*, 34 N. Y. App. Div. 392; *Dechert v. Mu-*

*nicipal Electric Light Co.*, 39 N. Y. App. Div. 490; *Spellman v. Muehlfeld*, 48 N. Y. App. Div. 262. See also *Matter of Smith*, 85 Hun (N. Y.) 359. Early cases *contra*, *People v. Vane*, 12 Wend. (N. Y.) 80; *People v. Moore*, 15 Wend. (N. Y.) 419; *People v. Rector*, 19 Wend. (N. Y.) 569.

*Ohio*.—*Rose v. State*, 7 Ohio Cir. Dec. 226, 13 Ohio Cir. Ct. 342.

*Pennsylvania*.—This seems to be the rule which obtains in Pennsylvania, but it cannot be said that the question is definitely settled. *Craig v. Craig*, 5 Rawle (Pa.) 91; *Good v. Good*, 7 Watts (Pa.) 195; *Clever v. Hilberry*, 116 Pa. St. 431; *Thomas v. Miller*, 165 Pa. St. 216; *Sinsheimer v. Hartman*, 19 Pa. Super. Ct. 494; *Shannon v. Castner*, 21 Pa. Super. Ct. 294. See also *Crooks v. Bunn*, 136 Pa. St. 368; *Com. v. Kay*, 14 Pa. Super. Ct. 376 (extensively reviewing Pennsylvania decisions); *White v. Black*, 14 Pa. Super. Ct. 459; *Com. v. Brown*, 23 Pa. Super. Ct. 470. Compare *Packer v. Gonsalus*, 1 S. & R. (Pa.) 536; *Henderson v. Jones*, 10 S. & R. (Pa.) 322, 13 Am. Rep. 676; *Farmers', etc., Bank v. Boraef*, 1 Rawle (Pa.) 152, *followed* *Meighen v. Bank*, 25 Pa. St. 288; *McKee v. Jones*, 6 Pa. St. 425; *Bricker v. Lightner*, 40 Pa. St. 199.

*South Carolina*.—*State v. Thomas*, 3 Strobb. L. (S. Car.) 269; *Davis v. Kirksey*, 2 Rich. L. (S. Car.) 176; *State v. Gilliam*, 66 S. Car. 419; *State v. McDaniel*, (S. Car. 1904) 47 S. E. Rep. 384. Compare *State v. Turner*, 36 S. Car. 534.

*Texas*.—*Lewy v. Fischl*, 65 Tex. 311; *Ætna Ins. Co. v. Eastman*, 95 Tex. 34; *Gulf, etc., R. Co. v. Garren*, 96 Tex. 605; *Ft. Worth, etc., R. Co. v. Stone*, (Tex. Civ. App. 1894) 25 S. W. Rep. 808; *McGowen v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 46; *Dolan v. Meehan*, (Tex. Civ. App. 1904) 80 S. W. Rep. 99; *Glover v. Coit*, (Tex. Civ. App. 1904) 81 S. W. Rep. 136. See also *Moody v. Gardner*, 42 Tex. 411. Compare *Texas, etc., R. Co. v. Hall*, 17 Tex. Civ. App. 45.

*Vermont*.—*Munson v. Hastings*, 12 Vt. 346; *Gibbs v. Linsley*, 13 Vt. 209; *Lavigne v. Lee*, 71 Vt. 167.

*Virginia*.—*Repass v. Richmond*, 99 Va. 508, 3 Va. Sup. Ct. Rep. 377.

*Washington*.—*State v. Manville*, 8 Wash. 523; *State v. Coates*, 22 Wash. 601. Compare *State v. Murphy*, 9 Wash. 204.

*Wisconsin*.—*Dufresne v. Weise*, 46 Wis. 298.

**Prior Consistent Statements to Rebut Mental Incapacity.**—*Bricker v. Lightner*, 40 Pa. St. 199. Compare *Dundas v. Lansing*, 75 Mich. 499.

## 1. Witness Testifying under Influence of Bias,



(d) **Where Witness Is a Party to the Litigation.** — Evidence of prior statements consistent with the testimony of a party to the litigation, called as a witness in his own behalf, has been held inadmissible, as precluded by the well-settled general rule that a party cannot give his own self-serving declarations in evidence. There are, however, some decisions to the contrary.<sup>1</sup>

(e) **As Corroborative Evidence.** — Prior statements of a witness, especially private memoranda, entries in books of account, or other writings referred to by the witness for the purpose of refreshing his recollection, have been sometimes held admissible as corroborative or confirmatory evidence.<sup>2</sup>

d. **EVIDENCE OF GOOD CHARACTER** — (1) *In General.* — As already stated herein, a direct attack on the credibility of a witness by evidence of his bad character or reputation may be rebutted by evidence of good character.<sup>3</sup>

etc. — See generally the cases cited in this subsection; and for instances of the application of the rule see the following:

*California.* — *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413; *California Electric Light Co. v. California Safe Deposit, etc., Co.*, (Cal. 1904) 78 Pac. Rep. 372.

*Illinois.* — *Gates v. People*, 14 Ill. 438; *Waller v. People*, 209 Ill. 284.

*Kansas.* — *State v. Petty*, 21 Kan. 54; *Cloud County v. Vickers*, 62 Kan. 25.

*Louisiana.* — *State v. Dudoussat*, 47 La. Ann. 977.

*Massachusetts.* — *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Hewitt v. Corey*, 150 Mass. 445.

*New Hampshire.* — *French v. Merrill*, 6 N. H. 465.

*New York.* — *Gilbert v. Sage*, 57 N. Y. 639, affirming 5 Lans. (N. Y.) 287; *Matter of Hedsra*, 119 N. Y. 615; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.) 90; *Herrick v. Smith*, 13 Hun (N. Y.) 448; *Vilas Nat. Bank v. Newton*, 25 N. Y. App. Div. 62; *Hawley v. Hawley*, 48 N. Y. App. Div. 301; *Baber v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 20; *McLain v. British, etc., Marine Ins. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 336.

*Pennsylvania.* — *Good v. Good*, 7 Watts (Pa.) 195; *Hester v. Com.*, 85 Pa. St. 139; *Zell v. Com.*, 94 Pa. St. 258; *White v. Black*, 14 Pa. Super. Ct. 459; *Com. v. Crown*, 23 Pa. Super. Ct. 470.

*Tennessee.* — *Hayes v. Cheatham*, 6 Lea (Tenn.) 10; *Nashville, etc., R. Co. v. Lawson*, 105 Tenn. 639.

*Texas.* — *Lewy v. Fischl*, 65 Tex. 311; *Gulf, etc., R. Co. v. Garren*, 96 Tex. 605; *Dolan v. Meehan*, (Tex. Civ. App. 1904) 80 S. W. Rep. 99; *Conway v. State*, 33 Tex. Crim. 327; *English v. State*, 34 Tex. Crim. 190; *Mitchell v. State*, 36 Tex. Crim. 278; *Jones v. State*, 38 Tex. Crim. 87; *Ballow v. State*, 42 Tex. Crim. 263. Compare *Reese v. State*, 43 Tex. Crim. 539, 44 Tex. Crim. 34.

*Vermont.* — *State v. Dennin*, 32 Vt. 158; *State v. Flint*, 60 Vt. 304.

*Washington.* — *State v. Manville*, 8 Wash. 523; *State v. Coates*, 22 Wash. 601.

**To Bring the Case Within the Exception to the rule** that such evidence is inadmissible, the grounds which take it out of that rule must clearly appear. *Ætna Ins. Co. v. Eastman*, 95 Tex. 34.

**Proof of Relationship of a Witness to the Party** for whom he testifies, without more, is insufficient to impute to him a motive to testify

falsely, within this rule. *State v. Cady*, 46 La. Ann. 1346; *State v. Taylor*, 134 Mo. 109.

1. **Where Witness Is a Party to the Litigation.**

— *Logansport, etc., Turnpike Co. v. Heil*, 118 Ind. 135; *Bacon v. Ransom*, 139 Mass. 117; *Murchie v. Cornell*, 155 Mass. 60; *Ætna Ins. Co. v. Eastman*, 95 Tex. 34; *Silva v. Pickard*, 10 Utah 78; *Ewing v. Keith*, 16 Utah 312; *Repass v. Richmond*, 99 Va. 508, 3 Va. Sup. Ct. Rep. 377. See the title EVIDENCE, vol. 11, pp. 508, 509. *Contra*, *McAleer v. Horsey*, 35 Md. 439. See also *Clever v. Hillberry*, 116 Pa. St. 431; *Crooks v. Bunn*, 136 Pa. St. 368; *Thomas v. Miller*, 165 Pa. St. 216; *Moody v. Gardner*, 42 Tex. 411; *Lewy v. Fischl*, 65 Tex. 311.

In *Maryland*, by Act 1874, c. 385, 386, evidence of prior consistent statements of parties to litigation, in corroboration of their testimony, was prohibited, thereby abrogating early Maryland decisions to the contrary. *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; *Mallonee v. Duff*, 72 Md. 283.

2. **Prior Statements, etc., as Corroborative Evidence.**

— *Bean v. Lambert*, 77 Fed. Rep. 862; *Dunlap v. Hopkins*, (C. C. A.) 95 Fed. Rep. 231, citing *Insurance Cos. v. Weide*, 14 Wall. (U. S.) 375; *Aulls v. Young*, 98 Mich. 231; *Ellsworth Coal Co. v. Quade*, 28 Mo. App. 421; *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351; *Farmers', etc., Bank v. Boraef*, 1 Rawle (Pa.) 152, *followed* *Meighen v. Bank*, 25 Pa. St. 288; *Welsh v. Cooper*, 8 Pa. St. 217; *Donahue v. Connor*, 93 Pa. St. 356; *Charles v. Bishoff*, (Pa. 1885) 1 Atl. Rep. 527; *Missisquoi Bank v. Evarts*, 45 Vt. 293; *Baker v. Sherman*, 71 Vt. 439. See also *State v. Cruise*, 19 Iowa 312, *distinguished* *State v. Vincent*, 24 Iowa 570; *Gill v. Staylor*, 93 Md. 453, *citing* *Digby v. Stedman*, 1 Esp. 328; *Fain v. Edwards*, Busb. L. (44 N. Car.) 64, 11 Ired. L. (33 N. Car.) 305; *Little v. Ratliff*, 126 N. Car. 262; *Jones v. State*, 54 Ohio St. 1; *Hine v. Pomeroy*, 39 Vt. 211; *Manning v. School Dist. No. 6*, (Wis. 1905) 102 N. W. Rep. 356. Compare *Jones v. Wetherill*, 1 MacA. Pat. Cas. 409, 13 Fed. Cas. No. 7,508; *Townsend Bank v. Whitney*, 3 Allen (Mass.) 454; *Lawrence v. Barker*, 5 Wend. (N. Y.) 302; *Matter of Smith*, 85 Hun (N. Y.) 359; *Friendly v. Lee*, 20 Oregon 202; *Susewind v. Lever*, 37 Oregon 365.

3. See *supra*, this subdivision, 2. b. *Allowed When Credibility of Witness Is Attacked* — *In General*.

**An Attempt to Impeach a Witness** by inquiries of other witnesses concerning his character or

(2) *To Rebut Inference of Bad Character or Reputation* — (a) **Evidence Held Admissible.** — In several states the broad rule has been announced, that whenever the character of a witness for truth is impeached in any way known to the law, the party calling him may introduce evidence of his good character to sustain him;<sup>1</sup> and the statements of some of the text writers on the law of evidence lend considerable support to this view.<sup>2</sup> Where this rule obtains evidence that a witness has made statements contradictory of his testimony on the stand is a sufficient attack on his character to warrant the introduction of evidence of his good character in rebuttal.<sup>3</sup> So it has been held proper to admit evidence of good character where the witness has been assailed in a severe and searching cross-examination by questions which, in their substance and in the manner of their asking, are calculated to impeach his veracity, irrespective of whether any discrediting evidence is produced through his admissions or otherwise.<sup>4</sup> In a few instances also it has been held that where

reputation has been held sufficient to warrant the introduction of evidence of good character in his support, although the only testimony elicited was favorable to the witness. *Com. v. Ingraham*, 7 Gray (Mass.) 46, cited *Gertz v. Fitchburg R. Co.*, 137 Mass. 77; *Wilson v. State*, 17 Tex. App. 525.

**Disproving Facts Stated by Impeaching Witness on Cross-examination.** — *Surles v. State*, 89 Ga. 167.

**1. Proof of Good Character in General.** — *Mercer v. State*, 40 Fla. 216; *Berryman v. Cox*, 73 Mo. App. 67; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209; *March v. Harrell*, 1 Jones L. (46 N. Car.) 329; *Isler v. Dewey*, 71 N. Car. 14; *Paine v. Tilden*, 20 Vt. 554; *George v. Pilcher*, 28 Gratt. (Va.) 318, 26 Am. Rep. 350. And see generally the cases cited in the following notes.

Evidence introduced in a personal injury suit to show that the plaintiff, who testified as a witness, was, to some extent, feigning his injuries, has been held to be such an attack on him as will warrant the reception of evidence of good character in his support. *Texas Cent., etc., R. Co. v. Weideman*, (Tex. Civ. App. 1901) 62 S. W. Rep. 810.

2. See *Stark. Ev.* (10th Am. ed.) 252; 1 *Greenl. Ev.*, § 469.

**3. Attacking Character by Evidence of Contradictory Statements** — *Alabama.* — *Hadjo v. Gooden*, 13 Ala. 718; *Lewis v. State*, 35 Ala. 380; *Haley v. State*, 63 Ala. 83; *Holley v. State*, 105 Ala. 100; *Towns v. State*, 111 Ala. 1; *McClellan v. State*, 117 Ala. 140. See also *Lusk v. State*, 129 Ala. 1.

*Florida.* — *Mercer v. State*, 40 Fla. 216.

*Georgia.* — *Clark v. State*, 117 Ga. 254; *Price v. State*, 72 Ga. 441. *Contra*, prior to statutory provisions, *Stamper v. Griffin*, 12 Ga. 456.

*Indiana.* — *Clark v. Bond*, 29 Ind. 555; *Harris v. State*, 30 Ind. 131; *Stratton v. State*, 45 Ind. 468; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18; *Carroll County v. O'Conner*, 137 Ind. 622; *Garr v. Shaffer*, 139 Ind. 191, *reversing* on rehearing on other grounds (Ind. 1894) 36 N. E. Rep. 208. See also *Paxton v. Dye*, 26 Ind. 393.

*Missouri.* — *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209. See also *Fulkerson v. Murdock*, 53 Mo. App. 151, *affirmed* on other grounds 123 Mo. 292; *Berryman v. Cox*, 73 Mo. App. 67; *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166.

*North Carolina.* — *Isler v. Dewey*, 71 N. Car. 14.

*Texas.* — *Burrell v. State*, 18 Tex. 730; *Johnson v. Brown*, 51 Tex. 65; *Fox v. Robbins*, (Tex. Civ. App. 1902) 70 S. W. Rep. 597; *Sheppard v. Love*, (Tex. Civ. App. 1902) 71 S. W. Rep. 67; *Dixon v. State*, 15 Tex. App. 271; *Coombes v. State*, 17 Tex. App. 258; *Thomas v. State*, 18 Tex. App. 214; *Phillips v. State*, 19 Tex. App. 164; *Tipton v. State*, 30 Tex. App. 530; *Morrison v. State*, 37 Tex. Crim. 601; *Payne v. State*, 40 Tex. Crim. 290; *Ledbetter v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 479; *Runnels v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 458.

*Vermont.* — *State v. Roe*, 12 Vt. 111; *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23.

*West Virginia.* — *State v. Staley*, 45 W. Va. 792, citing 10 ENCYC. OF PL. AND PR. 326.

**Merely Laying the Foundation** for the admission of evidence showing contradictory statements is insufficient to let in evidence of good character unless proof of the statements is supplied by admissions drawn from the witness. In other cases the discrediting evidence must be actually introduced. *State v. Cooper*, 71 Mo. 436; *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43; *Renfro v. State*, 42 Tex. Crim. 393; *Gulf, etc., R. Co. v. Younger*, (Tex. Civ. App. 1897) 40 S. W. Rep. 423; *State v. Staley*, 45 W. Va. 792.

**Proof of Admissions Made by a Party to the Litigation**, inconsistent with his testimony, is original and not merely impeaching testimony; and contradictions thus shown cannot be rebutted by evidence of good character. *Garr v. Shaffer*, 139 Ind. 191, *reversing* on other grounds (Ind. 1894) 36 N. E. Rep. 208. See also *Tedens v. Schumers*, 14 Ill. App. 607, *reversed* on other grounds 112 Ill. 263.

**4. Witness Assailed by Vigorous Cross-examination.** — *State v. Boyd*, 38 La. Ann. 374; *State v. Fruge*, 44 La. Ann. 165; *State v. Johnson*, 47 La. Ann. 1225; *State v. Cherry*, 63 N. Car. 493; *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Warfield v. Louisville, etc., R. Co.*, 104 Tenn. 74. See also *Mercer v. State*, 40 Fla. 216; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166; *Youngstown Bridge Co. v. Barnes*, 98 Tenn. 401; *Loomis v. Stuart*, (Tex. Civ. App. 1893) 24 S. W. Rep. 1078.

opposing witnesses squarely contradict each other respecting a matter about which they have equal means of knowledge and equal reasons for accurate recollection, their character for truth is put in issue, and evidence of good character may be given in their support.<sup>1</sup>

(b) **Evidence Held Inadmissible.**— Mere contradictions in the testimony of opposing witnesses, or different versions of the transaction in issue, have been generally held not to involve such an attack on the character of the witnesses as to justify the admission of general evidence of their character for truth;<sup>2</sup> otherwise trials would be rendered interminable, and instead of reaching truth by the verdict, it would be likely to be stifled under a large number of side issues, calculated to obscure and not to elucidate the real one.<sup>3</sup> The rule has been generally applied, although the contradictions in testimony are of such nature as to consequentially impute fraud, immorality, or crime to the witness.<sup>4</sup> Further, under the decisions in some jurisdictions, disapproving the statements of text writers to the contrary, proof that a witness has made declarations contradictory of his testimony will not warrant the reception of such evidence;<sup>5</sup> nor will the cross-examination of a witness, however severe

**1. Contradictions in Testimony Between Opposing Witnesses.**— *State v. Desforges*, 48 La. Ann. 73; *Davis v. State*, 38 Md. 15, two judges dissenting; *March v. Harrell*, 1 Jones L. (46 N. Car.) 329; *Isler v. Dewey*, 71 N. Car. 14. Compare *Vernon v. Tucker*, 30 Md. 456. In *McAleer v. Horsey*, 35 Md. 439, approved *Gill v. Staylor*, 93 Md. 453, the court say that where witnesses thus contradict one another it is vain to argue that one of them has not sworn falsely.

**2. Contradictions in Testimony Between Opposing Witnesses**— *Alabama*.— *Owens v. White*, 28 Ala. 413; *Funderberg v. State*, 100 Ala. 36; *Turner v. State*, 124 Ala. 59; *Bell v. State*, 124 Ala. 94. Compare *Newton v. Jackson*, 23 Ala. 335.

*Connecticut*.— *State v. Ward*, 49 Conn. 429. *Florida*.— *Saussy v. South Florida R. Co.*, 22 Fla. 327.

*Georgia*.— *Miller v. Western, etc., R. Co.*, 93 Ga. 480; *Bell v. State*, 100 Ga. 78; *Anderson v. Southern R. Co.*, 107 Ga. 500. See also *Stamper v. Griffin*, 12 Ga. 456.

*Illinois*.— *Chicago, etc., R. Co. v. Fisher*, 31 Ill. App. 36.

*Indiana*.— *Pruitt v. Cox*, 21 Ind. 15; *Presser v. State*, 77 Ind. 274; *Brann v. Campbell*, 86 Ind. 516; *Fitzgerald v. Goff*, 99 Ind. 34; *Garr v. Shaffer*, 139 Ind. 191, reversing on rehearing (Ind. 1894) 36 N. E. Rep. 208.

*Kentucky*.— *Vance v. Vance*, 2 Met. (Ky.) 581.

*Louisiana*.— See *State v. Johnson*, 47 La. Ann. 1225.

*Missouri*.— *Fulkerson v. Murdock*, 53 Mo. App. 151, affirmed on other grounds 123 Mo. 292.

*New York*.— *Starks v. People*, 5 Den. (N. Y.) 106; *People v. Rector*, 19 Wend. (N. Y.) 569.

*Ohio*.— See *Webb v. State*, 29 Ohio St. 351.

*Oregon*.— *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43.

*Pennsylvania*.— *Braddee v. Brownfield*, 9 Watts (Pa.) 124; *Com. v. Kay*, 14 Pa. Super. Ct. 376.

*Texas*.— *Texas, etc., R. Co. v. Raney*, 86 Tex. 363, affirming on other grounds (Tex. Civ. App. 1893) 23 S. W. Rep. 340; *Tomson v.*

*Heidenheimer*, 16 Tex. Civ. App. 114; *White v. Epperson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 851; *Simmonds v. Simmonds*, (Tex. Civ. App. 1904) 79 S. W. Rep. 630; *Payne v. State*, 40 Tex. Crim. 290; *Jacobs v. State*, 42 Tex. Crim. 353; *Zysman v. State*, 42 Tex. Crim. 432; *Harris v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 714.

*Vermont*.— *Stevenson v. Gunning*, 64 Vt. 609. See also *State v. Roe*, 12 Vt. 111; *Sweet v. Sherman*, 21 Vt. 24.

*Washington*.— *State v. Nelson*, 13 Wash. 523.

**3. Mobile, etc., R. Co. v. Williams**, 54 Ala. 172; *Tedens v. Schumers*, 112 Ill. 263, reversing 14 Ill. App. 607; *Fulkerson v. Murdock*, 53 Mo. App. 151, affirmed 123 Mo. 292; *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43; *Stevenson v. Gunning*, 64 Vt. 609. See also *Russell v. Coffin*, 8 Pick. (Mass.) 154, cited with approval in *Stamper v. Griffin*, 12 Ga. 450; *State v. Archer*, 73 Iowa 320, and *Vernon v. Tucker*, 30 Md. 456.

**4. Contradictions Imputing Fraud, Immorality, or Crime.**— *Rogers v. Moore*, 10 Conn. 14; *Tedens v. Schumers*, 112 Ill. 263, reversing 14 Ill. App. 607; *Diffenderfer v. Scott*, 5 Ind. App. 243; *Heywood v. Reed*, 4 Gray (Mass.) 574; *Atwood v. Dearborn*, 1 Allen (Mass.) 483, 79 Am. Dec. 755; *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166. See also *Leonori v. Bishop*, 4 Duer (N. Y.) 420. Compare *Stark. Ev.* (10th Am. ed.) 253; *Durham v. Beaumont*, 1 Campb. 207. *Contra*, *George v. Pilcher*, 28 Gratt. (Va.) 299, 26 Am. Rep. 350. See also *Bamfield v. Massey*, 1 Campb. 460; *Davis v. State*, 38 Md. 15; *Isler v. Dewey*, 71 N. Car. 14; *Loomis v. Stuart*, (Tex. Civ. App. 1893) 24 S. W. Rep. 1078.

**5. Attack on Witness by Evidence of Contradictory Statements**— *Iowa*.— *State v. Archer*, 73 Iowa 320.

*Kentucky*.— *Vance v. Vance*, 2 Met. (Ky.) 581.

*Massachusetts*.— *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Brown v. Mooers*, 6 Gray (Mass.) 451.

*New York*.— *People v. Hulse*, 3 Hill (N. Y.) 313; *Frost v. McCargar*, 29 Barb. (N. Y.) 617.



or searching, unless admissions of extrinsic facts going to his character are wrung from him during its course.<sup>1</sup> Evidence of contradictory statements is an assault on the credit rather than on the character of the witness, and therefore does not open the way for evidence to sustain his general character.<sup>2</sup>

(3) *Witness Convicted of or Charged with Crime.* — Where it is shown, either by cross-examination or by independent testimony, that the witness has been convicted of crime, evidence of his good character is admissible in rebuttal.<sup>3</sup> Proof that the witness is charged with a criminal offense has also been held sufficient to warrant the reception of character evidence in his support.<sup>4</sup>

(4) *Witness a Stranger in the Community.* — In a few cases it has been held that a witness who is a stranger in the community where the trial is held may be supported by evidence of good character, irrespective of any attack on his credibility.<sup>5</sup> This doctrine, however, has been generally repudiated.<sup>6</sup>

(5) *Absent or Deceased Subscribing Witnesses.* — An exception to the rule that evidence of good character is inadmissible to support the credibility of a witness, until a direct attack has been made on his character, has been countenanced by some decisions in the case of subscribing witnesses, who are absent or deceased at the time of the trial, and whose attestations are proved by secondary evidence.<sup>7</sup>

Ohio. — *Webb v. State*, 29 Ohio St. 351.

Oregon. — *Sheppard v. Yocum*, 10 Oregon 402, *overruling* *Glaze v. Whitbey*, 5 Oregon 166; *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43.

Pennsylvania. — *Wertz v. May*, 21 Pa. St. 274.

South Carolina. — *Chapman v. Cooley*, 12 Rich. L. (S. Car.) 654, *overruling* *Farr v. Thompson*, Cheves. L. (S. Car.) 37; *State v. Rice*, 49 S. Car. 418.

1. **Attack on Witness in Cross-examination** — *England.* — *Dodd v. Norris*, 3 Campb. 519; *Doe v. Harris*, 7 C. & P. 330, 32 E. C. L. 529.

Alabama. — *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433.

Connecticut. — *Rogers v. Moore*, 10 Conn. 14. *Georgia.* — *Stamper v. Griffin*, 12 Ga. 450; *Central R., etc., Co. v. Dodd*, 83 Ga. 507.

Iowa. — *State v. Owens*, 109 Iowa 1.

Massachusetts. — *Russell v. Coffin*, 8 Pick. (Mass.) 154; *Harrington v. Lincoln*, 4 Gray (Mass.) 563; *McCarty v. Leary*, 118 Mass. 509.

New York. — *People v. Hulse*, 3 Hill (N. Y.) 309, *explaining* *People v. Rector*, 19 Wend. (N. Y.) 569; *Hannah v. McKellip*, 49 Barb. (N. Y.) 312.

Oregon. — *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43.

Texas. — *Texas, etc., R. Co. v. Raney*, 86 Tex. 363, *affirming* (Tex. Civ. App. 1893) 23 S. W. Rep. 340, *explaining* *Phillips v. State*, 19 Tex. App. 158.

2. **Distinction Between Character and Credit.** — *Chapman v. Cooley*, 12 Rich. L. (S. Car.) 654; *State v. Jones*, 29 S. Car. 201; *State v. Wallace*, 44 S. Car. 357; *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43.

3. **Conviction of Crime.** — *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433; *People v. Amanacus*, 50 Cal. 233; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *Curtis v. Cochran*, 50 N. H. 242; *Webb v. State*, 29 Ohio St. 351; *Wick v. Baldwin*, 51 Ohio St.

51; *Kraimer v. State*, 117 Wis. 350. See also *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Braddee v. Brownfield*, 9 Watts (Pa.) 124.

4. **Proof that Witness Is Charged with Criminal Offense.** — *Murphy's Case*, 19 How. St. Tr. 724; *Central R., etc., Co. v. Dodd*, 83 Ga. 507; *Coombs v. State*, 17 Tex. App. 258; *Farmer v. State*, 35 Tex. Crim. 270; *Luttrell v. State*, 40 Tex. Crim. 651. See also *Payne v. State*, 40 Tex. Crim. 290. *Contra*, *People v. Gay*, 7 N. Y. 378, *affirming* 1 Park. Crim. (N. Y.) 308, *overruling* *Carter v. People*, 2 Hill (N. Y.) 317.

5. **Witness a Stranger in the Community.** — *Rogers v. Moore*, 10 Conn. 14; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354. See also *Whart. Crim. Ev.*, 9th ed., § 491; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Tyler v. Todd*, 36 Conn. 218.

**Deaf and Dumb Witness.** — On similar principles it has been held proper to support the character of a witness who is deaf and dumb. *State v. De Wolf*, 8 Conn. 93 20 Am. Dec. 90.

6. *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43; *Texas, etc., R. Co. v. Raney*, 86 Tex. 363, *affirming* on other ground (Tex. Civ. App. 1893) 23 S. W. Rep. 340; *Payne v. State*, 40 Tex. Crim. 290, *overruling* *Phillips v. State*, 19 Tex. App. 158, and *Crook v. State*, 27 Tex. App. 198; *Murphy v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 978. See also *State v. Owens*, 109 Iowa 1. *Compare* *McGrath v. State*, 35 Tex. Crim. 413; *Kipper v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 611.

7. **Absent or Deceased Subscribing Witnesses.** — *Doe v. Stephenson*, 3 Esp. 284; *Doe v. Walker*, 4 Esp. 50; *Durham v. Beaumont*, 1 Campb. 207; *Doe v. Harris*, 7 C. & P. 330, 32 E. C. L. 529, *Provis v. Reed*, 5 Bing. 435, 15 E. C. L. 490, 3 M. & P. 4, 30 Rev. Rep. 695. See also *Rogers v. Moore*, 10 Conn. 14; *Atwood v. Dearborn*, 1 Allen (Mass.) 483, 79 Am. Dec. 755; *Crouse v. Miller*, 10 S. & R. (Pa.) 155; *Braddee v. Brownfield*, 9 Watts (Pa.) 124; *Ward v. Brown*, 53 W. Va. 227.

(6) *How Proof Made — Qualifications of Witnesses* — (a) **Cross-examination of Impeaching Witnesses.** — To rebut evidence of bad character or reputation, the party calling the witness who is thus attacked is, of course, entitled to cross-examine the impeaching witnesses as to their means of knowledge and the grounds of their opinion, for the purpose of showing, if it can, that their testimony is entitled to little or no weight. This subject has been discussed elsewhere in this title.<sup>1</sup>

(b) **Direct Evidence of Good Character** — *aa. AFFIRMATIVE EVIDENCE.* — As a general rule a sustaining witness to character must know the general repute of the other witness, and so state, before he can be examined further. His individual knowledge or opinion is inadmissible.<sup>2</sup> If he says he is acquainted with the character or reputation of the witness sought to be sustained, he is ordinarily qualified to testify without any further preliminary inquiry. The sources or extent of his knowledge or information bear on the weight to be given to his testimony and not on his competency, and are to be attended to on cross-examination.<sup>3</sup> The rules of evidence relating to this subject are generally applicable to both impeaching and sustaining witnesses and will be found fully discussed elsewhere.<sup>4</sup>

*bb. NEGATIVE EVIDENCE.* — It has been generally held that sustaining witnesses to character, who are well acquainted with the other witness and the people in the community where he dwells, may testify that they have never heard his character discussed or called in question, whether they can swear that they know his general reputation or not. Indeed, such testimony is sometimes said to be the best evidence of good character, the best character being that which is least talked about.<sup>5</sup> Some of the decisions go further and permit sustaining witnesses to testify affirmatively on such foundation, that the general character or reputation of the other witness is good and that they would believe him on oath.<sup>6</sup>

**1. Cross-examination of Impeaching Witnesses.** — See *supra*, this title, VII. *Credibility and Impeachment of Witnesses — Attacking Reputation of Witness.* See also 2 Phil. Ev. 956; Mawson v. Hartsink, 4 Esp. 102.

**2. Qualifications of Sustaining Witnesses** — *Alabama.* — McCutchen v. McCutchen, 9 Port. (Ala.) 650; Holmes v. State, 88 Ala. 26; Jackson v. State, 106 Ala. 12.

*Arkansas.* — Cole v. State, 59 Ark. 50.

*Georgia.* — Savannah, etc., R. Co. v. Wideman, 99 Ga. 245; Barnwell v. Hannegan, 105 Ga. 396; Suddeth v. State, 112 Ga. 407. See also Artrope v. Goodall, 53 Ga. 318.

*Illinois.* — Cook v. Hunt, 24 Ill. 536; Magee v. People, 139 Ill. 138; Gifford v. People, 148 Ill. 173; Hays v. Johnson, 92 Ill. App. 80.

*Maryland.* — Sloan v. Edwards, 61 Md. 90.

*Michigan.* — People v. Turney, 124 Mich. 542.

*New York.* — Conkey v. People, (Ct. App.) 5 Park. Crim. (N. Y.) 31.

*Ohio.* — Bucklin v. State, 20 Ohio 18.

*Pennsylvania.* — Lyman v. Philadelphia, 56 Pa. St. 488.

*Texas.* — Gay v. State, 40 Tex. Crim. 242.

*West Virginia.* — Clay v. Robinson, 7 W. Va. 348.

Compare *infra*, this page, note *Affirmative Evidence Based on Negative Affirmation.*

**Time and Place of Acquiring Reputation.** — Prater v. State 107 Ala. 26; Cline v. State, 51 Ark. 140; State v. Fahey, 35 La. Ann. 9; Chess v. Chess, 1 P. & W. (Pa.) 32; Morris v. Palmer, 15 Pa. St. 51; State v. Cushing, 14 Wash. 527.

**3. McClellan v. State, 117 Ala. 140; State v. Fairlamb, 121 Mo. 137.**

**Cross-examination of Sustaining Witnesses.** — Holmes v. State, 88 Ala. 26; Morgan v. State, 88 Ala. 223; Smith v. State, 103 Ala. 57; McAlpine v. State, 117 Ala. 93; Mercer v. State, 40 Fla. 216; State v. Brown, 100 N. Car. 519; Hopperwood v. State, 39 Tex. Crim. 15.

**4. See the title CHARACTER (IN EVIDENCE),** vol. 5, p. 850; *supra*, this title, VII. *Credibility and Impeachment of Witnesses — Attacking Reputation of Witness.*

**5. Negative Evidence — General Rule.** — Cole v. State, 59 Ark. 50; Taylor v. Smith, 16 Ga. 7; Flenister v. State, 81 Ga. 768; State v. Nelson, 58 Iowa 208; State v. Keenan, 111 Iowa 286; Sloan v. Edwards, 61 Md. 89; Lenox v. Fuller, 39 Mich. 268; McLaughlin v. Salley, 46 Mich. 219; Bingham v. Bernard, 36 Minn. 114; People v. Seldner, 62 N. Y. App. Div. 357; Bucklin v. State, 20 Ohio 18; Morris v. Palmer, 15 Pa. St. 51; Davis v. Franke, 33 Gratt. (Va.) 413; Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293; State v. Meadows, 18 W. Va. 658; Clay v. Robinson, 7 W. Va. 348. See also Reg. v. Rowton, 10 Cox C. C. 25; State v. Lee, 22 Minn. 409, 21 Am. Rep. 769; Sturmwald v. Schreiber, 69 N. Y. App. Div. 476; Tyler v. State, (Tex. Crim. 1904) 79 S. W. Rep. 558. *Contra*, Magee v. People, 139 Ill. 138; Hays v. Johnson, 92 Ill. App. 80, *distinguishing* Gifford v. People, 148 Ill. 173.

**6. Affirmative Evidence Based on Negative Foundation.** — Hodgkins v. State, 89 Ga. 761; People v. Davis, 21 Wend. (N. Y.) 309; Adams

**IX. PRIVILEGE OF REFUSING TO ANSWER — 1. Exposure to Criminal Charge.** — It is the privilege of a witness to refuse to answer any question the answer to which might expose, or tend to expose, him to a criminal charge, or to any kind of punishment.<sup>1</sup>

**Direct Crimination Not Necessary.** — The privilege is not confined to matters which will criminate him directly, but extends also to such matters as will have any tendency to criminate him; and the witness cannot be compelled to disclose any link in the chain of proof against himself.<sup>2</sup>

*v. Greenwich Ins. Co.*, 70 N. Y. 166, *affirming* 9 Hun (N. Y.) 45; *National Bank v. Scriven*, 63 Hun (N. Y.) 375; *Hand v. Miller*, 58 N. Y. App. Div. 126. *Contra*, *Clay v. Robinson*, 7 W. Va. 363.

**1. Exposure to Criminal Charge — England.** — *Freind's Case*, 13 How. St. Tr. 16; *Macclesfield's Case*, 16 How. St. Tr. 1149; *Hardy's Case*, 24 How. St. Tr. 720; *Parkhurst v. Lowten*, 2 Swanst. 216; *Cates v. Hardacre*, 3 Taunt. 424; *East India Co. v. Campbell*, 1 Ves. 247; *Paxton v. Douglas*, 19 Ves. Jr. 225, 16 Ves. Jr. 239; *Dodd v. Norris*, 3 Campb. 519; *Maloney v. Bartley*, 3 Campb. 210; *Rex v. Slaney*, 5 C. & P. 213, 24 E. C. L. 285; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417, 1 Burr Tr. 247; *Rex v. Hodgson*, R. & R. C. C. 211; *Rex v. Barber*, 1 Stra. 444; *Cundell v. Pratt*, M. & M. 108; *Reg. v. Garbett*, 2 Cox C. C. 448; *Rex v. England*, 2 Leach C. C. 767.

*Canada.* — *Brown v. Hooper*, 3 Manitoba 86; *Re Askwith*, 31 Ont. 150.

*United States.* — *Matter of Graham*, 8 Ben. (U. S.) 419; *Marbury v. Madison*, 1 Cranch (U. S.) 144; *U. S. v. Moses*, 1 Cranch (C. C.) 170; *U. S. v. Lynn*, 2 Cranch (C. C.) 309; *Foot v. Buchanan*, 113 Fed. Rep. 156.

*Alabama.* — *Black v. Pate*, 130 Ala. 514; *Ex p. Boscowitz*, 84 Ala. 463.

*Arkansas.* — *State v. Bach Liquor Co.*, 67 Ark. 163; *Pleasant v. State*, 15 Ark. 624.

*California.* — *Rogers v. San Francisco*, (Cal. 1904) 78 Pac. Rep. 344.

*Connecticut.* — *Grannis v. Branden*, 5 Day (Conn.) 260, 5 Am. Dec. 143.

*Delaware.* — *Short v. State*, 4 Harr. (Del.) 408.

*Georgia.* — *Marshall v. Riley*, 7 Ga. 367.

*Illinois.* — *Eggers v. Fox*, 177 Ill. 185; *Lamson v. Boyden*, 160 Ill. 613; *Minters v. People*, 139 Ill. 363; *Taylor v. McIrvine*, 94 Ill. 488.

*Indiana.* — *Lister v. Boker*, 6 Blackf. (Ind.) 439.

*Iowa.* — *State v. Abley*, 109 Iowa 61; *Richman v. State*, 2 Greene (Iowa) 532.

*Kentucky.* — *Rutherford v. Com.*, 2 Met. (Ky.) 387; *Howard v. Com.*, (Ky. 1904) 80 S. W. Rep. 211.

*Minnesota.* — *Simmons v. Holster*, 13 Minn. 319.

*Missouri.* — *State v. Faulkner*, 175 Mo. 546; *Matter of Green*, 86 Mo. App. 216; *State v. Marshall*, 36 Mo. 400.

*New Hampshire.* — *Janvrin v. Scammon*, 29 N. H. 280; *Amherst v. Hollis*, 9 N. H. 107; *State v. Foster*, 23 N. H. 348; *State v. K.*, 4 N. H. 562; *Coburn v. Odell*, 30 N. H. 540.

*New York.* — *Fellows v. Wilson*, 31 Barb. (N. Y.) 162; *Kinney v. Roberts*, 26 Hun (N. Y.) 166; *Brandon Mfg. Co. v. Bridgman*, 14 Hun (N. Y.) 122; *Matter of Tappan*, (Supm.

*Ct. Spec. T.*) 9 How. Pr. (N. Y.) 394; *Matter of Van Tine*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 507; *Ward v. People*, 3 Hill (N. Y.) 395; *Vilas v. Jones*, 10 Paige (N. Y.) 76; *Bellinger v. People*, 8 Wend. (N. Y.) 595; *People v. Mather*, 4 Wend. (N. Y.) 229; *Burns v. Kempshall*, 24 Wend. (N. Y.) 360; *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155; *People v. Forbes*, 143 N. Y. 219.

*North Carolina.* — *Smith v. Smith*, 116 N. Car. 386.

*North Dakota.* — *State v. Kent*, 5 N. Dak. 516.

*Tennessee.* — *Reed v. Williams*, 5 Sneed (Tenn.) 580; *Johnson v. Goss*, 2 Yeig. (Tenn.) 110; *Lea v. Henderson*, 1 Coldw. (Tenn.) 146; *Douglass v. Wood*, 1 Swan (Tenn.) 393.

*Vermont.* — *Chamberlain v. Willson*, 12 Vt. 491.

*Virginia.* — *Temple v. Com.*, 75 Va. 892.

*Wisconsin.* — *Emery v. State*, 101 Wis. 627.

**Confined to Consequences to Witness Himself.** — The privilege is confined to consequences likely to be occasioned to the party refusing to answer. *Rex v. Willcox*, 1 Sim. N. S. 301.

**Husband and Wife Not Required to Answer Questions Tending to Criminate Each Other —**

*England.* — *Rex v. Cliviger*, 2 T. R. 263; *Rex v. All Saints*, 6 M. & S. 194; *Cartwright v. Green*, 8 Ves. Jr. 405; *Reg. v. Halliday*, Bell C. C. 257, 8 Cox C. C. 298.

*Canada.* — *Millette v. Little*, 10 Ont. Pr. 265.

*New Hampshire.* — *State v. Marvin*, 35 N. H. 22.

*New Jersey.* — See *Schaab v. Schaab*, (N. J. 1904) 57 Atl. Rep. 1090.

*Pennsylvania.* — *Com. v. Reid*, 8 Phila. (Pa.) 385.

*Rhode Island.* — *State v. Briggs*, 9 R. I. 361.

*Vermont.* — *State v. Bridgman*, 49 Vt. 202.

*Wisconsin.* — *State v. Dudley*, 7 Wis. 664.

**2. Witness Not Compellable to Disclose Any Link in Chain of Proof Against Him —**

*England.* — *Paxton v. Douglas*, 16 Ves. Jr. 239; *Cates v. Hardacre*, 3 Taunt. 424; *Parkhurst v. Lowten*, 2 Swanst. 215; *Swift v. Swift*, 4 Hag. Ecc. 154; *King v. King*, 2 Rob. 153; *Southall v. —*, Young 308.

*Canada.* — *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

*United States.* — *Sanderson's Case*, 3 Cranch (C. C.) 638; *Wyckoff v. Wagner Typewriter Co.*, 99 Fed. Rep. 158; *Ex p. Irvine*, 74 Fed. Rep. 954; *Foot v. Buchanan*, 113 Fed. Rep. 156; *U. S. v. Burr*, 25 Fed. Cas. No. 14,692c; *Counselman v. Hitchcock*, 142 U. S. 565; *U. S. v. Lynn*, 2 Cranch (C. C.) 309.

*Alabama.* — *Ex p. Boscowitz*, 84 Ala. 463.

*Florida.* — *Wallace v. State*, 41 Fla. 547.



**Reasonable Danger of Prosecution.** — There must be a reasonable danger of prosecution in order to excuse the witness; no remote and barely possible contingency will avail.<sup>1</sup> If no conceivable answer to the question put can tend to criminate the witness he cannot refuse to answer.<sup>2</sup>

**Proceedings to Which Rule Applies.** — The privilege is not confined to trials in open court. It extends also to examinations before the grand jury<sup>3</sup> and all other legal tribunals.<sup>4</sup>

**In Equity** the rule protects a defendant against discovery of matters which might subject him to a penalty or punishment, the privilege being assertable by demurrer or plea, or in the answer.<sup>5</sup>

*Illinois.* — *Minters v. People*, 139 Ill. 363, reversing 39 Ill. App. 438.

*Indiana.* — *South Bend v. Hardy*, 98 Ind. 577.

*Iowa.* — *Printz v. Cheeney*, 11 Iowa 469.

*Kansas.* — *Stevens v. State*, 50 Kan. 712.

*Minnesota.* — *State v. Bilansky*, 3 Minn. 246; *State v. Gardner*, 88 Minn. 130.

*Missouri.* — *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449.

*New Hampshire.* — *Janvrin v. Scammon*, 29 N. H. 280; *Eaton v. Farmer*, 46 N. H. 200.

*New York.* — *People v. Forbes*, 143 N. Y. 219; *People v. Priori*, 164 N. Y. 459; *Matter of Tappan*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 394; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155; *Burns v. Kempshall*, 24 Wend. (N. Y.) 360; *Matter of Van Tine*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 507; *Friess v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 205.

*North Carolina.* — *Smith v. Smith*, 116 N. Car. 386.

*South Carolina.* — *Poole v. Perritt*, 1 Spears L. (S. Car.) 128; *State v. Edwards*, 2 Nott & M. (S. Car.) 14, 10 Am. Dec. 557.

*Tennessee.* — *Cook v. Corn*, 1 Overt. (Tenn.) 340; *Lea v. Henderson*, 1 Coldw. (Tenn.) 146.

*Utah.* — *People v. Reggel*, 8 Utah 21.

*Wyoming.* — *Miskimmins v. Shaver*, 8 Wyo. 392.

1. *Reg. v. Boyes*, 9 Cox C. C. 32; *Mills v. Mercer Co.*, 15 Orf. Pr. 276; *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236; *In re Moser*, (Mich. 1904) 101 N. W. Rep. 589.

2. **If Answer Cannot Criminate Him, Witness Must Answer** — *England.* — *In re Mexican, etc., Co.*, 5 Jur. N. S. 779; *Ex p. Reynolds*, 20 Ch. D. 294.

*United States.* — *Ex p. Lindo*, 1 Cranch (C. C.) 445; *In re Peasley*, 44 Fed. Rep. 271.

*California.* — *Overend v. Superior Ct.*, 131 Cal. 280; *Bradley v. Clark*, 133 Cal. 196.

*Idaho.* — *State v. Seymour*, 7 Idaho 548.

*Illinois.* — *Moline Wagon Co. v. Preston*, 35 Ill. App. 358; *Smith v. People*, 20 Ill. App. 591.

*Indiana.* — *Ford v. State*, 29 Ind. 541.

*Iowa.* — *Hunt v. McCalla*, 20 Iowa 20.

*Michigan.* — *In re Moser*, (Mich. 1904) 101 N. W. Rep. 589.

*Minnesota.* — *State v. Thaden*, 43 Minn. 253; *State v. Tall*, 43 Minn. 273.

*Missouri.* — *Ex p. Gfeller*, 178 Mo. 248.

*New York.* — *Matter of Van Tine*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 507.

*Pennsylvania.* — *McFadden v. Reynolds*, (Pa. 1887) 11 Atl. Rep. 638.

*Rhode Island.* — *Rosendale v. McMulty*, 23 R. I. 465.

3. **Grand Jury.** — *Foot v. Buchanan*, 113 Fed. Rep. 156; *State v. Gardner*, 88 Minn. 130; *State v. Comer*, 157 Ind. 611; *State v. Faulkner*, 175 Mo. 546; *People v. Seaman*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 152; *Ex p. Wilson*, 39 Tex. Crim. 630; *Wilson v. State*, 41 Tex. Crim. 115; *Elliott v. State*, (Tex. App. 1892) 19 S. W. Rep. 249. See also the title JURY AND JURY TRIAL, vol. 17, p. 1288.

4. **Other Legal Tribunals.** — *Kanter v. Circuit Ct. Clerk*, 108 Ill. App. 287.

**Legislative Bodies.** — *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

**City Council.** — *Matter of Van Tine*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 507.

5. **Rule in Equity** — *England.* — *Ex p. Symes*, 11 Ves. Jr. 525; *Paxton v. Douglas*, 16 Ves. Jr. 239; *Thorpe v. Macauley*, 5 Madd. 218; *Lee v. Read*, 5 Beav. 381; *Glynn v. Houston*, 1 Keen 329; *Dummer v. Chippenham*, 14 Ves. Jr. 255; *Williams v. Farrington*, 2 Cox Ch. 202; *Brownsword v. Edwards*, 2 Ves. 243; *Claridge v. Hoare*, 14 Ves. Jr. 59; *Maccallum v. Turton*, 2 Y. & J. 183; *Southall v. —*, *Younge* 308; *Parkhurst v. Lowten*, 1 Meriv. 361.

*Canada.* — *Hall v. Gowanlock*, 12 Ont. Pr. 604; *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387; *Keith v. Lynch*, 19 Grant Ch. (U. C.) 497.

*United States.* — *U. S. v. Saline Bank*, 1 Pet. (U. S.) 100.

*Connecticut.* — *Skinner v. Judson*, 8 Conn. 529; *Northrop v. Hatch*, 6 Conn. 361.

*Georgia.* — *Higdon v. Heard*, 14 Ga. 258.

*Illinois.* — *Lamson v. Boyden*, 160 Ill. 613; *Robson v. Doyle*, 191 Ill. 566.

*Indiana.* — *French v. Venneman*, 14 Ind. 282.

*Maryland.* — *Broadbent v. State*, 7 Md. 416. And see *Wolf v. Wolf*, 2 Har. & G. (Md.) 382.

*Missouri.* — *Matter of Green*, 86 Mo. App. 216.

*New York.* — *March v. Davison*, 9 Paige (N. Y.) 580; *Stewart v. Turner*, 3 Edw. (N. Y.) 458; *Brownell v. Curtis*, 10 Paige (N. Y.) 210; *Leggett v. Postley*, 2 Paige (N. Y.) 599; *Kinney v. Roberts*, 26 Hun (N. Y.) 166; *Yamato Trading Co. v. Brown*, 27 Hun (N. Y.) 248; *Phoenix v. Dupuy*, (C. Pl.) 2 Abb. N. Cas. (N. Y.) 146; *Brookway v. Copp*, 3 Paige (N. Y.) 539. See also *Livingston v. Harris*, 3 Paige (N. Y.) 528.

See also the title DISCOVERY, 6 ENCYC. OF PL. AND PR. 742 *et seq.*

"One cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to

**Aliens.** — A witness cannot object to answering a question on the ground that he is a foreigner and that his answer will subject him to punishment should he return to his own country, the rule of protection in such a case being confined to what may tend to subject him to penalties under the laws of the country exercising jurisdiction and where he at present resides.<sup>1</sup> But where he is subject to penalty or forfeiture under the laws of his own country which will be equally effective in both countries, he is entitled to the privilege.<sup>2</sup>

**2. Exposure to Penalty or Forfeiture.** — It is also the privilege of a witness to refuse to answer any question which will expose him, or which has a tendency to expose him, to a penalty or to a forfeiture of estate,<sup>3</sup> and this rule also is the same in equity as at law.<sup>4</sup>

**3. Exposure to Civil Action.** — In *England* it is settled by statute that a witness, in a cause to which he is not a party, cannot lawfully refuse to answer a question relevant to the matter in issue, on the ground that his answer might subject him to a civil suit on a cause of action not involving a penalty or a forfeiture.<sup>5</sup> And in the *United States* this rule is held to be the true

forfeit his property." *Boyd v. U. S.*, 116 U. S. 616.

1. *Rex v. Willcox*, 1 Sim. N. S. 301.

2. *U. S. v. McRae*, L. R. 3 Ch. 79.

**3. Exposure to Penalty or Forfeiture — England.** — *Jackson v. Benson*, 1 Y. & J. 32; *Rex v. Gordon*, 2 Dougl. 590; *Harrison v. Southcote*, 1 Atk. 539; *Honeywood v. Selwin*, 3 Atk. 276; *Maccallum v. Turton*, 2 Y. & J. 183; *Pye v. Butterfield*, 5 B. & S. 829, 117 E. C. L. 829; *Dandridge v. Corden*, 3 C. & P. 11, 14 E. C. L. 185; *Rawlings v. Hall*, 1 C. & P. 11, 11 E. C. L. 300.

*United States.* — *Wyckoff v. Wagner Type-writer Co.*, 99 Fed. Rep. 158; *Johnson v. Donaldson*, 18 Blatchf. (U. S.) 287; *La Bourgogne*, 104 Fed. Rep. 823; *U. S. v. Collins*, 1 Woods (U. S.) 499.

*Georgia.* — *Higdon v. Heard*, 14 Ga. 255.

*Indiana.* — *Lister v. Boker*, 6 Blackf. (Ind.) 439. But see *Wilkins v. Malone*, 14 Ind. 153.

*Kentucky.* — *Rutherford v. Com.*, 2 Met. (Ky.) 387.

*Maryland.* — *Trammell v. Thomas*, 1 Har. & J. (Md.) 261.

*Minnesota.* — *Simmons v. Holster*, 13 Minn. 249.

*New York.* — *Matter of Dickinson*, 58 How. Pr. (N. Y.) 260; *Henry v. Salina Bank*, 1 N. Y. 86, affirming *Salina Bank v. Henry*, 2 Den. (N. Y.) 155; *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 432; *Davies v. Lincoln Nat. Bank*, (Supm. Ct. Spec. T.) 16 Civ. Pro. (N. Y.) 68; *Livingston v. Harris*, 3 Paige (N. Y.) 533; *Matter of Kip*, 1 Paige (N. Y.) 601; *Taylor v. Wood*, 2 Edw. (N. Y.) 94; *Burns v. Kempshall*, 24 Wend. (N. Y.) 360, affirmed 4 Hill (N. Y.) 468; *Cloyes v. Thayer*, 3 Hill (N. Y.) 564.

*Ohio.* — *Kuder v. Cronice*, 7 Ohio (pt. ii) 249; *Ex p. Jennings*, 60 Ohio St. 319.

*Tennessee.* — *Reed v. Williams*, 5 Sneed (Tenn.) 580; *Lea v. Henderson*, 1 Coldw. (Tenn.) 146; *Johnson v. Goss*, 2 Yerg. (Tenn.) 110.

*Virginia.* — *Poindexter v. Davis*, 6 Gratt. (Va.) 481.

Therefore a postmaster cannot be compelled to testify whether a certain registered letter went through the post, he being forbidden to

furnish such information by "The Postal Laws and Regulations" under penalty of removal. *Nye v. Daniels*, 75 Vt. 81.

**Secret Process.** — A witness was held entitled to refuse to answer certain cross-questions in interference proceedings in the Patent Office on the ground that they would disclose his secret process. *Herreshoff v. Knietzsch*, 127 Fed. Rep. 492.

**4. In Equity.** — *Harrison v. Southcote*, 1 Atk. 539; *Slooman v. Kelly*, 3 Y. & C. Ch. 673; *Fane v. Atlee*, 1 Eq. Cas. Abr. 77, pl. 15; *Uxbridge v. Staveland*, 3 Atk. 453; *Honeywood v. Selwin*, 3 Atk. 276; *Jackson v. Benson*, 1 Y. & J. 32; *Smith v. Read*, 1 Atk. 526; *Boteler v. Marmaduke*, 3 Atk. 453; *Bird v. Hardwicke*, 1 Vern. 109; *Sharp v. Carter*, 3 P. Wms. 375; *Davis v. Reid*, 5 Sim. 443; *Chancey v. Fenhoulet*, 2 Ves. 265; *Chauncey v. Tahourden*, 2 Atk. 392; *La Bourgogne*, 104 Fed. Rep. 823; *People v. Western Manufacturers' Mut. Ins. Co.*, 40 Ill. App. 428; *Wolf v. Wolf*, 2 Har. & G. (Md.) 382; *Currier v. Concord R. Corp.*, 48 N. H. 321; *Livingston v. Harris*, 3 Paige (N. Y.) 528, affirmed 11 Wend. (N. Y.) 329; *Poindexter v. Davis*, 6 Gratt. (Va.) 481. But see *contra*, *Green v. Weaver*, 1 Sim. 404.

**5. Exposure to Civil Action — England.** — This question was propounded by the House of Lords to the judges in Lord Melville's case, 29 How. St. Tr. 549. Eight of the judges besides the Lord Chancellor and Lord Eldon (who was not then in judicial office) were of the opinion that the law was as it is given in the text. Four of them, among whom was Lord Mansfield, C. J., were of the opinion that a witness was not compellable to answer any question, the answer to which might subject him to a civil action. 6 Parl. Debates, pp. 234, 245. This division of opinion gave rise to the statute 46 Geo. III., c. 37, which declares that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture, of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is

doctrine, the English statute being accepted as declaratory of the common law.<sup>1</sup> Though the rule was formerly not so applied in either country as to compel a party to the record, or the real party in interest, though not a party to the record, to testify against his own interest,<sup>2</sup> parties are now compelled, by the abolition of their disqualification as witnesses, to give evidence, though against their own interests.<sup>3</sup>

**4. Exposure to Disgrace.** — There has been much discussion as to whether a witness may be compelled to answer a question, the answering of which will expose him to disgrace or infamy, though it will not tend to criminate him or to expose him to a penalty or a forfeiture. It is often difficult to determine whether the decisions holding that the witness is not obliged to answer are based on the ground of privilege or on the necessity of setting a limit to cross-examination. Many cases decide generally, without discussing the question, that the witness may refuse to answer.<sup>4</sup>

otherwise subject to a civil suit, either at the instance of His Majesty, or of any other person or persons." *Pye v. Butterfield*, 5 B. & S. 829, 117 E. C. L. 829. See also *Ex p. Chamberlain*, 19 Ves. Jr. 482.

**Production of Documents.** — A witness cannot be excused from producing papers in his possession, merely because their production may subject him to a civil suit. *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889.

But if the papers called for are the title deeds of the witness, he is not bound to produce them. *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889; *Pickering v. Noyes*, 1 B. & C. 263, 8 E. C. L. 112. See also *Marston v. Downes*, 1 Ad. & El. 31, 28 E. C. L. 24.

**1. United States.** — *Fay v. Montgomery*, 1 Curt. (U. S.) 266, 8 Fed. Cas. No. 4,708; *In re Cliffe*, 97 Fed. Rep. 540; *Masseth v. Johnston*, 59 Fed. Rep. 613.

*Alabama.* — *Alexander v. Knox*, 7 Ala. 503.

*Illinois.* — *Brooks v. McKinney*, 5 Ill. 309.

*Kentucky.* — *Com. v. Thruston*, 7 J. J. Marsh. (Ky.) 62; *Helm v. Handley*, 1 Litt. (Ky.) 221; *Conover v. Bell*, 6 T. B. Mon. (Ky.) 157; *Gorham v. Carroll*, 3 Litt. (Ky.) 221; *Black v. Crouch*, 3 Litt. (Ky.) 226; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 213.

*Louisiana.* — *Planters' Bank v. George*, 6 Mart. (La.) 670, 12 Am. Dec. 487, *overruling Orleans Nav. Co. v. New Orleans*, 1 Mart. (La.) 23.

*Maine.* — *Lowney v. Perham*, 20 Me. 235.

*Maryland.* — *Taney v. Kemp*, 4 Har. & J. (Md.) 348, 7 Am. Dec. 673; *Naylor v. Semmes*, 4 Gill & J. (Md.) 273; *City Bank v. Bateman*, 7 Har. & J. (Md.) 104; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Stoddert v. Manning*, 2 Har. & G. (Md.) 147.

*Massachusetts.* — *Com. v. Willard*, 22 Pick. (Mass.) 478; *Bull v. Loveland*, 10 Pick. (Mass.) 12. See also *Devoll v. Brownell*, 5 Pick. (Mass.) 448.

*New Hampshire.* — *Copp v. Upham*, 3 N. H. 159; *Whitcher v. Davis*, 70 N. H. 237 (under statute).

*New York.* — *Stewart v. Turner*, 3 Edw. (N. Y.) 458; *Taylor v. Jennings*, 7 Robt. (N. Y.) 581; *Matter of Kip*, 1 Paige (N. Y.) 601. See also *Cook v. Spalding*, 1 Hill (N. Y.) 588.

*North Carolina.* — *Jones v. Lanier*, 2 Dev. L. (13 N. Car.) 480; *Harper v. Burrow*, 6 Ired. L. (28 N. Car.) 30.

*Ohio.* — *Cox v. Hill*, 3 Ohio 424.

*Pennsylvania.* — *Baird v. Cochran*, 4 S. & R. (Pa.) 397; *Nass v. Vanswearingen*, 7 S. & R. (Pa.) 192; *In re Danforth*, 1 Pa. L. J. Rep. 31, 1 Pa. L. J. 148. But see *Bell's Case*, 1 Browne (Pa.) 376.

*South Carolina.* — *Hawkins v. Sumter*, 4 Desaus. (S. Car.) 103, 446.

*Tennessee.* — *Zollicoffer v. Turney*, 6 Yerg. (Tenn.) 297. But see *Cook v. Corn*, 1 Overt. (Tenn.) 340, where a witness who declared that he was interested was held not compellable to testify against his interest.

*Vermont.* — *Stevens v. Whitcomb*, 16 Vt. 121; *Ward v. Sharp*, 15 Vt. 115.

There are some early *Connecticut* cases in which the contrary was held. *Benjamin v. Hathaway*, 3 Conn. 528; *Storrs v. Wetmore*, *Kirby* (Conn.) 203; *Starr v. Tracy*, 2 Root (Conn.) 528.

**2. Parties.** — *Brooks v. McKinney*, 5 Ill. 309; *Fenn v. Granger*, 3 Campb. 177; *Rex v. Woburn*, 10 East 395; *Appleton v. Boyd*, 7 Mass. 131; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *People v. Irving*, 1 Wend. (N. Y.) 20; *White v. Everest*, 1 Vt. 181.

**3. Parties Now Not Excused on Account of Interest.** — *Bunn v. Bunn*, 4 De G. J. & S. 316; *Conant v. Delafield*, 3 Edw. (N. Y.) 201; *Jones v. Lanier*, 2 Dev. L. (13 N. Car.) 480; *Dunsford v. Carlisle*, 10 Ont. Pr. 449. And see *Zollicoffer v. Turney*, 6 Yerg. (Tenn.) 297; *Planters' Bank v. George*, 6 Mart. (La.) 670.

**4. England.** — *Rex v. Hodgson*, R. & R. C. C. 211; *Reg. v. Cockcroft*, 11 Cox C. C. 410; *Anonymous*, Salk. 153; *Rex v. Pitcher*, 1 C. & P. 85, 11 E. C. L. 323; *Reading's Case*, 7 How. St. Tr. 296; *Shaftesbury's Case*, 8 How. St. Tr. 817; *Rex v. O'Coigly*, 26 How. St. Tr. 1351.

*United States.* — See *U. S. v. Craig*, 4 Wash. (U. S.) 732.

*California.* — *People v. Reinhart*, 39 Cal. 449.

*Iowa.* — *Mahanke v. Cleland*, 76 Iowa 401.

*New York.* — *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498; *People v. Herrick*, 13 Johns. (N. Y.) 82.

*North Carolina.* — *State v. Simpson*, 2 Hawks (9 N. Car.) 580.

*Ohio.* — *Hanoff v. State*, 37 Ohio St. 178.

*Pennsylvania.* — *Respublica v. Gibbs*, 3 Yeates (Pa.) 429. See also *Bell's Case*, 1 Browne (Pa.) 376.



**Matter Material to Issue.** — Where the subject is discussed the commonly accepted rule appears to be that a witness will not be excused from answering a question concerning a matter which is material to the issue on trial, on the sole ground that his answer will tend to disgrace him,<sup>1</sup> but that as to collateral and irrelevant matters he is not bound to answer.<sup>2</sup>

**Collateral and Irrelevant Matters.** — Other cases hold that as to such collateral and irrelevant matters inquired of under the license allowed in cross-examination, it is a matter within the sound discretion of the trial court in each particular case as to how far such a method of attack may be pursued.<sup>3</sup> The further distinction is made between cases where the evidence will directly and certainly show the witness's infamy, and where it will only tend to that end, the privilege being allowed in the former case, but not in the latter.<sup>4</sup>

**5. Constitutional Guaranty** — *a.* IN GENERAL. — It is provided by the Constitution of the *United States* that "no person shall be compelled in any criminal case to be a witness against himself."<sup>5</sup> Although this amendment

**1. Witness Required to Answer as to Material Matters** — *England.* — *Cundell v. Pratt*, M. & M. 108; *Roberts v. Allatt*, M. & M. 192, 22 E. C. L. 288. See also *Rex v. Edwards*, 4 T. R. 440 (where a bail was rejected after being compelled to answer whether he had ever stood in the pillory for perjury).

*United States.* — *Brown v. Walker*, 161 U. S. 591, affirming 70 Fed. Rep. 46.

*Alabama.* — *Hall v. State*, 40 Ala. 698; *Calhoun v. Thompson*, 56 Ala. 166.

*California.* — *Clark v. Reese*, 35 Cal. 89.

*Illinois.* — *Prussing v. Jackson*, 85 Ill. App. 337; *Moline Wagon Co. v. Preston*, 35 Ill. App. 358; *Weldon v. Burch*, 12 Ill. 374.

*Indiana.* — *Hill v. State*, 4 Ind. 112.

*Iowa.* — *State v. Sutherland*, 30 Iowa 570.

*Kentucky.* — *Rutherford v. Com.*, 2 Met. (Ky.) 387; *McC Campbell v. McC Campbell*, 103 Ky. 745. And see *Mitchell v. Com.*, (Ky. 1890) 14 S. W. Rep. 490.

*Michigan.* — *Jennings v. Prentice*, 39 Mich. 421.

*Missouri.* — *Clementine v. State*, 14 Mo. 112.

*Montana.* — *State v. Rogers*, (Mont. 1904) 77 Pac. Rep. 293.

*New York.* — *Brandon v. People*, 42 N. Y. 265; distinguished in *People v. Brown*, 72 N. Y. 574; *People v. Mather*, 4 Wend. (N. Y.) 250; *Taylor v. Jennings*, 7 Robt. (N. Y.) 581.

But see *contra*, *Vaughn v. Perrine*, 3 N. J. L. 299.

**2. Collateral and Irrelevant Matters** — *Alabama.* — *Ortez v. Jewett*, 23 Ala. 662; *Bivens v. Brown*, 37 Ala. 422.

*California.* — *Ex p. Rowe*, 7 Cal. 184; *People v. Un Dong*, 106 Cal. 83; *People v. Crandall*, 125 Cal. 129.

*Illinois.* — *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

*Indian Territory.* — *Oxier v. U. S.*, 1 Indian Ter. 85.

*Massachusetts.* — *Smith v. Castles*, 1 Gray (Mass.) 108.

*Missouri.* — *Harper v. Indianapolis, etc.*, R. Co., 47 Mo. 567.

*Montana.* — *State v. Gleim*, 17 Mont. 17.

*New York.* — *Lohman v. People*, 1 N. Y. 379; *People v. Brown*, 72 N. Y. 571; *In re Lewis*, (U. S. Dist. Ct.) 39 How. Pr. (N. Y.) 155; *People v. Rector*, 19 Wend. (N. Y.) 569. See

also *Third G. W. Turnpike-Road Co. v. Loomis*, 32 N. Y. 127.

*Texas.* — *Carroll v. State*, 32 Tex. Crim. 431. But see *Hill v. Dous*, (Tex. Civ. App. 1896) 37 S. W. Rep. 638.

*Virginia.* — See *Howel v. Com.*, 5 Gratt. (Va.) 664.

*West Virginia.* — *State v. Hill*, 52 W. Va. 296. See *Forney v. Ferrell*, 4 W. Va. 729.

*Wisconsin.* — *Ingalls v. State*, 48 Wis. 647; *Crawford v. Christian*, 102 Wis. 51.

*Canada.* — *Laliberte v. Reg.*, 1 Can. Sup. Ct. 117.

**3. Within Discretion of Court.** — *Warren v. Com.*, 99 Ky. 370; *Wilbur v. Flood*, 16 Mich. 40; *State v. Pfefferle*, 36 Kan. 90; *Burdette v. Com.*, 93 Ky. 77; *U. S. v. Dickinson*, 2 McLean (U. S.) 325; *South Bend v. Hardy*, 98 Ind. 577; *State v. Staples*, 47 N. H. 113; *Real v. People*, 42 N. Y. 270; *Wroe v. State*, 20 Ohio St. 461; *Marr v. Marr*, 3 U. C. C. P. 36. See also *State v. Bacon*, 13 Oregon 154. And see generally title EXAMINATION OF WITNESSES, 8 ENCYC. OF PL. AND PR. 117.

**4. Macbride v. Macbride**, 4 Esp. 242; *McArdle v. McArdle*, 12 Minn. 98; *State v. Bilansky*, 3 Minn. 246; *People v. Mather*, 4 Wend. (N. Y.) 229; *Howel v. Com.*, 5 Gratt. (Va.) 664; *Forney v. Ferrell*, 4 W. Va. 729. See also the title DISCOVERY, 6 ENCYC. OF PL. AND PR. 744.

**5. Constitutional Guaranty.** — Const. U. S., Amendment 5.

As to what constitutes compulsion, see the following cases: *U. S. v. Bell*, 81 Fed. Rep. 830; *U. S. v. Kimball*, 117 Fed. Rep. 164; *State v. Mortensen*, 26 Utah 312. See also *Rex v. Britton*, 1 M. & Rob. 297; *State v. Stone*, 46 La. Ann. 147.

**What Is Not Compulsion.** — The following cases illustrate acts which do not constitute compulsion to testify. *Tucker v. U. S.*, 151 U. S. 164; *State v. Laudano*, 74 Conn. 638; *State v. Stone*, 46 La. Ann. 147; *Howe's Cave Lime, etc., Co. v. Howe's Cave Assoc.*, 88 Hun (N. Y.) 554; *People v. Truck*, 170 N. Y. 203; *People v. Courtney*, 94 N. Y. 490; *State v. Eastwood*, 73 Vt. 205.

**Codefendant.** — One who is jointly indicted with another cannot be compelled, on the demand of his codefendant, to take the witness stand and testify for the codefendant, unless a

to the Constitution is a restriction solely on federal power and has no application to the states,<sup>1</sup> the constitutions of most of the states contain similar provisions.<sup>2</sup>

**Not Limited to Criminal Prosecutions Against Witness Himself.** — The constitutional guaranty is not limited to cases of criminal prosecution against the witness himself.<sup>3</sup> Where the suit, though civil in form, is a criminal prosecution in reality, the defendant is protected, both by the federal and state constitutions.<sup>4</sup>

**No Objection to Being Sworn.** — It does not alter the defendant's constitutional right that he did not object to be sworn. If he is compelled to testify his conviction will be set aside.<sup>5</sup>

**Defendant's Name Not Indorsed on Indictment as Witness.** — The fact that the defendant's name was not indorsed on the indictment as a witness does not deprive him of his constitutional guaranty, and it is not necessary, in order to have the indictment quashed, to show that the defendant was injured by the compulsion.<sup>6</sup>

**Production of Books and Papers.** — It has been held that the fifth amendment, read in connection with the fourth amendment, aimed at unreasonable searches and seizures, protects a witness from producing books and papers which may be used as criminating evidence against him.<sup>7</sup> But it is usually held that the fifth amendment by itself has this effect, irrespective of the fourth amendment.<sup>8</sup> If the private papers of the accused have been obtained

severance has been granted, because one co-defendant's case is generally so interwoven with the others that he would thus probably be compelled to testify against himself. *Holman v. State*, 72 Miss. 108.

**1. Fifth Amendment — Restriction Solely on Federal Power.** — *In re Briggs*, 135 N. Car. 118; *State v. Comer*, 157 Ind. 611; *People v. Adams*, 85 N. Y. App. Div. 390. See also the title CONSTITUTIONAL LAW, vol. 6, p. 961. But see *Higdon v. Heard*, 14 Ga. 235.

**2. Ex p. Cohen**, 104 Cal. 524; *Blum v. State*, 94 Md. 375. And see the various state constitutions.

**3. Not Limited to Criminal Prosecutions Against Witness — United States.** — *Counselman v. Hitchcock*, 142 U. S. 547; *In re Feldstein*, 103 Fed. Rep. 269; *In re Smith*, 112 Fed. Rep. 509; *U. S. v. Kimball*, 117 Fed. Rep. 156; *In re Sapiro*, 92 Fed. Rep. 340.

*California.* — *Ex p. Clarke*, 103 Cal. 352; *Ex p. Cohen*, 104 Cal. 524. See *Levy v. San Francisco*, 105 Cal. 600.

*Illinois.* — *Kanter v. Circuit Ct. Clerk*, 108 Ill. App. 287.

*Indiana.* — *State v. Enochs*, 69 Ind. 314.

*Massachusetts.* — *Emery's Case*, 107 Mass. 172.

*New Hampshire.* — *State v. Nowell*, 58 N. H. 314.

*New York.* — *People v. Forbes*, 143 N. Y. 219; *Kellogg v. Sowerby*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 327. See *People v. McClave*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 764.

*Virginia.* — *Cullen v. Com.*, 24 Gratt. (Va.) 624.

*Wyoming.* — *Miskimmins v. Shaver*, 8 Wyo. 392.

Some earlier decisions held that the constitutional provision referred only to criminal cases. *U. S. v. Three Tons Coal*, 6 Biss. (U. S.) 379; *Wilkins v. Malone*, 14 Ind. 153; *People v. Kelly*, 24 N. Y. 74; *Matter of Dickinson*, 58 How. (N. Y.) 260; *Perrine v. Striker*, 7

*Paige* (N. Y.) 598. And see also the later case of *Miller v. State*, 110 Ala. 69.

**4. Suit Civil in Form but Criminal in Character.** — *Lees v. U. S.*, 150 U. S. 476; *U. S. v. National Lead Co.*, 75 Fed. Rep. 94 (where the real gravamen of the action was fraud and misfeasance); *Thurston v. Clark*, 107 Cal. 285; *Robson v. Doyle*, 191 Ill. 566; *Matter of Green*, 86 Mo. App. 216; *Com. v. Reed*, 5 Pa. Dist. 57; *Pennsylvania Ins. Co. v. Philadelphia*, etc., R. Co., 9 Pa. Co. Ct. 517.

**In Contempt Proceedings.** — *In re Haines*, 67 N. J. L. 442. Where the offense of inducing witnesses to absent themselves is made a crime by statute the accused cannot be compelled to testify. *Matter of Nickell*, 47 Kan. 734; *In re McKenna*, 47 Kan. 738.

**Actions for Penalties.** — *Hunnings v. Williamson*, 10 Q. B. D. 459; *Reg. v. McNicol*, 11 Ont. 659; *Martin v. Treacher*, 16 Q. B. D. 507; *Malcolm v. Race*, 16 Ont. Pr. 330; *Pick-erel River Imp. Co. v. Moore*, 17 Ont. Pr. 287; *Newgold v. American Electrical Novelty*, etc., Co., 108 Fed. Rep. 341; *Logan v. Pennsylvania R. Co.*, 132 Pa. St. 403; *Boyle v. Smithman*, 146 Pa. St. 255; *Dexter v. Walker*, 7 Pa. Co. Ct. 274.

**Suit under National Banking Act for Usurious Interest Paid.** — *Union Glass Co. v. Newcastle First Nat. Bank*, 10 Pa. Co. Ct. 574.

**5. No Objection to Being Sworn.** — *Cross Hill v. Owens*, 61 S. Car. 22.

**6. State v. Gardner**, 88 Minn. 130.

**7. Production of Books and Papers.** — *Boyd v. U. S.*, 116 U. S. 616. See also *Interstate Commerce Commission v. Baird*, 194 U. S. 25. But see *infra* as to their production after seizure.

**8. Under Fifth Amendment.** — *U. S. v. National Lead Co.*, 75 Fed. Rep. 97, *following Boyd v. U. S.*, 116 U. S. 616; *Newgold v. American Electrical Novelty*, etc., Co., 108 Fed. Rep. 341; *McKnight v. U. S.*, (C. C. A.) 115 Fed. Rep. 972; *In re Kanter*, 117 Fed. Rep. 356. See also *Johnson v. Donaldson*, 18

by the prosecution by seizure or otherwise, and the accused is not compelled to testify concerning them, they may be used in evidence against him without violating the constitutional provision.<sup>1</sup> A party is not protected by the constitutional provision from the production of public records.<sup>2</sup>

**Physical Examination and Experiments.** — It is generally held that it is a violation of the constitutional privilege of the witness to compel him to submit to a physical examination, or to make experiments in the presence of the jury which tend to criminate him, or to admit in evidence the results of such compulsory examination or experiment made out of court, though some cases hold that such compulsion is not a violation of the privilege.<sup>3</sup> But it is not a violation of the defendant's constitutional privilege for the jury to observe his general personal appearance, and scrutinize such of his physical peculiarities as are open to the observation of the general public.<sup>4</sup>

**b. STATUTES ABRIDGING PRIVILEGE.** — Provided sufficient indemnity against prosecution is afforded, the constitutional privilege may be abridged by the legislature. In *England* the privilege has been taken away in some cases by act of Parliament.<sup>5</sup>

*Blatchf.* (U. S.) 287; *Snow v. Mast*, 63 Fed. Rep. 623.

**Under State Constitution Provisions — Georgia.**

— *Farmer v. State*, 100 Ga. 41.

*Illinois.* — *Lamson v. Boyden*, 160 Ill. 613.

*Kentucky.* — *Wolfstein v. Steinharter*, 10 Ky.

L. Rep. 635.

*Maryland.* — *Blum v. State*, 94 Md. 375.

*Michigan.* — *In re Moser*, (Mich. 1904) 101

N. W. Rep. 588.

*New York.* — *Kellogg v. Sowerby*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 327.

*Pennsylvania.* — *Logan v. Pennsylvania R. Co.*, 132 Pa. St. 403; *Boyle v. Smithman*, 146 Pa. St. 255; *Ladenburg v. Pennsylvania Co.*, 6 Pa. Dist. 453; *Dexter v. Walker*, 7 Pa. Co. Ct. 274; *Pennsylvania Ins. Co. v. Philadelphia, etc.*, R. Co., 9 Pa. Co. Ct. 517; *Union Glass Co. v. Newcastle First Nat. Bank*, 10 Pa. Co. Ct. 574.

*Texas.* — *Ex p. Wilson*, 39 Tex. Crim. 630; *Wilson v. State*, 41 Tex. Crim. 115.

**An Officer of a Corporation** cannot object to the production of the corporation books on the ground that they will criminate him, as they do not belong to him. *McElree v. Darlington*, 187 Pa. St. 593.

**1. Papers Otherwise Obtained by the Prosecution May Be Used.** — U. S. *v. Hughes*, 12 *Blatchf.* (U. S.) 553; *Adams v. New York*, 192 U. S. 585, *affirming* 176 N. Y. 351; *State v. Pomeroy*, 130 Mo. 489; *State v. Flynn*, 36 N. H. 64; *People v. Spiegel*, 143 N. Y. 107; *People v. Coombs*, 36 N. Y. App. Div. 284; *State v. Atkinson*, 40 S. Car. 363. See also *State v. Griswold*, 67 Conn. 290.

Analogous English cases are *Legatt v. Tollervey*, 14 East 302, and *Jordan v. Lewis*, cited in the note thereto, *followed* in *Com. v. Dana*, 4 Met. (Mass.) 329, and in *State v. Perry*, 4 Idaho 224.

**2. Public Records.** — *Russell v. State*, 57 Ga. 421; *People v. Coombs*, 158 N. Y. 532, *affirming* 36 N. Y. App. Div. 284.

This applies to such records as are required by statute to be kept by druggists having permits to sell intoxicating liquors. *State v. Donovan*, 10 N. Dak. 203. It also applies to the reports which druggists are required to make to the prosecuting attorney of the sales of

liquor made by them each week. *People v. Shuler*, (Mich. 1904) 98 N. W. Rep. 986. It is likewise applicable to the prescriptions of a physician which druggists selling liquor are required by statute to preserve and produce in court. *State v. Davis*, 117 Mo. 614.

**3. Compulsory Physical Examination of Accused**

— See the title INSPECTION AND PHYSICAL EXAMINATION, vol. 16, p. 818. See also the following cases: *Cooper v. State*, 86 Ala. 610, 11 Am. St. Rep. 84; *Davis v. State*, 131 Ala. 10; *State v. Garrett*, 71 N. Car. 85, 17 Am. Rep. 1; *State v. Graham*, 74 N. Car. 646, 21 Am. Rep. 493; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *State v. Nordstrom*, 7 Wash. 506.

**Compelling Accused to Stand Up for Identification Held Proper.** — *People v. Goldenson*, 76 Cal. 328. See also *Coles v. State*, 23 Ohio Cir. Ct. 313; *People v. Truck*, 170 N. Y. 203.

**Result of Compulsory Experiments by Accused Out of Court Held Admissible.** — *People v. Gardner*, 144 N. Y. 119; *People v. Van Wormer*, 175 N. Y. 188. See *Dunwoody v. State*, 118 Ga. 308.

**Waiver of Privilege.** — A voluntary surrender by accused of his shoes for the purpose of comparison with footprints found at the scene of the crime is a waiver of his constitutional right. *State v. Sexton*, 147 Mo. 89; *Thornton v. State*, 117 Wis. 338.

**4. Scrutiny of Personal Appearance.** — *Williams v. State*, 98 Ala. 52; *State v. Johnson*, 67 N. Car. 55; *State v. Woodruff*, 67 N. Car. 89.

**5. England.** — See 24 & 25 Vict., c. 96, §§ 75-84; 26 & 27 Vict., c. 119, § 5; *Reg. v. Scott*, 7 Cox C. C. 164; *Reg. v. Cross*, 7 Cox C. C. 226; *Ex p. Schofield*, 6 Ch. D. 230; *Reg. v. Cherry*, 12 Cox C. C. 32; *Reg. v. Sloggett*, 7 Cox C. C. 139.

*Canada.* — In Canada it was held that the maxim *nemo tenetur seipsum accusare* cannot be set up against a statute taking away the privilege. *Reg. v. McLinehy*, 2 Can. Crim. Cas. (Quebec) 416; *Reg. v. Hammond*, 29 Ont. 211; *Reg. v. Fee*, 13 Ont. 590. But *Reg. v. Halpin*, 12 Ont. 330, ruled to the contrary, and in *In re Connolly*, 4 Can. L. T. 301, giving a similar ruling the court said that be-



**Provision that Answers Shall Not Be Used Against Witness.** — In a number of the states having constitutional provisions similar to that contained in the fifth amendment to the Constitution of the *United States*, it has been held that statutes which provide that a witness may be compelled to give self-criminating evidence, but that his answers shall not thereafter be used as evidence against him, fully preserve the constitutional privilege.<sup>1</sup>

**Absolute Indemnity.** — It is the better opinion, however, that the constitutional privilege of refusing to answer cannot be taken away by statute, unless absolute indemnity is provided, and that nothing short of complete immunity to the witness, an absolute wiping out of the offense as to him, so that he can no longer be prosecuted for it, will furnish that indemnity, and that statutes aiming to take away the constitutional privilege without providing complete immunity are unconstitutional.<sup>2</sup>

**Where Immunity Complete.** — If, however, he is thus fully protected by statute, he may be compelled to answer, though his testimony may show that he has committed a crime.<sup>3</sup>

fore compelling the witness to answer it must be satisfied beyond all reasonable doubt by the express language of the legislature of its intention to take away the privilege. See also *Reg. v. Nurse*, 2 Can. Crim. Cas. (Ont.) 57; *Re Askwith*, 31 Ont. 150.

**1. Statutes Providing that Answers Shall Not Be Used in Evidence Held Constitutional** — *Arkansas*. — *State v. Quarles*, 13 Ark. 307; *Cosart v. State*, 14 Ark. 539; *Pleasant v. State*, 15 Ark. 649.

*California*. — *Ex p. Rowe*, 7 Cal. 184.

*Georgia*. — *Higdon v. Heard*, 14 Ga. 255; *Kneeland v. State*, 62 Ga. 395.

*Indiana*. — *Wilkins v. Malone*, 14 Ind. 153; *Frazee v. State*, 58 Ind. 8; *Bedgood v. State*, 115 Ind. 275.

*Missouri*. — *Ex p. Buskett*, 106 Mo. 602.

*New York*. — *People v. Kelly*, 24 N. Y. 74; *Gilpin v. Daly*, 59 Hun (N. Y.) 413; *Gilpin v. Appleby*, 59 Hun (N. Y.) 624, 13 N. Y. Supp. 394; *People v. Sharp*, 107 N. Y. 427.

*North Carolina*. — *La Fontaine v. Southern Underwriters Assoc.*, 83 N. Car. 132; *In re Briggs*, 135 N. Car. 118. And see *U. S. v. McCarthy*, 18 Fed. Rep. 89.

*North Dakota*. — *State v. Kent*, 5 N. Dak. 516.

**2. Absolute Indemnity** — *United States*. — *Counselman v. Hitchcock*, 142 U. S. 547, reversing 44 Fed. Rep. 268; *Ex p. Irvine*, 74 Fed. Rep. 954; *U. S. v. Bell*, 81 Fed. Rep. 830; *Wyckoff v. Wayner Typewriter Co.*, 99 Fed. Rep. 158; *Foot v. Buchanan*, 113 Fed. Rep. 156. *Arkansas*. — *State v. Bach Liquor Co.*, 67 Ark. 163.

*California*. — *Ex p. Clarke*, 103 Cal. 352; *Ex p. Cohen*, 104 Cal. 524.

*Illinois*. — *Lamson v. Boyden*, 160 Ill. 613.

*Massachusetts*. — *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

*Missouri*. — *State v. Simmons Hardware Co.*, 109 Mo. 118; *Ex p. Carter*, 166 Mo. 604.

*New Hampshire*. — *State v. Nowell*, 58 N. H. 314.

*New York*. — *Matter of Peck*, 167 N. Y. 391; *Hill v. Muller*, 2 Sandf. (N. Y.) 684; *Thomas v. Harrop*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 57; *Matter of Tappan*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 394; *People v.*

*Lewis*, (Supm. Ct.) 14 Misc. (N. Y.) 264; *Matter of Cullinan*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 423; *People v. Nussbaum*, 55 N. Y. App. Div. 245.

*Pennsylvania*. — *Hamburger v. Freedman*, 20 Pa. Co. Ct. 1; *Samler v. Meyers*, 20 Pa. Co. Ct. 521; *Millers v. Brown*, 22 Pa. Co. Ct. 109; *Mayer v. Mayer*, 16 Lanc. L. Rev. 49.

*Texas*. — *Ex p. Park*, 37 Tex. Crim. 590. See also *Smith v. Smith*, 116 N. Car. 386.

*Virginia*. — *Cullen v. Com.*, 24 Gratt. (Va.) 624; *Temple v. Com.*, 75 Va. 892.

**The Bankruptcy Act** does not afford sufficient immunity to the bankrupt to deprive him of his constitutional privilege. *In re Scott*, 95 Fed. Rep. 815; *In re Rosser*, 96 Fed. Rep. 305; *In re Feldstein*, 103 Fed. Rep. 269; *In re Walsh*, 104 Fed. Rep. 518; *In re Smith*, 112 Fed. Rep. 509; *In re Nachman*, 114 Fed. Rep. 995; *In re Franklin Syndicate*, 114 Fed. Rep. 205; *In re Shera*, 114 Fed. Rep. 207. Nor to a witness other than the bankrupt. *In re Feldstein*, 103 Fed. Rep. 269; *In re Smith*, 112 Fed. Rep. 509. See also *In re Kanter*, 117 Fed. Rep. 356.

*Contra*. — *In Mackel v. Rochester*, (C. C. A.) 102 Fed. Rep. 314, it was held that the immunity offered by Bankr. Act 1898, § 7, subd. 9, secured to the bankrupt his constitutional privilege against self-criminating evidence, and that a voluntary bankrupt must give evidence in an action by the trustee in bankruptcy against a third person. The authority of this case was, however, questioned in *In re Walsh*, 104 Fed. Rep. 518, and in *In re Shera*, 114 Fed. Rep. 207.

**Insolvency Laws.** — And on the ground that the doing so will criminate him, an insolvent has the right to object to the production of his business books by his assignees, who only hold them for the specific purpose of the assignment. *Hazlett's Estate*, 8 Pa. Dist. 201.

**3. Where Immunity Complete** — *United States*. — *Interstate Commerce Commission v. Brimson*, 154 U. S. 448; *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *Brown v. Walker*, 161 U. S. 591, affirming 70 Fed. Rep. 46; *In re Pooling Freights*, 115 Fed. Rep. 588; *U. S. v. Price*, 96 Fed. Rep. 960; *U. S. v. James*, 60 Fed. Rep. 257.

**Where No Immunity Offered.** — A statute which compels criminating testimony, but offers no immunity from prosecution, is clearly in violation of the state constitution.<sup>1</sup>

Neither the Court Nor the Prosecuting Attorney Can Offer a witness such immunity as will deprive him of his constitutional privilege; it must be positively guaranteed to him by statute.<sup>2</sup> Testimony given by an accused on compulsion in violation of his constitutional privilege or under the statutory protection cannot be afterwards used against him; but if he fails to assert his privilege and gives incriminating testimony voluntarily, it may be used against him.<sup>3</sup>

**c. CROSS-EXAMINATION OF DEFENDANT.** — In view of the federal and state constitutional provisions, the question frequently arises as to what is the constitutional limit of the cross-examination of the prisoner by counsel for the prosecution. It may be stated, as a general rule, that when the accused takes the stand in his own behalf, he voluntarily changes his status from that of defendant to that of witness, and is subject to examination and cross-examination within the limits of the rules governing the examination of other witnesses; consequently he waives his privilege of refusing to give evidence against himself concerning all matters touched upon in his direct examination, and upon such other matters as are so related to his direct testimony as to bring them within the scope of proper cross-examination of witnesses generally.<sup>4</sup> The extent, however, to which cross-examination may be permitted

*California.* — *Bradley v. Clark*, 133 Cal. 196; *Ex p. Cohen*, 104 Cal. 524.

*Illinois.* — *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236.

*Kansas.* — *State v. Jack*, (Kan. 1904) 76 Pac. Rep. 911.

*Nebraska.* — *Cooney v. State*, 61 Neb. 342; *Parsons v. State*, 61 Neb. 244.

*New Hampshire.* — *State v. Nowell*, 58 N. H. 314.

*New York.* — *Perrine v. Striker*, 7 Paige (N. Y.) 598; *People v. Lewis*, (Supm. Ct.) 14 Misc. (N. Y.) 264; *Matter of Leich*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 671; *People v. Court Gen. Sess.*, 96 N. Y. App. Div. 201.

*North Carolina.* — *State v. Morgan*, 133 N. Car. 743; *In re Briggs*, 135 N. Car. 118.

*Pennsylvania.* — *Kelly's Contested Election*, 200 Pa. St. 430.

*Tennessee.* — *Hirsch v. State*, 8 Baxt. (Tenn.) 89.

*Texas.* — *Kain v. State*, 16 Tex. App. 282.

*Virginia.* — *Kendrick v. Com.*, 78 Va. 490.

*Wisconsin.* — *Harrigan v. Gilchrist*, (Wis. 1904) 99 N. W. Rep. 909.

**1. Where No Immunity Offered.** — *State v. Enochs*, 69 Ind. 314; *State v. Simmons Hardware Co.*, 109 Mo. 118.

**2. Must Be Positive Guaranty by Statute.** — *Ex p. Irvine*, 74 Fed. Rep. 954; *Foot v. Buchanan*, 113 Fed. Rep. 156; *Temple v. Com.*, 75 Va. 892. And see *Rex v. England*, 2 Leach C. C. 767. *Compare Stanford v. State*, 42 Tex. Crim. 343; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159.

**3. Testimony Cannot Be Used Against Witness.** — *Reg. v. Madden*, 14 Can. L. T. 505; *Sandwich v. State*, 137 Ala. 85; *Steele v. State*, 76 Miss. 387; *Mackmasters v. State*, 83 Miss. 1; *Com. v. House*, 28 Pittsb. Leg. J. N. S. (Pa.) 210.

**4. Waiver of Privilege by Defendant** — *United States.* — *Fitzpatrick v. U. S.*, 178 U. S. 304; *U. S. v. Kimball*, 117 Fed. Rep. 156.

*Alabama.* — *Clarke v. State*, 87 Ala. 71; *Cotton v. State*, 87 Ala. 103; *Rains v. State*, 88 Ala. 91.

*California.* — This was formerly the common-law rule in California. *People v. Dennis*, 39 Cal. 625; *People v. Reinhart*, 39 Cal. 449; *People v. McGungill*, 41 Cal. 431; *People v. Russell*, 46 Cal. 121; *People v. Rozelle*, 78 Cal. 84. But see *infra*, p. 1163, note 4.

*Colorado.* — *Bradford v. People*, 22 Colo. 157.

*Indiana.* — *Thomas v. State*, 103 Ind. 419; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218; *Parker v. State*, 136 Ind. 284; *Bachner v. State*, 25 Ind. App. 597.

*Kansas.* — *State v. Wells*, 54 Kan. 161.

*Kentucky.* — *Bess v. Com.*, (Ky. 1904) 82 S. W. Rep. 576.

*Maine.* — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Witham*, 72 Me. 533.

*Maryland.* — *Roddy v. Finnegan*, 43 Md. 490.

*Michigan.* — *People v. Howard*, 73 Mich. 10.

*Nevada.* — *State v. Cohn*, 9 Nev. 179; *State v. Huff*, 11 Nev. 17; *State v. Harrington*, 12 Nev. 125.

*New York.* — *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *Marx v. People*, 63 Barb. (N. Y.) 618; *Fralich v. People*, 65 Barb (N. Y.) 48; *People v. Casey*, 72 N. Y. 393; *Pontius v. People*, 82 N. Y. 339; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128.

*North Carolina.* — *State v. Pritchett*, 106 N. Car. 667; *State v. Allen*, 107 N. Car. 805.

*North Dakota.* — *State v. Kent*, 5 N. Dak. 516.

*Ohio.* — *Este v. Wilshire*, 44 Ohio St. 636.

*Texas.* — *Pyland v. State*, 33 Tex. Crim. 382; *Mendez v. State*, 29 Tex. App. 608.

*Washington.* — *State v. Melvern*, 32 Wash. 7.

*Wisconsin.* — *Yanke v. State*, 51 Wis. 464; *Frank v. State*, 94 Wis. 211.

*Wyoming.* — See *Johnson v. State*, 8 Wyo. 494.

is largely within the discretion of the trial court, and appellate courts will rarely disturb a verdict on this ground unless there has been a manifest abuse of discretion.<sup>1</sup> Where the accused, on his direct examination, has undertaken to give a full account of his doings during a certain period of time, he may be cross-examined as to any of his acts done within such period, though they have not been inquired of on the direct examination. In such case the true scope of the direct examination within the meaning of the rule is the prisoner's whole conduct between the two points of time designated, so far as it is pertinent to the issue.<sup>2</sup> There is eminent authority to the effect that the accused may, in his direct examination, stop at any point he chooses, and that his constitutional privilege protects him from cross-examination on any point not touched on in his examination in chief.<sup>3</sup> And in a number of jurisdictions it has been provided by statute, or settled by judicial determination, that the cross-examination of the accused shall be confined to the matters concerning which he testified in his direct examination.<sup>4</sup> In some

In *State v. Burrell*, 27 Mont. 282, it was held that by testifying before the referee in bankruptcy proceedings as to matters tending to incriminate him the bankrupt waived his constitutional privilege and his admissions could be made the subject of cross-examination, if pertinent, in a criminal proceeding against him.

**Making Statement.**—In *Georgia* an accused may by statute make such a statement in his defense as he considers proper, and as he is not under examination as a witness on oath he cannot be cross-examined at all unless by his own consent, nor does he waive his right by answering a question propounded by the court. *Hackney v. State*, 101 Ga. 512.

**Other Offenses.**—The fact that the accused waives his constitutional privilege by testifying as a witness on his own behalf does not give the commonwealth the right to compel him to admit the commission of other offenses which would subject him to punishment or infamy. *Howard v. Com.*, 110 Ky. 356; *Saylor v. Com.*, 97 Ky. 184; *State v. Kent*, 5 N. Dak. 516.

**1. Discretion of Trial Court.**—*State v. Griswold*, 67 Conn. 290; *State v. Chingren*, 105 Iowa 169; *State v. Watson*, 102 Iowa 651; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496; *Brandon v. People*, 42 N. Y. 265; *People v. Casey*, 72 N. Y. 393; *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *People v. Crapo*, 76 N. Y. 290, 32 Am. Rep. 302; *People v. Oyer & T. Ct.*, 83 N. Y. 460; *People v. Tice*, 131 N. Y. 651.

*2. People v. Russell*, 46 Cal. 123; *Boyle v. State*, 105 Ind. 475, 55 Am. Rep. 218.

*3. Cooley Const. Lim.* (6th ed.) 384-386. See also *Reg. v. Garbett*, 2 Cox C. C. 448.

**4. Cross-examination Confined to Matters Testified in Chief.**—*California*.—The common-law rule in *California* has been modified by section 1323 of the Penal Code, and the court is not allowed that discretion as to the extent of the scope of the cross-examination of a defendant which it is permitted to exercise in the examination of the other witnesses. *People v. O'Brien*, 66 Cal. 602; *People v. Rozelle*, 78 Cal. 84; *People v. Bishop*, 81 Cal. 113; *People v. Mullings*, 83 Cal. 138; *People v. O'Brien*, 96 Cal. 171; *People v. Crowley*, 100 Cal. 481; *People v. Gallagher*, 100 Cal. 475;

*People v. Arrighini*, 122 Cal. 121. And see *People v. Johnson*, 57 Cal. 571. The credibility of the accused is in issue when he offers himself as a witness, and he may be cross-examined for the purpose of impeaching it. *People v. Meyer*, 75 Cal. 383; *People v. Arnold*, 116 Cal. 682, *McFarland, J., dissenting*.

*Kansas*.—*State v. Wells*, 54 Kan. 161.

*Michigan*.—*Gale v. People*, 26 Mich. 157.

*Missouri*.—*State v. McGraw*, 74 Mo. 573; *State v. Porter*, 75 Mo. 171; *State v. McLaughlin*, 76 Mo. 320; *State v. Douglass*, 81 Mo. 231; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Chamberlain*, 89 Mo. 133; *State v. Graves*, 95 Mo. 516; *State v. Avery*, 113 Mo. 475; *State v. Anderson*, 126 Mo. 542. As to the rule under the former Missouri statute, see *State v. Clinton*, 67 Mo. 380; *State v. Cox*, 67 Mo. 392; *State v. Testerman*, 68 Mo. 408; *State v. Rugan*, 68 Mo. 214.

*Nevada*.—*State v. Harrington*, 12 Nev. 125.

*New Jersey*.—In *New Jersey*, where there is no constitutional provision similar to that of the Fifth Amendment, a trial court overruled questions asked of a defendant who had testified in his own behalf, on the ground that they related to subjects not opened on his direct examination. *Roessel v. State*, 62 N. J. L. 216. And the Supreme Court in *State v. Sprague*, 64 N. J. L. 420, took the same view. These cases were cited in *State v. Zdanowicz*, 69 N. J. L. 619, though the court did not find it necessary to pronounce on the point.

*Oregon*.—*State v. Lurch*, 12 Oregon 99; *State v. Bacon*, 13 Oregon 143, 57 Am. Rep. 8; *State v. Saunders*, 14 Oregon 300; *State v. Gallo*, 18 Oregon 425; *State v. Bartmess*, 33 Oregon 110.

*Washington*.—*State v. O'Hara*, 17 Wash. 525. But see *State v. Melvern*, 32 Wash. 7, following *State v. Duncan*, 7 Wash. 336.

**Recall for Further Cross-examination.**—The court may permit the defendant to be recalled for further cross-examination on the subject of the examination in chief on any point material to the cause. *Thomas v. State*, 100 Ala. 53; *State v. Horne*, 9 Kan. 119; *State v. Kennade*, 121 Mo. 405; *State v. Cohn*, 9 Nev. 179; *Mendez v. State*, 29 Tex. App. 608; *Clay v. State*, 40 Tex. Crim. 593; *Hamilton v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 39; *State v. Glass*, 50 Wis. 218.



jurisdictions the defendant's cross-examination is not confined to matters inquired of in his direct examination. Where this rule obtains, it is held that the defendant, by taking the witness stand and testifying in his own behalf, completely waives his constitutional privilege of refusing to give evidence against himself, and that he may be cross-examined concerning any matter pertinent to the issue on trial, regardless of the extent of the direct examination.<sup>1</sup> The accused cannot be compelled, on cross-examination, to disclose confidential communications made by him to his counsel. This privilege is not waived by his becoming a witness.<sup>2</sup>

**6. Where Witness Can No Longer Be Prosecuted.**—As a pardon precludes the possibility of subsequent punishment for the offense pardoned, it takes away the privilege of refusing to answer questions concerning the same,<sup>3</sup> and where a prosecution for an offense, or an action for the recovery of a forfeiture, or a penalty, is barred by the statute of limitations, the privilege of refusing to answer no longer exists.<sup>4</sup> But in order to deprive the

But though he may be recalled by the prosecution for a further cross-examination on the evidence given by him when he was first on the stand, he cannot then be compelled to submit to what is really an examination in chief by the prosecution. *State v. Lewis*, 56 Kan. 374.

**1. Complete Waiver**—*Alabama*.—*Clarke v. State*, 78 Ala. 474; *Williams v. State*, 98 Ala. 52; *Thomas v. State*, 100 Ala. 53.

*Idaho*.—*State v. Larkins*, 5 Idaho 200.

*Illinois*.—*Spies v. People*, 122 Ill. 235.

*Maine*.—*State v. Wentworth*, 65 Me. 240; *State v. Witham*, 72 Me. 533.

*Maryland*.—*Guy v. State*, 90 Md. 29, adopts the doctrine stated in the text, disapproving Judge Cooley's doctrine.

*Massachusetts*.—*Com. v. Lannan*, 13 Allen (Mass.) 563; *Com. v. Smith*, 163 Mass. 411; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Morgan*, 107 Mass. 205; *Com. v. Nichols*, 114 Mass. 287; *Com. v. Tolliver*, 119 Mass. 315; *Com. v. Reynolds*, 122 Mass. 454.

*Michigan*.—*People v. Dupounce*, 133 Mich. 1.

*New Hampshire*.—*State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88.

*New York*.—*McGarry v. People*, 2 Lans. (N. Y.) 227; *People v. Sebring*, (Supm. Ct.) 14 Misc. (N. Y.) 31; *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *Stover v. People*, 56 N. Y. 315; *Marx v. People*, 63 Barb. (N. Y.) 618; *People v. Casey*, 72 N. Y. 394; *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *People v. Crapo*, 76 N. Y. 290, 32 Am. Rep. 303; *Ryan v. People*, 79 N. Y. 594; *Pontius v. People*, 82 N. Y. 339; *People v. Court Sessions*, 82 Hun (N. Y.) 242, reversed on other grounds 147 N. Y. 290; *People v. Oyer & T. Ct.*, 83 N. Y. 460; *People v. Webster*, 139 N. Y. 84; *People v. Tice*, 131 N. Y. 651.

*North Dakota*.—*State v. Kent*, 5 N. Dak. 516.

*Texas*.—*Quintana v. State*, 29 Tex. App. 401; *Brown v. State*, 38 Tex. Crim. 597.

*Canada*.—*Reg. v. Fee*, 13 Ont. 590.

**Cross-examination on Unimportant Matters.**—If the defendant be cross-examined as to trivial and unimportant matters which were

not embraced in his direct testimony, it is harmless error and affords no ground for reversing the judgment. *State v. Beauceleigh*, 92 Mo. 490; *State v. Brooks*, 92 Mo. 581; *State v. Avery*, 113 Mo. 475. See also *People v. Brown*, 76 Cal. 573.

**2. Confidential Communications.**—*Bigler v. Reyher*, 43 Ind. 112; *Barker v. Kuhn*, 38 Iowa 392; *State v. White*, 19 Kan. 446, 27 Am. Rep. 137; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *Duttenhofer v. State*, 34 Ohio St. 94, 32 Am. Rep. 362; *Hemenway v. Smith*, 28 Vt. 701. *Contra*, *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333, a civil case. And this view is cited in a dictum in *Com. v. Nichols*, 114 Mass. 286, 19 Am. Rep. 346, a criminal prosecution.

The general rule is that a party to a civil action may not be cross-examined concerning his consultations with his attorney. See the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 47.

**3. Pardon.**—*Reg. v. Boyes*, 1 B. & S. 327, 101 E. C. L. 327. This case overrules, by implication, the earlier cases of *Reading's Case*, 7 How. St. Tr. 296, and *Shaftesbury's Case*, 8 How. St. Tr. 817; *Reg. v. Kinglake*, 22 L. T. N. S. 316, ruling upheld in *banc* 11 Cox C. C. 499.

**4. Statute of Limitations**—*England*.—*Roberts v. Allatt*, M. & M. 192, 22 E. C. L. 288; *Parkhurst v. Lowten*, 1 Meriv. 400; *Williams v. Farrington*, 2 Cox Ch. 202; *Davis v. Reid*, 5 Sim. 443.

*Alabama*.—*Calhoun v. Thompson*, 56 Ala. 166; *Ex p. Boscowitz*, 84 Ala. 463.

*Illinois*.—*Weldon v. Burch*, 12 Ill. 374; *Prussing v. Jackson*, 85 Ill. App. 324.

*Iowa*.—*Mahanke v. Cleland*, 76 Iowa 401.

*Maine*.—*Dwinal v. Smith*, 25 Me. 379.

*New Hampshire*.—*Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100.

*New York*.—*Close v. Olney*, 1 Den. (N. Y.) 319; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155, 3 Den. (N. Y.) 593; *People v. Mather*, 4 Wend. (N. Y.) 252; *McCreery v. Ghormley*, 9 N. Y. App. Div. 221.

*Pennsylvania*.—See *McFadden v. Reynolds*, (Pa. 1887) 11 Atl. Rep. 638.

*Tennessee*.—*The Druggist Cases*, 85 Tenn. 449.

witness of his privilege, it is not sufficient to show simply that a prosecution instituted after the question is asked would be barred; it should appear affirmatively that no prosecution is then pending.<sup>1</sup> And a witness may not refuse to answer concerning a criminal charge of which he has been acquitted.<sup>2</sup>

**7. Privilege of Witness, Not of Party.** — The privilege of refusing to answer is exclusively the privilege of the witness;<sup>3</sup> neither party to the action can claim it or raise the objection on behalf of the witness.<sup>4</sup> The opposite party's

*Vermont.* — Childs v. Merrill, 66 Vt. 302.

In *U. S. v. Smith*, 4 Day (Conn.) 123, a witness objected that though he was *prima facie* protected from prosecution by the statute of limitations, he was not protected because he had fled from justice. The court held that he ought not to make this a ground for withholding his testimony, but at the same time the court would see that the attorney did not afterwards bring forward a prosecution and say it was not barred.

**1. If Prosecution Pending.** — *Lamson v. Boyden*, 160 Ill. 613; *Southern R. News Co. v. Russell*, 91 Ga. 808; *Salina Bank v. Henry*, 2 Den. (N. Y.) 155, 3 Den. (N. Y.) 593.

**2. Acquittal.** — *Lothrop v. Roberts*, 16 Colo. 250.

**3. Exclusively Privilege of Witness** — *England.* — *Thomas v. Newton*, M. & M. 46, note, 22 E. C. L. 244; *Rex v. Adey*, 1 M. & Rob. 94; *Reg. v. Kinglake*, 11 Cox C. C. 499.

*Canada.* — *In re Connolly*, 4 Can. L. T. 301.

*United States.* — *Morgan v. Halberstadt*, (C. C. A.) 60 Fed. Rep. 592; *In re Shera*, 114 Fed. Rep. 207.

*Colorado.* — *Lothrop v. Roberts*, 16 Colo. 250; *Bradford v. People*, 22 Colo. 157.

*Connecticut.* — *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156.

*Florida.* — *Williams v. Dickenson*, 28 Fla. 90; *Ex p. Senior*, 37 Fla. 1. See also *Barber v. State*, 13 Fla. 675.

*Illinois.* — *Samuel v. People*, 164 Ill. 379; *Eggers v. Fox*, 177 Ill. 185; *Kanter v. Circuit Ct. Clerk*, 108 Ill. App. 287.

*Iowa.* — *State v. Van Winkle*, 80 Iowa 15. *Kentucky.* — *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621.

*Maine.* — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

*Maryland.* — *Roddy v. Finnegan*, 43 Md. 490.

*Michigan.* — *In re Moser*, (Mich. 1904) 101 N. W. Rep. 588; *People v. Lauder*, 82 Mich. 100.

*Minnesota.* — *State v. Bilansky*, 3 Minn. 246.

*Missouri.* — *State v. Kennedy*, 154 Mo. 268; *State v. Faulkner*, 175 Mo. 615.

*New Hampshire.* — *State v. Foster*, 23 N. H. 348.

*New Jersey.* — *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52.

*New York.* — *People v. Bodine*, 1 Den. (N. Y.) 281; *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Ward v. People*, 6 Hill (N. Y.) 144; *McCreery v. Ghormley*, 9 N. Y. App. Div. 221; *People v. Abbot*, 19 Wend. (N. Y.) 195; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *People v. Court Gen. Sess.*, 96 N. Y. App. Div. 201.

*North Carolina.* — *Boyer v. Teague*, 106 N. Car. 625; *State v. Morgan*, 133 N. Car. 743.

*Tennessee.* — *The Druggist Cases*, 85 Tenn. 449.

*Texas.* — *Brown v. State*, (Tex. Crim. 1893) 20 S. W. Rep. 924.

**Officer of Corporation Cannot Claim Privilege for Corporation.** — *In re Peasley*, 44 Fed. Rep. 271; *U. S. Express Co. v. Henderson*, 69 Iowa 40; *In re Moser*, (Mich. 1904) 101 N. W. Rep. 589.

And the personal privilege of a witness cannot be claimed by his principal. *New York L. Ins. Co. v. People*, 195 Ill. 430.

**4. Neither Party Can Claim Privilege** — *England.* — *Marston v. Downes*, 1 Ad. & El. 31, 28 E. C. L. 24; *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889; *Reg. v. Kinglake*, 11 Cox C. C. 499.

*United States.* — *Morgan v. Halberstadt*, (C. C. A.) 60 Fed. Rep. 592.

*Alabama.* — *Southern R. Co. v. Bush*, 122 Ala. 470.

*Arkansas.* — *Pleasant v. State*, 13 Ark. 360 (state cannot object to witness of state).

*California.* — *Clark v. Reese*, 35 Cal. 89.

*Colorado.* — *Lothrop v. Roberts*, 16 Colo. 250.

*Delaware.* — *Knopf v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 392.

*Georgia.* — *Taylor v. State*, 83 Ga. 647.

*Illinois.* — *Eggers v. Fox*, 177 Ill. 185; *Boley v. People*, 184 Ill. 338; *Moline Wagon Co. v. Preston*, 35 Ill. App. 358; *Prussing v. Jackson*, 85 Ill. App. 337.

*Iowa.* — *Burk v. Putman*, (Iowa 1901) 84 N. W. Rep. 1053.

*Louisiana.* — *MacCarty v. Bond*, 9 La. 351.

*Massachusetts.* — *Com. v. Shaw*, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; *Com. v. Gould*, 158 Mass. 499.

*Michigan.* — *Foster v. People*, 18 Mich. 271.

*Mississippi.* — *Newcomb v. State*, 37 Miss. 383; *White v. State*, 52 Miss. 216.

*New Hampshire.* — *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191.

*New Jersey.* — *Fries v. Brugler*, 12 N. J. L. 79.

*New York.* — *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Ward v. People*, 6 Hill (N. Y.) 144; *People v. Carroll*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 83; *Mitchell v. Hinman*, 8 Wend. (N. Y.) 667.

*North Carolina.* — *Boyer v. Teague*, 106 N. Car. 625; *State v. Morgan*, 133 N. Car. 743.

*North Dakota.* — *State v. Ekanger*, 8 N. Dak. 550.

*Ohio.* — See *Cox v. Hill*, 3 Ohio 424.

*Texas.* — *Ingersol v. McWillie*, 87 Tex. 647; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443; *Brown v. State*, (Tex. Crim. 1893) 20 S. W. Rep. 924; *Day v. State*, 27 Tex. App. 143.

*West Virginia.* — *State v. Hill*, 52 W. Va. 296.

*Wisconsin.* — *Ingalls v. State*, 48 Wis. 647.

counsel cannot interpose the objection,<sup>1</sup> nor can the witness's own counsel do so.<sup>2</sup> But where a party is a witness in his own behalf he may claim his privilege through his counsel.<sup>3</sup> And where the matter inquired of is not pertinent to the issue, a party may, of course, object on that ground, or the court may of its own volition exclude the question.<sup>4</sup>

**8. Who Determines Tendency of Question.** — When a question is asked, it is for the court to determine whether any possible answer to it might tend to criminate the witness,<sup>5</sup> or to degrade the witness, where the question is as to a collateral matter.<sup>6</sup> A witness need not state the reason for his refusal to answer

But see *People v. Maunusau*, 60 Mich. 15, where counsel for the people was allowed to make the objection, and *Com. v. Kimball*, 24 Pick. (Mass.) 366, where there is a dictum to the effect that a party may object.

**Coprincipal.** — An accused cannot object to the testimony of a coprincipal on the ground that it would criminate such coprincipal. *Barr v. People*, 30 Colo. 522; *Com. v. Shaw*, 4 Cush. (Mass.) 594; *State v. Kennedy*, 154 Mo. 268; *Duncan v. State*, 40 Tex. Crim. 591.

1. *State v. Butler*, 47 S. Car. 25.

2. *Osborn v. London Dock Co.*, 10 Exch. 608; *In re Shera*, 114 Fed. Rep. 207; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688. See also *East v. Chapman*, M. & M. 46, note, 22 E. C. L. 244; *Rex v. Adey*, 1 M. & Rob. 94; *Marston v. Downes*, 1 Ad. & El. 31, 28 E. C. L. 24; *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889; *Doe v. Egremont*, 2 M. & Rob. 386.

But counsel have the right in protecting their clients to raise the point and call the attention of the court to the matter and demand that the witness be apprised of his rights and given an opportunity to make the claim under oath if he so elect. A refusal of the trial court to properly instruct a witness, when thus requested by the counsel, might constitute reversible error. *State v. Kent*, 5 N. Dak. 516.

**3. Party Witness in Own Behalf.** — *Clifton v. Granger*, 86 Iowa 573; *People v. Brown*, 72 N. Y. 571; *People v. Crapo*, 76 N. Y. 288. See *Pickard v. Collins*, 23 Barb. (N. Y.) 444. *Contra*, *State v. Ekanger*, 8 N. Dak. 559.

**4. Where Party May Object or Court Act Mero Motu.** — *Sharon v. Sharon*, 79 Cal. 633; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 623; *Howel v. Com.*, 5 Gratt. (Va.) 664; *Forney v. Ferrell*, 4 W. Va. 729; *State v. Hill*, 52 W. Va. 296.

Where, upon the question whether the witness had not sworn differently upon a former occasion, the court without any objection by the witness excluded it, it was held erroneous. *People v. Bodine*, 1 Den. (N. Y.) 281.

The court has no right to interpose if the witness does not object unless the question is not pertinent. *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Ward v. People*, 6 Hill (N. Y.) 144.

**5. For Court to Determine Tendency.** — *England.* — *Reg. v. Boyes*, 1 B. & S. 311, 101 E. C. L. 311; *Reg. v. Garbett*, 2 C. & K. 474, 61 E. C. L. 474; *Reg. v. Charlesworth*, 2 F. & F. 326; *Doe v. Egremont*, 2 M. & Rob. 386; *Sidebottom v. Adkins*, 3 Jur. N. S. 631; *Osborne v. London Dock Co.*, 10 Exch. 701; *Ex p. Reynolds*, 20 Ch. D. 294, 1 Burr. Tr. 245.

*Canada.* — *D'Ivry v. World Newspaper Co.*, 17 Ont. Pr. 387.

*United States.* — *U. S. v. Miller*, 2 Cranch (C. C.) 247; *Devaughn's Case*, 2 Cranch (C. C.) 501; *Sanderson's Case*, 3 Cranch (C. C.) 638; *U. S. v. McCarthy*, 18 Fed. Rep. 87; *Ex p. Irvine*, 74 Fed. Rep. 954; *Wyckoff v. Wagner Typewriter Co.*, 99 Fed. Rep. 158; *Foot v. Buchanan*, 113 Fed. Rep. 156.

*Alabama.* — *Ex p. Boscowitz*, 84 Ala. 463.

*Arkansas.* — *Furth v. State*, (Ark. 1904) 78 S. W. Rep. 759.

*California.* — *In re Rogers*, 129 Cal. 468; *Overend v. Superior Ct.*, 131 Cal. 280.

*Florida.* — *Ex p. Senior*, 37 Fla. 1.

*Iowa.* — *Richman v. State*, 2 Greene (Iowa) 532; *State v. Duffy*, 15 Iowa 425; *Hunt v. McCalla*, 20 Iowa 20.

*Kansas.* — *Stevens v. State*, 50 Kan. 712.

*Maryland.* — *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

*Massachusetts.* — *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Com. v. Braynard*, Thach. Crim. Cas. (Mass.) 146.

*Michigan.* — *In re Moser*, (Mich. 1904) 101 N. W. Rep. 589.

*Minnesota.* — *State v. Thaden*, 43 Minn. 253.

*Missouri.* — *Ward v. State*, 2 Mo. 120.

*New Hampshire.* — *Janvrin v. Scammon*, 29 N. H. 280.

*New York.* — *People v. Mather*, 4 Wend. (N. Y.) 229; *Byass v. Smith*, 4 Bosw. (N. Y.) 679; *Youngs v. Youngs*, 5 Redf. (N. Y.) 506; *Fellows v. Wilson*, 31 Barb. (N. Y.) 162; *Forbes v. Willard*, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 193; *Friess v. New York Cent.*, etc., R. Co., 67 Hun (N. Y.) 205; *People v. Priori*, 164 N. Y. 459; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159.

*North Carolina.* — *La Fontaine v. Southern Underwriters Assoc.*, 83 N. Car. 132.

*Pennsylvania.* — *Phelin v. Kenderdine*, 20 Pa. St. 354; *Com. v. Bell*, 145 Pa. St. 374.

*Texas.* — *Floyd v. State*, 7 Tex. 215; *Ex p. Park*, 37 Tex. Crim. 590.

*West Virginia.* — *State v. Hill*, 52 W. Va. 296.

*Wisconsin.* — *Kirschner v. State*, 9 Wis. 140.

*Wyoming.* — *Miskimmins v. Shaver*, 8 Wyo. 392.

6. *Labiberte v. Reg.*, 1 Can. Sup. Ct. 117.

The mere declaration of the witness is not sufficient, and the court is not bound to accept the concession of the plaintiff that the answers of a witness for the defendant would tend to criminate him. *Bradley v. Clark*, 133 Cal. 196.

When a court can discover no reasonable theory upon which the answer could be incriminating further investigation may be made or the privilege denied. *State v. Kent*, 5 N. Dak. 516.



if it is not asked for,<sup>1</sup> or where there is sufficient before the court for the latter to see that the answer would tend to criminate the witness.<sup>2</sup> If the court decide that any answer might incriminate the witness, the latter must then decide for himself whether or not the answer he would give would have such a tendency.<sup>3</sup> If the judge were to require him to point out how his answer would criminate him, his privilege would be worthless.<sup>4</sup> It has been held that if the witness abuse his privilege by wilfully and falsely asserting that his answer would criminate him, he may be made to respond in civil damages to the party thus wrongfully deprived of the benefit of his testimony.<sup>5</sup> Where a witness claims the privilege on the ground that his answer will criminate him or subject him to penalty or forfeiture, he must swear to his belief that his answer will so subject him,<sup>6</sup> unless the court can plainly see that it would do so.<sup>7</sup>

**9. Time of Claiming Privilege.**—In *England* it has been held that if a witness testifies without objection to any portion of a matter tending to criminate him, it is then too late for him to claim his privilege.<sup>8</sup> And it has also been held that he may claim his protection at any stage of the inquiry though what he has already said may be ample evidence to convict him, and having done so, may not be compelled to answer any additional questions tending to criminate him.<sup>9</sup> According to the weight of authority in the *United States*, if the witness understandingly discloses part of a material transaction in which he was criminally concerned without claiming his privilege, he may be compelled to go forward and state the whole of it.<sup>10</sup> But he

1. *Matter of Van Tine*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 507.

2. *Wallace v. State*, 41 Fla. 547; *Friess v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 205.

3. **Witness to Decide Whether Answer Would Criminate**—*England*.—*Reg. v. Boyes*, 1 B. & S. 311, 101 E. C. L. 311, 1 Burr. Tr. 245; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418.

*United States*.—*U. S. v. Burr*, 25 Fed. Cas. No. 14,692e; *Sanderson's Case*, 3 Cranch (C. C.) 638; *In re Rosser*, 96 Fed. Rep. 305; *In re Kanter*, 117 Fed. Rep. 356.

*Connecticut*.—*Grannis v. Branden*, 5 Day (Conn.) 260.

*Iowa*.—*Richman v. State*, 2 Greene (Iowa) 532.

*Minnesota*.—*State v. Thaden*, 43 Minn. 253. *Missouri*.—*Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449.

*New York*.—*Matter of Van Tine*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 507.

*Ohio*.—*Warner v. Lucas*, 10 Ohio 336.

*South Carolina*.—*Poole v. Perritt*, 1 Spears L. (S. Car.) 128; *State v. Edwards*, 2 Nott & M. (S. Car.) 13.

*Texas*.—*Floyd v. State*, 7 Tex. 215; *Ex p. Park*, 37 Tex. Crim. 590.

*Vermont*.—*Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356.

*Wisconsin*.—*Kirschner v. State*, 9 Wis. 140.

4. *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418, 1 Burr. Tr. 244; *Janvrin v. Scammon*, 29 N. H. 280; *People v. Mather*, 4 Wend. (N. Y.) 229.

5. *Warner v. Lucas*, 10 Ohio 336.

6. **Witness Must Swear to His Belief**.—*Scott v. Miller*, 5 Jur. N. S. 858, following the laid down in *Fisher v. Ronalds*, 12 C. B. 762, 74 E. C. L. 762; *Grainger v. Latham*, 2 Ch. Chamb. (Ont.) 313; *Power v. Ellis*, 6 Can. Sup. Ct. 1, reversing 20 N. Bruns. 40; *D'Ivry*

*v. World Newspaper Co.*, 17 Ont. Pr. 387; *Com. v. Braynard*, Thach. Crim. Cas. (Mass.) 146; *People v. Seaman*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 152; *State v. Kent*, 5 N. Dak. 516. See also *U. S. v. Burr*, 25 Fed. Cas. No. 14,692c.

7. *Blum v. State*, 94 Md. 375; *Perkins v. North End Bank*, 17 Wash. 100.

**Bad Faith**.—If the witness inform the court, upon oath, that he cannot testify without criminating himself, the court cannot compel him to testify, unless they are fully satisfied such is not the fact, i. e., that the witness is either mistaken or acts in bad faith, in either of which cases the court should compel the witness to testify. *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356.

It is only where the criminating effect of the question is doubtful that the motive of the witness may be considered, for in such a case his bad faith would have a tendency to show that his answer would not subject him to the danger of a criminal prosecution or help to prove him guilty of crime. *Ex p. Irvine*, 74 Fed. Rep. 954. See also *Miskimmins v. Shaver*, 8 Wyo. 392.

8. *Dixon v. Vale*, 1 C. & P. 278, 11 E. C. L. 391; *East v. Chapman*, 2 C. & P. 570, 12 E. C. L. 268; *Ewing v. Osbaldiston*, 6 Sim. 608; *Dandridge v. Corden*, 3 C. & P. 11, 14 E. C. L. 185; *Dolder v. Huntingfield*, 11 Ves. Jr. 283.

9. *Reg. v. Garbett*, 1 Den. C. C. 236; *Rex v. Wilcox*, 1 Sim. N. S. 301, *disapproving* *Ewing v. Osbaldiston*, 6 Sim. 608; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418.

10. **Disclosure of Part**—*California*.—*Clark v. Reese*, 35 Cal. 89; *People v. Freshour*, 55 Cal. 375.

*Connecticut*.—*Norfolk v. Gaylord*, 28 Conn. 311.

*Florida*.—*Ex p. Senior*, 37 Fla. 1.

*Georgia*.—See *Pinkard v. State*, 30 Ga. 757.

is entitled to decline to answer if his answer is not necessary to the full understanding of other material statements which he has made.<sup>1</sup> Where the scope of the investigation is wide enough to enable the examination to include particulars which could not tend to criminate him, the witness has no right to refuse to be sworn on the ground that any testimony he could give would tend to criminate him. The privilege should not be claimed until the question is asked.<sup>2</sup> It is otherwise when the examination relates solely to matters tending to criminate.<sup>3</sup> The same principle is applied to an order for the examination of a party. If it appear that the only material evidence that can be given by the party sought to be examined will tend to show that he is guilty of a crime or subject him to a penalty or forfeiture, the order will not be granted;<sup>4</sup> but if it appear that any testimony material to the case may be given, not necessarily having that tendency, the examination may be had and the party left to assert his privilege upon the examination.<sup>5</sup> Disclosure of part of the transaction applies to the testimony at the trial and not to disclosures made elsewhere, either in or out of court.<sup>6</sup> It is not too late

*Iowa.*—*State v. Fay*, 43 Iowa 651.

*Maine.*—*Low v. Mitchell*, 18 Me. 372.

*Maryland.*—*Roddy v. Finnegan*, 43 Md. 502.

*Massachusetts.*—*Brown v. Brown*, 5 Mass. 320; *Com. v. Price*, 10 Gray (Mass.) 476; *Foster v. Pierce*, 11 Cush. (Mass.) 437, 71 Am. Dec. 668; *Com. v. Pratt*, 126 Mass. 463; *Evans v. O'Connor*, 174 Mass. 287.

*Michigan.*—*Foster v. People*, 18 Mich. 276.

*Minnesota.*—*State v. Nichols*, 29 Minn. 357.

*New Hampshire.*—*State v. K.*, 4 N. H. 562;

*State v. Foster*, 23 N. H. 354, 55 Am. Dec. 191. *New York.*—*Youngs v. Youngs*, 5 Redf. (N. Y.) 505; *Matter of Cross*, 85 Hun (N. Y.) 343; *People v. Carroll*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 73.

*Ohio.*—*Este v. Wilshire*, 44 Ohio St. 636.

*Texas.*—*Ex p. Park*, 37 Tex. Crim. 590.

See also *eggerts v. Fox*, 177 Ill. 185; *State v. Donelon*, 45 La. Ann. 744.

**1. Answer Not Necessary to Understanding of Evidence Given.**—*Lombard v. Mayberry*, 24 Neb. 674; *Amherst v. Hollis*, 9 N. H. 110; *Cullinan v. Quinn*, 95 N. Y. App. Div. 492.

See also *Wallace v. State*, 41 Fla. 547; *Coburn v. Odell*, 30 N. H. 540.

The fact that a witness has testified to matters not self-incriminating does not warrant a cross-examination in respect to matters which are self-incriminating. *Emery v. State*, 101 Wis. 627.

**Accomplice's Privilege as to Different Crime.**—

A witness indicted for the same robbery as the prisoner, and also for concealing the stolen property, can refuse to testify concerning the latter. *People v. Loomis*, 76 N. Y. App. Div. 243.

As to an accomplice's right to refuse to answer as to other crimes, see generally the title ACCOMPLICES, vol. 1, p. 407.

**2. Cannot Refuse to Be Sworn—England.**—

*Boyle v. Wiseman*, 10 Exch. 647; *Osborn v. London Dock Co.*, 10 Exch. 698.

*Canada.*—*Grainger v. Latham*, 2 Ch. Chamb. (Ont.) 313.

*United States.*—*In re Scott*, 95 Fed. Rep. 815; *U. S. v. Kimball*, 117 Fed. Rep. 156.

*California.*—*Ex p. Stice*, 70 Cal. 51.

*New Hampshire.*—*Rancour's Petition*, 66 N. H. 172.

*New York.*—*People v. Seaman*, (Supm. Ct.

*Spec. T.*) 8 Misc. (N. Y.) 152; *Matter of Leich*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 671; *Skinner v. Steele*, 88 Hun (N. Y.) 307; *Ryan v. Reagan*, 46 N. Y. App. Div. 590.

*Pennsylvania.*—*Eckstein's Petition*, 148 Pa. St. 509.

**3. When Examination Relates Solely to Matters Tending to Criminate.**—*Neale v. Coningham*, 1 Cranch (C. C.) 76; *Trammell v. Thomas*, 1 Har. & M. (Md.) 261; *Phoenix v. Dupuy*, (C. Pl.) 2 Abb. N. Cas. (N. Y.) 146; *Brandon Mfg. Co. v. Bridgman*, 14 Hun (N. Y.) 122; *Kinney v. Roberts*, 26 Hun (N. Y.) 166; *Ex p. Sauls*, (Tex. Crim. 1904) 78 S. W. Rep. 1073.

**4. Order for Examination—Where Only Evidence Will Tend to Criminate, etc.**—*Skinner v. Steele*, 88 Hun (N. Y.) 307; *Andrews v. Prince*, 31 Hun (N. Y.) 232; *Yamato Trading Co. v. Brown*, 27 Hun (N. Y.) 248; *Kinney v. Roberts*, 26 Hun (N. Y.) 166; *Corbett v. De Comeau*, (N. Y. Super. Ct. Gen. T.) 5 Abb. N. Cas. (N. Y.) 169; *Franks v. Riemer*, (N. Y. City Ct. Spec. T.) 28 N. Y. St. Rep. 156; *Mechanical Orgueinet Co. v. Haynes*, 19 N. Y. Wkly. Dig. 535; *Griesmann v. Dreyfus*, (Brooklyn City Ct. Spec. T.) 4 Civ. Pro. (N. Y.) 38; *People v. Nussbaum*, 55 N. Y. App. Div. 245, reversed on other grounds 168 N. Y. 90.

**5. Where Some Evidence Only May Tend to Criminate.**—*Farmer v. National L. Assoc.*, 73 Hun (N. Y.) 522; *Davies v. Fish*, 35 Hun (N. Y.) 430; *Davenport Glucose Mfg. Co. v. Tausig*, 33 Hun (N. Y.) 32; *Fogg v. Fisk*, 30 Hun (N. Y.) 61; *Sprague v. Butterworth*, 22 Hun (N. Y.) 502; *Canada Shipping Co. v. Sinclair*, 49 N. Y. Super. Ct. 242; *Haynes v. Hatch*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 805; *Judah v. Lane*, 14 Daly (N. Y.) 308; *Ball v. Evening Post Pub. Co.*, (Supm. Ct. Gen. T.) 12 Civ. Pro. (N. Y.) 4; *Rosenbaum v. Rice*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 410.

**6. Statements Made Elsewhere Do Not Constitute Waiver.**—*Overend v. Superior Ct.*, 131 Cal. 280; *Georgia R., etc., Co. v. Lybrend*, 99 Ga. 421 (at a former hearing before a different jury); *Samuel v. People*, 164 Ill. 379; *Boston Marine Ins. Co. v. Slovovitch*, 55 N. Y. Super. Ct. 452; *Temple v. Com.*, 75 Va. 892 (before the grand jury); *Cullen v. Com.*, 24 Gratt. (Va.) 624 (before a coroner). But see *State*

to make the claim of privilege upon a motion to commit for refusal to answer questions which had been put to the witness before an examiner,<sup>1</sup> and a party who has answered interrogatories subjecting him to a penalty and forfeiture may object to the admission of the answers in evidence, on the trial of the cause,<sup>2</sup> but where the privilege was not claimed at the trial it cannot be claimed on appeal.<sup>3</sup>

**10. Question May Lawfully Be Asked.**—Any question pertinent to the matter in issue may lawfully be asked, even in the case of the plainest privilege, and the court should not exclude it on the ground that the answer would criminate the witness, unless he claim his privilege.<sup>4</sup> The judge, however, may and usually does inform the witness of his privilege.<sup>5</sup> In some cases it has been held that it is the duty of the court to caution the witness,<sup>6</sup> and especially where the examination was not before the court itself, but before an examiner,<sup>7</sup> or coroner.<sup>8</sup> And beyond so advising the witness, it is neither the duty nor the right of the court to say or do anything to prevent him from testifying if he think proper.<sup>9</sup> Should the witness see fit, he may waive his privilege and answer the question at his peril.<sup>10</sup> If the witness testify without objection he will be deemed to have done so voluntarily,<sup>11</sup> and his

*v. Peffers*, 80 Iowa 580; *State v. Van Winkle*, 80 Iowa 15.

1. *Hall v. Gowanlock*, 12 Ont. Pr. 604.

2. *Poindexter v. Davis*, 6 Gratt. (Va.) 481.

3. *Millar v. McTaggart*, 20 Ont. 617.

4. **Question May Lawfully Be Asked**—*England*.—*Thomas v. Newton*, M. & M. 46, note, 22 E. C. L. 244; *Rex v. Watson*, 2 Stark. 153, 3 E. C. L. 355; *Paxton v. Douglas*, 16 Ves. Jr. 239. But see the early cases of *Rex v. Lewis*, 4 Esp. 225, and *Macbride v. Macbride*, 4 Esp. 243.

*Canada*.—*Laliberté v. Reg.*, 1 Can. Sup. Ct. 117.

*United States*.—*U. S. v. Craig*, 4 Wash. (U. S.) 732.

*Connecticut*.—*Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156.

*Delaware*.—*Short v. State*, 4 Harr. (Del.) 568.

*Florida*.—*Williams v. Dickenson*, 28 Fla. 90.

*Illinois*.—*Taylor v. McIrvin*, 94 Ill. 488.

*Massachusetts*.—*Root v. Hamilton*, 105 Mass. 22.

*Michigan*.—*Foster v. People*, 18 Mich. 271; *Johnston Harvester Co. v. Miller*, 72 Mich. 265.

*New Jersey*.—*Fries v. Brugler*, 12 N. J. L. 81, 21 Am. Dec. 52.

*New York*.—*Southard v. Rexford*, 6 Cow. (N. Y.) 254; *People v. Abbot*, 19 Wend. (N. Y.) 195.

*North Carolina*.—*State v. Patterson*, 2 Ired. L. (24 N. Car.) 346, 38 Am. Dec. 699.

*North Dakota*.—*State v. Kent*, 5 N. Dak. 516.

*Tennessee*.—See *Stokes v. State*, 5 Baxt. (Tenn.) 619.

*Virginia*.—*Litton v. Com.*, 101 Va. 833.

*West Virginia*.—*State v. Hill*, 52 W. Va. 296.

**5. Judge May Inform Witness of Privilege.**—*Cardigan's Case*, Gurney 79; *Millman v. Tucker*, Peake Add. Cas. 222; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; *State v. Bilansky*, 3 Minn. 246; *People v. Priori*, 164 N. Y. 459; *State v. Edwards*, 2 Nott & M. (S. Car.) 13. The court will always so instruct an ignorant witness as to enable him, if he possess any under-

standing, to determine whether he would be jeopardized. *Emery v. State*, 101 Wis. 627.

**6. Cases Holding that Court Must Instruct Witness.**—*Simmons v. Holster*, 13 Minn. 249; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Friess v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 205. See also *Ivy v. State*, (Miss. 1904) 36 So. Rep. 265; *Perkins v. North End Bank*, 17 Wash. 100.

**Cases Holding Court Not Bound to Caution Witness.**—*Atty.-Gen. v. Radloff*, 10 Exch. 88; *Reg. v. Coote*, 12 Cox C. C. 557; *Dunn v. State*, 99 Ga. 211; *Com. v. Shaw*, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; *Com. v. Howe*, 13 Gray (Mass) 31.

7. *U. S. v. Bell*, 81 Fed. Rep. 830; *Taylor v. Wood*, 2 Edw. Ch. (N. Y.) 94.

8. *Cullen v. Com.*, 24 Gratt. (Va.) 624.

9. *Eggers v. Fox*, 177 Ill. 185.

**10. Witness May Waive Privilege**—*England*.—*Smith v. Beadnell*, 1 Campb. 30; *Reg. v. Sloggett*, 7 Cox C. C. 139; *Paxton v. Douglas*, 19 Ves. Jr. 225.

*Canada*.—*In re Connolly*, 4 Can. L. T. 301.

*Delaware*.—*Knopf v. Philadelphia, etc., R. Co.*, 2 Penn. (Del.) 392.

*Illinois*.—*Mackin v. People*, 115 Ill. 312; *Samuel v. People*, 164 Ill. 379; *Eggers v. Fox*, 177 Ill. 185.

*Iowa*.—*Burk v. Putman*, (Iowa 1901) 84 N. W. Rep. 1053.

*Louisiana*.—*Horrell v. Parish*, 26 La. Ann. 6.

*Maine*.—*State v. Blake*, 25 Me. 350.

*Michigan*.—*People v. Arnold*, 40 Mich. 713; *People v. Lauder*, 82 Mich. 109.

*Missouri*.—*State v. Faulkner*, 175 Mo. 516.

*New Jersey*.—*Fries v. Brugler*, 12 N. J. L. 79.

*New York*.—*Cloyes v. Thayer*, 3 Hill (N. Y.) 564; *Southard v. Rexford*, 6 Cow. (N. Y.) 254.

*Utah*.—*People v. Reggel*, 8 Utah 21.

*Virginia*.—*Litton v. Com.*, 101 Va. 833.

**11. State v. Comer**, 157 Ind. 611; *People v. Lauder*, 82 Mich. 109; *People v. Reggel*, 8 Utah 21.

"The witness must express his unwillingness in some form, and bring himself within the



voluntary testimony, not improperly induced, will be admissible in evidence against him in subsequent proceedings.<sup>1</sup>

11. **Effect of Refusing to Answer** — *a. WHERE PRIVILEGE IS ALLOWED.* — If a witness declines to answer a question on the ground that his answer might criminate him, or subject him to a penalty or a forfeiture, no inference whatever may be drawn from that circumstance, and from the allowance of the privilege, so as to affect either party or the witness himself.<sup>2</sup> Nor may the fact of such refusal be commented on by counsel or taken into consideration by the jury in determining the weight to be given to the witness's testimony.<sup>3</sup> A party to a civil action, however, who offers himself as a witness in his own behalf, stands on a different footing in this respect from a third person brought into court to testify in a case in which he has no interest. If he claims his privilege, and refuses to answer a material question, that fact may be considered against him the same as any other refusal to produce evidence within his power.<sup>4</sup> The refusal of a witness to answer a criminating question cannot be shown as a circumstance against him in a subsequent trial for the offense inquired of.<sup>5</sup> Neither can his answer be put in evidence against him if the court compels him to answer such a question.<sup>6</sup>

*b. WHERE PRIVILEGE IS DENIED.* — The refusal of a witness to answer any question which he may lawfully be required to answer is a contempt of court, and if he persists in his refusal he may be punished accordingly;<sup>7</sup> but

rule that he who would have the benefit of an exemption or privilege must claim it." Thomas, D. J., in *U. S. v. Kimball*, 117 Fed. Rep. 165; *People v. Smith*, 37 N. Y. App. Div. 280.

1. *Henderson v. State*, 95 Ga. 326; *State v. Burrell*, 27 Mont. 282; *People v. Reggel*, 8 Utah 21; *Reg. v. Connolly*, 25 Ont. 151; *Reg. v. Williams*, 28 Ont. 583, *overruling Reg. v. Hendershott*, 26 Ont. 678; *Rex v. Clark*, 5 Can. Crim. Cas. (Ont.) 235; *Reg. v. Madden*, 14 Can. L. T. 505. But see *Reg. v. Hammond*, 29 Ont. 211. In *Smith v. Beadnell*, 1 Campb. 30, where the witness having ungardedly answered the questions put to him, it was held that his answers might be employed against him for all purposes to which they were legally applicable. Compare *Mayo v. Mayo*, 119 Mass. 290.

For waiver by answering as to part of the transaction, see *supra*, this section, *Time of Claiming Privilege*.

2. **Where Privilege Allowed — No Inference May Be Drawn.** — *Rose v. Blakemore*, R. & M. 383, 21 E. C. L. 465; *Rex v. Watson*, 2 Stark. 158, 3 E. C. L. 357; *Millman v. Tucker*, Peake Add. Cas. 222; *Nunn v. Brandon*, 24 Ont. 375; *State v. Harrington*, 12 Nev. 125; *Phelin v. Kenderdine*, 20 Pa. St. 354. And see *Dandridge v. Corden*, 3 C. & P. 11, 14 E. C. L. 185.

3. *Lloyd v. Passingham*, 16 Ves. Jr. 64; *Carr v. Litchfield*, 2 Mich. 340; *Foster v. People*, 18 Mich. 273; *People v. Maunsausau*, 60 Mich. 15; *Friess v. New York Cent.*, etc., R. Co., 67 Hun (N. Y.) 205. See also *Carter v. Beals*, 44 N. H. 412.

Where a witness declines to answer on the ground that the answer would criminate him, no inference prejudicial to his credit can be drawn from his refusal, and courts are careful so to inform the jury. *Newcomb v. State*, 37 Miss. 383. See also *Ex p. Symes*, 11 Ves. Jr. 521.

4. *In re De Gottardi*, 114 Fed. Rep. 328; *Andrews v. Frye*, 104 Mass. 234.

Such refusal, however, is not to be taken

as an admission of the fact inquired of. *Lloyd v. Passingham*, 16 Ves. Jr. 64.

5. *State v. Bailey*, 54 Iowa 414.

6. *Reg. v. Garbett*, 2 C. & K. 474, 61 E. C. L. 474; *Horstman v. Kaufman*, 97 Pa. St. 147, 39 Am. Rep. 802.

7. **Where Privilege Denied — Contempt of Court** — *England.* — *Reg. v. Garbett*, 2 C. & K. 474, 61 E. C. L. 474; *Reg. v. Charlesworth*, 2 F. & F. 326; *Ex p. Fernandez*, 10 C. B. N. S. 3, 100 E. C. L. 3.

*Canada.* — *Ex p. Barker*, 30 N. Bruns. 406.

*United States.* — *Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196; *Brungger v. Smith*, 49 Fed. Rep. 124.

*California.* — *Matter of Gannon*, 69 Cal. 541; *Ex p. Zeehandelaar*, 71 Cal. 238; *In re Rogers*, 129 Cal. 468; *Overend v. Superior Ct.*, 131 Cal. 280.

*Georgia.* — *Pledger v. State*, 77 Ga. 242.

*Iowa.* — *U. S. Express Co. v. Henderson*, 69 Iowa 40.

*Kansas.* — *Matter of Merkle*, 40 Kan. 27.

*Massachusetts.* — *Com. v. Braynard*, Thach. Crim. Cas. (Mass.) 146; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

*Michigan.* — *In re Archer*, (Mich. 1903) 96 N. W. Rep. 442; *In re Moser*, (Mich. 1904) 101 N. W. Rep. 589.

*Missouri.* — *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449.

*New York.* — *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159; *People v. Kelly*, 24 N. Y. 74; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *People v. Rice*, 57 Hun (N. Y.) 62; *People v. O'Brien*, 81 N. Y. App. Div. 51; *People v. Court Gen. Sess.*, 96 N. Y. App. Div. 201.

*North Carolina.* — *In re Briggs*, 135 N. Car. 118; *La Fontaine v. Southern Underwriters Assoc.*, 83 N. Car. 132.

*Tennessee.* — *Hirsch v. State*, 8 Baxt. (Tenn.) 89.

*Utah.* — *Ex p. Harris*, 4 Utah 5.

a witness is entitled to relief on habeas corpus from a commitment for contempt for refusal to answer a series of questions, although some of them might have been safely answered, if the answering of all would have criminated him.<sup>1</sup>

**X. RIGHT OF WITNESS TO SERVICES OF COUNSEL.** — It is not the right or privilege of a witness, as such, to have, during his examination, the attendance and services of counsel.<sup>2</sup> The witness must look solely to the court for the enforcement of the privileges to which he is entitled in that capacity.<sup>3</sup> Where, however, the examination is not only of the witness in the capacity as such, but is intended to affect or may affect his rights as a party, he should be allowed the assistance of professional advisers.<sup>4</sup> But the mere circumstance that the witness may be indirectly interested in the result of the cause under adjudication does not entitle him to the assistance of counsel, where he is not actually a party to the cause.<sup>5</sup> Likewise, the right to refuse to answer questions on the ground that they would incriminate the witness belongs to the witness alone, and the objection cannot be made<sup>6</sup> or argued by counsel.<sup>7</sup>

**XI. COMPENSATION AND EXPENSES** — 1. **In General.** — The right which a person has to an allowance as a witness is now regulated by statute in most jurisdictions,<sup>8</sup> but it may be stated, as a general rule, that witnesses are entitled to compensation for their services.<sup>9</sup>

*Wisconsin.* — *Stuart v. Allen*, 45 Wis. 158; *State v. Lonsdale*, 48 Wis. 348.

See also the title CONTEMPT, vol. 7, p. 48.

1. *Foot v. Buchanan*, 113 Fed. Rep. 156; *State v. Faulkner*, 175 Mo. 546. But see *U. S. v. Miller*, 2 Cranch (C. C.) 247. See the title HABEAS CORPUS, vol. 15, p. 179.

2. **Witnesses Not Entitled to Counsel.** — *Matter of Fredenberg*, 2 Ben. (U. S.) 133; *Matter of Feinberg*, 3 Ben. (U. S.) 162; *In re Comstock*, 3 Sawy. (U. S.) 517. But see *Ex p. Parsons*, 1 Atk. 204, in which the court recommended that a witness be indulged with counsel, but refused to make any order for that purpose on the ground that it might be made a precedent in other commissions and give rise to confusion and inconvenience.

3. **Witness Must Look to Court for Protection.** — *Doe v. Egremont*, 2 M. & Rob. 386; *Re Assiniboia*, 4 Manitoba 328; *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889.

4. **When Witness May Be Affected as Party.** — *Dominion Bank v. Bell*, 13 Ont. Pr. 471; *In re Greys Brewery Co.*, 25 Ch. D. 400; *In re Merchants' Co.*, L. R. 4 Eq. 454; *In re Breech-Loading Armoury Co.*, L. R. 4 Eq. 453.

5. **Witness Indirectly Interested in Result of Controversy.** — *Re Assiniboia*, 4 Manitoba 328; *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889.

**Examination of Witness in Bankruptcy.** — In the examination of a witness in respect to the estate of the bankrupt, on the application of a creditor, the witness is not entitled to the assistance of counsel even though his examination may establish a liability on his part to the estate of the bankrupt. *Matter of Stuyvesant Bank*, 6 Ben. (U. S.) 33.

6. **Objection to Incriminating Questions Not to Be Made by Counsel.** — *Thomas v. Newton*, M. & M. 46, note, 22 E. C. L. 244; *Osborn v. London Dock Co.*, 1 Jur. N. S. 93.

7. *Rex v. Adey*, 1 M. & Rob. 94.

8. **Compensation of Witnesses — By Statute.** — See the statutes of the various states. See also

*Chamberlain v. Stoneham*, 24 Q. B. D. 113; *Stern v. Herren*, 101 N. Car. 516; *Hester v. Park*, etc., Com'rs, 84 Mich. 450.

**Witnesses Referred to by a Statute Allowing Compensation** are, in ordinary cases, only such persons as may be compelled by subpoena to attend the trial, or to give their deposition, and, in case of a party, to one who has been subpoenaed by the opposite party. *Beal v. Stevens*, 72 Cal. 451.

9. **Compensation Allowed — England.** — *Richards v. Goddard*, L. R. 17 Eq. 238.

*United States.* — *Dreskill v. Parish*, 5 McLean (U. S.) 241, 7 Fed. Cas. No. 4,076; *U. S. v. Williams*, 1 Cranch (C. C.) 178, 28 Fed. Cas. No. 16,709; *Anderson v. Moe*, 1 Abb. (U. S.) 299, 1 Fed. Cas. No. 359; *Cummings v. Akron Cement*, etc., Co., 6 Blatchf. (U. S.) 509, 6 Fed. Cas. No. 3,473; *Dennis v. Eddy*, 12 Blatchf. (U. S.) 195; *U. S. v. Sanborn*, 28 Fed. Rep. 299; *Cahn v. Monroe*, 29 Fed. Rep. 675; *The Vernon*, 36 Fed. Rep. 113; *The Syracuse*, 36 Fed. Rep. 830; *Eastman v. Sherry*, 37 Fed. Rep. 845; *In re Williams*, 37 Fed. Rep. 325; *Sims v. Schult*, 40 Fed. Rep. 143; *Burrow v. Kansas City*, etc., R. Co., 54 Fed. Rep. 278; *Pinson v. Atchison*, etc., R. Co., 54 Fed. Rep. 464; *Sloss Iron*, etc., Co. v. South Carolina, etc., R. Co., 75 Fed. Rep. 106; *Hanchett v. Humphrey*, 93 Fed. Rep. 895; *St. Matthew's Sav. Bank v. Fidelity*, etc., Co., 105 Fed. Rep. 161; *Griggsby Constr. Co. v. Louisiana*, etc., R. Co., 123 Fed. Rep. 751. See also *Dreskill v. Parish*, 5 McLean (U. S.) 241. *Compare Anonymous*, 5 Blatchf. (U. S.) 134, 1 Fed. Cas. No. 432.

*California.* — See also *Beal v. Stevens*, 72 Cal. 451.

*Georgia.* — *Harris v. Early County*, 96 Ga. 186.

*Iowa.* — *Jones County v. Linn County*, 68 Iowa 63. See also *State v. Willis*, 79 Iowa 326.

*Kentucky.* — *Brown v. Moore*, 3 J. J. Marsh. (Ky.) 306.

*Massachusetts.* — *Farmer v. Storer*, 11 Pick. (Mass.) 241; *Barber v. Parsons*, 145 Mass. 203.

In Criminal Cases the services of witnesses are considered in some states to be of that class of general services which every man in the community is bound to render for the general as well as his own good. In these states it is considered the duty of a citizen to attend and testify when his services are required, because it is a case in which he is in some sense a party, as a member of the commonwealth supposed to be injured.<sup>1</sup>

**2. Fees Distinguished from Costs.** — The terms "fees" and "costs" are often used interchangeably in referring to the compensation of witnesses, but, accurately speaking, only the term "fees" is applicable to the items chargeable by law as between the witness and the party whom he serves. The term "costs" is more correctly used in reference to the expenses of the litigation as between litigants.<sup>2</sup>

**3. Origin of Compensation.** — Fees to witnesses owe their origin to a period when none but disinterested parties could be witnesses, and fair dealing required that a person who was compelled to leave his business and attend the court for the purpose of testifying in a matter in which he had no interest should be indemnified for the expense to which he was put — going, staying, and returning.<sup>3</sup>

**4. Purpose of Compensation.** — Compensation is allowed to witnesses not as wages or emoluments, but for their expenses in attending court,<sup>4</sup> and these expenses have been held to include not only the actual expense and loss of time in attending court, but also the trouble and expense of making preparation for the journey.<sup>5</sup>

*Minnesota.* — State *v.* Bliss, 21 Minn. 458.

*Missouri.* — Wilson *v.* St. Louis, etc., R. Co., 53 Mo. App. 342; Mt. Olivet Cemetery Assoc. *v.* Dalton, 53 Mo. App. 345; McHoney *v.* Kerwin, 56 Mo. App. 459; Hoover *v.* Missouri Pac. R. Co., 115 Mo. 77; State *v.* Oliver, 116 Mo. 188.

*Montana.* — McGlaulin *v.* Wormser, 28 Mont. 177.

*New York.* — People *v.* Dowelle, Col. & C. Cas. (N. Y.) 41; Wheeler *v.* Lozee, (Supm. Ct. Gen. T.) 12 How. Pr. (N. Y.) 448; Vence *v.* Speir, (Super. Ct. Spec. T.) 18 How. Pr. (N. Y.) 168; Heckman *v.* Bach, (N. Y. City Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 401.

*North Carolina.* — Hayle *v.* Cowan, 1 Hayw. (2 N. Car.) 21; Holmes *v.* Johnson, 11 Ired. L. (33 N. Car.) 55; Carpenter *v.* Taylor, Term (4 N. Car.) 265.

*Oregon.* — Crawford *v.* Abraham, 2 Oregon 163; Egan *v.* Finney, 42 Oregon 599.

*Pennsylvania.* — Feree *v.* Strome, 1 Yeates (Pa.) 303; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Com. *v.* Smith, 4 Pa. Co. Ct. 321. See also First Nat. Bank *v.* Broadhead, 8 Pa. Co. Ct. 536.

*South Carolina.* — Johnson *v.* Wideman, Cheves L. (S. Car.) 26. See also Lewis *v.* Brown, 16 S. Car. 62.

*Tennessee.* — Hopkins *v.* Waterhouse, 2 Yerg. (Tenn.) 323; Gray *v.* Alexander, 7 Humph. (Tenn.) 17.

*Texas.* — International, etc., R. Co. *v.* Richmond, 28 Tex. Civ. App. 513.

*Vermont.* — Mattock *v.* Wheaton, 10 Vt. 493. *Washington.* — Christensen *v.* Union Trunk Line, 6 Wash. 75.

*Wisconsin.* — Baumbach Co. *v.* Gessler, 82 Wis. 231.

**Whether on the Law or Equity Side of the Court,** a witness is entitled to be allowed compensa-

tion for his services. Coleman *v.* Curtis, 43 S. Car. 1.

**Admission by the Opposite Party** of points to be proved by certain witnesses does not affect the right of such witnesses to their fees. Young *v.* Merchants' Ins. Co., 29 Fed. Rep. 273.

**1. In Criminal Cases — No Compensation.** — O'Kane *v.* People, 46 Ill. App. 225; Israel *v.* State, 8 Ind. 467; Lewis *v.* Wake County, 74 N. Car. 199.

**In Oregon** witnesses residing within two miles of the place of trial or the place where they are required to appear and testify in a criminal action or proceeding, have been held not to be entitled to receive either fees or mileage. Daly *v.* Multnomah County, 14 Oregon 20; Morin *v.* Multnomah County, 18 Oregon 163.

**In an Early New York Case** it was held that only poor witnesses were entitled to compensation in criminal cases. *Ex p.* Manning, 1 Cai. (N. Y.) 59.

**A Defendant under Recognizances**, who has also been bound over as a witness for the government, is entitled to compensation as such witness. *In re* Addis, 28 Fed. Rep. 794. See also *Ex p.* Turner, 32 Fed. Rep. 372.

**2. Fees Distinguished from Costs.** — Alexander *v.* Harrison, 2 Ind. App. 47; Musser *v.* Good, 11 S. & R. (Pa.) 247.

**3. Origin.** — Roundtree *v.* Rembert, 71 Fed. Rep. 255.

**4. Purpose of Compensation.** — Unger *v.* Long, 12 Manitoba 454; *Ex p.* Turner, 32 Fed. Rep. 372; Sloss Iron, etc., Co. *v.* South Carolina, etc., R. Co., 75 Fed. Rep. 106; Healy *v.* Hillsborough County, 70 N. H. 588; Courtney *v.* Baker, 3 Den. (N. Y.) 27; Howard *v.* Beaver County, 23 W. N. C. (Pa.) 574, 6 Pa. Co. Ct. 397.

**5. Ford *v.* Monroe**, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 204.



**5. Prerequisites to Compensation** — *α. SUBPŒNA AND RECOGNIZANCE.* — There are many cases to the effect that a witness cannot claim fee for attendance or mileage unless he has been compelled to attend under the command of a valid subpœna or the obligation of a recognizance. It is not sufficient in such cases that the witness attend at the request of a party.<sup>1</sup> And it has been held that the order of a court granting a party authority to subpœna witnesses is not in any sense an order or request of the court to such witnesses to attend, nor is the request of counsel based on such order sufficient.<sup>2</sup> But the better rule, and the one supported by the great weight of authority, is that a witness who attends a trial and testifies therein without the service of a subpœna on him is entitled to compensation therefor. And a party cannot be injured in having to pay mileage and attendance merely for the witnesses of an adversary who attend on request or agreement, when the additional expense of officers' fees and mileage for issuing and serving a subpœna could do no more than procure the attendance of the witnesses.<sup>3</sup>

**Return and Preservation of Subpœna.** — With the return of the subpœna, or the preservation of it after it is returned, the witness has nothing to do. If the

**1. Subpœna or Recognizance Essential** — *Alaska.*

— See *Græco-Russian Church v. Cohen*, 1 Alaska 32.

*Arizona.* — *Hereford v. O'Connor*, (Ariz. 1898) 52 Pac. Rep. 471.

*Georgia.* — *Harris v. Early County*, 96 Ga. 186.

*Indiana.* — See also *Goodwin v. Smith*, 68 Ind. 201.

*Iowa.* — *Warnstaff v. Louisa County*, 76 Iowa 585. See also *Fisher v. Burlington*, etc., R. Co., 104 Iowa 588.

*Missouri.* — *Herson v. Chicago*, etc., R. Co., 18 Mo. App. 439; *McHoney v. Kerwin*, 56 Mo. App. 459.

*Nevada.* — *Meagher v. Van Zandt*, 18 Nev. 236.

*North Carolina.* — *Meredith v. Kent*, Mart. (1 N. Car.) 28; *State v. Stewart*, Law Repos. (4 N. Car.) 524; *Thompson v. Hodges*, 3 Hawks (10 N. Car.) 318; *Kinzey v. King*, 6 Ired. L. (28 N. Car.) 76; *Lewis v. Wake County*, 74 N. Car. 194; *Stern v. Herren*, 101 N. Car. 516.

*Texas.* — *Harris v. Coleman*, 8 Tex. 278; *Sapp v. King*, 66 Tex. 570; *Manuel v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 30.

**Witnesses Subpœnaed by a Deputy Sheriff** of his own volition and without authority are not entitled to witness fees. *Manuel v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 30.

**An Invalid Subpœna**, in response to which a witness attends court in a criminal case, does not entitle such witness to recover any fees. *Warnstaff v. Louisa County*, 76 Iowa 585.

**2. Order Granting Authority to Subpœna.** — *State v. Willis*, 79 Iowa 326.

**3. Subpœna Not Essential** — *United States.* — *Dreskill v. Parish*, 5 McLean (U. S.) 241, 7 Fed. Cas. No. 4,076; *U. S. v. Williams*, 1 Cranch (C. C.) 178, 28 Fed. Cas. No. 16,709; *Power v. Semmes*, 1 Cranch (C. C.) 247, 19 Fed. Cas. No. 11,360; *Anderson v. Moe*, 1 Abb. (U. S.) 299, 1 Fed. Cas. No. 359; *Cummings v. Akron Cement*, etc., Co., 6 Blatchf. (U. S.) 509, 6 Fed. Cas. No. 3,473; *Dennis v. Eddy*, 12 Blatchf. (U. S.) 195; *U. S. Sanborn*, 28 Fed. Rep. 299; *Cahn v. Monroe*, 29 Fed.

Rep. 675; *The Syracuse*, 36 Fed. Rep. 830; *The Vernon*, 36 Fed. Rep. 113; *Eastman v. Sherry*, 37 Fed. Rep. 845; *In re Williams*, 37 Fed. Rep. 325; *Eastman v. Sherry*, 37 Fed. Rep. 844; *Pinson v. Atchison*, etc., R. Co., 54 Fed. Rep. 464; *Burrow v. Kansas City*, etc., R. Co., 54 Fed. Rep. 278; *Sloss Iron*, etc., Co. v. South Carolina, etc., R. Co., 75 Fed. Rep. 106; *Hanchett v. Humphrey*, 93 Fed. Rep. 895; *St. Matthew's Sav. Bank v. Fidelity*, etc., Co., 105 Fed. Rep. 161; *Griggsby Constr. Co. v. Louisiana*, etc., R. Co., 123 Fed. Rep. 751. See also *Dreskill v. Parish*, 5 McLean (U. S.) 241. *Compare Anonymous*, 5 Blatchf. (U. S.) 134, 1 Fed. Cas. No. 432.

*California.* — See also *Beal v. Stevens*, 72 Cal. 451.

*Iowa.* — *Jones County v. Linn County*, 68 Iowa 63. See also *State v. Willis*, 79 Iowa 326.

*Massachusetts.* — *Farmer v. Storer*, 11 Pick. (Mass.) 241; *Barber v. Parsons*, 145 Mass. 203.

*Montana.* — *McGlauffin v. Wormser*, 28 Mont. 177.

*New York.* — *Wheeler v. Lozee*, (Supm. Ct. Gen. T.) 12 How. Pr. (N. Y.) 448; *Vence v. Speir*, (Super. Ct. Spec. T.) 18 How. Pr. (N. Y.) 168.

*Oregon.* — *Crawford v. Abraham*, 2 Oregon 166; *Egan v. Finney*, 42 Oregon 599.

*Pennsylvania.* — *Cody v. Cleam*, 1 Pa. Co. Ct. 8; *Com. v. Smith*, 4 Pa. Co. Ct. 321. See also *First Nat. Bank v. Broadhead*, 8 Pa. Co. Ct. 536.

*South Carolina.* — *Johnson v. Wideman*, Cheves L. (S. Car.) 26. See also *Lewis v. Brown*, 16 S. Car. 62.

*Tennessee.* — *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 323.

*Texas.* — *International*, etc., R. Co. v. Richmond, 28 Tex. Civ. App. 513.

*Vermont.* — *Mattock v. Wheaton*, 10 Vt. 493.

*Washington.* — *Christensen v. Union Trunk Line*, 6 Wash. 75.

**Poor Persons Appearing on Subpœna** to give evidence against the defendant are equally entitled to be paid as if they had appeared on recognizance. *People v. Dowelle*, Col. & C. Cas. (N. Y.) 41.

writ is not returned, or if it is lost after being returned, the witness is not prejudiced thereby.<sup>1</sup>

**Acceptance of Service of Subpœna.** — While there may be no statutory provision providing for the acceptance of the service of a subpœna there is no good reason why witnesses cannot dispense with the legal form of service, and accordingly attendance by a witness who has accepted the service of a subpœna should be regarded as in obedience to or under subpœna.<sup>2</sup>

**b. EXAMINATION.** — As a general rule it makes no difference to the right of a witness to compensation whether he is in fact called to testify, or whether he is sworn, provided always, of course, that he is not at fault, that his attendance has been procured in good faith, and that his testimony would have been material to the issue involved.<sup>3</sup>

**An Intoxicated Witness,** whose condition renders it impracticable to examine him, is not entitled to compensation.<sup>4</sup>

**6. For What Compensation Is Allowable** — *a. MILEAGE* — (1) *In General.* — The great weight of authority seems to be that a witness who in good faith attends the court, whether he comes in obedience to a subpœna or at the mere request of a party, is entitled to compensation for his traveling expenses.<sup>5</sup>

**1. Return and Preservation of Subpœna.** — *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 323.

**2. Acceptance of Service of Subpœna.** — *Wilson v. St. Louis*, etc., R. Co., 53 Mo. App. 342; *Mt. Olivet Cemetery Assoc. v. Dalton*, 53 Mo. App. 345; *McHoney v. Kerwin*, 56 Mo. App. 459; *Feree v. Strome*, 1 Yeates (Pa.) 303. See also *Brown v. Moore*, 3 J. J. Marsh. (Ky.) 306.

**3. Examination Not Essential** — *United States*. — *Hathaway v. Roach*, 2 Woodb. & M. (U. S.) 63; *Clark v. American Dock*, etc., Co., 25 Fed. Rep. 641; *Burrow v. Kansas City*, etc., R. Co., 54 Fed. Rep. 278.

*Georgia*. — See also *Huff v. State*, 29 Ga. 424.

*Illinois*. — *Leigh v. Hodges*, 4 Ill. 15.

*Kentucky*. — *Worland v. Outten*, 3 Dana (Ky.) 477.

*Massachusetts*. — *Farmer v. Storer*, 11 Pick. (Mass.) 241.

*New Hampshire*. — *Gunnison v. Gunnison*, 41 N. H. 121.

*New York*. — *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Andrews v. Bates*, 5 Johns. (N. Y.) 351; *Fuller v. Mattice*, 14 Johns. (N. Y.) 357; *Baker v. Brill*, 15 Johns. (N. Y.) 260.

*North Carolina*. — *Carpenter v. Taylor*, Term (4 N. Car.) 265; *Hayle v. Cowan*, 1 Hayw. (2 N. Car.) 21; *Holmes v. Johnson*, 11 Ired. L. (33 N. Car.) 55.

*Pennsylvania*. — *De Benneville v. De Benneville*, 1 Binn. (Pa.) 46; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Com. v. Smith*, 4 Pa. Co. Ct. 321. See also *First Nat. Bank v. Broadhead*, 8 Pa. Co. Ct. 536.

*Wisconsin*. — *Baumbach Co. v. Gessler*, 82 Wis. 231.

**In Indiana** it has been held that a person who is neither subpoenaed nor sworn on the trial of a cause cannot claim a witness fee, and the mere act of the clerk in taxing a fee for such witness is of no consequence. *Goodwin v. Smith*, 68 Ind. 301.

**4. Examination Prevented by Intoxication.** — *Murray v. Williston*, 6 N. Bruns. 492; *Fritz v. Fritz*, 5 Pa. Dist. 676.

**5. Mileage** — *England*. — *Tidd Pr. Ch.* 35;

*Pearson v. Iles*, 2 Dougl. 556; *Fuller v. Prentice*, 1 H. Bl. 49; *Bowles v. Johnson*, 1 W. Bl. 36; *Chapman v. Pointon*, 2 Stra. 1150; *Nokes v. Gibbon*, 3 Jur. N. S. 282; *Hallet v. Mears*, 13 East 15.

*United States*. — *Anderson v. Moe*, 1 Abb. (U. S.) 299, 1 Fed. Cas. No. 359; *Dennis v. Eddy*, 12 Blatchf. (U. S.) 195, 7 Fed. Cas. No. 3,793; *Cummings v. Akron Cement*, etc., Co., 6 Blatchf. (U. S.) 509, 6 Fed. Cas. No. 3,473; *In re Addis*, 28 Fed. Rep. 794; *U. S. v. Sanborn*, 28 Fed. Rep. 299; *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 273; *The Vernon*, 36 Fed. Rep. 113; *The Syracuse*, 36 Fed. Rep. 830; *In re Williams*, 37 Fed. Rep. 325; *Eastman v. Sherry*, 37 Fed. Rep. 845; *Pinson v. Atchison*, etc., R. Co., 54 Fed. Rep. 464; *Burrow v. Kansas City*, etc., R. Co., 54 Fed. Rep. 278; *Sloss Iron*, etc., Co. v. South Carolina, etc., R. Co., 75 Fed. Rep. 106; *Carter v. Sweet*, 84 Fed. Rep. 16; *Hanchett v. Humphrey*, 93 Fed. Rep. 895; *St. Matthew's Sav. Bank v. Fidelity*, etc., Co., 105 Fed. Rep. 161; *Griggsby Constr. Co. v. Louisiana*, etc., R. Co., 123 Fed. Rep. 751.

*California*. — *Beal v. Stevens*, 72 Cal. 451.

*Massachusetts*. — *Farmer v. Storer*, 11 Pick. (Mass.) 241.

*Missouri*. — *Mt. Olivet Cemetery Assoc. v. Dalton*, 53 Mo. App. 345; *Wilson v. St. Louis*, etc., R. Co., 53 Mo. App. 342.

*Montana*. — *McGlaflin v. Wormser*, 28 Mont. 177.

*New Hampshire*. — *Gunnison v. Gunnison*, 41 N. H. 121.

*New York*. — *Wheeler v. Lozee*, (Supm. Ct. Gen. T.) 12 How. Pr. (N. Y.) 448.

*Oregon*. — *Crawford v. Abraham*, 2 Oregon 163; *Egan v. Finney*, 42 Oregon 599.

*Pennsylvania*. — *Feree v. Strome*, 1 Yeates (Pa.) 303; *Com. v. McArdle*, 3 Pa. Dist. 258; *Wilson v. Mutual F. Ins. Co.*, 1 Pa. Co. Ct. 11.

*South Carolina*. — *Coleman v. Curtis*, 43 S. Car. 1.

*Washington*. — *Christensen v. Union Trunk Line*, 6 Wash. 75; *Carlson v. Van De Vanter*, 19 Wash. 32.

Where There Is a Continuance the court may in a proper case permit the witnesses to return home and come back again, with the understanding that they are to be paid their traveling fees in lieu of their pay for remaining in attendance at court until the case comes on to be tried. To hold that where a case is continued, as, for instance at the beginning or at any time before the last day of the week, until the following week, the witnesses must go home and return without being paid their mileage, would be unjust.<sup>1</sup>

(2) *Nonresident Witnesses* — (a) *Resident Without the State*. — The decisions are conflicting on the point whether a witness who resides in another state is entitled to fees, where he has been summoned at the place of trial or brought from his residence to that place.<sup>2</sup> But the great weight of authority is to the effect that a witness from another state is entitled to mileage to and from his residence in such state,<sup>3</sup> even though he is subpoenaed while in the state wherein the trial is held,<sup>4</sup> or removes to another state after being summoned or recognized.<sup>5</sup>

*Mileage Only from State Line*. — Some cases, however, hold that such witnesses are entitled to mileage only from the state line.<sup>6</sup>

(b) *Resident Without the County*. — There are a few cases holding that a witness residing without the county wherein the trial is held is a mere voluntary witness and not entitled to mileage,<sup>7</sup> but the majority of the decisions are to the effect that such witness is entitled to mileage to and from the place at which he is summoned to attend.<sup>8</sup>

If Recognized at the Place of Trial a nonresident of the county should be allowed mileage from the place of his residence. A witness is not deemed a resident of the county because he is recognized there.<sup>9</sup>

*Wisconsin*. — *Baumbach Co. v. Gessler*, 82 Wis. 231.

See *supra*, this subsection, *Prerequisites to Compensation — Subpoena and Recognition*.

1. *Where There Is a Continuance*. — *Matter of Griffen*, 2 Ben. (U. S.) 209, 11 Fed. Cas. No. 5,810; *Union Pac. R. Co. v. Harris*, 29 Kan. 275; *Harman v. Shank*, 3 Pa. Dist. 813; *Com. v. Swisher*, 3 Pa. Dist. 662; *Com. v. Smith*, 4 Pa. Co. Ct. 321; *Koch v. Peters*, 97 Wis. 492. But see *Hoffman v. New York, etc., R. Co.*, 50 N. Y. Super. Ct. 512.

2. *Nonresident Witnesses*. — *State v. Seibert*, 130 Mo. 202.

3. *Resident Without the State — Entitled to Mileage* — *United States*. — *U. S. v. Sanborn*, 28 Fed. Rep. 299; *Anderson v. Moe*, 1 Abb. (U. S.) 299, 1 Fed. Cas. No. 359; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story (U. S.) 84, 29 Fed. Cas. No. 17,515; *Hathaway v. Roach*, 2 Woodb. & M. (U. S.) 63; *Edwards v. Bond*, 5 McLean (U. S.) 300.

*Georgia*. — *Dutcher v. Justices*, 38 Ga. 214. *Illinois*. — *Doppelt v. Columbia Paper Stock Co.*, 99 Ill. App. 207.

*Iowa*. — *Westfall v. Madison County*, 62 Iowa 427; *Casley v. Mitchell*, 121 Iowa 96; *Climie v. Appanoose County*, (Iowa 1904) 101 N. W. Rep. 98.

*Missouri*. — *Hutchins v. State*, 8 Mo. 288; *State v. Seibert*, 130 Mo. 202.

*New Hampshire*. — *Gunnison v. Gunnison*, 41 N. H. 121.

*North Carolina*. — *State v. Stewart*, Law Repos. (4 N. Car.) 524.

*Vermont*. — See *Albany v. Derby*, 30 Vt. 718.

4. *Subpoenaed at Place of Trial*. — *Dutcher v. Justices*, 38 Ga. 214; *Hutchins v. State*, 8 Mo. 290; *State v. Seibert*, 130 Mo. 202.

5. *Removal to Another State After Summons or Recognizance*. — *Gunnison v. Gunnison*, 41 N. H. 121; *State v. Stewart*, Law Repos. (4 N. Car.) 524.

6. *Mileage Not Allowable Beyond State Line* — *United States*. — *Wooster v. Hill*, 44 Fed. Rep. 819; *Burrow v. Kansas City, etc., R. Co.*, 54 Fed. Rep. 278.

*Georgia*. — *Howell v. Blackwell*, 7 Ga. 443.

*Illinois*. — *Fish v. Farwell*, 33 Ill. App. 242.

*Kansas*. — *Lyon County v. Chase*, 24 Kan. 774.

*Maine*. — *Kingfield v. Pullen*, 54 Me. 398.

*Massachusetts*. — *White v. Judd*, 1 Met. (Mass.) 293; *Melvin v. Whiting*, 13 Pick. (Mass.) 190.

*New Hampshire*. — *Gunnison v. Gunnison*, 41 N. H. 121.

*New York*. — *Howland v. Lenox*, 4 Johns. (N. Y.) 311.

*North Carolina*. — *Stern v. Herren*, 101 N. Car. 516.

*Oregon*. — *Crawford v. Abraham*, 2 Oregon 165.

*Pennsylvania*. — *Leeds v. Loud*, 2 Miles (Pa.) 189; *Com. v. Boyer*, 7 Pa. Dist. 175.

7. *Resident Without the County — Not Entitled to Mileage*. — *Wylie v. Duffy*, 14 Ohio Dec. 280; *Hereford v. O'Connor*, (Ariz. 1898) 7 Pac. Rep. 471; *Matter of Hughbanks*, 44 Kan. 105.

8. *Entitled to Mileage*. — *Thurman v. Virgin*, 18 B. Mon. (Ky.) 786; *Perkins v. Delta Pine Land Co.*, 66 Miss. 378; *Henry v. Walton*, 52 N. J. L. 370; *Burrows v. Balfour*, 39 Oregon 488.

9. *Nonresident Recognized at Place of Trial*. — *Hutchins v. State*, 8 Mo. 288.



If Notified to Report as a Witness at the place of trial, to be subpoenaed on arrival, a nonresident of the county who does so report, in order to facilitate justice and prevent delay, is entitled to mileage from his residence to the place of trial.<sup>1</sup>

(o) **Limitation as to District and Distance.** — There is some conflict of authority in the federal courts as to whether witnesses who live within the district, but over one hundred miles distant from the place where the court is held, can charge mileage for a distance of over one hundred miles. In some cases it has been held that witnesses are entitled to their mileage regardless of the distance they come or the fact that they come from out of the district.<sup>2</sup> Other courts have held that the mileage ought to be confined to one hundred miles, for the reason that section 863 of the Revised Statutes provides for the taking of the testimony of any witness by deposition *de bene esse* when the witness lives at a greater distance from the place of trial than one hundred miles.<sup>3</sup> But the true rule, as gleaned from all the authorities, is substantially to the effect that the Acts of Congress were intended to, and do, allow mileage to witnesses to the full extent of the distance that could be legally reached by subpoena, or, in other words, mileage is allowed to any place within the district, or to any point without the district to the extent of one hundred miles from the place where the court is held.<sup>4</sup>

A Nonresident Summoned Within the District, at the place of holding the court, has been held to be entitled to mileage for returning to his home, but not for coming to the court.<sup>5</sup>

In the State Courts the matter is generally regulated by statute.<sup>6</sup>

(3) **Amount of Allowance.** — As a General Rule mileage is to be computed by ascertaining the distance by the nearest practicable, usually traveled route between the place of the witness's residence and place of trial.<sup>7</sup>

But Where Another Route Is Longer but Quicker than the one usually traveled it has been held that witnesses are not bound to adopt the latter merely because it is more direct, and thereby incur loss of time, place themselves in contempt

1. **Nonresident Notified to Report.** — Wylie v. Duffy, 14 Ohio Dec. 280.

2. **Limitation as to District and Distance — Not Regarded.** — Hathaway v. Roach, 2 Woodb. & M. (U. S.) 63; Prouty v. Draper, 2 Story (U. S.) 199; Whipple v. Cumberland Cotton Mfg. Co., 3 Story (U. S.) 84; U. S. v. Sanborn, 28 Fed. Rep. 299. See also Edwards v. Bond, 5 McLean (U. S.) 300.

3. **Mileage Confined to One-hundred-mile Limit.** — The Vernon, 36 Fed. Rep. 113; Smith v. Chicago, etc., R. Co., 38 Fed. Rep. 321; Pinson v. Atchison, etc., R. Co., 54 Fed. Rep. 464; Burrow v. Kansas City, etc., R. Co., 54 Fed. Rep. 278; Sloss Iron, etc., Co. v. South Carolina, etc., R. Co., 75 Fed. Rep. 106.

4. **The True Rule.** — Holmes v. Sheridan, 1 Dill. (U. S.) 351; Spaulding v. Tucker, 2 Sawy. (U. S.) 50, 22 Fed. Cas. No. 13,221; Beckwith v. Easton, 4 Ben. (U. S.) 357, 3 Fed. Cas. No. 1,212; The Steamship Leo, 5 Ben. (U. S.) 486, 15 Fed. Cas. No. 8,252; Dieskill v. Parish, 5 McLean (U. S.) 241, 7 Fed. Cas. No. 4,076; Buffalo Ins. Co. v. Providence, etc., Steam Ship Co., 29 Fed. Rep. 237; The Vernon, 36 Fed. Rep. 113; The Syracuse, 36 Fed. Rep. 830; Eastman v. Sherry, 37 Fed. Rep. 844; Sims v. Schult, 40 Fed. Rep. 143; The Progresso, 48 Fed. Rep. 239; Pinson v. Atchison, etc., R. Co., 54 Fed. Rep. 464; Burrow v. Kansas City, etc., R. Co., 54 Fed. Rep. 278; Hunter v. Russell, 59 Fed. Rep. 964; Hanchett v. Humphrey, 93 Fed. Rep. 895; Griggshy

Constr. Co. v. Louisiana, etc., R. Co., 123 Fed. Rep. 751; Anonymous, 5 Blatchf. (U. S.) 134, 1 Fed. Cas. No. 432.

5. **Nonresident Summoned Within District.** — Woodruff v. Barney, 1 Bond (U. S.) 528, 30 Fed. Cas. No. 17,986.

6. **Statutory Regulations.** — Alabama Midland R. Co. v. Rushing, 103 Ala. 542; Briggs v. M. Rumely Co., 96 Iowa 202; Daly v. Multnomah County, 14 Oregon 20. And see generally the statutes of the various states.

7. **Computation of — By Usually Traveled Route.** — Hunter v. Russell, 59 Fed. Rep. 964; Freeble v. Graves, 114 Ga. 418; Melvin v. Whiting, 13 Pick. (Mass.) 190; State v. Ramsey, 11 Mont. 245; Cody v. Clelam, 1 Pa. Co. Ct. 8; Johnson v. A., etc., R. Co., 1 Pa. Co. Ct. 10; Leeds v. Loud, 2 Miles (Pa.) 189; Com. v. Heiges, 4 Pa. Dist. 184; Com. v. Fairman, 6 Pa. Dist. 744; Com. v. Boyer, 7 Pa. Dist. 175; Venetian Blind Co. v. Nesbit, 13 Pa. Co. Ct. 330; Rebert v. Eline, 21 Pa. Co. Ct. 431.

In an Early English Case it was held that the circumstances and station in life of a witness regulate the amount of traveling expenses to be paid. Dixon v. Lee, 5 Tyrw. 180.

**Allowance One Way Only.** — Cole v. Ducheneau, 13 Utah 42.

**Witnesses May Select the Route** over which they will travel, but they cannot, by their election, change the distance or the compensation to which they are entitled. Johnson v. A., etc., R. Co., 1 Pa. Co. Ct. 10.

of court, and hazard an attachment by not appearing at the time fixed in the subpoena.<sup>1</sup> On the other hand, the fact that another route is merely more convenient or more pleasant than the one usually traveled cannot change the general rule.<sup>2</sup>

**The Distance Actually Traveled** should be taken into consideration in the computation, as the route actually traveled, in any particular case, if shorter than the usual route, will govern.<sup>3</sup> Consequently, if a witness for any reason is not required to travel any appreciable distance, no mileage should be computed.<sup>4</sup>

**Where There Are Two Commonly Traveled Routes** between the residence of the witness and the place of trial, there is authority to the effect that mileage should be taxed by the shorter and more direct route,<sup>5</sup> and there is also authority for computing the distance according to the route actually traveled by the witness.<sup>6</sup>

**The Computation Must Be from the Residence of the Witness.** — The law allowing fees for mileage for going to and returning from court contemplates a journey from and to such residence, and a witness will not be permitted to charge for the extra mileage from some other point to which business, duty, or pleasure may have called him.<sup>7</sup>

**Fractions of Miles** are to be counted as whole miles in determining the number of miles traveled.<sup>8</sup>

**b. ATTENDANCE AT COURT — (1) Actual Attendance.** — A witness who in good faith, at the instance of one of the parties, actually attends court prepared to testify in the cause, is entitled to compensation for his attendance.<sup>9</sup>

1. *Com. v. Heiges*, 4 Pa. Dist. 184.

2. **More Convenient or More Pleasant Route.** — *State v. Ramsey*, 11 Mont. 245; *Johnson v. A.*, etc., R. Co., 1 Pa. Co. Ct. 10; *Com. v. Fairman*, 6 Pa. Dist. 744.

3. **Distance Actually Traveled to Be Considered.** — *Lyon County v. Chase*, 24 Kan. 774; *M'Fall's Case*, 2 Mart. (La.) 171; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Rebert v. Eline*, 21 Pa. Co. Ct. 431. See also *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story (U. S.) 84, 29 Fed. Cas. No. 17,515.

4. **When Travel Is Unnecessary.** — *The Steamboat Sunnyside*, 5 Ben. (U. S.) 162, 23 Fed. Cas. No. 13,619; *Ex p. Turner*, 32 Fed. Rep. 372; *Chicago City R. Co. v. Burke*, 102 Ill. App. 661; *Lyon County v. Chase*, 24 Kan. 774; *Niagara Bank v. Austin*, 6 Wend. (N. Y.) 548; *Taaks v. Schmidt*, (Supm. Ct. Spec. T.) 25 How. Pr. (N. Y.) 340; *Crawford v. Abraham*, 2 Oregon 163; *Lafferty v. Kerfoot*, 14 Can. L. T. 70.

5. **Two Commonly Traveled Routes — Mileage Computed by Shorter.** — *Venetian Blind Co. v. Nesbit*, 13 Pa. Co. Ct. 330.

6. **Computation by Route Actually Traveled.** — *Rebert v. Eline*, 21 Pa. Co. Ct. 431.

7. **Computation to Be from Residence of Witness.** — *Marks v. Fields*, (Tex. Civ. App. 1895) 29 S. W. Rep. 664.

8. *Bedel v. Goodall*, 26 N. H. 92.

9. **Attendance at Court — Actual Attendance — England.** — *Hallet v. Mears*, 13 East 15.

**Canada.** — *Unger v. Long*, 12 Manitoba 454.

**United States.** — *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story (U. S.) 84, 29 Fed. Cas. No. 17,515; *Schott v. Benson*, 1 Blatchf. (U. S.) 564, 21 Fed. Cas. No. 12,479; *U. S. v. Williams*, 1 Cranch (C. C.) 178; *Levy Ct. v. Coroner*, 2 Wall. (U. S.) 501; *Dennis v. Eddy*,

12 Blatchf. (U. S.) 196; *Wylie v. Duffy*, 14 Ohio Dec. 280; *In re Crane*, 15 Nat. Bankr. Reg. 120, 6 Fed. Cas. No. 3,352; *In re Addis*, 28 Fed. Rep. 794; *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 273; *Archer v. Hartford F. Ins. Co.*, 31 Fed. Rep. 660; *In re Williams*, 37 Fed. Rep. 325; *Pinson v. Atchison*, etc., R. Co., 54 Fed. Rep. 464; *Carter v. Sweet*, 84 Fed. Rep. 16. See also *Dreskill v. Parish*, 5 McLean (U. S.) 241.

**Alabama.** — *Alabama Midland R. Co. v. Rushing*, 103 Ala. 542.

**Alaska.** — *Græco-Russian Church v. Cohen*, 1 Alaska 32.

**Arizona.** — *Hereford v. O'Connor*, (Ariz. 1898) 52 Pac. Rep. 471.

**California.** — See *Beal v. Stevens*, 72 Cal. 451.

**Illinois.** — *Leigh v. Hodges*, 4 Ill. 15.

**Iowa.** — *Hardin v. Polk County*, 39 Iowa 661; *State v. Willis*, 79 Iowa 326; *Fisher v. Burlington*, etc., R. Co., 104 Iowa 585.

**Massachusetts.** — *Farmer v. Storer*, 11 Pick. (Mass.) 241.

**Mississippi.** — *Perkins v. Delta Pine Land Co.*, 66 Miss. 378. See also *Marshall County v. Tidmore*, 74 Miss. 317.

**New Hampshire.** — *Gunnison v. Gunnison*, 41 N. H. 121.

**New York.** — *Courtney v. Baker*, 3 Den. (N. Y.) 27; *Wheeler v. Lozee*, (Supm. Ct. Gen. T.) 12 How. Pr. (N. Y.) 448; *Vence v. Speir*, (Super. Ct. Spec. T.) 18 How. Pr. (N. Y.) 168; *People v. Hull*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 63; *Muscott v. Runge*, (Supm. Ct. Gen. T.) 27 How. Pr. (N. Y.) 85.

**North Carolina.** — *Carpenter v. Taylor*, Term (4 N. Car.) 265; *Hayle v. Cowan*, 1 Hayw. (2 N. Car.) 21; *Holmes v. Johnson*, 11 Ired. L. (33 N. Car.) 55.

During the Continuance of a Cause a witness may be allowed compensation for the time he is in attendance at court from the time of the continuance until the time fixed for the trial.<sup>1</sup>

Attendance of a Witness After His Examination is concluded may entitle him to compensation where it does not appear that such attendance was unnecessary or improper and where, under the circumstances of the case, it may be necessary for the court to direct the witnesses to be recalled to explain some part of their testimony which has been obscurely given or misinterpreted.<sup>2</sup>

Actual Attendance Before Any Officer, pursuant to law, is not distinguished from attendance at court so far as the fees for such attendance are concerned.<sup>3</sup>

(2) *Constructive Presence*. — Constructive presence is not sufficient; actual presence, as a witness, is essential.<sup>4</sup>

c. *DETENTION PENDING TRIAL OF CAUSE*. — There is some conflict as to the right of a witness to compensation for the time during which he has been detained pending the trial of the cause. One line of decisions is to the effect that where the detention is the misfortune rather than the fault of a witness, such witness is entitled to compensation for the whole time that he is detained.<sup>5</sup> And conversely, if it appears that a witness cannot find security for his appearance because his character is so bad that those who knew him refuse to become bound for him, he will have no claim to be compensated if he is detained as a witness. His inability to furnish security is the result of his own fault and not of his misfortune, and the reason for treating him as entitled to compensation while in custody does not exist. He will not be

*Oregon*. — Crawford v. Abraham, 2 Oregon 166.

*Pennsylvania*. — Feree v. Strome, 1 Yeates (Pa.) 303; Wilson v. Mutual F. Ins. Co., 1 Pa. Co. Ct. 11; Dellinger v. Dellinger, 1 Pa. Co. Ct. 13; De Benneville v. De Benneville, 1 Binn. (Pa.) 46; Lagrosse v. Curran, 10 Phila. (Pa.) 140, 31 Leg. Int. (Pa.) 148; Shutt v. Canon, 5 Pa. Dist. 167; Sluchko v. Luzerne County, 16 Pa. Co. Ct. 221, 4 Pa. Dist. 418; Goodman's Estate, 23 W. N. C. (Pa.) 235.

*South Carolina*. — Coleman v. Curtis, 43 S. Car. 1.

*Washington*. — Christensen v. Union Trunk Line, 6 Wash. 75.

*Wisconsin*. — Baumbach Co. v. Gessler, 82 Wis. 231.

**A Witness Subpoenaed by Mistake** to attend on a day previous to the day of trial, and who in good faith so attends, is entitled to his fees for attendance from the party making the mistake. Maher v. Mitchell, 1 Pa. Co. Ct. 570.

**Allowance for Attendance on Sunday**. — Schott v. Benson, 1 Blatchf. (U. S.) 564, 21 Fed. Cas. No. 12,479; Moulton v. Townsend, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 306; Muscott v. Runge, (Supm. Ct. Gen. T.) 27 How. Pr. (N. Y.) 85.

**1. During Continuance of Cause**. — Hathaway v. Roach, 2 Woodb. & M. (U. S.) 63, 11 Fed. Cas. No. 6,213; Whipple v. Cumberland Cotton Mfg. Co., 3 Story (U. S.) 84, 29 Fed. Cas. No. 17,515; Hance v. McCormick, 1 Cranch (C. C.) 522; Com. v. Smith, 4 Pa. Co. Ct. 321.

**Witnesses Not Present When a Continuance Is Granted** and who accordingly fail to hear the announcement thereof are not entitled to attend afterwards and charge attendance. Robison v. Banks, 17 Ga. 211.

**2. Attendance After Examination**. — Whipple v. Cumberland Cotton Mfg. Co., 3 Story (U. S.) 84, 29 Fed. Cas. No. 17,515.

**3. Actual Attendance Before Any Officer**. — Levy Ct. v. Coroner, 2 Wall. (U. S.) 501; Archer v. Hartford F. Ins. Co., 31 Fed. Rep. 660.

**Witness Before Grand Jury**. — People v. Hull, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 63. See Lewis v. Wake County, 74 N. Car. 194.

**Requisites of Actual Attendance Before Grand Jury**. — Dunn v. Douglas County, 61 Neb. 179.

**4. Actual Presence Essential**. — United States. — The Michigan, 52 Fed. Rep. 509.

*Iowa*. — State v. Willis, 79 Iowa 326.

*Maine*. — See Kennedy v. Wright, 34 Me. 351.

*Nebraska*. — Dunn v. Douglas County, 61 Neb. 179.

*New York*. — Booth v. Smith, 5 Wend. (N. Y.) 107; Vence v. Speir, (Super. Ct. Spec. T.) 18 How. Pr. (N. Y.) 168. See also Ford v. Monroe, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 204.

*Oregon*. — Crawford v. Abraham, 2 Oregon 163.

*Pennsylvania*. — Cody v. Clelam, 1 Pa. Co. Ct. 8; Shutt v. Canon, 5 Pa. Dist. 167.

*Texas*. — McArthur v. State, (Tex. Crim. 1900) 57 S. W. Rep. 847.

**A Witness Is Not in Attendance** upon the court after he has been informed by the proper party that he would be notified when his services are wanted. *In re Crane*, 15 Nat. Bankr. Reg. 120, 6 Fed. Cas. No. 3,352.

**5. Detention Awaiting Trial — Through Misfortune of Witness**. — Higginson's Case, 1 Cranch (C. C.) 73; Hall v. Somerset County, 82 Md. 618; Robinson v. Chambers, 94 Mich. 471; Hutchins v. State, 8 Mo. 288; State v. Stewart, Law Repos. (4 N. Car.) 524.



allowed to invoke and rely on his bad character to secure for himself compensation as a witness, when but for that bad character he would not have been compelled to undergo a detention.<sup>1</sup> Other decisions deny the right of a witness to compensation under any circumstances during the period of his detention.<sup>2</sup>

*d. LOSS OF TIME* — (1) *In General*. — In *England* courts, in their discretion, have allowed compensation for loss of time to be paid to medical men and attorneys for attendance as witnesses, but they have refused it in all other instances.<sup>3</sup> In the *United States* the general rule is that time spent in going to and from the place at which the trial is held does not entitle any witness to additional compensation.<sup>4</sup>

(2) *Effect of Agreement to Compensate*. — Even in a case where the party subpoenaing promises to pay the witness for loss of time necessitated by attending the trial there can be no recovery therefor.<sup>5</sup>

**7. Who Entitled to Compensation** — *a. PARTIES*. — There are cases upholding the very broad rule that no one who is a party can be entitled to witness fees, and this is said to be true whether such party is interested or disinterested,<sup>6</sup> or whether he is a party in his own right, or in a representative capacity, as agent, attorney, assignee, or superintendent of some one else, and attends to conduct the suit, or perhaps only as a witness.<sup>7</sup>

**A Party Called and Examined in His Own Behalf** is not usually entitled to fees for travel and attendance as a witness.<sup>8</sup>

**1. Through Fault of Witness**. — *Markwell v. Warren County*, 53 Iowa 422; *Hall v. Somerset County*, 82 Md. 618.

**2. No Compensation in Any Event**. — *Marshall County v. Tidmore*, 74 Miss. 317; *Morin v. Multnomah County*, 18 Oregon 163; *People v. Pettit*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 280; *Shutt v. Canon*, 5 Pa. Dist. 167; *Howard v. Beaver County*, 6 Pa. Co. Ct. 397; *Sluchko v. Luzerne County*, 16 Pa. Co. Ct. 221, 4 Pa. Dist. 418. See also *Shaddock's Case*, 2 Mart. (La.) 207. Compare *M'Fall's Case*, 2 Mart. (La.) 171; *Lafferty v. Kerfoot*, 14 Can. L. T. 70.

**3. Loss of Time — In England**. — *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171; *Collins v. Godefroy*, 1 B. & Ad. 950, 20 E. C. L. 514; *Nokes v. Gibbon*, 3 Jur. N. S. 282; *Pritchard v. Walker*, 3 C. & P. 212, 14 E. C. L. 274; *Moor v. Adam*, 5 M. & S. 156.

**4. Hathaway v. Roach**, 2 Woodb. & M. (U. S.) 63, 11 Fed. Cas. No. 6,213; *The Michigan*, 52 Fed. Rep. 509; *Carter v. Sweet*, 84 Fed. Rep. 16; *Venetian Blind Co. v. Nesbit*, 13 Pa. Co. Ct. 330. See *contra*, *Nichols v. Doty*, 3 Cow. (N. Y.) 352; *McArthur v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 847.

**5. Effect of Agreement to Compensate**. — *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171.

**6. Parties Not Entitled to Compensation — England**. — *Reed v. Fairless*, 3 F. & F. 958.

*California*. — *Beal v. Stevens*, 72 Cal. 451.

*Illinois*. — *Bonner v. People*, 40 Ill. App. 628.

*New Hampshire*. — *Young v. Tilden*, 3 N. H.

74.

*New York*. — *Perry v. Livingston*, (Supm. Ct.) 6 How. Pr. (N. Y.) 404; *Christy v. Christy*, 6 Paige Ch. (N. Y.) 170; *Case v. Price*, (Supm. Ct. Spec. T.) 9 Abb. Pr. (N. Y.) 111, 17 How. Pr. (N. Y.) 348; *Logan v. Thomas*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 160; *Steere v. Miller*, (Ct. App.) 30 How. Pr. (N. Y.) 7, affirming (Supm. Ct. Gen.

T.) 28 How. Pr. (N. Y.) 266. See also *Walker v. Russell*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 91.

*Pennsylvania*. — *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Fisher v. Selden*, 4 Pa. Co. Ct. 392; *Rambrey v. Baltimore*, etc., R. Co., 6 Pa. Co. Ct. 145; *Bell v. Dawes*, 9 Pa. Co. Ct. 636. See also *Shannon v. Brosius*, 9 Pa. Dist. 167.

*Texas*. — *Texas Midland R. Co. v. Parker*, 28 Tex. Civ. App. 116; *Gause v. Edminston*, 35 Tex. 69.

**7. Party in Representative Capacity**. — *Fisher v. Selden*, 4 Pa. Co. Ct. 392; *Grub v. Simpson*, 6 Heisk. (Tenn.) 92.

**An Administrator as Plaintiff**. — *Eakin v. Fulmer*, 4 Pa. Co. Ct. 319.

**Action by Next Friend**. — *Bambrey v. Baltimore*, etc., R. Co., 6 Pa. Co. Ct. 145.

**8. Who Party Called in His Own Behalf — United States**. — *Nichols v. Brunswick*, 3 Cliff. (U. S.) 88, 18 Fed. Cas. No. 10,239; *Roundtree v. Rembert*, 71 Fed. Rep. 255.

*California*. — *Beal v. Stevens*, 72 Cal. 451.

*Indiana*. — *Goodwin v. Smith*, 68 Ind. 301.

*Minnesota*. — *Barry v. McGrade*, 14 Minn. 286.

*New York*. — *Steere v. Miller*, (Ct. App.) 30 How. Pr. (N. Y.) 7, affirming (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 266. But see *Querissle v. Hilliard*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 31; *Rogers v. Chamberlain*, (C. Pl. Spec. T.) 7 Abb. Pr. (N. Y.) 452; *Logan v. Brooks*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 127, 17 How. Pr. (N. Y.) 29; *Hanna v. Dexter*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 135; *Taaks v. Schmidt*, (Supm. Ct. Spec. T.) 25 How. Pr. (N. Y.) 340; *Bronner v. Frauenthal*, (N. Y. Super. Ct. Spec. T.) 20 How. Pr. (N. Y.) 355, 12 Abb. Pr. (N. Y.) 183.

*North Carolina*. — *Penny v. Brink*, 75 N. Car. 68.

*Pennsylvania*. — *Parker v. Martin*, 3 Pittsb. (Pa.) 166; *Street v. Progresso*, 28 W. N. C.

But a Party Made a Witness by His Adversary has been said to be as much entitled to fees as any ordinary witness.<sup>1</sup>

The English Rule seems to be that a plaintiff is entitled to his expenses when he attends and is a necessary witness in his own behalf. The principle on which the cases rest is that the reasonable expenses to which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of a just demand or to seek redress for an injury should be thrown on the wrongdoer.<sup>2</sup> The tendency seems to be to extend the rule to include either party to a cause, whether an accounting party or not, and it has been held that such party, if called upon to give evidence, or if cross-examined, is entitled to his reasonable expenses.<sup>3</sup>

**Defendant Summoned to Answer Interrogatories.** — A defendant summoned by the court to appear and answer interrogatories relative to certain notes disclosed by a trustee is entitled to compensation as a witness. The summons is for a new proceeding, tending to a different result from the original suit.<sup>4</sup>

**Party a Witness for Coplaintiff or Codefendant.** — A party may be entitled to his fees as a witness when it appears that he attended solely as a witness for his coplaintiff or codefendant and was examined as to matters in which he was not jointly interested or liable.<sup>5</sup>

**Effect of Consolidation of Suits.** — Where several actions, begun as separate and distinct suits, are consolidated, a defendant in one of the original actions who is subpœnaed by a defendant in another of such original actions is entitled to witness fees.<sup>6</sup>

**A Nominal Party,** having but slight if any interest in the result of the action, has been held to be entitled to witness fees.<sup>7</sup>

**An Agent of a Party,** who attends court for the purpose of conducting a suit, will not be allowed fees as a witness.<sup>8</sup>

**Children of Parties,** though interested in the action, but who are not and could not be legally made parties to such action, are entitled, when subpœnaed and examined as witnesses, to fees and mileage.<sup>9</sup>

**Husband or Wife of Party.** — It has been held that a husband who is regularly subpœnaed as a witness on behalf of his wife may be entitled to witness fees,<sup>10</sup> and, conversely, that a wife who testifies on behalf of her husband is also so entitled.<sup>11</sup>

(Pa.) 368. See also *Shannon v. Brosius*, 9 Pa. Dist. 167.

*Texas.* — *Gause v. Edminston*, 35 Tex. 69.

*Wisconsin.* — *Grinnell v. Denison*, 12 Wis. 402.

*Canada.* — *Blacklock v. M'Martin, Taylor* (U. C.) 437.

**1. Party Made a Witness by His Adversary.** — *Bonner v. People*, 40 Ill. App. 628; *Goodwin v. Smith*, 68 Ind. 301; *Street v. Progresso*, 28 W. N. C. (Pa.) 368.

In *Texas* if a party is called to testify by his opponent, it is said that he is only complying with a necessity which the law has imposed upon him as a litigant. And if he volunteer his evidence in his own behalf, he is only availing himself of a privilege which the legislature has conferred upon him and he is not entitled in either case to compensation as a witness. *Gause v. Edminston*, 35 Tex. 69.

**2. English Rule — Plaintiff Entitled to Fees.** — *Dowdell v. Australian Royal Mail Steam Nav. Co.*, 3 El. & Bl. 902, 77 E. C. L. 902; *Howes v. Barber*, 18 Q. B. 588, 83 E. C. L. 588; *Fox v. Toronto, etc., R. Co.*, 7 Ont. Pr. 157.

**3. Either Party May Be Entitled to Fees.** — *Young v. English*, 7 Beav. 10; *Leeds v. Am-*

*herst*, 14 Sim. 357; *Street v. Faulkner*, 15 U. C. Q. B. 116; *Davey v. Durrant*, 24 Beav. 493; *Bolkow v. Foster*, 7 Ont. Pr. 388. *Compare* *Reed v. Fairless*, 3 F. & F. 958.

**4.** *Hurd v. Fogg*, 22 N. H. 98.

**5. Party Witness for Coplaintiff or Codefendant.** — *Barry v. McGrade*, 14 Minn. 286; *Penny v. Brink*, 75 N. Car. 68. *Compare* *Beal v. Stevens*, 72 Cal. 451.

**6. Consolidation of Suits.** — *Gray's Harbor Boom Co. v. McAmant*, 21 Wash. 465.

**7. Nominal Party.** — *Keith v. Stiles*, 92 Wis. 15.

**8. Agent of Party.** — *Climeson v. Green*, 2 Chest. Co. Rep. (Pa.) 206; *Freck v. Barclay*, 5 Pa. Dist. 587.

**9. Children of Parties.** — *M'Alpine v. Coles*, 2 Dowl. 299; *Kauffman v. Manor Tp.*, 11 Pa. Co. Ct. 304.

**10. Husband of Party Entitled to Compensation.** — *Curry v. Philips*, 14 Pa. Co. Ct. 479.

**11. Wife of Party Entitled to Compensation.** — *Matter of Griffen*, 2 Ben. (U. S.) 209, 11 Fed. Cas. No. 5,810; *Bell v. Dawes*, 9 Pa. Co. Ct. 636. See *contra*, *Texas Midland R. Co. v. Parker*, 28 Tex. Civ. App. 116; *Sewards v. Elliott*, 3 Pa. Co. Ct. 72.

But a Husband Acting as Attorney in Fact for his wife, and managing and conducting a suit for her in her absence, is not entitled to witness fees.<sup>1</sup>

A Third Person required to attend and submit to an examination as to property in his possession belonging to the judgment debtor is so far a party to the special finding that he is not entitled to witness fees.<sup>2</sup>

b. PARTNERS. — In an action by a receiver of a firm, a partner who testifies stands in the position of a party directly interested in the prosecution of the suit, and is not entitled to witness fees.<sup>3</sup> The mere fact that a partner is not joined in an action against the firm of which he is a member does not entitle him to witness fees if he testifies for such firm.<sup>4</sup>

c. PUBLIC OFFICERS — (1) *Federal Officers*. — An officer of the United States cannot receive any mileage or compensation in addition to his salary.<sup>5</sup>

(2) *County Officers*. — A county officer, who is not an officer of the court and whose daily attendance at his office is not made compulsory, cannot be forced to attend upon the court as a witness unless legally subpoenaed. If he attends and is examined as a witness he is entitled to the same compensation as any other witness.<sup>6</sup>

(3) *Police Officers*. — It not being a duty pertaining to the office of a policeman for a person holding that office to attend upon the court as a witness, such person is ordinarily entitled to compensation for his services as a witness.<sup>7</sup>

(4) *Other Officers*. — All public officers generally who are not required by statute to appear as witnesses are entitled to witness fees when summoned to attend and testify.<sup>8</sup>

d. OFFICERS, AGENTS, AND MEMBERS OF CORPORATIONS. — Officers, agents, and members of corporations or limited partnerships, subpoenaed and in attendance on behalf of such corporation or partnership, and taking no other part in the conduct of the suit, are, as a general rule, held to be entitled to witness fees and mileage. There is no good reason why this should be otherwise. They cannot legally be considered as parties to the suit although they may be indirectly interested.<sup>9</sup>

**In a Suit Regarding Community Property**, a husband or wife is not entitled to fees while attending court as a witness for the other. Hereford v. O'Connor, (Ariz. 1898) 52 Pac. Rep. 471.

1. **Husband Acting as Attorney in Fact for Wife**. — Freck v. Barclay, 5 Pa. Dist. 587.

2. **Third Person Considered as Party**. — Heckman v. Bach, (N. Y. City Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 401.

3. **Partners — Actions by Receiver**. — Leonard v. Smith, 4 Pa. Dist. 249.

4. **Nonjoinder of Partner**. — Pentecost v. Parks, 8 Pa. Dist. 636.

5. **Public Officers — Federal Officers**. — U. S. v. Sanborn, 28 Fed. Rep. 299; *Ex p.* Burdell, 32 Fed. Rep. 681; Wintermute v. Smith, 1 Bond (U. S.) 210, 30 Fed. Cas. No. 17,897. *Compare Ex p.* Burdell, 32 Fed. Rep. 681.

**Chief Clerk of United States Marshal** is not an officer and is therefore entitled to attendance fees. *Ex p.* Burdell, 32 Fed. Rep. 681.

**A Clerk Appointed by a Postmaster**, who gets a salary out of which he pays such clerk, is not an officer of the United States, and is entitled to mileage and *per diem* as a witness. *In re* Waller, 49 Fed. Rep. 271.

6. **County Officers Entitled to Compensation**. — Com. v. McArdle, 3 Pa. Dist. 258; Ellison v. Stevenson, 6 T. B. Mon. (Ky.) 271.

7. **Police Officers**. — State v. Gifford, 70 Mo.

App. 522; Davis v. Schuylkill County, 27 Pa. Co. Ct. 177; State v. Saillard, 22 Wash. 267.

**Constables** cannot draw witness fees for the first day of the term. Cody v. Clelam, 1 Pa. Co. Ct. 8.

Under a statute allowing compensation to a police officer for attending court in his official capacity, an officer who attends for the purpose of testifying is not entitled to fees therefor. Healy v. Hillsborough County, 70 N. H. 588.

**An Officer in Charge of a Prisoner**, being entitled to his fees as such officer, is not entitled to fees as a witness. Starmont v. Cummins, 120 Mich. 629.

8. **Trustees of the Poor**. — Taylor v. Trustees of Poor, 1 Penn. (Del.) 247.

**Special Agents of Excise Department**. — People v. Hull, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 63.

**Registrar of Surrogate Court**. — *In re* Nelson, 2 Ch. Chamb. (Ont.) 252.

**A Justice of the Peace** is entitled to witness fees where he attends as a witness for the commonwealth in a criminal case, though he is bound to attend the court for one day for the purpose of returning his recognizances, but he is not entitled to pay for such day. Cody v. Clelam, 1 Pa. Co. Ct. 8; Com. v. Philadelphia County, 6 Binn. (Pa.) 397.

9. **Officers, Agents, and Members of Corporations**,



If One or More of the Directors Are Managers of a limited partnership, a distinction is made, and such directors are not entitled to compensation as witnesses.<sup>1</sup>

*c. ATTORNEYS AT LAW.* — The General Rule is that a member of the bar in actual practice in the court in which he is called as a witness is not entitled to witness fees,<sup>2</sup> and, *a fortiori*, is this true in the case of an attorney of record appearing as a witness for his client, even though he makes an affidavit that he attended court only as a witness;<sup>3</sup> but where a member of the bar devotes a greater portion of his time to another profession, there may be an exception to the rule.<sup>4</sup>

*f. JURORS.* — A person in attendance as a juror, and not as a witness, is not entitled to fees for attendance or mileage if called as a witness.<sup>5</sup>

8. Rate of Compensation — *a. UNDER STATUTE.* — In most states the fees of witnesses are fixed by statute at so much per mile for travel, and so much per day for attendance, without regard to actual expenses in attending the trial, or to the employment or rank in life of the witness.<sup>6</sup>

*b. IN ABSENCE OF STATUTE.* — Where there is no statute regulating the amount of compensation to which witnesses are entitled, such compensation is a reasonable sum for necessary expenses and loss of time.<sup>7</sup>

*c. EFFECT OF SPECIAL CONTRACT* — In General. — The general rule seems to be that where the rate of compensation for witnesses is fixed by law, they can receive only such statutory amount, and this is not changed by any special contract.<sup>8</sup> In case the rate of compensation is not regulated by statute, an

— Chickasaw County Farmers' Mut. F. Ins. Co. *v.* Weller, 98 Iowa 731; Sharpless *v.* Pikeland Creamery, 1 Pa. Co. Ct. 42; Wilson *v.* Mutual F. Ins. Co., 1 Pa. Co. Ct. 11; Fisher *v.* Selden, 4 Pa. Co. Ct. 392; Skinner Engine Co. *v.* Webb, 5 Pa. Co. Ct. 480; Sattler *v.* Aultman, etc., Machinery Co., 9 Pa. Dist. 73; Susquehanna Mut. F. Ins. Co. *v.* Commercial Ins. Co., 18 W. N. C. (Pa.) 132.

A President of a Corporation Who Fails to Attend as required by a subpoena, will be required to attend at his own expense where he does not object in due time to the fees accompanying such subpoena. Smith Co. *v.* Greey, 11 Ont. Pr. 345.

Officers of a Defendant Corporation Testifying Before a Master in obedience to an order that the defendant should account, and for the purpose of furnishing the account, are representatives of the defendant and are not entitled to witness fees. American Diamond Drill Co. *v.* Sullivan Mach. Co., 32 Fed. Rep. 552, 131 U. S. 428, 33 U. S. (L. Ed.) 217.

1. Where Directors Are Also Managers. — Sharpless *v.* Pikeland Creamery, 1 Pa. Co. Ct. 42.

2. Attorneys at Law. — U. S. *v.* Seldon, 2 Hayw. & H. (D. C.) 332; M'Williams *v.* Hopkins, 1 Whart. (Pa.) 276; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Com. *v.* Lucas, 24 Pa. Co. Ct. 126. But see *contra*, Abbott *v.* Johnson, 47 Wis. 239.

3. Attorneys of Record. — Jones *v.* Botsford, 17 N. Bruns. 581; Barry *v.* McGrade, 14 Minn. 286.

In New York it has been held that an attorney of record is entitled to a witness fee for the day on which he is sworn and testifies, but not for mileage. Taaks *v.* Schmidt, (Supm. Ct. Spec. T.) 25 How. Pr. (N. Y.) 340.

In England, under the Bankruptcy Rules 1886, r. 71, it was provided that a solicitor summoned by the official receiver to attend as a

witness was entitled to his costs. Chamberlain *v.* Stoneham, 24 Q. B. D. 113.

4. Engaged in Some Other Profession. — Com. *v.* Lucas, 24 Pa. Co. Ct. 126.

5. Jurors Not Entitled to Witness Fees. — *Ex p.* Turner, 32 Fed. Rep. 372, disregarding Edwards *v.* Bond, 5 McLean (U. S.) 300; Cody *v.* Clelam, 1 Pa. Co. Ct. 8; Roberts *v.* Clemens, 11 Pa. Dist. 530, affirmed 202 Pa. St. 198.

6. Rate of Compensation — Generally. — See the statutes of the various states; Stern *v.* Herren, 101 N. Car. 516. See also Carter *v.* Sweet, 84 Fed. Rep. 16; Matter of Corwin, (Supm. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 437; Gulf, etc., R. Co. *v.* Mitchell, 21 Tex. Civ. App. 165.

The Statute in Force at the Rendition of the Services of a witness regulates the amount of the fees to be paid the witness. People *v.* Clayton, 5 Utah 598; People *v.* Pyper, 6 Utah 160.

7. Burrow *v.* Kansas City, etc., R. Co., 54 Fed. Rep. 278.

8. Effect of Special Contract. — Collins *v.* Godfrey, 1 B. & Ad. 950, 20 E. C. L. 514; Dodge *v.* Stiles, 26 Conn. 463; Smith *v.* McLaughlin, 77 Ill. 596; Walker *v.* Cook, 33 Ill. App. 561; Union Pac. R. Co. *v.* Harris, 29 Kan. 275; Fuller *v.* Mattice, 14 Johns. (N. Y.) 357; Pengelly *v.* Ashland County, 11 Ohio Dec. 620; Ramschael's Estate, 24 Pa. Super. Ct. 262; House *v.* Barber, 10 Vt. 158. But see Holbrook *v.* Cooley, 25 Minn. 275.

The Reason of the Rule is that otherwise, witnesses might make terms for testifying and there would be room for oppressive conduct and for corruption. Walker *v.* Cook, 33 Ill. App. 561. See also Stanley *v.* Jones, 7 Bing. 369; Dawkins *v.* Gile, 10 Ala. 206.

In Alabama it has been held that although the statute ascertains the compensation of a witness and the mode by which his attendance shall be proved, it does not change the nature

agreement between a witness and the party at whose instance he attends may determine the amount to be paid.<sup>1</sup>

*d. WITNESSES ATTENDING IN MORE THAN ONE ACTION.* — It has been held in many cases that a witness summoned in several suits is entitled to his fees in all the cases.<sup>2</sup> Other courts have decided that a witness is entitled to compensation in all such cases when the parties are different. That there is a common plaintiff or defendant, the other party being different, does not alter the rule.<sup>3</sup> A great many other courts have held that the compensation of a witness is determined without regard to the number of suits in which he may be called to testify.<sup>4</sup>

**9. Payment or Tender in Advance** — *a. IN GENERAL.* — In England, by the statute of 5 Eliz., c. 9, § 12, a party summoning a witness was required to tender to him, according to his countenance or calling, such reasonable sum for his costs and charges as, having regard to the distance of the places, were necessary to be allowed in that behalf.<sup>5</sup> And the rule is now well settled that unless the whole necessary expenses of the journey to and from the place of trial, and of the necessary stay there, be tendered with the subpoena, the witness is under no obligation to attend at the time and place of trial.<sup>6</sup>

In the United States the courts generally recognize the right of witnesses to

of the contract. It is, after all, compensation to the witness for attending the court at the instance of the party, and if, before service is rendered, the witness undertakes to perform it gratuitously, there is no pretense to say that he is entitled to recover for this, any more than any other gratuitous service. *Carville v. Reynolds*, 9 Ala. 969.

**1. In the Absence of Statute.** — *Burrow v. Kansas City*, etc., R. Co., 54 Fed. Rep. 278.

**2. Attendance in Two or More Actions** — *United States*. — *Parker v. Bigler*, 1 Fish. Pat. Cas. 285; *Wooster v. Handy*, 23 Fed. Rep. 49; *Archer v. Hartford F. Ins. Co.*, 31 Fed. Rep. 660; *The Vernon*, 36 Fed. Rep. 113; *L. E. Waterman Co. v. Lockwood*, 128 Fed. Rep. 174. See also *Edwards v. Bond*, 5 McLéan (U. S.) 300.

*Arkansas*. — *Pulaski County v. Downer*, 10 Ark. 588.

*Georgia*. — *Robison v. Banks*, 17 Ga. 211.

*Illinois*. — *O'Kane v. People*, 46 Ill. App. 225.

*Maine*. — *Eames v. Black*, 72 Me. 263.

*Massachusetts*. — *Dorrell v. Johnson*, 17 Pick. (Mass.) 263.

*Nevada*. — See dissenting opinion in *Meagher v. Van Zandt*, 18 Nev. 236.

*New York*. — *Hicks v. Brennan*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 304; *Vence v. Speir*, (Super. Ct. Spec. T.) 18 How. Pr. (N. Y.) 168; *Willink v. Reckle*, 19 Wend. (N. Y.) 82.

*Texas*. — *Flores v. Thorn*, 8 Tex. 377.

*Utah*. — *Smith v. Nelson*, 23 Utah 512.

*Wisconsin*. — *McHugh v. Chicago*, etc., R. Co., 41 Wis. 79.

In *Tennessee* it has been held that no witness can prove attendance at any one term of the court in more than two criminal cases. *State v. O'Haver*, 15 Lea (Tenn.) 16.

**3. Different Parties.** — *Parker v. Bigler*, 1 Fish. Pat. Cas. 285, 18 Fed. Cas. No. 10,726; *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 273; *Archer v. Hartford F. Ins. Co.*, 31 Fed. Rep. 660; *Findley v. Wyser*, 1 Stew. (Ala.) 23; *Vernon*, etc., R. Co. *v. Johnson*, 108 Ind. 126; *Robison*

*v. Banks*, 17 Ga. 211; *House v. Barber*, 10 Vt. 158.

**4. Compensation in Only One Cause.** — *Meffert v. Dubuque*, etc., R. Co., 34 Iowa 430; *Hardin v. Polk County*, 39 Iowa 661; *Crawford v. Abraham*, 2 Oregon 163; *Howe v. Douglas County*, 3 Oregon 492; *Com. v. Cozens*, 1 Ashm. (Pa.) 265; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Keller v. Clinton County*, 4 Pa. Dist. 216; *Batdorff v. Eckert*, 3 Pa. St. 267; *Hormer v. Harrington*, 6 Watts (Pa.) 331; *Curtis v. Buzard*, 15 S. & R. (Pa.) 21; *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 323.

After the Consolidation of Several Actions, there being thenceforth but one single action, a witness can prove his attendance in only that case. *Morristown Mills Co. v. Lytle*, 118 N. Car. 837.

Where Several Cases Are Heard Together, and the same attorneys are employed in each of the cases, and the witnesses are all summoned in but one case, such witnesses are not entitled to compensation in more than one case merely because the officer who served the subpoenas on the witnesses requested them to attend for all the cases. *Barber v. Parsons*, 145 Mass. 203. See also *Brown v. Sears*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 559.

**Attendance Before a Justice and at Court** on the same day and in the same case will not entitle a witness to compensation in both instances. *Com. v. Lovett*, 2 Pa. Co. Ct. 375.

**5. Payment or Tender in Advance, Stat. of 5 Eliz., c. 9.** — *Hallet v. Mears*, 13 East 15.

**6. England.** — *Pearson v. Iles*, 2 Dougl. 556; *Fuller v. Prentice*, 1 H. Bl. 49; *Bowles v. Johnson*, 1 W. Bl. 36; *Chapman v. Pointon*, 2 Stra. 1150; *Brocas v. Lloyd*, 2 Jur. N. S. 555; *Newton v. Harland*, 3 Jur. 679; *Hallet v. Mears*, 13 East 15. See also *Mercer's Case*, 18 Jur. 161.

*Canada*. — *Unger v. Long*, 12 Manitoba 454; *Bolkow v. Foster*, 7 Ont. Pr. 388; *Re Darling*, 39 U. C. Q. B. 339; *Rex v. Clements*, 34 Nova Scotia 113.

**A Witness Should Attend in Obedience to a Subpœna**, and if the witness fees paid him are

the payment of proper fees in advance, and if such payment is not made or tendered, or if an insufficient sum is tendered, the witness is not obliged to obey the subpoena,<sup>1</sup> and his failure to attend will be regarded as the fault of the party who should have paid or tendered the legal fees.<sup>2</sup>

*b. WAIVER.* — The right of a witness to have his fees paid in advance may be waived, but such witness does not thereby lose his right to compensation,<sup>3</sup> for if one person goes to another, and, by a subpoena, requests him to attend a trial, it being known personally that the party requested may refuse to attend unless his expenses are paid, and the latter, without saying anything, goes to the trial, he certainly does so on the faith that he will be paid. That is a reasonable conclusion to be drawn from the facts, and it may be presumed that the party was promised a reasonable remuneration.<sup>4</sup>

**The Waiver Must Be Express** in order to subject the witness to the penalty for nonattendance. An implied waiver is not sufficient.<sup>5</sup>

**10. Actions Relating to Compensation** — *a. BY WITNESSES* — (1) *Against Party Securing Attendance* — (a) **In General.** — Attendance, whether in compliance with an authorized subpoena or without legal summons, entitles the witness so attending to claim the amount of his compensation from the party at whose instance he is called,<sup>6</sup> although such amount may not be properly

not sufficient to reimburse him his necessary expenses occasioned by his detention, he may refuse to be cross-examined until paid such amount as the clerk shall deem reasonable. *Lafferty v. Kerfoot*, 14 Can. L. T. 70.

**Although a Witness Be Subpoenaed by Both Parties** in a cause, he is entitled before giving evidence to be paid all his expenses by the party who calls him at the trial. *Allen v. Yoxall*, 1 C. & K. 315, 47 E. C. L. 315.

**A Witness Who Demanded Fees for a Previous Attendance** before an examiner in the same cause and refused to be sworn unless he was paid such fees was ordered to attend and pay the cost of the motion. *Gaunt v. Johnson*, 6 Hare 551.

**Objection to an Insufficient Payment** should be made at the time it is paid. *Dixon v. Lee*, 5 Tyrw. 180.

**1. United States.** — *In re Thomas*, 1 Dill. (U. S.) 420; *Matter of Griffen*, 2 Ben. (U. S.) 209, 11 Fed. Cas. No. 5,810.

*Illinois.* — *Bonner v. People*, 40 Ill. App. 628. *Iowa.* — *State v. Willis*, 79 Iowa 326; *State v. Keenan*, 111 Iowa 286.

*Kentucky.* — *Thurman v. Virgin*, 18 B. Mon. (Ky.) 791.

*Massachusetts.* — *Robinson v. Trull*, 4 Cush. (Mass.) 249; *Atwood v. Scott*, 99 Mass. 177.

*Minnesota.* — *Kipp v. Dawson*, 59 Minn. 82.

*Missouri.* — *Larimore v. Bobb*, 114 Mo. 446.

*Nebraska.* — *Compare Huckins v. State*, 61 Neb. 871.

*New Hampshire.* — *Gunnison v. Gunnison*, 41 N. H. 121.

*New York.* — *Courtney v. Baker*, 3 Den. (N. Y.) 27; *Bradley, etc., Co. v. Harrison*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 241; *Muscott v. Runge*, (Supm. Ct. Gen. T.) 27 How. Pr. (N. Y.) 85.

*Oregon.* — *Egan v. Finney*, 42 Oregon 599.

*Rhode Island.* — *Holden v. Shove*, 1 R. I. 287.

*Vermont.* — *Mattock v. Wheaton*, 10 Vt. 493.

See *infra*, this subsection, **Actions Relating to Compensation** — **Against a Witness** — **Recovery of Fees Paid.**

**The United States Is Not Required to Tender witness fees in advance.** *In re Storrer*, 63 Fed. Rep. 564. It is only where a witness for the government has not the means of paying his expenses that it is necessary for the money to be tendered to him in order to make it incumbent on him to obey the process of the court. *U. S. v. Durling*, 4 Biss. (U. S.) 509, 25 Fed. Cas. No. 15,010.

**In Tennessee** a statute in 1794 abrogated the common-law rule that the expenses of a witness should be tendered before he should be compelled to attend court. *Smith v. Barger*, 9 Yerg. (Tenn.) 323.

**Tender of Insufficient Sum.** — *Pease v. Bamford*, 96 Me. 23.

**2. A Continuance Should Not Be Allowed** a party on the ground of the absence of a witness who lives in another county who has not been made the requisite tender or payment and who has not waived the same. *Thurman v. Virgin*, 18 B. Mon. (Ky.) 791.

**3. Waiver.** — *Newton v. Harland*, 3 Jur. 679; *Pell v. Daubeny*, 5 Exch. 955; *Wilson v. St. Louis, etc., R. Co.*, 53 Mo. App. 342; *Rozek v. Redzinski*, 87 Wis. 525.

**4. Presumption as to Waiver.** — *Collins v. Godefroy*, 1 B. & Ad. 950, 20 E. C. L. 514; *Amey v. Long*, 1 Campb. 16; *Willis v. Peckham*, 1 Brod. & B. 515, 5 E. C. L. 171; *Robins v. Bridge*, 3 M. & W. 114; *Pell v. Daubeny*, 5 Exch. 955, 1 Eng. L. & Eq. 450; *Goodwin v. West, Cro. Car.* 522; *Gunnison v. Gunnison*, 41 N. H. 121.

**5. Waiver Must Be Express.** — *Muscott v. Runge*, (Supm. Ct. Gen. T.) 27 How. Pr. (N. Y.) 85.

**6. Suit for Compensation Against Party Securing Attendance** — *England.* — *Pell v. Daubeny*, 5 Exch. 955; *Richards v. Goddard*, L. R. 17 Eq. 238.

*United States.* — *U. S. v. Sanborn*, 28 Fed. Rep. 299; *Cahn v. Monroe*, 29 Fed. Rep. 675; *The Vernon*, 36 Fed. Rep. 113; *The Syracuse*, 36 Fed. Rep. 830; *In re Williams*, 37 Fed. Rep. 325; *Burrow v. Kansas City, etc., R. Co.*, 54 Fed. Rep. 278; *Anderson v. Moe*, 1 Abb. (U. S.) 299; *U. S. v. Williams*, 1 Cranch (C. C.)



taxable against the adverse party, or although the party procuring such attendance is successful in the suit.<sup>1</sup> The opposite party incurs no legal obligation towards the witness of his adversary. There is no privity of contract between them.<sup>2</sup>

An Action upon a Certificate of Attendance may be brought, even after the trial and judgment, against the party in whose behalf the witness attended.<sup>3</sup>

A Witness Having Received Insufficient Fees when served with a subpoena, and who makes no further demand, may maintain an action against the party on whose behalf he has been subpoenaed for additional expenses incurred by him in attending the trial.<sup>4</sup>

A Defendant in a Criminal Action, who has been tried and acquitted, has been held bound to pay his own witnesses on the ground that he incurs the expense by calling on them for services he thinks he needs. He must pay them for labor done at his request.<sup>5</sup> But a witness for the state cannot bring suit on his certificate of attendance against a defendant after his conviction.<sup>6</sup>

At the End of Each Term a witness may bring an action for his compensation against the party summoning him.<sup>7</sup>

(b) Evidence — (aa) *Subpœnas*. — The subpoena is evidence that the witness was subpoenaed.<sup>8</sup>

(bb) *Certificates*. — It is the duty of the clerk of the court, in some jurisdictions, to issue a certificate to certain witnesses and to state therein the amount of compensation to which each is entitled and the facts which make it a good claim against the county.<sup>9</sup> Such certificates are generally admitted as *prima*

178; *Cummings v. Akron Cement, etc., Co.*, 6 Blatchf. (U. S.) 509; *Dennis v. Eddy*, 12 Blatchf. (U. S.) 195; *Dreskill v. Parish*, 5 McLean (U. S.) 241, 7 Fed. Cas. No. 4,076. See also *Eastman v. Sherry*, 37 Fed. Rep. 844. *Alabama*. — See *Porter v. Williams*, 22 Ala.

525.

*Georgia*. — *Crozier v. Berry*, 27 Ga. 346.

*Illinois*. — *Carpenter v. People*, 8 Ill. 147.

*Iowa*. — *Donnelly v. Johnson County*, 7 Iowa

410.

*Kansas*. — *Bennett v. Kroth*, 37 Kan. 235.

*Louisiana*. — *Smith v. Shreveport*, 10 La. Ann. 582.

*Mississippi*. — *Perkins v. Delta Pine Land, etc., Co.*, 66 Miss. 378; *Hall v. Moore*, 70 Miss. 75.

*New Hampshire*. — *Gunnison v. Gunnison*, 41 N. H. 121. See also *State v. Grand Trunk R. Co.*, 58 N. H. 198.

*New York*. — *Andrews v. Bates*, 5 Johns. (N. Y.) 351; *Watts v. Van Ness*, 1 Hill (N. Y.) 76.

*North Carolina*. — *State v. Massey*, 104 N. Car. 877; *State v. Whithed*, 3 Murph. (7 N. Car.) 223; *Costin v. Baxter*, 7 Ired. L. (29 N. Car.) 111.

*Pennsylvania*. — *Maher v. Mitchell*, 1 Pa. Co. Ct. 570.

*Tennessee*. — *Wetherspoon v. Killough*, Mart. & Y. (Tenn.) 43; *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 323; *Carren v. Breed*, 2 Coldw. (Tenn.) 467; *Burson v. Mahoney*, 6 Baxt. (Tenn.) 306.

*Texas*. — *Sapp v. King*, 66 Tex. 570.

**Witness Summoned by Both Parties Held Entitled to Compensation from Both.** — *Peace v. Person*, 1 Murph. (5 N. Car.) 188. But see *contra*, *Renfro v. Kelly*, 10 Ala. 338; *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 323; *Com. v. Cozens*, 1 Ashm. (Pa.) 265.

1. *Boyd v. Humphries*, 53 Ill. App. 422.

2. *Smith v. Shreveport*, 10 La. Ann. 582. See also *Hittson v. Burrow*, 28 Tex. Civ. App. 442.

3. **Action upon Certificate of Attendance.** — *Hill v. White*, 1 Ala. 577; *Nicolas v. Trickey*, 19 Ala. 92.

**Demand Not Prerequisite to Suit.** — *Utt v. Long*, 6 W. & S. (Pa.) 174.

4. **Witness in Receipt of Insufficient Fees.** — *Pell v. Daubeney*, 5 Exch. 955, 1 Eng. L. & Eq. 450.

5. **Acquitted Defendant in Criminal Action.** — *Bennett v. Kroth*, 37 Kan. 238; *State v. Whithed*, 3 Murph. (7 N. Car.) 223. Compare *Howell v. Blackwell*, 7 Ga. 443.

6. **Suit on Certificate After Conviction.** — *Nicolas v. Trickey*, 19 Ala. 92.

7. **When Action May Be Brought.** — *Wetherspoon v. Killough*, Mart. & Y. (Tenn.) 43; *Carren v. Breed*, 2 Coldw. (Tenn.) 465; *Burson v. Mahoney*, 6 Baxt. (Tenn.) 306.

8. **Subpœna.** — *Flores v. Thorn*, 8 Tex. 377.

9. **Witness Certificate.** — *Herr v. Seymour*, 76 Ala. 270; *Alston v. Yerby*, 108 Ala. 480; *Climie v. Appanoose County*, (Iowa 1904) 101 N. W. Rep. 98; *State v. Greene*, 91 Wis. 500.

**The Attendance of the Witness** is the fact upon which the right to the certificate primarily depends. *State v. Greene*, 91 Wis. 500.

**A Certificate Is Not a Claim Against the County.** — *Briggs v. Coleman*, 51 Ala. 561.

**If, on a Change of Venue,** a certificate of the clerk of a court, to which a criminal action was taken, relates that a certain person attended as a witness for a specified number of days and is entitled to a certain amount in compensation, and that the same is payable by the county in which the action was instituted, the certificate is not an order upon

*fact* evidence of the right of the witness to the compensation set forth therein.<sup>1</sup>

The Certificate of the Foreman of a Grand Jury is evidence of the claim of and amount due to a witness who has appeared and testified before the grand jury, in obedience to a proper summons.<sup>2</sup>

(*cc*) *Witness Tickets*. — The witness ticket which the witness obtains from the clerk for his attendance in a criminal action is merely evidence that he has attended as a witness. It furnishes no evidence as to how he is to be paid.<sup>3</sup> Witnesses who prove their attendance by ticket, obtained on oath, should specify the particular term or terms at which they attended, and also the number of days' attendance at each term or terms.<sup>4</sup>

(*dd*) *Affidavits of Witnesses*. — A witness having proven his attendance by his affidavit, such affidavit is evidence for him until disproven.<sup>5</sup>

(*ee*) *Taxation of Fees*. — On general assumpsit to recover witness fees, the fact that the fees of the witness have been taxed has a tendency to show that the witness has been in attendance, and this evidence is properly admitted.<sup>6</sup>

(*ff*) *Order of Court Directing Payment*. — The order of a Circuit or District Court directing the payment of a witness's fees is a summary method for ascertaining and paying them, and a protection to the marshal who makes such payment, but is in no sense an adjudication and fixes no right. It is not therefore conclusive evidence for the witness in the case.<sup>7</sup>

(2) *Against Party Adjudged to Pay Costs — After Judgment*. — While it is true that, during the progress of a suit, a witness may recover from the party at whose instance he was summoned the fees for his attendance at the end of each term or as soon as a suit is disposed of, it is also true that, after judgment, the claim is not against the person summoning him, but is against the person bound by the judgment to pay costs, unless such party is insolvent.<sup>8</sup>

**Witnesses Not Summoned** are not entitled to prove their attendance so as to charge the losing party with the amount of their fees.<sup>9</sup> And there is authority for

such county. *Stoll v. Johnson County*, 6 Wyo. 231.

**A Certificate May Be Equivalent to Judgment and Execution** for the purpose of a levy and sale. *Worland v. Outten*, 3 Dana (Ky.) 477.

**In Alabama** certificates are receivable in payment of any debt due to the county for fines and forfeitures and are payable by the treasurer out of any fines and forfeitures in the county treasury. *Alston v. Yerby*, 108 Ala. 480.

**In Georgia** payment out of the county funds is not required to be made unless the attendance and mileage of the witness is certified by the solicitor-general. *Freeble v. Graves*, 114 Ga. 418.

**In Massachusetts** a certificate signed in the name of a witness, by his duly authorized agent, is sufficient, as such certificate need not be signed by the witness with his own hand. *Rothschild v. Knight*, 176 Mass. 48.

**In South Carolina** no fees or other compensation are allowed to any witness bound over or summoned to testify in any case in the Circuit Court of General Sessions, unless the circuit judge who has tried the cause shall certify that such witness was material in the cause. *Hellams v. Greenville County*, 32 S. Car. 441; *State v. Bullock*, 54 S. Car. 300.

**1. Evidence — Certificate — Alabama**. — *Hill v. White*, 1 Ala. 576; *Carville v. Reynolds*, 9 Ala. 969; *Marsh v. Branch Bank*, 10 Ala. 57; *Burns v. Howard*, 68 Ala. 352; *Ward v. Chavers*, 115 Ala. 427.

*Mississippi*. — *Perkins v. Delta Pine Land Co.*, 66 Miss. 378.

*Tennessee*. — *Burson v. Mahoney*, 6 Baxt. (Tenn.) 306.

*Texas*. — *Crawford v. Crain*, 19 Tex. 145; *Gause v. Edmiston*, 35 Tex. 69.

**In Texas** a suit for witness fees, not being supported by the certificate of the clerk on his affidavit, the witness cannot claim the benefit of any presumption that might have arisen in his favor from such certificate. He should show that he has been subpoenaed by the party by the production of the subpoena, or account for its absence, and show at what time he attended. *Harris v. Coleman*, 8 Tex. 278.

**2. Certificate of Foreman of Grand Jury**. — *Scruggs v. State*, 111 Ala. 60.

**3. Witness Ticket**. — *Young v. Buncombe County*, 76 N. Car. 316.

**4. Facts to Be Specified**. — *Thompson v. Hodges*, 3 Hawks (10 N. Car.) 318.

**5. Affidavits of Witnesses**. — *Robison v. Banks*, 17 Ga. 211.

**6. Taxation of Fees**. — *Hamilton v. Gray*, 67 Vt. 233.

**7. Order of Court Directing Payment**. — *Duval v. U. S.*, 23 Ct. Cl. 102.

**8. Action Against Party Adjudged to Pay Costs — After Judgment**. — *Belden v. Snead*, 84 N. Car. 243; *Carter v. Wood*, 11 Ired. L. (33 N. Car.) 22; *Thompson v. Hodges*, 3 Hawks (10 N. Car.) 318.

**9. Witnesses Not Summoned**. — *Stern v. Her-*

holding that witnesses summoned but not subpœnaed cannot look to the losing party for their compensation, but must recover, if at all, from the party in whose behalf the summons is issued.<sup>1</sup>

(3) *Intervention in Own Name.* — It is a general proposition, applicable to both civil and criminal cases, that witnesses have no independent right to have the costs of their attendance taxed against one party in preference to another. The most that can be said is, that when they attend under compulsory process, they have the right to have the costs of their attendance taxed against somebody, or else to have some remedy against the party summoning them. It is probable that no case can be found where a witness has been permitted to intervene by any proceeding in a cause in his own name for the purpose of changing the taxation of the costs of his attendance from one party to another. This right must be exercised, if at all, through the agency of a party to the suit.<sup>2</sup>

(4) *Against the County* — (a) *Witnesses in Criminal Proceedings.* — Witnesses for the prosecution are, as a general rule, entitled to recover their fees from the county,<sup>3</sup> although a few courts have held that the services of witnesses for the prosecution in criminal cases are of that class of general services which every member of the community is bound to render for the general as well as his own good.<sup>4</sup>

Witnesses for the Defense in a criminal prosecution have no right to recover their fees from the county where there is no statute giving such right.<sup>5</sup> In some jurisdictions, however, the legislature has provided for the payment of such witnesses in certain cases.<sup>6</sup>

(b) *Witnesses in Compensative Proceedings.* — Witnesses in a compensative proceeding before the grand jury on whose testimony an indictment is obtained should not be paid by the county when the object of the proceeding is not the punishment of a crime, but compensation to the heirs of a person killed through the negligence of the defendant. In such case it is reasonable that such fees should be advanced by those for whose benefit the proceeding is instituted and carried on.<sup>7</sup>

b. BY PARTIES TO ACTIONS — (1) *Against a Witness* — (a) *Recovery of Fees Paid.* — The sum tendered to a witness on serving the subpœna is a disbursement allowed by law. It belongs to the witness and cannot be recovered back by the party paying it, unless the witness has failed, without a reasonable excuse, to attend the court in obedience to the subpœna. By accepting the money, the witness impliedly agrees to perform the duty enjoined upon him by the writ. The settlement of the suit by the parties, or the postponement of it, works a discharge of the witness's liability to attend court, but does not impair his right to retain the money tendered to him.<sup>8</sup> If, however, the witness wrongfully fails to attend, the fees paid to him may be recovered by

ren, 101 N. Car. 516; Thompson v. Hodges, 3 Hawks (10 N. Car.) 318.

1. *Witness Summoned but Not Subpœnaed.* — Dreskill v. Parish, 5 McLean (U. S.) 24, 7 Fed. Cas. No. 4,076.

2. *Intervention in Own Name.* — State v. Oliver, 50 Mo. App. 217.

3. *Witness for Prosecution.* — Alston v. Yerby, 108 Ala. 480; Sargent v. Cavis, 36 Cal. 552; Murphy v. Madden, 130 Cal. 674; Donnelly v. Johnson County, 7 Iowa 419; Huckins v. State, 61 Neb. 871. See also Freeble v. Graves, 114 Ga. 418.

4. *Attendance Considered Duty of Citizen.* — O'Kane v. People, 46 Ill. App. 225; Israel v. State, 8 Ind. 467; Morin v. Multnomah County, 18 Oregon 163.

5. *Witness for Defense — In Absence of Statute.*

— Donnelly v. Johnson County, 7 Iowa 419; Pengelly v. Ashland County, 11 Ohio Dec. 620.

6. *Under Statute.* — Jones County v. Linn County, 68 Iowa 63; Climie v. Appanoose County, (Iowa 1904) 101 N. W. Rep. 98; State v. Massey, 104 N. Car. 877; In re Smith, 105 N. Car. 170; Merrimon v. Henderson County, 106 N. Car. 372; State v. Horne, 119 N. Car. 853; Guilford v. Beaufort County, 120 N. Car. 23; Clerk's Office v. Carteret County, 121 N. Car. 30; State v. Ray, 122 N. Car. 1095; State v. Hicks, 124 N. Car. 829.

7. *Witnesses in Compensative Proceeding.* — State v. Grand Trunk R. Co., 58 N. H. 198.

8. *Action by Party to Recover Fees Paid.* — Leighton v. Twombly, 9 N. H. 483; Ford v. Monroe, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 204.



the party by whom he has been summoned.<sup>1</sup>

Witnesses Subpoenaed and Paid by Both Parties have been held to be liable to the party from whom the costs are collected, and the sum recoverable is not that which such party has paid but the amount which has been improperly and fraudulently received a second time.<sup>2</sup>

Where the Fees of a Witness Have Been Improperly Taxed in the bill of costs and the losing party has paid them, and, on his motion to retax, the same have been stricken out, he has no right of action against the witness to recover them, but his action, if any, is against the party to the suit in whose name the costs were recovered.<sup>3</sup>

(b) Attachment and Damages for Nonattendance. — In England it is well settled that, unless there is a tender of the whole necessary expenses of the witness's journey to and from the place of trial, and of his necessary stay there, the court will not grant an attachment for the nonattendance.<sup>4</sup>

In the United States it has been held necessary to prove service of the summons and a tender of sufficient fees in order to recover damages against a witness for failure to attend and testify. A waiver of the right to service and fees cannot be shown.<sup>5</sup>

(2) *Against Opposite Party.* — A party to an action who has been awarded costs and who has received a bond therefor cannot bring an action for the fees of witnesses where it does not appear that the party has either paid any part of such fees, or that they were due the party's witnesses, or that he had any interest in the fees, or that he was authorized by the witnesses to collect them or sue for them. If, however, the party states facts showing that he is suing as the trustee of an express trust or as a person with whom the contract was made for the benefit of the witnesses holding the certificate, he might probably maintain the action without making the witnesses parties, the bond being good as a common-law bond.<sup>6</sup>

c. BY ASSIGNEE OF CERTIFICATE. — A witness may transfer his certificate by delivery and authorize the holder to use his name to recover the amount specified in such certificate.<sup>7</sup>

d. CRIMINAL PROSECUTION — (1) *Contempt for Failure to Attend.* — A witness will not be punished for contempt for failing to attend as a witness in a civil case unless his fees have been paid or tendered.<sup>8</sup>

(2) *Perjury as to Amount Due.* — A statute providing that where a witness swears falsely as to the amount due him, he shall be entitled to no fees at all but shall be liable to the party whom he tries to defraud for four times the amount of the fees unjustly claimed, does not apply where the clerk issues an execution for an excessive amount. It is presumed in such a case that the clerk has discharged his duty and taken the proper means of informing himself as

1. *Witness Wrongfully Failing to Attend.* — *In re Wetmore*, 19 N. Bruns. 639; *Ehle v. Bingham*, 4 Hill (N. Y.) 595. See also *Ford v. Monroe*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 204.

If an Insufficient Sum Is Tendered as a witness fee, the witness is not obliged to obey the subpoena. But he cannot refuse to attend court on that ground and also retain the money received. *Pease v. Bamford*, 96 Me. 23.

Conduct Money Has Been Recovered in England as money had and received. It was held that the money was paid for the purpose of defraying the expenses of the witness's journey and accordingly if there was no journey there was no expense and the consideration failed. *Martin v. Andrews*, 7 El. & Bl. 1, 90 E. C. L. 1, 2 Jur. N. S. 1121.

2. *Witnesses Subpoenaed and Paid by Both Parties.* — *Johnson v. Wideman*, Cheves L. (S.

Car.) 26. But see *Crompton v. Hutton*, 3 Taunt. 230.

3. *Fees Improperly Taxed.* — *Gray v. Alexander*, 7 Humph. (Tenn.) 17.

4. *Attachment for Nonattendance.* — *Pearson v. Iles*, 2 Dougl. 556; *Tidd Pr. c. 35*; *Bowles v. Johnson*, 1 W. Bl. 36; *Fuller v. Prentice*, 1 H. Bl. 49; *Chapman v. Pointon*, 2 Stra. 1150; *Hallet v. Mears*, 13 East 15; *Re Darling*, 39 U. C. Q. B. 339.

5. *Prerequisites to Recovery of Damages.* — *Robinson v. Trull*, 4 Cush. (Mass.) 249.

6. *Against Each Other.* — *Munzesheimer v. Byrne*, 56 Ark. 116.

7. *Action by Assignee of Certificate.* — *Bollin v. Blythe*, 46 Fed. Rep. 181; *Findley v. Wyser*, 1 Stew. (Ala.) 23; *Burns v. Howard*, 68 Ala. 352.

8. *Criminal Prosecution — Contempt.* — *Bonner v. People*, 40 Ill. App. 628.

to the amount due each witness before undertaking to issue an execution.<sup>1</sup>

**11. Unconstitutional Disposition of Unclaimed Fees.** — A statute providing that all fees which shall not have been duly demanded and received out of the hands of the clerk or justice by the person for whom the same may have been deposited, shall be paid to the school commissioner, is unconstitutional.<sup>2</sup>

**12. Prohibition of Speculation in Witness Fees.** — The legislature of a state may prohibit speculation in witness fees.<sup>3</sup>

**WITTINGLY.** — Knowingly; with knowledge; by design.<sup>4</sup>

**WM.** — See note 5.

**WOLFRAM.** — See note 6.

**WOMAN.** — See note 7.

**WOOD.** — The word "wood" has several well-defined and recognized

**1. Perjury as to Amount Due.** — *State v. Everett*, 93 Ga. 575.

**2. Disposition of Unclaimed Fees.** — *State v. Boyles*, 7 Blackf. (Ind.) 90.

**3. Speculation in Witness Fees.** — *Davis v. State*, 3 Lea (Tenn.) 376.

**4. Wittingly.** — *Webst. Dict.*; followed in *Osborne v. Warren*, 44 Conn. 357. In that case a statute of *Connecticut* provided that "every person who shall *wittingly* and unlawfully throw down, or leave open, any bars, gate, or fence," belonging to any inclosure, shall pay to the party injured double damages and a sum not exceeding five dollars, to be recovered in an action of trespass. The defendant in a controversy with the plaintiffs as to a right of way over their land threw down their fence, claiming and believing that he had a right to do so, but the court found that he had no right of way. It was held that his case fell within the intent of the statute. The court said: "That we may know the precise force of the word *wittingly* we resort to the dictionary. Webster defines it thus: 'Knowingly — with knowledge — by design.' We must presume that in the common speech of the people it imported knowledge simply; that the legislature understood and used it in the same sense, and that the statute is aimed at persons who knowingly and by design throw down fences and leave open gates and bars, having no legal right so to do, excluding only cases which are the result of accident or forgetfulness. The legislature designed to punish to the extent of double damages all persons who, having controversies with adjoining owners as to dividing lines, take the law into their own hands, and render judgment and do execution in their own favor, thereby exposing inclosures to serious damage from incursions of cattle, in the absence and without the knowledge of the owner. The law intends that all persons shall adjust such differences through its appointed means."

**Willingly and Wittingly.** — See *WILLING*, ante.

**5. Wm.** — *Wm.* was held a sufficient abbreviation of the Christian name William. See *Henry v. Armitage*, 12 Q. B. D. 257.

**6. Wolfram.** — See *Hempstead v. U. S.*, 115 Fed. Rep. 256.

**7. Age.** — In *Com. v. Watts*, 4 Leigh (Va.) 672, it was held that a white girl under twelve years of age, and not having attained to puberty,

is a white *woman*, within the meaning of the statute making it felony punishable with death for a slave, free negro or mulatto, to attempt to ravish a white *woman*.

Upon the meaning of *woman* in a statute making the taking any *woman* against her will, with intent to have carnal knowledge with her, a crime, in *Couch v. Com.*, (Ky. 1895) 29 S. W. Rep. 29, the court said: "The word *woman* is used generically in the statute and embraces every female of the human race. We cannot believe the legislature intended by this statute to protect mature *women* from the wanton conduct of brutish men and allow females of tender years to be subjected to their assaults and lascivious carriage. In the case of *Malone v. Com.*, 91 Ky. 307, the complainant was, when the offense was committed, between thirteen and fourteen years of age. The accused was convicted and the question was not raised that she was not a *woman*. In *Howell v. Com.*, 5 Ky. L. Rep. 174, the complainant was under fourteen years of age. The question was raised that she was not a *woman* in the contemplation of the statute. The court held the word *woman*, as used in the statute, was synonymous with the word 'female.'"

**Woman Child.** — In *Com. v. Bennet*, 2 Va. Cas. 237, the court said that it was at a loss to see a distinction between a "*woman child*" and a "female child."

**Woman and Female Synonymous.** — In *Myers v. State*, 84 Ala. 11, it was held that the use of the word "female," in an indictment, meant the same thing as *woman*, and did not render the indictment insufficient. The court said: "The words 'female' and *woman*, used as the former was in the indictment before us, mean the same thing, and the indictment is sufficient. 1 Brick. Dig. 499, § 736; *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643; *Smith v. State*, 63 Ala. 55; *Block v. State*, 66 Ala. 493; *Parker v. State*, 39 Ala. 365; *Watson v. State*, 55 Ala. 150."

**Settlement of Pauper — Married Woman.** — In *Somerville v. Boston*, 120 Mass. 574, it was held that the *Massachusetts* statute providing "that any *woman* of the age of twenty-one years, who resides in any place within this state for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place," applied only to unmarried *women*.

**Woman of Ill-repute.** — In *Burke v. Stewart*,

meanings: 1. A thick collection of trees; a forest.<sup>1</sup> 2. The substance of trees; trees sawed or cut for agricultural or other purposes; timber.<sup>2</sup> 3. Trees sawed or cut for fuel.<sup>3</sup>

**WOODEN BUILDING.** (See also the title FIRE LIMITS, vol. 13, p. 396.) — See note 4.

**WOODHOUSE.** — See note 5.

**WOOD PULP.** — See note 6.

81 Ill. App. 506, it was held that to charge a *woman* to be a *woman* of ill-repute merely was not actionable in itself.

1. **Wood.** — Worc. Dict., quoted in *State v. Howard*, 72 Me. 459. See also the title WOODS AND FORESTS, post.

"So Long as Wood Grows and Water Runs." — In *Arms v. Burt*, 1 Vt. 309, it is said: "It runs to him, his heirs and assigns, and continues so long as '*wood* grows and water runs.' Those terms extend as fully beyond the use of land as the term '*forever*.'"

2. Worc. Dict., quoted in *State v. Howard*, 72 Me. 459. See also the title LOGS AND LUMBER, vol. 19, p. 522.

In *Darling v. Clement*, 69 Vt. 293, it was said: "One definition of the word *wood* is the hard substance of a tree or shrub as cut for use. This is its most common meaning. The old maxim is, '*Arbor dum crescit, lignum dum crescere nescit*;' a tree while it grows, *wood* when it cannot grow, — that is, when it is cut down."

**Lumber and Bark.** — A conveyance was conditioned upon the grantee applying to the purchase money the avails of any *wood* cut from the land other than that necessary for sugar *wood*. It was held that the term *wood* included lumber and bark. *Hutchinson v. Ford*, 62 Vt. 97.

**Refuse Wood and Timber.** — Sawdust and shavings are "refuse *wood* and timber." *State v. Howard*, 72 Me. 459. This was an indictment for throwing such stuff into the Penobscot river from a sawmill.

**Property Employed in the Manufacture of Wood.** — In *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194, it was held that vessels employed in conveying timber to sawmills were not within this phrase as used within the exemption statute. See also the title EXEMPTIONS, vol. 12, p. 350.

3. Worc. Dict., quoted in *State v. Howard*, 72 Me. 459.

**Standing Wood.** — A sale of "standing *wood*" includes trees suitable for timber as well as those for fuel. *Strout v. Harper*, 72 Me. 270. The court said: "True, the word *wood* is often used to designate fuel. But when so used it means fuel wholly, or at least partially, prepared for the fire. The term 'standing *wood*' cannot be so used. It can apply only to trees. And when there is nothing in the context, or in any other part of the deed, to indicate that it is used in a more limited sense, we think it must be held to include all the trees — trees suitable for timber as well as those fit only for firewood."

**Firewood — Cord Wood.** — Under a statute requiring "firewood" to be measured it is not necessary to measure trimmings of lumber, con-

sisting of pieces from one or two inches to one or two feet long, and sold by the cart load. The court said: "We cannot doubt that it means cord *wood* of the usual length. \* \* \* It never could have been the intention of the legislature that chips or the trimmings of lumber, which is sold by the load and not by the cord, should be surveyed." *Duren v. Gage*, 72 Me. 118.

**Seasonable Wood.** — See *Dashwood v. Magniac*, (1891) 3 Ch. 306.

4. **Wooden Building.** — In *Montgomery v. Louisville, etc., R. Co.*, 84 Ala. 132, it was held that a prohibition against *wooden buildings* within the fire limits did not apply to an extension of a brick building by an addition at one end two stories high constructed of wooden framework resting on brick pillars and covered on the outside with corrugated iron.

A bungalow constructed of wood and corrugated iron was erected on a piece of land for the purpose of exhibition and sale, but it was not used or occupied, or intended to be used or occupied, on the spot on which it was erected, and it was held that this was not a "*wooden* structure or erection of a movable or temporary character." *London County Council v. Humphreys*, (1894) 2 Q. B. 755.

An addition to a building made by erecting a wooden frame and placing a brick wall around it has been held to be a *wooden building*. *Tuttle v. State*, 4 Conn. 68.

A building composed partly of wood and partly of brick was held not to be a *wooden building*. *Stewart v. Com.*, 10 Watts (Pa.) 306.

A structure of wood laid on timbers on the surface of the ground was held to be a *wooden building*. *Stevens v. Gourley*, 7 C. B. N. S. 99, 97 E. C. L. 99.

**Lease.** — In *Oliver v. Dickinson*, 100 Mass. 114, it was held that the lease of a *wooden building* did not pass as appurtenant any title to an outbuilding, yard, or passageway in an adjoining curtilage equally belonging to a brick house.

5. **Woodhouse.** — A policy of insurance on a "a dwelling house and *woodhouse*," described in the application as "occupied for the usual purposes," covers a building, built at one time, with a single frame and roof, and designed for one building, for a carriage house and *woodhouse*, of which the wood room constitutes two-thirds, and is separated from the carriage room by a loose partition extending to the eaves on one side, and halfway to the roof on the other; and evidence is admissible that the whole building was called by the tenants and neighbors the *woodhouse*. *White v. Mutual F. Assur. Co.*, 8 Gray (Mass.) 566.

6. **Wood Pulp.** — See *Goldman v. U. S.*, 87 Fed. Rep. 194. This was a tariff case.



# WOODS AND FORESTS.

## I. TERMS DEFINED AND EXPLAINED.

1. *Woods.*
2. *Forests.*

## II. GOVERNMENT OWNERSHIP OF FOREST RESERVES --- TRESPASS.

### CROSS-REFERENCES.

See the titles *LOGS AND LUMBER*, vol. 19, p. 522; *STATE AND PUBLIC LANDS*, vol. 26, p. 452; *TREES AND TIMBER*, vol. 28, p. 536; *TRESPASS*, vol. 28, p. 548.

**I. TERMS DEFINED AND EXPLAINED** — 1. **Woods.** — Woods are large and thick collections of growing trees.<sup>1</sup>

"Woods" Includes the Land as well as the trees growing thereon.<sup>2</sup>

2. **Forests.** — While the term "forest" has been said usually to indicate a wood of considerable extent,<sup>3</sup> the two terms may be used synonymously.<sup>4</sup>

**Forest Preserves** consist of all the lands within certain specified limits which are owned by a state.<sup>5</sup>

**Forest Commission.** — In *New York*, the forest commission is a board having full power to protect and maintain the rights of the state in the wild and unsettled lands embraced within the limits of the forest preserve.<sup>6</sup>

**II. GOVERNMENT OWNERSHIP OF FOREST RESERVES --- TRESPASS.** — The government may have the ownership of forest reserves, and the unauthorized use thereof for sheep grazing may be a trespass, but there must be a special statutory enactment making such use an offense before a regulation of a department officer can make it a criminal act.<sup>7</sup>

**WOOL.** — See *MANUFACTURE*, vol. 19, p. 926.

**WOOL WASTE.** — See note 8.

**WORDS.** (See also *INVENTED WORDS*, vol. 17, p. 419, and see the titles *INTERPRETATION AND CONSTRUCTION*, vol. 17, p. 1; *STATUTES*, vol. 26, p. 520;

1. **Definitions** — **Woods.** — See *Cent. Dict.* "Wood;" *Worcester's Dict.* "Wood." See also *State v. Howard*, 72 Me. 459.

Under the *North Carolina Statute* the term "woods" means forest lands in their natural state, and is used in contradistinction to lands cleared and inclosed for cultivation. *Averitt v. Murrell*, 4 Jones L. (49 N. Car.) 322.

**A Field Surrounded by an Old Fence** and grown up in broomsedge and wiregrass does not come within the term "woods." *Achenbach v. Johnston*, 84 N. Car. 264.

**But an Old Field, Without Fences**, which was formerly cleared, inclosed, and cultivated, and has been allowed to become overgrown with broomsedge and pine bushes, some of which are as high as a man's head, may be said to be "woods." *Hall v. Cranford*, 5 Jones L. (50 N. Car.) 3.

2. **"Woods" Includes Land.** — *Co. Litt.* 4b; *Hide v. Whistler*, Popham 146; *Boults v. Mitchell*, 15 Pa. St. 380. Compare *Doe v. Beviss*,

7 C. B. 456, 62 E. C. L. 456. See also the title *TREES AND TIMBER*, vol. 28, p. 537.

3. **Forests** — **Wood of Considerable Extent.** — See *Cent. Dict.* "Forest."

4. **Synonymous with Wood.** — See *Cent. Dict.* "Forest;" *Worcester's Dict.* "Wood." See also *State v. Howard*, 72 Me. 459.

**Blackstone Defines Forests** as waste grounds, belonging to the king, replenished with all manner of beasts of chase and venary. 1 Com. 289.

**Every Forest Is a Chase**, but not every chase is a forest. *Co. Litt.* 233a.

5. **Forest Preserves.** — *Meigs v. Roberts*, 42 N. Y. App. Div. 290.

6. **Forest Commission.** — See the statutes of *New York*. See also *People v. Campbell*, 152 N. Y. 51.

7. **Government Ownership** — **Trespass.** — *Dent v. U. S.*, (Ariz. 1903) 71 Pac. Rep. 920. See also *Dastervignes v. U. S.*, 122 Fed. Rep. 30. 58 C. C. A. 346.

8. **Wool Waste.** — See *U. S. v. Patton*, 46 Fed. Rep. 464. This was a tariff case.

**TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION**, vol. 28, p. 358 *et seq.*) — Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly, and perfectly, there is no occasion to have recourse to any other means of interpretation.<sup>1</sup>

**WORDS OF PURCHASE AND LIMITATION.** — See the titles CHILD — CHILDREN, vol. 5, p. 1082; HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318; ISSUE (DESCENDANTS), vol. 17, p. 543; SHELLEY'S CASE, vol. 25, p. 639; WILLS, *ante*; and see LIMITATION (WORDS OF), vol. 19, p. 334.

**WORK ANIMAL—WORK HORSE.** — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 130.

**WORKHOUSE.** — See note 2.

**1. Words.** — *Pea Patch Island*, 1 Wall. Jr. (C. C.) appendix cxlv.

**Words** are nothing except in connection with the intention with which they are used or taken. The *animus* of a look, or other expression of countenance, is as perceptible to the eye as *words* are to the ear, and often much more capable of correct understanding. That this is so is self-evident. *Ray v. State*, 50 Ala. 107.

**Confined to Written Words.** — In *State v. McArthur*, 5 Wash. 558, it was held that the Penal Code of *Washington* did not abolish the distinction between libel and slander. The court said: "It is true that the use of the expression *words*, if construed without reference to the rest of the section, would probably lead us to that conclusion; but while the rule is undoubted that, in construing statutes, *words* must be given their ordinarily accepted meaning, yet that must be taken in consideration with, and made subservient to, another imperative and absolutely necessary rule, that 'the whole section must be construed together;' and considering the descriptive part of this section in connection with the latter part, which provides that every person who makes, composes, or dictates a libel, or who publishes or wilfully

circulates such libel, etc., shall be punished, etc., plainly indicates that the expression *words*, used in the section, has reference to written or printed *words*. This view is strengthened by the provisions of section eighteen, which define what publication of a libel is. There is no provision in said section for the publication of a libel by oral language, as there certainly would have been if it had been the intention of the legislature to incorporate spoken *words* into the definition of libel."

**General Words.** — By general *words* are meant such terms as, according to the common use of language, can, without doing them violence, be made to stand in agreement with the rest of the descriptive phrases. *Evans v. Griscom*, 42 N. J. L. 588.

**Defamatory Words.** — See the title LIBEL AND SLANDER, vol. 18, p. 851.

**Insulting Words.** — See INSULTING, vol. 16, p. 829.

**2. Workhouse.** — In *Farmer v. St. Paul*, 65 Minn. 176, it was said: "The word, in this state, has a well-defined, popular, and legal signification. It is a place or prison where persons convicted of minor offenses and misdemeanors may be confined and kept at labor."

# WORKING CONTRACTS.

BY BRISCOE BALDWIN CLARK.

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**I. DEFINITION.** — A working contract is one under which work or labor is to be performed in the erection, construction, or repair of some building, edifice, structure, or other work.

**Contractor.** — The party who undertakes to perform the required work or labor is designated the contractor.<sup>1</sup>

**1. General Contractor.** — The term "general contractor" includes all persons doing work upon a building under a contract made by such

persons directly with the owner. Merchants', etc., Sav. Bank v. Dashiell, 25 Gratt. (Va.) 616.

**Subcontractor.** — Where the contractor sublets the whole or a part of the work or labor to be performed by him, the party with whom he contracts is designated a subcontractor.<sup>1</sup>

**II. CREATION OF CONTRACT** — 1. In General. — The general rules with regard to the creation of contracts apply, of course, to the creation of working contracts.<sup>2</sup>

2. Offer and Acceptance. — To create a valid working contract there must be a proposal and acceptance.<sup>3</sup>

**Request for Bids or Tenders.** — A mere request by the builder for bids or tenders for the erection or construction of particular works is not an offer on his part to accept any particular bid or tender, or to accept the lowest bid or tender, and without an express or implied acceptance of any bid or tender submitted there is no binding contract.<sup>4</sup> Of course if the builder accepts a particular tender or bid, the contract is consummated, and is binding upon both the contractor<sup>5</sup> and the builder.<sup>6</sup> The acceptance of the bid must, however, be unconditional and without change in the terms of the offer,<sup>7</sup> and if the acceptance varies from the terms of the bid or tender the contractor is entitled only to consider such acceptance as a new offer to be accepted by him upon the terms thereof;<sup>8</sup> and where a tender is not responsive to the proposal, it is an offer by the contractor to do the work according to the terms of the bid, and its acceptance by the builder creates a contract according to the terms of the bid.<sup>9</sup> Where, in pursuance of a request for bids, a bid is made and accepted by the builder, the contractor is justified in refusing to sign a formal contract drawn up by the builder which contains stipulations not contemplated in the proposal for bids, the bid, and its acceptance;<sup>10</sup> but if a bid in answer to a request therefor is accepted by the bidder and subsequently a written contract is entered into by the parties, varying from the terms of the

1. **Builder.** — The employer or party for whom the work or labor is to be performed is commonly designated as the builder; and the term "builder" will be so used throughout this article, though in common parlance it is used also to designate the person who undertakes to build or construct the structure or other work.

2. See the title **CONTRACTS**, vol. 7, p. 88.

3. **Offer and Acceptance** — *United States*. — *People's R. Co. v. Memphis R. Co.*, 10 Wall. (U. S.) 38.

*Alabama*. — *Mobile, etc., R. Co. v. Worthington*, 95 Ala. 598; *Hodges v. Sublett*, 91 Ala. 588.

*California*. — *Nagle v. McMurray*, 84 Cal. 539.

*Colorado*. — *Dunning v. Thomas*, 10 Colo. 84.

*Indiana*. — *Lewis v. Crow*, 69 Ind. 434.

*Massachusetts*. — *Jackson v. Carson*, 160 Mass. 215.

*New York*. — *White v. Corlies*, 46 N. Y. 467; *Poulson v. De Navarro*, 171 N. Y. 692, 57 N. Y. App. Div. 623; *Diskin v. Herter*, 175 N. Y. 480, 73 N. Y. App. Div. 453; *Talmadge v. Spofford*, 41 N. Y. Super. Ct. 428; *Levenson v. Bollova*, (Supm. Ct. App. T.) 85 N. Y. Supp. 386.

*Wisconsin*. — *Johnson v. Filkington*, 39 Wis. 62.

4. **Request for Bids.** — *Reusch v. American Brewing Assoc.*, 44 La. Ann. 1111; *Howard v. Maine Industrial School*, 78 Me. 230; *Doyle v. Desenberg*, 74 Mich. 79; *Hogan v. Shields*, 20 Mont. 438; *Soper v. Buffalo, etc., R. Co.*, 19 Barb. (N. Y.) 310; *Topping v. Swords*, 1 E. D. Smith (N. Y.) 609; *State v. Board of Education*, 42 Ohio St. 374; *Leskie v. Haseltine*, 155 Pa. St. 98.

5. **Acceptance of Bid.** — *Allen v. Yoxall*, 1 C. & K. 315, 47 E. C. L. 314; *Lewis v. Brass*, 3 Q. B. D. 667; *Garfield v. U. S.*, 93 U. S. 242; *McCormack v. Lynch*, 69 Mo. App. 524; *Dutch v. Harrison*, 37 N. Y. Super. Ct. 306.

An intimation, in the written acceptance of a tender, that a contract will be afterwards prepared does not render the acceptance conditional and prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing in formal language the agreement already reached. *Lewis v. Brass*, 3 Q. B. D. 667.

6. *Jackson v. North Wales R. Co.*, 1 Hall & T. 75, 6 R. & Can. Cas. 112, 18 L. J. Ch. 91, 13 Jur. 69; *Mobile, etc., R. Co. v. Worthington*, 95 Ala. 598; *Sanford v. East Riverside Irrigation Dist.*, 101 Cal. 275; *Matter of Protestant Episcopal Public School*, 58 Barb. (N. Y.) 161, 40 How. Pr. (N. Y.) 139; *Highland County v. Rhoades*, 26 Ohio St. 411; *Hughes v. Clyde*, 41 Ohio St. 339; *Joske v. Pleasants*, 15 Tex. Civ. App. 130.

7. **Unconditional Acceptance.** — *Howard v. Maine Industrial School*, 78 Me. 230.

8. *Hughes v. Clyde*, 41 Ohio St. 339.

9. *Sneed, etc., Iron-Works v. Douglas*, 49 Ark. 355; *Schwoerer v. Zimmermann*, (Supm. Ct. App. T.) 63 N. Y. Supp. 1020, 30 Misc. (N. Y.) 800. See also *Heine Safety-Boiler Co. v. Francis*, 105 Fed. Rep. 413.

10. *Lewis v. Brass*, 3 Q. B. D. 667; *Highland County v. Rhoades*, 26 Ohio St. 411.

request for bids, the bid, and the acceptance, the original contract evidenced by the request, bid, and acceptance is merged in the written contract.<sup>1</sup> A proposal for the construction of a particular work may be made as an offer, though made to no particular person, and if accepted by another before its withdrawal will create a binding contract.<sup>2</sup> No particular form of words is necessary to constitute an acceptance of a bid or tender, provided the intention of the builder to accept is evidenced.<sup>3</sup> Still, of course, there must exist such circumstances as will show an intention to accept the bid.<sup>4</sup> A provision in the proposal for tenders stating that the bidders will be required to give security for the performance of the work may be waived by the builder, and a valid contract created upon the acceptance of a bid though no security is given by the bidder.<sup>5</sup> A tender and acceptance may constitute a binding contract if so intended by the parties, although the acceptance may refer to a formal contract to be drawn up afterwards.<sup>6</sup>

**Municipal Contracts.** — In many jurisdictions the statutes require that where municipal corporations are to contract for the performance of work and labor, the contract shall be let, after advertisements for bids, to the lowest bidder.<sup>7</sup>

**Agreements to Stifle Competition in Bids.** — Where contracts for the construction of public works are to be let on competitive bids, public policy requires that competition in bids should be unrestrained, and agreements between intended bidders to stifle competition in bids are illegal as against public policy;<sup>8</sup> and if such agreements result in the letting of the contracts at an unreasonable price to one of the parties to an agreement, the municipality may, on the ground of fraud, be relieved from the contract.<sup>9</sup>

**Reality of Assent.** — To render a building contract valid there must be a mutual and real consent to the terms of the contract; but whatever one party's real interest may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the latter upon that belief performs the contract, the former cannot assert that in fact he did not intend to consent to the terms proposed.<sup>10</sup> So, in making tenders, the fact that the contractor, through negligence in computing the cost of the work to be done, makes a mistake, will not prevent a valid contract from arising upon the acceptance of the tender in good faith, or authorize a court of equity to grant to the contractor relief from the contract on the ground of mistake;<sup>11</sup> and where the parties to a written building contract sign the same, the terms of the contract, in the absence of fraud, are

1. *Taylor v. Fox*, 16 Mo. App. 527; *Megrath v. Gilmore*, 10 Wash. 339.

2. Thus, in *Bull v. Talcot*, 2 Root (Conn.) 119, 1 Am. Dec. 62, where a written promise was made to pay a certain sum to such persons as should build a courthouse of a particular description, it was held that the plaintiffs, having accepted the offer and erected the courthouse according to the proposals, were entitled to recover the sum proposed.

3. **Sufficiency of Acceptance.** — *Burch v. New Lindell Hotel Co.*, 7 Mo. App. 583.

4. See *Leskie v. Haseltine*, 155 Pa. St. 98.

5. *Mobile, etc., R. Co. v. Worthington*, 95 Ala. 598.

6. Thus, where the defendant sent in a tender to do work for the plaintiff, and the plaintiff's agent replied, accepting the tender, and adding "The contract will be prepared by," etc., it was held that the tender and acceptance formed a complete contract. *Lewis v. Brass*, 3 Q. B. D. 667.

7. **Municipal Contracts.** — *Littler v. Jayne*, 124 Ill. 123; *Hoole v. Kinkead*, 16 Nev. 217; *People v. Dorsheimer*, (Supm. Ct. Spec. T.)

55 How. Pr. (N. Y.) 118; *Weed v. Beach*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 470; *People v. Contracting Board*, 27 N. Y. 378; *State v. Licking County*, 26 Ohio St. 531; *State v. Board of Education*, 42 Ohio St. 374; *Com. v. Mitchell*, 82 Pa. St. 343. See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1123.

8. **Agreements to Stifle Bidding.** — *Hannah v. Fife*, 27 Mich. 172; *Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389; *People v. Lord*, 6 Hun (N. Y.) 390; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *People v. Stephens*, 71 N. Y. 527; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627. See also *Whalen v. Brennan*, 34 Neb. 129. And see the title ILLEGAL CONTRACTS, vol. 15, p. 927.

9. *People v. Lord*, 6 Hun (N. Y.) 390; *People v. Stephens*, 71 N. Y. 527.

10. **Reality of Consent.** — *Phillip v. Gallant*, 62 N. Y. 256.

11. *Moffett, etc., Co. v. Rochester*, (C. C. A.) 91 Fed. Rep. 28; *Brown v. Levy*, 29 Tex. Civ. App. 389. See also the title MISTAKE, vol. 20, p. 805.



binding upon both parties, and one cannot escape liability on the ground that he made a mistake as to the terms of the contract.<sup>1</sup>

**3. Certainty.**—A working contract must also have the requisite element of certainty;<sup>2</sup> but it will not be invalidated by failure to specify the time within which it is to be performed or the time when the compensation is to be paid.<sup>3</sup>

**Reference to Plans and Specifications.**—A working contract may, for the purpose of describing the work to be performed, refer to particular plans and specifications or other writings.<sup>4</sup> It is not necessary that such plans and specifications be signed by the parties; it will be sufficient if they are referred to with certainty.<sup>5</sup> Where the working contract does not sufficiently describe the work to be done, but refers for such description to particular plans and specifications, if the plans and specifications referred to cannot be identified, the contract will be invalid for uncertainty;<sup>6</sup> but the fact that a working contract refers for a particular description of the work to be performed to alleged plans and specifications not in existence will not constitute a fatal uncertainty if the contract itself sufficiently describes the work to be done.<sup>7</sup> It has been held that if a written working contract refers to plans and specifications by a particular reference and no plans or specifications are in existence conforming to such reference, parol evidence is not admissible to identify the plans and specifications intended.<sup>8</sup>

**4. Consideration.**—A consideration is always essential to the validity of a working contract.<sup>9</sup> Thus, where a building contract has been fully performed by the contractor, his further agreement to perform extra work must, to be binding upon him, be supported by a consideration.<sup>10</sup> Where the contractor refuses to perform his contract, and the builder promises to pay him additional compensation in consideration of the continued performance of the contract, the authorities are not in accord on the question whether the promise for additional compensation is supported by a sufficient consideration. The prevailing rule seems to be, however, that such a promise is valid as an abandonment of the original contract and the creation of a new contract.<sup>11</sup> Where

1. *Kimberley v. Dick*, L. R. 13 Eq. 1, 41 L. J. Ch. 38; *Wood v. Wack*, 31 Ind. App. 252.

2. **Certainty.**—*Fraley v. Bentley*, 1 Dak. 25; *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384; *Doyle v. Desenberg*, 74 Mich. 79; *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446; *Thomas v. Thomasville Shooting Club*, 123 N. Car. 285; *Levering v. Memphis*, 7 Humph. (Tenn.) 553; *Cole v. Clark*, 4 Chand. (Wis.) 29, 3 Pin. (Wis.) 303.

Thus, a mere schedule of prices for work and materials, signed by the parties, is not a written agreement to erect a building. *Eyser v. Weissgerber*, 2 Iowa 463.

3. *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659.

4. **Reference to Plans and Specifications.**—*O'Connor v. Adams*, (Ariz. 1899) 59 Pac. Rep. 105.

5. *Worden v. Hammond*, 37 Cal. 64.

6. *Worden v. Hammond*, 37 Cal. 64; *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 229; *Donnelly v. Adams*, 115 Cal. 129; *Almini Co. v. King*, 92 Ill. App. 276.

7. *Hitchcock v. Galveston*, 3 Woods (U. S.) 287, 12 Fed. Cas. No. 6,534.

8. Thus, a written contract for the construction of a building which falsely refers to specifications as being signed by the parties to the contract, no specifications having in fact been

signed, is invalid, and parol evidence is not admissible to identify unsigned specifications as those referred to. *Donnelly v. Adams*, 115 Cal. 129.

In *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 229, a building contract referred to plans and specifications as annexed thereto, and the court said: "The insertion of this clause in the contract made with drawings and specifications an essential part thereof as material as was the price of the work or the terms of payment, and until they were annexed to the contract so that its entire terms could be ascertained by mere inspection and without oral testimony, the contract was only inchoate and not complete."

9. **Consideration.**—*Kansas City, etc., R. Co. v. Morley*, 45 Mo. App. 304.

10. *Widiman v. Brown*, 83 Mich. 241.

11. *Georgia*.—*Willingham Sash, etc., Co. v. Drew*, 117 Ga. 850.

*Illinois*.—*Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96.

*Indiana*.—*Coyner v. Lynde*, 10 Ind. 282.

*Iowa*.—*Stevenson v. Robertson*, 55 Iowa 680.

*Massachusetts*.—*Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Pease v. McQuillin*, 180 Mass. 135.

*Minnesota*.—*Grant v. Duluth, etc., R. Co.*, 61 Minn. 395; *McHenry v. Brown*, 66 Minn. 123.

the contractor has agreed to do a particular work for a certain amount, his agreement while the work is in progress to take a smaller amount has been held to be without consideration.<sup>1</sup>

**Mutuality.** — A working contract to be valid must have the necessary element of mutuality.<sup>2</sup> An agreement by one party to erect a building upon the land of another for his own occupancy and to receive as compensation the cost of the material upon a surrender of the house to the landowner is not invalid for want of mutuality.<sup>3</sup>

**Public Policy.** — Working contracts may be to the same extent as other contracts<sup>4</sup> illegal and void on the ground of public policy.<sup>5</sup> For example, such illegality has been held to taint contracts to construct buildings or structures in violation of municipal building regulations.<sup>6</sup>

**5. Necessity for Written Contracts.** — Working contracts which provide for the performance of work and labor and the furnishing of materials are not as a general rule required to be in writing,<sup>7</sup> and where the parties verbally agree upon terms with the intention of creating a binding contract, the fact that the execution of a formal written memorandum is in the contemplation of the parties does not make the writing essential to the completeness of the contract;<sup>8</sup> but though the terms of a working contract are agreed upon, still, if it is understood that the contract is to be reduced to writing before it shall become binding, it is, of course, necessary that this be done before a binding contract is created.<sup>9</sup> Working contracts are not within the provision of the statute of frauds relating to the sale of merchandise, etc., nor are they within the provision of the statute relating to the creation of interests in real estate.<sup>10</sup>

*Missouri.* — *Yeoman v. Mueller*, 33 Mo. App. 343; *Wear v. Schmeltzer*, 92 Mo. App. 314; *Koerper v. Royal Invest. Co.*, 102 Mo. App. 543.

*New Jersey.* — *Osborne v. O'Reilly*, 42 N. J. Eq. 467.

*New York.* — *Hart v. Lauman*, 29 Barb. (N. Y.) 410; *Mansfield v. New York Cent., etc.*, R. Co., 114 N. Y. 331; *Casterton v. McIntire*, (Buffalo Super. Ct. Gen. T.) 3 Misc. (N. Y.) 380; *Innes v. Ryan*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 806.

*Ohio.* — *McClure v. Lorain County*, 24 Ohio Cir. Ct. 72.

*Pennsylvania.* — *Gaynor v. Williamsport, etc.*, R. Co., 189 Pa. St. 5.

*Texas.* — *Brin v. McGregor*, (Tex. Civ. App. 1898) 45 S. W. Rep. 923.

*Vermont.* — *Morrison v. Heath*, 11 Vt. 610; *Grand Isle v. Kinney*, 70 Vt. 381.

*Washington.* — *Brodek v. Farnum*, 11 Wash. 565.

See also the title **CONSIDERATION**, vol. 6, p. 667.

Thus, where a joint contract was made by two persons to erect a church, at a certain price, which contract was by them abandoned, and a contract was then made by one of the building committee, in his own right, with one of the contractors to erect the church at the same price, he to pay the additional actual cost, it was held that this contract was founded on a good consideration and would sustain an action. *Morrison v. Heath*, 11 Vt. 610.

1. *Wendling v. Snyder*, 30 Ind. App. 330.

2. **Mutuality.** — *Dayton, etc., Turnpike Co. v. Coy*, 13 Ohio St. 84; *Greve v. Ganger*, 36 Wis. 369; *Woodward v. Smith*, 109 Wis. 607.

3. *Stevenson v. Robertson*, 55 Iowa 689.

4. **Illegal Contracts.** — See the title **ILLEGAL CONTRACTS**, vol. 15, p. 927.

5. *Stockton v. Weber*, 98 Cal. 433; *Fox v. Rogers*, 171 Mass. 546; *Michael v. Bacon*, 49 Mo. 474, 8 Am. Rep. 138; *Bryson v. Haley*, 68 N. H. 337.

6. *Brinkman v. Eisler*, (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 154, *affirming* (N. Y. City Ct. Tr. T.) 7 N. Y. Supp. 193; *Burger v. Koelsch*, 77 Hun (N. Y.) 44; *Black v. Popper*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 707; *Beman v. Tugnot*, 5 Sandf. (N. Y.) 153; *Chimene v. Pennington*, (Tex. Civ. App. 1904) 79 S. W. Rep. 63.

7. **Necessity for Written Contracts.** — *Girard Ins., etc., Co. v. Cooper*, 162 U. S. 529; *Backus v. Clark*, 1 Kan. 303, 83 Am. Dec. 437; *Plimpton v. Curtiss*, 15 Wend. (N. Y.) 336; *Central Lunatic Asylum v. Flanagan*, 80 Va. 110. See also *Banghart v. Flummerfelt*, 43 N. J. L. 28.

8. *Lewis v. Brass*, 3 Q. B. D. 667, 37 L. T. N. S. 738; *Hodges v. Sublett*, 91 Ala. 588.

9. *Hodges v. Sublett*, 91 Ala. 588; *Hogan v. Shields*, 20 Mont. 438; *Sparks v. Pittsburgh Co.*, 159 Pa. St. 295, 34 W. N. C. (Pa.) 27; *Congdon v. Darcy*, 46 Vt. 478.

10. *Scoggin v. Slater*, 22 Ala. 687; *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356; *Benedict v. Beebee*, 11 Johns. (N. Y.) 145; *Thouvenin v. Lea*, 26 Tex. 612. See also *Clark v. Shultz*, 4 Mo. 235; *Keyser v. School Dist. No. 8*, 35 N. H. 477. And see the title **VERBAL AGREEMENTS (STATUTE OF FRAUDS)**, vol. 29, p. 795.

Of course, if the consideration of a working contract is the conveyance of land, it must be in writing or it will be void under the statute. *Cameron v. Austin*, 65 Wis. 652; *Koch v. Williams*, 82 Wis. 186.

Where the building contract is not to be performed within a year, it will, of course, fall under the provision of the statute of frauds that contracts not to be performed within a year shall be in writing.<sup>1</sup>

**Signing.** — A working contract is valid though signed by only one of the parties if intended to be binding and so acted upon,<sup>2</sup> but where the contract contains mutual agreements, the presumption is that it was not to become binding until signed by both parties.<sup>3</sup>

**6. Delivery of Contract.** — Where the working contract is in writing, there must be a delivery of the written instrument, but such delivery may be to a third person for the benefit of both parties.<sup>4</sup> Thus, a valid delivery may be made to the architect to hold for the benefit of both parties.<sup>5</sup>

**7. Recording.** — In *California* the statute expressly requires certain building contracts to be recorded,<sup>6</sup> but it has been held that as such a provision is intended solely for the benefit of materialmen, subcontractors, etc., the failure to record the contract does not affect its validity as between the builder and the contractor.<sup>7</sup>

**8. Parties.** — The general principles of law with regard to the capacity of particular persons to contract have been heretofore fully discussed in appropriate places. Working contracts may be entered into through duly authorized agents<sup>8</sup> or through committees.<sup>9</sup> Where a committee is appointed by the builder or builders to enter into the contract, a majority of the committee must concur in making the contract,<sup>10</sup> but a majority of the committee may act.<sup>11</sup> The power of a corporation to enter into working contracts is dependent entirely upon the express or implied powers conferred upon it by its charter,<sup>12</sup> and the authority of its officers and agents to contract on the part of the corporation for the performance of work and labor is governed by the general rules of agency.<sup>13</sup> Where a working contract is entered into through an agent,

1. *Oakes v. Cushing*, 24 Me. 313.

2. **Signing.** — *Whatley v. Reese*, 128 Ala. 500; *Reedy v. Smith*, 42 Cal. 245; *M. E. Parish v. Clarke*, 74 Me. 110. Compare *Keating v. Nelson*, 33 Ill. App. 357.

3. *Keller v. Blasdel*, 1 Nev. 491.

4. **Delivery of Contract.** — *Coey v. Lehman*, 79 Ill. 177; *Blanchard v. Blackstone*, 102 Mass. 343.

Thus, where the evidence showed that the contract was written and signed on behalf of both parties in an attorney's office, and after being thus completed was left with him for the purpose of having a duplicate made and sent to one of the parties, there was held to be a sufficient delivery. *Blanchard v. Blackstone*, 102 Mass. 343.

5. *Coey v. Lehman*, 79 Ill. 177.

6. **Recording.** — *Palmer v. White*, 70 Cal. 220; *Rebman v. San Gabriel Valley Land, etc., Co.*, 95 Cal. 390; *Laidlaw v. Marye*, 133 Cal. 170; *Bryson v. McCone*, 121 Cal. 153.

7. *Sullivan v. California Realty Co.*, 142 Cal. 201.

8. **Agency.** — *La Fayette R. Co. v. Tucker*, 124 Ala. 514; *Kiely v. McMillen*, 91 Hun (N. Y.) 637; *Nicholson v. Kennedy*, 188 Pa. St. 90, 43 W. N. C. (Pa.) 145.

9. *Consociated Presb. Soc. v. Staples*, 23 Conn. 544; *Kerfoot v. Cromwell Mound Co.*, 115 Ill. 502; *Damon v. Granby*, 2 Pick. (Mass.) 345.

10. *Howard v. Maine Industrial School*, 78 Me. 230; *Adams v. Hill*, 16 Me. 215.

11. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277.

**Quorum Majority.** — A major part of the committee is necessary to constitute a quorum, and the act of a majority of a quorum is the act of the committee. *Damon v. Granby*, 2 Pick. (Mass.) 345.

**Ratification.** — Where a contractor made and executed on his own part an agreement under seal to slate the roof of the plaintiffs' meeting house in a good, substantial, and workmanlike manner, and to warrant the same against leaking for ten years from the completion of the job, and the instrument was executed by only one of the plaintiffs' building committee of three, and there was never any vote authorizing the committee to enter into a contract under seal, but the plaintiff paid the sum agreed to the defendant, and allowed it in the settlement of its treasurer's accounts, it was held that the defendant was liable for any breach of his covenants, notwithstanding the contract was not so executed by the plaintiffs in the outset as to enable him to maintain an action of covenant against them thereon, and that he could not take exceptions to instructions authorizing the jury to find that the plaintiffs had ratified the contract and made it a valid and binding contract between the parties, if their acts and doings satisfied the jury that such was their intention. *M. E. Parish v. Clarke*, 74 Me. 110.

12. **Corporations.** — *Crampton v. Varna R. Co.*, L. R. 7 Ch. 568; *Prairie Lodge v. Smith*, 58 Miss. 301; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 280.

13. *England.* — *Clark v. Cuckfield Union*, 1 Lowndes & M. Bail. Ct. 81, 16 Jur. 686; *Frend v. Dennett*, 4 C. B. N. S. 576, 93 E. C. L. 576,



the latter, in order to avoid personal liability thereon, should execute the contract in the name of his principal. If he signs the contract in his own name, though his signature is followed by words *descriptio personæ*, he may incur personal liability thereon.<sup>1</sup>

**9. Implied Contracts.**—Working contracts may be implied as well as expressed.<sup>2</sup> Thus, where one at the request of the builder performs work and labor without an express agreement for compensation, the law implies a promise on the part of the builder to make a reasonable compensation therefor,<sup>3</sup> and it has been held that where one stands by in silence and sees work done in the improvement of his premises, of which he accepts the benefit, a promise to pay therefor may be implied.<sup>4</sup> Where, however, the contractor sublets his contract, the law will not imply any agreement on the part of the builder to compensate the subcontractor for the work and labor performed by him; the implied obligation of the builder to make compensation to one who performs work and labor in the improvement of his property is taken away by the special contract between the contractor and the subcontractor.<sup>5</sup> The

4 Jur. N. S. 897; *Crampton v. Varna R. Co.*, L. R. 7 Ch. 562.

*United States.*—*Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299; *Travers's Case*, 5 Ct. Cl. 329; *Thompson's Case*, 9 Ct. Cl. 187; *Trenton Co's Case*, 12 Ct. Cl. 147.

*Alabama.*—*Mobile, etc., R. Co. v. Worthington*, 95 Ala. 598.

*Connecticut.*—*Turney v. Bridgeport*, 55 Conn. 412.

*Illinois.*—*Sexton v. Cook County*, 114 Ill. 174; *Littler v. Jayne*, 124 Ill. 123; *Chicago v. Shober, etc., Lithographing Co.*, 6 Ill. App. 560.

*Indiana.*—*Archer v. Allen County*, 3 Blackf. (Ind.) 501; *Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471; *Bicknell v. Widner School Tp.*, 73 Ind. 501; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Eigemann v. Posey County*, 82 Ind. 413; *Bass Foundry, etc., Works v. Parke County*, 115 Ind. 234.

*Louisiana.*—*Southworth v. Flanders*, 33 La. Ann. 190.

*Maryland.*—*Baltimore v. Eschbach*, 18 Md. 276; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

*Massachusetts.*—*Ashuelot Mfg. Co. v. Marsh*, 1 Cush. (Mass.) 507; *Damon v. Granby*, 2 Pick. (Mass.) 345; *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277.

*Missouri.*—*Keating v. Kansas City*, 84 Mo. 415.

*New York.*—*Haight v. Sahler*, 30 Barb. (N. Y.) 218; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Greene v. New York*, 3 Thomp. & C. (N. Y.) 753, 1 Hun (N. Y.) 24; *Cunningham v. Massena Springs, etc.*, R. Co., 63 Hun (N. Y.) 439; *Brady v. New York*, 20 N. Y. 312, *affirming* 2 Bosw. (N. Y.) 173.

*Vermont.*—*Lyndon Mill Co. v. Lyndon Literary, etc., Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783.

*Wisconsin.*—*Shipman v. State*, 42 Wis. 377.

See also generally the titles AGENCY, vol. 1, p. 930; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833; PUBLIC OFFICERS, vol. 23, p. 314.

**1. Personal Liability of Agent**—*Connecticut.*—*Hewitt v. Wheeler*, 22 Conn. 557.

*Georgia.*—*Wilkins v. St. Mark's Protestant Episcopal Church*, 52 Ga. 351; *Partridge v. Hollinshead*, 105 Ga. 278.

*Illinois.*—*Sharp v. Smith*, 32 Ill. App. 336.

*Maine.*—*Chick v. Trevett*, 20 Me. 462, 37 Am. Dec. 68; *Copeland v. Hewett*, 96 Me. 525.

*Massachusetts.*—*Damon v. Granby*, 2 Pick. (Mass.) 345; *Fullam v. West Brookfield*, 9 Allen (Mass.) 1; *Cutler v. Ashland*, 121 Mass. 588.

*Michigan.*—*Landyskowski v. Lark*, 103 Mich. 500.

*New York.*—*Stanton v. Camp*, 4 Barb. (N. Y.) 274; *Haight v. Sahler*, 30 Barb. (N. Y.) 218; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Brockway v. Allen*, 17 Wend. (N. Y.) 40.

*Tennessee.*—*Steele v. McElroy*, 1 Sneed (Tenn.) 341; *Cruse v. Jones*, 3 Lea (Tenn.) 66.

*West Virginia.*—*Johnson v. Welch*, 42 W. Va. 18.

In *Sharp v. Smith*, 32 Ill. App. 336, certain school directors entered into a contract for the erection of a schoolhouse, and in the body of the contract described themselves as "Directors of District No. 2," and in signing the contract simply wrote "Directors" after their names. They were held to be personally liable.

Where the contract read, "We, the undersigned, a committee chosen by the town of A. to finish the basement of their town house, do hereby agree to pay," etc., for the finishing of such basement, and was signed and sealed by the committee as "A committee for the town," it was held to be a contract of the individuals who signed it, and not the contract of the town. *Fullam v. West Brookfield*, 9 Allen (Mass.) 1.

**2. Implied Contracts.**—See the title IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1076.

*3. Henderson Bridge Co. v. McGrath*, 134 U. S. 260; *Tebbetts v. Haskins*, 16 Me. 283; *Thomas v. Walnut Land, etc., Co.*, 43 Mo. App. 653; *Blount v. Guthrie*, 99 N. Car. 93; *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544; *Naughton v. Sioux Falls*, 3 S. Dak. 90.

*4. Thomas v. Walnut Land, etc., Co.*, 43 Mo. App. 653; *Bailey v. Rutjes*, 86 N. Car. 517; *Blount v. Guthrie*, 99 N. Car. 93; *Reiser v. Stauer*, 73 Wis. 477.

*5. Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Reed v. Baggott*, 5 Ill. App. 257; *Holmes v. Shands*, 26 Miss. 639.

right of one who performs work and labor under contract with the contractor to a lien on the premises for his compensation has been heretofore fully treated.<sup>1</sup> Where an express working contract is invalid by reason of some formal requisite, the law will imply a contract to make a reasonable compensation for the work and labor performed thereunder.<sup>2</sup> Thus, whereas in *California* a building contract is invalid because not recorded as required by the statute, the contractor may nevertheless recover on an implied contract a reasonable compensation for the work performed thereunder.<sup>3</sup> Where one is in possession of the land of another under a claim of right in derogation of the latter's rights, and performs work and labor in its improvement, the law will not imply any contract on the part of the owner to pay therefor.<sup>4</sup>

**III. PLANS AND SPECIFICATIONS.** — Working contracts frequently refer to particular plans and specifications for the details of construction, and they thus become constructively a part of the contract;<sup>5</sup> and where original plans and specifications are referred to and identified, the omission to annex a copy thereof to the contract is immaterial though the contract expressly recites that a copy is annexed thereto.<sup>6</sup> When the plans and specifications are referred to in such a manner as to identify them, it is not necessary that they be signed by the parties in order to incorporate them into the contract.<sup>7</sup> If it clearly appears that they are the plans and specifications referred to in the contract, they may be considered as a part of the contract though they do not comply with the provisions of the contract for the purpose of identification.<sup>8</sup> The contract may require the work to be constructed according to plans and specifications thereafter to be prepared by a particular person.<sup>9</sup>

**Variations and Obscurities.** — Where there is a difference between the contract and the plans and specifications referred to for details of construction, the contract controls,<sup>10</sup> and where the contract refers to original plans and speci-

1. See the title *MECHANICS' LIENS*, vol. 20, p. 255.

2. *Brady v. New York*, 20 N. Y. 312; *Moore v. New York*, 73 N. Y. 248.

Rev. Stat. U. S., § 3744, provides that the secretary of the interior shall cause all contracts made by him on behalf of the government to be reduced to writing, which shall be then signed by him; yet, although in such case a parol agreement enlarging the quantity of work required by the contract is not obligatory on the government, if the work be actually done thereunder, a recovery may be had upon an implied assumpsit. *Wilson v. U. S.*, 23 Ct. Cl. 77.

3. *Rebman v. San Gabriel Valley Land, etc., Co.*, 95 Cal. 390.

4. *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356. And see the title *IMPROVEMENTS*, vol. 16, p. 62.

5. **Plans and Specifications** — *England*. — *Coker v. Young*, 2 F. & F. 98.

*United States*. — *Francis v. Heine Safety-Boiler Co.*, 109 Fed. Rep. 838, 48 C. C. A. 687, reversing 105 Fed. Rep. 413.

*Alabama*. — *Terrell Coal Co. v. Lacey*, (Ala. 1901) 31 So. Rep. 109.

*Illinois*. — *Coey v. Lehman*, 79 Ill. 173; *Sexton v. Chicago*, 107 Ill. 323; *Lake View v. MacRitchie*, 134 Ill. 203.

*Kentucky*. — *Campbell County v. Youtsey*, (Ky. 1889) 12 S. W. Rep. 305.

*Louisiana*. — *Suarez v. Duralde*, 1 La. 260.

*Massachusetts*. — *Bergin v. Williams*, 138 Mass. 544; *White v. McLaren*, 151 Mass. 553; *Daly v. Kingston*, 177 Mass. 312.

*Michigan*. — *Maxted v. Seymour*, 56 Mich. 129.

*Missouri*. — *Taylor v. Fox*, 16 Mo. App. 527; *Burke v. Kansas City*, 34 Mo. App. 570.

*Montana*. — *Watson v. O'Neill*, 14 Mont. 197.

*New Jersey*. — *Monmouth Park Assoc. v. Warren*, 55 N. J. L. 598; *North Bergen Board of Education v. Jaeger*, 67 N. J. L. 39; *McGeragle v. Broemel*, 53 N. J. L. 59.

*New York*. — *Cook v. Allen*, 67 N. Y. 578; *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153; *Adamant Mfg. Co. v. Bach*, 163 N. Y. 555, affirming 26 N. Y. App. Div. 255; *Lennon v. Smith*, 14 Daly (N. Y.) 520; *L'Hommedieu v. Winthrop*, 59 N. Y. App. Div. 192; *Dwyer v. New York*, 77 N. Y. App. Div. 224.

*Texas*. — *Linch v. Paris Lumber, etc., Co.*, (Tex. 1890) 14 S. W. Rep. 701; *Myer v. Fruin*, (Tex. 1891) 16 S. W. Rep. 868.

*Washington*. — *Young v. Borzone*, 26 Wash. 4, rehearing denied 26 Wash. 23.

*Wisconsin*. — *Stein v. McCarthy*, (Wis. 1904) 97 N. W. Rep. 912.

6. *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153.

7. *White v. McLaren*, 151 Mass. 553; *Lennon v. Smith*, 14 Daly (N. Y.) 520.

8. *Snoqualmi Realty Co. v. Moynihan*, 179 Mo. 629; *Lennon v. Smith*, 14 Daly (N. Y.) 520. See also *Cook v. Littlefield*, 98 Me. 299.

9. *Harvey's Case*, 8 Ct. Cl. 501; *O'Connor v. Adams*, (Ariz. 1899) 59 Pac. Rep. 105.

10. **Contract Controls Plans and Specifications.** — *Williams v. Fitzmaurice*, 3 H. & N. 844; *Neelon v. Toronto*, 25 Can. Supm. Ct. 579; *Andrews v. Tucker*, 127 Ala. 602; *Tischler v. Apple*,

fications and recites that a copy thereof is annexed to the contract, in case there is a difference between the copy annexed and the originals the latter control.<sup>1</sup> So, where there is an inconsistency between the copy of the plans and specifications furnished to the contractor, upon the faith of which his bid is made and the contract entered into, and the original plans retained by the builder, the former will control, and the builder cannot take advantage of such inconsistencies to the prejudice of the contractor.<sup>2</sup> Where there is a variance between the plans or drawings and the written specifications, the latter will prevail.<sup>3</sup> So, where there is a variance between the plans and specifications referred to in the contract and the working plans subsequently furnished to the contractor, the former will prevail.<sup>4</sup> Variance between the terms of the contract, the plans, and the specifications should be reconciled in a practical manner if possible.<sup>5</sup>

**Defective Plans.** — In *England* it is held that where plans and specifications for the execution of a certain work are prepared for the use of those who tender bids for its execution, the person asking for the bids does not impliedly warrant that the work can be successfully executed according to such plans and specifications.<sup>6</sup> In the *United States*, however, it seems that there is an implied undertaking on the part of the builder that the plans and specifications are sufficient for the successful construction of the work,<sup>7</sup> and where the work is constructed by the contractor according to the plans and specifications there is no agreement upon the part of the contractor that the

30 Fla. 132; *Meyer v. Berlandi*, 53 Minn. 59; *Boteler v. Roy*, 40 Mo. App. 234; *Isaacs v. Dawson*, 174 N. Y. 537; *Palladino v. New York*, 56 Hun (N. Y.) 565; *Demarest v. Haide*, 52 N. Y. Super. Ct. 398; *Reichert v. Brown*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 782. Compare *Suarez v. Duralde*, 1 La. 260.

**Time for Completion of Work.** — *Boteler v. Roy*, 40 Mo. App. 234.

**Mode of Determination as to Extras.** — Where a building contract provides a mode of determining as to extras, and the specifications referred to and made a part of the contract provide a different and inconsistent mode, the contract prevails. *Meyer v. Berlandi*, 53 Minn. 59.

1. *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153.

2. *Sexton v. Chicago*, 107 Ill. 323; *Millstone Granite Co. v. Dolan*, 61 N. Y. Super. Ct. 106.

In *Harvey's Case*, 8 Ct. Cl. 501, however, it was held that where a contract provided for the construction of piers and abutments for a bridge, "in accordance with such plans and specifications as may be fixed by the proper authority acting for the United States," the contractors were bound by the terms of the contract, notwithstanding that the plans and specifications subsequently fixed upon by the officers of the government materially differed from plans and specifications exhibited to the contractors at the time when they made their bid for the work, and materially affected the value thereof.

3. *Smith v. Flanders*, 129 Mass. 322. See also *Early v. O'Brien*, 51 N. Y. App. Div. 569.

In *Smith v. Flanders*, 129 Mass. 322, Colt, J., said: "This is in analogy to the rule by which, when there is a discrepancy or repugnancy between the written and printed portions of a contract, the former will prevail over the latter, for the reason that there is

more ground for supposing that the printed part has not been modified to conform to the written portion through inadvertence than for supposing that the special provisions, to which the attention of the parties was more closely given, were adopted without consideration and against the intention of the parties."

4. *Williams v. Boehan*, 60 N. Y. Super. Ct. 319.

5. See *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

6. **Defective Plans.** — T. contracted with a corporation to take down an old bridge and build a new one. Plans and a specification prepared by the engineer of the corporation were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be believed to be correct, but were not guaranteed; and, in one particular matter at least, he was warned to make an examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labor and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labor occasioned by the failure of the caissons, and in his declaration alleged that the corporation had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract, and it was held that none could be implied. *Thorn v. London*, 1 App. Cas. 120, 45 L. J. Exch. 487, 24 W. R. 932, 34 L. T. N. S. 545.

7. See *Bentley v. State*, 73 Wis. 416.



work when completed will be safe and fit for the purposes intended.<sup>1</sup> Where the work is to be done under the direction of an architect and according to certain plans and specifications, if there is an obscurity in the drawings and specifications the contractors should apply to the architect for directions, and if they rely on their own judgment and a mistake occurs, they must bear the consequences.<sup>2</sup>

**IV. BILLS OF QUANTITIES.** — As a preliminary to the execution of contracts for the construction of important works, an estimate is frequently made of the amount of materials to be furnished, to be submitted to prospective competitive bidders for the work. The contract, when entered into, does not, however, usually refer to such bill, but requires the work to be completed as a whole according to certain plans and specifications. Though such bill is used by the bidders in estimating the amount of their bid, there is no implied agreement on the part of the builder that the bill of quantities is correct, and in case such bill is incorrect the contractor is not entitled to compensation, as for extras, for additional work and materials necessary for the completion of the work;<sup>3</sup> and on the other hand, the builder is not entitled to a reduction from the agreed price for the work as a whole in case the actual amount of work performed falls short of the estimate.<sup>4</sup> Of course the builder may by express or implied agreement bind himself as to the correctness of bills of quantities and estimates as to the nature of the work.<sup>5</sup>

**V. GENERAL CONSTRUCTION OF WORKING CONTRACTS — 1. In General.** — Working contracts, not being essentially different from contracts in general, are to be construed by the same general rules of interpretation.<sup>6</sup>

1. *Daegling v. Gilmore*, 49 Ill. 248; *Clark v. Pope*, 70 Ill. 128; *MacRitchie v. Lake View*, 30 Ill. App. 393; *Byron v. New York*, 54 N. Y. Super. Ct. 411; *Loundsberry v. Eastwick*, 3 Phila. (Pa.) 371, 16 Leg. Int. (Pa.) 142; *Wade v. Haycock*, 25 Pa. St. 382; *Beswick v. Platt*, 140 Pa. St. 28; *Graves v. Caruthers*, *Meigs* (Tenn.) 58.

A **Guaranty Clause** in a contract is not to be so construed as to make the contractors liable for the failure of the work to remain in good condition by reason of defects in the plan or design. *MacRitchie v. Lake View*, 30 Ill. App. 393.

2. *Clark v. Pope*, 70 Ill. 128.

3. **Bills of Quantities.** — *Coker v. Young*, 2 F. & F. 98; *Kemp v. Rose*, 4 Jur. N. S. 919; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597; *Scrivener v. Pask*, 18 C. B. N. S. 785, 114 E. C. L. 785; *Haydnville Min., etc., Co. v. Art Institute*, 39 Fed. Rep. 484; *St. Paul, etc., R. Co. v. Bradbury*, 42 Minn. 222; *Riley v. Brooklyn*, 46 N. Y. 444, *reversing* 56 Barb. (N. Y.) 559; *Sullivan v. Sing Sing*, 122 N. Y. 389. *Compare* *Monmouth Park Assoc. v. Warren*, 55 N. J. L. 598.

In *St. Paul, etc., R. Co. v. Bradbury*, 42 Minn. 222, the plaintiff's "notice to proposers" for the construction of certain buildings had annexed to it the plans and specifications of the buildings, and estimates by the plaintiff's engineers of the amount of material required to construct them; but stated that the quantities and amounts given in these estimates must be **verified** by the proposer by the aid of the plans, as the plaintiff would not be responsible for any error resulting from their use. A proposer, without verifying these estimates, but supposing them to be correct, made a contract to furnish the material and erect the buildings

according to the plans for a gross sum. It was held that the fact that it required more material to construct the buildings than was estimated did not entitle him to an allowance beyond the contract price.

4. *Peters v. Quebec Harbour Com'rs*, 19 Can. Sup. Ct. 685.

5. *Haydnville Min., etc., Co. v. Art Institute*, 39 Fed. Rep. 484; *Langley v. Rouss*, 85 N. Y. App. Div. 27. See also *Cincinnati Southern R. Co. v. Cummings*, 6 Ky. L. Rep. 441.

Thus, where at the end of the plans and specifications for proposed waterworks for a village was a note stating that the "pipe line is mostly, and the tunnels are entirely, to be in soft shale rock," and it appeared that plaintiff, whose bid for constructing the waterworks was accepted, relied, in making his bid, on the representations as to the character of the excavations, it was held that such representations were part of the contract, and a warranty as to the quality of the excavations. *Delafield v. Westfield*, 77 Hun (N. Y.) 124. See also *Atlantic Dredging Co. v. U. S.*, 35 Ct. Cl. 463.

6. See the title **INTERPRETATION AND CONSTRUCTION**, vol. 17, p. 1.

**Construction of Particular Contracts** — *United States*. — *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1; *Lee v. New Haven, etc., R. Co.*, 15 Fed. Cas No. 8,197; *Harvey's Case*, 8 Ct. Cl. 501; *Skelsey v. U. S.*, 23 Ct. Cl. 61.

*California*. — *Sanford v. East Riverside Irrigation Dist.*, 101 Cal. 275; *McPherson v. San Joaquin County*, (Cal. 1899) 56 Pac. Rep. 802; *McCarthy v. Mutual Relief Assoc.*, 81 Cal. 584; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401.

*Colorado*. — *Dargin v. Cranson*, 12 Colo. App. 368.

**Construction by Court.** — Where the contract is in writing and its terms are not ambiguous or inconsistent its interpretation is a question of law for the consideration of the court.<sup>1</sup>

**Consideration of Contract as Whole.** — The contract is to be considered as a whole in arriving at the intention of the parties,<sup>2</sup> and when possible effect should be given to each clause of the contract.<sup>3</sup>

**Reasonable and Just Construction.** — The language of working contracts must where possible receive such a construction as is consistent with reason and justice; but where it appears from the tenor of the whole agreement that the parties thereto intended the one to insist upon and the other to submit to conditions, however unreasonable and oppressive, the court will in such case give effect to them.<sup>4</sup>

**Construction by Parties.** — If the contract is ambiguous, great and sometimes controlling weight will be given to the construction which the parties have by their acts placed on it.<sup>5</sup>

**Written and Printed Matter.** — Written matter will control printed in case of a repugnancy between the two.<sup>6</sup>

*Connecticut.* — Jones, etc., Co. v. Davenport, 74 Conn. 418.

*Illinois.* — Higgins v. Lee, 16 Ill. 495; Western Union R. Co. v. Smith, 75 Ill. 496; Sexton v. Chicago, 107 Ill. 323; Bohrer v. Stumpff, 31 Ill. App. 139.

*Iowa.* — Des Moines University v. Polk County Homestead, etc., Co., 87 Iowa 36; Indianapolis Terra-Cotta Co. v. Murphy, 99 Iowa 633; Thompson v. Brown, 106 Iowa 367; Meader v. Allen, 110 Iowa 588.

*Maine.* — Rockland, etc., Steamboat Co. v. Fessenden, 79 Me. 140; Mason v. Bridge, 14 Me. 468, 31 Am. Dec. 66; Hovey v. Luce, 31 Me. 346; Rogers v. Hogan, 58 Me. 305.

*Maryland.* — Conner v. Mt. Vernon Co., 25 Md. 55.

*Massachusetts.* — Leverone v. Arancio, 179 Mass. 439.

*Michigan.* — Bush v. Brooks, 70 Mich. 446.

*Minnesota.* — St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277.

*Missouri.* — Fisher v. Chitty, 62 Mo. App.

*Nebraska.* — Omaha Consol. Vinegar Co. v. Burns, 49 Neb. 229.

*Nevada.* — Gerrens v. Huhn, etc., Silver Min. Co., 10 Nev. 137.

*New York.* — Porter v. Waring, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 295; Johnson v. New York, 48 Hun (N. Y.) 620, 1 N. Y. Supp. 254; Preston v. Syracuse, 92 Hun (N. Y.) 301; Preston v. Syracuse, 158 N. Y. 356; Horgan v. New York, 160 N. Y. 516, reversing 21 N. Y. App. Div. 405; Lennon v. Smith, 161 N. Y. 661; SooySmith v. Venner, 7 N. Y. App. Div. 242; Kumberger v. Congress Spring Co., 8 N. Y. App. Div. 96; Schillinger v. McGarry, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 745; Isaacs v. Dawson, 70 N. Y. App. Div. 232; Cobb v. West, 4 Duer (N. Y.) 38; Weeks v. Little, 47 N. Y. Super. Ct. 1.

*Oregon.* — Pendleton v. Saunders, 19 Oregon 9.

*Pennsylvania.* — Maguire v. Howard, 40 Pa. St. 391; Philadelphia Hydraulic Works v. Schenck, 80 Pa. St. 334.

*Tennessee.* — Sullivan County v. Ruth, 106 Tenn. 85.

*Texas.* — Linch v. Paris Lumber, etc., Elevator Co., 80 Tex. 23; Ferrier v. Knox County,

(Tex. Civ. App. 1896) 33 S. W. Rep. 896; Masterson v. Heitmann, (Tex. Civ. App. 1903) 77 S. W. Rep. 983

*Washington.* — Long v. Pierce County, 22 Wash. 330.

*Wisconsin.* — Beers v. North Milwaukee Town-Site Co., 93 Wis. 569.

**Agreement of Railroad to Transport Materials Necessary for Railroad Work.** — American Bonding, etc., Co. v. Baltimore, etc., R. Co., 124 Fed. Rep. 866, 60 C. C. A. 52.

**Contract to "Sink" Mining Shaft.** — No. 5 Mining Co. v. Bruce, 4 Colo. 293; Buckeye Min., etc., Co. v. Carlson, 16 Colo. App. 446.

**1. Construction by Court.** — Hughbanks v. Boston Invest. Co., 92 Iowa 267; Independent School Dist. v. Sweargin, 119 Iowa 702; Whitney v. Olean, 45 N. Y. App. Div. 435; Keefer v. Sunbury School Dist., 203 Pa. St. 334.

**2. Consideration of Contract as Whole.** — White v. McLaren, 151 Mass. 553.

**3. Erickson v. U. S.**, 107 Fed. Rep. 204; Mellen v. Ford, 28 Fed. Rep. 639; Sprague Electric Co. v. Hennepin County, 83 Minn. 262; Porter v. Spence, 38 N. Y. 119; Fitzgerald v. Moran, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 958.

**4. Reasonable and Just Construction.** — Stahard v. Lee, 3 B. & S. 364, 113 E. C. L. 364; Deyo v. Ferris, 22 Ill. App. 154.

**5. Construction by Parties.** — *United States.* — District of Columbia v. Gallaher, 124 U. S. 505; Charleston Ice Mfg. Co. v. Joyce, 63 Fed. Rep. 916, 25 U. S. App. 89; Gibbons's Case, 2 Ct. Cl. 353.

*California.* — Katz v. Bedford, 77 Cal. 319.

*Illinois.* — Chicago, etc., R. Co. v. Vosburgh, 45 Ill. 311; Western Union R. Co. v. Smith, 75 Ill. 496.

*Minnesota.* — O'Dea v. Winona, 41 Minn. 424.

*Missouri.* — Reisenleiter v. Evangelische Lutherische Kirche, 29 Mo. App. 291.

*Nebraska.* — Price v. Kearney Canal, etc., Co., 29 Neb. 33.

*New York.* — McMullen v. Hopper, 15 N. Y. App. Div. 364.

*Wisconsin.* — McPhee v. McDermott, 77 Wis. 33; Laycock v. Parker, 103 Wis. 161.

**6. Written and Printed Matter.** — Breyman v.

**Construction Against Party Preparing Contract.** — Where the contract is prepared by one of the parties thereto, doubtful expressions will be construed against the party who prepared the contract and used the language.<sup>1</sup>

**Parol Evidence to Vary Writing.** — Parol evidence to vary the terms of a written working contract is not admissible.<sup>2</sup>

**Associated Agreements.** — Working contracts are frequently incorporated in several writings, and in such a case all the writings are to be construed together,<sup>3</sup> but in order that the writings may be construed together they must relate to the same subject-matter.<sup>4</sup>

**Technical Terms and Expressions.** — In working contracts, words and phrases are frequently used which with regard to the subject-matter of the contract have a technical meaning, and such meaning should be given to them unless it is evident that they were used in a different sense.<sup>5</sup>

**Construction by Architect or Engineer.** — While the architect or engineer in charge of the work has no implied power to bind the parties by his construction of the contract,<sup>6</sup> working contracts frequently provide that any dispute as to the construction of the language used shall be submitted to the architect or engineer, whose decision shall be binding upon the parties, and such a provision is upheld by the courts;<sup>7</sup> but a provision that in case of a dispute as to the construction of the contract the decision of the builder should be final and conclusive has been held to be invalid, as one party to a contract cannot make a valid stipulation that he shall be the arbiter of disputes arising thereunder.<sup>8</sup>

**2. Particular Terms and Phrases.** — The construction of working contracts has called for the construction of particular words and phrases, such as

*Ann Arbor R. Co.*, 85 Fed. Rep. 579; *Collins v. Knuth*, 51 N. Y. App. Div. 188.

**1. Construction Against Party Preparing Contract.** — *Gibbons's Case*, 15 Ct. Cl. 174.

**2. Parol Evidence to Vary.** — *McGuinness v. Shannon*, 154 Mass. 86; *Jones v. Sherman*, 34 Neb. 452; *Morowsky v. Rohrig*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 167; *Reynolds v. Welsh*, (C. Pl. Spec. T.) 8 N. Y. St. Rep. 404; *Yeisley v. Bundel*, (Pa. 1888) 15 Atl. Rep. 854; *Megrath v. Gilmore*, 10 Wash. 339.

**3. Associated Agreements.** — *Henry v. Allen*, 49 Ark. 122; *M'Carty v. Osborne*, 1 Blackf. (Ind.) 325; *Hughes v. Gibson*, 15 Colo. App. 318; *Price v. Garland*, 3 N. Mex. 285; *Adamant Mfg. Co. v. Bach*, 26 N. Y. App. Div. 255; *Salvinsky v. Levin*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 521. See also *supra*, this title, *Plans and Specifications*.

**4. McMaster v. State**, 108 N. Y. 542. See also *Kingston v. Berry*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 803.

**5. Technical Terms and Expressions.** — *International Bow, etc., Dock Co. v. U. S.*, 60 Fed. Rep. 523; *George A. Fuller Co. v. B. P. Young Co.*, (C. C. A.) 126 Fed. Rep. 343; *Long v. Davidson*, 101 N. Car. 170.

In *Snoqualmi Realty Co. v. Moynihan*, 179 Mo. 629, where the contract required the contractor to use "San Domingo mahogany," and it was shown that in the trade the phrase was used to include not merely mahogany grown on the island of San Domingo, but also mahogany grown in that latitude and similar in texture, color, and figure, the latter meaning was given to the phrase.

**6. Construction by Architect or Engineer.** — *Mallard v. Moody*, 105 Ga. 400; *Busse v. Agnew*, 10 Ill. App. 527; *Mason v. Bridge*, 14

Me. 468, 31 Am. Dec. 66; *Walker v. Syms*, 118 Mich. 183; *O'Brien v. New York*, 139 N. Y. 543; *Pollock v. Pennsylvania Iron Works Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 194; *Isaacs v. Dawson*, 70 N. Y. App. Div. 232; *Citizens' Trust, etc., Co. v. Howell*, 19 Pa. Super. Ct. 255; *Galveston v. Devlin*, 84 Tex. 319.

Where a written contract to find materials and build a stone dam stipulated that "it is mutually agreed between the parties that all the work and materials shall be inspected by a third person, and made to correspond with the decision of such person in all respects, whose decision shall be final between the parties," such third person was held to have no power to give a legal construction of what the contract required of the parties, but merely to determine the differences relating to the workmanship and to the fitness and quality of the materials proposed to be used. *Mason v. Bridge*, 14 Me. 468, 31 Am. Dec. 66.

A provision in a subcontract that any dispute respecting the true construction or meaning of the drawings or specifications shall be decided by the architects, and their decision shall be final and conclusive, does not apply to a dispute relating to the question whether the contract does or does not call for particular work. *Isaacs v. Dawson*, 70 N. Y. App. Div. 232, *affirmed* 174 N. Y. 537.

**7. O'Donnell v. Henry**, 44 La. Ann. 845; *Brown v. Baton Rouge*, 109 La. 967; *Kelly v. Public Schools*, 110 Mich. 529; *Duell v. McCraw*, 86 Hun (N. Y.) 331; *Burns v. New York*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 315; *Barclay v. Deckerhoof*, 171 Pa. St. 378; *Wymard v. Deeds*, 21 Pa. Super. Ct. 332; *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 130.

**8. Fulton County v. Gibson**, 158 Ind. 471.



"adjustable stern dock,"<sup>1</sup> "arch,"<sup>2</sup> "available site,"<sup>3</sup> "best French plate glass,"<sup>4</sup> "best lumber,"<sup>5</sup> "best product of mill,"<sup>6</sup> "best capacity" as applied to an engine,<sup>7</sup> the verb "to build"<sup>8</sup> and the noun "building,"<sup>9</sup> "complete railroad,"<sup>10</sup> "earth,"<sup>11</sup> "elevator,"<sup>12</sup> "excavation,"<sup>13</sup> "exterior walls,"<sup>14</sup> "filled and stained" as applied to woodwork,<sup>15</sup> "filtration" as applied to loss of water from a reservoir,<sup>16</sup> "finish house ready for occupancy,"<sup>17</sup> "first-class work,"<sup>18</sup> "free from knots" as applied to lumber,<sup>19</sup> "grading,"<sup>20</sup> "ground floor,"<sup>21</sup> to heat "well and sufficiently"<sup>22</sup> or "properly,"<sup>23</sup> "keep in repair,"<sup>24</sup> "material,"<sup>25</sup> "nominal horse power,"<sup>26</sup> "order" as qualified by the terms "good"<sup>27</sup> and "running,"<sup>28</sup> "proper shape" as used in a contract to put a gutter on a mill "in proper shape,"<sup>29</sup> "rock,"<sup>30</sup> "solid rock,"<sup>31</sup> "rub down brickwork,"<sup>32</sup> "sash,"<sup>33</sup> "suitable precautions,"<sup>34</sup> "surfaced" as applied to a railroad,<sup>35</sup> "vicinity" as regards location,<sup>36</sup> "wagon" as used in the phrase "hailed by wagon,"<sup>37</sup> "wall,"<sup>38</sup> and "water-tight" as applied to the condition of a cellar.<sup>39</sup>

**3. Dependent and Independent Stipulations.** — Where working contracts contain mutual stipulations on the part of the parties, the question frequently arises whether these stipulations are to be considered as dependent or independent. This must be ascertained from the contract and attending circumstances,<sup>40</sup> the tendency of the courts being to construe such stipulations as dependent unless a contrary intention clearly appears.<sup>41</sup> On the other hand,

1. *International Bow, etc., Dock Co. v. U. S.*, 60 Fed. Rep. 523.

2. *Denmead v. Coburn*, 15 Md. 29.

3. *Simpson v. U. S.*, 31 Ct. Cl. 217.

4. *South Cong. Meeting-house v. Hilton*, 11 Gray (Mass.) 407.

5. *McIntire v. Barnes*, 4 Colo. 285. See also *Higgins v. Lee*, 16 Ill. 495.

6. *Nordyke, etc., Co. v. Kehlor*, 155 Mo. 643, 78 Am. St. Rep. 600.

7. *Horgan v. McKenzie*, (C. Pl. Gen. T.) 17 N. Y. Supp. 174.

8. *Yost v. Schuylkill Nav. Co.*, 125 Pa. St. 152, 23 W. N. C. (Pa.) 489.

9. *U. S. v. Mueller*, 113 U. S. 153.

10. *Central Trust Co. v. Condon*, 67 Fed. Rep. 84, 31 U. S. App. 387.

11. *Shephard v. St. Charles Western Plank Road Co.*, 28 Mo. 373; *Nesbitt v. Louisville, etc., R. Co.*, 2 Spears L. (S. Car.) 697.

12. *Horgan v. McKenzie*, (C. Pl. Gen. T.) 17 N. Y. Supp. 174.

13. *Hellwig v. Blumenberg*, 55 Hun (N. Y.) 605, 5 Silv. Supp. (N. Y.) 290.

14. *Ittner v. St. Louis Exposition, etc., Assoc.*, 97 Mo. 561.

15. *Carver v. Hall*, 3 App. Cas. (D. C.) 170.

16. *Pendleton v. Saunders*, 19 Oregon 9.

17. *Cunningham v. Washburn*, 119 Mass. 224.

18. *Boughton v. Smith*, 142 N. Y. 674, 37 N. E. Rep. 470, reversing 67 Hun (N. Y.) 652, 22 N. Y. Supp. 148.

19. *Rush v. Wagner*, (Brooklyn City Ct. Gen. T.) 12 N. Y. Supp. 2.

20. *Snell v. Cottingham*, 72 Ill. 161.

21. *Isaacs v. Dawson*, 70 N. Y. App. Div. 232.

22. *Phoenix Iron Co. v. Richmond*, 6 Mackey (D. C.) 180; *Ellis v. Lane*, 85 Pa. St. 265.

23. *Pitt v. Downing*, 52 N. Y. Super. Ct. 508.

24. *Davis v. New Orleans*, 13 La. Ann. 624; *Cornell v. Vanartsdalen*, 4 Pa. St. 364. See also the title *LANDLORD AND TENANT*, vol. 18, p. 149, with regard to the obligation of a tenant under a covenant to repair or keep in repair.

Under an agreement to build a bridge and keep it in repair for a specified time the contractor is required to rebuild if the bridge is destroyed. *Brecknock, etc., Canal Nav. Co. v. Pritchard*, 6 T. R. 750. See, however, *Livingston County v. Graves*, 32 Mo. 479.

25. *Schulz v. Tessman*, (Tex. Civ. App. 1898) 48 S. W. Rep. 207.

26. *Heine Safety Boiler Co. v. Francis*, 117 Fed. Rep. 235, 54 C. C. A. 267.

27. *Davis v. Smith*, 9 Humph. (Tenn.) 557.

28. *Rhodes v. Cox*, 9 Ky. L. Rep. 895.

29. *Dwight v. Ludlow Mfg. Co.*, 128 Mass. 280.

30. *Okey v. Moyers*, 117 Iowa 514.

31. *Gregory v. U. S.*, 33 Ct. Cl. 434; *Fruin v. Crystal R. Co.*, 89 Mo. 397.

32. *Chamberlain v. Hibbard*, 26 Oregon 428.

33. *Smith v. Collins*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 53.

34. *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 277.

35. *Western Union R. Co. v. Smith*, 75 Ill. 496.

36. *In re Oil Well Lease*, 9 Ohio Cir. Dec. 860, 18 Ohio Cir. Ct. 885; *Sparks v. Pittsburgh Co.*, 159 Pa. St. 295, 34 W. N. C. (Pa.) 27.

37. *Campbell v. Cincinnati Southern R. Co.*, (Ky. 1888) 6 S. W. Rep. 337.

38. *Shipman v. District of Columbia*, 18 Ct. Cl. 291.

39. *MacKnight Flintic Stone Co. v. New York*, 13 N. Y. App. Div. 231.

**40. Dependent and Independent Stipulations.** — *Milnes v. Vanhorn*, 8 Blackf. (Ind.) 198; *Davis v. Jeffris*, 5 S. Dak. 352.

41. *Drake v. Goree*, 22 Ala. 409; *Manuel v. Campbell*, 3 Ark. 324; *M'Call v. Welsh*, 3 Bibb (Ky.) 289; *Lord v. Belknap*, 1 Cush. (Mass.) 279; *Clayton v. Blake*, 4 Ired. L. (26 N. Car.) 497; *Dunham v. Dayton, etc., R. Co.*, 3 Ohio Dec. (Reprint) 329; *Davis v. Jeffris*, 5 S. Dak. 352.

If a contract for the performance of work

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if it appears that it was the intention of the parties that the stipulations should be considered independent, the courts will so construe them.<sup>1</sup>

**4. Entire and Divisible Contracts.**—Whether a working contract is entire or divisible depends, of course, upon the intention of the parties and the terms and subject-matter of the contract.<sup>2</sup> If the contract is for the construction of an entire work or structure for a fixed compensation, it is considered as entire and not divisible,<sup>3</sup> especially where it is stipulated that the compensation is not to be paid until the work or structure is completed.<sup>4</sup> So, though the contract calls for the performance of several items, if the compensation is not apportioned among the several items, but provides for a fixed sum for the work as a whole, the contract is regarded as entire,<sup>5</sup> and this has been held true though the amount to be paid is made up by stating the estimated cost of each item and then adding the whole together, without any agreement to pay by items;<sup>6</sup> and if the contract is for a work as a whole, it will not be rendered divisible by the fact that the compensation is payable in instalments as the work progresses, as where payments are made periodically on an estimate of the amount of work done<sup>7</sup> or as the work reaches certain stages of completion.<sup>8</sup> Of course, if a working contract clearly shows an intention of the parties that it should be considered as divisible as regards

fixes no time for performance, and the day of payment as fixed by the contract occurs after the expiration of a reasonable time for the performance of the work, the stipulations are dependent, and the money cannot be recovered until plaintiff has performed. *Drake v. Goree*, 22 Ala. 409. See also *infra*, this title, *Compensation*.

1. Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307; Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371; Craddock v. Aldridge, 2 Bibb (Ky.) 15; Allen v. Sanders, 7 B. Mon. (Ky.) 593; Armstrong v. Andrews, 109 Mich. 537; Wortman v. Montana Cent. R. Co., 22 Mont. 266; Gay v. Haskins, (Buffalo Super. Ct. Gen. T.) 11 Misc. (N. Y.) 134; Long v. Caffrey, 93 Pa. St. 526; Tait v. Tait, 6 Leigh (Va.) 154.

2. **Entire and Divisible Contracts.**—Partridge v. Forsyth, 29 Ala. 200; Keeler v. Clifford, 165 Ill. 544; Dibol v. Minott, 9 Iowa 403; Nolt v. Crow, 22 Pa. Super. Ct. 113.

3. Simonds v. Pearce, 31 Fed. Rep. 137; Clark v. Collier, 100 Cal. 256; Coburn v. Hartford, 38 Conn. 290; Hunnicutt, etc., Co. v. Van Hoose, 111 Ga. 518; Madden v. Smith, 28 Kan. 798; Phelps v. Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; McConnell v. Hewes, 50 W. Va. 33. Compare Arndt v. Keller, 96 Wis. 274.

**Stipulation for Suspension of Work.**—Where by the terms of a contract one agrees to furnish all material and labor for the construction of a building, and to turn over the building in a finished state to another on payment of a stipulated price, such a contract is entire and is not to be held divisible because it contains a stipulation that when the building has arrived at a certain stage of completion the owner may suspend further work, and that if he elects to do so a stated sum is to be the compensation for the labor done and material furnished. Hunnicutt, etc., Co. v. Van Hoose, 111 Ga. 518.

4. Simonds v. Pearce, 31 Fed. Rep. 137; Partridge v. Forsyth, 29 Ala. 200; Huyett, etc., Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 59 Am. St. Rep. 272, affirming 66 Ill. App. 222.

5. *Pitcairn v. Philip Hiss Co.*, 113 Fed. Rep. 492, 51 C. C. A. 323; *Stokes v. Baars*, 18 Fla. 656; *Atlantic, etc., R. Co. v. Delaware Constr. Co.*, 98 Va. 503.

6. *Broxton v. Nelson*, 103 Ga. 327, 68 Am. St. Rep. 97; *Chicago v. Sexton*, 115 Ill. 230; *Wehrung v. Denham*, 42 Oregon 386; *Quigley v. De Haas*, 82 Pa. St. 267. See also *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44.

7. *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 47 Cal. 87; *Broxton v. Nelson*, 103 Ga. 327, 68 Am. St. Rep. 97; *Grassman v. Bonn*, 32 N. J. Eq. 43; *Wehrung v. Denham*, 42 Oregon 386; *Quigley v. De Haas*, 82 Pa. St. 267; *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384.

Thus, if a contractor agrees with a railroad company to grade a section of its road, and do all necessary to make the road ready for the cross-ties and iron equipments, and to receive a fixed sum for the work, to be paid from time to time as the work progresses, at the prices fixed and estimates of work done made by an engineer, the contract is entire. *Cox v. Western Pac. R. Co.*, 44 Cal. 18.

8. *McGowan v. U. S.*, 35 Ct. Cl. 606; *Clark v. Collier*, 100 Cal. 256; *Freeman v. Campbell*, 22 Ga. 184; *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Newman Lumber Co. v. Purdum*, 41 Ohio St. 373; *Bartlett v. Bishey*, 27 Tex. Civ. App. 405. Compare *Siegel v. Eaton, etc., Co.*, 165 Ill. 550, affirming 60 Ill. App. 630; *Keeler v. Clifford*, 165 Ill. 544, affirming 62 Ill. App. 64; *Crawford v. McKinney*, 165 Pa. St. 605.

A contract to build a house for two thousand six hundred and fifty dollars, payable in five instalments, five hundred dollars when the frame is raised, five hundred dollars when roofed in, five hundred dollars when the floors and partitions are finished, five hundred dollars when the ceilings and carpenters' work are done, and six hundred and fifty dollars when painted and delivered, is an entire contract. *Freeman v. Campbell*, 22 Ga. 184.

the several items to be performed, or as regards the several stages of an entire work, it will be so construed by the courts,<sup>1</sup> and in construing contracts as entire or severable it has been said that the law is guided by a respect to general convenience and equity, for this is the construction which it must be supposed the parties intended should be given,<sup>2</sup> and that, as a general rule, where a working contract requires the performance of several separate and distinct items, the price for which is apportioned to each item, or where the price is clearly and distinctly apportioned to the different parts of but one item, it will be regarded as severable.<sup>3</sup>

By Agreement, express or implied, the parties may render divisible a contract which in the first instance was entire.<sup>4</sup>

**5. Joint and Several Contracts.**—Working contracts are not essentially different from other contracts, and the question whether they are joint or several is governed by the same rules applicable to other contracts.<sup>5</sup> Contracts for the construction of works are frequently entered into with the contractor by a number of persons who agree to pay each for himself a certain amount, thus making up among themselves the total compensation, and in such cases each of them is liable only for the specific amount he assumes to pay.<sup>6</sup>

1. *Milnes v. Vanhorn*, 8 Blackf. (Ind.) 198; *Richmond v. Dubuque, etc.*, R. Co., 33 Iowa 422; *Independence v. Ott*, 135 Mo. 301; *Johnston v. Dahlgren*, 31 N. Y. App. Div. 204; *Nolt v. Crow*, 22 Pa. Super. Ct. 113; *Briggs v. Titus*, 7 R. I. 441.

2. *Dibol v. Minott*, 9 Iowa 405.

3. *Dibol v. Minott*, 9 Iowa 403; *Barnard v. McLeod*, 114 Mich. 73; *Spear v. Snider*, 29 Minn. 463; *Nolt v. Crow*, 22 Pa. Super. Ct. 113; *Perkins v. Locke*, (Tex. Civ. App. 1894) 27 S. W. Rep. 783.

A contract for painting and glazing ten houses at seventy dollars per house has been held to be severable. *Dibol v. Minott*, 9 Iowa 403. See also *Barnard v. McLeod*, 114 Mich. 73.

The plaintiff agreed to bore five wells for the defendant at one dollar per foot, and to furnish pipe at thirty-five cents per foot, and pumps and other appliances at prices specified for each separately. It was stipulated that "in case of failure to get a good supply of water," the plaintiff should have "no pay." It was held that the agreement was not an entire one, and that by failure to get a good supply of water from one of the wells the plaintiff did not forfeit his right to payment for the rest. *Spear v. Snider*, 29 Minn. 463.

4. *Partridge v. Forsyth*, 29 Ala. 200; *East Union Tp. v. Comrey*, (Pa. 1887) 9 Atl. Rep. 290.

**5. Joint and Several Contracts.**—*Davis v. Shafer*, 50 Fed. Rep. 764; *Hodges v. Sublett*, 91 Ala. 588; *Current v. Fulton*, 10 Ind. App. 617; *Fauble v. Davis*, 48 Iowa 462; *Ripley v. Crooker*, 47 Me. 370, 74 Am. Dec. 491; *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Springfield v. Harris*, 107 Mass. 532. See also *Beck v. Pounds*, 20 Ga. 36. And see generally the title CONTRACTS, vol. 7, p. 88.

6. *O'Connor v. Hooper*, 102 Cal. 528; *Beck v. Pounds*, 20 Ga. 36; *Combs v. Steele*, 80 Ill. 101; *Current v. Fulton*, 10 Ind. App. 617; *Costigan v. Lunt*, 104 Mass. 217.

In *Davis v. Shafer*, 50 Fed. Rep. 764, it ap-

peared that a contractor agreed to erect a cheese factory for six thousand eight hundred and fifty dollars. The contract recited, "We, the subscribers, agree to pay" six thousand eight hundred and fifty dollars for the factory when completed. The contract further provided that the subscribers should incorporate with a capital stock of not less than six thousand eight hundred and fifty dollars, the stock to be divided into shares of one hundred dollars, and that the stock should be issued to the subscribers in proportion to the amount paid by them. The signatures to the contract by the subscribers was under a heading "Names of Subscribers." After the name of each, under columns headed "Number of Shares"—"Amount of Stock after Incorporation," was stated the amount of each subscriber's subscription. It was held that the contract imposed a liability upon each subscriber to the full amount of the compensation agreed to be paid, and not merely a liability to the extent of the amount stated after his name. This case was, however, expressly *disapproved* in *Davis, etc., Bldg., etc., Co. v. Barber*, 51 Fed. Rep. 148, wherein a liability under the identical form of contract was involved. And the latter case was *followed* by the Circuit Court of Appeals. *Davis, etc., Bldg., etc., Co. v. Jones*, 66 Fed. Rep. 124, 32 U. S. App. 32; *Chicago Bldg., etc., Co. v. Graham*, 78 Fed. Rep. 83, 41 U. S. App. 680.

And state courts have refused to construe similar contracts as imposing on the subscribers a greater liability than the amounts set opposite their signatures. *Davis, etc., Bldg., etc., Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 42; *Davis, etc., Bldg., etc., Co. v. Booth*, 10 Ind. App. 364; *Davis, etc., Bldg., etc., Co. v. McKinney*, 11 Ind. App. 696; *Davis v. Belford*, 70 Mich. 120; *Davis, etc., Bldg., etc., Co. v. Murray*, 102 Mich. 217; *Cornish v. West*, 82 Minn. 107; *Davis v. Hendrix*, 50 Mo. App. 444, 1 Mo. App. Rep. 41; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471; *Frost v. Williams*, 2 S. Dak. 457; *Gibbons v. Grinsel*, 79 Wis. 365; *Davis, etc., Bldg., etc., Co. v. Cupp*, 89 Wis. 673. See, however, *Pittsley v. King*, 206 Pa. St. 193.



**VI. MODIFICATIONS AND ALTERATIONS.** — In the absence of any provision therefor in the contract the builder has no right to demand that the contractor shall permit modifications and alterations of the agreement,<sup>1</sup> and, of course, on the other hand, the contractor is not justified without the consent of the builder, express or implied, in departing from the requirements of the contract.<sup>2</sup> Working contracts, however, frequently expressly provide that the builder shall have power to make alterations and modifications and require the contractor to assent to such alterations and modifications.<sup>3</sup> The contractor and the builder may, of course, by subsequent agreement modify the original contract and authorize or require deviations and alterations therefrom;<sup>4</sup> and though the original contract was in writing, a parol modification is valid,<sup>5</sup> even where there is a provision in the original contract that any

**1. Right of Builder to Demand Alterations.** — *Roettinger v. U. S.*, 26 Ct. Cl. 391; *Burke v. Kansas City*, 34 Mo. App. 570; *McMaster v. State*, 108 N. Y. 542.

**2. Linch v. Paris Lumber, etc., Co.,** (Tex. 1890) 14 S. W. Rep. 701.

**3. Provisions for Alterations, etc.** — American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. Rep. 866, 60 C. C. A. 52; *Swift's Case*, 14 Ct. Cl. 208; *Shaver v. Murdock*, 36 Cal. 293; *Smith v. Sanitary Dist.*, 108 Ill. App. 69; *Annapolis, etc., Short Line R. Co. v. Ross*, 68 Md. 310; *Bush v. Brooks*, 70 Mich. 466; *St. Louis Bridge, etc., Co. v. St. Louis Brewing Assoc.*, 129 Mo. 343; *Dorsey v. McGee*, 30 Neb. 657; *Lauer v. Brown*, 30 Barb. (N. Y.) 416; *Huckestein v. Nunnery Hill Incline Plane Co.*, 173 Pa. St. 169.

A clause in a contract for a public work which reserves to the employer the right to make alterations in the form and dimensions of the work does not authorize him to stop the work in an unfinished state, and thus annul the agreement. *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379.

On October 9, 1849, the plaintiff agreed, in writing, to do the mason work and furnish the materials for a building for the defendant, which was to be completed, except a portion of the plastering, before November 20, which time was subsequently extended ten days. The building was to be three stories in height, the defendant reserving the right to put on a fourth story by paying a specified sum for the brick laid in the walls. It was held that the defendant's right of election in regard to the fourth story must be exercised while a reasonable time remained for adding another story and finishing the work, with the addition, by the time specified in the contract, or as extended; and that unless exercised within that time it was lost. *Lauer v. Brown*, 30 Barb. (N. Y.) 416.

A provision in a contract that "should the owner at any time during the progress of said building request any alteration, deviations, additions, or omissions from this contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but it will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation," was construed to mean that the "omissions" were to be limited to things which, upon the conditions specified, might be entirely left out of the building, and ex-

tended to nothing which the owner might elect to take off the contractor's hands and finish himself. *Shaver v. Murdock*, 36 Cal. 293.

**4. West Haven Water Co. v. Redfield**, 58 Conn. 39; *Cable v. Foley*, 45 Minn. 421; *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Green v. Paul*, 155 Pa. St. 126; *Towson v. Reese*, 1 Tenn. Ch. 245.

**Proof and Extent of Modification** — *Alabama*. — *Andrews v. Tucker*, 127 Ala. 602.

*Connecticut*. — *West Haven Water Co. v. Redfield*, 58 Conn. 39.

*Indiana*. — *Wendling v. Snyder*, 30 Ind. App. 330.

*Kentucky*. — *Power v. Walker*, (Ky. 1896) 35 S. W. Rep. 907.

*New York*. — *Fitzgerald v. Moran*, 141 N. Y. 419; *Klingman v. Quincy*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 526; *Hecla Iron Works v. Milliken*, 49 N. Y. App. Div. 631.

*Oregon*. — *Cline v. Shell*, 43 Oregon 372.

*Pennsylvania*. — *Gaynor v. Williamsport, etc.*, R. Co., 189 Pa. St. 5.

*Tennessee*. — *Perkins Oil Co. v. Eberhart*, 107 Tenn. 409.

*Wisconsin*. — *Hasbrouck v. Milwaukee*, 17 Wis. 266; *Pormann v. Walsh*, 97 Wis. 356, 65 Am. St. Rep. 125.

**5. Parol Modifications** — *United States*. — *Emerson v. Slater*, 22 How. (U. S.) 28.

*Connecticut*. — *West Haven Water Co. v. Redfield*, 58 Conn. 39.

*Illinois*. — *Cooke v. Murphy*, 70 Ill. 96; *Clark v. Pope*, 70 Ill. 128.

*Iowa*. — *McCausland v. Cresap*, 3 Greene (Iowa) 161.

*Michigan*. — *Willey v. Fractional School Dist. No. One*, 25 Mich. 419; *Roberts v. Wilkinson*, 34 Mich. 129.

*Missouri*. — *Keating v. Korfhage*, 88 Mo. 524.

*New Hampshire*. — *Bailey v. Woods*, 17 N. H. 365; *Green v. Wilson*, 60 N. H. 146.

*New Jersey*. — *Church v. Florence Iron Works*, 45 N. J. L. 129.

*New York*. — *Perry v. Levenson*, (N. Y. 1904) 70 N. E. Rep. 1104.

*Pennsylvania*. — *Lawall v. Rader*, 24 Pa. St. 283; *Bryant v. Stilwell*, 24 Pa. St. 314; *Beswick v. Platt*, 140 Pa. St. 28.

*Compare* *Barnard, etc., Mfg. Co. v. Gal-loway*, 5 S. Dak. 205; *Mettel v. Gales*, 12 S. Dak. 632 (statutory provision).

The right to contract includes the right to modify, change, or abrogate a pre-existing contract; therefore, any contract not under seal,

modification shall be in writing.<sup>1</sup> The architect or engineer under whose supervision the work is being performed has no implied authority to modify the contract and authorize deviations therefrom by the contractor;<sup>2</sup> but of course the builder may confer on his architect or engineer the power to agree to modifications of the contract.<sup>3</sup>

**Allowances and Deductions from Compensation.** — Where the deviations and alterations are made by agreement of the parties, the builder is liable for any increased cost resulting, the provisions of the special contract governing as far as applicable,<sup>4</sup> and it is sometimes provided that where the deviations lessen the cost of the work the contractor's charges shall be decreased proportionately;<sup>5</sup> but if the alterations are made at the request of the builder and without any agreement for a reduction from the agreed compensation, the contractor is not obliged to allow a deduction though the alteration lessened the cost of the work.<sup>6</sup>

**Effect of Modifications and Deviations on Original Contract.** — Slight modifications and variations made in a working contract with the consent of the parties do not abrogate the entire contract and the rights and obligations of the parties thereto, but the original contract continues in force except as altered by such modifications and alterations;<sup>7</sup> and this is especially true where the original

whether in writing or verbal, may, by a subsequent verbal contract, be annulled or changed, and the last contract, if supported by a consideration, will bind the parties. *Bishop v. Busse*, 69 Ill. 403.

**Contracts Required to Be in Writing.** — Where all municipal contracts are required to be in writing, all variations of such contracts must also be in writing. *Malone v. Philadelphia*, 147 Pa. St. 416.

1. *Porter v. Swan*, (Brooklyn City Ct. Gen. T.) 17 N. Y. Supp. 351. See also *Foster v. McKeown*, 192 Ill. 339.

2. *Rex v. Peto*, 1 Y. & J. 37; *Cooper v. Langdon*, 9 M. & W. 60, 1 Dowl. N. S. 392; *U. S. v. Walsh*, 115 Fed. Rep. 697, 52 C. C. A. 419; *Adlard v. Muldoon*, 45 Ill. 193; *Grimes v. Simpson Centenary College*, 48 Iowa 208; *Leverone v. Arancio*, 179 Mass. 439; *L'Hommiedieu v. Winthrop*, 59 N. Y. App. Div. 192; *Gibbs v. School Dist.*, 195 Pa. St. 396; *Alexander v. Robertson*, 86 Tex. 511.

3. *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Duell v. McCraw*, 86 Hun (N. Y.) 331; *In re Freel*, (Supm. Ct. Spec. T.) 38 N. Y. Supp. 143.

4. *Boody v. Rutland, etc.*, R. Co., 3 Blatchf. (U. S.) 25, 3 Fed. Cas. No. 1,635; *De Boom v. Priestly*, 1 Cal. 206; *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Goldsmith v. Hand*, 26 Ohio St. 101. See also *infra*, this title, *Extra Work*.

5. *Turner v. Diaper*, 2 M. & G. 241, 40 E. C. L. 351; *Beinhauer v. Gleason*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 227. See also *St. Louis Bridge, etc., Co. v. St. Louis Brewing Assoc.*, 129 Mo. 343.

Where the contract provides that the builder shall have the right to make changes in the work as it progresses, and that the difference for work omitted shall be deducted from the amount of the contract by a fair and reasonable valuation, the contractor is not entitled to set off against this deduction a claim for voluntarily doing other work in a manner superior to that demanded by the contract. *Beinhauer*

*v. Gleason*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 227.

6. *Brabazon v. Seymour*, 42 Conn. 551; *Kingsley v. Brooklyn*, 78 N. Y. 200. See also *Wagner v. Jennings*, (Tex. Civ. App. 1894) 27 S. W. Rep. 888.

Where changes in a building contract are made by the mutual consent of the parties, and the contractor takes and receives credit for the reasonable value of the items thereby substituted in the place of others which were omitted, he is also chargeable with the reasonable value of the items thus omitted. *Lindemann v. Dennis*, 65 Mo. App. 511.

7. **Effect on Original Contract — England.** — *Robson v. Godfrey*, Holt. N. P. 236, 3 E. C. L. 100, 1 Stark. 275, 2 E. C. L. 110; *Morgan v. Birnie*, 3 Moo. & S. 76, 9 Bing. 672, 23 E. C. L. 414; *Pattinson v. Luckley*, L. R. 10 Exch. 330, 44 L. J. Exch. 180.

*California.* — *De Boom v. Priestly*, 1 Cal. *Connecticut.* — *O'Keefe v. St. Francis's Church*, 59 Conn. 551.

*Florida.* — *Jacksonville, etc., R. Co. v. Woodworth*, 26 Fla. 368.

*Illinois.* — *Cook County v. Harms*, 10 Ill. App. 24.

*Indiana.* — *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Garver v. Daubenspeck*, 22 Ind. 238; *Norton v. Browne*, 89 Ind. 333.

*Louisiana.* — *Jones v. Adams*, 12 La. Ann. 621.

*Maryland.* — *North v. Mallory*, 94 Md. 305. *Missouri.* — *Menne v. Neumeister*, 25 Mo. App. 300.

*New York.* — *Hollinsead v. Mactier*, 13 Wend. (N. Y.) 276; *Goodwin v. McCormick*, (Brooklyn City Ct. Gen. T.) 6 N. Y. Supp. 662.

*Ohio.* — *Kugler v. Wiseman*, 20 Ohio 361.

*Pennsylvania.* — *Malone v. Philadelphia, etc., R. Co.*, 157 Pa. St. 430; *Gibbs v. School Dist.*, 195 Pa. St. 396.

*South Carolina.* — *Dubois v. Read*, 1 Mill (S. Car.) 472; *M'Cormick v. Connolly*, 2 Bay (S. Car.) 401.

*Texas.* — *Houston, etc., R. Co. v. Snelling*, 59 Tex. 116.

contract expressly provides that modifications and alterations in the plans of the work may be made.<sup>1</sup> If, however, the original contract is deviated from in material respects so that the work cannot be reasonably recognized as that originally contracted for, the original contract should be treated as abandoned.<sup>2</sup>

**VII. RESCISSION AND TERMINATION OF CONTRACT — 1. In General.** — As in case of other contracts, a working contract may be rescinded and terminated by mutual agreement of the parties,<sup>3</sup> but to show a rescission by mutual consent of the parties the intention to rescind must be apparent or clearly shown by implication.<sup>4</sup> The fact that the builder, upon the wrongful refusal of the contractor to complete the work, has the work done under his own supervision does not show a rescission or termination of the contract by mutual consent.<sup>5</sup> Upon the mutual rescission of the contract, the contractor may recover on a *quantum meruit* the value of the work performed, if used by the employer and of value to him.<sup>6</sup> While the builder may prohibit the contractor from further performing the contract, and thereby require him to sue for damages for breach of the contract, and deprive him of any right to continue the completion of the work and recover the stipulated compensation,<sup>7</sup> still, of course, if the builder wrongfully prohibits or prevents the continuance of the work he is liable in damages to the contractor for breach of the contract.<sup>8</sup>

*Vermont.* — *Boody v. Rutland, etc.*, R. Co., 24 Vt. 660.

*Wyoming.* — *Hood v. Smiley*, 5 Wyo. 70.

1. *O'Keefe v. St. Francis's Church*, 59 Conn. 551; *Reiss v. Scherner*, 87 Ill. App. 84; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373; *Lauer v. Brown*, 30 Barb. (N. Y.) 416.

2. *United States.* — *Henderson Bridge Co. v. McGrath*, 134 U. S. 260; *Columbus Safe-Deposit Co. v. Burke*, (C. C. A.) 88 Fed. Rep. *Alabama.* — *Hutchison v. Cullum*, 23 Ala. 622.

*Iowa.* — *Mather v. Butler County*, 28 Iowa 253.

*Maine.* — *Cocheco Bank v. Berry*, 52 Me. 293.

*Maryland.* — *Howard v. Wilmington, etc.*, R. Co., 1 Gill (Md.) 311.

*New Jersey.* — *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373.

*New York.* — *Lawrence v. Dale*, 3 Johns. Ch. (N. Y.) 23; *Hollinsead v. Mactier*, 13 Wend. (N. Y.) 276.

*Pennsylvania.* — *Green v. Paul*, 155 Pa. St. 126; *Malone v. Philadelphia, etc.*, R. Co., 157 Pa. St. 430.

*Texas.* — *McClellan v. McLemore*, (Tex. Civ. App. 1902) 70 S. W. Rep. 224.

*Utah.* — *Rhodes v. Clute*, 17 Utah 137.

*Wyoming.* — *Hood v. Smiley*, 5 Wyo. 70.

3. **Mutual Rescission.** — *Satterlee v. U. S.*, 30 Ct. Cl. 31; *McGowan v. U. S.*, 35 Ct. Cl. 606; *Badders v. Davis*, 88 Ala. 367; *Tebbets v. Haskins*, 16 Me. 283; *Adams v. Boston Iron Co.*, 10 Gray (Mass.) 495; *Douglass v. Roberts*, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 454; *Schofield v. McGregor*, 1 Thomp. & C. (N. Y.) 404; *Davison v. Jersey Co.*, 71 N. Y. 333; *Gottstein v. Seattle Lumber, etc.*, Co., 7 Wash. 424; *Gilbert Blasting, etc.*, Co. v. Rex, 7 Can. Exch. 221.

4. **Proof of Rescission.** — *McGonigle v. Klein*, 6 Colo. App. 306; *Indianapolis, etc.*, R. Co. v. Miller, 71 Ill. 463; *Washburn v. Dettinger*, 76 Hun (N. Y.) 141; *Parr v. Greenbush*, 72 N. Y. 463; *Fox v. Clark*, 44 N. Y. App. Div. 626; *Peck-Williamson Heating, etc.*, Co. v. Board

of Education, 6 Olka. 279; *Ferguson v. Wills*, 88 Va. 136.

5. *Casey v. Gunn*, 29 Mo. App. 14.

6. **Compensation.** — *Kirkland v. Oates*, 25 Ala. 465; *Prince v. Thomas*, 15 Ark. 378; *Cranmer v. Graham*, 1 Blackf. (Ind.) 406.

7. **Termination by Builder.** — *Black v. Woodrow*, 39 Md. 194; *Heaver v. Lanahan*, 74 Md. 493; *Damon v. Granby*, 2 Pick. (Mass.) 345; *McGregor v. Ross*, 96 Mich. 103; *Wigent v. Marrs*, 130 Mich. 609; *Davis v. Bronson*, 2 N. Dak. 300, 33 Am. St. Rep. 783; *Dunham v. Hastings Pavement Co.*, 95 N. Y. App. Div. 360; *Winton v. Mulherin*, 3 Lack. Leg. N. (Pa.) 264; *Clark v. Franklin*, 7 Leigh (Va.) 1. See also *Hyland v. Giddings*, 11 Gray (Mass.) 232.

**Where the Contract Is with a State** for the construction of a building or other public work, the state stands in the same position as an individual, and may at any time abandon the enterprise and refuse to allow the contractor to proceed, or it may assume control and do the work embraced in the contract by its own immediate servants and agents, or enter into a new contract for its performance by other persons, without reference to the contract previously made, although there has been no default on the part of the contractor. The state in such case would violate the contract, but the obligation of the contract would not be impaired by its refusal to perform, and it cannot be compelled to proceed with the prosecution of the work at the instance of the contractor; the latter would have a just claim against the state for any damages sustained by him from the breach of the contract, and, although the claim could not be enforced through an action at law, he would have the remedy by appealing to the legislature, which can, and it must be presumed will, do whatever justice may require. *Lord v. Thomas*, 64 N. Y. 107.

8. **Damages for Breach.** — *Alabama.* — *Danforth v. Tennessee, etc.*, R. Co., 99 Ala. 331; *Tennessee, etc.*, R. Co. v. *Danforth*, 112 Ala. 80.



**Mistake.**—The right of parties to working contracts to rescind on the ground of mistake is governed by the rules applicable to the rescission of other contracts.<sup>1</sup>

**Fraud.**—Fraudulent representation on the part of the builder will, as in other cases of fraud,<sup>2</sup> authorize a rescission by the contractor.<sup>3</sup>

**Failure of Contractor to Perform.**—The failure of the contractor duly and properly to perform his contract, if such failure is not due to any wrongful acts or omissions on the part of the builder, gives to the latter the right to rescind and annul the contract.<sup>4</sup> Of course, the builder cannot rescind for failure of the contractor to perform where his own failure to perform prevents performance by the contractor.<sup>5</sup>

**Waiver.**—The builder may waive his right to rescind the contract for failure of the contractor duly and properly to perform.<sup>6</sup> Thus, where the builder accepts the work in an uncompleted condition and makes use of it he waives his right to rescind the contract for failure entirely to complete the work.<sup>7</sup>

**Failure of Builder to Perform.**—So, where the builder fails or refuses to perform stipulations in the contract to be performed by him which are conditions

*District of Columbia.*—*U. S. v. Maloney*, 4 App. Cas. (D. C.) 505, 22 Wash. L. Rep. 785.

*Indiana.*—*Heavilon v. Kramer*, 31 Ind. 241.

*Iowa.*—*Dibol v. Minott*, 9 Iowa 403.

*Maryland.*—*Black v. Woodrow*, 39 Md. 194; *Baltimore, etc., R. Co. v. Stewart*, 74 Md. 487.

*Michigan.*—*Wells v. Board of Education*, 78 Mich. 260; *McGregor v. Ross*, 101 Mich. 575.

*Mississippi.*—*Vicksburg Water Supply Co. v. Gorman*, 70 Miss. 360.

*Missouri.*—*Lee v. Clifford*, 55 Mo. App. 497; *Gabriel v. Akinsville Pressed Brick Co.*, 57 Mo. App. 520.

*Montana.*—*Wortman v. Montana Cent. R. Co.*, 22 Mont. 266.

*New York.*—*Clark v. New York*, 3 Barb. (N. Y.) 288; *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 153; *Wharton v. Winch*, 140 N. Y. 287, *reversing* (C. Pl. Gen. T.) 19 N. Y. Supp. 477; *Sewer Com'rs v. Sullivan*, 162 N. Y. 594.

*North Dakota.*—*Davis v. Bronson*, 2 N. Dak. 300, 33 Am. St. Rep. 783.

*Pennsylvania.*—*Dobbling v. York Springs R. Co.*, 203 Pa. St. 628, 207 Pa. St. 123; *E. Keeler Co. v. Schott*, 1 Pa. Super. Ct. 458.

*Texas.*—*Waco Tap R. Co. v. Shirley*, 45 Tex. 355; *Kilgore v. Northwest Texas Baptist Educational Assoc.*, 90 Tex. 139; *Joske v. Pleasants*, 15 Tex. Civ. App. 433; *Watson v. De Witt County*, 19 Tex. Civ. App. 150; *Andrae v. Watson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 991.

See also *Villalobos v. Mooney*, 2 La. 331.

1. **Mistake.**—*Gibbs v. School Dist.*, 195 Pa. St. 396. And see the title MISTAKE, vol. 20, p. 805.

2. **Fraud.**—See the title FRAUD AND DECEIT, vol. 14, p. 12.

3. *Ricker v. Sanitary Dist.*, 89 Fed. Rep. 251; *Hington v. L. P., etc., Smith Co.*, 114 Fed. Rep. 294, 52 C. C. A. 206; *St. Louis Expanded Metal Co. v. Burgess*, 20 Tex. Civ. App. 527. See also *McCorkle v. Doby*, 1 Strobb. L. (S. Car.) 396, 47 Am. Dec. 560.

**What Constitutes Fraud.**—*Hington v. L. P., etc., Smith Co.*, 114 Fed. Rep. 294, 52 C. C.

A. 206; *Rowland Lumber Co. v. Ross*, 100 Va. 275, 4 Va. Supm. Ct. 191.

Where one, by fraudulently representing himself to be the owner of land, induces another to bestow labor upon it in the expectation of enjoying the property as a joint owner, the party performing the work may, upon the discovery of the fraud, abandon the contract and recover the value of the work done on the common count of *indebitatus assumpsit*. The law will imply a promise to pay for the labor. *Rickard v. Stanton*, 16 Wend. (N. Y.) 25.

4. **Failure of Contractor to Perform.**—*United States.*—*George A. Fuller Co. v. Doyle*, 87 Fed. Rep. 687.

*Arkansas.*—*Rector v. McDermott*, (Ark. 1890) 13 S. W. Rep. 334.

*California.*—*American Type Founders' Co. v. Packer*, 130 Cal. 459.

*Connecticut.*—*West v. Suda*, 69 Conn. 60.

*Illinois.*—*Chamber of Commerce v. Sollitt*, 43 Ill. 519.

*Iowa.*—*Wernli v. Collins*, 87 Iowa 548; *Meador v. Allen*, 110 Iowa 588; *Peacock v. Gleesen*, 117 Iowa 291.

*Kentucky.*—*Chamberlin v. McCalister*, 6 Dana (Ky.) 352; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305 (delay in performance).

*Massachusetts.*—*Chapman v. Lowell*, 4 Cush. (Mass.) 378; *Morrissey v. Geisel*, 172 Mass. 95.

*Montana.*—*Wortman v. Montana Cent. R. Co.*, 22 Mont. 266.

*New York.*—*Davison v. Jersey Co.*, 71 N. Y. 333; *Feinberg v. Weiher*, (C. Pl. Gen. T.) 19 N. Y. Supp. 215.

*Oregon.*—*Portland v. Baker*, 8 Oregon 356.

*Pennsylvania.*—*Miller v. Phillips*, 31 Pa. St. 218 (delay in performance).

*South Carolina.*—*Feaster v. Richland Cotton Mills*, 51 S. Car. 143.

*Texas.*—*Milliken v. Callahan County*, 69 Tex. 205; *Watson v. De Witt County*, 19 Tex. Civ. App. 150.

*Wisconsin.*—*Davis v. Hubbard*, 41 Wis. 408.

5. *Koerper v. Royal Invest. Co.*, 102 Mo. App. 543; *Scales v. Wiley*, 68 Vt. 39.

6. *Aikin v. Bloodgood*, 12 Ala. 221.

7. *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15.

precedent to performance by the contractor, the latter may rescind or annul the contract;<sup>1</sup> but of course the contractor is not entitled to rescind and abandon the contract unless there has been some wrongful act or default on the part of the builder.<sup>2</sup>

**2. Provisions in Contract for Rescission and Termination.** — The law recognizes as valid provisions in working contracts that the builder may, at his option or upon certain contingencies, stop the further performance of the work without incurring any liability to the contractor for damages,<sup>3</sup> or that the builder may rescind and annul the contract upon the failure of the contractor duly and properly to perform the work,<sup>4</sup> or allowing the builder to annul the contract if the contractor is not doing the work to his satisfaction.<sup>5</sup> So, provisions that upon the failure of the contractor, in the opinion of the architect or engineer in charge of the work, to proceed with the work with proper speed and in a proper manner the builder may rescind and annul the contract are valid,<sup>6</sup> and in the absence of fraud or bad faith on the part of the architect or engineer, his decision upon such question is, as a general rule, conclusive upon the contractor;<sup>7</sup> but, as in other cases, where the decision of questions is left to the architect, his decision may be impeached for fraud or bad faith.<sup>8</sup> Provisions authorizing the builder to declare a forfeiture and termination of the contract are not favored by the law,<sup>9</sup> and in order to authorize the builder

**1. Failure of Builder to Perform** — *United States*. — *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561.

*Illinois*. — *Selby v. Hutchinson*, 9 Ill. 319; *Schwartz v. Saunders*, 46 Ill. 18; *Dobbins v. Higgins*, 78 Ill. 440; *Christopher, etc., Architectural Iron, etc., Co. v. Yeager*, 202 Ill. 486.

*Iowa*. — *Duple v. Warren*, (Iowa 1899) 79 N. W. Rep. 363.

*Louisiana*. — *Lynch v. Sellers*, 41 La. Ann. 375.

*Missouri*. — *Bean v. Miller*, 69 Mo. 384.

*New York*. — *Clark v. New York*, 3 Barb. (N. Y.) 288; *Powers v. Hogan*, (C. Pl. Gen. T.) 6 N. Y. St. Rep. 239; *Meyer v. Hallock*, 2 Robt. (N. Y.) 285.

*Pennsylvania*. — *Worden v. Connell*, 196 Pa. St. 281.

*Texas*. — *Miller v. Sullivan*, 14 Tex. Civ. App. 112.

See also *infra*, this title, *Performance and Breach* — *Partial Performance*.

**2. Sanitary Dist. v. Ricker**, (C. C. A.) 91 Fed. Rep. 833; *Davis v. Bond*, 75 Mo. App. 32; *Cronin v. Tebo*, 144 N. Y. 660, 39 N. E. Rep. 344, *affirming* 71 Hun (N. Y.) 59; *Gallagher v. Baird*, 54 N. Y. App. Div. 398; *Becker v. Philadelphia*, (Pa. 1889) 16 Atl. Rep. 625.

**3. Provisions for Termination.** — *Warren-Scharf Asphalt Paving Co. v. Laclede Constr. Co.*, 111 Fed. Rep. 695, 49 C. C. A. 552; *Smell v. Brown*, 71 Ill. 133; *Dickinson v. Gray*, (Ky. 1888) 8 S. W. Rep. 876; *Omaha Consol. Vinegar Co. v. Burns*, 49 Neb. 229; *Curnan v. Delaware, etc., R. Co.*, 138 N. Y. 480; *Riley v. Black*, (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 206.

A contractor agreed to do certain work according to plans and specifications, with a provision that if he was guilty of delay the defendants might give a three days' notice of their intention to employ another person to complete the work, and that at the expiration of the notice the agreement should be void and the amount already paid to the contractor

should be considered the full value of the work executed by him up to that time. It was held that the power of determining the agreement might be exercised before any payment had been made. *Davies v. Swansea*, 8 Exch. 808.

**4. Garrett v. Banstead, etc., R. Co.**, 4 De G. J. & S. 462, 11 Jur. N. S. 591; *Davies v. Swansea*, 8 Exch. 808; *Munro v. Wivenhoe, etc., R. Co.*, 11 Jur. N. S. 612, 4 De G. J. & S. 723; *Mundy v. Stevens*, 61 Fed. Rep. 77, 17 U. S. App. 442, 463; *Rector v. McDermott*, (Ark. 1890) 13 S. W. Rep. 334; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305; *Carland v. New Orleans*, 13 La. Ann. 43.

**5. Harder v. Marion County Com'rs**, 97 Ind. 455.

**6. Ranger v. Great Western R. Co.**, 2 Jur. 787; *Munro v. Wivenhoe, etc., R. Co.*, 4 De G. J. & S. 723; *Mitchell v. Dougherty*, 86 Fed. Rep. 859; *Culbertson v. Ellis*, 6 McLean (U. S.) 248, 6 Fed. Cas. No. 3,461; *Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 233; *Hoyle v. Stellwagen*, 28 Ind. App. 681; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305; *Maloney v. Malcolm*, 31 Mo. 45; *Wortman v. Montana Cent. R. Co.*, 22 Mont. 266; *Charlton v. Scoville*, 68 Hun (N. Y.) 348; *Jones v. New York*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 211; *Faunce v. Burke*, 16 Pa. St. 469, 55 Am. Dec. 519.

**7. Ranger v. Great Western R. Co.**, 2 Jur. 787, 5 H. L. Cas. 72; *Scott v. Liverpool*, 3 De G. & J. 334; *Roberts v. Bury Imp. Com'rs*, L. R. 4 C. P. 755; *Culbertson v. Ellis*, 6 McLean (U. S.) 248, 6 Fed. Cas. No. 3,461; *State v. McGinley*, 4 Ind. 7; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305; *Faunce v. Burke*, 16 Pa. St. 469.

**8. Pawley v. Turnbull**, 3 Giff. 70, 7 Jur. N. S. 792; *Roberts v. Bury Imp. Com'rs*, L. R. 5 C. P. 310, 39 L. J. C. Pl. 129.

**9. See Anvil Min. Co. v. Humble**, 153 U. S. 540; *Chicago v. Sexton*, 115 Ill. 230; *Harley v. Sanitary Dist.*, 107 Ill. App. 546; *Louisville*,

to rescind and annul the contract under provisions therefor in the memorandum he must comply with the requirements of the contract as to the exercise of such right.<sup>1</sup> Thus, the builder must procure the required certificate of the architect or engineer,<sup>2</sup> and must give the required notice of his intention to terminate the contract.<sup>3</sup> If the failure of the builder to perform which is made by the contractor a cause for the termination of the contract is caused by the wrongful acts or omissions of the builder or his architect or engineer, the builder cannot take advantage of such failure as ground for terminating the contract.<sup>4</sup>

**Waiver.** — The builder may, of course, waive his reserved right to rescind and annul the contract,<sup>5</sup> and if, after the cause for termination, he fails to declare a termination of the contract, and acquiesces in the continuance of the work, he waives his right to terminate the contract for such cause.<sup>6</sup> Thus, where the right to annul and rescind is dependent upon the failure of the contractor to proceed with the speed required to complete the work within the required time, the builder, by acquiescing in the continuance of the work after the specified time, waives his right of rescission.<sup>7</sup>

**Forfeitures on Annulment and Rescission of Contract.** — Working contracts wherein the compensation is paid in instalments frequently provide for a retention by the builder of a certain percentage of the value of the work done until the full completion of the contract, and for a forfeiture of such percentage in case of an annulment of the contract for failure of the contractor duly and properly

etc., *R. Co. v. Donnegan*, 111 Ind. 179; *White v. Harrigan*, 41 Minn. 414; *Hatch v. Fogerty*, 33 N. Y. Super. Ct. 166.

In *Minnesota* it has been held, under a contract providing that if the contractor fails to comply with the conditions thereof, the architect shall be entitled to take possession of the building, that this right does not depend upon the mere arbitrary discretion of the architect, but in an action for damages by the contractor for such interference by the architect the issue whether he had fulfilled his contract is one which he is entitled to have tried. *White v. Harrigan*, 41 Minn. 414.

When the right to terminate the contract after notice that it is not being properly performed is given to the builder, he cannot by giving such notice terminate the contract if the work is in fact being properly done. *Hoyle v. Stellwagen*, 28 Ind. App. 681.

1. *White v. Mitchell*, 30 Ind. App. 342; *Sullivan v. Moffatt*, (N. J. 1903) 56 Atl. Rep. 304. Compare *Kennedy v. U. S.*, 24 Ct. Cl. 122.

2. *White v. Mitchell*, 30 Ind. App. 342; *Benson v. Miller*, 56 Minn. 410; *Wilson v. Borden*, 68 N. J. L. 627.

Under a provision that "if the architect shall certify that the refusal, neglect, or failure of the contractor to comply with the contract is ground for such action, the owner may terminate the employment of the contractor," the architect occupies a judicial position as to the parties, and is bound to act impartially upon his own judgment, and to express in some appropriate language in writing his opinion that there is sufficient ground to take the work out of the contractor's hands. A private letter written by the architect to the owner and not communicated to the contractor will not justify a rescission by the owner. *Wilson v. Borden*, 68 N. J. L. 627.

Where the contract requires a certificate of the architect that the failure of the contractor

properly to perform the contract is sufficient ground for its termination, a certificate that the contractor has failed properly to perform the contract and merely notifying the builder "to take such action as you deem best" is not sufficient to authorize the builder to terminate the contract. *White v. Mitchell*, 30 Ind. App. 342.

3. *Rodemer v. Gonder*, 9 Gill (Md.) 288; *Baltimore, etc., R. Co. v. Stewart*, 79 Md. 487; *Benson v. Miller*, 56 Minn. 410; *McClellan v. McLemore*, (Tex. Civ. Rep. 1902) 70 S. W. Rep. 224. Compare *Hendrie v. Canadian Bank of Commerce*, 49 Mich. 401.

**Sufficiency of Notice.** — *Charlton v. Scoville*, 68 Hun (N. Y.) 348.

**By Whom Notice to Be Given.** — *Hendrie v. Canadian Bank of Commerce*, 49 Mich. 401.

**Waiver of Defects in Notice.** — *Dickinson v. Gray*, (Ky. 1888) 8 S. W. Rep. 876.

Where the contract requires written notice of the termination of the contract, and the contractor accepts an oral notice and abandons work, he waives the necessity for a written notice. *Kennedy v. U. S.*, 24 Ct. Cl. 122.

4. *Waring v. Manchester, etc., R. Co.*, 7 Hare 482; *Roberts v. Bury Imp. Com'rs*, L. R. 5 C. P. 310; *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633; *Faunce v. Burke*, 16 Pa. St. 469, 55 Am. Dec. 519.

5. **Waiver.** — *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305; *Taylor v. New York*, 83 N. Y. 625; *Fallon v. Lawler*, 102 N. Y. 228; *Smith v. Corn*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 545; *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

6. *Carland v. New Orleans*, 13 La. Ann. 43; *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23.

7. *Walker v. London, etc., R. Co.*, 1 C. P. D. 518; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305. See also *Rodemer v. Gonder*, 9 Gill (Md.) 288.



to perform,<sup>1</sup> and while such provisions are upheld and enforced,<sup>2</sup> the right to retain such percentage must be clearly brought within the provisions of the contract.<sup>3</sup>

**VIII. PROPERTY IN MATERIALS — 1. Structure on Land.** — When the contractor is to furnish the materials and labor for the performance of a working contract requiring the erection of structures on the land of the builder, the materials remain the property of the contractor until they are affixed to the land of the builder or are delivered to and accepted by him as his property,<sup>4</sup> and this rule is not altered by the fact that the materials were purchased by the contractor with the intention of working them into the structure,<sup>5</sup> or that they were brought upon the land of the builder,<sup>6</sup> or that preliminary work had been done upon them so as to fit them for annexation to the structure,<sup>7</sup> or that they had been tentatively affixed to the structure for the purpose of seeing whether they would fit, and afterwards removed,<sup>8</sup> or that the builder has made payments to the contractor as the work progressed.<sup>9</sup> If the materials are furnished by the builder and the contractor is merely to use them in the performance of the work, they remain the property of the builder, and the same is true if they were purchased by the contractor as the agent of and on the credit of the builder;<sup>10</sup> and in *Pennsylvania* it has been held that where the materials are purchased by the contractor on the credit of the building to be constructed, so as to entitle the materialman to a mechanic's lien on the building, they are the property of the builder and therefore cannot be sold on execution against the contractor.<sup>11</sup> So the parties may, by express

**1. Forfeitures.** — *Henegan's Case*, 17 Ct. Cl. 273; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305; *Lord v. Belknap*, 1 Cush. (Mass.) 279; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 431; *Jenks v. Robertson*, 2 Thomp. & C. (N. Y.) 255.

**2. United States.** — *Miller v. Hubbard*, 4 Cranch (C. C.) 451, 17 Fed. Cas. No. 9,574; *Williams v. U. S.*, 28 Ct. Cl. 518. Compare *Kennedy v. U. S.*, 24 Ct. Cl. 122.

*Florida.* — *Finegan v. L'Engle*, 8 Fla. 413; *Lara v. Greeley*, 20 Fla. 926.

*Kentucky.* — *Elizabethtown, etc., R. Co. v. Geoghegan*, 9 Bush (Ky.) 56; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305.

*Maryland.* — *Geiger v. Western Maryland R. Co.*, 41 Md. 4.

*New Jersey.* — *Grassman v. Bonn*, 32 N. J. Eq. 43.

*Pennsylvania.* — *Faunce v. Burke*, 16 Pa. St. 469. Compare *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151.

*Wisconsin.* — *Jackson v. Cleveland*, 19 Wis. 400; *Dullaghan v. Fitch*, 42 Wis. 679.

See also the title **LICQUATED DAMAGES**, vol. 19, p. 394.

**3. Culbertson v. Ellis**, 6 McLean (U. S.) 248, 6 Fed. Cas. No. 3,461; *Harley v. Sanitary Dist.*, 107 Ill. App. 546; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 305; *Bietry v. New Orleans*, 22 La. Ann. 149; *Ricker v. Fairbanks*, 40 Me. 43; *Lord v. Belknap*, 1 Cush. (Mass.) 279; *Winters v. Fleece*, 4 Lea (Tenn.) 546.

**4. Materials Belong to Contractor.** — *Tripp v. Armitage*, 4 M. & W. 687; *Orleans, etc., R. Co. v. International Constr. Co.*, 108 La. 82 (materials assembled for railway construction); *Cameron v. Orleans, etc., R. Co.*, 108 La. 83; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Allis v. Voight*, 90 Mich. 125; *Manchester Mills v. Rundlett*, 23 N. H. 271; *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

In *Tripp v. Armitage*, 4 M. & W. 687, where sash frames were sent to a building for the approval of the owner, and then returned to the shop of the contractor and fitted with pulleys belonging to the owner, it was held that the final affixture had not taken place, and that, notwithstanding the approval by the owner and the act of appropriation, they were still the property of the contractor.

**5. Manchester Mills v. Rundlett**, 23 N. H. 271; *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

**6. Johnson v. Hunt**, 11 Wend. (N. Y.) 137.

**7. Fairfield Bridge Co. v. Nye**, 60 Me. 372; *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

**8. In Manchester Mills v. Rundlett**, 23 N. H. 271, it was held that where a contractor had procured blinds and fitted them to the windows of a house, and had then taken them off to paint them in accordance with his contract, the blinds, while in his hands for the purpose of being painted and finished, were his property and liable to be taken for his debts. *Perley, J.*, said: "The contract required Brandon (the contractor) to paint the blinds, and they were in his hands unfinished; the plaintiffs had no possession nor any right of possession; the fitting of the blinds to the windows did not complete the work to be done on them; it was not a surrender of the possession and control of them to the plaintiff; it did not annex them to the house and make them a part of it. The fitting of the blinds was done by way of trial in the progress of the manufacture of the blinds, and cannot be regarded as having any more effect to transfer the possession and property to the plaintiffs than a measurement which would have answered the same purpose."

**9. Fairfield Bridge Co. v. Nye**, 60 Me. 372; *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

**10. Materials Furnished by Builder.** — *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

**11. Where the materials are furnished on the**

agreement, provide that the materials furnished by the contractor shall become the property of the builder before they have been actually affixed to the structure;<sup>1</sup> but an agreement that materials brought upon the premises of the builder shall become his property has been held not to make them so absolutely the property of the builder as to be subject to seizure under an execution against him,<sup>2</sup> nor will such provisions be allowed to operate as a fraud upon the bankruptcy laws.<sup>3</sup> A mere option given to the builder to

credit of the building, the contractor may be considered the owner's agent in purchasing them, and hence they are the property of the owner, and cannot be levied on and sold under execution as the property of the contractor. *White v. Miller*, 18 Pa. St. 52.

**1. Provisions Passing Title to Builder.** — *Brown v. Bateman*, L. R. 2 C. P. 272; *Stevens v. Taylor*, 2 F. & F. 419; *Reeves v. Barlow*, 12 Q. B. D. 436; *Blake v. Izard*, 16 W. R. 108; *Duplan Silk Co. v. Spencer*, (C. C. A.) 115 Fed. Rep. 689.

In such case materials brought upon the land vest in the owner of the freehold, and are not liable for the debts of the builder. *Blake v. Izard*, 16 W. R. 108.

An agreement between a railway company and a contractor provided that in case the contractor should be guilty of any delay or default in the fulfilment of the contract the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, or implements; that, in addition to all rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract toward satisfaction of all losses or expenses occasioned to the company by the delay; and that all the materials, plant, and implements which at the time of such delay or default should be on or about the site of the works should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company. The company took the execution of the works out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which, with all matters in difference between the parties, was referred to arbitration. It was held that the plant and materials did not become the absolute property of the company unless loss or expense had been occasioned to it; and an interlocutory injunction was awarded to restrain the company from moving and selling the plant and materials pending the arbitration. *Garrett v. Salisbury*, etc., R. Co., L. R. 2 Eq. 358.

By an agreement made between the plaintiff company and the defendant, a contractor, for the construction of a railway, it was provided that once a month the company's engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, and that such certificates should be paid by the company seven days after presentation. It was held that the property in the materials delivered, upon their being certified for by the engineer, passed to the company, though the materials were not fixed. *Banbury*, etc.,

*Direct R. Co. v. Daniel*, 54 L. J. Ch. 265, 33 W. R. 321.

**Contractor's Plant.** — A contract for executing sewage works, made between a contractor and improvement commissioners, provided that the plant brought by the contractor on to the works should be deemed to be the property of the commissioners, and should not be removed during the progress of the work without the written order of their engineer; and in case of suspension of the works by the engineer for any default of the contractor, or of the work being taken out of the contractor's hands, the same should be subject to be used as should be ordered by the engineer in and about the completion of the works. The engineer suspended the works, and the commissioners took possession of the plant and completed the works. The contractor having become bankrupt, and a sum of two thousand eight hundred and seventy-six pounds, seven shillings and five pence having been certified to be due to the commissioners from him for default under the contract, the commissioners claimed to retain the plant, which was sold by consent for six hundred and eighty-five pounds, but it was held that the contract gave to the commissioners no property in the plant, only a right of user. *In re Winter*, 8 Ch. D. 225.

**2.** A contractor supplied materials to a railway company for the purpose of carrying out his contract. By the terms of the contract it was provided that the materials brought upon the railway should become immediately the absolute property of the company, except that they were to remain under the dominion of the contractor; that if he should duly complete his contract, the company would give to the contractor, as part of his payment, the unconsumed materials; and that if, instead of the contractor, the company should use the materials, the company should compensate him in respect of them. It was held that the materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under an execution upon a judgment against the company. *Beeston v. Marriott*, 4 Giff. 436, 9 Jur. N. S. 960.

**3.** *Tripp v. Armitage*, 4 M. & W. 687, 3 Jur. 249; *In re Winter*, 8 Ch. D. 225; *Ex p. Jay*, 14 Ch. D. 19; *Ex p. Barter*, 26 Ch. D. 510.

A contract by a trader to do certain works contained a clause that if he should become bankrupt, or delay proceedings with the works, his employer should have power, after seven days' notice to him to proceed, to employ others to do the work, that the advances made to the trader before his default should be taken as full payment, and that all tools and materials used upon the work should become the property of the employer. The trader, having delayed to proceed with the works, was served, on April



take possession of and keep materials furnished by the contractor upon certain contingencies has been held not to vest the title thereto in the builder before he has exercised his option and taken possession.<sup>1</sup> When the materials furnished by the contractor have been affixed to the structure so as to form a part of the real estate they become the property of the builder and cease to be the property of the contractor, though by express agreement they may remain the property of the contractor even after they have been affixed to the reality of the builder.<sup>2</sup>

**Material in Removed Building.** — It has been held that where the contract is silent as to old structures standing upon the land, whose removal is necessary to the performance of the contract, and makes no reference to the materials in them, they become the property of the contractor upon taking possession and removing them.<sup>3</sup>

**2. Construction of Chattels.** — Where materials are furnished by the contractor and work is performed in the construction of a chattel which remains in the custody and under the control of the contractor, no property passes to the person for whom the chattel is being constructed until the completion and delivery of the chattel,<sup>4</sup> and *a fortiori* no title passes to such person in

it, by his employer, with notice to proceed. On April 17 the trader committed an act of bankruptcy; on April 19, the notice to proceed not having been complied with, his employer took possession of the tools and materials. In June a fiat was issued against the trader. In trover by his assignees in bankruptcy against the employer for tools and materials left upon the works by the bankrupt, it was held that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on April 17, before the notice had expired. *Rouch v. Great Western R. Co.*, 2 R. & Can. Cas. 505, 5 Jur. 821.

1. *Tripp v. Armitage*, 4 M. & W. 687. In this case the materials were held to be the property of the assignee in bankruptcy of the contractor, where the builder had not taken possession of them before the bankruptcy of the contractor.

In *In re Waugh*, 4 Ch. D. 524, it appeared that a contractor contracted with a building club to erect houses for it on its own land. The contract contained a stipulation that if the contractor should neglect or refuse to proceed with the work in a proper manner, to the satisfaction of the architect of the club, or become bankrupt or insolvent or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements, provided that the contractor should have drawn money on account of his contract. The contractor began the works and carried them on for some time, receiving a considerable sum from the club. On May 2 he filed a liquidation petition. On June 2 the architect of the club gave notice to the contractor that as he had neglected to proceed with the works the club, on the expiration of two days, should employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works; and on the expiration of this notice the club took possession of the

materials, implements, and plant. It was held that the club was entitled, as against the trustee in the liquidation, to retain what it had seized, the seizure being a protected transaction within the Bankruptcy Act (1869), § 94.

**2. Effect of Annexation.** — Where a mill was built upon the land of another under an express contract by which it was to be the sole property of the builder until a judgment which was a lien upon the land should be paid by the owner, it was held that the builder had a right to remove the mill after a sale of the land on an execution issued upon such judgment. *Yater v. Mullen*, 24 Ind. 277.

3. *Morgan v. Stevens*, (C. Pl.) 6 Abb. N. Cas. (N. Y.) 356.

**Excavation Contract.** — Where an excavation contract was silent as to the ownership of the sand or material taken from the lots, it was held that a custom by which the earth removed in making excavations belongs to the excavator and not to the owner of the land could be shown as evidence of the contract of the parties. *Cooper v. Kane*, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512.

In *Jones v. Wick*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 112, it was held that a contract for excavation which was silent with regard to the earth, etc., removed, did not as a matter of law impliedly transfer title thereto to the contractor.

A right given to a lessee to make alterations does not entitle him to claim the materials taken out of the building in making the alterations. *Agate v. Lowenbein*, 57 N. Y. 604.

**4. Construction of Chattels**—*England*.—*Mucklow v. Mangles*, 1 Taunt. 318; *Laidler v. Burlinson*, 2 M. & W. 602; *Bellamy v. Davey*, (1891) 3 Ch. 540; *Atkinson v. Bell*, 8 B. & C. 277, 15 E. C. L. 216; *Clarke v. Spence*, 4 Ad. & El. 448, 31 E. C. L. 107.

*United States*.—*Clarkson v. Stevens*, 106 U. S. 505.

*Massachusetts*.—*Briggs v. A Light Boat*, 7 Allen (Mass.) 287; *Williams v. Jackman*, 16 Gray (Mass.) 514.

*New Jersey*.—*Elliott v. Edwards*, 35 N. J. L. 265.



the loose materials intended for but not worked into the chattel;<sup>1</sup> and it is immaterial that the work is performed on the land of the person for whom the chattel is being constructed,<sup>2</sup> or that the contractor is paid in instalments as the work progresses<sup>3</sup> or that a superintendent is appointed by the person for whom the chattel is intended to overlook the work and see that it is done according to the tenor of the contract.<sup>4</sup> A constructive appropriation or delivery may be sufficient to vest title in the person for whom the chattel is being constructed,<sup>5</sup> and the parties may by agreement vest title in such person as the work upon the chattel progresses.<sup>6</sup> Where materials furnished by the contractor are united in the construction of a chattel with materials furnished by the person for whom the chattel is being constructed, and the principal materials are furnished by the contractor, the materials worked into the chattel are the property of the contractor; but where the contractor constructs a chattel entirely from materials furnished by the person for whom the chattel is being constructed, the property in the chattel as constructed is in the latter.<sup>7</sup>

**IX. PERFORMANCE AND BREACH — 1. In General.** — Both the builder and the contractor must perform all the obligations assumed by each, and if the builder fails to perform the obligations assumed by him, the contractor may, of course, recover the damages he may suffer from such failure,<sup>8</sup> as where the contractor suffers damages through delay of his work by reason of defaults on the part of the builder;<sup>9</sup> and the builder is, in the absence of any stipu-

*New York.* — *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55.

*Pennsylvania.* — *Estate of Reany Engineers, etc.*, 9 Phila. (Pa.) 620, 29 Leg. Int. (Pa.) 157.

1. *Seath v. Moore*, 11 App. Cas. 350; *Wood v. Bell*, 6 El. & Bl. 355, 88 E. C. L. 355; *Baker v. Gray*, 17 C. B. 462, 84 E. C. L. 462, 2 Jur. N. S. 400.

2. *Bellamy v. Davey*, (1891) 3 Ch. 540.

3. *Clarkson v. Stevens*, 106 U. S. 505; *Briggs v. A Light Boat*, 7 Allen (Mass.) 287; *Andrews v. Durant*, 11 N. Y. 35.

In *England* the payment of instalments dependent upon the progress of the work upon the chattel is held to be an indication of an intention to vest the property in the person for whom it is intended as it is building. *Wood v. Bell*, 5 El. & Bl. 772, 85 E. C. L. 772; *Seath v. Moore*, 11 App. Cas. 350.

4. *Clarkson v. Stevens*, 106 U. S. 505; *Briggs v. A Light Boat*, 7 Allen (Mass.) 287.

5. *Wilkins v. Bromhead*, 6 M. & G. 963, 46 E. C. L. 963.

6. *Briggs v. A Light Boat*, 7 Allen (Mass.) 287.

7. *Merritt v. Johnson*, 7 Johns. (N. Y.) 473.

8. **Duty to Perform.** — *Clark v. U. S.*, 6 Wall. (U. S.) 543; *Collins v. U. S.*, 34 Ct. Cl. 294; *Smith v. Boston, etc.*, R. Co., 36 N. H. 458.

**Duty to Procure Building Permits.** — *Leverone v. Arancio*, 179 Mass. 439; *Thorp v. Ross*, 4 Keyes (N. Y.) 546; *Dieterlen v. Powers*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 492; *Strom v. Dongan*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 754; *Weeks v. Trinity Church*, 56 N. Y. App. Div. 195; *Norton v. New Amsterdam Gas Co.*, 69 N. Y. App. Div. 10.

**Implied Obligations on Part of Builder.** *Smith v. Boston, etc.*, R. Co., 36 N. H. 458.

**Place for Materials.** — The builder is not under any implied obligation to furnish to the

contractor a place for the storage of materials. *Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

**Place to Dump Earth Excavated.** — Under a contract for excavation, the builder is under no implied obligation to furnish to the contractor a place to dump the earth excavated. *Cronin v. Tebo*, 71 Hun (N. Y.) 59.

**9. Delaying Contractor** — *England.* — *Roberts v. Bury Imp. Com'rs*, L. R. 5 C. P. 325; *Lawson v. Wallasey Local Board*, 11 Q. B. D. 229, 52 L. J. Q. B. 302; *Freeman v. Hensler*, 64 J. P. 260; *Bush v. Whitehaven Trustees*, 52 J. P. 392.

*United States.* — *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *U. S. v. Mueller*, 113 U. S. 153; *Wood v. Ft. Wayne*, 119 U. S. 312; *Figh's Case*, 8 Ct. Cl. 319; *Roettinger v. U. S.*, 26 Ct. Cl. 391.

*Illinois.* — *Tobey v. Price*, 75 Ill. 645; *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333; *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210.

*Indiana.* — *Brown v. Langner*, 25 Ind. App. 538.

*Maryland.* — *Orange, etc., R. Co. v. Placide*, 35 Md. 315; *Geiger v. Western Maryland R. Co.*, 41 Md. 4.

*Massachusetts.* — *Blanchard v. Blackstone*, 102 Mass. 343.

*Michigan.* — *Perine v. Standfield*, 107 Mich. 553.

*Missouri.* — *Haynes v. St. Louis Second Baptist Church*, 12 Mo. App. 536.

*New Hampshire.* — *Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

*New York.* — *Allamon v. Albany*, 43 Barb. (N. Y.) 33; *Thorp v. Ross*, 4 Keyes (N. Y.) 546; *Mansfield v. New York Cent., etc., R. Co.*, 102 N. Y. 205; *Parr v. Greenbush*, 112 N. Y. 246; *Del Genovese v. Third Ave. R. Co.*, 162 N. Y. 614, 57 N. E. Rep. 1008, affirming 13 N. Y. App. Div. 412; *Montgomery v.*

lation in the contract exempting him therefrom, liable for damages from delays caused by the failure of other contractors to perform work they have undertaken to do for the builder and which, as regards the former contractor, the builder was under obligation to do.<sup>1</sup> Still, the builder may, by express stipulation in the contract, exempt himself from liability to one contractor for delays caused by other contractors,<sup>2</sup> and building contracts with separate contractors for different parts of the work on a structure may, by express stipulation, render one contractor liable to another for improper delays caused to the latter.<sup>3</sup> Where the contractor is delayed by the failure of the builder duly to perform the obligations assumed by him, the fact that the contractor continues the work is not a waiver of his claim for damages for such delay.<sup>4</sup> So it has been held that the receipt by the contractor of the stipulated price for the performance of his contract was not a waiver of his claim for such damages.<sup>5</sup> If the contractor fails to perform his contract, the builder may, of course, recover damages therefor as in case of the breach of any other contract,<sup>6</sup> and may recoup such damages from any claim on the part of the contractor for work done and material furnished in the part performance of the contract.<sup>7</sup> If the contract expressly provides that upon the failure of the

New York, (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 331; *Weeks v. Trinity Church*, 56 N. Y. App. Div. 195; See *v. Partridge*, 2 Duer (N. Y.) 463.

*Pennsylvania*.—*Lauman v. Young*, 31 Pa. St. 306.

*Texas*.—*O'Connor v. Smith*, 84 Tex. 232.

*Virginia*.—*Atlantic, etc., R. Co. v. Delaware Constr. Co.*, 98 Va. 503, 2 Va. Sup. Ct. 430.

When a person employed to furnish all necessary labor and materials and do everything specified under the head of mason's work, etc., in the erection of a building, the ironwork and stonecutters' work to be furnished by the employer, is delayed in the completion of his contract by the delay of his employer in furnishing the ironwork and cut stone, he will be entitled to recover the damages occasioned by the delay. *Tobey v. Price*, 75 Ill. 645.

One who has contracted with a town for the erection of a building within a certain time may recover damages for its unreasonable omission to fix the site of the building, under a declaration alleging that it hindered him in the performance of the contract. *Blanchard v. Blackstone*, 102 Mass. 343.

Where one contracts to do the carpenter work on a building, and to proceed forthwith without delay, the employer is bound to have the building in readiness to begin work within a reasonable time, and if he fails to do so the contractor may recover his damages by reason of the delay. *Allamon v. Albany*, 43 Barb. (N. Y.) 33.

**1. Delays Through Other Contractors.**—*Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333; *State v. Farish*, 23 Miss. 483. See also *Coulter v. Board of Education*, 63 N. Y. 365.

**2.** *Haydnville Min., etc., Co. v. Art Institute*, 39 Fed. Rep. 484; *Cook County v. Sexton*, 16 Ill. App. 93; *McNulty v. Stearns*, 85 Iowa 437; *O'Connor v. Smith*, 84 Tex. 232.

In *Haydnville Min., etc., Co. v. Art Institute*, 39 Fed. Rep. 484, it was held that where the contract provided for an extension of time in case delay was caused by other contractors, such a stipulation implied that there was to be no pecuniary compensation for such delay

to the contractor. See, however, *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333.

**3.** *Grant v. Diebold Safe, etc., Co.*, 77 Wis. 72.

**4. Waiver.**—*Figh's Case*, 8 Ct. Cl. 319; *Tobey v. Price*, 75 Ill. 645; *Allamon v. Albany*, 43 Barb. (N. Y.) 33. Compare *Western Union R. Co. v. Smith*, 75 Ill. 496.

**5.** *Weeks v. Trinity Church*, 56 N. Y. App. Div. 195.

**6. Breach by Contractor**—*England*.—*Marshall v. Mackintosh*, 78 L. T. N. S. 750.

*United States*.—*Junker v. Fobes*, 45 Fed. Rep. 840.

*California*.—*Bryant v. Broadwell*, 140 Cal. 490.

*Colorado*.—*Barker v. Nichols*, 3 Colo. App. 25.

*District of Columbia*.—*U. S. v. Maloney*, 4 App. Cas. (D. C.) 505, 22 Wash. L. Rep. 785.

*Iowa*.—*Hensen v. Beebe*, 111 Iowa 534.

*Louisiana*.—*Dwyer v. Tulane Educational Fund*, 47 La. Ann. 1232; *Sarrazin v. Adams*, 110 La. 124; *Vernon Police Jury v. Johnson*, 111 La. 279.

*Maryland*.—*Davis v. Ford*, 81 Md. 333.

*Massachusetts*.—*Nolan v. Collins*, 112 Mass. 12; *National Contracting Co. v. Com.*, 183 Mass. 89.

*Missouri*.—*Vincent v. Morrison*, 58 Mo. App. 497; *Harrison v. Murray Iron Works Co.*, 96 Mo. App. 348; *Ramlose v. Dollman*, 100 Mo. App. 347.

*New York*.—*Haist v. Bell*, 24 N. Y. App. Div. 252; *Ogden v. Pioneer Iron Works*, 91 N. Y. App. Div. 394.

*South Dakota*.—*Aldrich v. Wilmarth*, 3 S. Dak. 523.

*Vermont*.—*Clifford v. Richardson*, 18 Vt. 620.

*Virginia*.—*Atlantic, etc., R. Co. v. Delaware Constr. Co.*, 98 Va. 503, 2 Va. Sup. Ct. 430.

*Washington*.—*Long v. Pierce County*, 22 Wash. 330.

*Wisconsin*.—*Keller v. Oberreich*, 67 Wis. 282.

**7.** *Florida R. Co. v. Smith*, 88 U. S. 255;

contractor to perform the builder shall annul the contract and retain the unpaid part of the compensation, the builder is restricted to this remedy, and cannot maintain an action for damages.<sup>1</sup> So, if the contract provides that on the failure of the contractor to perform he shall have no pay for work performed and materials furnished, this fixes the consequences of a failure of the contractor to perform, and the builder cannot maintain an action for damages for such failure.<sup>2</sup> And if the contract expressly requires the contractor to remedy any defects in his work after the building is completed and accepted, the contractor is entitled to notice of defects and an opportunity to remedy them, and without such notice and opportunity he cannot be held liable to the builder for damages for such defects.<sup>3</sup>

**Subletting.** — Unless expressly restricted by the terms of the contract, the contractor is not necessarily required personally to perform the work, but may sublet it.<sup>4</sup> Working contracts sometimes provide that the contractor shall not sublet the work,<sup>5</sup> but such a provision is for the benefit of the builder, and may be waived by him;<sup>6</sup> and if the contractor sublets the work in violation of a provision in the contract, he is not by reason of such provision released from liability to his subcontractor for breach of the contract.<sup>7</sup>

**Estimate of Architect or Engineer of Amount of Damages.** — Working contracts frequently provide that if the contractor or builder fails to perform the contract, the architect or engineer in charge of the work shall audit and certify the amount of damages suffered by the one for the default of the other, and that his certificate shall be conclusive upon the parties; and while the binding force of such stipulations is recognized by all the courts,<sup>8</sup> the certificate may be impeached for fraud or bad faith on the part of the architect or engineer, but the burden of proof to show fraud or bad faith rests upon the party attacking the certificate.<sup>9</sup> Unless the determination of the amount of damages resulting from a breach of the contract is expressly referred to the architect or engineer, his decision upon the question is not, of course, binding upon the parties.<sup>10</sup>

**Proof of Performance or Breach.** — The general rules of evidence apply, of course,

*Manville v. McCoy*, 3 Ind. 148; *Fitts v. Reinhart*, 102 Iowa 311; *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215; *Schuler v. Eckert*, 90 Mich. 165; *Smith v. Ferris*, 1 Daly (N. Y.) 18; *Beck v. Catholic University*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 567; *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. St. 167.

1. *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633.

2. *Spear v. Snider*, 29 Minn. 463.

3. *Mansfield v. Beard*, 82 N. Y. 60.

4. **Subletting.** — *Curran v. Clifford*, 6 Colo. App. 289; *Reed v. Conway*, 26 Mo. 13; *Drumheller v. American Surety Co.*, 30 Wash. 530.

A contractor undertaking to roof a building with gravel is not required personally to perform the work, but may hire another to do it. *Curran v. Clifford*, 6 Colo. App. 289.

5. *Bienhauer v. Gleason*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 227.

6. *Lauman v. Young*, 31 Pa. St. 306.

In *Danforth v. Tennessee*, etc., R. Co., 93 Ala. 614, the court said: "The contract provides that no work shall be subcontracted without the written consent of the engineer in chief. This provision was intended for the benefit of the defendant. It was entirely competent to show the defendant waived this right or benefit, and for this purpose it was proper to prove by the chief engineer that he knew subcontractors of plaintiffs were at work; that

he, as chief engineer, directed them when and where to work, and that he estimated the work of the subcontractors, and gave the estimates to plaintiffs, knowing that it had been done by subcontractors for plaintiffs; and it was competent to show the president of the company was apprised of all these subcontracts, and permitted the work to be done by them without objection." *Citing Badders v. Davis*, 88 Ala. 367.

7. *Herry v. Benoit*, (Tex. Civ. App. 1902) 70 S. W. Rep. 359.

8. **Estimates of Architects, etc., of Amount of Damages.** — *Fontano v. Robbins*, 18 App. Cas. (D. C.) 402; *Maysville, etc., Turnpike Road Co. v. Waters*, 6 Dana (Ky.) 62; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Scott v. Texas Constr. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 37; *Hughes v. Bravinder*, 9 Wash. 595; *De Mattos v. Jordan*, 20 Wash. 315; *J. G. Wagner Co. v. Cawker*, 112 Wis. 532.

9. *Eldridge v. Fuhr*, 59 Mo. App. 44.

10. *Downey v. O'Donnell*, 86 Ill. 49; *Michigan Ave. M. E. Church v. Hearson*, 41 Ill. App. 89; *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210; *Weeks v. Trinity Church*, 56 N. Y. App. Div. 195; *McGovern v. Bockius*, 10 Phila. (Pa.) 438, 22 Leg. Int. (Pa.) 248; *Chandley v. Cambridge Springs*, 200 Pa. St. 230.



with regard to the admissibility of evidence to show the performance or breach of working contracts.<sup>1</sup> The burden of proof to show performance is on the party alleging performance on his part,<sup>2</sup> and where the evidence as to whether a working contract was properly performed is conflicting, the question is one of fact, and the finding or verdict upon such issue will not, as a rule, be disturbed.<sup>3</sup>

**2. Substantial Performance.** — Where the compensation is due only upon the performance of the contract it is, as a general rule, necessary to entitle the contractor to recover thereon that he show a performance of the contract. Still, a literal and strict performance is not required, and if the contractor, acting in good faith and intending and attempting to perform his contract, does so substantially, he may recover in an action on the contract notwithstanding slight and trivial defects in performance, for which compensation may be made by an allowance to the builder;<sup>4</sup> but the builder is entitled to

**1. Proof of Performance or Breach.**—*Hawley v. Belden*, 1 Conn. 93; *Hartford Bridge Co. v. Granger*, 4 Conn. 458; *Patterson v. Crowther*, 70 Md. 124; *Swank v. Barnum*, 63 Minn. 447; *Dubois v. Bigler*, 95 Pa. St. 203; *Lange v. Johnson*, 87 Wis. 26.

**Report of Superintendent of Building.—Failure of Contractor to Question Correctness.**—*Watson v. De Witt County*, 19 Tex. Civ. App. 150.

**Refusal of Contractor to Allow Inspection of Work.**—In an action for the contract price for building a house, it is competent for the plaintiff to show that he sent a person to examine the work, in order that such person might be able to testify how the work had been done, and that defendant refused to admit him. *Bryant v. Stilwell*, 24 Pa. St. 314.

**Proof of Other Defective Work by Contractor.**—*Boyer v. Rhinehart*, (Brooklyn City Ct. Gen. T.) 17 N. Y. Supp. 346.

**2. Lehan v. Kiley**, (Ky. 1900) 54 S. W. Rep. 727.

**3. United States.**—*Cunningham v. Hall*, 1 Sprague (U. S.) 404, 6 Fed. Cas. No. 3,482.

*California.*—*Gray v. Wells*, 118 Cal. 11.

*Illinois.*—*Smith v. Stafford*, 14 Ill. App. 313; *Colburn v. Westcott*, 36 Ill. App. 347; *Congress Constr. Co. v. Gutrich*, 70 Ill. App. 183.

*Indian Territory.*—*South McAlester Electric Light, etc., Co. v. Eddy*, 2 Indian Ter. 645.

*Louisiana.*—*Fremont v. Harris*, 9 Rob. (La.) 23.

*Massachusetts.*—*Mason v. Field*, 119 Mass. 585.

*Missouri.*—*Smith v. Clark*, 58 Mo. 145; *Standard Stamping Co. v. Hemminghaus*, 157 Mo. 23; *Lewis v. Slack*, 27 Mo. App. 119.

*New York.*—*Curtice v. West*, 50 Hun (N. Y.) 47; *Cortright v. Mt. Vernon*, 50 Hun (N. Y.) 606, 3 N. Y. Supp. 296; *Logan v. Berkshire Apartment Assoc., (N. Y. City Ct. Gen. T.)* 18 N. Y. Supp. 164; *Sylvester v. Wheeler*, 74 Hun (N. Y.) 382; *MacKnight Flintic Stone Co. v. New York*, 13 N. Y. App. Div. 231.

*Pennsylvania.*—*Bachler v. Cooper*, 150 Pa. St. 533; *Harlow v. Homestead*, 194 Pa. St. 57.

**4. Substantial Performance.—England.**—*Cutler v. Close*, 5 C. & P. 337, 24 E. C. L. 348.

*United States.*—*Woodruff v. Hough*, 91 U. S. 596; *Philip Hiss Co. v. Pitcairn*, 107 Fed. Rep. 425; *Pitcairn v. Philip Hiss Co., (C. C. A.)* 113 Fed. Rep. 492; *Cranford v. District of Columbia*, 20 Ct. Cl. 376.

*California.*—*Hunt v. Elliott*, 77 Cal. 588.

*Connecticut.*—*Smith v. Scott's Ridge School Dist.*, 20 Conn. 312; *Blakeslee v. Holt*, 42 Conn. 226; *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183; *Jones, etc., Co. v. Davenport*, 74 Conn. 418. And see *Brabazon v. Seymour*, 42 Conn. 551.

*District of Columbia.*—*Beha v. Ottenberg*, 6 Mackey (D. C.) 348.

*Florida.*—*Finegan v. L'Engle*, 8 Fla. 413.

*Illinois.*—*Keeler v. Herr*, 157 Ill. 57; *Shepard v. Mills*, 173 Ill. 223, affirming 70 Ill. App. 72; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, affirming 88 Ill. App. 485; *School Directors v. Roberson*, 65 Ill. App. 298; *Cook v. American Luxfer Prism Co.*, 93 Ill. App. 299; *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 106 Ill. App. 17, affirmed 210 Ill. 26.

*Indiana.*—*Manville v. McCoy*, 3 Ind. 148; *McLaughlin v. Child*, 62 Ind. 412.

*Iowa.*—*Corwin v. Wallace*, 17 Iowa 374; *Fauble v. Davis*, 48 Iowa 462; *Ætna Iron, etc., Works v. Kossuth County*, 79 Iowa 40; *Hensen v. Beebe*, 111 Iowa 534.

*Massachusetts.*—*Gleason v. Smith*, 9 Cush. (Mass.) 484; *Rose v. O'Riley*, 111 Mass. 57; *Cullen v. Sears*, 112 Mass. 299.

*Minnesota.*—*Leeds v. Little*, 42 Minn. 414; *Madden v. Oestrich*, 46 Minn. 538; *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329.

*Missouri.*—*Nelson Mfg. Co. v. Mitchell*, 38 Mo. App. 321; *Buschmann v. Bray*, 68 Mo. App. 8. Compare *Boteler v. Roy*, 40 Mo. App. 234.

*New Jersey.*—*Feeney v. Bardsley*, 66 N. J. L. 239.

*New York.*—*Smith v. Gugerty*, 4 Barb. (N. Y.) 614; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Rancher v. Cronk*, 50 Hun (N. Y.) 602, 3 N. Y. Supp. 470; *Valk v. McKiege*, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 741; *Boughton v. Smith*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 148; *Anderson v. Meislahn*, 12 Daly (N. Y.) 149; *Zimmermann v. Jourgensen*, 70 Hun (N. Y.) 222; *Turner v. Haight*, 16 N. Y. 465; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Johnson v. De Peyster*, 50 N. Y. 666; *Woodward v. Fuller*, 80 N. Y. 312; *Heckmann v. Pinkney*, 81 N. Y. 211; *Nolan v. Whitney*, 88 N. Y. 648; *Flaherty v. Miner*, 123 N. Y. 382, affirming 15 Daly (N. Y.) 173; *Oberlies v. Bullinger*, 132 N. Y. 598, reversing 58 Hun (N. Y.) 601; *Lennon v. Smith*, 161 N. Y.

an allowance for the damages he may suffer by reason of failure to perform strictly,<sup>1</sup> though to entitle him to claim an allowance for such defects the burden is upon him to allege and prove the amount of his damages.<sup>2</sup> As a general rule, the amount to be allowed to the builder in case of a substantial performance is the necessary cost of remedying the defects or omissions in performance;<sup>3</sup> but where the cost of remedying the omissions would be very large as compared with the benefit which would be derived therefrom by the

661, 57 N. E. Rep. 1115, *affirming* 23 N. Y. App. Div. 293; *Freeman v. Rothschild*, 168 N. Y. 589, 60 N. E. Rep. 1111, *affirming* 49 N. Y. App. Div. 643; *Wollreich v. Fettretch*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 326; *Byron v. Bell*, 16 Daly (N. Y.) 198; *Crouch v. Gutmann*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 275, *affirmed* 134 N. Y. 45; *Rush v. Wagner*, (Brooklyn City Ct. Gen. T.) 12 N. Y. Supp. 2; *Hopper v. Cutting*, (C. Pl. Gen. T.) 13 N. Y. Supp. 820; *Highton v. Dessau*, (C. Pl. Gen. T.) 19 N. Y. Supp. 395; *Monteverde v. Queens County*, 78 Hun (N. Y.) 267; *Chapin v. Candee*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 453; *Ryan v. Voelkl*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 840; *Vogel v. Friedman*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 775; *Niemeyer v. Woods*, 72 N. Y. App. Div. 630; *Perry v. Levenson*, 82 N. Y. App. Div. 94; *Logan v. Berkshire Apartment Assoc.*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 18; *Smith v. Clark*, (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 165.

*North Carolina*.—*Russell v. Iredell County*, 123 N. Car. 264.

*Ohio*.—*Kane v. Wilson, etc.*, *Stone Co.*, 4 Ohio Dec. (Reprint) 509, 2 Cleve. L. Rep. 290; *Goldsmith v. Hand*, 26 Ohio St. 101; *Mehurin v. Stone*, 37 Ohio St. 55; *Kane v. Stone Co.*, 39 Ohio St. 1; *Ashley v. Henahan*, 56 Ohio St. 559.

*Oregon*.—*Gove v. Island City Mercantile, etc., Co.*, 16 Oregon 93.

*Pennsylvania*.—*Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151; *Monocacy Bridge Co. v. American Iron Bridge Mfg. Co.*, 83 Pa. St. 517; *Ellis v. Lane*, 85 Pa. St. 265; *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546; *Coon v. Citizens Water Co.*, 152 Pa. St. 644.

*South Carolina*.—*Killian v. Herndon*, 4 Rich. L. (S. Car.) 609.

*South Dakota*.—*Aldrich v. Wilmarth*, 3 S. Dak. 523.

*Texas*.—*Johnson v. White*, (Tex. Civ. App. 1894) 27 S. W. Rep. 174; *Jennings v. Willer*, (Tex. Civ. App. 1895) 32 S. W. Rep. 24; *Bradford v. Whitcomb*, 11 Tex. Civ. App. 221. *Compare* *Linch v. Paris Lumber, etc., Co.*, (Tex. 1890) 14 S. W. Rep. 701.

*Vermont*.—*Kelly v. Bradford*, 33 Vt. 35.

*Washington*.—*Washington Bridge Co. v. Land, etc., Imp. Co.*, 12 Wash. 272.

*Wisconsin*.—*Lange v. Johnson*, 87 Wis. 26.

And see *Woodworth v. Hammond*, 19 Neb. 215. *Compare* *Hill v. School Dist. No. 2*, 17 Me. 316.

In *Gleason v. Smith*, 9 Cush. (Mass.) 484, *Dewey, J.*, said: "This case does not differ from the cases that have been so frequently before the court, in which it has been held that a strict literal fulfilment of a building contract was not a condition precedent to a recovery upon the contract. In terms the last

payment was to be made when the work was completed, but that does not take the case out of the rule, and where the party has acted in good faith, and has unintentionally failed, in some particulars, to perform the contract, he may yet recover for his services, deducting therefrom such sums as will fully indemnify the other party for any deficiency in the work."

**1. Reductions Allowed to Builder—England.**—*Farnsworth v. Garrard*, 1 Campb. 38; *Grounsell v. Lamb*, 1 M. & W. 352; *Cutler v. Close*, 5 C. & P. 337, 24 E. C. L. 348.

*United States*.—*Van Buren v. Digges*, 11 How. (U. S.) 461; *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255.

*Georgia*.—*Cannon v. Hunt*, 116 Ga. 452.

*Illinois*.—*Keeler v. Herr*, 157 Ill. 57; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, *affirming* 88 Ill. App. 485; *School Directors v. Roberson*, 65 Ill. App. 298; *Shepard v. Mills*, 70 Ill. App. 72.

*Louisiana*.—*Sarrazin v. Adams*, 110 La. 124. *Massachusetts*.—*Gleason v. Smith*, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; *Cullen v. Sears*, 112 Mass. 299.

*Michigan*.—*Schuler v. Eckert*, 90 Mich. 165. *Missouri*.—*Boteler v. Roy*, 40 Mo. App. 238.

*New Jersey*.—*Feeney v. Bardsley*, 66 N. J. L. 239.

*New York*.—*Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Glacius v. Black*, 50 N. Y. 153, 10 Am. Rep. 449; *Woodward v. Fuller*, 80 N. Y. 312; *Heckmann v. Pinkney*, 81 N. Y. 213; *Nolan v. Whitney*, 88 N. Y. 648; *Flaherty v. Miner*, 123 N. Y. 382; *Rush v. Wagner*, (Brooklyn City Ct. Gen. T.) 12 N. Y. Supp. 2; *Ryan v. Voelkl*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 840; *Smith v. Cowan*, 157 N. Y. 714, 53 N. E. Rep. 1132, *affirming* 3 N. Y. App. Div. 230; *Smith v. Clark*, (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 165.

*North Carolina*.—*Howie v. Rea*, 70 N. Car. 559.

*Ohio*.—*Kane v. Stone Co.*, 39 Ohio St. 1. *Pennsylvania*.—*Holmes v. Chartiers Oil Co.*, 138 Pa. St. 516, 21 Am. St. Rep. 919, 27 W. N. C. (Pa.) 156.

*South Dakota*.—*Aldrich v. Wilmarth*, 3 S. Dak. 523.

**2.** *Madden v. Oestrich*, 46 Minn. 538. See, however, *Spence v. Ham*, 163 N. Y. 220, *affirming* 27 N. Y. App. Div. 379.

**3.** *Keeler v. Herr*, 157 Ill. 57; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508; *School Directors v. Roberson*, 65 Ill. App. 298; *Shepard v. Mills*, 70 Ill. App. 72; *Cook v. American Luxfer Prism Co.*, 93 Ill. App. 299; *Kiel v. Kline*, 15 Ky. L. Rep. 158; *Haysler v. Owen*, 61 Mo. 270; *Danforth v. Freeman*, 69 N. H. 466. See also the cases cited *supra* this subsection.

builder, he has been allowed as a deduction only the difference in the value of the work as done and its value if it had been done in strict compliance with the contract.<sup>1</sup> The question whether the contract has been substantially performed is, as a general rule, a question of fact depending upon all the circumstances of the case,<sup>2</sup> and a verdict or finding that there was a substantial performance will not, as a rule, be disturbed.<sup>3</sup> Thus, it has been held that neither substantial performance nor failure thereof was shown as a matter of law by proof that the compensation was to be one thousand dollars and the contract was completed except in regard to small matters which could be completed for one hundred dollars;<sup>4</sup> that the compensation was to be seven thousand dollars and the defects could be remedied for two hundred and seventy-five dollars;<sup>5</sup> that the compensation was three hundred and ninety dollars and the cost of remedying defects thirteen dollars and eighty cents;<sup>6</sup> that the compensation was six thousand dollars and the defects would cost six hundred and fifty-six dollars;<sup>7</sup> that the compensation was to be five thousand two hundred dollars and the cost of remedying defects and omissions five hundred dollars;<sup>8</sup> that the compensation was three thousand dollars and the cost of remedying omissions three hundred and fifty dollars;<sup>9</sup> or that the compensation was three thousand five hundred dollars and the defects would cost six hundred dollars.<sup>10</sup> Variations and omissions in the ornamentation of a building may constitute a substantial variance and defeat the claim of a substantial performance.<sup>11</sup> If the failure to perform the contract strictly is done knowingly or in bad faith the contractor is precluded from claiming a substantial performance,<sup>12</sup> and the same is true where the omissions and departures are so substantial as not to be readily capable of remedy, and an

1. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183.

2. *What Constitutes Substantial Performance—United States.*—*Swain v. Seamens*, 9 Wall. (U. S.) 254; *Pitcairn v. Philip Hiss Co.*, 113 Fed. Rep. 492, 51 C. C. A. 323.

*California.*—*Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114.

*Iowa.*—*Fauble v. Davis*, 48 Iowa 462.

*Massachusetts.*—*Rose v. O'Riley*, 111 Mass. 57.

*Montana.*—*Franklin v. Schultz*, 23 Mont. 165.

*New York.*—*Anderson v. Meislahn*, 12 Daly (N. Y.) 149; *Boughton v. Smith*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 148; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Johnson v. De Peyster*, 50 N. Y. 666; *Nolan v. Whitney*, 88 N. Y. 648; *Oberlies v. Bullinger*, 132 N. Y. 598, 31 N. E. Rep. 629, reversing 58 Hun (N. Y.) 601, 11 N. Y. Supp. 264; *Byron v. Bell*, 16 Daly (N. Y.) 198; *Rush v. Wagner*, (Brooklyn City Ct. Gen. T.) 12 N. Y. Supp. 2; *Hopper v. Cutting*, (C. Pl. Gen. T.) 13 N. Y. Supp. 820; *Gibbons v. Russell*, (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 879; *Boughton v. Smith*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 148; *D'Andre v. Zimmermann*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 357; *Petrolia Mfg. Co. v. Jenkins*, 29 N. Y. App. Div. 403; *Pitt v. Downing*, 52 N. Y. Super. Ct. 508; *Weeks v. O'Brien*, 59 N. Y. Super. Ct. 28; *Freeman v. Rothschild*, 49 N. Y. App. Div. 643; *Rauscher v. Cronk*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 470; *Logan v. Berkshire Apartment Assoc.*, (N. Y. City Ct. Gen. T.) 18 N. Y. Supp. 164.

*North Carolina.*—*Russell v. Iredell County*, 123 N. Car. 264.

3. *Connecticut.*—*Jones, etc., Co. v. Davenport*, 74 Conn. 418.

*Illinois.*—*Colburn v. Wescott*, 36 Ill. App. 347.

*Massachusetts.*—*Rose v. O'Riley*, 111 Mass. 57 (failure to hang doors on barn).

*Minnesota.*—*Madden v. Oestrich*, 46 Minn. 538.

*New York.*—*Rancher v. Cronk*, 50 Hun (N. Y.) 602, 3 N. Y. Supp. 470; *Valk v. McKiege*, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 741; *Johnson v. De Peyster*, 50 N. Y. 666; *Flaherty v. Miner*, 123 N. Y. 382; *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608, affirming 57 Hun (N. Y.) 586, 10 N. Y. Supp. 275; *Rush v. Wagner*, (Brooklyn City Ct. Gen. T.) 12 N. Y. Supp. 2; *Murphy v. Stickley-Simonds Co.*, 82 Hun (N. Y.) 158. Compare *Mitchell v. Williams*, 80 N. Y. App. Div. 527.

*Texas.*—*Bradford v. Whitcomb*, 11 Tex. Civ. App. 221.

4. *Monteverde v. Queens County*, 78 Hun (N. Y.) 267.

5. *Valk v. McKeize*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 741.

6. *D'Andre v. Zimmermann*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 357.

7. *Crouch v. Gutmann*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 275, affirmed 134 N. Y. 45.

8. *Pitcairn v. Philip Hiss Co.*, 113 Fed. Rep. 492, 51 C. C. A. 323.

9. *Perry v. Quackenbush*, 105 Cal. 299.

10. *Flaherty v. Miner*, 123 N. Y. 382.

11. *McIntyre v. Tucker*, (C. Pl. Gen. T.) 5 Misc. (N. Y.) 228, 23 Civ. Pro. (N. Y.) 171.

12. *Wilful Deviations—Minnesota.*—*Elliott v. Caldwell*, 43 Minn. 357.

*New York.*—*Van Clief v. Van Vechten*, 130 N. Y. 571, modifying 55 Hun (N. Y.) 467;



allowance to the builder out of the contract price would not give to him essentially what he contracted for.<sup>1</sup> The burden of proof rests upon the contractor to show a substantial performance.<sup>2</sup>

**3. Partial Performance** — *a. FULL PERFORMANCE NOT EXCUSED.* — If the contractor does not substantially perform the contract, and performance has not been waived or excused, he cannot maintain an action on the contract for the compensation payable upon the completion of the work.<sup>3</sup> Still, if the contractor acted with a *bona fide* intention of performing

*D'Amato v. Gentile*, 173 N. Y. 596, 65 N. E. Rep. 1116, *affirming* 54 N. Y. App. Div. 625; *Weeks v. O'Brien*, 59 N. Y. Super. Ct. 28; *May v. Menton*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 737; *Kohl v. Fleming*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 690; *Fox v. Davidson*, 36 N. Y. App. Div. 159; *Spence v. Ham*, 27 N. Y. App. Div. 379.

*North Dakota.* — *Anderson v. Todd*, 8 N. Dak. 158; *Braseth v. State Bank*, (N. Dak. 1904) 98 N. W. Rep. 79.

*Pennsylvania.* — *Wade v. Haycock*, 25 Pa. St. 382; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19.

**1. California.** — *Laidlaw v. Marye*, 133 Cal. 170.

*Minnesota.* — *Elliott v. Caldwell*, 43 Minn. 357; *Anderson v. Pringle*, 79 Minn. 433; *Cornish, etc., Co. v. Antrim Co-operative Dairy Assoc.*, 82 Minn. 215.

*New York.* — *Woolreich v. Fettretch*, 51 Hun (N. Y.) 640, 4 N. Y. Supp. 326; *Lewis v. Yagel*, 77 Hun (N. Y.) 337; *Flannery v. Sahagian*, 83 Hun (N. Y.) 109; *Anderson v. Peterett*, 86 Hun (N. Y.) 600; *Smith v. Sheltering Arms*, 89 Hun (N. Y.) 70; *Van Clief v. Van Vechten*, 130 N. Y. 571, *modifying* 55 Hun (N. Y.) 467; *D'Amato v. Gentile*, 173 N. Y. 596, 65 N. E. Rep. 1116, *affirming* 54 N. Y. App. Div. 625; *Cahill v. Heuser*, 2 N. Y. App. Div. 292; *Spence v. Ham*, 27 N. Y. App. Div. 379; *MacKnight Flintic Stone Co. v. New York*, 31 N. Y. App. Div. 232; *Fox v. Clark*, 44 N. Y. App. Div. 626.

*North Dakota.* — *Anderson v. Todd*, 8 N. Dak. 158; *Braseth v. State Bank*, (N. Dak. 1904) 98 N. W. Rep. 79.

*Vermont.* — *Viall v. Hubbard*, 37 Vt. 114.

*Wisconsin.* — *Houlahan v. Clark*, 110 Wis. 43; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1.

**2. Woolreich v. Fettretch**, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 326; *Mehurin v. Stone*, 37 Ohio St. 49.

**3. No Recovery on Contract** — *England.* — *Munro v. Butt*, 8 El. & Bl. 738, 92 E. C. L. 738. *United States.* — *Simonds v. Pearce*, 31 Fed. Rep. 137.

*California.* — *Green v. Wells*, 2 Cal. 584; *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114; *Perry v. Quackenbush*, 105 Cal. 299.

*Colorado.* — *Walling v. Warren*, 2 Colo. 434.

*Connecticut.* — *Coburn v. Hartford*, 38 Conn. 290.

*Florida.* — *Finegan v. L'Engle*, 8 Fla. 413.

*Illinois.* — *Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381.

*Iowa.* — *Wernli v. Collins*, 87 Iowa 548; *Fauble v. Davis*, 48 Iowa 462.

*Kentucky.* — *Morford v. Mastin*, 6 T. B.

Mon. (Ky.) 609; *Allen v. Sanders*, 7 B. Mon. (Ky.) 593.

*Louisiana.* — *St. Mary's Wholesale Fruit, etc., Market Co. v. New Orleans*, 47 La. Ann. 205; *Sarrazin v. Adams*, 110 La. 124. But see *Cairy v. Randolph*, 6 La. Ann. 202.

*Maine.* — *Hill v. School Dist. No. 2*, 17 Me. 316; *White v. Oliver*, 36 Me. 92; *Veazie v. Bangor*, 51 Me. 509.

*Michigan.* — *Martus v. Houck*, 39 Mich. 431, 33 Am. Rep. 409; *Scheible v. Klein*, 89 Mich. 376; *U. S. Electric Fire-Alarm Co. v. Big Rapids*, 78 Mich. 67; *Brown v. Kriser*, 129 Mich. 448.

*Minnesota.* — *Bixby v. Wilkinson*, 25 Minn. 481; *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415; *Elliott v. Caldwell*, 43 Minn. 357; *Lynes v. Holl*, 60 Minn. 532; *Uldrickson v. Samdahl*, (Minn. 1904) 100 N. W. Rep. 5.

*Missouri.* — *Brinkerhoff v. Elliott*, 43 Mo. App. 185; *Lewis v. Slack*, 27 Mo. App. 119.

*Nebraska.* — *Omaha Consol. Vinegar Co. v. Burns*, 44 Neb. 21; *Burns v. Fairmont*, 28 Neb. 866.

*New Hampshire.* — *Wadleigh v. Sutton*, 6 N. H. 15.

*New Jersey.* — *Edwards v. Derrickson*, 28 N. J. L. 39; *Derrickson v. Edwards*, 29 N. J. L. 468, 80 Am. Dec. 220.

*New York.* — *Harris v. Rathbun*, 2 Abb. App. Dec. (N. Y.) 326; *Pullman v. Corning*, 14 Barb. (N. Y.) 174; *Moll v. Foery*, 43 Hun (N. Y.) 476; *Sullivan v. New York, etc., Cement Co.*, 48 Hun (N. Y.) 619, 14 Civ. Pro. (N. Y.) 365; *Walker v. Millard*, 29 N. Y. 375; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Boughton v. Smith*, 142 N. Y. 674; *Flaherty v. Miner*, 123 N. Y. 382; *Weeks v. O'Brien*, 59 N. Y. Super. Ct. 28; *Sherwood v. Houtman*, 73 Hun (N. Y.) 544; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248; *Lewis v. Yagel*, 77 Hun (N. Y.) 337; *Kohl v. Fleming*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 690; *Charlton v. Rose*, 24 N. Y. App. Div. 485; *Spence v. Ham*, 27 N. Y. App. Div. 379; *Norton v. U. S. Wood Preserving Co.*, 89 N. Y. App. Div. 237; *Parke v. Franco-American Trading Co.*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 498; *New York, etc., Automatic Sprinkler Co. v. Andrews*, 38 N. Y. App. Div. 56; *Cronin v. Tebo*, 71 Hun (N. Y.) 59.

*North Carolina.* — *Brewer v. Tysor*, 3 Jones L. (48 N. Car.) 180; *Moffitt v. Glass*, 117 N. Car. 142.

*North Dakota.* — *Nollman v. Evenson*, 5 N. Dak. 344.

*Ohio.* — *Mehurin v. Stone*, 37 Ohio St. 49.

*Oregon.* — *Gove v. Island City Mercantile, etc., Co.*, 16 Oregon 93.

*Pennsylvania.* — *Philadelphia v. Brooke*, 9 Phila. (Pa.) 168, 31 Leg. Int. (Pa.) 12; *Waugh*

the contract, and the builder retains the benefit of the labor and materials expended in the partial performance and derives benefit therefrom, the law will imply a promise on the builder's part to pay therefor, and the contractor may maintain an action on the *quantum meruit* for compensation.<sup>1</sup> If the failure of the contractor to perform is wilful and the builder cannot avoid availing himself of the benefits of a partial performance, by reason of the

*v. Shunk*, 20 Pa. St. 130; *Philadelphia Hydraulic Works v. Schenck*, 80 Pa. St. 334; *Quigley v. De Haas*, 82 Pa. St. 267; *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. St. 167. But see *Wade v. Haycock*, 25 Pa. St. 382.

*South Dakota*.—*Hulst v. Benevolent Hall Assoc.*, 9 S. Dak. 144; *Aldrich v. Wilmarth*, 3 S. Dak. 523; *Davis v. Jeffris*, 5 S. Dak. 352, 363.

*Washington*.—*Edison Gen. Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370.

*Wisconsin*.—*Moritz v. Larsen*, 70 Wis. 569; *Genni v. Hahn*, 82 Wis. 92.

*Compare Sheppard v. Dowling*, 103 Ala. 563.

**1. Quantum Meruit**—*England*.—*Lucas v. Godwin*, 3 Bing. N. Cas. 737, 32 E. C. L. 309.  
*United States*.—*Miller v. Hubbard*, 4 Cranch (C. C.) 451; *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Lee v. New Haven, etc., R. Co.*, 15 Fed. Cas. No. 8,197; *Quinn v. U. S.*, 99 U. S. 30.

*Alabama*.—*Thomas v. Ellis*, 4 Ala. 108; *Bell v. Teague*, 85 Ala. 211; *Davis v. Badders*, 95 Ala. 348; *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15.

*Arkansas*.—*Simpson v. McDonald*, 2 Ark. 370; *Bertrand v. Byrd*, 5 Ark. 651.

*California*.—*Katz v. Bedford*, 77 Cal. 319; *Hunt v. Elliott*, 77 Cal. 588.

*Colorado*.—*Schaefer v. Gildea*, 3 Colo. 15; *Bush v. Finucane*, 8 Colo. 192.

*Connecticut*.—*Blakeslee v. Holt*, 42 Conn. 226; *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183.

*District of Columbia*.—*Beha v. Ottenberg*, 6 Mackey (D. C.) 348.

*Georgia*.—*Freeman v. Campbell*, 22 Ga. 184; *Ford v. Smith*, 25 Ga. 675.

*Illinois*.—*Sexton v. Chicago*, 107 Ill. 323.

*Indiana*.—*McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *McClure v. Secrist*, 5 Ind. 31; *Becker v. Hecker*, 9 Ind. 497.

*Iowa*.—*Wolf v. Gerr*, 43 Iowa 339; *Ætna Iron, etc., Works v. Kossuth County*, 79 Iowa 40.

*Kansas*.—*School Dist. No. 2 v. Boyer*, 46 Kan. 54; *School Dist. No. 46 v. Lund*, 51 Kan. 731.

*Kentucky*.—*Lexington Ice Mfg., etc., Co. v. Farnan*, 13 Ky. L. Rep. 270; *Kiel v. Kline*, 15 Ky. L. Rep. 158; *Morford v. Mastin*, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168.

*Louisiana*.—*Allen v. Wills*, 4 La. Ann. 97; *Thomas v. L'Hote*, 22 La. Ann. 73; *Bietry v. New Orleans*, 22 La. Ann. 149.

*Maine*.—*Hayden v. Madison*, 7 Me. 76; *Jewett v. Weston*, 11 Me. 346; *Norris v. School Dist. No. 1*, 12 Me. 293, 28 Am. Dec. 182; *White v. Oliver*, 36 Me. 92.

*Maryland*.—*Presbyterian Church v. Hoopes Artificial Stone, etc., Co.*, 66 Md. 598.

*Massachusetts*.—*Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Snow v. Ware*, 13 Met. (Mass.) 49; *Smith v. Lowell First Cong. Meetinghouse*, 8 Pick. (Mass.) 178; *Bassett v. Sanborn*, 9 Cush. (Mass.) 58; *Gleason v. Smith*, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; *Thompson v. Purcell*, 10 Allen (Mass.) 426; *Cullen v. Sears*, 112 Mass. 299; *Wagner v. Allen*, 174 Mass. 563.

*Michigan*.—*Fildew v. Besley*, 42 Mich. 100.

*Missouri*.—*Lee v. Ashbrook*, 14 Mo. 379, 55 Am. Dec. 110; *Marsh v. Richards*, 29 Mo. 99; *Dutro v. Walter*, 31 Mo. 516; *Yeats v. Ballentine*, 56 Mo. 530; *Eyerman v. Mt. Sinai Cemetery Assoc.*, 61 Mo. 489; *Moore v. H. Gaus, etc., Mfg. Co.*, 113 Mo. 98; *Austin v. Keating*, 21 Mo. App. 30; *Ibers v. O'Donnell*, 25 Mo. App. 120; *Kelly v. Rowane*, 33 Mo. App. 440; *Fleischmann v. Miller*, 38 Mo. App. 177; *Gregg v. Dunn*, 38 Mo. App. 283; *Linnenkohl v. Winkelmeyer*, 54 Mo. App. 570; *Heman v. Compton Hill Imp. Co.*, 58 Mo. App. 480.

*Nebraska*.—*Johnson v. Bowman*, 26 Neb. 745.

*New Hampshire*.—*Wadleigh v. Sutton*, 6 N. H. 15, 23 Am. Dec. 704.

*New Jersey*.—*Feeney v. Bardsley*, 66 N. J. L. 239.

*New York*.—*Jewell v. Schroepel*, 4 Cow. (N. Y.) 564; *Ladue v. Seymour*, 24 Wend. (N. Y.) 60; *Smith v. Brady*, 17 N. Y. 173.

*North Carolina*.—*Simpson v. Carolina Cent. R. Co.*, 112 N. Car. 703; *Dixon v. Gravely*, 117 N. Car. 84.

*Ohio*.—*Johnson v. Slaymaker*, 9 Ohio Cir. Dec. 500; *Goldsmith v. Hand*, 26 Ohio St. 101; *Mehurin v. Stone*, 37 Ohio St. 56.

*Oregon*.—*Gove v. Island City Mercantile, etc., Co.*, 19 Oregon 363.

*Pennsylvania*.—*Preston v. Finney*, 2 W. & S. (Pa.) 53; *Liggett v. Smith*, 3 Watts (Pa.) 331, 27 Am. Dec. 358; *Gallagher v. Sharpless*, 134 Pa. St. 134; *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546, 27 W. N. C. (Pa.) 156; *White v. Braddock School Dist.*, 159 Pa. St. 201.

*South Carolina*.—*Woodruff v. Thomas*, 2 Spears L. (S. Car.) 148.

*Tennessee*.—*Winters v. Fleece*, 4 Lea (Tenn.) 546; *Bush v. Jones*, 2 Tenn. Ch. 190; *Deberry v. Young*, Thomp. Tenn. Cas. 76, 1 Shannon Tenn. Cas. 51.

*Texas*.—*Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475; *Harris County v. Campbell*, 68 Tex. 22; *Jennings v. Willer*, (Tex. Civ. App. 1895) 32 S. W. Rep. 24; *Banks v. House*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1022.

*Vermont*.—*Gilman v. Hall*, 11 Vt. 510, 34 Am. Dec. 700.

*West Virginia*.—*Baltimore, etc., R. Co. v. Lafferty*, 2 W. Va. 104.

*Wisconsin*.—*Taylor v. Williams*, 6 Wis. 363; *Trowbridge v. Barrett*, 30 Wis. 661.

*Compare Elliott v. Caldwell*, 43 Minn. 357.

labor and materials being attached to the builder's freehold, it seems that the contractor is not entitled to any compensation for his partial performance;<sup>1</sup> and it has been held that the mere fact that the builder takes possession of a structure erected upon his land, but not in compliance with the express contract therefor, will not raise an implied promise on his part to pay the contractor therefor, as the possession of the land necessarily involves possession of the structures thereon in their existing state, and the builder has no option of rejecting them.<sup>2</sup> *A fortiori*, when the builder refuses to accept the work not performed as required by the contract, and requests the contractor to remove the structure, which the latter refuses to do, he cannot recover on a *quantum meruit* for the work and labor done.<sup>3</sup> When the contractor abandons his contract and leaves materials on the builder's premises which the latter makes use of in completing the work, the contractor is entitled to recover the value of such materials.<sup>4</sup> The basis of the contractor's recovery for the partial performance of the contract is the benefit received by the builder therefrom, and therefore if the builder has derived no benefit therefrom the contractor cannot recover on a *quantum meruit* for such partial performance.<sup>5</sup> Where the contract provides that upon the failure of the contractor to complete the work, the builder may do so at his expense, and the builder completes the work upon the contractor's failure to do so, the latter may recover for his partial performance the contract price less the expense incurred by the builder in completing the work;<sup>6</sup> but of course if

#### 1. Wilful Failure to Perform Fully — England.

— *Pontifex v. Wilkinson*, 2 C. B. 349, 52 E. C. L. 349; *Ellis v. Hamlen*, 3 Taunt. 52; *Sinclair v. Bowles*, 4 M. & R. 1, 9 B. & C. 92, 17 E. C. L. 340; *Munro v. Butt*, 8 El. & Bl. 738, 92 E. C. L. 738, 4 Jur. N. S. 1231; *Appleby v. Meyers*, L. R. 2 C. P. 651, 36 L. J. C. Pl. 331.

*United States*. — *Dermott v. Jones*, 2 Wall. (U. S.) 1.

*Alabama*. — *Stewart v. Weaver*, 12 Ala. 538.

*Arkansas*. — *Simpson v. McDonald*, 2 Ark. 370.

*California*. — *Laidlaw v. Marye*, 133 Cal. 170; *Marchant v. Hayes*, 117 Cal. 669.

*Colorado*. — *Walling v. Warren*, 2 Colo. 434; *McGonigle v. Klein*, 6 Colo. App. 306; *Cochran v. Balfe*, 12 Colo. App. 75.

*Connecticut*. — *O'Keefe v. St. Francis' Church*, 59 Conn. 551.

*District of Columbia*. — *Beha v. Ottenberg*, 6 Mackey (D. C.) 348.

*Florida*. — *Livingston v. Anderson*, 30 Fla. 117.

*Illinois*. — *Bassett v. Child*, 11 Ill. 569; *Holmes v. Stummel*, 24 Ill. 370.

*Indiana*. — *Forkner v. Purl*, 1 Ind. 489; *Swift v. Williams*, 2 Ind. 365.

*Maryland*. — *Gill v. Vogler*, 52 Md. 663.

*Massachusetts*. — *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Faxon v. Mansfield*, 2 Mass. 147.

*Minnesota*. — *Elliott v. Caldwell*, 43 Minn. 357.

*Mississippi*. — *Wooten v. Read*, 2 Smed. & M. (Miss.) 585.

*New Jersey*. — *Feeney v. Bardsley*, 66 N. J. L. 239.

*New York*. — *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *Walden v. Eldred*, 58 Hun (N. Y.) 605, 11 N. Y. Supp. 856; *Cronin v. Tebo*, 71 Hun (N. Y.) 59; *Jennings v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 673; *Cunningham v.*

*Jones*, 3 E. D. Smith (N. Y.) 650, 20 N. Y. 486; *Sickels v. Pattison*, 14 Wend. (N. Y.) 257, 28 Am. Dec. 527; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Rauscher v. Cronk*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 470; *Otto v. McCaffray*, 38 N. Y. App. Div. 631; *D'Amato v. Gentile*, 54 N. Y. App. Div. 625; *Lawson v. Hogan*, 93 N. Y. 39.

*Ohio*. — *Allen v. Curies*, 6 Ohio St. 505.

*Pennsylvania*. — *Wade v. Haycock*, 25 Pa. St. 382.

*Vermont*. — *Brown v. Kimball*, 12 Vt. 617; *Kettle v. Harvey*, 21 Vt. 301.

*West Virginia*. — *Strauss v. Chesapeake, etc., R. Co.*, 7 W. Va. 368.

*Wisconsin*. — *Malbon v. Birney*, 11 Wis. 107; *Cohn v. Plumer*, 88 Wis. 622; *Woodward v. Smith*, 109 Wis. 607.

2. *Munro v. Butt*, 8 El. & Bl. 738, 92 E. C. L. 738; *Mackay v. Dick*, 6 App. Cas. 251; *Elliott v. Caldwell*, 43 Minn. 357; *Gove v. Island City Mercantile, etc., Co.*, 16 Oregon 93.

3. *Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Denton v. Atchison*, 34 Kan. 438; *North v. Mallory*, 94 Md. 305; *Eaton v. Gladwell*, 121 Mich. 444; *Elliott v. Caldwell*, 43 Minn. 357; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373; *Byerly v. Kepley*, 1 Jones L. (46 N. Car.) 35; *Allen v. Curies*, 6 Ohio St. 505; *Miller v. Phillips*, 31 Pa. St. 218.

4. *Elliott v. Wilkinson*, 8 Yerg. (Tenn.) 411; *Bayley v. Anderson*, 71 Wis. 417. See also *Wooten v. Read*, 2 Smed. & M. (Miss.) 589.

5. *Smith v. Scott's Ridge School Dist.*, 20 Conn. 312; *Claney v. Chicago Dredging, etc., Co.*, 70 Ill. App. 158; *Hill v. School Dist. No. 2*, 17 Me. 316; *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215; *Gillis v. Cobe*, 177 Mass. 584; *Byerly v. Kepley*, 1 Jones L. (46 N. Car.) 35; *Nollman v. Evenson*, 5 N. Dak. 344.

6. *Charles v. E. F. Hallack Lumber, etc., Co.*, 22 Colo. 283; *Wells v. Board of Education*, 78 Mich. 260.



the cost of completing the work is greater than the amount of the compensation remaining unpaid, the contractor cannot recover.<sup>1</sup> If, before the full performance, the contract is rescinded by mutual consent, the contractor may recover the value of the work performed.<sup>2</sup> The builder may, when sued by the contractor for the stipulated compensation, recoup the damages he may have suffered from the contractor's failure fully to perform the contract,<sup>3</sup> and after recovery of such damages by the builder the contractor has been allowed to recover on a *quantum meruit* for the partial performance.<sup>4</sup> If the contract is severable and not entire, the contractor may recover for a partial performance though he refused to complete the work.<sup>5</sup> The measure of the contractor's recovery for a partial performance seems to be the value of the labor and materials, having reference to the contract price, not to exceed the benefit received by the builder,<sup>6</sup> with the additional right to the builder to recoup his damages by reason of the contractor's failure to complete the work.<sup>7</sup> The fact that the value of the work performed exceeds the contract price does not entitle the contractor to recover therefor in excess of the contract price; otherwise he would be allowed to take advantage of his own wrong, in failing to perform his contract, to enhance the price of his work.<sup>8</sup> But the builder is not necessarily entitled to limit the recovery to the contract price less the amount it would cost to make the work what it should have been by the contract.<sup>9</sup>

*b. FULL PERFORMANCE EXCUSED*—(1) *In General*.—If the builder, through his wrongful acts or omissions, prevents the further performance of the contract by the contractor, or if he fails to perform stipulations in the contract to be performed on his part and which are conditions precedent to further performance by the contractor, the contractor is excused from further performance, and may recover compensation for his part performance.<sup>10</sup> For

1. *Zimmermann v. Jourgensen*, 70 Hun (N. Y.) 222.

2. *Kirkland v. Oates*, 25 Ala. 465; *Andrews v. Tucker*, 127 Ala. 602; *Baltimore, etc., R. Co. v. Resley*, 7 Md. 297.

3. *Chapel v. Hickes*, 2 Crompt. & M. 214, 4 Tyrw. 43; *Laidlaw v. Marye*, 133 Cal. 170; *Woods v. Robertson*, (Supm. Ct. App. T.) 85 N. Y. Supp. 338.

4. *Maloney v. Rust*, 42 Conn. 236.

5. *Divisible Contracts*.—*Roberts v. Havelock*, 3 B. & Ad. 404, 23 E. C. L. 105; *Voss v. Varden*, 1 Cranch (C. C.) 410, 28 Fed. Cas. No. 17,016; *Katz v. Bedford*, 77 Cal. 319; *Sullivan v. Grass Valley Quartz Milling, etc., Co.*, 77 Cal. 418; *Spear v. Snider*, 29 Minn. 463; *Wright v. Petrie, Smed. & M. Ch. (Miss.)* 282; *Baeder v. Carnie*, 44 N. J. L. 208; *Morgan v. Ward*, *Wright (Ohio)* 474; *Perkins v. Locke*, (Tex. Civ. App. 1894) 27 S. W. Rep. 783; *Scofield v. Grow*, 63 Vt. 283.

6. *Measure of Recovery*.—*Swift v. Williams*, 2 Ind. 365; *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Ætna Iron, etc., Works v. Kosuth County*, 79 Iowa 40; *White v. Oliver*, 36 Me. 92; *Gillis v. Cobe*, 177 Mass. 584; *Phelps v. Beebe*, 71 Mich. 554; *Austin v. Keating*, 21 Mo. App. 30; *Ibers v. O'Donnell*, 25 Mo. App. 120; *Kick v. Doerste*, 45 Mo. App. 134; *Carpenter v. Gay*, 12 R. I. 306; *Bishop v. Price*, 24 Wis. 480.

7. *Austin v. Keating*, 21 Mo. App. 30; *Globe Light, etc., Co. v. Doud*, 47 Mo. App. 439; *Bishop v. Price*, 24 Wis. 480.

8. *Bishop v. Price*, 24 Wis. 480.

9. *Pinches v. Evangelical Swedish Lutheran*

*Church*, 55 Conn. 183; *White v. Oliver*, 36 Me. 92.

10. *Full Performance Excused*—*England*.—*Roberts v. Bury Imp. Com'rs*, L. R. 5 C. P. 311; *Planche v. Colburn*, 8 Bing. 14, 21 E. C. L. 203.

*United States*.—*Cook v. Hamilton County*, 6 McLean (U. S.) 612; *Ellithorpe Air-Brake Co. v. Sire*, 41 Fed. Rep. 662; *Cass County v. Gibson*, 107 Fed. Rep. 363, 46 C. C. A. 341; *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 124 Fed. Rep. 866, 60 C. C. A. 52; *Kimball v. U. S.*, 24 Ct. Cl. 35.

*Arkansas*.—*Cassady v. Clarke*, 7 Ark. 123.

*California*.—*Cox v. Western Pac. R. Co.*, 47 Cal. 87; *Remy v. Olds*, 88 Cal. 537; *Joyce v. White*, 95 Cal. 236; *Adams v. Burbank*, 103 Cal. 646.

*Colorado*.—*Cochran v. Balfe*, 12 Colo. App. 75.

*Delaware*.—*McDaniel v. Webster*, 2 Houst. (Del.) 305.

*Illinois*.—*Wise v. Chaney*, 6 Ill. 562; *Western Union R. Co. v. Smith*, 75 Ill. 496; *Guerdon v. Corbett*, 87 Ill. 272; *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Bonnet v. Glattfeldt*, 120 Ill. 166; *Cook v. Truesdell*, 23 Ill. App. 335; *Clark v. Scanlan*, 33 Ill. App. 48; *Bennett v. Teetzel*, 34 Ill. App. 295; *Curlee v. Reiger*, 45 Ill. App. 544.

*Indiana*.—*Floyd v. Maddux*, 68 Ind. 124; *Gastlin v. Weeks*, 2 Ind. App. 222.

*Iowa*.—*Dibol v. Minott*, 9 Iowa 403; *Shulte v. Hennessy*, 40 Iowa 352; *Eastern Granite Co. v. Heim*, 89 Iowa 608. *Compare* *Litchfield Mfg. Co. v. Gallagher*, 98 Iowa 390.

example, full performance is excused where the contractor is prohibited by the builder from discontinuing the work or is ousted by him from the premises upon which it is to be done;<sup>1</sup> where the builder fails to furnish the materials for the work as required by the contract;<sup>2</sup> where the contract is for the erection of a structure in a city and the builder fails to procure from the city authorities the necessary building permit, by reason of which failure the contractor is unable to complete his contract;<sup>3</sup> where the builder fails to pay the instalments of the compensation stipulated for in the contract and payable as the work progressed;<sup>4</sup> or where the builder fails to perform certain

*Kentucky.*—Morford v. Ambrose, 3 J. J. Marsh. (Ky.) 688.

*Louisiana.*—Lynch v. Sellers, 41 La. Ann. 375.

*Maine.*—Wright v. Haskell, 45 Me. 489.

*Maryland.*—Hogg v. Jackson, etc., Co., (Md. 1893) 26 Atl. Rep. 869; Heaver v. Lanahan, 74 Md. 493; Rodemer v. Gonder, 9 Gill (Md.) 288; Black v. Woodrow, 39 Md. 194.

*Massachusetts.*—Bassett v. Sanborn, 9 Cush. (Mass.) 58; Ford v. Burchard, 130 Mass. 424; Simmons v. Lawrence Duck Co., 133 Mass. 298; Gilbert, etc., Mfg. Co. v. Butler, 146 Mass. 82.

*Michigan.*—Rayburn v. Comstock, 80 Mich. 448; Lee v. Briggs, 99 Mich. 487.

*Mississippi.*—Vicksburg Water Supply Co. v. Gorman, 70 Miss. 360.

*Missouri.*—Little v. Mercer, 9 Mo. 218; McCollough v. Baker, 47 Mo. 401; Bean v. Miller, 69 Mo. 384; Park v. Kitchen, 1 Mo. App. 387; Ahern v. Boyce, 19 Mo. App. 552; Kelly v. Rowane, 33 Mo. App. 440; Halpin v. Manny, 57 Mo. App. 59; Koerper v. Royal Invest. Co., 102 Mo. App. 543.

*New Hampshire.*—Theobald v. Burleigh, 66 N. H. 574.

*New Jersey.*—Potts v. Point Pleasant Land Co., 49 N. J. L. 411.

*New York.*—Howell v. Gould, 2 Abb. App. Dec. (N. Y.) 418; Niblo v. Binsse, 3 Abb. App. Dec. (N. Y.) 375; Powers v. Hogan, 12 Daly (N. Y.) 444; Gallagher v. Nichols, 60 N. Y. 438; McMaster v. State, 108 N. Y. 542; Sullivan v. New York, etc., Cement Co., 119 N. Y. 348; Hollister v. Mott, 132 N. Y. 18; Curnan v. Delaware, etc., R. Co., 138 N. Y. 480; Dolan v. Rodgers, 149 N. Y. 489; Stone v. Assip, (Brooklyn City Ct. Gen. T.) 18 N. Y. Supp. 441; Highton v. Dessau, (C. Pl. Gen. T.) 19 N. Y. Supp. 395; Smith v. O'Donnell, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 98; French v. Syracuse, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 278; Smith v. Wetmore, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 225; Tone v. Doelger, 6 Robt. (N. Y.) 251; Byron v. New York, 54 N. Y. Super. Ct. 411; Williams v. Boehan, 60 N. Y. Super. Ct. 319.

*Ohio.*—Ross Road Mach. Co. v. Forbus, 10 Ohio Dec. (Reprint) 725, 23 Cinc. L. Bul. 217.

*Oregon.*—Monroe v. Northern Pac. Coal Min. Co., 5 Oregon 510.

*Pennsylvania.*—Hall v. Rupley, 10 Pa. St. 231; Schleicher v. United Security L. Ins., etc., Co., 191 Pa. St. 477, 44 W. N. C. (Pa.) 188.

*Rhode Island.*—Greene v. Haley, 5 R. I. 260.

*South Carolina.*—Killian v. Herndon, 4 Rich. L. (S. Car.) 609.

*South Dakota.*—Caldwell v. Myers, 2 S. Dak. 506.

*Texas.*—Sheldon v. Caples, 7 Tex. Civ. App. 151; St. Louis Expanded Metal Co. v. Burgess, 20 Tex. Civ. App. 527.

*Vermont.*—Doolittle v. Nash, 48 Vt. 441; Gray v. Reed, 65 Vt. 178.

*Virginia.*—Clark v. Franklin, 7 Leigh (Va.) 1.

**Employment by Builder of Nonunion Labor.**—A builder who contracts for the performance of certain work on his building is under no implied obligation to the contractor not to employ nonunion labor on other work on the building, and therefore the fact that he employs nonunion labor, by reason of which the laborers of the contractor quit work, does not show that the contractor was wrongfully prevented from completing his work. Serber v. McLaughlin, 97 Ill. App. 104.

1. *Georgia.*—Roberts v. Glass, 112 Ga. 456.

*Illinois.*—Bennett v. Teetzel, 34 Ill. App. 295; Wilderman v. Pitts, 39 Ill. App. 416; Waggeman v. Janssen, 74 Ill. App. 38.

*Louisiana.*—Joubanc v. Daunoy, 6 La. 659.

*Maryland.*—Rodemer v. Gonder, 9 Gill (Md.) 288.

*Michigan.*—Rayburn v. Comstock, 80 Mich. 448.

*New Mexico.*—Baca v. Barrier, 2 N. Mex. 131.

*New York.*—Devlin v. Second Ave. R. Co., 44 Barb. (N. Y.) 81; Highton v. Dessau, (C. Pl. Gen. T.) 19 N. Y. Supp. 395; Raven v. Smith, 87 Hun (N. Y.) 90; McMaster v. State, 108 N. Y. 542, 15 N. E. Rep. 417.

*Ohio.*—Kugler v. Wiseman, 20 Ohio 361.

*Pennsylvania.*—Wilman v. Wagner, 23 Pittsb. Leg. J. N. S. (Pa.) 40, 4 Luz. Leg. Reg. (Pa.) 252.

*Vermont.*—Derby v. Johnson, 21 Vt. 17.

*Washington.*—Cochran v. Yoho, 34 Wash. 238.

*Wisconsin.*—Davis v. Hubbard, 41 Wis. 408.

*Compare* Meyer v. Martin, (Tex. Civ. App. 1899) 50 S. W. Rep. 470.

**2. Failure to Furnish Materials.**—McPherson v. San Joaquin County, (Cal. 1899) 56 Pac. Rep. 802; Barrett v. Austin, (Cal. 1892) 31 Pac. Rep. 3; Western Union R. Co. v. Smith, 75 Ill. 496; Vermont St. M. E. Church v. Brose, 104 Ill. 206; Cargain v. Everett, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 668; Hall v. Rupley, 10 Pa. St. 231; Hood v. Raines, 19 Tex. 400; Hill v. Hovey, 26 Vt. 109.

**3. Failure to Procure Building Permits.**—Theobald v. Burleigh, 66 N. H. 574; Heine v. Meyer, 61 N. Y. 171.

**4. Nonpayment of Instalments of Compensation**

work which he had agreed to do and which was necessary to further performance by the contractor.<sup>1</sup> So, where the work cannot be completed according to the plans and specifications furnished by the builder, in accordance with which it was to be performed, the contractor is, it seems, excused from full performance.<sup>2</sup> But the mere fact that after the contractor has failed to perform his contract the builder notifies him that he will himself complete it does not show that the contractor was justified in his failure to perform,<sup>3</sup> nor is it an excuse that full performance of the contract would not have been profitable to the builder.<sup>4</sup> So, the inability of the contractor to perform the contract, not due to any wrongful act or omission of the builder, is no excuse for his failure to perform;<sup>5</sup> and when the contractor undertakes to erect a structure for a fixed sum, payable upon performance, the mere fact that the builder becomes insolvent during the progress of the work does not justify the contractor in refusing to perform.<sup>6</sup> Where a contract with a municipality in accordance with an unconstitutional law requires the contractor to pay laborers on the work the prevailing rate of wages, the contract provision falls with the statute, and the contractor may recover upon the contract though he failed to observe such provision.<sup>7</sup>

**Measure of Recovery.**—If the contract is entire and the full performance by the contractor is excused by reason of the wrongful acts of the builder, the contractor may treat the contract as rescinded and recover the full value of his labor done and materials furnished in the partial performance of the contract, though this may exceed the contract price;<sup>8</sup> and where the builder

—*United States*.—*South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561; *Pigeon v. U. S.*, 27 Ct. Cl. 167.

*Arkansas*.—*Eastern Arkansas Hedge Fence Co. v. Tanner*, 67 Ark. 156.

*California*.—*San Francisco Bridge Co. v. Dumbarton Land, etc., Co.*, 119 Cal. 272.

*Illinois*.—*Schwartz v. Saunders*, 46 Ill. 18; *Lincoln v. Schwartz*, 70 Ill. 134; *Dobbins v. Higgins*, 78 Ill. 440; *Geary v. Bangs*, 138 Ill. 77, affirming 37 Ill. App. 301; *Keeler v. Clifford*, 165 Ill. 544. See also *Palm v. Ohio, etc., R. Co.*, 18 Ill. 217.

*Iowa*.—*Shulte v. Hennessy*, 40 Iowa 352.

*Kentucky*.—*Stringtown, etc., R. Co. v. Riley*, 8 Ky. L. Rep. 267.

*Michigan*.—*Grand Rapids, etc., R. Co. v. Van Deusen*, 29 Mich. 431; *Scheible v. Klein*, 89 Mich. 376.

*Minnesota*.—*Palmer v. Breen*, 34 Minn. 39.

*Missouri*.—*Bean v. Miller*, 69 Mo. 384; *Butcher v. Gibson*, 47 Mo. App. 137; *Mugan v. Regan*, 48 Mo. App. 461.

*New York*.—*Cunningham v. Massena Springs, etc., R. Co.*, 63 Hun (N. Y.) 439; *Wharton v. Winch*, 140 N. Y. 287; *Eagle Iron Works v. Farley*, 83 N. Y. App. Div. 82; *Lawrence v. Heylman*, 89 N. Y. App. Div. 620.

*Pennsylvania*.—*Shaw v. Lewiston, etc., Turnpike Co.*, 3 P. & W. (Pa.) 445; *Worden v. Connell*, 196 Pa. St. 281; *Prindle v. Kountz Bros. Co.*, 15 Pa. Super. Ct. 258.

*Texas*.—*Childress v. Smith*, 90 Tex. 610; *McClellan v. McLemore*, (Tex. Civ. App. 1902) 70 S. W. Rep. 224.

*Utah*.—*Bennett v. Shaughnessy*, 6 Utah 273.

*Vermont*.—*Camp v. Barker*, 21 Vt. 469.

*Compare* *Crowell v. Brown*, 9 Gray (Mass.) 274.

The fact that the contract provides that the

work shall be steadily prosecuted to final completion is immaterial. *Bean v. Miller*, 69 Mo. 384.

1. *Vaughn v. Digman*, (Ky. 1897) 43 S. W. Rep. 251.

2. **Defective Plans.**—*Siebert v. Leonard*, 17 Minn. 433; *Murphy v. Liberty Nat. Bank*, 184 Pa. St. 208. See also *Block-Pollak Iron Co. v. Cincinnati Corrugating Iron Co.*, 10 Ohio Dec. 51, 7 Ohio N. P. 266. *Compare* *Thorn v. London*, 1 App. Cas. 120, 45 L. J. Exch. 487; *Hooper v. Webb*, 27 Minn. 485.

3. *Beecher v. Schuback*, 158 N. Y. 687, affirming 1 N. Y. App. Div. 359; *Norton v. U. S. Wood Preserving Co.*, 89 N. Y. App. Div. 237.

4. *Chapman v. Clements*, (Ky. 1900) 56 S. W. Rep. 646.

5. *Barrett v. Austin*, (Cal. 1892) 31 Pac. Rep. 3; *Ricardi Apartment House Co. v. Beaudet*, 64 Ill. App. 261; *Brinkerhoff v. Elliott*, 43 Mo. App. 185.

**Insolvency of Contractor.**—*McConnell v. Hewes*, 50 W. Va. 33.

6. *Walling v. Warren*, 2 Colo. 434.

7. *People v. Coler*, 166 N. Y. 1.

8. **Measure of Recovery**—*United States*.—*Elithorpe Air Brake Co. v. Sire*, 41 Fed. Rep. 662.

*California*.—*Cox v. Western Pac. R. Co.*, 47 Cal. 87; *Adams v. Burbank*, 103 Cal. 646; *San Francisco Bridge Co. v. Dumbarton Land, etc., Co.*, 119 Cal. 272.

*Delaware*.—*McDaniel v. Webster*, 2 Houst. (Del.) 305.

*Indiana*.—*Gastlin v. Weeks*, 2 Ind. App. 222.

*Iowa*.—*Dibol v. Minott*, 9 Iowa 403.

*Louisiana*.—*Joublanc v. Daunoy*, 6 La. 659.

*Maryland*.—*Rodemer v. Gonder*, 9 Gill (Md.) 288.



has, by his wrongful acts, prevented the performance of the contract, the contractor may maintain an action on the contract for damages resulting from the breach by the builder and recover as damages the full value of his part performance,<sup>1</sup> or may recover in an action on the contract the value of his part performance according to the contract,<sup>2</sup> and in addition damages for the loss of profits he would have made if he had been permitted to complete the work.<sup>3</sup> The fact that full performance of the contract is prevented by the wrongful acts of the builder does not necessarily entitle the contractor to recover the compensation provided for in case the contract was fully performed,<sup>4</sup> and where the compensation is paid in advance the contractor is not entitled to retain the full compensation without regard to the value of the work done in the partial performance;<sup>5</sup> but where the contractor had been put to the same expense in time and money in his partial performance of the contract as if he had fully performed, he has been allowed to recover the full stipulated compensation.<sup>6</sup> If the contract is separable or divisible, and the contractor performs with regard to some of the divisible items and is prevented by the builder from further performance, it has been held that if he treats the contract as rescinded and sues for the value of his work and labor he cannot recover the full value of the work performed irrespective of the contract price, but is entitled to recover only the contract price for the items fully performed and damages to the amount of the profits that he would have made if allowed to perform the other items.<sup>7</sup> Of course, if the contractor is justified in abandoning further work under the contract, the builder cannot recover damages for a failure fully to perform the contract.<sup>8</sup>

(2) *Waiver of Full Performance.*—The builder may, of course, waive a full performance of the contract so as to entitle the contractor to sue on the contract,<sup>9</sup>

*Missouri.*—Ahern v. Boyce, 19 Mo. App. 552.

*New Mexico.*—Baca v. Barrier, 2 N. Mex. 131.

*New York.*—Powers v. Hogan, 12 Daly (N. Y.) 444; Cargain v. Everett, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 668; Jones v. Judd, 4 N. Y. 411; Clark v. New York, 4 N. Y. 338, 53 Am. Dec. 379. Compare Meyer v. Hallock, 2 Robt. (N. Y.) 284; Koon v. Greenman, 7 Wend. (N. Y.) 121.

*Ohio.*—Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182. Compare Doolittle v. McCullough, 12 Ohio St. 360.

*Vermont.*—Derby v. Johnson, 21 Vt. 17.

*Wisconsin.*—Davis v. Hubbard, 41 Wis. 408; George M. Newhall Engineering Co. v. Daly, 116 Wis. 256.

Compare Clark v. Scanlan, 33 Ill. App. 48.

1. Doughty v. O'Donnell, 4 Daly (N. Y.) 60; McMaster v. State, 108 N. Y. 542.

2. Eastern Arkansas Hedge Fence Co. v. Tanner, 67 Ark. 156; Eastern Granite Co. v. Heim, 89 Iowa 698; Wells v. Board of Education, 78 Mich. 260; Bean v. Miller, 69 Mo. 384; Mugan v. Regan, 48 Mo. App. 461; Jones v. Judd, 4 N. Y. 411; Jenks v. Robertson, 58 N. Y. 621; Lawrence v. Heylman, 89 N. Y. App. Div. 620; Derby v. Johnson, 21 Vt. 17.

3. Nourse v. U. S., 25 Ct. Cl. 7; Black v. Woodrow, 39 Md. 194; Rayburn v. Comstock, 80 Mich. 448; Lee v. Briggs, 99 Mich. 487; Elizabethtown, etc., R. Co. v. Pottinger, 10 Bush (Ky.) 185; Jones v. Judd, 4 N. Y. 411; Derby v. Johnson, 21 Vt. 17. Compare Lake Shore, etc., R. Co. v. Richards, (Ill. 1892) 32 N. E. Rep. 402, reversing 40 Ill. App. 560.

**Failure to Pay Compensation.**—Where the contractor abandoned the performance of the contract on failure of the builder to pay an installment of the compensation when due, it was held that though this might justify the contractor's abandonment of further work, it would not entitle him to recover as damages the amount of profits he would have realized if he had performed the contract. Cox v. McLaughlin, 52 Cal. 590. See also Christian County v. Overholt, 18 Ill. 223; Palm v. Ohio, etc., R. Co., 18 Ill. 217.

4. Dunn v. Barton, 40 Minn. 415; Hood v. Raines, 19 Tex. 400. See also St. Louis v. McDonald, 10 Mo. 609. Compare Little v. Mercer, 9 Mo. 218; Halpin v. Manny, 57 Mo. App. 59.

5. Hood v. Raines, 19 Tex. 400.

6. Wood v. Schettler, 23 Wis. 501.

7. Thus, in Dibal v. Minott, 9 Iowa 403, where the contractor under a divisible contract agreed to paint ten houses at a certain price for each house, and after completing four was prevented by the builder from doing further work, it was held that the contractor could recover only the contract price for the houses completed and damages to the extent of profits he would have made if allowed to complete the full work.

8. San Francisco Bridge Co. v. Dumbarton Land, etc., Co., 119 Cal. 272; Hutchinson v. New Sharon, etc., R. Co., 63 Iowa 727; Stone v. Assip, (Brooklyn City Ct. Gen. T.) 18 N. Y. Supp. 441. See also A. J. Anderson Electric Co. v. Cleburne Water, etc., Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 929.

9. Full Performance Waived—England.—

and an acceptance of the work as in compliance with the contract will constitute such a waiver.<sup>1</sup> When the builder accepts the work as a full compliance with the contract he cannot, as a general rule, either maintain an action for damages for a failure of the contractor strictly to perform the contract nor recoup such damages in an action by the contractor for compensation;<sup>2</sup> but an acceptance is not a waiver of latent defects in performance so as to preclude the builder from maintaining an action for damages or recouping damages therefor,<sup>3</sup> and of course if the acceptance of the work is expressly on

Lucas v. Godwin, 3 Bing. N. Cas. 737, 32 E. C. L. 309.

United States.—Woodruff v. Hough, 91 U. S. 596.

Alabama.—Merriweather v. Taylor, 15 Ala.

735; Hawkins v. Gilbert, 19 Ala. 54.

California.—Zottinan v. San Francisco, 20 Cal. 96; Katz v. Bedford, 77 Cal. 319.

Delaware.—Waters v. Harvey, 3 Houst. (Del.) 441.

Georgia.—Freeman v. Campbell, 22 Ga. 184; Ford v. Smith, 25 Ga. 675.

Illinois.—Garrison v. Dingman, 56 Ill. 150.

Indiana.—Cummings v. Pence, 1 Ind. App. 317.

Kentucky.—Maysville, etc., Turnpike Road Co. v. Waters, 6 Dana (Ky.) 62.

Louisiana.—Mitchell v. Curell, 11 La. 252.

Maine.—Jewett v. Weston, 11 Me. 346; Andrews v. Portland, 35 Me. 475.

Maryland.—Johnson v. Harvey, 30 Md. 259; Potomac Steamboat Co. v. Harlan, etc., Co., 66 Md. 42; Hagerstown Presb. Church v. Hoopes Artificial Stone, etc., Co., 66 Md. 598.

New Hampshire.—Bailey v. Woods, 17 N. H. 365.

New Jersey.—Wood v. Boney, (N. J. 1891)

21 Atl. Rep. 574.

New York.—Neville v. Frost, 2 E. D. Smith (N. Y.) 62; Dubois v. Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Oregon Imp. Co.

v. Roach, 117 N. Y. 527; Flaherty v. Miner, 123 N. Y. 382.

Oregon.—Harrisburg Lumber Co. v. Washburn, 29 Oregon 150.

Pennsylvania.—Wilhelm v. Caul, 2 W. & S. (Pa.) 26; Beswick v. Platt, 140 Pa. St. 28; Robinson v. Baird, 165 Pa. St. 505.

Texas.—Bailey v. Knight, 4 Tex. App. Civ. Cas., § 274; Harris County v. Campbell, 68 Tex. 22; Texas Gulf Coast Land, etc., Co. v. Galveston-Chicago Well Boring, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 974.

Vermont.—Porter v. Stewart, 2 Aik. (Vt.) 417; Austin v. Austin, 47 Vt. 311.

Wisconsin.—Trowbridge v. Barrett, 30 Wis. 661; Howard v. Oshkosh, 37 Wis. 242.

Where the contractor voluntarily and without cause abandoned a contract to build a house, before the completion thereof, and sued to recover the contract price, and the employer presented in offset a claim for work done and expense incurred by himself on the job, and for work necessary to be done thereon to complete it, and for damage for noncompletion thereof by the plaintiff, which was allowed by the referee, it was held that the employer had thereby received the equivalent for the performance of the contract and that the plaintiff was therefore entitled to recover the contract price. Austin v. Austin, 47 Vt. 311.

1. Acceptance of Work.—Alabama.—De Jarrette v. Cox, 128 Ala. 518; Aarnes v. Windham, 137 Ala. 513.

Arkansas.—Fitzgerald v. La Porte, 64 Ark. 34.

California.—Katz v. Bedford, 77 Cal. 319; Thomason v. Richards, 135 Cal. xx, 67 Pac. Rep. 1056; Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30.

Delaware.—Draper v. Randolph, 4 Harr. (Del.) 454.

Georgia.—Porter v. Wilder, 62 Ga. 520.

Indiana.—Gulick v. Connely, 42 Ind. 134;

Cummings v. Pence, 1 Ind. App. 317; Elwood Natural Gas, etc., Co. v. Baker, 13 Ind. App. 576.

Iowa.—Demoss v. Noble, 6 Iowa 530; Levally v. Harmon, 24 Iowa 592.

Kentucky.—Cunningham v. Fischer, (Ky.

1899) 48 S. W. Rep. 993.

Louisiana.—Clark v. Kemper, 3 Rob. (La.) 10.

Maine.—Emerson v. Cogswell, 16 Me. 77.

Massachusetts.—Hutchins v. Webster, 165 Mass. 439.

Missouri.—Standard Stamping Co. v. Hemminghaus, 157 Mo. 23.

New York.—Bristol v. Tracy, 21 Barb. (N. Y.) 236; Cortwright v. Mt. Vernon, (Supm.

Ct. Gen. T.) 3 N. Y. Supp. 296; Oregon Imp. Co. v. Roach, 57 N. Y. Super. Ct. 228; Horgan

v. McKenzie, (C. Pl. Gen. T.) 17 N. Y. Supp. 174; McMullen v. Hopper, 15 N. Y. App. Div.

364; Diehl v. Schmalacker, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 786, affirming (Supm. Ct.

App. T.) 26 Misc. (N. Y.) 835.

North Carolina.—Pipkin v. Robinson, 3 Jones L. (48 N. Car.) 152.

Oregon.—Vanderhoof v. Shell, 42 Oregon 578.

South Carolina.—Killian v. Herndon, 4 Rich. L. (S. Car.) 609.

Vermont.—Austin v. Wheeler, 16 Vt. 95; Barker v. Troy, etc., R. Co., 27 Vt. 766.

Virginia.—Atlantic, etc., R. Co. v. Delaware Constr. Co., 98 Va. 503.

Wisconsin.—Colby v. Franklin, 15 Wis. 311; Howard v. Oshkosh, 37 Wis. 242; Laycock v. Parker, 103 Wis. 161.

Waiver of Guaranty.—See U. S. Fidelity, etc., Co. v. Damskibsskateselskabet Habi, 138 Ala. 348; Wadleigh v. McDowell, 102 Iowa 480.

2. Waiver of Claim for Damages.—U. S. v. Walsh, 108 Fed. Rep. 502; De Lambre v.

Williams, 36 La. Ann. 330; Strome v. Lyon, 110 Mich. 680; Oregon Imp. Co. v. Roach, 57

N. Y. Super. Ct. 228. Compare Adlard v. Muldoon, 45 Ill. 193; Estep v. Fenton, 66 Ill. 467;

Morford v. Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168; Stewart v. Fulton, 31 Mo.

59; Mohney v. Reed, 40 Mo. App. 99.

3. Latent Defects.—U. S. v. Walsh, 115 Fed.

condition that the contractor remedy certain defects therein the builder is not precluded from claiming damages for such defects.<sup>1</sup> Where the work is inspected by the builder during its progress, it seems that if the contractor is not complying with the contract, it is the duty of the builder to object to such work as does not comply with the contract, and upon his failure to do so he cannot, after the work is completed, claim that the work was not done in accordance with the contract.<sup>2</sup> Where a structure or other work is erected on the land of the builder, or repairs or alterations are made on an existing structure, the mere fact that the builder, on the failure of the contractor fully to perform his contract, takes possession and occupies or uses the structure erected does not necessarily constitute an acceptance of the work as a performance of the contract and a waiver of the contractor's failure fully to perform;<sup>3</sup> but such possession or use is evidence of a waiver, to be considered in connection with the other circumstances of the case.<sup>4</sup> A payment on account of the contract does not itself amount to an acceptance of work not

Rep. 697, 52 C. C. A. 419; *Barker v. Nichols*, 3 Colo. App. 25; *Van Buskirk v. Murden*, 22 Ill. 446, 74 Am. Dec. 163 (latent defects in plastering); *Korf v. Lull*, 70 Ill. 420; *Monahan v. Fitzgerald*, 164 Ill. 525, affirming 62 Ill. App. 192; *Mitchell v. Wiscotta Land Co.*, 3 Iowa 209; *Eaton v. Gladwell*, 108 Mich. 678; *Utah Lumber Co. v. James*, 25 Utah 434; *Morrison v. Cummings*, 26 Vt. 486. See also *Monroe Female University v. Broadfield*, 30 Ga. 1; *Kilbourne v. Jennings*, 40 Iowa 473; *Fuller v. Brown*, 67 N. H. 188.

Mere acceptance of and payment for a bridge built under contract does not waive any defect in the work of which the acceptor is at the time ignorant. To constitute a waiver, there must be both knowledge and acquiescence. *Johnson County v. Lowe*, 72 Mo. 637.

1. *Gray v. New Paynesville*, 89 Minn. 258.

2. **Acquiescence as Work Progresses.** — *George A. Fuller Co. v. B. P. Young Co.*, (C. C. A.) 126 Fed. Rep. 343; *Schaefer v. Gildea*, 3 Colo. 15; *Buckeye Min., etc., Co. v. Carlson*, 16 Colo. App. 446; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 269; *Laycock v. Moon*, 97 Wis. 59; *Laycock v. Parker*, 103 Wis. 161; *Ashland Lime, etc., Co. v. Shores*, 105 Wis. 122; *Siebert v. Roth*, 118 Wis. 250. Compare *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61; *Hill v. School Dist. No. 2*, 17 Me. 316; *Cornish, etc., Co. v. Antrim Co-operative Dairy Assoc.*, 82 Minn. 215.

3. **Occupation or Use of Work** — *England.* — *Ellis v. Hamlen*, 3 Taunt. 52; *Munro v. Butt*, 8 El. & Bl. 738, 92 E. C. L. 738.

*Alabama.* — *Badders v. Davis*, 88 Ala. 367. *Arkansas.* — *Manuel v. Campbell*, 3 Ark. 324; *Fitzgerald v. La Porte*, 64 Ark. 34.

*Connecticut.* — *Smith v. Scott's Ridge School Dist.*, 20 Conn. 312.

*Georgia.* — *Cannon v. Hunt*, 116 Ga. 452.

*Indiana.* — *Forkner v. Purl*, 1 Ind. 489; *Gwinup v. Shies*, 161 Ind. 500.

*Iowa.* — *Mitchell v. Wiscotta Land Co.*, 3 Iowa 209; *Corwin v. Wallace*, 17 Iowa 374; *Kilbourne v. Jennings*, 40 Iowa 473.

*Kentucky.* — *Escott v. White*, 10 Bush (Ky.) 169; *Morford v. Mastin*, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168.

*Louisiana.* — *Gordy v. Veazey*, 25 La. Ann. 518. Compare *Conery v. Noyes*, 17 La. Ann. 201.

*Maryland.* — *Presbyterian Church v. Hoopes Artificial Stone, etc., Co.*, 66 Md. 598.

*Massachusetts.* — *Gray v. James*, 128 Mass. 110.

*Michigan.* — *Willey v. Fractional School Dist.*, 25 Mich. 419; *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433.

*Missouri.* — *Stewart v. Fulton*, 31 Mo. 59; *Yeats v. Ballentine*, 56 Mo. 530; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413; *Eberly v. Curtis*, 5 Mo. App. 596; *Mohney v. Reed*, 40 Mo. App. 99; *Boteler v. Roy*, 40 Mo. App. 234.

*Montana.* — *Franklin v. Schultz*, 23 Mont. 165.

*New Hampshire.* — *Wadleigh v. Sutton*, 6 N. H. 15; *Fuller v. Brown*, 67 N. H. 188.

*New Jersey.* — *Feeney v. Bardsley*, 66 N. J. L. 239; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373.

*New York.* — *Reed v. Board of Education*, 4 Abb. App. Dec. (N. Y.) 24, 33 How. Pr. (N. Y.) 37; *Smith v. Coe*, 2 Hilt. (N. Y.) 365; *Tucker v. Williams*, 2 Hilt. (N. Y.) 562; *Crane v. Knubel*, (Supm. Ct. Gen. T.) 43 How. Pr. (N. Y.) 389; *Vanderzee v. Herman*, 59 Hun (N. Y.) 617, 13 N. Y. Supp. 164; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Rep. 442; *MacKnight Flintic Stone Co. v. New York*, 13 N. Y. App. Div. 231, 31 N. Y. App. Div. 232; *Spence v. Ham*, 27 N. Y. App. Div. 379; *Mitchell v. Williams*, 80 N. Y. App. Div. 527; *Parke v. Franco-American Trading Co.*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 498.

*North Carolina.* — *Brewer v. Tysor*, 3 Jones L. (48 N. Car.) 180.

*Ohio.* — *Bender v. Buehrer*, 4 Ohio Cir. Dec. 507, 8 Ohio Cir. Ct. 244.

*Oregon.* — *Gove v. Island City Mercantile, etc., Co.*, 16 Oregon 93.

*Pennsylvania.* — *Bryant v. Stilwell*, 24 Pa. St. 314; *Hartup v. Pittsburgh*, 97 Pa. St. 107; *Wilkinson v. Becker*, 13 Montg. Co. Rep. (Pa.) 106.

*Texas.* — *Paschall v. Pioneer Sav., etc., Co.*, 19 Tex. Civ. App. 102.

*Wisconsin.* — *Malbon v. Birney*, 11 Wis. 107; *Genni v. Hahn*, 82 Wis. 92; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1.

Compare *Bush v. Finucane*, 8 Colo. 192.

4. *Veazie v. Bangor*, 51 Me. 509; *Gray v.*



fully performed so as to constitute a waiver of the contractor's failure to perform in full,<sup>1</sup> and if the builder was unaware at the time of such payment that there were such defects in the work, he does not waive full performance.<sup>2</sup> Of course the fact of making payments on account of the work is, with other circumstances, evidence of an acceptance of the work and waiver of a full and strict performance.<sup>3</sup>

**4. Character and Quality of Work Required.** — Where the contract fails to specify the manner in which the work shall be done there is an implied agreement that it shall be performed by the contractor in a proper and workmanlike manner,<sup>4</sup> and performance in such manner is not excused by the fact that the contractor is incapable,<sup>5</sup> or that the compensation is inadequate.<sup>6</sup> And it has been held that if it is not practicable to do the work in a proper and workmanlike manner, it is the duty of the contractor to inform the builder of such fact, otherwise the impracticability is no excuse.<sup>7</sup> Thus, where the

James, 126 Mass. 110; *Boteler v. Roy*, 40 Mo. App. 234; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Spence v. Ham*, 27 N. Y. App. Div. 379.

**1. Payments on Account.** — *Katz v. Bedford*, 77 Cal. 319; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36; *Hattin v. Chase*, 88 Me. 237; *Cunningham v. Jones*, 3 E. D. Smith (N. Y.) 650; *Cahill v. Heuser*, 2 N. Y. App. Div. 292; *Bender v. Bueher*, 4 Ohio Cir. Dec. 507, 8 Ohio Cir. Ct. 244; *Faunce v. Burke*, 16 Pa. St. 469; *Robinson v. Brinson*, 20 Tex. 438; *Morrison v. Cummings*, 26 Vt. 486; *Halleck v. Bresnahan*, 3 Wyo. 73.

**2. Monroe Female University v. Broadfield**, 30 Ga. 1; *Van Buskirk v. Murden*, 22 Ill. 446; *Petrie v. Grover*, 39 Ind. 343; *Andrews v. Portland*, 35 Me. 475; *Veazie v. Bangor*, 51 Me. 509; *Hartup v. Pittsburgh*, 97 Pa. St. 107; *Morrison v. Cummings*, 26 Vt. 486.

**3. Katz v. Bedford**, 77 Cal. 319; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36; *Hayden v. Madison*, 7 Me. 76; *Meehan v. Williams*, 2 Daly (N. Y.) 367.

**4. Duty to Perform in Workmanlike Manner — England.** — *Cousins v. Paddon*, 2 C. M. & R. 547; *Lucas v. Godwin*, 3 Bing. N. Cas. 737, 32 E. C. L. 309; *Pearce v. Tucker*, 3 F. & F. 136. *Arkansas.* — *Manuel v. Campbell*, 3 Ark. 324; *Fitzgerald v. La Porte*, 64 Ark. 34.

*Colorado.* — *Barker v. Nichols*, 3 Colo. App. 25.

*Connecticut.* — *Hawley v. Belden*, 1 Conn. 97. *Delaware.* — *Hall v. Cannon*, 4 Harr. (Del.) 360.

*Georgia.* — *Cannon v. Hunt*, 116 Ga. 452; *Doster v. Brown*, 25 Ga. 24.

*Idaho.* — *Lane v. Pacific, etc., R. Co.*, (Idaho 1902) 67 Pac. Rep. 656.

*Illinois.* — *Van Buskirk v. Murden*, 22 Ill. 446, 74 Am. Dec. 163; *Springdale Cemetery Assoc. v. Smith*, 32 Ill. 252; *Schwartz v. Daegling*, 55 Ill. 342.

*Indiana.* — *Indiana, etc., R. Co. v. Adamson*, 114 Ind. 282; *Gwinnup v. Shies*, 161 Ind. 500.

*Indian Territory.* — *South McAlester Electric Light, etc., Co. v. Eddy*, 2 Indian Ter. 645.

*Iowa.* — *Smith v. Bristol*, 33 Iowa 24; *Kilbourne v. Jennings*, 40 Iowa 473; *Wernli v. Collins*, 87 Iowa 548.

*Kentucky.* — *Sebastian v. Tompkins*, Litt. Sel. Cas. (Ky.) 198.

*Louisiana.* — *Fremont v. Harris*, 9 Rob. (La.)

23; *East Feliciana v. Taylor*, 2 La. Ann. 272; *Lewis v. Blanchard*, 8 Mart. N. S. (La.) 290. *Maine.* — *Hattin v. Chase*, 88 Me. 237.

*Maryland.* — *Denmead v. Coburn*, 15 Md. 29. *Massachusetts.* — *Gillis v. Cobe*, 177 Mass. 584.

*Missouri.* — *Feagan v. Meredith*, 4 Mo. 514; *Smith v. Clark*, 58 Mo. 145; *Taussig v. Wind*, 98 Mo. App. 129; *U. S. Wind, etc., Co. v. Manufacturers' Automatic Sprinkler Co.*, 84 Mo. App. 204; *Zimmerman v. Conrad*, (Mo. App. 1903) 74 S. W. Rep. 139.

*Nebraska.* — *Uhlig v. Barnum*, 43 Neb. 584. *New York.* — *De Remer v. Brown*, 36 N. Y. App. Div. 634; *King v. Moore*, 61 N. Y. App. Div. 609; *Walsh v. Campbell*, 1 N. Y. App. Div. 631; *Van Orden v. Andrews*, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 18; *Ryan v. Elephant Bldg. Co.*, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 784.

*North Carolina.* — *Byerly v. Kepley*, 1 Jones L. (46 N. Car.) 35.

*Ohio.* — *Somerby v. Tappan, Wright (Ohio)* 570; *Greene v. State*, 8 Ohio 310.

*Pennsylvania.* — *Philadelphia v. Brooke*, 9 Phila. (Pa.) 168, 31 Leg. Int. (Pa.) 12; *Waugh v. Shunk*, 20 Pa. St. 130; *Bryant v. Stilwell*, 24 Pa. St. 314; *Wade v. Haycock*, 25 Pa. St. 382; *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. St. 167.

*South Carolina.* — *Lipscomb v. South Bound R. Co.*, 65 S. Car. 148.

*Texas.* — *Waul v. Hardie*, 17 Tex. 553. *Virginia.* — *Davis v. Baxter*, 2 Patt. & H. (Va.) 133.

*Wisconsin.* — *Butler v. Titus*, 13 Wis. 429; *Muth v. Frost*, 68 Wis. 425.

**5. Clark v. Pope**, 70 Ill. 128; *Sherman v. Bates*, 15 Neb. 18.

One who contracts to construct a building according to his "best knowledge, skill, and ability" impliedly engages to perform the contract in a workmanlike manner, and is liable for defects resulting from his failure to perform in a workmanlike manner though the work is done according to his best skill, knowledge, and ability. *Manuel v. Campbell*, 3 Ark. 324.

**6. Smith v. Bristol**, 33 Iowa 24; *Williams v. Keech*, 4 Hill (N. Y.) 168.

**7. Pearce v. Tucker**, 3 F. & F. 136. See also *Kumberger v. Congress Spring Co.*, 158 N. Y. 330, reversing 8 N. Y. App. Div. 96; *Fletcher v. Seekell*, 1 R. I. 267.

contractor agrees to build a structure to be used for a particular purpose there is an implied agreement on his part that the structure when completed will be serviceable for the purpose intended.<sup>1</sup> Where the contract expressly provides that the work shall be done in such a manner as to accomplish a certain result, the risk of accomplishing such result is on the contractor.<sup>2</sup> Where the contractor is to perform the work with materials, etc., furnished by the builder, he does not assume responsibility for the fitness of the materials, so as to render him liable for defects in the work due to defective material,<sup>3</sup> and where the contractor is to use certain work already done by the builder, he is not responsible for defects in such work.<sup>4</sup> Thus, where a subcontractor contracts to complete a work partly constructed by the contractor, the contractor impliedly warrants that the work done by him has been done in a proper and workmanlike manner.<sup>5</sup> So, the contractor is not responsible for defects arising by doing the work in the manner directed by the builder.<sup>6</sup> Where a structure is erected by several contractors, each having an independent contract with the builder, one of such contractors is not liable for defects due to the default or failure of another contractor properly to perform his work.<sup>7</sup>

**Defective Plans and Specifications.** — A contractor who agrees to perform certain work according to plans and specifications furnished by the builder is not responsible for defects due to defects in the plans and specifications.<sup>8</sup>

1. *Farnsworth v. Garrard*, 1 Campb. 38; *Grounell v. Lamb*, 1 M. & W. 352; *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255.

Where a contract calls for the erection of a drawbridge upon which the cars of a railway company can cross, it implies that the bridge will be serviceable for that purpose and capable of being used with like facility as similar bridges properly constructed. *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255.

2. *Shoenberger v. Elgin*, 164 Ill. 80, *affirming* 59 Ill. App. 384; *Conner v. Mt. Vernon Co.*, 25 Md. 55; *Bell v. Harvey*, 50 Mich. 59; *Pendleton v. Saunders*, 19 Oregon 9. See also *Hancock v. McFarland*, 17 Iowa 124; *Herrick v. Noble*, 27 Vt. 1.

3. **Defective Material Furnished by Builder.** — *Gubbins v. Lautenschlager*, 74 Fed. Rep. 160; *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Manville v. McCoy*, 3 Ind. 148; *Collins v. Money*, 4 How. (Miss.) 11; *Knutzen v. Hanson*, 28 Neb. 591; *True v. Bryant*, 32 N. H. 241; *McLane v. De Leyer*, 56 N. Y. 619; *Killian v. Herndon*, 4 Rich. L. (S. Car.) 609.

4. *Hunt v. Toulmin*, 1 Stew. & P. (Ala.) 178. Compare *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255.

Where the contractor agreed to rebuild a building which had been destroyed by fire, and the contract provided for the use of the old walls, it was held that the contractor did not assume responsibility for the fitness of such walls. *Gibbons's Case*, 15 Ct. Cl. 174.

5. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

6. **Performance as Directed by Builder.** — *McKee v. Brandon*, 3 Ill. 339; *Carroll County v. O'Connor*, 137 Ind. 622; *Hogg v. Jackson*, etc., Co., (Md. 1893) 26 Atl. Rep. 869; *Burke v. Dunbar*, 128 Mass. 499; *Schliess v. Grand Rapids*, 131 Mich. 52, 9 Detroit Leg. N. 192; *Siebert v. Leonard*, 17 Minn. 433; *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 277; *Feike v. Columbus*, etc., R. Co., 3 Ohio

*Cir. Dec. 100*, 5 Ohio Cir. Ct. 199; *Rohrman v. Steese*, 9 Phila. (Pa.) 185, 31 Leg. Int. (Pa.) 98; *Robinson v. Baird*, 165 Pa. St. 505, 35 W. N. C. (Pa.) 561.

7. **Defects Due to Other Contractors.** — *De Lambre v. Williams*, 36 La. Ann. 330.

8. **Defective Plans** — *United States*. — *Weld v. Goldenberg*, (C. C. A.) 65 Fed. Rep. 466; *Smith v. Consumers' Cotton Oil Co.*, (C. C. A.) 86 Fed. Rep. 359.

*Alabama*. — *Birmingham Fire-Brick Works v. Allen*, 86 Ala. 185.

*California*. — *Kendall v. Vallejo*, 1 Cal. 371. *District of Columbia*. — *District of Columbia v. Clephane*, 2 Mackey (D. C.) 155.

*Georgia*. — *Cannon v. Hunt*, 116 Ga. 452.

*Illinois*. — *Clark v. Pope*, 70 Ill. 128; *MacRitchie v. Lake View*, 30 Ill. App. 393.

*Iowa*. — *Holland v. Union County*, 68 Iowa 56; *Independent School Dist. v. Swearingin*, 119 Iowa 702.

*Louisiana*. — *Powell v. Markham*, 18 La. Ann. 581.

*Massachusetts*. — *Hyannis Sav. Bank v. Moors*, 120 Mass. 459; *Morse v. Puffer*, 182 Mass. 423.

*New Hampshire*. — *Perkins v. Roberge*, 69 N. H. 171.

*New Jersey*. — *Isaacs v. Reeve*, (N. J. 1899) 44 Atl. Rep. 1.

*New York*. — *Byron v. New York*, 54 N. Y. Super. Ct. 411; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, *reversing* 31 N. Y. App. Div. 232; *Dwyer v. New York*, 77 N. Y. App. Div. 224.

*Ohio*. — *Feike v. Columbus*, etc., R. Co., 3 Ohio Cir. Dec. 100, 5 Ohio Cir. Ct. 199.

*Pennsylvania*. — *O'Loughlin v. Jefferson County*, 56 Pa. St. 62; *Beswick v. Platt*, 140 Pa. St. 28; *Filbert v. Philadelphia*, 181 Pa. St. 530; *Murphy v. Liberty Nat. Bank*, 184 Pa. St. 208; *Harlow v. Homestead*, 194 Pa. St. 57; *Muckle v. Payne*, 198 Pa. St. 444, 9 Pa. Dist. 113.

**Contracts to Sink Wells.**—Under a contract to sink a "well" without a guaranty on the part of the contractor that water shall be reached, there does not seem to be any implied agreement that water shall be reached.<sup>1</sup> If the quantity of water to be procured is not specified no provision as to quantity will be implied,<sup>2</sup> and if the contract contains no provision as to quality none will be implied.<sup>3</sup> So it has been held that when the agreement is to sink a well supplying a certain quantity of water, there is no implied agreement that the water reached shall be of any particular character, though the contractor knows the purposes for which it is wanted.<sup>4</sup> Of course, however, the parties may by provision in the contract bind the contractor to procure a certain quantity or quality of water.<sup>5</sup> Under a contract to dig a

*Rhode Island.*—*Fletcher v. Seekell*, 1 R. I. 267.

*Wisconsin.*—*Bentley v. State*, 73 Wis. 416.

*Compare Stees v. Leonard*, 20 Minn. 494; *Giles v. San Antonio Foundry Co.*, (Tex. Civ. App. 1893) 24 S. W. Rep. 546.

Where a contract for the installation of an elevator in a building calls for an engine of a certain capacity the contractor incurs no liability from the fact that the engine is not of sufficient capacity to operate the elevator. *Morse v. Puffer*, 182 Mass. 423.

Where a contract required the contractor to furnish all labor and material, and make water-tight a room beneath the surface "in the manner and under the conditions prescribed and set forth in the annexed specifications, which are hereby made part of this contract," it was held that the contractor was not to be deemed a guarantor of the sufficiency of the plans and specifications to produce the result desired, and that his contract was performed if he furnished the materials and did the work according to the plans and specifications, and thus made the room as water-tight as the plans and specifications permitted. *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, *reversing* 31 N. Y. App. Div. 232. See also *Dwyer v. New York*, 77 N. Y. App. Div. 224.

In *Filbert v. Philadelphia*, 181 Pa. St. 530, where the contractor agreed to construct a reservoir in accordance with plans and specifications, and further agreed to do "all work necessary to make a complete and perfect reservoir ready for use," it was held that the contractor performed his work if the reservoir was constructed in strict accordance with the plans and specifications though it was not water-tight. See also *Harlow v. Homestead*, 194 Pa. St. 57.

**1. Contract to Sink Well.**—*Bohrer v. Stumpff*, 31 Ill. App. 139; *Littrell v. Wilcox*, 11 Mont. 77; *Palmer v. Ott*, (Tex. Civ. App. 1894) 26 S. W. Rep. 526; *Butler v. Davis*, 119 Wis. 166. See also *Thompson v. Brown*, 106 Iowa 367. *Compare Jarrard v. Hill*, 14 Ky. L. Rep. 574.

In *Butler v. Davis*, 119 Wis. 166, Winslow, J., said: "The court charged the jury that in a contract of well drilling there is no implied undertaking that water shall be obtained, or that the well shall be a success as to the quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner, with such skill as may ordinarily be expected from those who undertake such work. It is contended that this instruction is erroneous, and that an agreement to obtain a suffi-

cient supply of good water is implied in every contract to dig or bore a well. We are referred to no authority in support of this contention, nor have we found any. The uncertainty of obtaining a supply of good water, however skillfully the work is done, is matter of common knowledge. If well-diggers were to be held to guarantee such results whenever they undertake to dig a well, we think there would be a great scarcity of diggers. We have no hesitation in approving the principle laid down by the trial court upon the subject."

**2.** *Chapin v. Candee*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 453; *Omaha Consol. Vinegar Co. v. Burns*, 49 Neb. 229; *Butler v. Davis*, 119 Wis. 166. *Compare Jarrard v. Hill*, 14 Ky. L. Rep. 574.

**3.** *Gregory v. U. S.*, 33 Ct. Cl. 434; *Electric Lighting Co. v. Elder*, 115 Ala. 138; *Rankin v. Wever*, 78 Ill. App. 86; *Littrell v. Wilcox*, 11 Mont. 77; *Chapin v. Candee*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 453; *Blum v. Brown*, 11 Tex. Civ. App. 463; *Butler v. Davis*, 119 Wis. 166.

A guaranty to get water from "bed rock," unless water acceptable to the owner is sooner found, does not impose any obligation on the contractor as to the quality of water gotten from the bed rock. *Book v. New Castle Wire Nail Co.*, 151 Pa. St. 499. See also *Electric Lighting Co. v. Elder*, 115 Ala. 138.

**4.** *American Well-Works v. Rivers*, 36 Fed. Rep. 880.

In *Blum v. Brown*, 11 Tex. Civ. App. 463, Garrett, C. J., said: "By the terms of the contract, appellee's compensation was made to depend upon his getting a sufficient quantity of water for the number of stock mentioned. Nothing was said about the quality of the water, and there was no agreement that it should be of a suitable quality. To ingraft upon the contract a condition that the water should also be of a quality suitable for drinking would be to imply a condition that does not appear upon the face of the contract. Appellee's contract was not to sell water of his own to the appellant, but to procure for him, on his own land, at a place pointed out by him, a sufficient quantity of such water as the appellant had. The water was the property of the appellant, and, though he knew nothing of its quantity or quality, neither did the appellee. It would be unreasonable to imply the further condition that the water should be of suitable quality, when the appellant had only contracted for a sufficient quantity."

**5. Contract Requirements as to Quantity or**



well which shall supply a certain quantity of water, the law will not imply an agreement by the contractor that the supply will continue without failure.<sup>1</sup>

5. **Performance to Satisfaction of Builder.** — Where the contract merely requires the contractor to perform the work according to certain plans and specifications, it is not necessary, of course, in case the work is so performed, that it also be performed to the satisfaction of the builder. Building contracts, however, frequently provide that the work shall be performed to the satisfaction of the builder.<sup>2</sup> Such a provision is generally construed as not making the builder's declaration of dissatisfaction conclusive, but as requiring the performance of the work by the contractor in such a manner as ought reasonably to satisfy the builder.<sup>3</sup> Thus, a contract to install a heating plant in a manner satisfactory to the owner of the building has been held merely to require the installation of the plant in such a manner as should reasonably satisfy the owner, and not to permit the owner to express dissatisfaction as a matter of mere caprice;<sup>4</sup> and the same has been held true with regard to a contract to do the polishing on the woodwork of a building to the satisfaction

**Quality — United States.** — *American Well-Works v. Rivers*, 36 Fed. Rep. 880.

*Illinois.* — *Waggoner v. Stocks*, 49 Ill. App. 151.

*Iowa.* — *Wernli v. Collins*, 87 Iowa 548; *Wiseman v. Thompson*, 94 Iowa 607; *Jackson v. Creswell*, 94 Iowa 713; *Meador v. Allen*, 110 Iowa 588; *Sherzer v. Buckholz*, 108 Iowa 750; *Sigworth v. Holcomb*, (Iowa 1899) 79 N. W. Rep. 364; *Eagle Iron Works v. Guthrie Center*, 97 Iowa 128.

*Nebraska.* — *Woodworth v. Hammond*, 19 Neb. 215; *Johnson v. Bowman*, 26 Neb. 745; *Burns v. Fairmont*, 28 Neb. 866.

*New York.* — *Bennett v. Edison Electric Illuminating Co.*, 26 N. Y. App. Div. 363.

*South Dakota.* — *Richison v. Mead*, 11 S. Dak. 639; *Blood v. Fargo, etc., Elevator Co.*, 1 S. Dak. 71.

*Texas.* — *Schulz v. Tessman*, 92 Tex. 489; *Low, etc., Water Co. v. Hickson*, (Tex. Civ. App. 1903) 74 S. W. Rep. 781.

*Wisconsin.* — *Genni v. Hahn*, 82 Wis. 90.

**Tests to Determine Capacity of Well.** — *Waggoner v. Stocks*, 49 Ill. App. 151; *Meador v. Allen*, 110 Iowa 588; *Woodworth v. Hammond*, 19 Neb. 215.

Acquiescence by the parties to the test adopted to determine the capacity of the well, no particular test being required by the contract, authorizes the use of such test. *Bennett v. Edison Electric Illuminating Co.*, 26 N. Y. App. Div. 363.

1. *Wunsch v. Boldt*, 4 Tex. App. Civ. Cas., § 50.

In *Louisiana* it has been held that where the well-digger guarantees a certain quantity of water per day the guaranty will continue for a reasonable time after the completion of the well. *Planters Well Co. v. Bodenheimer*, 48 La. Ann. 1345.

And in *Missouri* it has been held that where the well-digger agrees to procure "lasting water," he is liable if the water gives out during a very dry season. *Vincent v. Morrison*, 58 Mo. App. 497.

2. **Performance to Satisfaction of Builder.** — *McCarren v. McNulty*, 7 Gray (Mass.) 139.

Where the materials are to be approved by the builder before being used, the contractor

must apply to him to approve them, or use them at his peril. *Higgins v. Lee*, 16 Ill. 495.

3. *England.* — *Dallman v. King*, 4 Bing. N. Cas. 105, 33 E. C. L. 293; *Parson v. Sexton*, 4 C. B. 899, 56 E. C. L. 899.

*United States.* — *Lee v. New Haven, etc., R. Co.*, 15 Fed. Cas. No. 8,197.

*Alabama.* — *Electric Lighting Co. v. Elder*, 115 Ala. 138.

*Massachusetts.* — *Hawkins v. Graham*, 149 Mass. 284. See also *Sloan v. Hayden*, 110 Mass. 143.

*Minnesota.* — *O'Dea v. Winona*, 41 Minn. 424.

*New York.* — *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; *Doll v. Noble*, 116 N. Y. 230; *Thomas v. Gage*, 156 N. Y. 612, reversing 84 Hun (N. Y.) 607; *Logan v. Berkshire Apartment Assoc., (N. Y. City Ct. Gen. T.)* 18 N. Y. Supp. 164; *Hummel v. Stern, (N. Y. Super. Ct. Gen. T.)* 15 Misc. (N. Y.) 27.

*South Dakota.* — *Richison v. Mead*, 11 S. Dak. 639.

See also *Tetz v. Butterfield*, 54 Wis. 242.

In *Hawkins v. Graham*, 149 Mass. 284, *Holmes, J.*, said: "When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such way as reasonably ought to satisfy the defendant" (employer).

In *Hummel v. Stern, (N. Y. Super. Ct. Gen. T.)* 15 Misc. (N. Y.) 27, the court said: "The work done by the plaintiff was of a mechanical nature, requiring great expense in moving and putting up the machinery; and it would necessitate a like expenditure to take down and remove the same. It is evident, therefore, that the right to reject was not left to the whim or caprice of the defendants, but was to depend on some objection founded upon reason; and as this involved a question peculiarly for the jury, it should not have been withdrawn from their consideration."

4. *Hawkins v. Graham*, 149 Mass. 284.

of the builder,<sup>1</sup> to sink a well to the satisfaction of the landowner,<sup>2</sup> and to do railroad construction work to the "full satisfaction" of the railroad company.<sup>3</sup> Still, where a working contract is to be performed to the satisfaction of the builder, though he may not from mere caprice declare his dissatisfaction, he may in good faith refuse to accept the work.<sup>4</sup>

**6. Approval of Architects, Engineers, etc.**—*a. NECESSITY.*—In the absence of any provision in the contract requiring it, it is not necessary, in order for the contractor to show a performance of the contract, to show that the work has been approved or accepted by the architect, engineer, or superintendent employed by the builder to supervise it.<sup>5</sup> Working contracts, however, frequently provide that the work shall be performed subject to the approval of an architect, engineer, or superintendent employed by the builder, and that the right of the contractor to recover the compensation shall be subject to such approval. Such provisions are universally recognized as binding upon the parties,<sup>6</sup> and the necessity for compliance with them applies equally to a

1. *Doll v. Noble*, 116 N. Y. 230.

2. *Electric Lighting Co. v. Elder*, 115 Ala. 138; *Richison v. Mead*, 11 S. Dak. 639.

3. *Lee v. New Haven, etc., R. Co.*, 15 Fed. Cas. No. 8,197.

4. *Mitchell v. Williams*, 80 N. Y. App. Div. 527; *Wilbur v. Bingham*, 2 Ohio Cir. Dec. 262, 3 Ohio Cir. Ct. 459; *Marshall v. Ames*, 5 Ohio Cir. Dec. 403, 11 Ohio Cir. Ct. 363; *Singerly v. Thayer*, 108 Pa. St. 291. See also *Andrews v. Belfield*, 2 C. B. N. S. 779, 89 E. C. L. 779.

**Examples** of such refusal have arisen where the contractor agreed to instal an elevator in a building which should work to the satisfaction of the owner of the building, *Singerly v. Thayer*, 108 Pa. St. 291, and where the contract was to move a house and erect it upon a new foundation to the satisfaction of the owner, *Marshall v. Ames*, 5 Ohio Cir. Dec. 403, 11 Ohio Cir. Ct. 363.

**5. Acceptance by Architect, etc., Not Required.**—*Gubbins v. Lautenschlager*, 74 Fed. Rep. 160; *Keating v. Nelson*, 33 Ill. App. 357; *Niven v. Craig*, 63 Minn. 20; *Welch v. Hubschmitt, Bldg., etc., Co.*, 61 N. J. L. 57; *St. John v. Potter*, (C. Pl. Gen. T.) 19 N. Y. Supp. 230; *Gallagher v. Sharpless*, 134 Pa. St. 134; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139.

**6. Provisions for Approval by Architect, etc., Upheld.**—*England.*—*Scott v. Liverpool*, 3 De G. & J. 334, 4 Jur. N. S. 402; *Richardson v. Mahon*, L. R. 4 Ir. 486; *Milner v. Field*, 5 Exch. 829; *Grafton v. Eastern Counties R. Co.*, 8 Exch. 699; *Clarke v. Watson*, 18 C. B. N. S. 278, 114 E. C. L. 278.

*Canada.*—*Davidson v. Francis*, 14 Manitoba 141.

*United States.*—*Kihlberg v. U. S.*, 97 U. S., 398; *Sweeney v. U. S.*, 109 U. S. 618; *Kennedy v. U. S.*, 24 Ct. Cl. 122; *Barlow v. U. S.*, 35 Ct. Cl. 514.

*Colorado.*—*Denver, etc., R. Co. v. Riley*, 7 Colo. 494.

*Florida.*—*Finegan v. L'Engle*, 8 Fla. 413; *Wilcox v. Stephenson*, 30 Fla. 377.

*Illinois.*—*Clark v. Pope*, 70 Ill. 128; *Coey v. Lehman*, 79 Ill. 173; *Michaelis v. Wolf*, 136 Ill. 68; *Walsh v. Walsh*, 11 Ill. App. 199; *Sanders v. Hutchinson*, 26 Ill. App. 633.

*Kentucky.*—*Louisville Trust Co. v. Louisville Fireproof Constr. Co.*, (Ky. 1900) 57 S.

W. Rep. 506; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303.

*Maryland.*—*Gill v. Vogler*, 52 Md. 663.

*Massachusetts.*—*National Contracting Co. v. Com.*, 183 Mass. 89.

*Michigan.*—*Guthat v. Gow*, 95 Mich. 527.

*Missouri.*—*Dinsmore v. Livingston County*, 60 Mo. 241.

*Montana.*—*McGlaulin v. Wormser*, 28 Mont. 177.

*New Jersey.*—*Byrne v. Sisters of Charity*, 45 N. J. L. 213.

*New York.*—*Schencke v. Rowell*, (C. Pl. Gen. T.) 3 Abb. N. Cas. (N. Y.) 42; *Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 378; *Smith v. Briggs*, 3 Den. (N. Y.) 73; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Smith v. Wright*, 4 Hun (N. Y.) 652; *Bowery Nat. Bank v. New York*, 2 Thomp. & C. (N. Y.) 523; *Butler v. Tucker*, 24 Wend. (N. Y.) 447; *National Contracting Co. v. Hudson River Water Power Co.*, 170 N. Y. 439; *Pollock v. Pennsylvania Iron Works Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 194; *McIntyre v. Tucker*, 36 N. Y. App. Div. 53; *Diehl v. Schmalacker*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 835; *Smith v. Wetmore*, 41 N. Y. App. Div. 290, *affirming* (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 225; *Conolly v. Hyams*, 47 N. Y. App. Div. 592; *Woarms v. Becker*, 84 N. Y. App. Div. 491; *Adams v. New York*, 4 Duer (N. Y.) 295; *Haden v. Coleman*, 42 N. Y. Super. Ct. 256; *Weeks v. O'Brien*, 59 N. Y. Super. Ct. 28; *New York, etc., Automatic Sprinkler Co. v. Andrews*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 124; *Bossert v. Poerschke*, 51 N. Y. App. Div. 381; *Fox v. Powers*, 65 N. Y. App. Div. 112; *Montgomery v. New York*, 151 N. Y. 249.

*Ohio.*—*Ashley v. Henahan*, 56 Ohio St. 559; *Kane v. Stone Co.*, 39 Ohio St. 1.

*Pennsylvania.*—*Hostetter v. Pittsburgh*, 107 Pa. St. 410; *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631; *Barclay v. Deckerhoof*, 171 Pa. St. 378; *Fulton v. Peters*, 137 Pa. St. 613.

*Texas.*—*Boettler v. Tendick*, 73 Tex. 488; *Jones v. Gilchrist*, 88 Tex. 88; *A. J. Anderson Electric Co. v. Cleburne Water, etc., Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 929.

*Washington.*—*Schmidt v. North Yakima*, 12 Wash. 121; *Craig v. Geddis*, 4 Wash. 390.

proceeding in equity as to an action at law.<sup>1</sup> Provisions for performance of the work subject to the approval of an architect, engineer, etc., will not be extended beyond the requirements of the contract,<sup>2</sup> and it has been held that a provision in a contract for the payment of the compensation in instalments as the work progresses upon a certificate from the architect or engineer that the work has been done in accordance with the terms of the contract does not require a certificate as a condition precedent to the final payment.<sup>3</sup> So it has been held that a provision that the final certificate of the architect or engineer shall be conclusive evidence of the performance of the contract does not require such a certificate to show a performance of the contract and entitle the contractor to recover the compensation payable upon the completion of the work.<sup>4</sup> And where, in pursuance of a provision therefor in the contract, the builder proceeds to complete the work, the cost of completion to be deducted from the amount to be paid to the contractor, a provision in the contract requiring a certificate of approval from the architect or engineer in charge is rendered inapplicable, as the object of such a provision is merely to furnish to the builder when called upon to pay the contract price of the work authentic evidence that the work to be certified has been performed.<sup>5</sup>

**Quantum Meruit.** — Where there has been such a performance of a working contract as will enable the contractor to recover on a *quantum meruit* or *quantum valebat* count, it is not necessary, to entitle the contractor to recover on such counts, to show the approval by the architect or engineer, etc., which is made a condition precedent to the right to recover upon the contract.<sup>6</sup>

*Wisconsin.* — *Hudson v. McCartney*, 33 Wis. 331.

Where the contract provided for payment in six instalments, the first three at various stages of the work, the fourth when the building was completed, the fifth thirty days thereafter, and the last six months thereafter, in each case a certificate to be obtained from the architect that the work was done in strict accordance with the plans and specifications, it was held that the certificate of the architect was necessary as to each of the payments, and that the fourth certificate, given after the completion of the building, was not conclusive as to the character of the work. *Michaelis v. Wolf*, 136 Ill. 68.

Where the contract provides for the payment of the compensation "after the engineer in charge shall certify that the work has been completed," a certificate of approval is necessary to enable the contractor to show a performance of the contract and recover compensation. *Sweeney's Case*, 15 Ct. Cl. 400.

Where the materials are to be subject to the approval of the builder's architect or engineer, and can be procured only at a distance from the place where the work is to be performed, the builder is not required to send his architect or engineer to the place where the materials are to be procured to pass upon their quality. *Mayes v. Reg.*, 23 Can. Sup. Ct. 454.

1. *Scott v. Liverpool*, 3 De G. & J. 334, 5 Jur. N. S. 105; *Downey v. O'Donnell*, 86 Ill. 49; *Barney v. Giles*, 120 Ill. 154; *Michaelis v. Wolf*, 136 Ill. 68.

2. **Provision Strictly Construed.** — *Gubbins v. Lautenschlager*, 74 Fed. Rep. 160; *St. John v. Potter*, (C. Pl. Gen. T.) 19 N. Y. Supp. 230; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248.

3. *George A. Fuller Co. v. B. P. Young Co.*,

(C. C. A.) 126 Fed. Rep. 343; *Braun v. Winans*, 37 Ill. App. 248; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248.

4. *George A. Fuller Co. v. B. P. Young Co.*, (C. C. A.) 126 Fed. Rep. 343, in which case the court said: "While the contract, by implication, declares that if the subcontractor shall obtain a final certificate (from whom is not stated, but, we may assume, from the superintendent or the architects) performance is to be exclusively presumed, there is not a word concerning the effect of the subcontractor's failure to obtain the certificate. If the parties have not made such failure a bar to recovery, it is certain that the courts will not insert the term into the contract by mere implication."

5. *Gillen v. Hubbard*, 2 Hilt. (N. Y.) 303; *Weeks v. O'Brien*, 141 N. Y. 199; *Holl v. Long*, (Supm. Ct. Spec. T.) 34 Mise. (N. Y.) 1.

6. **Quantum Meruit.** — *Davis v. Badders*, 95 Ala. 348; *Adams v. Cosby*, 48 Ind. 153; *Neehan v. Donoghue*, 50 Mo. 493; *Yeats v. Ballentine*, 56 Mo. 530; *Linnenkohl v. Winkelmeier*, 54 Mo. App. 570. See also *Gillis v. Cobe*, 177 Mass. 584. Compare *Hanley v. Walker*, 79 Mich. 607.

In *Davis v. Badders*, 95 Ala. 348, the court said: "Parties competent may fix the terms of their contract as they deem proper, and in the absence of fraud or mistake the court is not justified in displacing or altering them, though regarded imprudent or otherwise. But whether, under the provisions of the contract, the obtaining of the architects' certificate is a condition precedent to final payment, we deem it unnecessary to decide. If conceded that it is requisite to entitle plaintiffs to recover the final payment under the counts declaring on the special contract; if the contract has not



**Damages for Breach of Contract.** — A provision in a working contract requiring performance of the work to the satisfaction of the architect or engineer of the builder and the production of such architect's or engineer's certificate as a condition precedent to the recovery of compensation does not require a certificate in order to entitle the contractor to sue for a breach of the contract by the builder.<sup>1</sup>

**b. SUFFICIENCY OF APPROVAL OR CERTIFICATE.** — Where the working contract requires that the contractor shall procure a certificate of approval from the architect, engineer, etc., the procurement of such certificate is, as a general rule, a condition to the right of the contractor to recover compensation,<sup>2</sup> and it has been held that a formal approval and acceptance by the architect, etc., without a certificate was insufficient.<sup>3</sup> Where, however, the

been performed, and defendant has accepted the house, the production of the certificate is not essential to recovery under the common counts on an implied contract to pay the value of the labor done and materials furnished. Charge 2 is too broad, and was properly refused, for the reason that it predicates the production of such certificate or proof of facts, showing that it was obstinately or unreasonably withheld, as an element of plaintiffs' right to recover 'in this action' — that is, under both the common and special counts."

**1. Damages for Breach of Contract.** — *Devlin v. Second Ave. R. Co.*, 44 Barb. (N. Y.) 81; *Gillen v. Hubbard*, 2 Hilt. (N. Y.) 303; *Byron v. New York*, 54 N. Y. Super. Ct. 411; *Smith v. Wetmore*, 167 N. Y. 234, *affirming* 41 N. Y. App. Div. 290; *Lauman v. Young*, 31 Pa. St. 306; *Childress v. Smith*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1076; *Linch v. Paris Lumber, etc., Elevator Co.*, 80 Tex. 23; *Markey v. Milwaukee*, 76 Wis. 349.

**2. Necessity for Certificate** — *England*. — *Scott v. Liverpool*, 3 De G. & J. 334, 5 Jur. N. S. 105; *Richardson v. Mahon*, L. R. 4 Ir. 486; *Milner v. Field*, 5 Exch. 829; *Morgan v. Birnie*, 9 Bing. 672; 23 E. C. L. 414, 3 Moo. & S. 76; *De Worms v. Mellier*, L. R. 16 Eq. 554; *Clarke v. Watson*, 18 C. B. N. S. 278, 114 E. C. L. 278; *Lewis v. Hoare*, 44 L. T. N. S. 66, 29 W. R. 357.

*Canada*. — *Jones v. Reg.*, 7 Can. Sup. Ct. 570; *Davidson v. Francis*, 14 Manitoba 141; *Reg. v. Starrs*, 17 Can. Sup. Ct. 118; *Reg. v. McGreevy*, 18 Can. Sup. Ct. 371; *Ferguson v. Galt*, 23 U. C. C. P. 66.

*United States*. — *U. S. v. Robeson*, 9 Pet. (U. S.) 319; *Sweeney v. U. S.*, 109 U. S. 618.

*Illinois*. — *Packard v. Van Schoick*, 58 Ill. 79; *Clark v. Pope*, 70 Ill. 128; *Coey v. Lehman*, 79 Ill. 173; *Fowler v. Deakman*, 84 Ill. 130; *Barney v. Giles*, 120 Ill. 154; *Michaelis v. Wolf*, 136 Ill. 68, *affirming* 27 Ill. App. 336; *Walsh v. Walsh*, 11 Ill. App. 199; *Bourneque v. Arnold*, 33 Ill. App. 303; *Vincent v. Stiles*, 77 Ill. App. 200; *Chicago Athletic Assoc. v. Eddy Electric Mfg. Co.*, 77 Ill. App. 204.

*Iowa*. — *McNamara v. Harrison*, 81 Iowa 486.

*Kentucky*. — *Louisville Trust Co. v. Louisville Fireproof Constr. Co.*, (Ky. 1900) 57 S. W. Rep. 506.

*Maryland*. — *Gill v. Vogler*, 52 Md. 663.

*Massachusetts*. — *Beharrell v. Quimby*, 162 Mass. 571.

*Michigan*. — *Hanley v. Walker*, 79 Mich. 607.

*Missouri*. — *Bayse v. Ambrose*, 32 Mo. 484; *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 539; *Dinsmore v. Livingston County*, 60 Mo. 244; *Roy v. Boteler*, 40 Mo. App. 222; *Mockler v. St. Vincent's Inst.*, 87 Mo. App. 473.

*Montana*. — *McGlauffin v. Wormser*, 28 Mont. 177.

*New Jersey*. — *Kirtland v. Moore*, 40 N. J. Eq. 106; *Byrne v. Sisters of Charity*, 45 N. J. L. 213.

*New York*. — *Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 378; *Smith v. Briggs*, 3 Den. (N. Y.) 73; *Adams v. New York*, 4 Duer (N. Y.) 295; *Smith v. Wright*, 4 Hun (N. Y.) 652, 6 Thomp. & C. (N. Y.) 694; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Smith v. Brady*, 17 N. Y. 173; *Stewart v. Keteltas*, 36 N. Y. 388; *Wangler v. Swift*, 90 N. Y. 38; *Byron v. Low*, 109 N. Y. 291; *O'Brien v. New York*, 139 N. Y. 543; *Weeks v. O'Brien*, 141 N. Y. 199; *National Contracting Co. v. Hudson River Water Power Co.*, 170 N. Y. 439; *Hopper v. Cutting*, (C. Pl. Gen. T.) 13 N. Y. Supp. 820; *Beecher v. Schuback*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 54; *Diehl v. Schmalacker*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 835; *Conolly v. Hyams*, 47 N. Y. App. Div. 592; *Bossert v. Poerschke*, 51 N. Y. App. Div. 381; *Fox v. Cowperthwait*, 60 N. Y. App. Div. 528; *Fox v. Powers*, 65 N. Y. App. Div. 112; *Dwyer v. New York*, 77 N. Y. App. Div. 224; *Beck v. New York Bldg. Loan Banking Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 323; *Excelsior Terra Cotta Co. v. Harde*, 90 N. Y. App. Div. 4; *Haden v. Coleman*, 42 N. Y. Super. Ct. 256; *Butler v. Tucker*, 24 Wend. (N. Y.) 447.

*Ohio*. — *Ashley v. Henahan*, 56 Ohio St. 559.

*Washington*. — *Schmidt v. North Yakima*, 12 Wash. 121.

*Wisconsin*. — *Hudson v. McCartney*, 33 Wis. 331; *Bannister v. Patty*, 35 Wis. 215; *Coorsen v. Ziehl*, 103 Wis. 381; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359.

**3. Approval Without Certificate.** — *Goodyear v. Weymouth*, 1 H. & R. 67; *Lamprell v. Guardians of Poor*, 3 Exch. 283; *Russell v. Sa da Bandeira*, 13 C. B. N. S. 149, 106 E. C. L. 149; *Hanley v. Walker*, 79 Mich. 607; *Roy v. Boteler*, 40 Mo. App. 224; *Byrne v. Sisters of Charity*, 45 N. J. L. 213; *Schencke v. Rowell*, (C. Pl. Gen. T.) 3 Abb. N. Cas. (N. Y.) 42.

contract merely requires the work to be performed subject to the approval or satisfaction of the architect, engineer, etc., and does not expressly require that the contractor shall procure a certificate of approval, actual approval of the work is sufficient, and the procurement of a certificate of approval is not necessary,<sup>1</sup> and in such a case the approval may be implied as well as express.<sup>2</sup> And where it is the builder's and not the contractor's duty to procure the certificate, its absence is no bar to a recovery where it is shown that the work has been completed to the satisfaction of the architect.<sup>3</sup>

**Form.** The courts do not require that technical accuracy be followed in the form and wording of the certificate of approval, and such certificate will be deemed sufficient where it conveys the meaning that the work has been performed to the satisfaction of the architect or engineer certifying;<sup>4</sup> and it is not in fact necessary that it should state in terms that the work has been done to his satisfaction where such fact can be reasonably implied.<sup>5</sup> Thus it is sufficient that the certificate states that the payment is "due as per contract,"<sup>6</sup> or that the final payment is "now due" to the contractor,<sup>7</sup> or that the contractor is entitled to a settlement from the builder,<sup>8</sup> or that the work has been completed, as this implies that it was done according to the contract and to the satisfaction of the architect.<sup>9</sup> It is not necessary for the certificate to state the amount remaining due to the contractor, if the contract does not expressly so require.<sup>10</sup> The certificate must, however, show that the

1. *Kirk v. Guardians of Poor*, 2 Phil. 640; *Roberts v. Watkins*, 14 C. B. N. S. 592, 108 E. C. L. 592; *Gubbins v. Lautenschlager*, 74 Fed. Rep. 160; *Willey v. Fractional School Dist.*, 25 Mich. 419; *Devlan v. Wells*, 65 N. J. L. 213; *Union Stove Works v. Arnoux*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 700; *Kane v. Stone Co.*, 39 Ohio St. 1; *Malone v. Philadelphia, etc., R. Co.*, 157 Pa. St. 430, 33 W. N. C. (Pa.) 373.

2. *Kane v. Stone Co.*, 39 Ohio St. 1; *Coon v. Citizens' Water Co.*, 152 Pa. St. 644, 31 W. N. C. (Pa.) 457; *Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

Where it appeared that the party subject to whose approval payment was to be made knew of the contract and visited the building where the work was going on every day, this was held to be sufficient, in the absence of a denial of approval by the defendant, to show an approval by implication. *Union Stove Works v. Arnoux*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 700.

3. *McKone v. Williams*, 37 Ill. App. 591.

4. **Form of Certificate.** — *Rousseau v. Poitras*, 62 Ill. App. 103; *Wysor Land Co. v. Jones*, 24 Ind. App. 451; *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388; *Stewart v. Keteltas*, 36 N. Y. 392, 9 Bosw. (N. Y.) 261; *Tilden v. Buffalo Office-Bldg. Co.*, 27 N. Y. App. Div. 510; *Robinson v. Baird*, 165 Pa. St. 505, 35 W. N. C. (Pa.) 561; *House v. Brown*, 21 Tex. Civ. App. 576; *Washington Bridge Co. v. Land, etc., Imp. Co.*, 12 Wash. 272; *Ludlam v. Wilson*, 2 Ont. L. Rep. 549.

**Statements of Work Marked "O. K."** Sufficient — *Wysor Land Co. v. Jones*, 24 Ind. App. 451.

5. In *Bannister v. Patty*, 35 Wis. 215, a superintendent certified to the amount and the value of the work furnished, stating the value at the contract prices, but not stating in terms that it was to his satisfaction. It was held to be in effect a certificate that the work was done to his satisfaction. *Lyon, J.*, said: "The

certificate does not state in terms that the work is to the satisfaction of the superintendent, but it fixes the value thereof at the contract price and states no objection thereto. This, we think, is equivalent to a statement that the work was done to his satisfaction."

6. *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388; *Wyckoff v. Meyers*, 44 N. Y. 143. *Compare Gay v. Haskins*, (Buffalo Super. Ct. Gen. T.) 11 Misc. (N. Y.) 134.

In *Wyckoff v. Meyers*, 44 N. Y. 143, where the building contract provided that the last instalment should be paid when all the work was "completely finished and certified to that effect by the architect" under whose direction the work was to be done, the certificate of the architect that "the last payment is due as per contract" was held to be sufficient.

Where the contract provided that the work should be done under the direction and supervision of the architect, "to be certified by a certificate or writing under his hand," a certificate stating "balance due in full of contract price" was held to be sufficient. *Mercer v. Harris*, 4 Neb. 77.

7. *Snaith v. Smith*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 37.

8. *Granniss, etc., Lumber Co. v. Deever*, 72 Hun (N. Y.) 171.

9. *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 247.

10. *Pashby v. Birmingham*, 18 C. B. 2, 86 E. C. L. 2. In this case *Willes, J.*, said: "The certificate in question is for the balance remaining unpaid in respect of the work done under the contract, and the alterations and additions. It is said that the certificate must state the amount due. There is, however, no provision for that in that part of the contract which I have read. Here is a certificate of the architect that the whole of the work has been completed to his satisfaction. The other provision which has been referred to applies to the intermediate certificates only. It is

architect or engineer intends to approve the work as a performance of the contract,<sup>1</sup> and merely checking the builder's charges,<sup>2</sup> or giving to the contractor an order on the owner for a certain sum, is insufficient.<sup>3</sup> Where the owner has repeatedly made payments on certificates of a peculiar form without objection, he cannot raise objections to the form for the first time on the trial.<sup>4</sup> If the contract expressly requires certain recitals in the certificate, there must be a substantial compliance with such requirement.<sup>5</sup> A conditional certificate will be sufficient where it is shown that the condition has been complied with.<sup>6</sup>

**Delivery.** — Where the contract requires the presentation by the contractor of a certificate of approval to be issued to him by the architect, there must be a delivery of the certificate to the contractor;<sup>7</sup> and where a certificate was delivered by the architect to the contractor, who, being dissatisfied therewith, returned it to the architect, a recovery by the contractor was denied for failure to procure and present to the builder the required certificate.<sup>8</sup>

**Notice of Application for Certificate.** — In *Illinois*, though there is a dictum to the contrary,<sup>9</sup> it has been held that unless the contract expressly requires it,

clear that the final certificate need show no more than the completion of the whole work. That view of the matter is considerably fortified by a reference to that part of the conditions which requires the particulars and the amount of alterations and additions to be entered in a book."

1. *Davidson v. Francis*, 14 Manitoba 141.

2. Where the defendant was to pay for a building upon receiving the architect's certificate that the work was done to his satisfaction, and the architect checked the builder's charges and sent them to the defendant, it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. *Morgan v. Birnie*, 9 Bing. 672, 23 E. C. L. 414. In this case, Tindal, C. J., said: "It appears to me that the effect of a certificate would be altogether different, applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges."

3. Thus, where the contract requires the contractor, before each payment, to procure a certificate signed by the architect therein named, "to the effect that the work is done in strict accordance with drawings and specifications, and that he considers the payment properly due," a mere order, signed by the architect and addressed to the owner, requesting him to pay a certain sum to the contractor, will not bind the owner. *Michaelis v. Wolf*, 136 Ill. 68.

4. **Waiver of Objections to Form of Certificate** — *Bloodgood v. Ingoldshy*, 1 Hilt. (N. Y.) 388; *Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 382.

5. *Michaelis v. Wolf*, 136 Ill. 68; *Mockler v. St. Vincent's Inst.*, 87 Mo. App. 473; *Gonder v. Berlin Branch R. Co.*, 171 Pa. St. 492; *Kansas City, etc., R. Co. v. Perkins*, 88 Tex. 66.

Thus, in *Smith v. Briggs*, 3 Den. (N. Y.) 73, where the architect certified that the house was finished in such a manner that he would accept it if he were the owner, and that he was satis-

fied as to the work and materials, the certificate was held to be insufficient, as the contract called for a certificate that the work was "fully and completely finished according to the specifications."

So, where the contract called for an architect's certificate "that the contract has been well and duly performed and accepted by him, and that all damages or allowances which should be made have been deducted," a certificate that the contractors "are entitled to a payment of one thousand seventy-nine dollars and seventy-three cents by the terms of the contract, work having been measured at the building," was held insufficient. *Barney v. Giles*, 120 Ill. 154.

In *Roy v. Boteler*, 40 Mo. App. 213, the contract required the certificate to be under the hand of the architects, and to show that the whole job had been completed and accepted by the architects, their final estimate of the amount due on the contract, and that the work had been performed agreeably to the drawings and specifications under the direction and to the satisfaction of the architects; and a certificate showing the balance due to the contractor, but nothing more, was held to be insufficient.

In *Kansas City, etc., R. Co. v. Perkins*, 88 Tex. 66, a railroad-construction contract provided for payment "when any five miles of said road are completed, ready for rolling stock, upon the certificate of the chief engineer to that effect," and it was held that the certificate of the engineer that "on this date ten miles of the track \* \* \* are laid; that trains have been run over the same, and that it is in condition suitable for traffic," was insufficient.

6. Thus, where an architect certified that when some slight additions should be made the work would be acceptable, and it appeared that these additions had been made and on notice thereof no further objections were interposed, it was held that there was a sufficient approval. *Mills v. Weeks*, 21 Ill. 561.

7. *Wear v. Schmelzer*, 92 Mo. App. 314 (certificate sent to builder and returned by him to architect).

8. *Bournique v. Arnold*, 33 Ill. App. 303.

9. *Packard v. Van Schoick*, 58 Ill. 79.



the contractor need not give notice to the builder of his application to the architect or engineer for the certificate of approval.<sup>1</sup>

c. BY WHOM TO BE APPROVED. — Where the contract designates by name the person subject to whose approval the work is to be performed and the certificate of approval is to be issued, the certificate must be issued by the person named;<sup>2</sup> and where the certificate of approval of two persons was required, a certificate signed by one only has been held to be defective.<sup>3</sup> So, under the principle that delegated powers cannot be delegated,<sup>4</sup> a certificate by an employee of or assistant to the person named is insufficient.<sup>5</sup> The parties may, of course, by agreement substitute another in place of the person named, and it has been held that when, upon the death of the architect whose certificate of approval was required by the contract, another is substituted by the builder and accepted by the contractor, the certificate of the latter is necessary.<sup>6</sup> Where the contract does not designate by name the person by whom the work shall be approved, but refers to him by official designation, as, for example, the chief engineer of the builder, the person filling the office at the time when his decision is called for, and not the one who held the office at the time when the contract was made, is, as a general rule, the proper one to give the certificate of approval.<sup>7</sup>

d. CONCLUSIVENESS OF APPROVAL. — Where working contracts provide that the work shall be performed under the supervision and direction of an architect, engineer, or superintendent employed by the builder and subject to his approval, the decision of such person in approving the work as a performance of the contract is, as a general rule, binding upon the builder; and this is especially true when the contract provides that his approval shall be binding upon the parties.<sup>8</sup> Hence, after such approval the builder cannot recover damages from the contractor as for a failure to perform the contract

1. *Korf v. Lull*, 70 Ill. 420. See also *McAuley v. Carter*, 22 Ill. 53; *Eldridge v. Fuhr*, 59 Mo. App. 44.

2. *By Whom to Be Approved*. — American Bonding, etc., Co. v. Baltimore, etc., R. Co., (C. C. A.) 124 Fed. Rep. 866; *Fitts v. Reinhart*, 102 Iowa 311; *McIntyre v. Tucker*, 36 N. Y. App. Div. 53; *Herrick v. Belknap*, 27 Vt. 673.

3. *Bowery Nat. Bank v. New York*, 2 Thomp. & C. (N. Y.) 523; *Adams v. New York*, 4 Duer (N. Y.) 295.

Where payments were to be made on the certificate of two architects, who were partners, it was held that a certificate signed by one in the firm name was sufficient. *Lull v. Korf*, 84 Ill. 225. See also *Wymard v. Deeds*, 21 Pa. Super. Ct. 332.

And the recognition by the owner and the contractor of the surviving member of a firm of architects, upon whose certificates payments were to be made, as superintendent and architect, is binding upon both. *Davidson v. Provost*, 35 Ill. App. 126.

4. *McEntyre v. Tucker*, (C. Pl. Gen. T.) 5 Misc. (N. Y.) 228. And see generally the title AGENCY, vol. 1, p. 972 *et seq.*

5. *Snell v. Brown*, 71 Ill. 133; *Monahan v. Fitzgerald*, 164 Ill. 525; *McNamara v. Harrison*, 81 Iowa 486; *McEntyre v. Tucker*, (C. Pl. Gen. T.) 23 Civ. Pro. (N. Y.) 171, 5 Misc. (N. Y.) 228, 36 N. Y. App. Div. 53.

6. *Beecher v. Schuback*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 54.

7. *Ranger v. Great Western R. Co.*, 27 Eng. L. & Eq. 35; *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132; *North Lebanon*

*R. Co. v. McGrann*, 33 Pa. St. 530. Compare *Wangler v. Swift*, 90 N. Y. 38.

8. *Conclusiveness of Approval — England*. — *Arnold v. Walker*, 1 F. & F. 671; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597; *Harvey v. Lawrence*, 15 L. T. N. S. 571; *De Worms v. Mellier*, L. R. 16 Eq. 554; *Dunaberg, etc., R. Co. v. Hopkins*, 36 L. T. N. S. 733; *Rogers v. James*, 56 J. P. 277.

*United States*. — *Omaha v. Hammond*, 94 U. S. 98; *Sweeney v. U. S.*, 109 U. S. 618; *Sheffield, etc., Coal, etc., Co. v. Gordon*, 151 U. S. 285; *Pauly Jail Bldg., etc., Co. v. Hemphill County*, 62 Fed. Rep. 698, 23 U. S. App. 481; *Kimball v. U. S.*, 24 Ct. Cl. 35; *Driscoll v. U. S.*, 34 Ct. Cl. 508; *Barlow v. U. S.*, 35 Ct. Cl. 514.

*Arkansas*. — *Hot Springs R. Co. v. Maher*, 48 Ark. 522.

*California*. — *Dingley v. Greene*, 54 Cal. 333; *Moore v. Kerr*, 65 Cal. 519.

*Dakota*. — *McGuire v. Rapid City*, 6 Dak. 346.

*Florida*. — *Wilcox v. Stephenson*, 30 Fla. 377.

*Illinois*. — *Mills v. Weeks*, 21 Ill. 561; *McAuley v. Carter*, 22 Ill. 53; *Korf v. Lull*, 70 Ill. 420; *Snell v. Brown*, 71 Ill. 133; *Taylor v. Renn*, 79 Ill. 181; *Coe v. Lehman*, 79 Ill. 173; *Lull v. Korf*, 84 Ill. 225; *Downey v. O'Donnell*, 86 Ill. 49; *Bournique v. Arnold*, 33 Ill. App. 303; *Stewart v. Carbray*, 59 Ill. App. 397; *West Chicago Park Com'rs v. Barber*, 62 Ill. App. 108; *Lindeman v. Wagner*, 67 Ill. App. 134; *Davis v. Gibson*, 70 Ill. App. 273; *Lauman v. Clark*, 73 Ill. App. 659; *Heberlein v. Wendt*,

according to the terms thereof;<sup>1</sup> but where the contract provided that it should be performed in a special manner, and in addition it was to be subject to the approval or rejection of the architect or engineer, it was held that the provision for approval or rejection by the architect or engineer was merely an additional safeguard against defects not ascertainable by an unskilled person, and therefore that the approval of the architect or engineer was not conclusive upon the builder to show a performance of the contract by the contractor,<sup>2</sup> and that in an action by the contractor for compensation the builder could, without regard to such approval, show the nonperformance of the work according to the contract.<sup>3</sup> So the approval of an architect or engineer who was merely employed by the builder to see that the work was properly done is not binding upon the builder.<sup>4</sup> Where the contract makes the certificate

99 Ill. App. 506. Compare *Davidson v. Provost*, 35 Ill. App. 126.

Indiana.—*Hamilton County v. Newlin*, 132 Ind. 27.

Iowa.—*Smith v. Farmers' Trust Co.*, 97 Iowa 117.

Kentucky.—Board of Internal Imp. v. Dougherty, 3 B. Mon. (Ky.) 446.

Maine.—*Merrill v. Gore*, 29 Me. 346.

Michigan.—*Willey v. Fractional School Dist.*, 25 Mich. 419.

Minnesota.—*Trainor v. Worman*, 33 Minn. 484.

Missouri.—*Chapman v. Kansas City, etc., R. Co.*, 114 Mo. 542; *Standard Stamping Co. v. Hemminghaus*, 157 Mo. 23.

Nebraska.—*Mercer v. Harris*, 4 Neb. 77; *School Dist. Number Twenty-seven v. Randall*, 5 Neb. 408.

New Jersey.—*Welch v. Hubschmitt Bldg., etc., Co.*, 61 N. J. L. 57; *Sisters of Charity, etc. v. Smith*, (N. J. 1899) 46 Atl. Rep. 598.

New York.—*Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 381; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Adams v. New York*, 4 Duer (N. Y.) 295; *Whiteman v. New York*, 21 Hun (N. Y.) 117; *Dorwin v. Westbrook*, 71 Hun (N. Y.) 405, 86 Hun (N. Y.) 363; *Stewart v. Keteltas*, 36 N. Y. 388; *Wyckoff v. Meyers*, 44 N. Y. 143; *Grube v. Schultheiss*, 57 N. Y. 669; *Brady v. New York*, 132 N. Y. 415, affirming 58 N. Y. Super. Ct. 184; *Snaith v. Smith*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 37; *Montgomery v. New York*, (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 331, affirmed 151 N. Y. 249; *Gay v. Haskins*, (Buffalo Super. Ct. Eq. T.) 8 Misc. (N. Y.) 626, 11 Misc. (N. Y.) 134; *Zimmerman v. German Evangelical Lutheran Immanuel's Church*, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 49; *Lantry v. New York*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 558; *De Remer v. Brown*, 36 N. Y. App. Div. 634; *Schultze v. Goodstein*, 82 N. Y. App. Div. 316; *Weeks v. Little*, 47 N. Y. Super. Ct. 1.

Pennsylvania.—*Messner v. Lancaster County*, 23 Pa. St. 291; *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Vulcanite Paving Co. v. Philadelphia Traction Co.*, 115 Pa. St. 280; *Nuttall v. Philadelphia*, 15 W. N. C. (Pa.) 439; *McCauley v. Keller*, 130 Pa. St. 53; *Brown v. Decker*, 142 Pa. St. 640; *Kennedy v. Poor*, 151 Pa. St. 472; *Malone v. Philadelphia, etc., R. Co.*, 157 Pa. St. 430; *Bowman v. Stewart*, 165 Pa. St. 394.

Texas.—*Boettler v. Tendick*, 73 Tex. 488;

*Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122; *Johnson v. White*, (Tex. Civ. App. 1894) 27 S. W. Rep. 174; *Jones v. Gilchrist*, (Tex. Civ. App. 1894) 27 S. W. Rep. 890; *Jones v. Risley*, 91 Tex. 1; *Brin v. McGregor*, (Tex. Civ. App. 1898) 45 S. W. Rep. 923.

Vermont.—*Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 130.

Virginia.—*Condon v. South Side R. Co.*, 14 Gratt. (Va.) 302.

Washington.—*Washington Bridge Co. v. Land, etc., Imp. Co.*, 12 Wash. 272.

Wisconsin.—*Hudson v. McCartney*, 33 Wis. 331; *Tetz v. Butterfield*, 54 Wis. 242, 41 Am. Rep. 29; *Ashland Lime, etc., Co. v. Shores*, 105 Wis. 122.

1. *Boettler v. Tendick*, 73 Tex. 488.

2. *Glacius v. Black*, 50 N. Y. 145. In this case the court said: "The contract provides 'that the materials to be furnished shall be of the best quality, and the workmanship performed in the best manner, subject to the acceptance or rejection of Edward Wall, architect, and all to be in strict accordance with the plans and specifications, which are signed by the parties, and form part of this contract.' The architect also had power to reject any particular work or materials; and in such case the builders were to remedy the defects. This is all the authority which the architect had under this contract, and his authority was equally known to both parties. It is quite clear to my mind that the acceptance of the work by the architect did not relieve the plaintiffs from their agreement to perform this work according to the plans and specifications. The provisions are distinct and independent. The contract was to be performed in a certain manner, particularly specified in writing; and in addition, it was to be subject to the acceptance or rejection of the architect; but his acceptance of a different class of work or inferior materials from that contracted for would not bind the defendant to pay for them. She was obliged to pay only where 'the work was done completely and accepted.' The provision for acceptance was an additional safeguard against defects not discernible by an unskilled person."

3. *Cannon v. Hunt*, 113 Ga. 501; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Lewis v. Yagel*, 77 Hun (N. Y.) 337; *Gallagher v. Minturn*, 27 N. Y. App. Div. 274; *O'Brien v. Jackson*, 42 N. Y. App. Div. 171; *Pormann v. Walsh*, 97 Wis. 356.

4. *McKinney v. Page*, 32 Me. 513.



of approval by the architect or engineer conclusive upon the builder, and no certificate is in fact issued, his testimony in an action on the contract by the builder for failure to perform the work properly will not be conclusive of the due performance of or failure to perform the contract.<sup>1</sup> In some instances contracts have expressly provided that the architect's or engineer's certificate should not be conclusive against the builder, and, of course, in such a case his certificate will not have a conclusive effect as against the builder.<sup>2</sup> Where the contract is to be performed to the satisfaction of the architect or engineer who is to issue a certificate of approval, the refusal of the architect or engineer to approve the work is, as a general rule, binding upon the contractor.<sup>3</sup>

**Progress Certificate.** — Where the compensation is payable in instalments as the work progresses, the final payment becoming due upon the completion of the work, and certificates of approval are required as a condition precedent to the right to demand payment, the certificates given during the progress of the work are not regarded as conclusive that the work therein certified to was properly performed, and the architect may properly refuse a final certificate on the ground that the work has not been properly done.<sup>4</sup>

**Latent Defects.** — It seems that the architect's or engineer's certificate of approval is not conclusive against the builder as regards latent defects in the performance of the work which could not have been discovered by the architect or engineer.<sup>5</sup>

**Fraud.** — If the work is approved by the architect or engineer and his certificate is issued in performance of a fraudulent agreement or understanding between him and the contractor, the certificate is not conclusive as against the builder, and the latter may, after establishing such fraud, show that the work was not in fact properly performed.<sup>6</sup> The burden of proving fraud, on the part of the architect or engineer in approving the work, is upon the party attacking his approval.<sup>7</sup>

1. *Boteler v. Roy*, 40 Mo. App. 234.

2. *Snell v. Evans*, 55 Ill. App. 670.

3. *Illinois*. — *Coe v. Lehman*, 79 Ill. 173; *Gilmore v. Courtney*, 158 Ill. 432; *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61; *Sanders v. Hutchinson*, 26 Ill. App. 633; *Classen v. Davidson*, 59 Ill. App. 106.

*New York*. — *Montgomery v. New York*, (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 331.

*Pennsylvania*. — *Brown v. Decker*, 142 Pa. St. 640; *Huckestein v. Kelly*, etc., Co., 152 Pa. St. 631; *Barclay v. Deckerhoof*, 171 Pa. St. 378.

*Texas*. — *Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

*West Virginia*. — *Fairmont Plumbing Co. v. Carr*, 54 W. Va. 272.

*Wisconsin*. — *Wendt v. Vogel*, 87 Wis. 462.

*Compare Mackinson v. Conlon*, 55 N. J. L. 564. See also the cases cited *supra*, this subsection, *Necessity*.

4. **Progress Certificates.** — *Cooper v. Uttoxeter Burial Board*, 11 L. T. N. S. 565. *Compare Ashland Lime*, etc., Co. v. *Shores*, 105 Wis. 122.

5. **Latent Defects.** — *Spink v. Mueller*, 77 Mo. App. 85. See also *Iaegre v. Bossieux*, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

Thus, where a building contract provided that the house should be built according to certain drawings and specifications, the work "to be done to the satisfaction of the architect," who should give a certificate to that effect, and the contractor failed to use the kind of varnish for wood finish required by the contract, but substituted therefor a cheaper and inferior varnish, and the evidence showed that the archi-

tect was absent while the varnishing was being done and that the use of the inferior varnish could not be detected when it was put on, but would only be developed by time, it was held that the certificate of acceptance of the architect was not conclusive as to latent defects arising from the use of inferior varnish. *Spink v. Mueller*, 77 Mo. App. 85.

6. **Fraud** — *England*. — *South Eastern R. Co. v. Warton*, 2 F. & F. 457; *Bliss v. Smith*, 34 Beav. 508.

*United States*. — *Sheffield*, etc., Coal, etc. Co. v. *Gordon*, 151 U. S. 285.

*Florida*. — *Wilcox v. Stephenson*, 30 Fla. 377.

*Illinois*. — *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Davidson v. Provost*, 35 Ill. App. 126; *Haunroth v. Peters*, 50 Ill. App. 366; *Davis v. Gibson*, 70 Ill. App. 273.

*Nebraska*. — *School Dist. Number Twenty-Seven v. Randall*, 5 Neb. 408.

*New York*. — *Wyckoff v. Meyers*, 44 N. Y. 143; *Gay v. Haskins*, (Buffalo Super. Ct. Eq. T.) 8 Misc. (N. Y.) 626; *Schultze v. Goodstein*, 82 N. Y. App. Div. 316; *Weeks v. Little*, 47 N. Y. Super. Ct. 1.

*Tennessee*. — *Chandler v. Wheeler*, (Tenn. Ch. 1898) 49 S. W. Rep. 278.

*Texas*. — *Johnson v. White*, (Tex. Civ. App. 1894) 27 S. W. Rep. 174.

*Washington*. — *Schmidt v. North Yakima*, 12 Wash. 121.

*Wisconsin*. — *Tetz v. Butterfield*, 54 Wis. 242.

7. *Schultze v. Goodstein*, 82 N. Y. App. Div.



**Mistake.** — The architect's or engineer's certificate of approval may also be attacked and a failure to perform shown when the certificate is issued under a mistake.<sup>1</sup>

**Negligence.** — If the architect or engineer is grossly negligent in certifying the execution of the work, his certificate of approval is not conclusive against the builder.<sup>2</sup>

**c. EXCUSES FOR NONAPPROVAL OR NONPRODUCTION OF CERTIFICATE.** — Where the architect or engineer, subject to whose approval the work is to be performed and from whom a certificate is to be procured, refuses to act, this will excuse the failure of the contractor to secure his approval and certificate.<sup>3</sup> So where the builder has by his own act rendered it impossible for the contractor to secure the approval and certificate of the architect or engineer, the failure to do so will be excused,<sup>4</sup> as where, prior to the completion of the work, the builder discharged the architect subject to whose approval the work was to have been performed,<sup>5</sup> or where the builder fails to employ an architect or engineer to supervise or approve the work,<sup>6</sup> or where the builder wrongfully compels the contractor to abandon the work before completion;<sup>7</sup> and it has been held that the procurement of the approval and certificate will not be required where its procurement is rendered impossible by accidental causes and without the fault of the contractor,<sup>8</sup> as where, after furnishing materials and labor for a part of a building, the building is destroyed by fire before the required approval and certificate can be secured.<sup>9</sup> So the death of the architect or engineer during the progress of the work will dispense with the procurement of his certificate of approval;<sup>10</sup> but where after his death another was, by agreement between the builder and the contractor, substituted in his stead, the certificate of the latter must be procured.<sup>11</sup> The mere fact that the architect or engineer whose certificate of approval as to the execution of the work is required as a condition precedent to the contractor's right to compensation is one of the directors of the corporate builder will not excuse the nonproduction of such certificate;<sup>12</sup> and the same has been held true where the architect or engineer was a stockholder in the building corporation;<sup>13</sup> but where the architect or engineer was one of the builders, a demand and refusal to pay the compensation upon the completion of the

316; *Pucci v. Barney*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 84.

**1. Mistake.** — *Sheffield, etc., Coal, etc., Co. v. Gordon*, 151 U. S. 285; *Wilcox v. Stephenson*, 30 Fla. 377; *Davidson v. Provost*, 35 Ill. App. 126; *Davis v. Gibson*, 70 Ill. App. 273; *Wyckoff v. Meyers*, 44 N. Y. 143; *Gay v. Haskins*, (Buffalo Super. Ct. Eq. T.) 8 Misc. (N. Y.) 626; *Schultze v. Goodstein*, 82 N. Y. App. Div. 316.

**2. Negligence.** — *Chandler v. Wheeler*, (Tenn. Ch. 1898) 49 S. W. Rep. 278.

**3. Refusal to Act.** — *Mitchell v. Dougherty*, (C. C. A.) 90 Fed. Rep. 639; *McDonald v. Patterson*, 186 Ill. 381, *affirming* 84 Ill. App. 326; *Starkey v. De Graff*, 22 Minn. 431; *Neenan v. Donoghue*, 50 Mo. 495; *A. J. Anderson Electric Co. v. Cleburne Water, etc., Co.*, (Tex. Civ. App. 1894) 27 S. W. Rep. 504.

**4. Procurement Rendered Impossible by Act of Builder.** — *Griffith v. Happersberger*, 86 Cal. 605; *U. S. v. Jack*, 124 Mich. 210; *New York, etc., Automatic Sprinkler Co. v. Andrews*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 124, 173 N. Y. 25, *affirming* 62 N. Y. App. Div. 8; *Union Stove Works v. Arnoux*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 64; *Doyn v. Ebbesen*, 72 Wis. 284.

**5. Discharge of Architect.** — *Griffith v. Happersberger*, 86 Cal. 605.

**6. Failure to Employ Architect.** — *Diehl v. Schmalacker*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 786, *affirming* (Supm. Ct. App. T.) 26 Misc. (N. Y.) 835; *Barker v. Troy, etc., R. Co.*, 27 Vt. 766.

**7. Wrongful Discharge of Builder.** — *Velsor v. Eaton*, 60 Hun (N. Y.) 579, 14 N. Y. Supp. 467; *Kingsley v. Brooklyn*, 78 N. Y. 200, 7 Abb. N. Cas. (N. Y.) 28; *Smith v. Wetmore*, 167 N. Y. 234; *Byron v. New York*, 54 N. Y. Super. Ct. 411; *Ocorr, etc., Co. v. Little Falls*, 77 N. Y. App. Div. 592; *Justice v. Elwert*, 28 Oregon 460.

**8. Accidental Causes.** — *Mills v. Weeks*, 21 Ill. 561.

**9. Rawson v. Clark**, 70 Ill. 656.

**10. Death.** — *Sullivan v. Byrne*, 10 S. Car. 122.

**11. Beecher v. Schuback**, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 54.

**12. Chicago Athletic Assoc. v. Eddy Electric Mfg. Co.**, 77 Ill. App. 204.

**13. Ranger v. Great Western R. Co.**, 5 H. L. Cas. 88; *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463; *Kidwell v. Baltimore, etc., R. Co.*, 11 Gratt. (Va.) 676.

work has been held equivalent to a demand and refusal of the certificate of approval and to excuse the nonproduction of the certificate;<sup>1</sup> and it has been held that where the architect or engineer occupied an intimate family and financial position with regard to the builder, and such position was not disclosed to the contractor, the nonproduction of his certificate would be excused.<sup>2</sup>

**Waiver.**—The provision requiring the architect's or engineer's approval and certificate of performance is for the benefit of the builder, and he may waive a compliance therewith by the contractor.<sup>3</sup> Such waiver may be implied as well as express,<sup>4</sup> and when there has been a complete or substantial performance, the purpose of a certificate as evidence of that fact being otherwise supplied, slight evidence of a waiver is sometimes permitted to go to the jury rather than turn a meritorious case out of court; but if the performance of the condition is necessary to the protection of a substantial right in the builder, evidence of a purpose to dispense with it is necessarily stronger and should be reasonably clear.<sup>5</sup> If the builder, where demand is made for payment of the compensation, after the contract has been performed, bases his refusal upon other grounds than the failure of the contractor to procure the architect's or engineer's certificate of approval, and does not demand such certificate, he will be deemed to have waived the production of such certificate.<sup>6</sup> So where in defense to an action for the contract price the builder merely pleads that the work was not properly performed, and fails to plead the failure to procure the certificate of approval, he will be deemed to have waived its production.<sup>7</sup> A promise by the builder after the work has been performed to pay therefor without requiring the certificate will be deemed a waiver of its production.<sup>8</sup>

**Acceptance of Work.**—The mere fact that the builder takes possession of a building or other structure erected upon his land will not necessarily constitute a waiver of a provision in the contract for its construction requiring as a condition precedent to the payment of compensation the architect's or engineer's certificate of approval,<sup>9</sup> but it is otherwise when the possession is taken and the building is accepted as under a completed contract.<sup>10</sup>

1. *Abramson-Engesser Co. v. McCafferty*, (Supm. Ct. App. T.) 86 N. Y. Supp. 185.

2. *Ludlam v. Wilson*, 2 Ont. L. Rep. 549.

3. **Waiver**—*California*.—*Blethen v. Blake*, 44 Cal. 117.

*Illinois*.—*Clark v. Pope*, 70 Ill. 128; *Gilmore v. Courtney*, 54 Ill. App. 417.

*New Jersey*.—*Byrne v. Sisters of Charity*, 45 N. J. L. 213.

*New York*.—*Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Haden v. Coleman*, 73 N. Y. 567; *Smith v. Alker*, 102 N. Y. 87; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248; *McEntyre v. Tucker*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 669; *Hartley v. Murtha*, 5 N. Y. App. Div. 408; *Edison Electric Illuminating Co. v. Guastavino Fire Proof Constr. Co.*, 16 N. Y. App. Div. 350; *Fox v. Powers*, 65 N. Y. App. Div. 112.

*Oregon*.—*Vanderhoof v. Shell*, 42 Oregon 578.

*Wisconsin*.—*Bannister v. Patty*, 35 Wis. 215; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359; *Ashland Lime, etc., Co. v. Shores*, 105 Wis. 122; *Boden v. Maher*, 105 Wis. 539.

4. *Byrne v. Sisters of Charity*, 45 N. J. L. 213.

5. *Byrne v. Sisters of Charity*, 45 N. J. L. 213; *Brown v. Winehill*, 3 Wash. 527.

6. **Basing Refusal to Pay on Other Grounds.**—*Tilden v. Buffalo Office-Bldg. Co.*, 27 N. Y. App. Div. 510; *Bannister v. Patty*, 35 Wis. 215.

7. *Healy v. Fallon*, 69 Conn. 228; *Hartley v. Murtha*, 5 N. Y. App. Div. 408. See also *Summerlin v. Thompson*, 31 Fla. 369.

8. **Promise to Pay.**—*Flaherty v. Miner*, 123 N. Y. 382.

9. **Occupation of Building.**—*Gillis v. Cobe*, 177 Mass. 584; *Hanley v. Walker*, 79 Mich. 607; *Yeats v. Ballentine*, 56 Mo. 531; *Schenke v. Rowell*, 7 Daly (N. Y.) 286.

The fact that the owner takes possession of the building after the contractor has left the premises cannot be construed as an unequivocal acceptance of the work, but the most that can be said is that such act, and all of the circumstances, may be taken into consideration in determining whether there is an implied waiver of the architect's certificate of approval. *Hanley v. Walker*, 79 Mich. 607.

10. **Acceptance.**—*Blethen v. Blake*, 44 Cal. 117; *Thomason v. Richards*, 135 Cal. xx, 67 Pac. Rep. 1056; *Duell v. McCraw*, 86 Hun (N. Y.) 331; *Haden v. Coleman*, 73 N. Y. 567; *Smith v. Alker*, 102 N. Y. 87; *Kane v. Stone Co.*, 39 Ohio St. 1; *Coon v. Citizens Water Co.*, 152 Pa. St. 644; *Wilkins v. Wilkerson*,

**Payments Without Production of Certificates.** — Where the compensation is to be paid in instalments during the progress of the work upon certificate of the architect or engineer, the payment of instalments during the progress of the work without requiring the production of certificates will not of itself be construed as a waiver of the requirement for the production of the certificate of final completion;<sup>1</sup> but it seems that a part payment of the final instalment, which was payable only on completion of the work and the production of the architect's or engineer's certificate of approval, would constitute a waiver of the production of such certificate.<sup>2</sup>

**Fraud.** — Where the architect's certificate of approval is fraudulently withheld or refused, through collusion with the builder, its production by the contractor will be excused,<sup>3</sup> as where, though the work was properly done, the certificate was withheld by the architect or engineer on account of an order from the builder to do so, and not because the work was not properly performed.<sup>4</sup> The fraudulent withholding of the certificate of approval by the architect or engineer will excuse its nonproduction by the contractor without the necessity of showing also fraudulent collusion on the part of the builder,<sup>5</sup> though in *England* it has been held to be insufficient as an excuse for the nonproduction of the certificate of approval to show that it was fraudulently withheld by the architect or engineer, but the contractor must also show that there was collusion between the architect or engineer and the builder.<sup>6</sup> Where the work is properly performed and the architect or engineer unrea-

(Tex. Civ. App. 1897) 41 S. W. Rep. 178; *McPherson v. Rockwell*, 37 Wis. 159.

1. **Payments.** — *Byrne v. Sisters of Charity*, 45 N. J. L. 213; *Bradley Currier Co. v. Bernz*, 55 N. J. Eq. 10; *Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 378; *McEntyre v. Tucker*, (C. Pl. Gen. T.) 5 Misc. (N. Y.) 228, 23 Civ. Pro. (N. Y.) 171; *Haden v. Coleman*, 42 N. Y. Super. Ct. 256; *Brown v. Winehill*, 3 Wash. 524. See also *McNamara v. Harrison*, 81 Iowa 486. See, however, *Bannister v. Patty*, 35 Wis. 215.

2. *Haden v. Coleman*, 73 N. Y. 567; *Abramson-Engesser Co. v. McCafferty*, (Supm. Ct. App. T.) 86 N. Y. Supp. 185.

3. **Fraud** — *England*. — *Brunsdon v. Beresford*, 1 Cab. & El. 125; *Batterbury v. Vyse*, 2 H. & C. 42; *Dabbs v. Nugent*, 11 Jur. N. S. 943, 13 L. T. N. S. 396; *McIntosh v. Great Western R. Co.*, 13 Jur. 92, 2 Macn. & G. 74; *Clarke v. Watson*, 18 C. B. N. S. 278, 114 E. C. L. 278; *Ludbrook v. Barrett*, 36 L. T. N. S. 616, 46 L. J. C. Pl. 798. Compare *Milner v. Field*, 5 Exch. 829.

*United States*. — *Sweeney v. U. S.*, 109 U. S. 618.

*Illinois*. — *Mills v. Weeks*, 21 Ill. 561; *Badger v. Kerber*, 61 Ill. 328; *Fowler v. Deakman*, 84 Ill. 130; *Michaelis v. Wolf*, 136 Ill. 68.

*Michigan*. — *Hanley v. Walker*, 79 Mich. 607.

*New York*. — *Schencke v. Rowell*, (C. Pl. Gen. T.) 3 Abb. N. Cas. (N. Y.) 42, 7 Daly (N. Y.) 286; *Barton v. Hermann* (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 382; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Gibbons v. Russell*, (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 879.

*Pennsylvania*. — *Pittsburg Terra-Cotta Lumber Co. v. Sharp*, 190 Pa. St. 256.

*Texas*. — *Mills v. Paul*, (Tex. Civ. App. 1895) 30 S. W. Rep. 558.

*Wisconsin*. — *Bannister v. Patty*, 35 Wis.

215; *Bentley v. Davidson*, 74 Wis. 420; *Wendt v. Vogel*, 87 Wis. 462. Compare *Hudson v. McCartney*, 33 Wis. 331.

4. *Brunsdon v. Beresford*, 1 Cab. & El. 125; *Crane Elevator Co. v. Clark*, (C. C. A.) 80 Fed. Rep. 705; *McDonald v. Patterson*, 186 Ill. 381; *Foster v. McKeown*, 192 Ill. 339, affirming 85 Ill. App. 449; *Beinhauer v. Gleason*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 227; *Wicker v. Messinger*, 12 Ohio Cir. Dec. 425, 22 Ohio Cir. Ct. 712; *Vanderhoof v. Shell*, 42 Oregon 578; *Whelen v. Boyd*, 114 Pa. St. 228.

5. **Co-operation by Builder in Fraud Unnecessary** — *United States*. — *Fletcher v. New Orleans*, etc., R. Co., 19 Fed. Rep. 731; *Batchelor v. Kirkbride*, 26 Fed. Rep. 899; *Sweeny's Case*, 15 Ct. Cl. 400.

*Illinois*. — *Badger v. Kerber*, 61 Ill. 328; *Michaelis v. Wolf*, 136 Ill. 68; *Arnold v. Bour-nique*, 144 Ill. 132.

*Missouri*. — *Dinsmore v. Livingston County*, 60 Mo. 244.

*New Jersey*. — *Bradner v. Roffsell*, 57 N. J. L. 32.

*New York*. — *Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 382; *Thomas v. Fleury*, 26 N. Y. 26; *Nolan v. Whitney*, 88 N. Y. 649.

*South Carolina*. — *Sullivan v. Byrne*, 10 S. Car. 122.

*Washington*. — *Schmidt v. North Yakima*, 12 Wash. 121.

*Wisconsin*. — *Hudson v. McCartney*, 33 Wis. 331; *Bannister v. Patty*, 35 Wis. 215; *Bentley v. Davidson*, 74 Wis. 420; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359.

6. *Clarke v. Watson*, 18 C. B. N. S. 277, 114 E. C. L. 277. See also *Scott v. Liverpool*, 3 De G. & J. 334, 5 Jur. N. S. 105.

Thus, where the plaintiff, in an action for the contract price of the work, averred that all things necessary had been duly and efficiently performed and completed to the satisfaction of



sonably or arbitrarily withholds his certificate of approval, this has been held to be such a fraud as will excuse its production by the contractor,<sup>1</sup> though it has been said that if fraud can be established by proof that the architect or engineer refused to certify the execution of the work when the same had been duly and properly performed, it can be only in those cases where the refusal is shown to have been grossly and palpably perverse, oppressive, and unjust; so much so that the inference of bad faith and dishonesty would at once arise where the facts are known.<sup>2</sup> And of course the withholding of the certificate of approval cannot be deemed wrongful so as to excuse its production by the contractor unless there has been a substantial performance of the contract, and so long as any portion of the work is incomplete and so situated that it may be fully completed;<sup>3</sup> but if there has been a substantial performance,

the surveyor, but that the latter had not given the certificate, but had wrongfully and improperly neglected and refused to do so, etc., it was held that, in the absence of collusion, the plaintiff could not recover without producing the certificate. *Clarke v. Watson*, 18 C. B. N. S. 278, 114 E. C. L. 278.

**1. Arbitrary Withholding of Approval**—*United States*.—*Fletcher v. New Orleans, etc., R. Co.*, 19 Fed. Rep. 731; *Crane Elevator Co. v. Clark*, (C. C. A.) 80 Fed. Rep. 705.

*Illinois*.—*Badger v. Kerber*, 61 Ill. 328; *Arnold v. Bournique*, 144 Ill. 132, 36 Am. St. Rep. 419; *Frost v. Rand*, 51 Ill. App. 276; *Neagle v. Herbert*, 73 Ill. App. 17; *Rawle v. Gilmore*, 76 Ill. App. 372; *Chicago, etc., R. Co. v. Moran*, 85 Ill. App. 543.

*Indiana*.—*Bird v. St. John's Episcopal Church*, 154 Ind. 138.

*Kentucky*.—*Louisville Trust Co. v. Louisville Fireproof Constr. Co.*, (Ky. 1900) 57 S. W. Rep. 506.

*Louisiana*.—*Mahoney v. St. Paul's Church*, 47 La. Ann. 1064.

*New Jersey*.—*Bradner v. Roffsell*, 57 N. J. L. 32.

*New York*.—*Thomas v. Fleury*, 26 N. Y. 26; *Bowery Nat. Bank v. New York*, 63 N. Y. 336; *Nolan v. Whitney*, 88 N. Y. 649; *Flaherty v. Miner*, 123 N. Y. 382; *O'Brien v. New York*, 139 N. Y. 543; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, reversing 31 N. Y. App. Div. 232; *Gibbons v. Russell*, (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 879; *Highton v. Dessau*, (C. Pl. Gen. T.) 19 N. Y. Supp. 395; *Van Keuren v. Miller*, 71 Hun (N. Y.) 68; *Murdock v. Jones*, 3 N. Y. App. Div. 221; *Fox v. Clark*, 44 N. Y. App. Div. 626; *Fox v. Powers*, 65 N. Y. App. Div. 112; *Happel v. Marasco*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 314; *Perry v. Levenson*, 82 N. Y. App. Div. 94; *Doyle v. Halpin*, 33 N. Y. Super. Ct. 352.

*Pennsylvania*.—*Terra Cotta Co. v. Sharp*, 7 Pa. Dist. 544; *Harlow v. Homestead*, 194 Pa. St. 57.

*South Carolina*.—*Sullivan v. Byrne*, 10 S. Car. 122.

*Washington*.—*Windham v. Independent Telephone Co.*, 35 Wash. 166.

*Wisconsin*.—*Bentley v. Davidson*, 74 Wis. 420.

In *Gibbons v. Russell*, (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 879, the contractor testified that the work had been completed, and

that he had applied to the architect for a certificate to that effect; that the architect made no complaint about the manner in which the work had been done, but referred to some damage done by water and advised the contractor to see the builder and fix the matter up, adding that the builder was a little "cranky," and that he did not like to give a certificate until the builder was satisfied. It was held to be proper to submit to the jury the question whether the architect's certificate had been unreasonably withheld so as to excuse its production by the contractor.

In an action for the contract price of a building, where the evidence showed that the architect, on inspection, stated that the building was completed according to contract, and that he would give the requisite certificate to the builder, but that he afterwards refused to do so, and that the building was in fact completed according to contract, the builder was held to be entitled to recover though the contract made the production of the architect's certificate of completion a condition precedent to such recovery. *Bradner v. Roffsell*, 57 N. J. L. 32.

**Injunction Preventing Issuance.**—In *Bowery Nat. Bank v. New York*, 63 N. Y. 336, reversing 3 Hun (N. Y.) 639, the plaintiff's assignor contracted with defendants to pave a street. The full completion of the work was to be certified to by the water purveyor before payment could be required. The contractor fully performed his contract, but the water purveyor refused to give his certificate because of an injunction order duly issued in an action by a third person against defendants. It was held that in determining whether the refusal was unreasonable, and if so whether the contractor was excused from the performance of the condition, the interference of a third party could not be considered, but only the circumstances of the contract and the object sought to be accomplished by the condition; that in the contemplation of the contract the certificate ought to have been given when the contract was fully completed, and that, therefore, its refusal was unreasonable and a dismissal of the complaint upon the ground of the failure to obtain the certificate was error.

**Refusal of Certificate on Ground of Failure to Complete Building in Required Time.**—*Perry v. Levenson*, 82 N. Y. App. Div. 94.

**2.** *Hudson v. McCartney*, 33 Wis. 331.

**3.** *Craig v. Geddis*, 4 Wash. 390. See also *Bradner v. Roffsell*, 57 N. J. L. 32.

though the contract has not been complied with in every detail, the refusal of a certificate may be unreasonable, so as to excuse its nonproduction, if at the time the work is so substantially completed that it is not reasonable to require a further compliance.<sup>1</sup> Failure to apply for the certificate through fear, on the part of the contractor, of a wrongful refusal or fraudulent act by the architect, is not sufficient to excuse nonproduction.<sup>2</sup>

**Mistake.** — Where the work is properly performed, and the architect, acting under a mistake, refuses to certify the proper execution of the work, the production of his certificate will be excused.<sup>3</sup>

**f. LIABILITY FOR WRONGFULLY WITHHOLDING APPROVAL.** — In *England* it has been held that where work is to be performed subject to the approval of the builder's architect or engineer, an action will lie against the architect or engineer for fraudulently refusing to certify to the execution of the work.<sup>4</sup>

**7. Destruction of Work** — *a. CONTRACT FOR ENTIRE STRUCTURE.* — A contractor who agrees under an entire contract to construct an entire work is not excused from the full performance of his contract by the destruction of the work when partly completed, but must himself bear the loss, though such destruction is caused by unavoidable accident;<sup>5</sup> and not only in such a case is he denied a recovery of compensation for the partly completed work,<sup>6</sup> but

1. *Washington Bridge Co. v. Land, etc., Imp. Co.*, 12 Wash. 272. Compare *Coorsen v. Ziehl*, 103 Wis. 381.

2. *Gilmore v. Courtney*, 158 Ill. 432, reversing 54 Ill. App. 417.

3. *Mistake.* — *Sullivan v. Byrne*, 10 S. Car. 122; *Bannister v. Patty*, 35 Wis. 215; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359. And see *Wendt v. Vogel*, 87 Wis. 462.

4. *Liability for Wrongfully Withholding Approval.* — *Ludbrook v. Barrett*, 46 L. J. C. Pl. 798.

5. *Destruction of Work — Contract for Entire Structure* — *United States.* — *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Chapman v. Montgomery Water Power Co.*, (C. C. A.) 126 Fed. Rep. 372; *Dale's Case*, 14 Ct. Cl. 514.

*Alabama.* — *Cutcliff v. McAnally*, 88 Ala. 507.

*Connecticut.* — *School Dist. No. 1 v. Dauchy*, 25 Conn. 530.

*Illinois.* — *Schwartz v. Saunders*, 46 Ill. 18; *Springdale Cemetery Assoc. v. Smith*, 32 Ill. 252.

*Iowa.* — *Wiseman v. Thompson*, 94 Iowa 607.

*Kentucky.* — *Shanks v. Griffin*, 14 B. Mon. (Ky.) 124.

*Maryland.* — *Eichelberger v. Miller*, 20 Md. 332.

*Massachusetts.* — *Adams v. Nichols*, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; *Boyle v. Agawam Canal Co.*, 22 Pick. (Mass.) 381, 33 Am. Dec. 749; *Butterfield v. Byron*, 153 Mass. 517.

*Minnesota.* — *Stees v. Leonard*, 20 Minn. 494.

*Missouri.* — *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413.

*New Hampshire.* — *Leavitt v. Dover*, 67 N. H. 94.

*New Jersey.* — *Public Schools v. Bennett*, 27 N. J. L. 513.

*New York.* — *Tompkins v. Dudley*, 25 N. Y. 272; *Washburn v. Dettinger*, 76 Hun (N. Y.) 141; *Norton v. Fancher*, 92 Hun (N. Y.) 463; *Early v. O'Brien*, 51 N. Y. App. Div. 569.

*North Carolina.* — *Lawing v. Rintles*, 97 N. Car. 350.

*Ohio.* — *Bailey v. Brown*, 6 Ohio Cir. Dec. 440, 9 Ohio Cir. Ct. 455. Compare *Benedict v. Cincinnati*, 7 Ohio Dec. (Reprint) 261, 2 Cinc. L. Bul. 33.

*Oregon.* — *Savage v. Glenn*, 10 Oregon 440.

*Pennsylvania.* — *Janes v. Scott*, 59 Pa. St. 178, 98 Am. Dec. 328.

*Tennessee.* — *Stover v. Allen*, 1 Heisk. (Tenn.) 486.

*Texas.* — *Burke v. Purifoy*, 21 Tex. Civ. App. 202; *Bartlett v. Bisbey*, 27 Tex. Civ. App. 405. See also *Classen v. Elmendorf*, (Tex. Civ. App. 1896) 37 S. W. Rep. 245.

*Wisconsin.* — *Eaton v. Joint School Dist. No. 3*, 23 Wis. 374; *Vogt v. Hecker*, 118 Wis. 306.

In *Public Schools v. Bennett*, 27 N. J. L. 513, *Whelpley, J.*, said: "No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

A contract for the building of a bridge, the bridge to be completed at a certain time, "unless providential accidents should intervene, then, and in that case, a reasonable time for said completion of the bridge," was held not to entitle the contractor to extra compensation for the loss of the bridge, when partially completed, by an act of God, such as a flood. *Stover v. Allen*, 1 Heisk. (Tenn.) 486.

6. *United States.* — *Chapman v. Montgomery Water Power Co.*, (C. C. A.) 126 Fed. Rep. 372.

*Alabama.* — *Brumby v. Smith*, 3 Ala. 123; *Drake v. Goree*, 22 Ala. 409; *Partridge v. Forsyth*, 29 Ala. 200; *Cutcliff v. McAnally*, 88 Ala. 507.

*California.* — *Clark v. Collier*, 100 Cal. 256.

*Georgia.* — *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153.



the builder may recover from him partial payments made as the work progressed,<sup>1</sup> and may maintain an action for damages against the contractor for failure to perform his contract.<sup>2</sup> This rule has chiefly been announced where the structure was destroyed before completion by fire,<sup>3</sup> but is equally applicable where the structure falls by reason of latent defects in the soil,<sup>4</sup> or is destroyed by lightning,<sup>5</sup> by a freshet,<sup>6</sup> or by a storm.<sup>7</sup> And the fact that the builder furnishes the materials for the work does not alter this rule.<sup>8</sup> If the builder accepts the structure before completion and the structure is afterwards destroyed before full completion, the contractor may recover a *pro rata* compensation for the work performed;<sup>9</sup> but it has been held that to entitle the contractor to recover in such case the evidence to show an acceptance should be unequivocal, and cannot be presumed from ordinary acts done as the owner of the realty.<sup>10</sup> If the destruction of the structure is due to the negligence or default of the builder, the contractor may recover for the labor done and materials furnished in partial performance of the work.<sup>11</sup> If the contract is

*Illinois*.—Clark *v.* Busse, 82 Ill. 515.

*Iowa*.—Parker *v.* Scott, 82 Iowa 266.

*Kentucky*.—Shanks *v.* Griffin, 14 B. Mon. (Ky.) 124.

*Maryland*.—Eichelberger *v.* Miller, 20 Md. 332.

*Massachusetts*.—Adams *v.* Nichols, 19 Pick. (Mass.) 275.

*Michigan*.—Fildew *v.* Besley, 42 Mich. 100.

*Missouri*.—Richardson *v.* Shaw, 1 Mo. App. 234.

*North Carolina*.—Lawing *v.* Rintles, 97 N. Car. 350.

*Ohio*.—Newman Lumber Co. *v.* Purdum, 41 Ohio St. 373.

*Tennessee*.—Stover *v.* Allen, 1 Heisk. (Tenn.) 486; Galyon *v.* Ketchen, 85 Tenn. 55.

*Compare* Wilson *v.* Knott, 3 Humph. (Tenn.) 473.

*Texas*.—Weis *v.* Devlin, 67 Tex. 507.

*Virginia*.—Clark *v.* Franklin, 7 Leigh (Va.) 1.

*Wisconsin*.—Eaton *v.* Joint School Dist. No. 3, 23 Wis. 374.

One who contracts to build a house, the last instalment of the cost to be paid to him on completion of the work, cannot claim such instalment or any part thereof if the house was destroyed by fire before the second coat of paint was on it, all the doors were hung, the fastenings put on the front doors and windows, or the building delivered to the owner. Clark *v.* Collier, 100 Cal. 256.

**Addition to Existing Building.**—In Fildew *v.* Besley, 42 Mich. 100, where the contractor agreed under an entire contract to erect an addition to an existing building, and the existing building and addition were destroyed by fire before the completion of the addition, the contract was considered as a contract for an entire independent work, and a recovery of compensation for the partial completion of the addition was denied.

**Spire to Church.**—In Parker *v.* Scott, 82 Iowa 266, a contract for the erection of spires upon a church building was held to be a contract for an independent structure, and where the spires were destroyed before completion, a recovery for his labor and materials was denied to the contractor.

1. Public Schools *v.* Bennett, 27 N. J. L. 513; Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Bartlett *v.* Bisbey, 27 Tex. Civ.

App. 405. See also Butterfield *v.* Byron, 153 Mass. 517.

2. School Dist. No. 1 *v.* Dauchy, 25 Conn. 530; Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Stees *v.* Leonard, 20 Minn. 494. See also Dermott *v.* Jones, 2 Wall. (U. S.) 1.

3. **Fire.**—Cutcliff *v.* McAnally, 88 Ala. 507; Clark *v.* Collier, 100 Cal. 256; Eichelberger *v.* Miller, 20 Md. 332; Richardson *v.* Shaw, 1 Mo. App. 234; Tompkins *v.* Dudley, 25 N. Y. 272.

4. **Defects in Soil.**—Public Schools *v.* Bennett, 27 N. J. L. 513, 72 Am. Dec. 373. See also Dermott *v.* Jones, 2 Wall. (U. S.) 1; Stees *v.* Leonard, 20 Minn. 494.

5. **Lightning.**—School Dist. No. 1 *v.* Dauchy, 25 Conn. 530.

6. **Freshet.**—Chapman *v.* Montgomery Water Power Co., (C. C. A.) 126 Fed. Rep. 372; Doster *v.* Brown, 25 Ga. 24.

7. **Storm.**—Parker *v.* Scott, 82 Iowa 266.

8. **Materials Furnished by Builder.**—Brumby *v.* Smith, 3 Ala. 123; Clark *v.* Franklin, 7 Leigh (Va.) 1; Vogt *v.* Hecker, 118 Wis. 306.

9. **Acceptance Before Completion.**—Galyon *v.* Ketchen, 85 Tenn. 55; Atlantic, etc., R. Co. *v.* Delaware Constr. Co., 98 Va. 503, 2 Va. Sup. Ct. 430. See also Lord *v.* Wheeler, 1 Gray (Mass.) 282; Eaton *v.* Joint School Dist. No. 3, 23 Wis. 374.

10. Fildew *v.* Besley, 42 Mich. 100.

11. **Wrongful Act of Builder.**—Rawson *v.* Clark, 70 Ill. 656; Rothwell *v.* Dean, 60 Mo. App. 428, 1 Mo. App. Rep. 309.

Where the performance of an entire contract for the construction of a house is unreasonably delayed by the owner, and the house is destroyed by fire before its completion, the builder is excused from performing the contract and may recover for the partial performance. Partridge *v.* Forsyth, 29 Ala. 200.

In an action to recover for labor and materials furnished under a contract to build four houses, which were destroyed before completion by the falling of a stone wall on another part of the lot, it was held that the contract itself implied an undertaking on the builder's part that the place chosen was free from danger, unless the contractor had assumed the risk of danger from the condition of the property. If the loss was occasioned by an accident that could have been prevented by



not entire and the work is destroyed when partly completed, the contractor has been held entitled to recover the instalments due at the time of the destruction of the work, or the *pro rata* value of the materials and work, as the evidence should show the contract to be.<sup>1</sup> If the work is destroyed before completion by reason of inherent weakness arising out of defective plans and specifications furnished by the builder and in accordance with which the contractor has agreed to do the work, it seems that the contractor may recover compensation for the work done.<sup>2</sup> And if the destruction of the work is due to changes in the plans of the work, directed by the builder against the protest of the contractor on the ground that the risk was increased thereby, the loss in case of the subsequent destruction of the work before completion should be borne by the builder.<sup>3</sup>

*b. CONTRACT FOR WORK ON EXISTING STRUCTURE.* — If the contract is for the performance of work on an existing structure, which must continue to exist in order that the work may be performed, and such structure is not wholly under the control of the contractor, as where repairs or alterations are to be made on a building,<sup>4</sup> or where the contract is for the construction of a particular part of a house,<sup>5</sup> the agreement is upon the implied condition that the structure upon which the work is to be done shall continue in existence, and if the structure is destroyed without the fault of the contractor, before the work is completed, he is excused from further performance;<sup>6</sup> and not only is the builder precluded from recovering partial payments made to the contractor as the work progressed,<sup>7</sup> but it also seems to be the well-settled rule in the *United States* that in the absence of any provision in the contract to the contrary, the contractor may recover on a *quantum meruit* for the value of his labor and materials expended in the partial performance of the work.<sup>8</sup>

reasonable care, skill, and expense, it should be borne by the builder. *Sinnott v. Mullin*, 82 Pa. St. 333.

1. *Divisible Contract.* — *Partridge v. Forsyth*, 29 Ala. 200; *Richardson v. Shaw*, 1 Mo. App. 234; *Wilson v. Knott*, 3 Humph. (Tenn.) 473.

2. *Defective Plans.* — *Sickels's Case*, 1 Ct. Cl. 214; *Siebert v. Leonard*, 17 Minn. 433; *Byron v. New York*, 54 N. Y. Super. Ct. 411; *Murphy v. Liberty Nat. Bank*, 184 Pa. St. 208. See also *supra*, this title, *Plans and Specifications*.

In *Steers v. Leonard*, 20 Minn. 494, where the contractor agreed "to do everything necessary to erect and complete the building," and while it was being erected in accordance with the plans and specifications the building fell, it was held that the contractor must bear the loss. See also *Leavitt v. Dover*, 67 N. H. 94.

3. *Dale's Case*, 14 Ct. Cl. 514.

4. *Work on Existing Structure.* — *Bailey v. Brown*, 6 Ohio Cir. Dec. 440, 9 Ohio Cir. Ct. 455.

5. *Garretty v. Brazell*, 34 Iowa 100; *Schwartz v. Saunders*, 46 Ill. 18; *Butterfield v. Byron*, 153 Mass. 517; *Hayes v. Gross*, 162 N. Y. 610, 57 N. E. Rep. 1112, *affirming* 9 N. Y. App. Div. 12.

6. *Taylor v. Caldwell*, 3 B. & S. 826, 113 E. C. L. 826; *Menetone v. Athawes*, 3 Burr. 1592; *Appleby v. Myers*, L. R. 2 C. P. 651; *Schwartz v. Daegling*, 55 Ill. 342; *Krause v. Board of School Trustees*, (Ind. App. 1903) 66 N. E. Rep. 1010; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Gilbert, etc., Mfg. Co. v. Butler*, 146 Mass. 82; *Butterfield v. Byron*, 153 Mass. 517; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

7. *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271.

8. *Recovery for Work Done* — *Iowa*. — *Garretty v. Brazell*, 34 Iowa 100.

*Massachusetts.* — *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Wells v. Calnan*, 107 Mass. 517; *Cleary v. Sohler*, 120 Mass. 210; *Gilbert, etc., Mfg. Co. v. Butler*, 146 Mass. 82; *Butterfield v. Byron*, 153 Mass. 517; *Angus v. Scully*, 176 Mass. 357.

*Missouri.* — *Haynes v. Second Baptist Church*, 88 Mo. 285; *Haynes v. St. Louis Second Baptist Church*, 12 Mo. App. 536.

*New York.* — *Niblo v. Binsse*, 3 Abb. App. Dec. (N. Y.) 375, 1 Keyes (N. Y.) 476; *Whelan v. Ansonia Clock Co.*, 27 Hun (N. Y.) 557; *Hayes v. Gross*, 162 N. Y. 610 57 N. E. Rep. 1112, *affirming* 9 N. Y. App. Div. 12. *Compare Niblo v. Binsse*, 44 Barb. (N. Y.) 54.

*Ohio.* — *Bailey v. Brown*, 6 Ohio Cir. Dec. 440, 9 Ohio Cir. Ct. 455.

*Tennessee.* — *Wilson v. Knott*, 3 Humph. (Tenn.) 473.

*Texas.* — *Hollis v. Chapman*, 36 Tex. 1; *Weis v. Devlin*, 67 Tex. 507, 60 Am. Rep. 38; *Bradford v. Whitcomb*, 11 Tex. Civ. App. 221.

*West Virginia.* — *Hysell v. Sterling Coal, etc., Co.*, 46 W. Va. 158.

*Wisconsin.* — *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765.

See also *Teakle v. Moore*, 131 Mich. 427. See, however, *Seguin v. Debon*, 3 Mart. (La.) 6, 5 Am. Dec. 735. *Compare Clark v. Collier*, 100 Cal. 256.

Where the contract is for the builder to furnish material and perform labor in altering a structure already erected, according to specifications agreed on, there being no agreement

If the failure of the contractor fully to perform the contract before the destruction of the structure is due to the default of the builder, he may

as to the time when payment should be made, and, without fault of either contracting party, the structure itself is destroyed by fire when the work of altering has been but partially performed, the owner must pay the builder a reasonable compensation for the work done and materials furnished before the fire. *Weis v. Devlin*, 67 Tex. 507.

In *Butterfield v. Byron*, 153 Mass. 517, it appeared that a contractor and a landowner entered into a contract by which the former was to make, erect, build, and finish a hotel upon the land, and the latter was to do the grading, excavating, stonework, brickwork, painting, and plumbing, and to pay each month seventy-five per cent. of the value of the work of the preceding month, the balance in thirty days after completion. Upon the building being destroyed by lightning shortly before completion, it was held that the contract was upon the implied condition that the building, when begun, should continue in existence until completed, and that the contractor might recover for what he had done and furnished under the contract.

Where a workman was prevented from completing a contract to lath and plaster a house by the destruction of the house by fire, he was allowed to recover for the work under a count for labor done. *Cleary v. Sohler*, 120 Mass. 210.

**Moving Building.**—In *Angus v. Scully*, 176 Mass. 357, a contractor who agreed to move a building for a fixed sum was allowed to recover compensation for part performance where after moving the building a part of the way it was destroyed by fire without his fault. See also *Board of Education v. Townsend*, 8 Ohio Cir. Dec. 732, 15 Ohio Cir. Ct. 674.

**The Missouri Revised Statutes**, section 667, providing that no "suit shall be maintained against any tenant or other person in whose house or apartment fire shall accidentally take place, nor shall any recompense be made by any such person for any damages occasioned thereby," does not change the rule announced in the text. *Haynes v. St. Louis Second Baptist Church*, 12 Mo. App. 536.

**Ruling in England.**—In an early English case a shipwright was allowed to recover for work and labor done and materials delivered in repairing a ship though the ship was destroyed before the repairs were completed. *Menetone v. Athawes*, 3 Burr. 1592.

In a later case, however, it was held that the destruction of the structure upon which the labor was to be performed by the contractor would excuse both parties from a further performance of the contract, and that the contractor could not recover for work and labor performed before the destruction of the structure. *Appleby v. Myers*, L. R. 2 C. P. 651; *Hughes v. Lenny*, 5 M. & W. 183.

In *Adlard v. Booth*, 7 C. & P. 108, 32 E. C. L. 458, the plaintiffs contracted with the defendant to erect machinery upon the latter's building and premises, and in his occupation, for a specified sum, and to keep the whole in

order under fair wear and tear for two years. When the machinery was only partly erected a fire accidentally broke out in the buildings, and, without any fault by either party, destroyed both the buildings and the machinery then erected thereon. It was held that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed.

The builder cannot recover back partial payments which he made to the contractor as the work progressed. *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271.

**In Both Ontario and Quebec** the courts have followed the English rule and denied a recovery for partial performance by the contractor upon the destruction of the structure upon which the work was to be performed. *King v. Low*, 3 Ont. L. Rep. 234; *Rozetsky v. Beullac*, 2 Quebec Super. Ct. 482; *Murphy v. Forget*, 19 Quebec Super. Ct. 135.

**In Illinois** the earlier cases seem to follow the general American rule. *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656. See also *Clark v. Busse*, 82 Ill. 515.

In *Schwartz v. Saunders*, 46 Ill. 18, where one contracted to do the carpenter work upon a brick building, the masonry to be done by another, and after the brickwork was nearly completed and the carpentry partly done, the brick walls were blown down, it was held that the loss as to the carpenter work fell upon the employer, and the contractor could recover for the work done.

A later case adopted the English rule and held that, if the contract is entire, no recovery can be had for partial performance, if the structure upon which the work is to be performed is accidentally destroyed before the completion of the work. *Siegel v. Eaton, etc.*, Co., 165 Ill. 550, *disapproving* the principles of law announced in 60 Ill. App. 630, but *affirming* the decision of the lower court on other principles.

In *Huyett, etc., Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233, *affirming* 66 Ill. App. 222, the above case was followed, and it was held, where a contractor agreed to erect a ventilating system in a building, payment to be made when the work was completed, that if the building was destroyed before the completion of the work without fault of either party no recovery could be had for the partial performance. In this case the court quoted with approval the following summary of the rule announced in *Siegel v. Eaton, etc., Co.*, 165 Ill. 550: "We think the law is that where a contract is entered into with reference to the existence of a particular thing, and that thing is destroyed before the time for the performance of the contract, without the fault of either party, both parties are excused from performing the contract, but neither is entitled to recover anything for a part performance thereof."

recover for the partial performance,<sup>1</sup> and, *a fortiori*, if by the express terms of the contract the risk of destruction is upon the builder, the contractor may recover for the partial performance of the contract.<sup>2</sup> If the builder has made a payment in advance and the work is not performed by the contractor by reason of the destruction of the structure upon which the work was to be performed, the builder may recover back the overpayment.<sup>3</sup> It seems that if the contract is to complete or do certain work on a partly completed structure and the structure is destroyed before it is completed or the work is performed, the builder may reconstruct the structure as it was before the contractor began and require him to comply with his contract.<sup>4</sup> Where a subcontractor contracts to do a part of the work upon a structure, he is not deprived of his right to compensation by the fact that the building is destroyed after the subcontractor has performed the work, but before entire completion by the contractor.<sup>5</sup> So, where one contracts to do a specific portion of the work, such as the carpenter work, in the erection of a building, and the building is destroyed after the performance of such work, but before entire completion by the other contractors, he may recover.<sup>6</sup>

**Severable Contracts.** — If the contract is not entire, but is severable, and the structure upon which the work is to be performed is burned or otherwise destroyed, it seems that the contractor may recover for the partial performance of the contract, even in the jurisdictions in which a recovery in case the contract was entire is denied.<sup>7</sup>

**8. Time of Performance** — *a.* IN GENERAL. — Where a working contract contains no provision with regard to the time within which the contractor is to perform the work, the law will imply that it is to be done within a reasonable time,<sup>8</sup> and if the contract is in writing, evidence of a contemporaneous oral agreement is inadmissible to vary the construction thus legally implied from the writing itself.<sup>9</sup> Indefinite provisions as to time of performance,<sup>10</sup>

1. *Rawson v. Clark*, 70 Ill. 656; *Siegel v. Eaton, etc., Co.*, 165 Ill. 550, 60 Ill. App. 639; *Gilbert, etc., Mfg. Co. v. Butler*, 146 Mass. 82; *Teakle v. Moore*, 131 Mich. 427.

2. *Sontag v. Brennan*, 75 Ill. 279.

3. *Butterfield v. Byron*, 153 Mass. 517.

4. *Chapman v. J. W. Beltz, etc., Co.*, 48 W. Va. 1. See also *Weis v. Devlin*, 67 Tex. 507. See, however, *Butterfield v. Byron*, 153 Mass. 517.

5. *Clark v. Busse*, 82 Ill. 515.

6. In *Garretty v. Brazell*, 34 Iowa 100, the plaintiff contracted to do the carpenter work in the erection of a building and furnish the materials therefor. Having performed all the work except a minor part which was to be done after the plastering, the building was turned over to the employer for that purpose, and while thus in his possession was blown down, and it was held that as he had performed his work in a workmanlike manner, he was entitled to recover therefor, and that the loss resulting from the accident fell upon the owner.

7. *Siegel v. Eaton, etc., Co.*, 165 Ill. 550; *Jean v. Papineau*, 19 Quebec Super. Ct. 438.

**8. Performance Within Reasonable Time** — *England.* — *Ellis v. Thompson*, 3 M. & W. 445.

*United States.* — *Minneapolis Gas Light Co. v. Kerr Murray Mfg. Co.*, 122 U. S. 300; *The Ella*, 48 Fed. Rep. 569. See also *Gubbins v. Lautenschlager*, 74 Fed. Rep. 160.

*Alabama.* — *Drake v. Goree*, 22 Ala. 409;

*Adams v. Adams*, 26 Ala. 272; *Bonifay v. Hassell*, 100 Ala. 269.

*Colorado.* — *Walling v. Warren*, 2 Colo. 434.

*Illinois.* — *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233; *Fowler v. Deakman*, 84 Ill. 130; *Driver v. Ford*, 90 Ill. 595; *Wilderman v. Pitts*, 29 Ill. App. 528; *George Lehman, etc., Co. v. Clark*, 33 Ill. App. 33.

*Indiana.* — *Krause v. School Trustees*, (Ind. App. 1903) 66 N. E. Rep. 1010.

*Maryland.* — *North v. Mallory*, 94 Md. 305.

*Massachusetts.* — *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 657.

*Michigan.* — *Turner v. Muskegon Mach., etc., Co.*, 97 Mich. 166.

*Minnesota.* — *Liljengren Furniture, etc., Co. v. Mead*, 42 Minn. 420.

*Missouri.* — *Moore v. H. Gaus, etc., Mfg. Co.*, 113 Mo. 98.

*New York.* — *Meyer v. Haven*, 37 N. Y. App. Div. 194; *McLaren v. Fischer*, 45 N. Y. App. Div. 13; *Happel v. Marasco*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 314.

*Texas.* — *Andrae v. Watson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 991.

*Vermont.* — *Clifford v. Richardson*, 18 Vt. 620.

*Washington.* — *McCartney v. Glassford*, 1 Wash. 579; *Brodek v. Farnum*, 11 Wash. 565. *Wisconsin.* — *Lang v. Menasha Paper Co.*, 119 Wis. 1.

See also *McDonald v. Whitley County Ct.*, 8 Ky. L. Rep. 874.

9. *Liljengren Furniture, etc., Co. v. Mead*, 42 Minn. 420.

10. Thus, a provision to raft timber as "fast



such as "as soon as practicable,"<sup>1</sup> or "as soon as possible,"<sup>2</sup> are generally construed as merely requiring performance within a reasonable time. Where the contract required the work to be done immediately, the contractor's claim that he was to be allowed a reasonable time within which to begin the work was denied.<sup>3</sup> The question what is a reasonable time is, as a general rule, one of fact,<sup>4</sup> and is to be determined from a consideration of all the surrounding facts and circumstances known to the parties at the time.<sup>5</sup> If the contractor abandons the work claiming that it was complete, he cannot afterwards claim that a reasonable time in which to perform has not elapsed.<sup>6</sup> Working contracts may, of course, and generally do, expressly provide the time within which the work shall be performed,<sup>7</sup> but a mere statement by the contractor while the work is in progress that he expects to do his best to have the work completed by a certain time does not constitute a contract on his part to perform by such time so as to render him liable in damages for failure to do so.<sup>8</sup> Where the contract is to be performed "by"

as same is put to the mouth" of a creek and to run the timber "as fast as water will permit" has been held merely to require the work to be performed within a reasonable time. *Bonifay v. Hassell*, 100 Ala. 269.

1. "As Soon as Practicable."—In *Reedy v. Smith*, 42 Cal. 245, where a contract provided for the construction of a dam as soon as practicable, an instruction that the contractor was required to perform the work within a certain time if it was within the range of human means was held to be erroneous. A contract to do a thing "as soon as practicable" implies that circumstances may occur which will delay the completion of it. The word "practicable" cannot be understood with regard to the means at the command of the contractors, for they may be entirely inadequate; but in ascertaining what was intended, the nature of the contract, the difficulties to be overcome, and the importance to the other party of the early completion of it, are to be considered.

2. *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15.

3. *Immediately*.—*Meyer v. Haven*, 37 N. Y. App. Div. 194.

4. *Reasonable Time—Question of Fact*.—*The Ella*, 48 Fed. Rep. 569; *Drake v. Goree*, 22 Ala. 409; *Fowler v. Deakman*, 84 Ill. 130; *Walling v. Warren*, 2 Colo. 434. Compare *North v. Mallory*, 94 Md. 305.

5. *Ellis v. Thompson*, 3 M. & W. 445; *Drake v. Goree*, 22 Ala. 409; *Liljengren Furniture, etc., Co. v. Mead*, 42 Minn. 420; *Moore v. H. Gaus, etc., Mfg. Co.*, 113 Mo. 98; *Meyer v. Haven*, 37 N. Y. App. Div. 194.

Suspension of work on a building for twenty days caused by a strike of the contractor's workmen does not show unreasonable delay in the performance of the work. *Happel v. Marasco*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 314.

Evidence of the condition of the market for materials necessary to complete the work is to be considered upon the question of reasonable time of performance. *Moore v. H. Gaus, etc., Mfg. Co.*, 113 Mo. 98.

6. *Clifford v. Richardson*, 18 Vt. 620.

7. *Provisions as to Time of Performance*.—*Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 233.

A provision of a contract that the contractors shall "proceed, with such diligence, and with such force of laborers, as the executive committee of the said company may direct, to perform the work," etc., is subordinate to and qualified by a provision requiring the work to be completed by a day named, and is intended to enable the company to compel completion by the day specified. *Grand Rapids, etc., R. Co. v. Van Deusen*, 29 Mich. 431.

Where the specifications and the contract differ as to the time of performance, the contract governs, as where the contract provided for the completion "without unnecessary delay as soon as ordered," and the specifications were for completion "within three months from the date of the contract." *Boteler v. Roy*, 40 Mo. App. 234. See also *supra*, this title, *Plans and Specifications*.

"In About One Month."—A contract to finish building a ship in about one month is not fulfilled by completing it six months later. *Smith v. Barker*, 3 Day (Conn.) 312.

*Time Computed from Notice to Begin Work—Sufficiency of Notice*.—*Jones v. New York*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 211.

*Proof of Performance Within Time*.—*Coen v. Birchard*, (Iowa 1904) 100 N. W. Rep. 48; *Shields v. Perkins*, 2 Bibb (Ky.) 227; *Watson v. De Witt County*, 19 Tex. Civ. App. 150; *J. G. Wagner Co. v. Cawker*, 112 Wis. 532.

Where under the terms of a contract the plaintiff was required thoroughly to irrigate the land of the defendants during a specified period of time, and the defendants were to furnish a water right and to construct a ditch along one side of the land to be irrigated, without specifying a limit of time therefor, the contract was construed to mean that the ditch should be dug and the water furnished when the time for the irrigation by plaintiff arrived. *Remy v. Olds*, 88 Cal. 537.

Where the contract requires the work to be performed by a certain time, the fact that the contract also contains a provision imposing a penalty upon the contractor for noncompletion after a later date does not extend the time of performance to such later date. *National Surety Co. v. Long*, (C. C. A.) 125 Fed. Rep. 887.

8. *Gubbins v. Lautenschlager*, 74 Fed. Rep. 160.

a particular time it must be performed before such time.<sup>1</sup>

*b. EXCUSES FOR NONPERFORMANCE WITHIN REQUIRED TIME* — (1) *Acts and Defaults of Builder*. — Where the failure of the contractor to perform the contract within the time stipulated therefor is caused by the wrongful acts or failure of the builder to perform his part of the contract, the failure of the contractor will be excused and the builder cannot take advantage of the delay so caused.<sup>2</sup> Thus, there is a valid excuse for nonperformance where the delay is caused by the builder's refusal to permit the contractor to complete the work or by his direction of a suspension of the work;<sup>3</sup> by the builder's failure to deliver to the contractor at the proper time the possession of the premises upon which the work is to be done;<sup>4</sup> by the failure of the builder to pay when due the instalments of the compensation which were payable as the work progressed;<sup>5</sup> by the failure of the builder to secure a building permit for the erection of the building or comply with the city building regulations;<sup>6</sup> by the builder's failure to do certain work required on his part and necessary to be done before the contractor could do his work;<sup>7</sup> under a contract for the construction of a railroad, by the railroad company's failure to secure a right of way;<sup>8</sup> by the failure of the builder to perform his agreement

1. Rankin v. Woodworth, 3 P. & W. (Pa.) 48.

2. **Acts and Defaults of Builder** — *England*. — Russell v. Sa da Bandeira, 13 C. B. N. S. 149, 106 E. C. L. 149.

*United States*. — McGowan v. American Pressed Tan Bark Co., 121 U. S. 575; Erickson v. U. S., 107 Fed. Rep. 204; Skelsey v. U. S., 23 Ct. Cl. 61.

*Alabama*. — U. S. Fidelity, etc., Co. v. Damskipsaktieselskabet Habil, 138 Ala. 348.

*California*. — White v. Fresno Nat. Bank, 98 Cal. 166.

*Illinois*. — Young v. Wells Glass Co., 187 Ill. 626; Christopher, etc., Architectural Iron, etc., Co. v. Yeager, 202 Ill. 486, *affirming* 105 Ill. App. 126; Lehmann v. Webster, 110 Ill. App. 298, *affirmed* 209 Ill. 264; Sanitary Dist. v. McMahon, etc., Co., 110 Ill. App. 510.

*Minnesota*. — Davis v. Crookston Waterworks, etc., Co., 57 Minn. 402.

*Missouri*. — Hammond v. Beeson, 112 Mo. 190; Pierce City Water Co. v. Pierce City, 61 Mo. App. 471, 1 Mo. App. Rep. 659.

*Montana*. — Starr v. Gregory Consol. Min. Co., 6 Mont. 485.

*New Jersey*. — Wood v. Boney, (N. J. 1891) 21 Atl. Rep. 574.

*New Mexico*. — Texas, etc., R. Co. v. Saxton, 7 N. Mex. 302.

*New York*. — Cooke v. Odd Fellows Fraternal Union, 49 Hun (N. Y.) 23; Sylvester v. Wheeler, 74 Hun (N. Y.) 382; Weeks v. Little, 89 N. Y. 566, 11 Abb. N. Cas. (N. Y.) 415; Dannat v. Fuller, 120 N. Y. 554; Gutmann v. Crouch, 134 N. Y. 585, *affirming* 57 Hun (N. Y.) 586; Vandegriff v. Cowles Engineering Co., 161 N. Y. 435, *reversing* (Supm. Ct. App. Div.) 56 N. Y. Supp. 1118; Ludlum v. Vail, 166 N. Y. 611, 59 N. E. Rep. 1125; Deeves v. New York, 60 N. Y. Super. Ct. 339; C. B. Keogh Mfg. Co. v. Eisenberg, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 79; Willis v. Webster, 1 N. Y. App. Div. 301; Van Aiken v. New York, 18 N. Y. App. Div. 89; Simmons v. Ocean Causeway, 21 N. Y. App. Div. 30; Ocorr, etc., Co. v. Little Falls, 77 N. Y. App. Div. 592; Beinhauer v. Gleason, (Supm. Ct. Gen. T.) 15 N.

Y. St. Rep. 227; Perry v. Levenson, 82 N. Y. App. Div. 94; Cornell v. Standard Oil Co., 91 N. Y. App. Div. 345.

*North Carolina*. — Dunavant v. Caldwell, etc., R. Co., 122 N. Car. 999.

*Pennsylvania*. — Wood v. Malone, 131 Pa. St. 554; Huckestein v. Kelly, etc., Co., 139 Pa. St. 201, 152 Pa. St. 631; Murphy v. Orne, 185 Pa. St. 250, 42 W. N. C. (Pa.) 271.

*Tennessee*. — Fisher v. Edgefield, etc., Mfg. Co., (Tenn. Ch. 1900) 62 S. W. Rep. 27.

*Texas*. — Wright v. Meyer, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

*Virginia*. — Atlantic, etc., R. Co. v. Delaware Constr. Co., 98 Va. 503, 2 Va. Sup. Ct. 430.

*Wisconsin*. — Maher v. Davis, etc., Lumber Co., 86 Wis. 530.

3. Nourse v. U. S., 25 Ct. Cl. 7; Marsh v. Kauff, 74 Ill. 189; Home Bank v. Drumgoole, 109 N. Y. 63; Willis v. Webster, 1 N. Y. App. Div. 301.

4. Eldridge v. Fuhr, 59 Mo. App. 44.

5. Harris v. Gardner, (Ky. 1902) 68 S. W. Rep. 8, 24 Ky. L. Rep. 103; Wood v. Boney, (N. J. 1891) 21 Atl. Rep. 574; Wright v. Meyer, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122. See also Henderson Bridge Co. v. O'Connor, 88 Ky. 303.

6. Deeves v. New York, 60 N. Y. Super. Ct. 339; Perry v. Levenson, 82 N. Y. App. Div. 94, *affirmed* (N. Y. 1904) 70 N. E. Rep. 1104.

7. King Iron Bridge, etc., Co. v. St. Louis, 43 Fed. Rep. 768; Standard Gaslight Co. v. Wood, 61 Fed. Rep. 74, 26 U. S. App. 15; Taylor v. Renn, 79 Ill. 181; Haughery v. Thiberge, 24 La. Ann. 442; Weeks v. Little, (Ct. App.) 11 Abb. N. Cas. (N. Y.) 415, 89 N. Y. 566; Granniss, etc., Lumber Co. v. Deeves, 72 Hun (N. Y.) 171; Stewart v. Keteltas, 36 N. Y. 388; Dannatt v. Fuller, 120 N. Y. 554; Gutmann v. Crouch, 134 N. Y. 585; Cornell v. Standard Oil Co., 91 N. Y. App. Div. 345; Beinhauer v. Gleason, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 227.

8. Altoona Electrical, etc., Co. v. Kittanning, etc., St. R. Co., 126 Fed. Rep. 559.

Where no time is specified for securing the right of way, it must be secured within a



to furnish the materials with which the contractor is to perform the work;<sup>1</sup> by the builder's failure as required in the contract to designate the time for beginning work;<sup>2</sup> or by the failure of the builder or his architect or engineer to furnish the contractor with plans and specifications.<sup>3</sup> So a delay caused by the issuance of an injunction against completion of the work is excusable.<sup>4</sup> The fact that the contract contains express provisions excusing delay from certain causes does not deprive the contractor of the right to excuse delay caused by the wrongful acts or omissions of the builder.<sup>5</sup> The contractor can excuse only such delay on his part as was due to the acts of the builder relied on as an excuse, and where the builder has removed the cause of delay he must, if he proceeds under the contract, use reasonable diligence to complete the work.<sup>6</sup>

(2) *Acts of Architect or Engineer.* — The architect or engineer under whose supervision and direction the work is to be performed is the agent of the builder, and the contractor cannot be held liable for delays in the completion of the work caused by such architect's or engineer's wrongful acts,<sup>7</sup> as where the delay is caused through mistakes in the plans and specifications, requiring a part of the work to be done a second time,<sup>8</sup> or by a failure to deliver copies of the plans and specifications,<sup>9</sup> or by the failure of the architect or engineer to furnish the necessary lines and levels.<sup>10</sup> But where the architect or engineer has power under the contract to pass upon the character of the materials, a delay caused by his rejection of materials is not excusable.<sup>11</sup>

(3) *Acts of Independent Contractors.* — Where the work to be performed by the contractor cannot be performed until the completion of other work to be done by the builder and for which the builder has contracted with a third person, delays caused by such third person's failure to perform his contract will excuse delay on the part of the contractor caused thereby.<sup>12</sup> But the parties may stipulate that the fault or neglect of other independent contractors is not to excuse delays unless notice of such fault or neglect is given by the contractor to the builder or his architect, and in such case unless the required

reasonable time, and to excuse delays on the part of the contractor it is sufficient to aver that it was not secured at the time when it ought to have been. *Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

1. *Harvey's Case*, 8 Ct. Cl. 501; *Bulkley v. Brainard*, 2 Root (Conn.) 5; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Starr v. Gregory Consol. Min. Co.*, 6 Mont. 485; *Goldnick v. Toelberg*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 805; *Summer v. Dewalt*, 1 Spears L. (S. Car.) 135; *Taylor v. Netherwood*, 91 Va. 88.

2. *Deeves v. New York*, 60 N. Y. Super. Ct. 339; *Dwyer v. New York*, 34 N. Y. App. Div. 450.

Where a party contracted to do work by a stipulated time, and the contract contained a provision that a portion of the work should not be done until directions were given to the builder, it was held that the power to suspend the doing of the work did not continue so long as to prevent the completion of it within the time agreed upon. *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285.

3. *Welch v. McDonald*, 85 Va. 500.

4. *Burkhardt v. Georgia School Tp.*, 9 S. Dak. 315.

5. *Ludlum v. Vail*, 53 N. Y. App. Div. 628, affirmed 166 N. Y. 611, 59 N. E. Rep. 1125.

6. *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575; *Graveson v. Tobey*, 75 Ill.

540; *Dannat v. Fuller*, 120 N. Y. 554, reversing 43 Hun (N. Y.) 633; *Pittsburg Iron, etc., Engineering Co. v. National Tube Works Co.*, 184 Pa. St. 251; *Inter-Ocean Transp. Co. v. Sheriffs*, 54 Wis. 202.

7. *Acts of Architect or Engineer.* — *Mahoney v. St. Paul's Church*, 47 La. Ann. 1064; *Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

8. *Sperry v. Fanning*, 80 Ill. 371.

9. *Welch v. McDonald*, 85 Va. 500.

10. *White v. Braddock School Dist.*, 159 Pa. St. 201; *Long v. Pierce County*, 22 Wash. 330; *Boden v. Maher*, 105 Wis. 539.

11. *White v. Braddock School Dist.*, 159 Pa. St. 201.

12. *Acts of Other Contractors.* — *Graveson v. Tobey*, 75 Ill. 540; *Cooke v. Odd Fellows Fraternal Union*, 49 Hun (N. Y.) 23; *Gutmann v. Crouch*, 134 N. Y. 585, affirming 57 Hun (N. Y.) 586; *Ludlum v. Vail*, 166 N. Y. 611, 59 N. E. Rep. 1125, affirming 53 N. Y. App. Div. 628; *Franchi v. Brunswick-Balke-Collender Co.*, (C. Pl. Gen. T.) 13 N. Y. Supp. 294; *Highton v. Dessau*, (C. Pl. Gen. T.) 19 N. Y. Supp. 395; *Willis v. Webster*, 1 N. Y. App. Div. 301; *Smith v. Vail*, 53 N. Y. App. Div. 628; *Cornell v. Standard Oil Co.*, 91 N. Y. App. Div. 345; *New York Metal Ceiling Co. v. Raub*, (Supm. Ct. App. T.) 86 N. Y. Supp. 249; *Stewart v. Keteltas*, 9 Bosw. (N. Y.) 261; *Vanderhoof v. Shell*, 42 Oregon 578.



notice is given the contractor cannot excuse his delay for such reason;<sup>1</sup> and if the contractor, after being delayed by other independent contractors, proceeds under the contract, he must use reasonable diligence in completing his work, and will be held liable for unnecessary delays upon his part.<sup>2</sup>

(4) *Acts of Third Persons.* — Acts of third persons for which the builder is not responsible will not excuse a delay on the part of the contractor in performing the contract.<sup>3</sup> Thus, a delay caused by the failure of materialmen, from whom the contractor purchased the material, to deliver it is not excusable.<sup>4</sup> So, when the contract contains no provision to that effect, a delay caused by a strike on the part of the contractor's workmen is not excusable.<sup>5</sup>

(5) *Acts of Subcontractors.* — The contractor is responsible for the acts of his subcontractor, and therefore cannot excuse his delay in performing the contract in time on the ground that his subcontractor failed to perform his contract.<sup>6</sup>

(6) *Accidental Causes.* — Where the contractor absolutely agrees to perform the work within a certain time, the fact that his failure to do so is due to accidental and unforeseen causes will not excuse his nonperformance,<sup>7</sup> as where the performance is more difficult than expected,<sup>8</sup> or where the delay in constructing a building is due to the settling of the foundation, caused by a latent defect in the soil,<sup>9</sup> or where the contractor is unable to procure the kind of material which he has contracted to use,<sup>10</sup> or where the contractor dies before the expiration of the time for the completion of the work,<sup>11</sup> or where the delay is caused by the character of the weather,<sup>12</sup> or where the completion of a bridge is delayed by high water,<sup>13</sup> or where the delay is caused by the sickness of the contractor's employees.<sup>14</sup> It has been held, however, that a delay caused by an act of God will excuse the nonperformance of the contract within the required time.<sup>15</sup>

(7) *Extra Work and Alterations.* — Where the delay in performance is caused by extra work and alterations in the contract directed by the builder, the contractor cannot, as a general rule, be held liable therefor,<sup>16</sup> and after

1. *Feeney v. Bardsley*, 66 N. J. L. 239; *Shute v. Hamilton*, 3 Daly (N. Y.) 462.

2. *Graveson v. Tobey*, 75 Ill. 540.

3. *Acts of Third Persons.* — *Murdock v. Jones*, 3 N. Y. App. Div. 221.

4. *McLaren v. Fischer*, 45 N. Y. App. Div. 13.

5. *Hexter v. Knox*, 39 N. Y. Super. Ct. 109.

6. *Acts of Subcontractor.* — *Merritt v. Peninsular Constr. Co.*, 91 Md. 453; *Reichenbach v. Sage*, 13 Wash. 364.

7. *Accidental Causes.* — *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Cochran v. People's R. Co.*, 131 Mo. 607; *Chase v. Hatch*, 4 Robt. (N. Y.) 89. *Compare Bailey v. Stetson*, 1 La. Ann. 332.

8. *Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 239 (encountering sunken logs in sinking bridge piers).

9. *Dermott v. Jones*, 2 Wall. (U. S.) 1.

10. *Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

11. *McDaniel's Appeal*, (Pa. 1888) 12 Atl. Rep. 154.

12. *Cannon v. Hunt*, 113 Ga. 501; *Cochran v. People's R. Co.*, 131 Mo. 607; *Reichenbach v. Sage*, 13 Wash. 364. *Compare Erickson v. U. S.*, 107 Fed. Rep. 204; *Deeves v. New York*, 60 N. Y. Super. Ct. 339; *Pengra v. Wheeler*, 24 Oregon 532.

When a contractor undertakes to do certain work (as the erection of a building) within a

limited period, the exercise of proper prudence on his part requires that the work be begun within such a reasonable time after the execution of the contract as will enable him to finish it within the time limit, notwithstanding unusual, heavy, or constant rains; and when it is shown in such a case that the contractor delayed the beginning of the work to a period after which he could only have finished it within the limit had the season been an ordinary one, it was held to be error on the part of the trial judge to charge the jury, in effect, that if the contractor commenced the work at a period which would have enabled him to finish it within the time limit under ordinary conditions, but was thereafter prevented from completing it in the given time, because of unusual, heavy, and constant rains, such causes would be a sufficient excuse for a failure to construct the work within the time limit. *Cannon v. Hunt*, 113 Ga. 501.

13. *Phoenix Bridge Co. v. U. S.*, 38 Ct. Cl. 492; *Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 239.

14. *Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 239.

15. *Pengra v. Wheeler*, 24 Oregon 532. See, however, *Phoenix Bridge Co. v. U. S.*, 38 Ct. Cl. 492. See also the title ACT OF GOD, vol. 1, p. 584.

16. *Extra Work and Alterations* — *England.* —

such alterations the obligation of the contractor is to finish within a reasonable time.<sup>1</sup> It has been held, however, that the fact that extra work is performed by the contractor at the request of the builder does not extend the time for the completion of the work in the absence of a stipulation to that effect as the condition of doing the extra work,<sup>2</sup> and this would seem reasonable where, as regards the original work, the extra work is not such as from its nature would delay the completion of the original work.<sup>3</sup> A contractor may, by express provisions in the contract, bind himself to perform within the time limit all extra work and alterations the builder may direct, and in such a case he cannot excuse his delay on the ground that he was required to make alterations and perform extra work.<sup>4</sup> Still, the mere fact that the contractor undertakes to execute any additional work which may be ordered does not require him to execute such additional work within the original time limit, and if he is unnecessarily delayed by additional work being ordered the delay is excusable;<sup>5</sup> and the same has been held true though the contract provided that extra work or alterations should be made by the contractor and that such changes should be made without holding the contract as violated or void in any other respect.<sup>6</sup> Working contracts frequently provide that where alterations and extra work are ordered the architect shall have power to determine what extension of time shall be allowed for the completion of the

*Dodd v. Churton*, (1897) 1 Q. B. 562; *Kemp v. Rose*, 4 Jur. N. S. 919; *Westwood v. Secretary of State*, 7 L. T. N. S. 736, 11 W. R. 261; *Thornhill v. Neats*, 8 C. B. N. S. 831, 98 E. C. L. 831; *Legge v. Harlock*, 12 Q. B. 1015, 64 E. C. L. 1015.

*United States*.—*Van Buren v. Digges*, 11 How. (U. S.) 461; *Texas*, etc., *R. Co. v. Rust*, 19 Fed. Rep. 239.

*Alabama*.—*Cornish v. Suydam*, 99 Ala. 620.

*California*.—*McGinley v. Hardy*, 18 Cal. 115.

*Connecticut*.—*O'Keefe v. St. Francis's Church*, 59 Conn. 551.

*Illinois*.—*St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Harrison v. Trickett*, 57 Ill. App. 515.

*Iowa*.—*Sweney v. Davidson*, 68 Iowa 386.

*Maryland*.—*Ramsburg v. McCahan*, 3 Gill (Md.) 341.

*Massachusetts*.—*Palmer v. Stockwell*, 9 Gray (Mass.) 237.

*New York*.—*Bridges v. Hyatt*, (Supm. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 449; *Smith v. Gugerty*, 4 Barb. (N. Y.) 614; *Van Buskirk v. Stow*, 42 Barb. (N. Y.) 9; *Anderson v. Meislahn*, 12 Daly (N. Y.) 149; *Close v. Clark*, 16 Daly (N. Y.) 91; *Green v. Haines*, 1 Hilt. (N. Y.) 254; *Cooke v. Odd Fellows Fraternal Union*, 49 Hun (N. Y.) 23; *Bigler v. New York*, etc., *Ferry Co.*, 52 Hun (N. Y.) 613, 5 N. Y. Supp. 347; *Gutmann v. Crouch*, 134 N. Y. 585, *affirming* 57 Hun (N. Y.) 586; *Hutton v. Gordon*, (County Ct.) 2 Misc. (N. Y.) 267; *Livingston v. Moore*, 15 N. Y. App. Div. 15; *Kenny v. Monahan*, 53 N. Y. App. Div. 421; *Farnham v. Ross*, 2 Hall (N. Y.) 167; *Doyle v. Halpin*, 33 N. Y. Super. Ct. 352; *Shute v. Hamilton*, 3 Daly (N. Y.) 462.

*Oregon*.—*Vanderhoof v. Shell*, 42 Oregon 578.

*Pennsylvania*.—*Huckestein v. Kelly*, etc., *Co.*, 152 Pa. St. 631; *White v. Braddock School Dist.*, 159 Pa. St. 201; *Lilly v. Person*, 168 Pa. St. 219; *Focht v. Rosenbaum*, 176 Pa. St. 14.

*Texas*.—*Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122; *Wilkins v. Wilkerson*, (Tex. Civ. App. 1897) 41 S. W. Rep. 178; *Mason v. Rempe*, (Tex. Civ. App. 1897) 41 S. W. Rep. 694.

*Wisconsin*.—*Baasen v. Baehr*, 7 Wis. 516.

Though the contract provides that changes and alterations which shall affect the time of completion of the contract shall be made only on the written order of the builder, the contractor is not responsible for delays caused by alterations made at the oral request of the builder. *Focht v. Rosenbaum*, 176 Pa. St. 14.

1. *Cornish v. Suydam*, 99 Ala. 620; *Harrison v. Trickett*, 57 Ill. App. 515; *Bridges v. Hyatt*, (Supm. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 449; *Green v. Haines*, 1 Hilt. (N. Y.) 254.

2. *Dermott v. Jones*, 23 How. (U. S.) 220.

3. *U. S. Fidelity*, etc., *Co. v. Damskibsa-tieselskabet Habel*, 138 Ala. 348; *Goldnick v. Toelberg*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 805.

4. *Tew v. Newbold-on-Avon School Board*, 1 Cab. & El. 260; *Jones v. St. John's College*, L. R. 6 Q. B. 115; *Weeks v. Little*, 47 N. Y. Super. Ct. 1. See also *Lauer v. Brown*, 30 Barb. (N. Y.) 416.

5. *Dodd v. Churton*, (1897) 1 Q. B. 562; *Ramsburg v. McCahan*, 3 Gill (Md.) 341; *Lauer v. Brown*, 30 Barb. (N. Y.) 416; *Wright v. Meyer*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1122.

Where the plaintiff agreed to construct within a certain time a three-story building for the defendant, the latter reserving the right to add a fourth story on the payment of a specified sum, it was held that the defendant could not recoup damages for delay beyond the time agreed if his election to add a fourth story was not made in season to enable the plaintiffs to complete the building within the agreed time. *Lauer v. Brown*, 30 Barb. (N. Y.) 416.

6. *Lilly v. Person*, 168 Pa. St. 219. See also *Mason v. Rempe*, (Tex. Civ. App. 1897) 41 S.

work, and such a provision is binding upon the contractor.<sup>1</sup>

(8) *Waiver and Extension of Time.* — The builder may, of course, waive or extend the time within which the contract is to be performed by the contractor,<sup>2</sup> and no new extraneous consideration is necessary for an agreement to extend the time for performance.<sup>3</sup> The waiver or extension may be implied as well as express,<sup>4</sup> and when, after the time for the completion of the work, the builder assents to the continuance without objection to the delay he will be deemed to have waived the provision as to time of performance,<sup>5</sup> especially when the continuance of the work is at the express request of the builder and upon his promise to pay therefor when completed,<sup>6</sup> or where on the continuance of the work at the request or assent of the builder he makes partial payment to the contractor for the work performed.<sup>7</sup> So where, after the completion of the work, the builder accepts the work without objection to the contractor's failure to perform in time, he thereby waives the provision as to time of performance;<sup>8</sup> and this is especially true when upon such acceptance he pays the compensation agreed to be paid upon the

W. Rep. 694. *Compare Weeks v. Little*, 47 N. Y. Super. Ct. 1.

1. Where a contractor undertook to execute works, with enlargement, etc., within a specified time, the architect having power to extend the time for completion in proportion to the extra work so ordered, and additions were ordered and executed, and caused delay in completion of the works beyond the time specified, but the architect did not extend the time, it was held that the contractor was bound to complete the works within the time specified and was liable to pay damages for noncompletion within the specified time. *Tew v. Newbold-on-Avon School Board*, 1 Cab. & El. 260.

2. *Waiver and Extension of Time* — *England.* — *Thornhill v. Neats*, 8 C. B. N. S. 831, 98 E. C. L. 831; *Wood v. Bernal*, 19 Ves. Jr. 220.

*United States.* — *Mundy v. Stevens*, 61 Fed. Rep. 77, 17 U. S. App. 442, 463; *U. S. v. Guerber*, 124 Fed. Rep. 823; *Gleason v. U. S.*, 33 Ct. Cl. 65; *Mundy v. U. S.*, 35 Ct. Cl. 265.

*California.* — *McGinley v. Hardy*, 18 Cal. 115; *Luckhart v. Ogden*, 30 Cal. 547; *White v. Soto*, 82 Cal. 654; *Witmer Bros. Co. v. Weid*, 108 Cal. 569.

*Colorado.* — *Dargin v. Crauson*, 12 Colo. App. 368.

*Connecticut.* — *O'Keefe v. St. Francis's Church*, 59 Conn. 551.

*Illinois.* — *Paddock v. Stout*, 121 Ill. 571; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Young v. Wells Glass Co.*, 187 Ill. 626, affirming 87 Ill. App. 537.

*Iowa.* — *Hutchinson v. New Sharon, etc., R. Co.*, 63 Iowa 727.

*Kentucky.* — *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303.

*Michigan.* — *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Barnard v. McLeod*, 114 Mich. 73.

*Nebraska.* — *Ersine v. Johnson*, 23 Neb. 261.

*New York.* — *Van Buskirk v. Stow*, 42 Barb. (N. Y.) 9; *Cooke v. Odd Fellows' Fraternal Union*, 49 Hun (N. Y.) 23; *Gallagher v. Nichols*, 60 N. Y. 438; *Elting v. Dayton*, 63 Hun (N. Y.) 629, 17 N. Y. Supp. 849; *Smith v. Corn*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 545; *Emslie v. Livingston*, 51 N. Y. App. Div. 628;

*Rode v. Auerbach*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 765; *Stout v. Jones*, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 570.

*Pennsylvania.* — *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631.

*South Dakota.* — *Blood v. Fargo, etc., Elevator Co.*, 1 S. Dak. 71.

*Tennessee.* — *Towson v. Reese*, 1 Tenn. Ch. 245.

*Vermont.* — *Smith v. Smith*, 45 Vt. 433.

**The Architect or Engineer** of the builder under whose supervision the work is to be done has no implied authority to extend the time for the completion of the work. *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

3. **Consideration.** — *Hill v. Smith*, 34 Vt. 535.

4. *Smith v. Gugerty*, 4 Barb. (N. Y.) 614.

5. *Lucas v. Godwin*, 3 Bing. N. Cas. 737, 32 E. C. L. 309; *Nibbe v. Brauhn*, 24 Ill. 268; *Adams v. Hill*, 1 Ind. App. 317; *Emerson v. Coggsell*, 16 Me. 77; *Snow v. Ware*, 13 Met. (Mass.) 42; *Smith v. Gugerty*, 4 Barb. (N. Y.) 614; *Meehan v. Williams*, 2 Daly (N. Y.) 367; *Gallagher v. Nichols*, 60 N. Y. 438; *Dunn v. Steubing*, 120 N. Y. 232; *Kenny v. Monahan*, 169 N. Y. 591, affirming 53 N. Y. App. Div. 421; *Smith v. Corn*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 545; *Doyle v. Halpin*, 33 N. Y. Super. Ct. 352; *Dillon v. Masterton*, 39 N. Y. Super. Ct. 133, 42 N. Y. Super. Ct. 176; *Foster v. Worthington*, 58 Vt. 65.

6. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128; *Cornish v. Suydam*, 99 Ala. 620; *Eyster v. Parrott*, 83 Ill. 517; *Smith v. Sanitary Dist.*, 108 Ill. App. 69; *Krause v. School Trustees*, (Ind. App. 1903) 66 N. E. Rep. 1010; *Close v. Clark*, 16 Daly (N. Y.) 91; *Bigler v. New York, etc., Ferry Co.*, 52 Hun (N. Y.) 613, 5 N. Y. Supp. 347; *Kenny v. Monahan*, 53 N. Y. App. Div. 421; *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631; *Hawman v. Turnpike Co.*, 2 Woodw. (Pa.) 332.

7. *The Isaac Newton, Abb. Adm.* 11, 13 Fed. Cas. No. 7,089; *Eyster v. Parrott*, 83 Ill. 517; *Dunn v. Steubing*, 120 N. Y. 232; *Brodek v. Farnum*, 11 Wash. 565.

8. *Nibbe v. Brauhn*, 24 Ill. 268; *Cummings v. Pence*, 1 Ind. App. 317; *Emerson v. Coggsell*, 16 Me. 77; *Adams v. Hill*, 16 Me. 215; *Bishop v. Jackson*, 6 Robt. (N. Y.) 286.



completion of the work.<sup>1</sup> The effect of an extension of or waiver of time for performance is merely to substitute a new time for the old; it does not affect the other provisions of the contract;<sup>2</sup> and when the agreement for extension or waiver is silent as to the duration of the extension, the law implies that it shall be for a reasonable time.<sup>3</sup> A waiver of the provision as to time of performance does not necessarily waive the builder's claim for damages by reason of the failure to perform in time.<sup>4</sup> Thus, the mere fact that the builder permits the contractor to continue the work after the time for its completion, though it constitutes a waiver of the time of performance so far as concerns the right of the contractor to recover upon the contract, has been held not to waive the builder's right to recover damages for the delay in performance;<sup>5</sup> and the same has been held true where the builder, after the time for completion, makes partial payment to the contractor,<sup>6</sup> or where the builder accepts the work on its completion after the time of performance.<sup>7</sup> So the fact that the builder takes possession of a part of the structure before its entire completion and after the time for performance does not waive his claim for damages for the delay prior to taking such possession.<sup>8</sup>

(9) *Express Stipulations Excusing Delay.* — Working contracts frequently contain express provisions excusing delays in performance arising from particular causes.<sup>9</sup> One of the most frequent provisions in this respect is one excusing delays arising from labor strikes. Such a provision does not excuse a delay caused by the contractor's workmen quitting work for failure of the contractor to pay their wages,<sup>10</sup> nor does it excuse delays caused by strikes arising from the contractor reducing the wages of his workmen,<sup>11</sup> but it is not to be restricted to strikes arising solely among the contractor's workmen.<sup>12</sup> Where the contract requires that the contractor shall give notice of delays arising from stipulated causes, the contractor must give such notice to entitle him to be excused for the delay.<sup>13</sup>

1. *Paddock v. Stout*, 121 Ill. 571; *Meehan v. Williams*, 2 Daly (N. Y.) 367.

2. **Effect of Extension of Time for Performance.** — *Barclay v. Messenger*, 43 L. J. Ch. 449; *Jacksonville, etc., R. Co. v. Woodworth*, 26 Fla. 368; *Nibbe v. Brauhn*, 24 Ill. 268; *Paddock v. Stout*, 121 Ill. 571.

3. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128; *Luckhart v. Ogden*, 30 Cal. 547; *Rode v. Auerbach*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 765; *Bond v. Stewart*, 58 N. Y. App. Div. 615.

4. *McIntire v. Barnes*, 4 Colo. 285; *Cannon v. Wildman*, 28 Conn. 472; *Grant v. Savannah, etc., R. Co.*, 51 Ga. 348.

5. *Lawrence County v. Stewart*, (Ark. 1904) 81 S. W. Rep. 1059; *Bryson v. McCone*, 121 Cal. 153; *Snell v. Cottingham*, 72 Ill. 161; *Barber v. Rose*, 5 Hill (N. Y.) 76; *Grannis, etc., Lumber Co. v. Deeves*, 72 Hun (N. Y.) 171; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248; *Dunn v. Steubing*, 120 N. Y. 232; *Crocker-Wheeler Co. v. Varick Realty Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 645; *Smith v. Smith*, 45 Vt. 433. See, however, *The Isaac Newton, Abb. Adm.* 11, 13 Fed. Cas. No. 7,089. *Compare Cooke v. Odd Fellows' Fraternal Union*, 49 Hun (N. Y.) 23.

6. *Lawrence County v. Stewart*, (Ark. 1904) 81 S. W. Rep. 1059; *Shute v. Hamilton*, 3 Daly (N. Y.) 462. *Compare Brodek v. Farnum*, 11 Wash. 565.

7. *Felt v. Smith*, 62 Ill. App. 637; *Hansen v. Kirtley*, 11 Iowa 565.

8. *Lawrence County v. Stewart*, (Ark. 1904)

81 S. W. Rep. 1059. *Compare Sarrazin v. Adams*, 110 La. 124.

9. **Provisions Excusing Delays.** — *Gleason v. U. S.*, 33 Ct. Cl. 65; *Richard v. Clark*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 622.

Where the contract provides that such additional time "may" be allowed if delay is caused "by freshets, ice, or other force or violence of the elements," as in the judgment of the engineer in charge shall be "just and reasonable," there is no discretion left in the engineer except as to the amount of time to be allowed, and that must be just and reasonable; and the word "may" should be construed to mean "shall." *Gleason v. U. S.*, 33 Ct. Cl. 65.

A contract providing that delays caused by fires should be excused has been held to excuse delays caused by fires started through the negligence of the contractor's servant. *Steamship Co. v. Dialogue*, 1 W. N. C. (Pa.) 475.

**Delays on Account of Weather.** — *Andrews v. Tucker*, 127 Ala. 602.

**"Unusual Action of the Elements or Otherwise."** — *McDonald v. Patterson*, 186 Ill. 381, *affirming* 84 Ill. App. 326.

10. **Strikes.** — *McLeod v. Genius*, 31 Neb. 1.

11. *Delaware, etc., R. Co. v. Bowns*, 36 N. Y. Super. Ct. 126.

12. *Milliken v. Keppler*, 4 N. Y. App. Div. 42.

13. *Kelly v. Fejervary*, (Iowa 1899) 78 N. W. Rep. 828; *Brown v. Strimple*, 21 Mo. App. 338; *J. G. Wagner Co. v. Cawker*, 112 Wis. 532.

In *Florida Northern R. Co. v. Southern Supply Co.*, 112 Ga. 1, it was held that a stipulation in a construction contract that if delays in

## c. EFFECT OF NONCOMPLETION IN TIME ON RIGHT TO COMPENSATION.

— Where the contract is entire and requires performance within a certain time to entitle the contractor to compensation, it is necessary, in order that the contractor may maintain an action on the contract for the compensation specified therein, that he fully perform the contract, as well in point of time as in other particulars, unless he can show facts or circumstances excusing performance within the required time.<sup>1</sup> As a general rule, however, the time of performance is not considered as of the essence of the contract, and the contractor is allowed to sue upon the contract subject to the builder's right to recoup damages for the failure to complete the work within the time limited.<sup>2</sup> *A fortiori*, where the builder waives the performance of the provisions as to time of performance and permits the work to be completed the contractor may recover in a suit upon the contract,<sup>3</sup> and when the work is completed after the time for performance and is accepted by the builder the contractor may recover on a *quantum meruit* count.<sup>4</sup> Where the contract expressly provides for a sum as liquidated damages for nonperformance within a limited time, this, it seems, impliedly allows a reasonable time after the time limited for completion subject to the penalty imposed.<sup>5</sup> The right of the contractor to recover for a partial performance when the builder takes possession of the work after the time for performance has elapsed, and thereby prevents the completion of the work, has already been discussed.<sup>6</sup>

d. REMEDIES FOR NONCOMPLETION IN TIME—(1) *In General*. — The

the completion of the work should be "occasioned by epidemics, strikes, or providential causes, a reasonable extension of time for the completion of this contract shall be made," when qualified by the condition that "timely notice of all such delays shall be given" by the contractor to the other party, did not, *proprio vigore*, operate to relieve the former from liability for damages resulting to the latter because of delays thus brought about, but under such a contract it was incumbent on the contractor to give actual notice to the other party of such delays within a reasonable time after their occurrence, and make thereon proper claims for extensions of time. Failing in these respects the consequences of such delays were chargeable to him to the same extent as if they had been occasioned by his own fault or negligence.

1. *England*. — Tilley v. Thomas, L. R. 3 Ch. 67; Maryon v. Carter, 4 C. & P. 295, 19 E. C. L. 392; Parkin v. Thorold, 16 Beav. 59; Hudson v. Temple, 29 Beav. 536; Jones v. St. John's College, L. R. 6 Q. B. 115.

*United States*. — Dermott v. Jones, 23 How. (U. S.) 220.

*Colorado*. — Walling v. Warren, 2 Colo. 434.

*Illinois*. — Kemp v. Humphreys, 13 Ill. 573.

*Kansas*. — Morrison v. Wells, 48 Kan. 494.

*Maine*. — Allen v. Cooper, 22 Me. 135.

*Missouri*. — Fitzgerald v. Hayward, 50 Mo. 506.

*New York*. — Smith v. Gugerty, 4 Barb. (N. Y.) 614; McEntyre v. Tucker, 36 N. Y. App. Div. 53.

*North Carolina*. — Clayton v. Blake, 4 Ired. L. (26 N. Car.) 497.

2. *England*. — Kingdom v. Cox, 2 C. B. 661, 52 E. C. L. 661; Lucas v. Godwin, 3 Bing. N. Cas. 737, 32 E. C. L. 309; Littler v. Holland, 3 T. R. 590; Parkin v. Thorold, 16 Beav. 59; Wilson v. General Iron Screw Collier Co., 47 L. J. Q. B. 239, 37 L. T. N. S. 789.

*California*. — Verzan v. McGregor, 23 Cal. 339; Witmer Bros. v. Weid, 108 Cal. 569.

*Indiana*. — Manville v. McCoy, 3 Ind. 148.

*Iowa*. — Lucas v. Snyder, 2 Greene (Iowa) 490.

*Kentucky*. — Craddock v. Aldridge, 2 Bibb (Ky.) 15.

*Louisiana*. — Goodloe v. Rogers, 9 La. Ann. 273, 61 Am. Dec. 205.

*Missouri*. — St. Louis Steam Heating, etc., Co. v. Bissell, 41 Mo. App. 426.

*Nebraska*. — Homan v. Steele, 18 Neb. 652.

*New York*. — Smith v. Gugerty, 4 Barb. (N. Y.) 614; Seers v. Fowler, 2 Johns. (N. Y.) 272; Heckmann v. Pinkney, 81 N. Y. 211.

*Texas*. — Johnson v. White, (Tex. Civ. App. 1894) 27 S. W. Rep. 174.

3. Cassidy v. Clarke, 7 Ark. 123; Cummings v. Pence, 1 Ind. App. 317; Fowlds v. Evans, 52 Minn. 551; Gallagher v. Nichols, (Ct. App.) 16 Abb. Pr. N. S. (N. Y.) 337; Rogers v. Beard, 36 Barb. (N. Y.) 31; Seers v. Fowler, 2 Johns. (N. Y.) 272; Dunn v. Steubing, 120 N. Y. 232, affirming 55 N. Y. Super. Ct. 533; Burke v. Educational Alliance, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 163; Happel v. Marasco, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 314; White v. Braddock School Dist., 159 Pa. St. 201.

4. Lucas v. Godwin, 3 Bing. N. Cas. 737, 32 E. C. L. 309; Emerson v. Slater, 22 How. (U. S.) 28; Dermott v. Jones, 2 Wall. (U. S.) 1; Canby v. Ingersol, 4 Blackf. (Ind.) 493; McClure v. Secrist, 5 Ind. 31; Barnwell v. Kempton, 22 Kan. 314; Snow v. Ware, 13 Met. (Mass.) 42.

5. Folsom v. McDonough, 6 Cush. (Mass.) 208; Farnham v. Ross, 2 Hall (N. Y.) 167.

6. See *supra*, this section, *Partial Performance*.

builder may maintain an action for damages against the contractor for non-completion of the work in the time limited,<sup>1</sup> or he may recoup such damages in an action by the contractor for compensation.<sup>2</sup> Where the contractor does not perform the work in the time limited the builder may rescind or terminate the contract,<sup>3</sup> but the right to rescind must be promptly exercised, and is waived if he permits the contractor to continue the work after the time limited for performance.<sup>4</sup> In many instances the working contract expressly provides that the builder may terminate the contract upon the failure of the contractor to perform in time.<sup>5</sup> Working contracts also frequently provide that if the work is not completed within a time limited the builder may finish it at the contractor's expense,<sup>6</sup> and where the builder exercises such right he may deduct from the unpaid compensation the cost of completing the building.<sup>7</sup>

(2) *Damages for Failure to Complete in Time* — (a) *In General*. — The general principles of law relating to the measure of damages for breach of contract<sup>8</sup> apply, of course, to the breach of working contracts.<sup>9</sup>

**1. Damages for Noncompletion in Time.** — *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405; *McDaniel's Appeal*, (Pa. 1888) 12 Atl. Rep. 154; *Jackson v. Cleveland*, 19 Wis. 400.

**2.** *Legge v. Harlock*, 12 Q. B. 1015, 64 E. C. L. 1015; *Wood v. Joliet Gaslight Co.*, (C. C. A.) 111 Fed. Rep. 463; *Marshall v. Hann*, 17 N. J. L. 425; *Rogers v. Beard*, 36 Barb. (N. Y.) 31; *Granniss, etc., Lumber Co. v. Deeves*, 72 Hun (N. Y.) 171; *C. B. Keogh Mfg. Co. v. Eisenberg*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 79; *Dillon v. Masterson*, 42 N. Y. Super. Ct. 176; *Huckestein v. Kelly, etc., Co.*, 139 Pa. St. 201; *Johnson v. White*, (Tex. Civ. App. 1894) 27 S. W. Rep. 174; *Bounds v. Hickerson*, 26 Tex. Civ. App. 608; *Davis v. Baxter*, 2 Patt. & H. (Va.) 133.

**3. England.** — *Parkin v. Thorold*, 16 Beav. 59.

*United States.* — *Clark's Case*, 3 Ct. Cl. 451. *Compare Hamby v. Delaware, etc., R. Co.*, 21 Fed. Rep. 541.

*Kansas.* — *Morrison v. Wells*, 48 Kan. 494. *Kentucky.* — *Chamberlin v. McCalister*, 6 Dana (Ky.) 352.

*Louisiana.* — *Hay v. Bush*, 110 La. 575.

*Massachusetts.* — *Pickering v. Greenwood*, 114 Mass. 479.

*Michigan.* — *Scheible v. Klein*, 89 Mich. 376.

*New York.* — *Wyckoff v. Taylor*, 13 N. Y. App. Div. 240, 4 N. Y. Annot. Cas. 102; *Mahoney v. Warren*, (Supm. Ct. Gen. T.) 10 N. Y. St. Rep. 149; *Dillon v. Masterson*, 42 N. Y. Super. Ct. 176.

*Texas.* — *Andrae v. Watson*, (Tex. Civ. App. 1903) 73 S. W. Rep. 991.

*Wisconsin.* — *Davis v. Hubbard*, 41 Wis. 408.

**4.** *Mohan v. Dundalk, etc., R. Co.*, L. R. 6 Ir. 477; *Dillon v. Masterson*, 42 N. Y. Super. Ct. 176.

**5.** *Fitzgerald v. Hayward*, 50 Mo. 516.

**6.** *The Revenue Cutter, No. 2*, 4 Sawy. (U. S.) 143, 20 Fed. Cas. No. 11,714.

**7.** *Wells v. Board of Education*, 78 Mich. 260.

**8.** See the title DAMAGES, vol. 8, p. 537 et seq.

**9. Measure of Damages** — *United States.* — *Quinn v. U. S.*, 99 U. S. 30.

*District of Columbia.* — *Washington, etc., R. Co. v. American Car Co.*, 5 App. Cas. (D. C.) 524.

*Illinois.* — *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 247.

*Kentucky.* — *Shields v. Perkins*, 2 Bibb (Ky.) 227; *Maysville, etc., Turnpike Road Co. v. Waters*, 6 Dana (Ky.) 62.

*Louisiana.* — *Percy v. Peyroux*, 5 Rob. (La.) 179; *Cable v. Leeds*, 6 La. Ann. 293.

*Minnesota.* — *Chicago Bridge, etc., Co. v. Olson*, 80 Minn. 533.

*Nebraska.* — *McDonald v. Dodge County*, 41 Neb. 905.

**Value of Use of Building to Builder.** — *Wood v. Joliet Gaslight Co.*, 111 Fed. Rep. 463, 49 C. C. A. 427; *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156; *McConey v. Wallace*, 22 Mo. App. 377; *Dengler v. Auer*, 55 Mo. App. 548; *Wagner v. Corkhill*, 40 Barb. (N. Y.) 175; *Ruff v. Rinaldo*, 55 N. Y. 664; *Finch v. Heermans*, 5 Luz. Leg. Reg. (Pa.) 125.

**Income from Apartment House.** — *Reich v. Colwell Lead Co.*, 66 Hun (N. Y.) 634, 21 N. Y. Supp. 495.

**Rental Value of Building** — *Colorado.* — *McIntire v. Barnes*, 4 Colo. 285.

*Illinois.* — *Korf v. Lull*, 70 Ill. 420; *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 247.

*Iowa.* — *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa 524.

*Maryland.* — *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.*, 77 Md. 202; *Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co.*, 79 Md. 103.

*Missouri.* — *Cochran v. People's R. Co.*, 113 Mo. 359.

*Nebraska.* — *Consaul v. Sheldon*, 35 Neb. 247.

*New York.* — *Rogers v. Beard*, 36 Barb. (N. Y.) 31; *Scribner v. Jacobs*, 56 Hun (N. Y.) 649, 9 N. Y. Supp. 856; *Ansonia Brass, etc., Co. v. Gerlach*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 256.

*Pennsylvania.* — *Brown v. Foster*, 51 Pa. St. 165; *Rogers v. Bemus*, 69 Pa. St. 432.

**Want of Opportunity to Rent Building.** — *Wagner v. Corkhill*, 40 Barb. (N. Y.) 175; *Horgan v. McKenzie*, (C. Pl. Gen. T.) 17 N. Y. Supp. 174; *McCarthy v. Gallagher*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 188.

**Value of Use of Railroad.** — *Snell v. Cottingham*, 72 Ill. 161.



(b) **Liquidated Damages.**—Because of the difficulty of ascertaining with certainty the damages arising from the failure to complete working contracts within the stipulated time, the parties to such contracts frequently provide for the payment of a specified amount as liquidated damages for failure to perform the contract in time, and the courts have unhesitatingly upheld and enforced such provisions.<sup>1</sup> But the builder cannot recover the sum stipulated as liquidated damages where he exercises his right, provided for in the contract, to take possession of the work and complete the contract on failure of the contractor to complete in the time limited,<sup>2</sup> or where he takes possession of the uncompleted structure at the time fixed for completion and prevents the continuance of the work by the contractor.<sup>3</sup> And if before the completion of the building and after the time limited therefor the builder takes possession of a part of the building, he cannot thereafter recover the daily penalty imposed by the contract as liquidated damages for delay in performance.<sup>4</sup>

(c) **Submission to Architect or Engineer of Question of Damages.**—Provisions in work-

**Injury to Crops for Want of Storage Room.**—*Haven v. Wakefield*, 39 Ill. 509.

**Loss of Prospective Profits.**—*Haven v. Wakefield*, 39 Ill. 509; *Taylor v. Maguire*, 12 Mo. 313; *Rogers v. Beard*, 36 Barb. (N. Y.) 31; *Wood v. Derbyshire*, 2 Del. Co. Rep. (Pa.) 247.

**Interest Allowed by Railroad Company on Subscriptions.**—*Barker v. Troy, etc.*, R. Co., 27 Vt. 766.

**Expenses Incurred by Builder.**—*Smith v. Smith*, 45 Vt. 433.

**Expense for Rental Incurred by Builder.**—*Jaundes v. Fisher*, 5 Ky. Law Rep. 768.

**Increased Cost of Materials.**—*Allamon v. Albany*, 43 Barb. (N. Y.) 33.

**Delay by Subcontractor—Damages Paid by Contractor to Builder.**—*Chicago Bridge, etc., Co. v. Olson*, 80 Minn. 533; *Murdock v. Jones*, 3 N. Y. App. Div. 221; *Fisher v. Edgefield, etc.*, Mfg. Co., (Tenn. Ch. 1900) 62 S. W. Rep. 27.

**Damages Suffered by Contractor from Delay by Subcontractor.**—*O'Connor v. Smith*, 84 Tex. 232.

1. **Liquidated Damages—England.**—*Legge v. Harlock*, 12 Q. B. 1015, 64 E. C. L. 1015; *In re Yeardon Waterworks Co.*, 72 L. T. N. S. 832; *Alcoy, etc., R., etc., Co. v. Greenhill*, 76 L. T. N. S. 542; *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72.

**United States.**—*Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 239.

**Arkansas.**—*Lincoln v. Little Rock Granite Co.*, 56 Ark. 405; *Lawrence County v. Stewart*, (Ark. 1904) 81 S. W. Rep. 1059.

**California.**—*Patent Brick Co. v. Moore*, 75 Cal. 205.

**Illinois.**—*Wilcus v. Kling*, 87 Ill. 107.

**Iowa.**—*Foley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107; *Kelly v. Fejervary*, 111 Iowa 693; *De Graff v. Wickham*, 89 Iowa 720.

**Louisiana.**—*Davis v. Glenn*, 3 La. Ann. 444.

**Massachusetts.**—*Hall v. Crowley*, 5 Allen (Mass.) 304.

**Minnesota.**—*Chicago Bridge, etc., Co. v. Olson*, 80 Minn. 533.

**Missouri.**—*Ramlose v. Dollman*, 100 Mo. App. 347.

**New Jersey.**—*Marshall v. Hann*, 17 N. J. L. 425.

**New York.**—*C. B. Keogh Mfg. Co. v. Eisenberg*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 79.

**Oregon.**—*Vanderhoof v. Shell*, 42 Oregon 578.

**Pennsylvania.**—*Young v. White*, 5 Watts (Pa.) 460; *Huckestein v. Kelly, etc., Co.*, 139 Pa. St. 201; *Clements v. Schuylkill River East Side R. Co.*, 132 Pa. St. 445; *Malone v. Philadelphia*, 147 Pa. St. 416.

**Texas.**—*Johnson v. White*, (Tex. Civ. App. 1894) 27 S. W. Rep. 174.

See also the title LIQUIDATED DAMAGES, vol. 19, p. 394.

In a building contract containing the usual clauses fixing the days for completing various parts of the work, a stipulation to the effect that any neglect to comply with the conditions of the contract and finish the work as provided shall be sufficient cause for the employer to claim damages at the rate of ten dollars for each and every day's detention so caused may be regarded as covenanting for stipulated damages; and the owner is entitled to retain at that rate for delay occurring without his contributory negligence or consent. *O'Donnell v. Rosenberg*, (C. Pl. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 59.

**Amount of Damages.**—*Denver Land, etc., Co. v. Rosenfeld Constr. Co.*, 19 Colo. 539.

**Deductions for Sundays.**—Where the contract provides for a sum payable as liquidated damages for each day's delay in the completion of the contract, Sundays occurring during the period of delay are to be included in the number of days for which the stipulated sum is to be deducted. *Vanderhoof v. Shell*, 42 Oregon 578.

2. **Fidelity, etc.**, *Co. v. Robertson*, 136 Ala. 379; *Crawford v. Becker*, 13 Hun (N. Y.) 375. See also *Lennon v. Smith*, 124 N. Y. 578, reversing 16 Daly (N. Y.) 520.

3. *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Sarrazin v. Adams*, 110 La. 124; *Collier v. Betterton*, 87 Tex. 440.

Where the compensation is payable only on completion of the work, the builder does not, by taking possession of the uncompleted work at the time for completion, waive his right to demand that the work be completed before the compensation shall be payable. *Bradley Currier Co. v. Bernz*, 55 N. J. Eq. 10.

4. *Collier v. Betterton*, 87 Tex. 440.

ing contracts for submission to the architect or engineer in charge of the work of the question of damages for delay in the performance of the work are upheld by the courts.<sup>1</sup>

**9. Completion of Work by Builder at Expense of Contractor.** — Working contracts frequently provide that upon certain contingencies the builder may take charge of the work and complete it at the expense of the contractor,<sup>2</sup> and it has been held that such a provision is not one for a forfeiture, and should therefore be fairly construed to effect its purpose.<sup>3</sup> Where the builder, under such a provision in the contract, takes charge of the work and completes it at the expense of the contractor, he is liable to the contractor for any excess of the compensation unpaid over the cost of completing the work.<sup>4</sup> On the other hand, of course, the builder is entitled to deduct from the amount of the compensation unpaid the cost of completion, and in case the latter exceeds the former, to be reimbursed by the contractor therefor.<sup>5</sup> Provisions for certification by the architect or engineer in charge of the work of the cost of completing the work are binding upon the parties.<sup>6</sup> In exercising the right to take the work from the contractor and complete it at his expense, the builder must comply with all the conditions precedent provided for in the contract.<sup>7</sup> Thus, notice of the intention to exercise the right must,

1. *Munro v. Ennis, etc., R. Co.*, 15 W. R. 255; *Young v. Wells Glass Co.*, 187 Ill. 626; *Hughes v. Bravinder*, 9 Wash. 595; *Drumheller v. American Surety Co.*, 30 Wash. 530.

2. **Completion of Work by Builder at Expense of Contractor** — *England*. — *Stevens v. Taylor*, 2 F. & F. 419; *Stadhard v. Lee*, 3 B. & S. 364, 113 E. C. L. 364; *In re Waugh*, 4 Ch. D. 524; *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72, 3 R. & Can. Cas. 298; *Mohan v. Dundalk, etc., R. Co.*, L. R. 6 Ir. 477; *Davies v. Swansea*, 8 Exch. 808; *Pauling v. Dover*, 10 Exch. 753.

*United States*. — *Culbertson v. Ellis*, 6 McLean (U. S.) 248; *George A. Fuller Co. v. Doyle*, 87 Fed. Rep. 687; *U. S. v. McIntyre*, 111 Fed. Rep. 590; *Spencer v. Duplan Silk Co.*, 112 Fed. Rep. 638.

*Alabama*. — *Hewlett v. Alexander*, 87 Ala. 193.

*District of Columbia*. — *Hammond v. Miller*, 2 Mackey (D. C.) 145.

*Florida*. — *Lara v. Greeley*, 20 Fla. 926.

*Illinois*. — *International Cement Co. v. Beifeld*, 173 Ill. 179; *Christopher, etc., Architectural Iron, etc., Co. v. Yeager*, 202 Ill. 486, affirming 105 Ill. App. 126.

*Indiana*. — *Louisville, etc., R. Co. v. Donnegan*, 111 Ind. 179.

*Louisiana*. — *Hay v. Bush*, 110 La. 575.

*Missouri*. — *Spink v. Mueller*, 77 Mo. App. 85.

*New Jersey*. — *Grassman v. Bonn*, 32 N. J. Eq. 43; *Isaacs v. Reeve*, (N. J. 1899) 44 Atl. Rep. 1.

*New York*. — *White v. Livingston*, 174 N. Y. 538; *Zimmerman v. Jourgensen*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 548; *Washburn v. Dettinger*, 76 Hun (N. Y.) 141; *Fox v. Davidson*, 36 N. Y. App. Div. 159; *New York Bldg., etc., Co. v. Springfield Elevator, etc., Co.*, 56 N. Y. App. Div. 294; *Hansen v. Hackman*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 290; *Rowe v. Gerry*, 86 N. Y. App. Div. 349; *Beck v. New York Bldg. Loan Banking Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 323.

3. *Duplan Silk Co. v. Spencer*, (C. C. A.) 115 Fed. Rep. 689.

4. *McGowan v. U. S.*, 35 Ct. Cl. 606; *White v. Livingston*, 174 N. Y. 538, 66 N. E. Rep. 1118, affirming 69 N. Y. App. Div. 361; *Simmons v. Ocean Causeway*, 21 N. Y. App. Div. 30; *Early v. O'Brien*, 51 N. Y. App. Div. 569; *Holl v. Long*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 1; *Wilkinson v. Becker*, 185 Pa. St. 225.

**Burden of Proving Cost of Completion.** — *Zimmerman v. Jourgensen*, 60 Hun (N. Y.) 578, 14 N. Y. Supp. 548.

5. *McGowan v. U. S.*, 35 Ct. Cl. 606; *Winamac School Town v. Hess*, 151 Ind. 229; *Beach v. Wakefield*, 107 Iowa 567; *Hay v. Bush*, 110 La. 575; *Wells v. Board of Education*, 78 Mich. 260; *Langdon v. Northfield*, 42 Minn. 464; *Zimmermann v. Jourgensen*, 70 Hun (N. Y.) 222; *Riley v. Kenney*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 384. See also *Hewlett v. Alexander*, 87 Ala. 193.

**Items Allowable as Cost of Completion.** — *Isaacs v. Reeve*, (N. J. 1899) 44 Atl. Rep. 1; *New York Bldg., etc., Co. v. Springfield Elevator, etc., Co.*, 56 N. Y. App. Div. 294; *Thomas Roberts Stevenson Co. v. Guenther*, 190 Pa. St. 628.

The builder is entitled to deduct expenses *bona fide* and nonnegligently incurred in the completion of the work though there is expert testimony that the work could have been completed for a smaller sum. *Riley v. Kenny*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 384.

6. *American Bonding, etc., Co. v. Gibson County*, (C. C. A.) 127 Fed. Rep. 671; *Tally v. Parsons*, 131 Cal. 516; *International Cement Co. v. Beifeld*, 173 Ill. 179, reversing 67 Ill. App. 110; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Charlton v. Scoville*, 144 N. Y. 691; *New York Bldg., etc., Co. v. Springfield Elevator, etc., Co.*, 56 N. Y. App. Div. 294; *De Mattos v. Jordan*, 20 Wash. 315.

7. *Champlain Constr. Co. v. O'Brien*, 104 Fed. Rep. 930; *Spencer v. Duplan Silk Co.*, 112 Fed. Rep. 638; *Sewer Com'rs v. Sullivan*,

when provided for in the contract, be given.<sup>1</sup> So, when required by the contract, the architect or engineer must certify to the failure of the contractor properly to perform the work.<sup>2</sup> Where the right to take charge of the work and complete it at the expense of the contractor is dependent upon the question whether, in the opinion of the architect or engineer, the contractor is proceeding with the work with sufficient speed to insure its completion within the time stipulated, the right cannot be exercised if the delays are due to the wrongful acts or omissions of the builder or his architect or engineer;<sup>3</sup> but in the absence of any bad faith or wrongful acts on the part of the architect or engineer, his decision that the circumstances warrant the taking of the work from the contractor and its completion by the builder is binding upon the contractor.<sup>4</sup> The right conferred on the builder to complete the work at the expense of the contractor is for the benefit of the builder, and it is optional with him whether he shall exercise it or not; and the contractor can not abandon the work and require the builder to complete it and account to him for the balance of the unpaid compensation.<sup>5</sup>

**X. COMPENSATION** — 1. Amount of Compensation *a. IN GENERAL.* — Building contracts generally provide for the amount of compensation to be paid for the work to be performed, and of course such a provision is binding upon the parties and fixes the amount of compensation recoverable.<sup>6</sup> Where the con-

11 N. Y. App. Div. 472; *Simmons v. Ocean Caseway*, 21 N. Y. App. Div. 30.

1. *Williams v. U. S.*, 26 Ct. Cl. 30.

**Sufficiency of Notice.** — *Pauling v. Dover*, 10 Exch. 753.

2. *O'Keefe v. St. Francis' Church*, 59 Conn. 551; *Charlton v. Scoville*, 144 N. Y. 691.

3. *Louisville, etc., R. Co. v. Donnegan*, 111 Ind. 179; *McAndrews v. Tippet*, 39 N. J. L. 105.

4. *Langdon v. Northfield*, 42 Minn. 464.

Where a building contract stipulated that, in case of the failure or unreasonable delay of the contractor to provide the necessary labor and materials to complete the work by a certain time, in the judgment of two architects named, then the other party might, after three days' notice, provide other labor and materials, and complete the work, it was held that the contractor could not be stopped from proceeding with his work on the judgment of the architects where the judgment of one was based solely on what the other had informed him, and not on his own examination. *Benson v. Miller*, 56 Minn. 410.

5. *Bernz v. Marcus Sayre Co.*, 52 N. J. Eq. 275; *Mitchell v. Williams*, 80 N. Y. App. Div. 527. See also *International Cement Co. v. Beifeld*, 173 Ill. 179.

**6. Amount of Compensation** — *England.* — *Pattinson v. Luckley*, L. R. 10 Exch. 330, 44 L. J. Exch. 180.

*United States.* — *Kellogg Bridge Co.'s Case*, 15 Ct. Cl. 206; *Tillson v. U. S.*, 20 Ct. Cl. 213; *Central Trust Co. v. Condon*, (C. C. A.) 67 Fed. Rep. 84.

*Alabama.* — *O'Brien v. Anniston Pipe-Works*, 93 Ala. 582.

*Illinois.* — *Chicago v. Sexton*, 115 Ill. 230; *Deyo v. Ferris*, 22 Ill. App. 154.

*Indiana.* — *Garver v. Daubenspeck*, 22 Ind. 238.

*Iowa.* — *Hummer v. Lockwood*, 3 Greene (Iowa) 90; *Shulte v. Hennssy*, 40 Iowa 352.

*Massachusetts.* — *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; *Craig v. French*, 181 Mass. 282; *Duncan v. Jacobs*, 184 Mass. 123.

*Michigan.* — *Davis v. Bush*, 28 Mich. 432; *Gillett v. Bowman*, 43 Mich. 477; *Davis v. East Saginaw*, 66 Mich. 37.

*Mississippi.* — *Petrie v. Wright*, 6 Smed. & M. (Miss.) 647; *Britney v. Bolding*, 28 Miss. 53.

*New Jersey.* — *Seymour v. Long Dock Co.*, 20 N. J. Eq. 396.

*New York.* — *Fellows v. New York*, 17 Hun (N. Y.) 240; *Sherman v. New York*, 1 N. Y. 316; *Camp v. Treanor*, 142 N. Y. 478; *Hilbrand v. Dininny*, 73 N. Y. App. Div. 511; *Canavan v. Dwyer*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 304.

*Oregon.* — *Aldrich v. Columbia Southern R. Co.*, 39 Oregon 263.

*Pennsylvania.* — *Yeisley v. Bundel*, (Pa. 1888) 15 Atl. Rep. 854; *Harrison v. Reeves*, 160 Pa. St. 134, 34 W. N. C. (Pa.) 131.

*South Dakota.* — *Stokes v. Green*, 10 S. Dak. 286.

*Texas.* — *Galveston, etc., R. Co. v. Johnson*, 74 Tex. 256; *Elmendorf v. Classen*, 92 Tex. 472, *reversing* (Tex. Civ. App. 1898) 47 S. W. Rep. 1023; *Meyer v. Stadtler*, 23 Tex. Civ. App. 432.

*Virginia.* — *Rowland Lumber Co. v. Ross*, 100 Va. 275, 4 Va. Sup. Ct. 191.

Where the district commissioners agreed to pay to the contractor for public work the price previously paid by the board of public works for similar work, the contractor may recover the price actually paid by the board, and not the price fixed by the board on its minutes. *Cranford v. District of Columbia*, 30 Ct. Cl. 464. See also *Taylor's Case*, 17 Ct. Cl. 367.

**Percentage on Cost.** — Where the contractor was to receive as compensation a certain percentage on the cost of the work, he has been held to be entitled to such percentage on amounts paid to subcontractors. *Ford v. St. Louis, etc., R.*



tract states a specified amount of compensation to be paid for the work as an entirety, the fact that it also shows that the amount so arrived at was based on estimates of quantities at fixed prices does not entitle the contractor to additional compensation where the estimate of quantities was less than the actual work required;<sup>1</sup> and, on the other hand, if the estimated quantities were more than the amount of work required, the builder is not entitled to a deduction from the contract price for the work as an entirety.<sup>2</sup> Where the contract fixes the compensation according to the amount of work, that is, at so much per cubic yard or other measure, the fact that the contract also states that the work will include about a certain amount of material does not entitle the contractor to compensation for such amount in case the work requires less.<sup>3</sup> Where the contract is ambiguous as to the rate of compensation, it will be interpreted most strongly against the builder and in favor of the contractor.<sup>4</sup> Where the contract fixes the rate of compensation, it is not permissible in an action thereon to show its cost value or the extent of the benefit therefrom to the builder.<sup>5</sup> The question whether the receipt by a contractor of less than the agreed compensation is binding upon him depends upon whether the acceptance of the less sum was by way of accord and satisfaction or not.<sup>6</sup> When the work is not performed as agreed an agreement to commute the contract rate is valid.<sup>7</sup> So, where the contractor, finding the work more difficult than contemplated, threatens to abandon it on the ground that the builder misrepresented its character, an agreement for increased compensation in consideration of the continuance of the work is binding.<sup>8</sup> If the contract does not specify the compensation to be paid, the contractor is entitled to receive a reasonable compensation.<sup>9</sup>

Co., 54 Iowa 723; *Hamilton v. Coogan*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 677.

**Evidence of Contract for Specific Compensation.**—*Klopp v. Jill*, 4 Kan. 482.

1. *Cannon v. Wildman*, 28 Conn. 472; *Swift v. New York*, 89 N. Y. 52, reversing 26 Hun (N. Y.) 508.

2. Under a contract for laying a pavement as an entirety, at "three dollars and twenty cents per square yard, which shall include two feet of grading," compensation at the rate of three dollars and twenty cents per yard is recoverable though in certain places no grading is required. *Cranford v. District of Columbia*, 20 Ct. Cl. 376.

3. See *Hackett v. State*, 103 Cal. 144.

4. *Gantz v. District of Columbia*, 18 Ct. Cl. 569.

5. *Van Buren v. Digges*, 11 How. (U. S.) 461; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656; *McDaniel v. Webster*, 2 Houst. (Del.) 305; *Campau v. Moran*, 31 Mich. 280; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121; *Van Orden v. Fox*, 32 N. Y. App. Div. 173, 52 N. Y. Supp. 863; *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546, 27 W. N. C. (Pa.) 156. Compare *Mosaic Tile Co. v. Chiera*, (Mich. 1903) 95 N. W. Rep. 537, 10 Detroit Leg. N. 278.

But when the testimony is conflicting as to the price agreed upon for the work, it is competent to show the value of such work at the time when such contract was made, as tending to show what the agreed price was. *Allison v. Horning*, 22 Ohio St. 138.

6. *Finney v. U. S.*, 32 Ct. Cl. 546.

7. *Fitzgerald v. Fitzgerald, etc.*, Constr. Co., 41 Neb. 374.

8. *Osborne v. O'Reilly*, 42 N. J. Eq. 467.

See also *supra*, this title, *Creation of Contract—Consideration*.

**9. Reasonable Compensation.**—*Hughes v. Lenny*, 5 M. & W. 183; *Illinois Educational Assoc. v. Strauder*, 78 Ill. 35; *Wybrant v. Brands*, 9 Ky. L. Rep. 682; *Carll v. Spofford*, 45 N. Y. 61; *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446; *Naughton v. Sioux Falls*, 3 S. Dak. 90.

On a contract with a public board to perform work and labor for whatever recompense the board might allow as right and proper, an action will lie to recover a reasonable recompense, although the board tenders what it considers right and proper. *Bird v. M'Gahey*, 2 C. & K. 707, 61 E. C. L. 707.

Where work has been done under mutual mistake between the employer and the employee, each supposing that there was a contract between them fixing the price, when in fact there was no such contract, the employee is entitled to recover what the work was reasonably worth. *Lanins v. Woods*, 4 Ky. L. Rep. 365; *Wybrant v. Brands*, 9 Ky. L. Rep. 682.

Where a contractor agreed to excavate rock at a given sum per cubic yard, and to do the ordinary excavation at another sum, and in the course of the work a large quantity of hardpan was excavated, for which no provision was made in the contract, and the builder conceded that compensation was due beyond the price fixed for ordinary excavation, it was held that the contractor might maintain a *quantum meruit* count for the excavation of hardpan. *Dubois v. Delaware, etc., Canal Co.*, 12 Wend. (N. Y.) 334.

**Evidence of Value.**—*Bradbury v. McHenry*, 125 Cal. xix, 57 Pac. Rep. 999; *Hough v. Cook*, 69 Ill. 581; *Blazo v. Gill*, 69 Hun (N. Y.) 69; *Gouge v. Roberts*, 53 N. Y. 619.

*b. MEASUREMENT OF WORK.* — Working contracts providing for excavations, embankments, masonry, etc., frequently provide for a certain compensation per cubic yard of work done, and questions have frequently arisen as to the manner in which the work shall be measured.<sup>1</sup> Where the contract provides for payment for masonry and similar work by the cubic yard or other measure denoting solidity, the work is to be measured after the stone or other material is in place, without deductions for the natural interstices between the material as laid in place.<sup>2</sup> So, where an earth embankment is to be paid for at a certain rate per cubic yard, the embankment is to be measured, and not the excavation from which the material therefor was taken;<sup>3</sup> but the contractor must stand for the natural waste and shrinkage.<sup>4</sup> Still, if the contractor does not specify the particular locality in which the embankment is to be built, and the builder requires it to be built where from necessity there will be a waste of earth, as where the contractor is required to build the embankment beside a river, dumping the earth into the river, whereby earth is washed away by the current, in estimating the contents of the embankment the contractor is entitled to an allowance for the earth so washed, and the measurement should be based on the amount of earth delivered less the natural loss by shrinkage which would have occurred if the embankment had been built under ordinary circumstances.<sup>5</sup> A general usage or custom may control the manner in which the amount of work shall be measured.<sup>6</sup> The parties may, of course, specify by their contract the mode of measurement to be adopted.<sup>7</sup> Where

**1. Measurement of Work.** — Where masonry is to be paid for by the yard, and the contract requires the stone to be so dressed that a rough and uneven surface projects beyond the cement or dimension line, the contractor is entitled to pay for the stone in the projecting face. *Mackintosh v. Locke*, 112 Iowa 252.

A contract stipulating for the payment of a certain rate "per square yard" for the removal of dirt means cubic yard. *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177.

**2.** *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608.

**3.** *Galveston, etc., R. Co. v. Johnson*, 74 Tex. 256; *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608.

Thus, under a contract to build a riprap wall at fifty cents per cubic yard, in the absence of proof of any general usage or uniform custom which could control the mode of measurement, it was held that the terms used implied pay by the cubic yard for the riprap after the stone was fitted and laid on the wall, though the work so measured would amount to about thirty and one-third per cent. more than in the solid. *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608.

Where a written contract to fill in a trestle on a railroad track provides for compensation by the cubic yard of dirt, the contractor cannot recover for the space occupied by a brick culvert constructed by the company under the trestle. *East Tennessee, etc., R. Co. v. Matthews*, 85 Ga. 457.

**4.** *Clark v. U. S.*, 6 Wall. (U. S.) 543, 3 Ct. Cl. 451; *Clark's Case*, 4 Ct. Cl. 148.

**5.** *Clark v. U. S.*, 6 Wall. (U. S.) 543, 3 Ct. Cl. 451; *Clark's Case*, 4 Ct. Cl. 148. See also *Henderson v. Louisville*, (Ky. 1887) 4 S. W. Rep. 187.

In *Kentucky* it has been held, under a contract for the construction of an embankment in a stream, compensation to be fixed by the

contents of the embankment, that where the contractor shows the amount of earth hauled and the builder claims a deduction on account of waste earth, he must show the amount of such waste, otherwise the contents of the embankment should be determined by the amount of earth hauled. *Henderson v. Louisville*, (Ky. 1887) 4 S. W. Rep. 187.

**6. Usages and Customs.** — *Fitzimmons v. Academy of Christian Brothers*, 81 Mo. 37; *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608.

**Rule of a Bricklayers' Association.** — *Ambler v. Phillips*, 132 Pa. St. 167.

**Where Work Is to Be Paid by the Perch,** this will be deemed to refer to the statute perch unless it is shown on the face of the memorandum that the contract was entered into with reference to some custom. *Harris v. Rutledge*, 19 Iowa 388.

**7. Contract Provisions as to Mode of Measurement.** — *Miller v. Botto*, 79 Ill. 535; *Smith v. Emerson*, 126 Mass. 169; *O'Dea v. Winona*, 41 Minn. 424; *O'Brien v. New York*, 139 N. Y. 543, affirming 65 Hun (N. Y.) 112, 142 N. Y. 671.

Where a contract for brickwork fixed the price at a certain sum per thousand, the number of brick laid to be estimated on the basis of twenty-four bricks per cubic foot, it was held that the contractor was entitled to pay estimating twenty-four bricks to the cubic foot, not to pay estimated by the actual amount laid. *Smith v. Emerson*, 126 Mass. 169.

Where a contract calls for "rubble stone" (undressed stone) at five dollars per yard, "net measurement in the building," and the superintendent of the building, without authority of his principal, dresses down the rubble stone delivered, and builds a "range rubble" or "broken ashlar" wall with it, the contractor is not bound by the "net measurement in the building," but the principal is liable for such quantity as would have been contained in the rub-

the contract apparently authorizes two inconsistent modes of measuring the work, an actual measurement by one mode made by the parties may be considered as persuasive that such mode of measurement should be recognized as that provided for.<sup>1</sup> Where no particular mode of measuring the contents of an embankment is specified, evidence of a measurement of the cubical contents of the embankment by a competent expert, using an ordinary and not unprofessional method which is shown to be sufficiently accurate for practical purposes, will justify the court in accepting his measurements as correct.<sup>2</sup> But some approximate accurate method of measurement must be used, and it has been held to be inadmissible, in order to show the contents of an excavation, to show the capacity of scrapers used in the work and the number of trips made by them.<sup>3</sup>

#### C. ESTIMATES AND CLASSIFICATION BY ARCHITECTS, ENGINEERS, ETC.

—(1) *In General.* — Working contracts providing for excavations, embankments, masonry, etc., frequently, instead of stating a fixed compensation for the entire work, fix the compensation according to the amount of work done and according to a classification which develops as the work progresses. Thus, in excavation contracts the compensation is frequently fixed at a certain price per cubic yard or other measurement for the excavation of earth, another for the excavation of rock, etc.; or in contracts for masonry, at a certain price for first-class masonry, another price for second-class masonry, etc.; and in such cases the contracts frequently further provide that the measurement and classification of the work shall be determined by the architect or engineer in charge of the work. In such contracts, if there is no provision for measurement or classification of the work by the architect or engineer, his classification or measurement is not binding on the contractor, nor is the contractor required to secure a classification or measurement of the work by him as a condition precedent to recover compensation.<sup>4</sup> On the other hand, if

ble wall of undressed stone. *Hawkins's Case*, 12 Ct. Cl. 181.

**Measuring Brickwork by Brick Laid in Wall Instead of by Kiln Count.** — *Miller v. Botto*, 79 Ill. 535; *Lester v. Pedigo*, 84 Va. 309.

**Double Measurement for Excavation and Embankment.** — *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33.

**Unnecessary Excavation.** — *O'Brien v. New York*, 139 N. Y. 543, 142 N. Y. 671; *McKinney v. City*, 2 Del. Co. Rep. (Pa.) 525.

**Use of Equivalent Method of Measurement.** — Where a contract provided that the pay quantities of earth should be computed from borrow pit and excavation measurements, and the testimony showed that such pay quantities were as accurately and as frequently ascertained by measuring the cubic yards in the fill or embankment, and deducting a well-established percentage for the known difference in the measurement of earth before and after removal, and it further appeared that this method was adopted by the engineer when estimating the pay quantities, it was held not to be error to permit a recovery under the latter manner of measurement. *O'Dea v. Winona*, 41 Minn. 424.

**Necessary Excavations Below Grade.** — *Ford's Case*, 17 Ct. Cl. 60.

**Slope of Embankment.** — Where in a street fill the slope of the embankment extends beyond the street line, the contractor is not entitled to have measured the slope of the embankment beyond the street line, though the contract calls for a fill for the entire width of the street. *Davies v. East Saginaw*, 66 Mich. 37.

**1. Inconsistent Modes of Measurement.** — A contract for embankment work provided: "The measurements of quantities will usually be made in the cuts or pits from which the material has been taken. When quantities are determined by a measurement of embankments the engineer will estimate the actual quantity, and no allowance will be made for shrinkage." In determining the first instalments due on the contract the engineer measured the contents of the embankment, and not the contents of the excavation pits, which would have been considerably less. Subsequently the builder claimed that the measurement of embankments should be determined by measurement of the excavation pits. It was held that the embankment measurement should be determined by measurement of the embankment, and not of the excavation pit. *Galveston, etc., R. Co. v. Johnson*, 74 Tex. 256.

**2. Scanlan v. San Francisco, etc., R. Co.**, 128 Cal. 586.

**Estimate from Measurement by Third Person.** — In an action for removal of earth at a given rate per cubic yard, a witness testified that he had cross-sectioned the work before the grading was done, and that his measurements were correct. It was held that the testimony of another witness that he made estimates from such measurements, and that a certain number of cubic yards had been removed, was admissible. *Clarke v. Williams*, 29 Neb. 691.

**3. American Silica Sand Co. v. McGarry**, 68 Ill. App. 333.

**4. Estimates and Classifications by Architects,**



the contract provides for the payment of the compensation upon estimates of the architect or engineer by whom the amount of work performed is to be measured and classified, his estimate of the quantity and character of the work is, as a general rule, a condition precedent to a recovery of the compensation.<sup>1</sup> In order to render the measurement and classification by the architect or engineer a prerequisite to a recovery of the compensation, and binding on the parties, there must be very conclusive language in the contract to that effect. And where the contract merely requires such classification and measurement to determine the payments to be made as the work progresses, a certain portion of such estimate to be detained until the work is completed, this does not require or render binding an estimate by the architect or engineer, after the work is completed, of the entire amount of the work done.<sup>2</sup>

(2) *By Whom Made.* — Where the contract expressly designates the person by whom the measurement and classification are to be made, it is held, on the principle that delegated power cannot be delegated,<sup>3</sup> that the person so designated should himself measure the work;<sup>4</sup> but the character of the work may be such that the architect or engineer may employ assistants to enable him to make the measurement, and estimates based on measurements made by his assistants in the usual manner and revised by him have been sustained.<sup>5</sup> The construction of working contracts as regards the person by whom the work was to be classified and measured has called for the construction of particular terms and phrases,<sup>6</sup> such as "engineers in charge."<sup>7</sup> Where the contract designates by reference to official position, and not by name, the person by whom the classification and measurement of the work is to be made, this refers to the person holding the office at the time when the measurement and classification are to be made, rather than to the person holding the office at the time when the contract was entered into.<sup>8</sup>

(3) *Excuses for Failure to Secure Estimates and Classification.* — Where the architect or engineer fails or refuses to make the required estimate and

etc. — *Central Trust Co. v. Louisville, etc., R. Co.*, 70 Fed. Rep. 282; *Abercrombie v. Vandiver*, 126 Ala. 513; *Scanlan v. San Francisco, etc., R. Co.*, (Cal. 1898) 55 Pac. Rep. 694; *Denver, etc., R. Co. v. Riley*, 7 Colo. 494; *Cook County v. Harms*, 108 Ill. 151; *Fellows v. Snyder*, 50 Kan. 705; *Schuler v. Eckert*, 90 Mich. 165; *Walker v. Syms*, 118 Mich. 183; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Smith v. Molleson*, 74 Hun (N. Y.) 606; *Rusling v. Union Pipe, etc., Co.*, 5 N. Y. App. Div. 448; *Memphis, etc., R. Co. v. Wilcox*, 48 Pa. St. 161; *O'Reilly v. Kerns*, 52 Pa. St. 214; *Peters v. Quebec Harbour Com'rs*, 19 Can. Supm. Ct. 685.

1. *Provisions for Estimate and Classification by Architect, etc.* — *England.* — *Scott v. Liverpool*, 3 De G. & J. 334.

*United States.* — *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549.

*Canada.* — *Guilbault v. McGreevy*, 18 Can. Supm. Ct. 609; *Peters v. Quebec Harbour Com'rs*, 19 Can. Supm. Ct. 685; *Ross v. Reg.*, 25 Can. Supm. Ct. 564.

*California.* — *Cox v. McLaughlin*, 63 Cal. 196.

*Illinois.* — *Packard v. Van Schoick*, 58 Ill. 79; *Fowler v. Deakman*, 84 Ill. 130.

*Indiana.* — *New Telephone Co. v. Foley*, 28 Ind. App. 418.

*Iowa.* — *McNamara v. Harrison*, 81 Iowa 486.

*Kansas.* — *Thurber v. Ryan*, 12 Kan. 453.

*Maryland.* — *Wilson v. York, etc., Line R. Co.*, 11 Gill & J. (Md.) 58.

*Missouri.* — *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463; *Roy v. Boteler*, 40 Mo. App. 213.

*New York.* — *Byron v. Low*, 109 N. Y. 291; *Dwyer v. Board of Education*, 165 N. Y. 613, 59 N. E. Rep. 1122; *Everard v. New York*, 89 Hun (N. Y.) 425. Compare *Rusling v. Union Pipe, etc., Co.*, 5 N. Y. App. Div. 448.

*Oregon.* — *Meyers v. Pacific Constr. Co.*, 20 Oregon 603.

*Pennsylvania.* — *Howard v. Allegheny Valley R. Co.*, 69 Pa. St. 494; *Fulton v. Peters*, 137 Pa. St. 613.

2. *Fellows v. Snyder*, 50 Kan. 705.

3. *By Whom Made.* — *Wilson v. York, etc., Line R. Co.*, 11 Gill & J. (Md.) 58.

4. *Snell v. Brown*, 71 Ill. 133; *McNamara v. Harrison*, 81 Iowa 486; *Wilson v. York, etc., Line R. Co.*, 11 Gill & J. (Md.) 58; *Wangler v. Swift*, 90 N. Y. 38; *Reilly v. Lee*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 313; *Van Hook v. Burns*, 10 Wash. 22.

5. *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 124 Fed. Rep. 866, 60 C. C. A. 52; *Palmer v. Clark*, 106 Mass. 373; *Sweet v. Morrison*, 116 N. Y. 19; *Miller v. Sullivan*, 14 Tex. Civ. App. 112; *Herrick v. Belknap*, 27 Vt. 673.

6. *Smith v. Molleson*, 74 Hun (N. Y.) 606.

7. *Reilly v. Lee*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 313.

8. *North Lebanon R. Co. v. McGrann*, 33 Pa. St. 530.

classification, the contractor may recover his compensation and show by other evidence the character and quantity of the work.<sup>1</sup> So where without the fault of the contractor it becomes, by reason of some portentous event, impossible to secure the measurement and estimate of the architect or engineer, as where the work is accidentally destroyed by fire, a recovery may be had without it.<sup>2</sup> And where the builder wrongfully prevents the contractor from completing the work, the contractor may recover for the work done without the measurement and estimate required by the contract.<sup>3</sup>

(4) *Conclusiveness of Estimate, etc.*—Where the contract provides for measurement and classification of the work by the architect or engineer in charge, and for payment made upon his calculations and estimates, it is well settled, as a general rule, that such estimates are conclusive upon the parties,<sup>4</sup>

1. **Excuses for Failure to Secure.**—St. Louis, etc., R. Co. v. Kerr, 153 Ill. 182, affirming 48 Ill. App. 496; Kistler v. Indianapolis, etc., R. Co., 88 Ind. 460; Crawford v. Wolf, 29 Iowa 567; Starkey v. De Graff, 22 Minn. 431; Williams v. Chicago, etc., R. Co., 112 Mo. 463; McConologue v. Larkin, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 166; North Lebanon R. Co. v. McGrann, 33 Pa. St. 530; McClellan v. McLemore, (Tex. Civ. App. 1902) 70 S. W. Rep. 224.

2. Rawson v. Clark, 70 Ill. 656.

3. Bean v. Miller, 69 Mo. 384.

**Conclusiveness**—United States.—Kihlberg v. U. S., 97 U. S. 400; Martinsburg, etc., R. Co. v. March, 114 U. S. 549; Wood v. Chicago, etc., R. Co., 39 Fed. Rep. 52; Lewis v. Chicago, etc., R. Co., 49 Fed. Rep. 708; Summers v. Chicago, etc., R. Co., 49 Fed. Rep. 714; Ogden v. U. S., 60 Fed. Rep. 725, 13 U. S. App. 615; Mundy v. Louisville, etc., R. Co., 67 Fed. Rep. 633, 31 U. S. App. 606; Elliott v. Missouri, etc., R. Co., 74 Fed. Rep. 707, 40 U. S. App. 61; Breyman v. Ann Arbor R. Co., 85 Fed. Rep. 579; U. S. v. Venable Constr. Co., 124 Fed. Rep. 267; Case's Case, 11 Ct. Cl. 712; Henegan's Case, 17 Ct. Cl. 273; Carothers v. Chesapeake, etc., Canal Co., 4 Cranch (C. C.) 698, 5 Fed. Cas. No. 2,425. Compare Central Trust Co. v. Louisville, etc., R. Co., 70 Fed. Rep. 282.

Arkansas.—Hot Springs R. Co. v. Maher, 48 Ark. 522.

California.—Scanlan v. San Francisco, etc., R. Co., (Cal. 1898) 55 Pac. Rep. 694.

Georgia.—Green v. Jackson, 66 Ga. 250.

Idaho.—Thompson v. Bradbury, 5 Idaho 760.

Illinois.—Illinois, etc., Canal v. Lynch, 10 Ill. 521; McAvoy v. Long, 13 Ill. 147; Alton, etc., R. Co. v. Northcott, 15 Ill. 49; Central Military Tract R. Co. v. Spurck, 24 Ill. 587; Lincoln v. Schwartz, 70 Ill. 134; Snell v. Brown, 71 Ill. 133; Scoville v. Miller, 40 Ill. App. 237. Compare Harley v. Sanitary Dist., 107 Ill. App. 546.

Indiana.—Wabash, etc., Canal v. Cokely, 5 Ind. 164. Compare Louisville, etc., R. Co. v. Donnegan, 111 Ind. 179; McCoy v. Able, 131 Ind. 417; Kistler v. Indianapolis, etc., R. Co., 88 Ind. 460.

Iowa.—Ross v. McArthur, 85 Iowa 203; Edwards v. Louisa County, 89 Iowa 499.

Kansas.—Thurber v. Ryan, 12 Kan. 453; Board of Education v. Shaw, 15 Kan. 33.

Kentucky.—Henderson Bridge Co. v. O'Connor, 88 Ky. 303; Covington v. Limerick, (Ky. 1897) 40 S. W. Rep. 254.

Louisiana.—O'Donnell v. Forrest, 44 La. Ann. 845.

Maine.—Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Robinson v. Fiske, 25 Me. 401.

Maryland.—Rodemer v. Gonder, 9 Gill (Md.) 288; Patterson v. Crowther, 70 Md. 124.

Massachusetts.—Palmer v. Clark, 106 Mass. 373.

Minnesota.—Schwerin v. De Graff, 21 Minn. 354; St. Paul, etc., R. Co. v. Bradbury, 42 Minn. 222; Langdon v. Northfield, 42 Minn. 464.

Missouri.—Williams v. Chicago, etc., R. Co., 112 Mo. 463, 153 Mo. 487; St. Joseph Iron Co. v. Halverson, 48 Mo. App. 383; Mackler v. Mississippi River, etc., R. Co., 62 Mo. App. 677.

Nebraska.—Mercer v. Harris, 4 Neb. 77.

New York.—Dorwin v. Westbrook, 71 Hun (N. Y.) 405, 86 Hun (N. Y.) 363; McMahon v. New York, etc., R. Co., 20 N. Y. 463; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376; O'Brien v. New York, 139 N. Y. 543, affirming 65 Hun (N. Y.) 112; Lawrence v. New York, 162 N. Y. 617, 57 N. E. Rep. 1115; Byron v. Bell, 16 Daly (N. Y.) 198; Pucci v. Barney, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 84; Lawrence v. New York, 29 N. Y. App. Div. 298; Burns v. New York, 69 N. Y. App. Div. 214; Zimmerman v. German Evangelical Lutheran Immanuel Church, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 49. Compare Sherman v. New York, 1 N. Y. 316.

Oregon.—Northrop v. Portland, 3 Oregon 258.

Pennsylvania.—Yutzky v. Railroad Co., 1 Walk. (Pa.) 463; Crumlish v. Wilmington, etc., R. Co., 5 Del. Ch. 270; Com. v. Clarkson, 3 Pa. St. 277; Howard v. Allegheny Valley R. Co., 69 Pa. St. 489; Drhew v. Altoona, 121 Pa. St. 401; Gonder v. Berlin Branch R. Co., 171 Pa. St. 492. Compare Memphis, etc., R. Co. v. Wilcox, 48 Pa. St. 161.

Texas.—Gulf, etc., R. Co. v. Ricker, (Tex. 1891) 17 S. W. Rep. 382; Kilgore v. North Texas Baptist Educational Soc., 89 Tex. 465.

Vermont.—Herrick v. Belknap, 27 Vt. 673; Barker v. Belknap, 27 Vt. 700.

Virginia.—Kidwell v. Baltimore, etc., R. Co., 11 Gratt. (Va.) 676; Baltimore, etc., R.

both the builder<sup>1</sup> and the contractor.<sup>2</sup> Where the architect or engineer, acting under an erroneous construction of the contract, without authority to construe that instrument, excludes work which should have been included in his estimate or includes work which should have been excluded, the error will be corrected.<sup>3</sup> Thus, where the contract fixes certain classifications of work, and the architect or engineer in making his classifications ignores such provisions in the contract, his classifications will not be binding.<sup>4</sup> So, where the contract expressly provides the manner in which the amount of work shall be measured and the architect or engineer adopts other rules of measurement, his estimate is not binding;<sup>5</sup> and the same is true where the contract fixes the price for particular classes of work and the estimate of the engineer is based on a different measure of compensation.<sup>6</sup> If the contract makes the measurement and estimate of the architect or engineer conclusive upon the contractor only, the builder is not precluded thereby from showing the actual amount of work done.<sup>7</sup> Where the architect or engineer, in making his estimate, allows to the builder a deduction from the amount of work done, consisting of a claim upon which he has no authority to pass or which is in violation of the terms of the contract, the estimate will be corrected by the court by adding the amount of such deduction.<sup>8</sup> Where both the contractor and his subcontractor were to be paid according to the measurement and classification of the builder's engineer, and the contractor, after having paid his subcontractor according to the engineer's estimate, assails the estimate in a suit against the builder and recovers additional compensation on the ground that the work was underestimated by the engineer, the subcontractor is entitled to recover from the contractor additional compensation on the basis of the contractor's recovery against the builder.<sup>9</sup> Where the estimate of the engineer or architect based on his classification and measurement of the work is made conclusive between the parties, this does not, when no estimate has been made, give a conclusive effect to the architect's or engineer's testimony given in an action by the contractor

*Co. v. Polly*, 14 Gratt. (Va.) 447; *Baltimore, etc., R. Co. v. Lafferty*, 14 Gratt. (Va.) 478; *James River, etc., Co. v. Adams*, 17 Gratt. (Va.) 441, note.

*Canada*.—*Gilbert Blasting, etc., Co. v. Rex*, 7 Can. Exch. 221; *Guilbault v. McGreevy*, 18 Can. Sup. Ct. 609; *Murray v. Reg.* 26 Can. Sup. Ct. 203.

1. *Chicago, etc., R. Co. v. Price*, 138 U. S. 185; *Elliott v. Missouri, etc., R. Co.*, 40 U. S. App. 61, 74 Fed. Rep. 707; *Pucci v. Barney*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 84; *Malone v. Philadelphia*, 12 Phila. (Pa.) 270, 34 Leg. Int. (Pa.) 230; *Ricker v. Collins*, 81 Tex. 662.

2. *England*.—*De Worms v. Mellier*, L. R. 16 Eq. 554.

*Canada*.—*Guilbault v. McGreevy*, 18 Can. Sup. Ct. 609; *Peters v. Quebec Harbour Com'rs*, 19 Can. Sup. Ct. 685; *Reg. v. Cimon*, 23 Can. Sup. Ct. 62.

*United States*.—*Newman v. U. S.*, 81 Fed. Rep. 122.

*Illinois*.—*Snell v. Brown*, 71 Ill. 133; *Scoville v. Miller*, 40 Ill. App. 237.

*Iowa*.—*Ross v. McArthur*, 85 Iowa 203; *Edwards v. Louisa County*, 89 Iowa 499.

*Louisiana*.—*O'Donnell v. Forrest*, 44 La. Ann. 845.

*Massachusetts*.—*Palmer v. Clark*, 106 Mass. 373.

*Missouri*.—*Williams v. Chicago, etc., R.*

*Co.*, 112 Mo. 463; *Clark v. Diffenderfer*, 31 Mo. App. 232.

*New York*.—*Phelan v. Albany, etc., R. Co.*, 1 Lans. (N. Y.) 258.

*Pennsylvania*.—*O'Reilly v. Kerns*, 52 Pa. St. 214.

*Texas*.—*Galveston, etc., R. Co. v. Henry*, 65 Tex. 685.

*Wisconsin*.—*Baasen v. Baehr*, 7 Wis. 516.

3. **Misconstruction of Contract**.—*Collins v. U. S.*, 34 Ct. Cl. 294; *O'Brien v. New York*, 139 N. Y. 543; *Burke v. New York*, 7 N. Y. App. Div. 128; *State v. Cuyahoga County*, 12 Ohio Cir. Dec. 328; *Galveston, etc., R. Co. v. Henry*, 65 Tex. 685. See also *Starkey v. De Graff*, 22 Minn. 431.

4. *Lewis v. Chicago, etc., R. Co.*, 49 Fed. Rep. 708; *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463. Compare *Ross v. McArthur*, 85 Iowa 203.

5. *McAvoy v. Long*, 13 Ill. 147; *Fisher v. South Williamsport*, 1 Pa. Super. Ct. 386; *Galveston, etc., R. Co. v. Henry*, 65 Tex. 685.

6. *Starkey v. De Graff*, 22 Minn. 431.

7. *O'Brien v. New York*, 139 N. Y. 543. See also *Gonder v. Berlin Branch R. Co.*, 171 Pa. St. 492.

8. *Peters v. Quebec Harbour Com'rs*, 19 Can. Sup. Ct. 685.

9. *Cummings v. Bradford*, (Ky. 1893) 22 S. W. Rep. 548.



for compensation.<sup>1</sup> The classification and measurement of the work by the architect or engineer which is made binding upon the parties is also binding upon the creditors of the contractor.<sup>2</sup>

**Percentage Classifications.** — Where an excavation contract fixes the compensation at a certain price for the excavation of earth, another price for loose rock, and another for solid rock, etc., and provides for the classification of the work by the architect or engineer, it is not essential that all material excavated shall be classified entirely under one or the other of the heads specified, and general classifications at a certain percentage of a particular class have been sustained as proper.<sup>3</sup>

**Periodical or Running Estimates.** — Where the contract calls for periodical or running estimates as the work progresses and payments based thereon, and for a final estimate after the work is completed, such periodical or running estimates are not, as a rule, conclusive upon either party.<sup>4</sup> But where the contractor has sublet the work or a part thereof and pays the subcontractor on the basis of the periodical estimates, in case there were overestimations whereby the contractor made overpayments to the subcontractor, the estimations will be binding upon the builder, and cannot be corrected to the detriment of the contractor. This is merely an application of the familiar rule that where one of two innocent persons must suffer for the acts of a third, the loss shall fall upon the one who placed it in the power of the third to make the mistake.<sup>5</sup> So, where the contract does not specify when the classification of the work shall be made, it may be made before the work is completed, and a classification during the progress of the work will be deemed binding upon the builder and cannot afterwards be changed to the injury of the contractor.<sup>6</sup> A classification by the architect or engineer made before the work is completed may be abandoned with the consent of the builder and contractor and a new classification made.<sup>7</sup>

**Fraud.** — It is the universally recognized rule that the estimate and classification by the architect or engineer may be assailed by either party for fraud,<sup>8</sup>

1. *Fitzgerald v. Beers*, 31 Mo. App. 356; *Boteler v. Roy*, 40 Mo. App. 234.

2. *St. Joseph Iron Co. v. Halverson*, 48 Mo. App. 383.

3. *Lewis v. Chicago, etc.*, R. Co., 49 Fed. Rep. 708; *Ross v. McArthur*, 85 Iowa 203; *Williams v. Chicago, etc.*, R. Co., 153 Mo. 487.

4. **Running Estimates.** — *Tharsis Sulphur, etc., Co. v. McElroy*, 3 App. Cas. 1040; *Cincinnati Southern R. Co. v. Cummings*, 6 Ky. L. Rep. 441; *Gonder v. Berlin Branch R. Co.*, 171 Pa. St. 492. *Compare Henderson Bridge Co. v. O'Connor*, 88 Ky. 303; *Rodemer v. Gonder*, 9 Gill (Md.) 288.

5. *Price v. Chicago, etc.*, R. Co., 38 Fed. Rep. 304.

6. *Ricker v. Collins*, 81 Tex. 662. See also *O'Donnell v. Forrest*, 44 La. Ann. 845. *Compare Dorwin v. Westbrook*, 71 Hun (N. Y.) 405.

7. *Ricker v. Collins*, 81 Tex. 662.

8. **Fraud** — *England*. — *Ormes v. Beadel*, 2 Giff. 166; *Waring v. Manchester, etc.*, R. Co., 7 Hare 482.

*United States*. — *Martinsburg, etc.*, R. Co. v. March, 114 U. S. 549; *Louisville, etc.*, R. Co. v. Meyer, 120 U. S. (L. Ed.) 689; *Wood v. Chicago, etc.*, R. Co., 39 Fed. Rep. 52; *Lewis v. Chicago, etc.*, R. Co., 49 Fed. Rep. 708; *Elliott v. Missouri, etc.*, R. Co., (C. C. A.) 74 Fed. Rep. 707; *O'Brien v. Champlain Constr. Co.*, 107 Fed. Rep. 338.

*Idaho*. — *Spaulding v. Coeur D'Alene R., etc., Co.*, 5 Idaho 528.

*Illinois*. — *Central Military Tract R. Co. v. Spurck*, 24 Ill. 587; *St. Louis, etc.*, R. Co. v. Kerr, 48 Ill. App. 496.

*Indiana*. — *Baltimore, etc.*, R. Co. v. Scholes, 14 Ind. App. 524.

*Iowa*. — *Crawford v. Wolf*, 29 Iowa 567; *Edwards v. Louisa County*, 89 Iowa 499.

*Kentucky*. — *Coyne v. Cosgrove*, 16 Ky. L. Rep. 397; *Covington v. Limerick*, (Ky. 1897) 40 S. W. Rep. 254.

*Michigan*. — *Bush v. Brooks*, 70 Mich. 446.

*Missouri*. — *Williams v. Chicago, etc.*, R. Co., 112 Mo. 463, 153 Mo. 487; *Mackler v. Mississippi River, etc.*, R. Co., 62 Mo App. 677.

*Nebraska*. — *Smith v. White*, 5 Neb. 405; *Anderson v. Imhoff*, 34 Neb. 335.

*New York*. — *Dorwin v. Westbrook*, 86 Hun (N. Y.) 363; *Byron v. Bell*, 16 Daly (N. Y.) 198.

*Oregon*. — *Meyers v. Pacific Constr. Co.*, 20 Oregon 603.

*Pennsylvania*. — *Gonder v. Berlin Branch R. Co.*, 171 Pa. St. 492.

*Texas*. — *Kilgore v. North West Texas Baptist Educational Soc.*, 89 Tex. 465. And see *Gulf, etc.*, R. Co. v. Ricker, (Tex. 1891) 17 S. W. Rep. 382.

*Virginia*. — *Baltimore, etc.*, R. Co. v. Polly, 14 Gratt. (Va.) 447; *Norfolk, etc.*, R. Co. v. Mills, 91 Va. 613.

and this may be done in a court of law as well as in a court of equity.<sup>1</sup> The burden of proving fraud upon the part of the architect or engineer is, of course, upon the party attacking his measurement and classification, and the evidence must be clear and convincing and point with reasonable certainty to fraud or collusion;<sup>2</sup> and the general rules of evidence apply with regard to the admissibility of evidence to prove fraud.<sup>3</sup> The fact that the architect or engineer by whom the estimate and classification of the work is to be made is a stockholder of the builder does not prevent his estimate and classification from being binding upon the contractor on the ground that he is thus made a judge in his own case;<sup>4</sup> nor does the fact that the architect or engineer is an officer of the corporation builder affect the conclusiveness of his estimate or classification.<sup>5</sup> So, it has been held that the fact that the architect or engineer has become the lessee of the work for a rental based upon the cost of the work would not prevent his measurement and estimate from being binding upon the contractor.<sup>6</sup> But where the architect or engineer had, without the knowledge of the contractor, bound himself to the builder to keep the cost of the work below a certain amount, it was held that his measurement and estimate would not be binding upon the contractor.<sup>7</sup>

**Mistake.** — Where the architect's or engineer's estimate or classification is the result of gross errors or mistakes, it will not be considered binding, but may be corrected;<sup>8</sup> but the mere fact that there are slight errors in the architect's or engineer's estimate based on his measurement and classification of the work does not deprive it of its conclusive effect.<sup>9</sup>

(5) *Notice of Measurement and Classification.* — The architect or engineer is not required to give notice to the contractor of the time when he intends to make the measurement.<sup>10</sup>

**2. When Payable** — *a. IN GENERAL.* — The time when the compensation shall be made may be, of course, and generally is, regulated by special provisions in the contract,<sup>11</sup> and where the contract provides for payment at a

1. Louisville, etc., R. Co. v. Meyer, 120 U. S. (L. Ed.) 689; Williams v. Chicago, etc., R. Co., 112 Mo. 463; Baltimore, etc., R. Co. v. Polly, 14 Gratt. (Va.) 447. Compare Wood v. Chicago, etc., R. Co., 39 Fed. Rep. 52.

2. Snell v. Brown, 71 Ill. 133; J. G. Wagner Co. v. Cawker, 112 Wis. 532.

3. Dorwin v. Westbrook, 86 Hun (N. Y.) 363.

4. Ranger v. Great Western R. Co., 5 H. L. Cas. 88; Chicago Athletic Assoc. v. Eddy Electric Mfg. Co., 77 Ill. App. 204; Williams v. Chicago, etc., R. Co., 112 Mo. 463.

5. Palmer v. Clark, 106 Mass. 373.

6. Hill v. South Staffordshire R. Co., 11 Jur. N. S. 192.

7. Long v. Pierce County, 22 Wash. 330. See also Kimberley v. Dick, L. R. 13 Eq. 1, 41 L. J. Ch. 38. Compare Kemp v. Rose, 1 Giff. 258.

8. **Mistake.** — Lewis v. Chicago, etc., R. Co., 49 Fed. Rep. 708; Baltimore, etc., R. Co. v. Scholes, 14 Ind. App. 524; Edwards v. Louisa County, 89 Iowa 499; Coyne v. Cosgrove, 16 Ky. L. Rep. 397; Williams v. Chicago, etc., R. Co., 112 Mo. 463; Mackler v. Mississippi River, etc., R. Co., 62 Mo. App. 677; Norfolk, etc., R. Co. v. Mills, 91 Va. 613.

9. Snell v. Brown, 71 Ill. 133; Gilmore v. Courtney, 158 Ill. 432.

10. **Notice of Measurement and Classification.** — Wilson v. York, etc., Linc R. Co., 11 Gill & J. (Md.) 58. Compare Packard v. Van Schoick, 58 Ill. 79; McMahon v. New York, etc., R. Co., 20 N. Y. 463.

**11. Provisions as to Time of Payment** — *United States.* — Gilbert's Case, 4 Ct. Cl. 290.

*Alabama.* — Crass v. Scruggs, 115 Ala. 258.

*Arizona.* — Simms v. Hampson, (Ariz. 1887) 12 Pac. Rep. 686; O'Connor v. Adams, (Ariz. 1899) 59 Pac. Rep. 105.

*Colorado.* — Orman v. Ryan, 25 Colo. 383.

*Massachusetts.* — Russell v. Barry, 115 Mass. 300.

*Missouri.* — Peery v. Cooper, 8 Mo. 205.

*New York.* — Bristol v. Tracy, 21 Barb. (N. Y.) 236; Beinhauer v. Gleason, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 227; Sullivan v. Eusner, 163 N. Y. 576, 57 N. E. Rep. 1125.

*Oregon.* — Thompson v. Coffman, 15 Oregon 631; Ball v. Doud, 26 Oregon 14.

*Pennsylvania.* — Chambers v. Jaynes, 4 Pa. St. 39.

*Tennessee.* — Pearl v. Nashville, Meigs (Tenn.) 597.

*Wisconsin.* — Bannister v. Patty, 35 Wis. 215; Cook v. McCabe, 53 Wis. 250, 40 Am. Rep. 765.

Where A built a boat for B, for which the latter was to pay a stipulated price so soon as there was sufficient water in the Grand river to let the boat out, it was held that A could not recover the price until the happening of the contingency, although B had in the meantime sold the boat. Peery v. Cooper, 8 Mo. 205.

Where the compensation is payable in instalments after the completion of the work, the failure to pay one instalment when due

specified time without regard to the completion of the work, the compensation then becomes payable though the work has not been completed.<sup>1</sup> The contract may provide for the performance or happening of special conditions precedent before the contractor shall be entitled, even after the completion of the work, to payment of the compensation, and such conditions precedent must be complied with.<sup>2</sup> Thus, the builder may require, and working contracts frequently do require, that the contractor shall furnish satisfactory evidence that the work or structure is free from liability to mechanics' liens in favor of persons furnishing materials or performing labor for the contractor.<sup>3</sup> So the contract may provide that the compensation shall not be payable until the work has been tested in a certain manner to show that it is performed in accordance with the contract, and until such test is made the compensation is not recoverable;<sup>4</sup> but where the compensation is payable after the work is tested and a certain time within which to make the test is given to the builder, the contractor may, after the expiration of such time, maintain an action for the compensation though the work has not been tested.<sup>5</sup> Provisions in subcontracts that the subcontractor shall not be entitled to payment until the contractor has secured his compensation from the builder are valid and enforceable;<sup>6</sup> but if the contractor has by his own fault lost the right to payment from the builder, the subcontractor will be entitled to his compensation,<sup>7</sup> and, of course, in case of subcontracts, unless the contract clearly and expressly so provides the right of the subcontractor to payment is not dependent upon the receipt of payment by the contractor.<sup>8</sup> Working contracts frequently expressly provide that the compensation shall be payable only upon the completion of the work;<sup>9</sup> and where no time is specified for

does not entitle the contractor to subsequent instalments before the time of their maturity as stipulated in the contract. *Flinn v. Mowry*, 131 Cal. 481.

**Payment on Sale of Vessel.**—One who agrees to pay for work done on a vessel when it shall be sold is entitled to credit only for a reasonable time for selling, and after expiration of this he may be held liable although no sale has been made. *Williston v. Perkins*, 51 Cal. 554; *Bryant v. Saling*, 4 Mo. 522.

**To Pay Promptly.**—*Thompson v. Coffman*, 15 Oregon 631.

1. *Drake v. Goree*, 22 Ala. 409.

2. *Tyner v. Scofield*, 11 Ind. 550; *Clark v. White*, 59 Ind. 435.

3. *Griffith v. Happersberger*, 86 Cal. 605; *Downey v. O'Donnell*, 92 Ill. 559; *Independent School Dist. v. Mardis*, 106 Iowa 295; *Leverone v. Arancio*, 179 Mass. 439; *Franklin v. Schultz*, 23 Mont. 165; *Turner v. Wells*, 67 N. J. L. 572; *Titus v. Gunn*, 69 N. J. L. 410; *Fogg v. Suburban Rapid-Transit Co.*, 90 Hun (N. Y.) 274; *Vanderhoof v. Snell*, 42 Oregon 578; *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631; *Bradford v. Whitcomb*, 11 Tex. Civ. App. 221; *Mills v. Norfolk, etc., R. Co.*, 90 Va. 523. See also *O'Connor v. Smith*, 84 Tex. 232; *Leavel v. Porter*, 52 Mo. App. 632.

**Expiration of Time for Filing Lien.**—*Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132; *Mills v. Norfolk, etc., R. Co.*, 90 Va. 523.

4. *Barnes v. Rawson*, 111 Iowa 426.

5. *International Bow, etc., Dock Co. v. U. S.*, 60 Fed. Rep. 523.

6. *Orman v. Ryan*, 25 Colo. 383; *Smith v. Ross*, 51 Mich. 116; *Barsby v. Warren*, 47 Neb. 275.

7. *Ford v. McGarvey*, 6 N. Mex. 222.

8. *Blair v. Corby*, 29 Mo. 480.

A subcontract for the construction of a railroad provided for payments "to be made on the 15th of each month, or as soon thereafter as said railway company pays or causes to be paid" the contractor. It was held that the payment to the subcontractor was not conditional on payment by the railway company to the contractor, but payment should be made on the 15th of each month, or within a reasonable time thereafter for the railway to make payment or cause payment to be made to the contractor. *Crass v. Scruggs*, 115 Ala. 258. See also *Simms v. Hampson*, (Ariz. 1887) 12 Pac. Rep. 686.

**9. Completion of Work—Arkansas.**—*Manuel v. Campbell*, 3 Ark. 324.

*Florida.*—*Finegan v. L'Engle*, 8 Fla. 413.

*Georgia.*—*Reed v. Gallaher*, 53 Ga. 456.

*Kentucky.*—*Hutcheson v. Creel*, 2 Litt. (Ky.) 348; *Conn v. Lewis*, 5 Litt. (Ky.) 66.

*Massachusetts.*—*Lord v. Belknap*, 1 Cush. (Mass.) 279.

*Michigan.*—*Sarmiento v. The Catherine C.*, 110 Mich. 120.

*New York.*—*Lewis v. Yagel*, 77 Hun (N. Y.) 337; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203; *Jenks v. Robertson*, 2 Thomp. & C. (N. Y.) 255; *Rosenweig v. Von Bauer*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 714; *Smith v. Clark*, (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 165.

*South Dakota.*—*Davis v. Jeffris*, 5 S. Dak. 352.

*Vermont.*—*Kettle v. Harvey*, 21 Vt. 301.

*Wisconsin.*—*Jackson v. Cleveland*, 19 Wis. 400; *Woodward v. Smith*, 109 Wis. 607.



the payment of the compensation, it is universally recognized that the completion of the work is a prerequisite to the right to payment.<sup>1</sup> Still, though there is no stipulation in the contract as to the time of payment, the right of the contractor to payment before the completion of the work may be inferred from other evidence, such as the action of the parties to the contract and the usage or custom of the builder with regard to similar contracts.<sup>2</sup> The fact that a working contract contains a guaranty of the work for a specified time does not postpone the contractor's right to compensation until the expiration of the time for which the guaranty is to run, but the compensation is payable when the work is completed.<sup>3</sup> So, under a contract to dig a canal and to keep it open for a certain time, the compensation was held to be payable when the canal was dug.<sup>4</sup>

**Divisible Contract.** — It has been held that where the contract calls for the construction of several distinct works for a certain compensation for each, the contract is severable as regards the separate works or structures, and the compensation for each becomes payable upon its completion; the contractor is not required to complete all of the works or structures before he becomes entitled to any compensation, though the contract did not fix any time for payment of the compensation.<sup>5</sup>

**Statutory Requirements.** — In some jurisdictions, for the purpose of protecting builders from mechanics' liens, the statutes require as a condition precedent to an action for the recovery of compensation by a building contractor that he shall furnish the builder with a sworn statement as to his subcontractors, amounts due for labor, material, etc.<sup>6</sup>

**b. INSTALMENTS AS WORK PROGRESSES.** — Because of the considerable sums of money which are required to carry out extensive working contracts, a provision is frequently inserted in such contracts for the payment from time to time of a certain proportion of the compensation as the work progresses,<sup>7</sup>

**1. No Time Fixed for Payment** — *England.* — Richardson *v.* Mahon, L. R. 4 Ir. 486; Munro *v.* Butt, 8 El. & Bl. 738, 92 E. C. L. 738; Mackay *v.* Dick, 6 App. Cas. 251.

*United States.* — Boody *v.* Rutland, etc., R. Co., 3 Blatchf. (U. S.) 25; Dermott *v.* Jones, 23 How. (U. S.) 220; McMahon *v.* The Primera, 16 Fed. Cas. No. 8,900.

*Alabama.* — Kirkland *v.* Oates, 25 Ala. 465.

*Colorado.* — Walling *v.* Warren, 2 Colo. 434.

*Connecticut.* — Coburn *v.* Hartford, 38 Conn. 290.

*Kentucky.* — Shanks *v.* Griffin, 14 B. Mon. (Ky.) 124.

*New Hampshire.* — Thompson *v.* Phelan, 22 N. H. 339.

*New York.* — Cronin *v.* Tebo, 71 Hun (N. Y.) 59; Smith *v.* Sheltering Arms, 89 Hun (N. Y.) 70; Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332; Duffield *v.* Johnston, 96 N. Y. 369, affirming 10 Daly (N. Y.) 360.

*North Carolina.* — Brewer *v.* Tysor, 3 Jones L. (48 N. Car.) 180.

*Ohio.* — Mehurin *v.* Stone, 37 Ohio St. 49.

*Pennsylvania.* — Becker *v.* Philadelphia, (Pa. 1889) 16 Atl. Rep. 625.

Under a contract to do the brickwork for a house, payment to be made at a certain rate per thousand brick laid, compensation is not due until the work is completed. Shanks *v.* Griffin, 14 B. Mon. (Ky.) 124.

**2.** Thus, where there is a contract to build bridges for a railroad company at a certain price per foot, to be paid partly in stock of

the company, and the contract does not stipulate as to the time of payment, and where it appears that it has been the custom of the company to make monthly payments to the contractor and its other contractors for work done on its road, upon estimates made by the engineer at the end of each month, such custom will be considered the rule of payment under the contract, established by mutual consent, and binding upon the parties. Boody *v.* Rutland, etc., R. Co., 3 Blatchf. (U. S.) 25.

**3.** Gilliam *v.* Brown, 116 Cal. 454.

**4.** Barksdale *v.* Toomer, 2 Bailey L. (S. Car.) 180.

**5.** Boody *v.* Rutland, etc., R. Co., 3 Blatchf. (U. S.) 25; Scofield *v.* Grove, 63 Vt. 283.

**6.** Gilmore *v.* Courtney, 158 Ill. 432; Barnard *v.* McLeod, 114 Mich. 73; Walker *v.* Syms, 118 Mich. 183; Bollin *v.* Hooper, 127 Mich. 287, 8 Detroit Leg. N. 306.

**7. Instalments as Work Progresses** — *United States.* — Key West *v.* Baer, 66 Fed. Rep. 440, 30 U. S. App. 140.

*Illinois.* — Siegel *v.* Eaton, etc., Co., 165 Ill. 550; Keeler *v.* Clifford, 62 Ill. App. 64, affirmed 165 Ill. 544.

*Iowa.* — McNamara *v.* Harrison, 81 Iowa 486.

*Kansas.* — Thurber *v.* Ryan, 12 Kan. 453.

*Kentucky.* — Ford *v.* Bronaugh, 11 B. Mon. (Ky.) 14.

*Maine.* — Ricker *v.* Fairbanks, 40 Me. 43.

*Massachusetts.* — Lord *v.* Belknap, 1 Cush. (Mass.) 279; Homer *v.* Shaw, 177 Mass. 1.

*Michigan.* — Hanley *v.* Walker, 79 Mich. 607.

and in such cases the usual provision is for estimates, from time to time, by the architect or engineer in charge of the work, of the amount and value of the work done and the payment of a certain percentage of such estimate. Where the instalment payments are to be made upon the estimate and certificate of the architect or engineer, no payment can, as a general rule, be claimed without the required estimate and certificate;<sup>1</sup> but as the requirement is for the benefit of the builder, he may waive the production of the estimate and certificate,<sup>2</sup> and if the architect or engineer wrongfully or fraudulently refuses to estimate the amount and value of the work and issue his certificate therefor, the contractor is entitled to payment without its production.<sup>3</sup> As a general rule, the estimate and certificate of the architect or engineer required as a condition to the payment of instalments of the agreed compensation is conclusive between the parties as to the amount and value of the work performed.<sup>4</sup> In estimating the amount and value of the work performed, regard must be had to the value of the work remaining to be performed.<sup>5</sup>

*c. DEMAND.*—Where the time of payment is stipulated in the contract, it is the duty of the builder to make payment when due, and the contractor may sue therefor without making a demand for payment.<sup>6</sup>

**3. Medium of Payment.**—If the contract is silent as to the medium of pay-

*Missouri.*—*Leavel v. Porter*, 52 Mo. App. 632.

*Nebraska.*—*School Dist. v. Thomas*, 51 Neb. 740.

*New York.*—*Wright v. Reusens*, 133 N. Y. 298, affirming 60 Hun (N. Y.) 585, 15 N. Y. Supp. 590; *Smith v. Molleson*, 74 Hun (N. Y.) 606; *Delafield v. Westfield*, 77 Hun (N. Y.) 124; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332; *Mullin v. Langley*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 789; *Weber v. Farrell*, (Supm. Ct. App. T.) 84 N. Y. Supp. 272.

*Pennsylvania.*—*Crawford v. McKinney*, 165 Pa. St. 605.

*Texas.*—*Perkins v. Locke*, (Tex. Civ. App. 1894) 27 S. W. Rep. 783; *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384.

*West Virginia.*—*McConnell v. Hewes*, 50 W. Va. 33.

Where the compensation is made payable in instalments as the work progresses, separate suits may be maintained for each instalment as it falls due. *Keeler v. Clifford*, 62 Ill. App. 64, affirmed 165 Ill. 544.

**"Materials Furnished on the Ground."**—Where a contract with a city for street paving provided for monthly payments on estimates made by the engineer of "material furnished on the ground" and work done, it was held that the term "material furnished on the ground" was meant to include all such suitable material in reasonable quantities for doing the work as the contractor had procured and placed in the city at a suitable point to be used as needed. *Key West v. Baer*, 66 Fed. Rep. 440, 30 U. S. App. 140.

**Work "on" Building.**—Where a contract for cutting, setting, and cleaning the granite work of a building provided that payment for the work was to be made in monthly instalments not to exceed eighty per cent. of the estimated value of the work performed "on the building," it was held that the work "on" meant in reference or relative to the building, and, therefore, the estimates should include work in preparing the stone ready for setting. *Smith*

*v. Molleson*, 74 Hun (N. Y.) 606. Compare *McConnell v. Hewes*, 50 W. Va. 33.

**"Completed Work."**—*Delafield v. Westfield*, 77 Hun (N. Y.) 124.

**1. Estimates and Certificates of Architect, etc.**—*Braun v. Winans*, 37 Ill. App. 248; *Martin v. Leggett*, 4 E. D. Smith (N. Y.) 255; *Excelsior Terra Cotta Co. v. Harde*, 90 N. Y. App. Div. 4.

**2. Blethen v. Blake, 44 Cal. 117; *Barton v. Hermann*, (C. Pl. Gen. T.) 11 Abb. Fr. N. S. (N. Y.) 378.**

**3. Wright v. Reusens, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 590, affirmed 133 N. Y. 298.**

**4. Howard County v. Baker, 119 Mo. 397. Compare *Board of Education v. Richfield Springs First Nat. Bank*, 70 Hun (N. Y.) 520.**

**5. Kelley v. Syracuse, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 306; *Hawkins v. Burrell*, 69 N. Y. App. Div. 462; *Reynolds v. Welsh*, (C. Pl. Spec. T.) 8 N. Y. St. Rep. 404; *Faunce v. Burke*, 16 Pa. St. 469, 55 Am. Dec. 519. Compare *Howard County v. Baker*, 119 Mo. 397.**

Thus, under a contract providing that the contract price shall be paid "in payments as the work progresses," and that on all payments fifteen per cent. of the amount due shall be retained to insure the faithful performance of the agreement, "and that no payment shall be made except on the written certificate of the architect stating that he considers the payment properly due," the value of the work performed is not the sole guide of the architect in determining the amount due, but he is obliged to consider the work as an entirety, and where it is apparent that the expense of completing the work from that point would be substantially the full amount of the unpaid contract price, he is justified in refusing a certificate. *Kelley v. Syracuse*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 306.

**6. Demand.**—*Boody v. Rutland, etc.*, R. Co., 3 Blatchf. (U. S.) 25; *Sims v. Petaluma Gas-Light Co.*, 131 Cal. 656; *Morford v. Mastin*, 6 T. B. Mon. (Ky.) 609; *Davis, etc., Bldg., etc., Co. v. Cagle*, (Tenn. Ch. 1899) 53 S. W. Rep. 240. See also *Cincinnati Southern R. Co. v. Cummings*, 6 Ky. L. Rep. 441; *South*

ment, a payment in legal tender is implied,<sup>1</sup> but of course the parties may stipulate for payment in any medium they desire,<sup>2</sup> and may confer on one party an option as to the medium of payment.<sup>3</sup> In contracts for the construction of works for corporations, it is frequently provided that payment of the compensation shall or may be made in the bonds<sup>4</sup> or stock of the corporation.<sup>5</sup> It has been held that under an option to pay in its stock a corporation, the winding up of which has been ordered by the court, cannot enforce the acceptance of such payment;<sup>6</sup> but the fact that the corporation has mortgaged its property for the payment of other debts does not authorize the contractor to refuse to accept payment in the stock of the corporation.<sup>7</sup> If the builder does not make payment when due in the medium other than legal tender which he has the right under the contract to employ for that purpose, the contractor may then demand payment in legal tender.<sup>8</sup>

*End Imp. Co. v. Harden*, (N. J. 1902) 52 Atl. Rep. 1127.

Under a contract to pay for building a house when completed it is not necessary for the contractor to give notice of the completion of the house nor to demand his pay. The builder must take notice of the event and show himself ready at the time and place to make payment. *Morford v. Mastin*, 6 T. B. Mon. (Ky.) 609.

**1. Medium of Payment.**—*Knapp v. Levantway*, 27 Vt. 298. See generally the title PAYMENT, vol. 22, p. 539.

**2. Stipulations as to Medium of Payment**—*United States*.—*Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879; *Lee v. New Haven, etc.*, R. Co., 15 Fed. Cas. No. 8,197.

*California*.—*O'Connor v. Dingley*, 26 Cal. 11; *Montague v. Leonard*, 135 Cal. 209.

*Iowa*.—*Arnold v. River R. Constr. Co.*, 35 Iowa 99.

*Michigan*.—*Friedland v. McNeil*, 33 Mich. 40; *Roberts v. Wilkinson*, 34 Mich. 129.

*Mississippi*.—*Sample v. Pickens, Smed. & M. Ch. (Miss.)* 501; *Lawrence v. Harris*, (Miss. 1894) 18 So. Rep. 125.

*New Jersey*.—*McPherson v. Walton*, 42 N. J. Eq. 282; *Wood v. Boney*, (N. J. 1891) 21 Atl. Rep. 574.

*South Dakota*.—*Barnard, etc., Mfg. Co. v. Galloway*, 5 S. Dak. 205.

*Pennsylvania*.—*Wisecarver v. Adamson*, 118 Pa. St. 53; *Haight v. Conners*, 149 Pa. St. 297; *Weis v. De Long*, 16 Pa. Super. Ct. 246.

*Wisconsin*.—*Bannister v. Patty*, 35 Wis. 215.

**Payment in Tax Assessments.**—A contractor with a city who agrees to take pay in tax bills may, if the tax bills prove to be invalid, bring suit to recover the contract price for the work done, without returning the void bills and demanding others. *Fisher v. St. Louis*, 44 Mo. 482.

Where a contractor for the construction of a railroad for the defendant agreed to collect and receive in part payment a certain sum from a township tax voted by the people of the township, or from certain subscriptions to stock that had been made, to entitle him to recover he must show proper effort and diligence to collect from the subscriptions or the tax, or some excuse for not doing so. *Arnold v. River R. Constr. Co.*, 35 Iowa 99.

**Existence of Additional Liens as Excuse for Re-**

**fusal to Accept Mortgage as Payment.**—*McCann v. McCrea*, 18 Pa. Super. Ct. 456.

**3. Options.**—*Re Alexandra Park Co.*, 12 Jur. N. S. 482; *Myers v. South Feather River Water Co.*, 14 Cal. 268.

Where one proposes to do work and furnish material for another at a certain rate gold, or a certain other rate currency, which proposal is accepted, an option as to mode of payment is created. The first right to exercise such option belongs to the party who is to make such payment, provided he makes it before he is in default for such payment, and if he so makes such option he binds both parties to the contract. *Stephens v. Howe*, 34 N. Y. Super. Ct. 133.

**4. Corporate Bonds.**—*Titus v. Cairo, etc.*, R. Co., 46 N. J. L. 393; *Wood v. Boney*, (N. J. 1891) 21 Atl. Rep. 574.

**5. Corporate Stock.**—*Harris v. Somerset, etc.*, R. Co., 47 Me. 298; *Wood v. Boney*, (N. J. 1891) 21 Atl. Rep. 574; *Moore v. Hudson River R. Co.*, 12 Barb. (N. Y.) 156; *Jones v. Chamberlain*, 30 Vt. 196.

Where contractors to perform work on a railroad agreed to receive a part of their compensation in stock of the railroad company, it was held that they could not refuse to receive it and demand money because the legislature afterwards altered the charter, by which the capital stock and debt of the company were increased, nor because the company decided not to pay dividends on the stock in cash, as it had previously done, it not appearing that by either was the value of the stock impaired. *Moore v. Hudson River R. Co.*, 12 Barb. (N. Y.) 156.

An agreement to pay the compensation earned under a working contract in the capital stock of a corporation, without specifying any price per share or otherwise in the agreement, has been held to be an agreement to pay stock to that amount in value according to the market price at the time. *Bates v. Cherry Valley, etc.*, R. Co., 3 Thomp. & C. (N. Y.) 16; *Hart v. Lauman*, 29 Barb. (N. Y.) 410.

**6. Re Alexandra Park Co.**, 12 Jur. N. S. 482.

**7. Boody v. Rutland, etc.**, R. Co., 3 Blatchf. (U. S.) 25, 3 Fed. Cas. No. 1,635.

**8. O'Connor v. Dingley**, 26 Cal. 11; *Hughes v. Eschback*, 7 D. C. 66; *Bryan v. Brazil*, 52 Iowa 350; *Fairbanks v. Jacobs*, 69 Iowa 265; *Grunwald v. Hahn*, 176 Pa. St. 37; *Jones v. Chamberlain*, 30 Vt. 196.



4. **Place of Payment.** — Where no place of payment is fixed by the contract, it is the duty of the builder to seek the contractor and tender payment.<sup>1</sup>

5. **Who Liable for Compensation.** — As a general rule, of course, the question who is liable to pay the compensation is solely a matter of contract.<sup>2</sup> The builder or person for whom the work is done is not, in the absence of an express contract, personally liable to those who perform labor for or furnish material to the contractor who has undertaken to perform the work,<sup>3</sup> and the fact that such percentage is retained for the express purpose of insuring the payment of all claims for materials furnished to or labor performed for the contractor does not render the builder personally liable for such claims.<sup>4</sup> The same has been held true though by the contract the builder expressly reserved the right of paying, from the stipulated compensation of the contractor, all claims against him for material furnished or labor performed.<sup>5</sup> Of course the builder or other person may by express contract bind himself to pay persons furnishing materials to or performing labor for the contractor;<sup>6</sup>

1. **Place of Payment.** — *Boody v. Rutland*, etc., R. Co., 3 Blatchf. (U. S.) 25.

2. **Who Liable for Compensation.** — *Barber Asphalt Paving Co. v. Denver*, 72 Fed. Rep. 336, 36 U. S. App. 499; *Laclede Firebrick Mfg. Co. v. Williams*, 14 Colo. 37; *Williams v. Laclede Fire Brick Mfg. Co.*, 5 Colo. App. 311; *Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Compton v. Payne*, 69 Ill. 354; *Star Brewery Co. v. Farnsworth*, 172 Ill. 247; *Turner v. McCarty*, 22 Mich. 265; *Van Rensselaer v. Aikin*, 44 N. Y. 126; *Hurd v. Wing*, 93 N. Y. App. Div. 62; *Clayton v. Newton Academy*, 95 N. Car. 298; *Moyle v. Congregational Soc.*, 16 Utah 69.

3. *United States.* — *U. S. v. Driscoll*, 96 U. S. 421; *Baltzer v. Raleigh*, etc., R. Co., 115 U. S. 634; *Anderson v. Fitzgerald*, 21 Fed. Rep. 294; *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879; *Lawrence v. U. S.*, 71 Fed. Rep. 228.

*Alabama.* — *Huntsville Belt Line*, etc., R. Co. *v. Corpening*, 97 Ala. 681.

*Colorado.* — *Dunning v. Thomas*, 10 Colo. 84.

*Illinois.* — *Indianapolis*, etc., R. Co. *v. Miller*, 71 Ill. 463; *Peers v. Board of Education*, 72 Ill. 508; *Owen v. Stevens*, 78 Ill. 462; *Bouton v. McDonough County*, 84 Ill. 384; *Campbell v. Day*, 90 Ill. 363; *Fender v. Kelly*, 58 Ill. App. 283.

*Indiana.* — *Floyd v. Indianapolis*, etc., R. Co., 8 Ind. 469; *Lake Erie*, etc., R. Co. *v. Eckler*, 13 Ind. 67; *Ferguson v. Despo*, 8 Ind. App. 523.

*Iowa.* — *Steele v. McBurney*, 96 Iowa 449.

*Kansas.* — *Streeter v. Dowell*, 43 Kan. 545.

*Louisiana.* — *Heuchert v. Barrere*, 21 La. Ann. 387.

*Maine.* — *Cleaves v. Stockwell*, 33 Me. 341.

*Massachusetts.* — *Allen v. Leonard*, 16 Gray (Mass.) 202; *Regan v. Dickinson*, 105 Mass. 112; *Farquhar v. Brown*, 132 Mass. 340.

*Missouri.* — *Cahill v. Ragan*, 20 Mo. 451.

*Nebraska.* — *Kiewit v. Harris*, 17 Neb. 249.

*New York.* — *Murphy v. Winchester*, 35 Barb. (N. Y.) 616; *Fuller v. Clark*, 3 E. D. Smith (N. Y.) 302; *Hutton v. Gordon*, (County Ct.) 2 Misc. (N. Y.) 267; *Taylor v. Bolton*, (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 609; *Brown v. Morgan*, 2 Bosw. (N. Y.) 485.

*Pennsylvania.* — *Mundorff v. School Directors*, 4 Penny. (Pa.) 103.

*Texas.* — *International*, etc., R. Co. *v. Hutchins*, 1 Tex. App. Civ. Cas., § 303.

*Vermont.* — *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 125.

*Virginia.* — *Richmond R.*, etc., Co. *v. Harris*, (Va. 1899) 32 S. E. Rep. 458.

*West Virginia.* — *Limer v. Traders' Co.*, 44 W. Va. 175.

*Wisconsin.* — *West Shore Lumber Co. v. Northrop*, 94 Wis. 558; *Yahr v. Joint School Dist. No. 2*, 99 Wis. 281.

**Provision for Withholding Part of Compensation — No Liability on Builder.** — *Steele v. McBurney*, 96 Iowa 449.

4. *School Dist. v. Thomas*, 51 Neb. 740; *Wells v. Williams*, 39 Barb. (N. Y.) 567; *Quinlan v. Russell*, 47 N. Y. Super. Ct. 212.

5. *O'Rourke v. Burke*, 44 Neb. 821; *O'Neil v. Hudson Valley Ice Co.*, 74 Hun (N. Y.) 163.

6. *Illinois.* — *Lumaghi v. Neuber*, 67 Ill. 250; *Owen v. Stevens*, 78 Ill. 462; *Boals v. Nixon*, 26 Ill. App. 517.

*Indiana.* — *Princeton v. Gebhart*, 61 Ind. 187; *Brownlee v. Lowe*, 117 Ind. 420.

*Iowa.* — *Wells v. Kavanagh*, 74 Iowa 372; *Carney v. Cook*, 80 Iowa 747.

*Kentucky.* — *Clore v. Johnson*, (Ky. 1900) 56 S. W. Rep. 5.

*Louisiana.* — *McIntosh v. Clannon*, 18 La. 469.

*Massachusetts.* — *Barber v. Coburn*, 165 Mass. 323.

*Michigan.* — *Kiely v. Bertrand*, 67 Mich. 332.

*Missouri.* — *Luthy v. Woods*, 6 Mo. App. 67; *Yeoman v. Mueller*, 33 Mo. App. 343.

*Nebraska.* — *Carlile v. Dauchy*, 26 Neb. 337.

*New Jersey.* — *Bennett v. Merchantville Bldg.*, etc., Assoc., 44 N. J. Eq. 116.

*New York.* — *Nial v. Flandrian*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 73.

*North Carolina.* — *Blount v. Guthrie*, 99 N. Car. 93.

*Pennsylvania.* — *Culver v. Pocono Spring Water Ice Co.*, 206 Pa. St. 481.

*West Virginia.* — *Chapman v. Pittsburgh*, etc., R. Co., 18 W. Va. 184.

*Wisconsin.* — *Willer v. Bergenthal*, 50 Wis. 474.

*Wyoming.* — *Wyman v. Quayle*, 9 Wyo. 326.

but a promise on the part of the builder to pay for materials furnished to or labor performed for the contractor must be supported by a sufficient consideration.<sup>1</sup> The effect of the provision of the statute of frauds requiring contracts to answer for the debt of another to be in writing upon contracts by the builder to pay for labor performed for or materials furnished to the contractor has heretofore been fully discussed.<sup>2</sup> The parties to the contract may impress the compensation due to the contractor with a trust in favor of persons furnishing material to or performing labor for the contractor in the completion of the work.<sup>3</sup>

**Statutory Provisions.** — In some jurisdictions statutes enacted for the protection of materialmen, laborers, etc., impose to a limited extent and under certain contingencies a personal liability upon the builder for the claims of persons furnishing materials to or performing labor for the contractor in the completion of the work.<sup>4</sup> These statutes, like the statutes giving to laborers, materialmen, etc., the so-called mechanics' lien,<sup>5</sup> have been considered to be in derogation of the common law, and therefore to be strictly construed.<sup>6</sup>

**6. Remedies for Enforcement.** — Under a working contract requiring the performance of labor and the furnishing of materials in the construction of an entire work, the contractor cannot recover for materials furnished on a count for goods sold and delivered.<sup>7</sup> Though the working contract is specific, fixing the compensation to be paid, if the contractor has fully performed the contract and nothing further remains to be done but to pay the agreed compensation, the contractor may sue in assumpsit, using the common count of *quantum meruit*;<sup>8</sup> but in such a case the amount of recovery is fixed by the terms of the contract and not by the reasonable value of the services performed.<sup>9</sup> A *quantum meruit* count is, of course, proper if the compensation is not fixed.<sup>10</sup> The contractor has no right to retain possession of the building or other structure which he erects upon the land of the builder, to enforce payment of the compensation.<sup>11</sup>

**XI. EXTRA WORK — 1. What Constitutes Extra Work — a. IN GENERAL.** — The question what constitutes extra work depends of course, as a general rule, upon the construction of the working contract,<sup>12</sup> and when the construction

1. *Jones v. Miller*, 12 Mo. 408. See also *Harris v. Harris*, 9 Colo. App. 211.

2. See the title *VERBAL AGREEMENTS (STATUTE OF FRAUDS)*, vol. 29, pp. 935-937. See also *Clark v. Jones*, 85 Ala. 127; *Sext v. Geise*, 80 Ga. 698; *Spooner v. Dunn*, 7 Ind. 81, 63 Am. Dec. 414; *Luark v. Malone*, 34 Ind. 444; *Holmes v. Shands*, 26 Miss. 639; *Dirringer v. Moynihan*, (C. Pl. Gen. T.) 10 N. Y. Supp. 540; *Parkes v. Stafford*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 756; *Wiggins v. Guthrie*, 101 N. Car. 661.

3. *Public Schools v. Stair*, 57 N. J. Eq. 433.

4. *California*. — *Bates v. Santa Barbara County*, 90 Cal. 543; *Russ Lumber, etc., Co. v. Roggenkamp*, (Cal. 1894) 35 Pac. Rep. 643; *Board of Education v. Blake*, (Cal. 1894) 38 Pac. Rep. 536; *Bridgeport First Nat. Bank v. Perris Irrigation Dist.*, 107 Cal. 55; *Newport Wharf, etc., Co. v. Drew*, 125 Cal. 585; *Mangrum v. Truesdale*, 128 Cal. 145; *Long Beach School Dist. v. Lutge*, 129 Cal. 409.

*Georgia*. — *R. C. Wilder's Sons Co. v. Walker*, 98 Ga. 508; *Willis v. Boyd*, 103 Ga. 130; *Hunnicuttt, etc., Co. v. Van Hoose*, 111 Ga. 518.

*Indiana*. — *Raleigh v. Tossett*, 36 Ind. 295.

*Louisiana*. — *Hogge v. Taliaferro*, 10 La. Ann. 561.

*Maine*. — *Rogers v. Dexter, etc.*, R. Co., 85 Me. 372.

*Ontario*. — *Russell v. French*, 28 Ont. 215.

5. See the title *MECHANICS' LIENS*, vol. 20 p. 255.

6. *Dudley v. Toledo, etc.*, R. Co., 65 Mich. 655.

7. *Cottrell v. Apsey*, 1 Marsh. 581.

8. *Castagnino v. Balletta*, (Cal. 1889) 21 Pac. Rep. 1097; *Williams v. Chicago, etc.*, R. Co., 112 Mo. 468; *Moore v. H. Gaus, etc.*, Mfg. Co., 113 Mo. 98.

9. *Chicago v. Sexton*, 115 Ill. 230.

10. *Kline v. Foster*, 1 Walk. (Pa.) 250.

11. *Beller v. Stange*, 27 Mich. 312.

Where, by the terms of a building contract, the owner agrees with the contractor to convey to him certain real property on the final completion of the building, but the contractor makes default in payment for materials used, so that the building becomes encumbered with liens, the owner is not bound to make such conveyance until the liens are discharged, but may hold the property for his security. *Erickson v. Brandt*, 53 Minn. 10.

12. **What Constitutes Extra Work — England.** — *Williams v. Fitzmaurice*, 3 H. & N. 844; *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72.

*Canada*. — *Ludlam v. Wilson*, 2 Ont. L. Rep. 549; *Weddell v. Rex*, 7 Can. Exch. 323.

*United States*. — *Harvey v. U. S.*, 105 U. S.

of an entire work is called for, at a fixed compensation, the hazards of the undertaking are assumed by the contractor, and he cannot recover for increased cost, as extra work, upon discovering that he has made a mistake in his estimate of the cost, or that the work is more difficult and expensive than he anticipated.<sup>1</sup> Where authority to pass upon the character of the work and reject all which does not come up to the requirements of the contract is given to the architect or engineer, the contractor is not, as a rule, entitled to claim

671; *U. S. v. Gibbons*, 109 U. S. 209; *Wood v. Ft. Wayne*, 119 U. S. 312; *James P. Witherow Co. v. De Bardeleben Coal, etc., Co.*, 99 Fed. Rep. 670, 40 C. C. A. 65; *Miles v. U. S.*, 113 Fed. Rep. 1011; *Donohue v. Culley, Taney (U. S.)* 468, 7 Fed. Cas. No. 3,991; *Bestor's Case*, 3 Ct. Cl. 425; *Shipman v. District of Columbia*, 18 Ct. Cl. 291; *Gregory v. U. S.*, 33 Ct. Cl. 434; *Collins v. U. S.*, 34 Ct. Cl. 294.

*Arkansas*.—*Sneed, etc., Iron Works v. Douglas*, 49 Ark. 355.

*Connecticut*.—*Cannon v. Wildman*, 28 Conn. 472.

*Illinois*.—*Kinsley v. Charnley*, 33 Ill. App. 553; *Thurber v. Anderson*, 35 Ill. App. 628.

*Indiana*.—*Fulton County v. Gibson*, 158 Ind. 471.

*Iowa*.—*Owens v. Butler County*, 40 Iowa 190.

*Louisiana*.—*Maas v. Hernandez*, 48 La. Ann. 264.

*Maryland*.—*Morgan v. Baltimore*, 58 Md. 509; *Annapolis, etc., Short Line R. Co. v. Ross*, 68 Md. 310.

*Massachusetts*.—*White v. McLaren*, 151 Mass. 553; *Carberry v. Farnsworth*, 177 Mass. 398.

*Michigan*.—*Davis v. East Saginaw*, 66 Mich. 37; *Friedland v. McNeil*, 33 Mich. 40.

*Minnesota*.—*Fravell v. Nett*, 46 Minn. 31; *Reardon v. Cushing*, 90 Minn. 360.

*Missouri*.—*Shepherd v. St. Charles Western Plank Road Co.*, 28 Mo. 373; *Itnner v. St. Louis Exposition, etc., Assoc.*, 97 Mo. 561; *Carroll Contracting Co. v. Gilsonite Roofing, etc., Co.*, 98 Mo. App. 78.

*Nebraska*.—*Doane College v. Lanham*, 26 Neb. 421; *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33.

*New Hampshire*.—*Dean-Whiting Elevator Co. v. Pease*, 70 N. H. 208.

*New Jersey*.—*Public Schools v. Bennett*, 27 N. J. L. 513.

*New York*.—*Gustaveson v. McGay*, 12 Daly (N. Y.) 423; *Riley v. Ackley*, 58 Hun (N. Y.) 610, 12 N. Y. Supp. 701; *Voorhis v. New York*, 62 N. Y. 498; *Horgan v. New York*, 160 N. Y. 516, 21 N. Y. App. Div. 405; *Hellwig v. Blumenberg*, 5 Silv. Sup. (N. Y.) 290; *Cassidy v. Fonham, (C. Pl. Gen. T.)* 14 N. Y. Supp. 151; *Abells v. Syracuse*, 7 N. Y. App. Div. 501; *Brewster v. Hornellsville*, 35 N. Y. App. Div. 161; *O'Brien v. Jackson*, 42 N. Y. App. Div. 171; *Burns v. New York, (Supm. Ct. Tr. T.)* 31 Misc. (N. Y.) 315; *Weber v. Farrell, (Supm. Ct. App. T.)* 84 N. Y. Supp. 272; *Burke v. New York*, 7 N. Y. App. Div. 128; *Alger v. Vanderpoel*, 34 N. Y. Super. Ct. 161; *Isaacs v. Smith*, 55 N. Y. Super. Ct. 446; *Burling v. Lighte*, 51 N. Y. App. Div. 603; *Isaacs v. Dawson*, 70 N. Y. App. Div. 232; *Canavan v. Dwyer, (C. Pl. Gen. T.)* 14

Misc. (N. Y.) 304; *Crocker v. Buffalo*, 90 N. Y. 351.

*Ohio*.—*Ashley v. Henahan*, 56 Ohio St. 559.

*Oregon*.—*Chamberlain v. Hibbard*, 26 Oregon 428.

*Pennsylvania*.—*Centenary M. F. Church v. Clime*, 116 Pa. St. 146; *Muckle v. Moore*, 134 Pa. St. 608.

*Tennessee*.—*Fisher v. Edgefield, etc., Mfg. Co.*, (Tenn. Ch. 1900) 62 S. W. Rep. 27.

*Texas*.—*Houston, etc., R. Co. v. Trentem*, 63 Tex. 442.

*Vermont*.—*Trow v. Forsyth*, 70 Vt. 498.

*Wisconsin*.—*Riesen v. Milwaukee*, 112 Wis. 651.

1. *England*.—*Rigby v. Bristol*, 29 L. J. Exch. 359.

*United States*.—*South Penn Oil Co. v. Latshaw*, 111 Fed. Rep. 598, 49 C. C. A. 478; *Venable Constr. Co. v. U. S.*, 114 Fed. Rep. 763; *Shipman v. District of Columbia*, 18 Ct. Cl. 291.

*Connecticut*.—*Cannon v. Wildman*, 28 Conn. 472; *Geary v. New Haven*, 76 Conn. 84.

*Illinois*.—*Chicago, etc., R. Co. v. Thomlinson*, 33 Ill. App. 388.

*Indiana*.—*Indiana, etc., R. Co. v. Adamson*, 114 Ind. 282.

*Iowa*.—*Owens v. Butler County*, 40 Iowa 190; *McCauley v. Des Moines*, 83 Iowa 212.

*Kentucky*.—*Simon v. Lanius*, 9 Ky. L. Rep. 59.

*Massachusetts*.—*Boyle v. Agawam Canal Co.*, 22 Pick. (Mass.) 381, 33 Am. Dec. 749.

*Minnesota*.—*St. Paul, etc., R. Co. v. Bradbury*, 42 Minn. 222.

*Mississippi*.—*Groton Bridge, etc., Mfg. Co. v. Alabama, etc., R. Co.*, 80 Miss. 162.

*Missouri*.—*Ruecking v. McMahon*, 81 Mo. App. 422; *Fruin v. Crystal R. Co.*, 89 Mo. 397; *Wear v. Schmelzer*, 92 Mo. App. 314.

*New Hampshire*.—*Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

*New York*.—*Devlin v. New York*, 4 Duer (N. Y.) 337; *Riley v. Brooklyn*, 46 N. Y. 444, reversing 56 Barb. (N. Y.) 559; *Voorhis v. New York*, 62 N. Y. 498; *Gisel v. Buffalo, (Supm. Ct. Gen. T.)* 15 N. Y. St. Rep. 561. Compare *Anderson v. Meislahn*, 12 Daly (N. Y.) 149.

*Pennsylvania*.—*Ambler v. Phillips*, 132 Pa. St. 167, 25 W. N. C. (Pa.) 371.

*South Carolina*.—*Nesbitt v. Louisville, etc., R. Co.*, 2 Spears L. (S. Car.) 697.

*Tennessee*.—*Perkins Oil Co. v. Eberhart*, 107 Tenn. 409.

*Virginia*.—*Rowland Lumber Co. v. Ross*, 100 Va. 275.

*Washington*.—*Wilkin v. Ellensburgh Water Co.*, 1 Wash. 236.



for extra work for labor performed in replacing work so rejected.<sup>1</sup> The burden is on the contractor to show that work claimed as extra was not required by the original contract,<sup>2</sup> and if the original contract is in writing the contractor, in an action for extra work, must put such writing in evidence in order to show that the claim for extra work was not within the terms of the contract.<sup>3</sup> In determining whether alleged extra work was within the terms of the original contract, the construction placed on the contract by the parties is of great weight.<sup>4</sup>

*b. DECISION OF ARCHITECT, ENGINEER, ETC.* — In the absence of any provision to that effect in the contract, the architect or engineer in charge of the work has no power to bind the parties by his decision as to what constitutes extra work.<sup>5</sup> But provisions in a working contract submitting such question to the architect or engineer are valid,<sup>6</sup> and it has been held that a provision that all extra work should be paid for at the valuation fixed by the architect or engineer impliedly submitted to such officer the question what constituted extra work.<sup>7</sup> A provision in a contract for the determination by the architect or engineer of the question what constitutes extra work may be waived by the parties.<sup>8</sup> The decision of the architect or engineer as to what constitutes extra work, where the contract provides for submitting such question to him, is, as a general rule, conclusive on both the builder and the contractor.<sup>9</sup>

**2. Liability of Builder for Extra Work.** — Where, in the execution of a working contract, the contractor performs extra work without any direction or request from the builder and without his knowledge, the builder is under no obligation to pay therefor;<sup>10</sup> and he is not rendered liable by the mere

1. *Bowe v. U. S.*, 42 Fed. Rep. 761; *Fire Proof Bldg. Co. v. First Nat. Bank*, 54 N. Y. Super. Ct. 511.

2. *Crocker v. U. S.*, 21 Ct. Cl. 255; *Dickinson v. Prince*, 61 Ill. App. 335; *Maas v. Hernandez*, 48 La. Ann. 264.

3. *Eccles v. Southern*, 3 F. & F. 142; *Cook County v. Harms*, 10 Ill. App. 24; *Fulton County v. Gibson*, 158 Ind. 471. See also *Gajewski v. Brzezinski*, 103 Wis. 519.

4. *Fulton County v. Gibson*, 158 Ind. 471.

5. *Decision of Architect, etc.* — *Ohio, etc.*, *R. Co. v. Crumbo*, 4 Ind. App. 456; *Long v. Pierce County*, 22 Wash. 330.

6. *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597; *Richards v. May*, 10 Q. B. D. 400.

7. *Richards v. May*, 10 Q. B. D. 400.

8. *Meyer v. Berlandi*, 53 Minn. 59; *Galveston v. Devlin*, 84 Tex. 319.

9. *Coker v. Young*, 2 F. & F. 98; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 605; *Richards v. May*, 10 Q. B. D. 400; *Kennedy v. U. S.*, 24 Ct. Cl. 122; *Nelson v. Halfen*, 51 Ill. App. 198; *McMahon v. Casement*, 13 Ky. L. Rep. 429; *Guthart v. Gow*, 95 Mich. 527; *King v. Duluth*, 78 Minn. 155; *Chism v. Schipper*, 51 N. J. L. 1; *Smith v. Philadelphia*, 13 Phila. (Pa.) 177, 36 Leg. Int. (Pa.) 277.

10. *Extra Work Voluntarily Performed* — *England*. — *Wilmot v. Smith*, 3 C. & P. 453, 14 E. C. L. 387.

*United States*. — *Erickson v. U. S.*, 107 Fed. Rep. 204; *Kingsbury's Case*, 1 Ct. Cl. 13; *Cooper's Case*, 8 Ct. Cl. 199; *Murphy's Case*, 13 Ct. Cl. 372; *Merchants' Exch. Case*, 15 Ct. Cl. 270; *Braden's Case*, 16 Ct. Cl. 389.

*Alabama*. — *Thorn v. Roman*, 89 Ala. 379.

*Illinois*. — *Springdale Cemetery Assoc. v. Smith*, 32 Ill. 252; *Fox River Mfg. Co. v.*

*Reeves*, 68 Ill. 403; *Mueller v. Rosen*, 179 Ill. 130.

*Indiana*. — *Duncan v. Miami County*, 19 Ind. 154.

*Iowa*. — *Phillips v. Starr*, 26 Iowa 349.

*Louisiana*. — *Alston v. Ross*, 4 Rob. (La.) 399; *Percy v. Peyroux*, 5 Rob. (La.) 179; *Doyle v. Ryan*, 9 Rob. (La.) 402; *Mathias v. Lebrete*, 10 Rob. (La.) 94; *Fossier v. Herries*, 2 La. 490; *Bennett v. Robinson*, 18 La. Ann. 204; *O'Hara v. New Orleans*, 30 La. Ann. 152; *Mitchell v. Curell*, 11 La. 252.

*Maryland*. — *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202.

*New York*. — *Cram v. Cranford*, 162 N. Y. 627, 57 N. E. Rep. 1107, affirming 19 N. Y. App. Div. 607; *Bond v. Stewart*, 58 N. Y. App. Div. 615; *Kenny v. Monahan*, (Supm. Ct. Spec. T.) 66 N. Y. Supp. 249; *Niemeyer v. Woods*, 72 N. Y. App. Div. 630.

*Pennsylvania*. — *Miller v. McCaffrey*, 9 Pa. St. 245; *Fisher v. South Williamsport*, 1 Pa. Super. Ct. 386.

*South Carolina*. — *Hort v. Norton*, 1 McCord L. (S. Car.) 22.

*Texas*. — *Williamson v. Smith*, (Tex. Civ. App. 1904) 79 S. W. Rep. 51.

Where extra work and material are voluntarily furnished by contractors, with knowledge that the payment therefor must depend upon the action of Congress, they cannot recover though the extra work may embellish and improve a government building. *Merchants' Exch. Case*, 15 Ct. Cl. 270.

**Alterations under Orders from Building Inspectors.** — In *Gunningham v. Fourth Baptist Church*, 159 Pa. St. 620, alterations in a building involving additions were ordered by city building inspectors, prompted by considerations

fact that he has knowledge that the contractor is doing extra work, if he does not know that the contractor expects additional pay.<sup>1</sup> This is true though the builder receives the benefit of such extra work by reason of his taking possession of the building or other structure upon which the extra work was performed.<sup>2</sup> It has been held that where, at the request of the builder, the contractor makes alterations from the original contract which are such that the builder is justified in thinking that there will be no extra cost therefor, he should notify the builder that there will be extra cost, if such is the case, otherwise he will be precluded from claiming extra compensation,<sup>3</sup> and this is especially true where the alterations are made at the suggestion of the contractor.<sup>4</sup> But when alterations made in the work are of such a character that the builder should from their nature be aware that they will be attended with extra cost, it is not necessary that the contractor notify the builder that extra compensation will be expected.<sup>5</sup> Where extra work is rendered necessary by reason of the defective manner in which the contractor has performed the work, he is not entitled to compensation therefor, as for extra work.<sup>6</sup> The builder and the contractor may, of course, during the progress of the work, by agreement provide for extra work and the compensation to be paid therefor;<sup>7</sup> and where extra work is done at the request of the builder the law will, as a general rule, imply a promise on his part to compensate the contractor,<sup>8</sup>

of safety and acting under the police power of the state, and the contractor was allowed to recover additional compensation therefor though the building contract provided that there should be no claim for extra work unless agreed to in writing and signed by the parties.

1. *Belt v. Cook*, 3 Cranch (C. C.) 666, 3 Fed. Cas. No. 1,282; *Berry v. Thompson*, 6 Har. & J. (Md.) 89; *McLeod v. Genius*, 31 Neb. 1.

Where the contract provides that there shall be no charge for extra work, the fact that the builder has knowledge that extra work is being performed will not render him liable to compensate the contractor therefor. *Miller v. McCaffrey*, 9 Pa. St. 245.

2. *Wilmot v. Smith*, 3 C. & P. 453, 14 E. C. L. 387; *Pattinson v. Luckley*, L. R. 10 Exch. 330; *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39.

3. *Gibbons's Case*, 15 Ct. Cl. 174; *Gallahoe v. District of Columbia*, 19 Ct. Cl. 564; *Kinsley v. Charnley*, 33 Ill. App. 553; *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167; *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202; *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33; *Collyer v. Collins*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 467; *Miller v. McCaffrey*, 9 Pa. St. 245.

If the contract expressly provides for extra compensation in case of alterations in the plans, the contractor may recover extra compensation therefor though at the time when the alterations were ordered he gave no notice that he would claim extra pay. *Essex v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736.

**Accelerating Work** at the request of the builder does not entitle the contractor to extra compensation. *Kinsley v. Charnley*, 33 Ill. App. 553.

4. In *Lovelock v. King*, 1 M. & Rob. 60, Tenterden, C. J., said: "A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate whether he proceeds or not.

It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labor and expenditure; and I do not think that the mere fact of assenting to them ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed at the time of the consent that the effect of the alteration will be to increase the expense of the work."

5. *Lovelock v. King*, 1 M. & Rob. 60; *Cooper's Case*, 8 Ct. Cl. 199; *Gibbons's Case*, 15 Ct. Cl. 174.

6. *Vanderhoof v. Shell*, 42 Oregon 578. See also *Isaacs v. Reeve*, (N. J. 1899) 44 Atl. Rep. 1.

7. **Agreements for Extra Work.** — *Belt v. Cook*, 3 Cranch (C. C.) 666, 3 Fed. Cas. No. 1,282; *Evans v. Montgomery*, 95 Mich. 497; *Teakle v. Moore*, 131 Mich. 427; *McLeod v. Genius*, 31 Neb. 1.

8. **Implied Promise to Pay for Extra Work** — *England*. — *Andrews v. Lawrence*, 19 C. B. N. S. 768, 115 E. C. L. 768.

*United States*. — *Chouteau v. U. S.*, 95 U. S. 61; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260; *Pacific Bridge Co. v. Clackamas County*, 45 Fed. Rep. 217; *Belt v. Cook*, 3 Cranch (C. C.) 666, 3 Fed. Cas. No. 1,282; *Childs v. Somerset, etc., R. Co.*, Brun. Col. Cas. (U. S.) 593, 5 Fed. Cas. No. 2,682; *Cooper's Case*, 8 Ct. Cl. 199; *Ford's Case*, 17 Ct. Cl. 60; *Gregory v. U. S.*, 33 Ct. Cl. 434.

*Alabama*. — *Aikin v. Bloodgood*, 12 Ala. 221,

and the same has been held true where the extra work was done with the knowledge of the builder, who was also aware that the contractor expected additional pay therefor.<sup>1</sup> When the builder wrongfully refuses to allow the contractor to use the quality of material specified in the contract, and requires him to use a more expensive kind, the contractor may recover additional compensation.<sup>2</sup> Where the necessity for extra work results from the errors and mistakes of the architect or engineer of the builder, under whose supervision the work is to be done, the loss should fall upon the builder, and the contractor may recover additional compensation.<sup>3</sup> So, where the work cannot be constructed according to the plans and specifications, as required by the contract, but additional work must be done to render the work secure, additional compensation may be recovered for such extra work,<sup>4</sup> and for any additional expense rendered necessary by the failure of the builder to perform his portion of the agreement the contractor may recover.<sup>5</sup> It has been held that where the contract provides that there shall be no charge for extra work unless a written agreement is made therefor, the contractor cannot recover compensation as for extra work on account of alterations made at the oral request of the builder but for which no agreement to pay additional compensation is made;<sup>6</sup> but the parties to written working contracts may by parol waive stipulations therein with regard to extra work,<sup>7</sup> such as a provision that extra work shall be agreed to in writing, and in such case if the builder orally requests extra work and promises to pay additional compensation

*Arkansas.*—Sneed, etc., *Iron Works v. Douglas*, 49 Ark. 355.

*California.*—De Boom *v. Priestly*, 1 Cal. 206; Mowry *v. Starbuck*, 4 Cal. 274.

*Connecticut.*—Alford *v. Belden*, 4 Conn. 461.

*Illinois.*—Donlin *v. Daegling*, 80 Ill. 608; Mueller *v. Rosen*, 179 Ill. 130; Chicago, etc., *R. Co. v. Moran*, 187 Ill. 316.

*Iowa.*—Kilbourne *v. Jennings*, 40 Iowa 473; Slusser *v. Burlington*, 47 Iowa 300; Foley *v. Tipton Hotel Assoc.*, 102 Iowa 272.

*Kentucky.*—Escott *v. White*, 10 Bush (Ky.) 169.

*Maryland.*—Leffler *v. Allard*, 18 Md. 545; Orange, etc., *R. Co. v. Placide*, 35 Md. 315.

*Michigan.*—Turner *v. Grand Rapids*, 20 Mich. 390; Evans *v. Montgomery*, 95 Mich. 497.

*New Jersey.*—Guerin *v. Rodwell*, 37 N. J. L. 71; Isaacs *v. Reeve*, (N. J. 1899) 44 Atl. Rep. 1.

*New York.*—Garnsey *v. Rhodes*, 63 Hun (N. Y.) 632, 18 N. Y. Supp. 484; Dubois *v. Delaware, etc., Canal Co.*, 12 Wend. (N. Y.) 334; Cassidy *v. Fonham*, (C. Pl. Gen. T.) 14 N. Y. Supp. 151; O'Brien *v. Jackson*, 42 N. Y. App. Div. 171; Doyle *v. Trinity Church Corp.*, (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 53; Griffin *v. Miner*, 54 N. Y. Super. Ct. 46; Isaacs *v. Dawson*, 174 N. Y. 537. And see Hellwig *v. Blumenberg*, 5 Silv. Sup. (N. Y.) 290.

*Pennsylvania.*—Wilman *v. Wagner*, 4 Luz. Leg. Reg. 252, 23 Pittsb. Leg. J. N. S. (Pa.) 40.

*South Carolina.*—McCormick *v. Connolly*, 2 Bay (S. Car.) 401.

*Tennessee.*—Fisher *v. Edgefield, etc., Mfg. Co.*, (Tenn. Ch. 1900) 62 S. W. Rep. 27.

*Texas.*—Childress *v. Smith*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1076; Essex *v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736.

*Wisconsin.*—Hasbrouck *v. Milwaukee*, 21 Wis. 217.

1. Lovelock *v. King*, 1 M. & Rob. 60; Cooper's Case, 8 Ct. Cl. 199; McLeod *v. Genius*, 31 Neb. 1; Bartholomew *v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

2. Hawkins's Case, 12 Ct. Cl. 181; Barlow *v. U. S.*, 35 Ct. Cl. 514; White *v. New Orleans*, 15 La. Ann. 667; Brin *v. McGregor*, (Tex. Civ. App. 1901) 64 S. W. Rep. 78.

3. Seymour *v. Long Dock Co.*, 20 N. J. Eq. 396; Becker *v. New York*, 77 N. Y. App. Div. 635; Jacob *v. Weissner*, 207 Pa. St. 484.

4. Wyandotte, etc., *R. Co. v. King Bridge Co.*, (C. C. A.) 100 Fed. Rep. 197; Murphy's Case, 13 Ct. Cl. 372; Carroll County *v. O'Connor*, 137 Ind. 622; Henderson *v. Louisville*, 4 Ky. L. Rep. 437; Erskine *v. Johnson*, 23 Neb. 261; Dwyer *v. New York*, 77 N. Y. App. Div. 224; Langley *v. Rouss*, 85 N. Y. App. Div. 27; Fisher *v. Edgefield, etc., Mfg. Co.*, (Tenn. Ch. 1900) 62 S. W. Rep. 27.

**Defective Plans.**—The builder is liable for alterations rendered necessary by defective plans. Erskine *v. Johnson*, 23 Neb. 261.

5. Wood *v. Ft. Wayne*, 119 U. S. 312; Central Trust Co. *v. Condon*, 67 Fed. Rep. 84, 31 U. S. App. 387; McPherson *v. San Joaquin County*, (Cal. 1899) 56 Pac. Rep. 802; Chicago, etc., *R. Co. v. Vosburgh*, 45 Ill. 311; Williams *v. Chicago, etc., R. Co.*, 153 Mo. 487; Becker *v. National Prohibition Park Co.*, 69 Hun (N. Y.) 55; Dubois *v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; Nason Mfg. Co. *v. Stephens*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 303.

6. Franklin *v. Darke*, 3 F. & F. 65; Baltimore Cemetery Co. *v. Coburn*, 7 Md. 202; Abbott *v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; Simpson *v. New York, etc., R. Co.*, 51 N. Y. Super. Ct. 419.

7. Copeland *v. Hewett*, 96 Me. 525; Smith *v. Gugerty*, 4 Barb. (N. Y.) 614.



therefor, the contractor may recover such additional compensation.<sup>1</sup>

**3. Power of Architect, Engineer, etc., to Order Extra Work.**—It seems to be the general rule that an architect, engineer, or superintendent in charge of the work whose duty it is to see that the work is done according to the contract has no power to bind the builder to pay for extra work and materials, and the builder will not be held liable to pay for extra work ordered by such architect or engineer and performed without the builder's knowledge;<sup>2</sup> and the fact that the builder has knowledge, after extra work has been performed, that it was ordered by the architect or engineer, and did not notify the contractor of such person's want of authority, will not render him liable.<sup>3</sup> So the mere fact that after the extra work has been performed the builder receives benefit therefrom by taking possession of the structure does not render him liable to pay therefor.<sup>4</sup> *A fortiori*, where the contract provides that no extra work shall be done without the consent of the builder, the architect or engineer has no power without the consent of the builder to bind the latter to pay for extra work.<sup>5</sup> Of course the builder may confer power upon the architect

**1. United States.**—Wyandotte, etc., R. Co. v. King Bridge Co., 100 Fed. Rep. 197, 40 C. C. A. 325; Ford's Case, 17 Ct. Cl. 60; Barlow v. U. S., 35 Ct. Cl. 514.

**Alabama.**—Badders v. Davis, 88 Ala. 367.

**California.**—McFadden v. O'Donnell, 18 Cal. 160.

**Illinois.**—Illinois Deaf, etc., Inst. v. Platt, 5 Ill. App. 567; Elgin v. Joslyn, 36 Ill. App. 301.

**Kentucky.**—St. John's Episcopal Church v. Clarke, 16 Ky. L. Rep. 207.

**Maryland.**—O'Brien v. Fowler, 67 Md. 561.

**Massachusetts.**—Bartlett v. Stanchfield, 148 Mass. 394.

**Mississippi.**—Baum v. Covert, 62 Miss. 113.

**Missouri.**—Ahern v. Boyce, 19 Mo. App. 552.

**Nebraska.**—Erskine v. Johnson, 23 Neb. 261; McLeod v. Genius, 31 Neb. 1.

**New York.**—Hogan v. Burton, 4 Silv. Sup. (N. Y.) 575; Close v. Clark, 16 Daly (N. Y.) 91; Porter v. Swan, (Brooklyn City Ct. Gen. T.) 17 N. Y. Supp. 351; Lewis v. Yagel, 77 Hun (N. Y.) 337; Abells v. Syracuse, 7 N. Y. App. Div. 501; Emslie v. Livingston, 51 N. Y. App. Div. 628; Stout v. Jones, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 570.

**Texas.**—Merchants' Exch. v. Butler, 3 Tex. App. Civ. Cas., § 310.

**Washington.**—Crowley v. U. S. Fidelity, etc., Co., 29 Wash. 268.

In Badders v. Davis, 88 Ala. 367, a contract for the construction of a house provided that "no new work done on the premises \* \* \* shall be considered as extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractor to the proprietor, and his signature obtained thereto." Alterations were made under verbal agreement. It was held that as the parties might waive the stipulation with regard to extra work, if no agreement as to the cost of the alterations was made, the presumption was that no increase of cost was contemplated; but if the new agreement fixed a higher price for the alterations, or substituted work and materials, he was entitled to recover the difference although no written estimate was submitted and signed.

**2. England.**—Homersham v. Wolverhampton Waterworks Co., 6 Exch. 137; Sharpe v. San Paulo R. Co., L. R. 8 Ch. 605, note; Thames Iron Works, etc., Co. v. Royal Mail Steam-Packet Co., 13 C. B. N. S. 358, 106 E. C. L. 358; Forman v. The Ship Liddesdale, (1900) A. C. 190.

**Canada.**—Reg. v. Starrs, 17 Can. Supm. Ct. 118.

**United States.**—Hawkins's Case, 12 Ct. Cl. 181.

**Connecticut.**—Starkweather v. Goodman, 48 Conn. 101, 40 Am. Rep. 152.

**Florida.**—Howard v. Pensacola, etc., R. Co., 24 Fla. 560.

**Illinois.**—Sexton v. Cook County, 114 Ill. 174; McKey v. Nelson, 43 Ill. App. 456.

**Indiana.**—Eigemann v. Posey County, 82 Ind. 413. Compare Gibson County v. Motherwell Iron, etc., Co., 123 Ind. 364.

**Maryland.**—Baltimore Cemetery Co. v. Coburn, 7 Md. 202.

**Massachusetts.**—Stuart v. Cambridge, 125 Mass. 102.

**Minnesota.**—Shaw v. Winona First Baptist Church, 44 Minn. 22.

**Mississippi.**—Benton County v. Patrick, 123 Ind. 364.

**Missouri.**—Holland v. McCarty, 24 Mo. App. 112.

**New York.**—Dillon v. Syracuse, 55 Hun (N. Y.) 612, 9 N. Y. Supp. 98; Woodruff v. Rochester, etc., R. Co., 108 N. Y. 39; Niemeyer v. Woods, 175 N. Y. 492, 67 N. E. Rep. 1086, affirming 72 N. Y. App. Div. 630; Richard v. Clark, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 622.

**Pennsylvania.**—Gillison v. Wanamaker, 140 Pa. St. 358, 27 W. N. C. (Pa.) 424.

**Texas.**—Alexander v. Robertson, (Tex. Civ. App. 1893) 24 S. W. Rep. 680.

**Vermont.**—Thayer v. Vermont Cent. R. Co., 24 Vt. 440.

**3. Starkweather v. Goodman, 48 Conn. 101, 40 Am. Rep. 152.**

**4. Driscoll v. U. S., 34 Ct. Cl. 508; Baum v. Covert, 62 Miss. 113; Woodruff v. Rochester, etc., R. Co., 108 N. Y. 39.**

**5. Baltimore Cemetery Co. v. Coburn, 7 Md. 202.**

or engineer to order extra work and materials,<sup>1</sup> and it has been held that such power may be implied from the facts that the builder had knowledge that extra work had been ordered by the architect or engineer, that compensation had been promised therefor, and that he made no objection thereto.<sup>2</sup> Contracts conferring upon the architect or engineer power to order extra work frequently provide that the power shall be exercised only in a certain manner, and in such case a compliance with the particular provisions is necessary in order to bind the builder.<sup>3</sup> Thus, it is often provided that in order to bind the builder for extra work, the architect's direction therefor shall be in writing and signed by the architect or engineer.<sup>4</sup> Under such a provision it has been held that a mere unsigned sketch of the extra work prepared by the architect or engineer was not a sufficient written order or direction so as to render the builder liable to pay therefor;<sup>5</sup> and the same has been held

1. *England*.—*Russell v. Sada Bandeira*, 13 C. B. N. S. 149, 106 E. C. L. 149.

*United States*.—*Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Wood v. Ft. Wayne*, 119 U. S. 312; *Merchants' Exchange Co. v. U. S.*, 15 Ct. Cl. 270; *Dialogue v. U. S.*, 22 Ct. Cl. 196; *Collins v. U. S.*, 34 Ct. Cl. 294.

*Colorado*.—*Irwin v. Locke*, 20 Colo. 148.  
*Illinois*.—*Chicago, etc., R. Co. v. Moran*, 187 Ill. 316, *affirmed* 85 Ill. App. 543; *Nelson v. Halfen*, 51 Ill. App. 198.

*Indiana*.—*Gibson County v. Motherwell Iron, etc., Co.*, 123 Ind. 364.

*Iowa*.—*Blake v. Dubuque*, 2 Iowa 492.

*New Jersey*.—*Isaacs v. Reeve*, (N. J. 1899) 44 Atl. Rep. 1.

*Texas*.—*Essex v. Murray* (Tex. Civ. App. 1902) 68 S. W. Rep. 736.

*Washington*.—*Long v. Pierce County*, 22 Wash. 330.

2. *Wallis v. Robinson*, 3 F. & F. 307.

3. *Sutherland v. Morris*, 45 Hun (N. Y.) 259; *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39; *Coorsen v. Ziehl*, 103 Wis. 381.

4. *England*.—*Brunsdon v. Staines Local Board*, 1 Cab. & El. 272; *Taff Vale R. Co. v. Nixon*, 1 H. L. Cas. 111; *Goodyear v. Weymouth*, 1 H. & R. 67; *Kirk v. Guardians of Poor*, 2 Phil. 640; *Tharsis Sulphur, etc., Co. v. M'Elroy*, 3 App. Cas. 1040; *Lamprell v. Guardians of Poor*, 3 Exch. 283; *Franklin v. Darke*, 3 F. & F. 65; *Myers v. Sarl*, 3 El. & Bl. 306, 7 Jur. N. S. 97; *Nixon v. Taff Vale R. Co.*, 7 Hare 136; *Thames Iron Works, etc., Co. v. Royal Mail Steam-Packet Co.*, 13 C. B. N. S. 358, 106 E. C. L. 358; *Russell v. Sada Bandeira*, 13 C. B. N. S. 149, 106 E. C. L. 149; *Kirk v. Bromley Union*, 17 L. J. Ch. 127. *Compare Connor v. Belfast Water Com'rs, Ir. R.* 5 C. L. 55.

*United States*.—*Bowe v. U. S.*, 42 Fed. Rep. 761; *Dale's Case*, 14 Ct. Cl. 514. *Compare Venable Constr. Co. v. U. S.*, 114 Fed. Rep. 763.

*California*.—*White v. San Rafael, etc., R. Co.*, 50 Cal. 417; *Gray v. La Societe Francaise, etc.*, 131 Cal. 566.

*Connecticut*.—*O'Keefe v. St. Francis's Church*, 59 Conn. 551.

*Florida*.—*Howard v. Pensacola, etc., R. Co.*, 24 Fla. 560.

*Georgia*.—*Heard v. Dooly County*, 101 Ga. 610.

*Illinois*.—*Illinois Deaf, etc., Inst. v. Platt*,

5 Ill. App. 567. *Compare Elgin v. Joslyn*, 36 Ill. App. 301, *affirmed* 136 Ill. 525.

*Indiana*.—*Duncan v. Miami County*, 19 Ind. 154; *Brown v. Langner*, 25 Ind. App. 538.

*Louisiana*.—*Monarch v. McDonogh School Fund*, 49 La. Ann. 991.

*Maryland*.—*Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.

*Massachusetts*.—*Stuart v. Cambridge*, 125 Mass. 102.

*Michigan*.—*Teakle v. Moore*, 131 Mich. 427.

*Missouri*.—*Ahern v. Boyce*, 19 Mo. App. 552; *Eldridge v. Fuhr*, 59 Mo. App. 44. *Compare Fitzgerald v. Beers*, 31 Mo. App. 356.

*Montana*.—*Wortman v. Kleinschmidt*, 12 Mont. 316.

*New Jersey*.—*Condon v. Jersey City*, 43 N. J. L. 452; *Cooper v. Hawley*, 60 N. J. L. 560.

*New York*.—*Sutherland v. Morris*, 45 Hun (N. Y.) 259; *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39; *O'Brien v. New York*, 139 N. Y. 543; *Abells v. Syracuse*, 7 N. Y. App. Div. 501. *Compare Langley v. Rouss*, 85 N. Y. App. Div. 27.

*North Dakota*.—*Northern Light Lodge v. Kennedy*, 7 N. Dak. 146.

*Pennsylvania*.—*Gillison v. Wanamaker*, 140 Pa. St. 358, 27 W. N. C. (Pa.) 424.

*Texas*.—*Houston, etc., R. Co. v. Trentem*, 63 Tex. 442; *Ferrier v. Knox County*, (Tex. Civ. App. 1896) 33 S. W. Rep. 896; *Essex v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736; *Merchants' Exch. v. Butler*, 3 Tex. App. Civ. Cas. § 309.

*Vermont*.—*Barker v. Troy, etc., R. Co.*, 27 Vt. 766.

*Virginia*.—*Atlantic, etc., R. Co. v. Delaware Constr. Co.*, 98 Va. 503, 2 Va. Sup. Ct. 430.

*Washington*.—*Long v. Pierce County*, 22 Wash. 330.

*Wisconsin*.—*Bentley v. Davidson*, 74 Wis. 420.

If a contract with a railroad company for constructing its road provides that the contractor shall not deviate from the contract, nor receive any pay for extra work, unless a written order for the same is made and signed by the engineer, the contractor cannot recover for extra work done on the verbal order of the engineer, even if there is another clause in the contract which provides that the engineer may direct alterations in and additions to the work. *White v. San Rafael, etc., R. Co.*, 50 Cal. 417.

5. *Myers v. Sarl*, 3 El. & El. 306, 107 E. C. L. 306.

true with regard to credits entered upon the certificate of the architect or engineer upon which interim payments were payable.<sup>1</sup> The builder may waive the provision in the contract that all extra work shall be ordered by the architect in writing,<sup>2</sup> and after extra work has been ordered and performed the builder may ratify the act of the architect or engineer and thereby render himself liable to pay for such extra work;<sup>3</sup> but the mere fact that the builder made no objection when a statement for extra work ordered by the architect or engineer was handed to him by the contractor does not show a ratification rendering the builder liable to pay.<sup>4</sup> So, the fact that the builder ratifies the act of the architect or engineer in ordering particular items of extra work does not show a ratification of his act in ordering other items.<sup>5</sup> A provision that any claim for extra work ordered by the architect or engineer shall be made within a specified time after the work is performed is binding upon the contractor.<sup>6</sup>

**Contractor and Subcontractor.** — A contractor is not liable to his subcontractor for extra work done by the latter under direction from the architect or engineer of the builder and on behalf of the latter.<sup>7</sup>

**4. Compensation** — *a.* IN GENERAL. — Where the extra work and materials furnished are of the same character as the work and materials named in the contract, the rule is that they are to be paid for according to the schedule of prices fixed by the contract;<sup>8</sup> but where the extra work and materials are of a different character from those specified in the contract, the rates named in the contract will not apply, and the party performing will be entitled to recover according to their real value,<sup>9</sup> and in determining such value a rea-

1. *Tharsis Sulphur, etc., Co. v. M'Elroy*, 3 App. Cas. 1040, in which case it appeared that during the execution of a contract for the construction of large iron buildings, the contractors alleged that it was impossible to cast certain iron trough girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight, and the actual weights were entered in the engineer's certificates issued from time to time authorizing the interim payments. On the completion of the work, the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied. It was held that the certificates were not written orders, and the claim was therefore excluded.

2. *Illinois*. — *Chicago, etc., R. Co. v. Moran*, 187 Ill. 316, affirming 85 Ill. App. 543; *Elgin v. Joslyn*, 36 Ill. App. 301, affirmed 136 Ill. 525.

*Maine*. — *Copeland v. Hewett*, 96 Me. 525. *Minnesota*. — *Michaud v. MacGregor*, 61 Minn. 198.

*Nebraska*. — *McLeod v. Genius*, 31 Neb. 1. *New York*. — *Abells v. Syracuse*, 7 N. Y. App. Div. 501; *Emslie v. Livingston*, 51 N. Y. App. Div. 628; *Perry v. Levenson*, 82 N. Y. App. Div. 94.

*Pennsylvania*. — *Williams v. Mears*, 5 Lack. Leg. N. (Pa.) 104.

*Texas*. — *Wilkens v. Wilkerson*, (Tex. Civ. App. 1897) 41 S. W. Rep. 178; *Essex v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736.

*Vermont*. — *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 130.

**Proof of Waiver Must Be Clear.** — *Ashley v. Henahan*, 56 Ohio St. 559.

3. *Braden's Case*, 16 Ct. Cl. 389; *Ford's Case*, 17 Ct. Cl. 60.

4. *Starkweather v. Goodman*, 48 Conn. 101, 40 Am. Rep. 152.

5. *Eigemann v. Posey County*, 82 Ind. 413.

6. *Brunsdon v. Staines Local Board*, 1 Cab. & El. 272; *Myers v. Sarl*, 7 Jur. N. S. 97; *Abercrombie v. Vandiver*, 126 Ala. 513, *O'Keefe v. St. Francis' Church*, 59 Conn. 551; *Long v. Pierce County*, 22 Wash. 330.

7. *Wendt v. Vogel*, 87 Wis. 462.

8. **Compensation — Contract Prices** — *United States*. — *North American R. Constr. Co. v. R. E. McMath Surveying Co.*, (C. C. A.) 116 Fed. Rep. 169.

*Alabama*. — *Hutchison v. Cullum*, 23 Ala. 622.

*California*. — *De Boom v. Priestly*, 1 Cal. 206.

*Illinois*. — *Chicago, etc., R. Co. v. Vosburgh*, 45 Ill. 311; *Eigin v. Joslyn*, 136 Ill. 525.

*Indiana*. — *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Eigemann v. Posey County*, 82 Ind. 413.

*Kentucky*. — *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167.

*Maine*. — *White v. Oliver*, 36 Me. 92.

*Missouri*. — *Rude v. Mitchell*, 97 Mo. 365.

*New York*. — *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Clark v. New York*, 4 N. Y. 338; *Sullivan v. Sing Sing*, 122 N. Y. 389; *McSorley v. Prague*, 137 N. Y. 546.

*North Carolina*. — *Malloy v. Lincoln Cotton Mills*, 132 N. Car. 432.

Where by the terms of a building contract extra work is to be estimated in proportion to the contract price of the entire work, evidence of the reasonable value of the extra work is not admissible. *Eigemann v. Posey County*, 82 Ind. 413.

9. **Reasonable Value** — *United States*. — *Wood v. Ft. Wayne*, 119 U. S. 312.



sonable profit is to be added to the actual and reasonable cost.<sup>1</sup> The parties may, of course, expressly contract with regard to the compensation for extra work and will be bound thereby,<sup>2</sup> and the original contract may fix the compensation to be paid for extra work.<sup>3</sup> The burden is upon the contractor to show the value of the extra work,<sup>4</sup> and the admissibility of evidence to prove such value is governed by the general rules of evidence.<sup>5</sup> Where the contract provides that the entire structure shall be completed before compensation shall become due, compensation for extra work is not payable until the completion of the structure;<sup>6</sup> but in the absence of any provision with regard to the time when compensation for extra work shall be due, payment therefor is due when the extra work is done,<sup>7</sup> and when by reason of failure to complete the entire work the compensation due upon completion is not recoverable, the contractor may still recover compensation for extra work.<sup>8</sup>

**6. ESTIMATES AND CERTIFICATES OF ARCHITECTS, ENGINEERS, ETC.** — In the absence of a provision to that effect, a valuation of the extra work by the architect or engineer is not binding upon the parties nor necessary to a recovery therefor;<sup>9</sup> but provisions in working contracts that the value of all extra work shall be estimated by the architect or engineer and that payments shall be made only upon his certificate are universally recognized as valid and binding.<sup>10</sup> But the builder may, of course, waive a provision that the extra work shall be valued by the architect or engineer.<sup>11</sup> As a general rule, where the contract provides for the valuation of the extra work by the architect or engineer, his valuation is conclusive upon the parties;<sup>12</sup> but the builder or

*Alabama.* — *Aikin v. Bloodgood*, 12 Ala. 221.

*Illinois.* — *Chicago, etc., R. Co. v. Vosburgh*, 45 Ill. 311; *Elgin v. Joslyn*, 136 Ill. 525.

*Indiana.* — *Fulton County v. Gibson*, 158 Ind. 471.

*South Carolina.* — *M'Cormick v. Connolly*, 2 Bay (S. Car.) 401; *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299.

*Texas.* — *Houston, etc., R. Co. v. Snelling*, 59 Tex. 116.

*Utah.* — *Rhodes v. Clute*, 17 Utah 137.

1. *Venable Constr. Co. v. U. S.*, 114 Fed. Rep. 763.

2. *Merchants' Exch. Case*, 15 Ct. Cl. 270.

Where it was stipulated between A and B that a house should not cost more than four hundred dollars, and, after the work was begun, A made a calculation, and proposed to B to put extra work upon the house, which would make the whole building cost not over five or six hundred dollars, it was held that this amounted to an agreement that if B would permit the extra work to be put on the house, A would not charge more than six hundred dollars for the entire work. *Britney v. Bolding*, 28 Miss. 53.

Where a contractor was directed to sink the foundations of a certain building three feet deeper than the depth agreed on in the contract, and, in answer to the letter of the builder's agent, replied that the additional cost would be one thousand three hundred and fifty dollars, but the extra work was actually done at a cost of one hundred and sixty dollars, it was held that he was entitled to recover only the actual expense and a reasonable profit of ten per cent. *Murphy's Case*, 13 Ct. Cl. 372.

3. *Fulton County v. Gibson*, 158 Ind. 471.

4. *Barnwell v. Keating*, 72 Conn. 732; *Schwerin v. De Graff*, 19 Minn. 414.

5. **Valuation by Architect.** — *Foster v. McKeown*, 192 Ill. 339.

6. *Royal Electric Co. v. Three Rivers*, 23 Can. Sup. Ct. 289.

7. *Garnsey v. Rhodes*, 63 Hun (N. Y.) 632, 18 N. Y. Supp. 484.

8. *Griffin v. Miner*, 54 N. Y. Super. Ct. 46.

9. **Valuation by Architect, Engineer, etc.** — *Elgin v. Joslyn*, 136 Ill. 525; *Chicago, etc., R. Co. v. Moran*, 187 Ill. 316, *affirming* 85 Ill. App. 543; *Munk v. Kanzler*, 26 Ind. App. 105; *Ramsburg v. McCahan*, 3 Gill (Md.) 341; *Weggner v. Greenstine*, 114 Mich. 310; *Dubois v. Delaware, etc., Canal Co.*, 12 Wend. (N. Y.) 334; *Jacob v. Weisser*, 207 Pa. St. 484; *Long v. Pierce County*, 22 Wash. 330; *Hasbrouck v. Milwaukee*, 17 Wis. 266.

10. *England.* — *Scott v. Liverpool*, 3 De G. & J. 334; *Morgan v. Birnie*, 3 Moo. & S. 76; *Westwood v. Secretary of State*, 7 L. T. N. S. 736; *Richards v. May*, 10 Q. B. D. 400.

*Illinois.* — *Mills v. Weeks*, 21 Ill. 561; *Fowler v. Deakman*, 84 Ill. 130.

*Michigan.* — *Guthat v. Gow*, 95 Mich. 527.

*Minnesota.* — *Shaw v. Winona First Baptist Church*, 44 Minn. 22.

*Missouri.* — *Rude v. Mitchell*, 97 Mo. 365.

*Pennsylvania.* — *O'Reilly v. Kerns*, 52 Pa. St. 214.

*Wisconsin.* — *Bentley v. Davidson*, 74 Wis. 420.

*Compare* *Fulton County v. Gibson*, 158 Ind. 471.

11. *Ohio, etc., R. Co. v. Crumbo*, 4 Ind. App. 456; *Munk v. Kanzler*, 26 Ind. App. 105.

12. **Conclusiveness of Valuation** — *England.* — *Laphorne v. St. Aubyn*, 1 Cab. & El. 486; *Goodyear v. Weymouth*, 1 H. & R. 67; *Coker v. Young*, 2 F. & F. 98; *Tullis v. Jackson*, (1892) 3 Ch. 441; *Connor v. Belfast Water Com'rs*, Ir. R. 5 C. L. 55; *Sharpe v. San Paulo*

contractor may attack such valuation for fraud and show the true value of the work,<sup>1</sup> and it has been held that the valuation was not binding on the contractor when, without his knowledge, the architect or engineer had guaranteed to the builder that the entire cost should not exceed a certain sum.<sup>2</sup> So, where the architect or engineer wrongfully refuses to estimate the value of the extra work, the contractor may recover therefor without his valuation.<sup>3</sup>

**C. ARBITRATION.** — Provisions in working contracts that in case of any dispute as to the value of extra work the matter shall be submitted to arbitration are binding on the parties,<sup>4</sup> and the contractor cannot recover compensation therefor without the submission of the question to arbitration,<sup>5</sup> unless he shows a valid excuse for not doing so,<sup>6</sup> as, for example, that the builder refuses to submit the question<sup>7</sup> or refuses payment and takes no steps nor makes any demand or offer to submit the matter to arbitration.<sup>8</sup>

**5. Right and Duty to Perform Extra Work.** — Unless the contract provides that the contractor shall perform such extra work as may be required by the builder, the former is under no obligation to do extra work upon the request of the builder; and, on the other hand, unless the contract requires that the contractor shall be permitted to perform whatever extra work may be decided upon by the builder, the latter is under no obligation to allow the contractor to do extra work, but may have such work done by third persons.<sup>9</sup> It has been held that a provision in the contract requiring the contractor to do such extra work as the builder may direct does not require the builder to allow the contractor to do extra work which he may desire done.<sup>10</sup>

**XII. CONTRACTOR'S BOND.** — As security for faithful performance, contractors are frequently required to execute a bond with sureties.<sup>11</sup> Such bonds fre-

R. Co., L. R. 8 Ch. 605; *Richards v. May*, 10 Q. B. D. 400.

*Canada.* — *Reg. v. Cimon*, 23 Can. Sup. Ct. 62.

*United States.* — *North America R. Constr. Co. v. R. E. McMath Surveying Co.*, (C. C. A.) 116 Fed. Rep. 169.

*Arkansas.* — *Hot Springs R. Co. v. Maher*, 48 Ark. 522.

*Georgia.* — *Green v. Jackson*, 66 Ga. 250.

*Illinois.* — *Matthews v. Rice*, 4 Ill. App. 90.

*Compare Cook County v. Harms*, 108 Ill. 151.

*Kansas.* — *Board of Education v. Shaw*, 15 Kan. 33.

*Michigan.* — *Rens v. Grand Rapids*, 73 Mich. 237; *Guthat v. Gow*, 95 Mich. 527.

*Nebraska.* — *Mercer v. Harris*, 4 Neb. 77.

*New York.* — *Wiberly v. Matthews*, 10 Daly (N. Y.) 153; *Swift v. State*, 89 N. Y. 52; *Sewer Com'rs v. Sullivan*, 162 N. Y. 594, 57 N. E. Rep. 1123, *affirming* 11 N. Y. App. Div. 472. But see *Dubois v. Delaware*, etc., Canal Co., 12 Wend. (N. Y.) 334.

*South Dakota.* — *Seim v. Krause*, 13 S. Dak. 530.

*Tennessee.* — *East Tennessee, etc., R. Co. v. Central Lumber, etc., Co.*, 95 Tenn. 538.

*Virginia.* — *Condon v. South Side R. Co.*, 14 Gratt. (Va.) 302.

*Wisconsin.* — *Baasen v. Baehr*, 7 Wis. 516.

1. *Marks v. Northern Pac. R. Co.*, 76 Fed. Rep. 941, 44 U. S. App. 714; *Anderson v. Imhoff*, 34 Neb. 335.

The parties may, however, expressly agree not to attack the estimate of the architect or engineer even on the ground of fraud. *Tullis v. Jason*, (1892) 3 Ch. 441.

2. *Kemp v. Rose*, 1 Giff. 258; *Kimberley v.*

*Dick*, L. R. 13 Eq. 1; *Long v. Pierce County*, 22 Wash. 330.

3. *Moran v. Schmitt*, 109 Mich. 282; *Rude v. Mitchell*, 97 Mo. 365; *Langley v. Rouss*, 85 N. Y. App. Div. 27.

4. *Arbitration.* — *Gray v. Societe Francaise, etc.*, 131 Cal. 566; *Anderson v. Meislahn*, 12 Daly (N. Y.) 149; *Ball v. Doud*, 26 Oregon 14; *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299; *Brown v. Farnandis*, 27 Wash. 232.

5. *Gray v. Societe Francaise, etc.*, 131 Cal. 566; *Dwyer v. Board of Education*, 27 N. Y. App. Div. 87; *Van Note v. Cook*, 55 N. Y. App. Div. 55; *Ball v. Doud*, 26 Oregon 14.

6. *Foster v. McKeown*, 192 Ill. 339; *Oberlies v. Bullinger*, 75 Hun (N. Y.) 248; *Preston v. Syracuse*, 92 Hun (N. Y.) 301; *Williams v. Shields*, 16 Daly (N. Y.) 178; *Porter v. Swan*, (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 406; *Essex v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736; *Hasbrouck v. Milwaukee*, 17 Wis. 266.

7. *Baker v. Herty*, 1 Cranch (C. C.) 249. See also *Truckee Lodge v. Wood*, 14 Nev. 293.

8. *Van Note v. Cook*, 171 N. Y. 659, 64 N. E. Rep. 1126, *affirming* 55 N. Y. App. Div. 55.

9. *Morgan v. Baltimore*, 58 Md. 509; *Gilbert Blasting, etc., Co. v. Rex*, 7 Can. Exch. 221.

10. *Gilbert Blasting, etc., Co. v. Rex*, 7 Can. Exch. 221.

11. *Contractor's Bonds.* — *Foster v. Gaston*, 123 Ind. 96; *Cassan v. Maxwell*, 39 Minn. 391; *Milliken v. Callahan County*, 69 Tex. 205.

Where a proposal for bids requires the bidder to give bond for faithful performance of the work, the builder is not obliged to accept a bond which requires him to give immediate notice to the sureties of the failure of the

quently require the contractor to pay all claims for materials used and the wages of all laborers, etc., employed by the contractor upon the work. Under such conditions the right of the persons who furnish materials or perform labor for the contractor to maintain an action on the bond to enforce their claims depends on the general rule prevailing in the jurisdiction in which the suit is brought with regard to the right of incidental beneficiaries of a contract, though not parties or privies thereto, to maintain an action on the contract.<sup>1</sup> The effect of alterations or deviations from the terms of the contract as a discharge of the sureties upon the contractor's bond has been heretofore discussed.<sup>2</sup>

**WORKING TOGETHER.** — See the title FELLOW SERVANTS, vol. 12, p. 971.

**WORKMAN.** (See also the title MECHANICS' LIENS, vol. 20, p. 338, and see LABOR — LABORER, vol. 18, p. 71.) — A workman has been defined as a man who is employed in menial labor, whether skilled or unskilled; a worker; a toiler; specifically, an artificer, a mechanic or artisan, a handicraftsman.<sup>3</sup> Ordinarily a workman is understood to be one who labors; one who is employed

contractor to perform and also requires him to sue on the bond within six months after completion of the work. *Brown v. Levy*, 29 Tex. Civ. App. 389.

**Consideration.** — Where a building contract is entered into on the faith that the contractor will give bond for performance of the work, a bond given after the beginning of the work is supported by sufficient consideration. *Smith v. Molleson*, 148 N. Y. 241, affirming (Supm. Ct. Gen. T.) 26 N. Y. Supp. 653. But compare *Ring v. Kelly*, 10 Mo. App. 411; *La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388; *McCarty v. Hampton Bldg. Assoc.*, 61 Iowa 287.

**Construction.** — In *Simonson v. Grant*, 36 Minn. 439, it was held that a building contract containing an agreement that the contractors would hold the builder harmless from liens for labor and materials was not broken by the mere existence of unpaid claims for which no proper acts had been performed to perfect a lien.

**When Action May Be Brought.** — *Oakwood Retreat Assoc. v. Rathborne*, 65 Wis. 177.

1. *California.* — *Mangrum v. Truesdale*, 128 Cal. 145; *Carpenter v. Furrey*, 128 Cal. 665; *Union Sheet Metal Works v. Dodge*, 129 Cal. 390.

*Illinois.* — *Stull v. Hance*, 62 Ill. 52.

*Indiana.* — *Williams v. Markland*, 15 Ind. App. 669; *Young v. Young*, 21 Ind. App. 509; *King v. Downey*, 24 Ind. App. 262.

*Iowa.* — *Baker v. Bryan*, 64 Iowa 561.

*Massachusetts.* — *Ball v. Newton*, 7 Cush. (Mass.) 599.

*Missouri.* — *St. Louis v. Von Puhl*, 133 Mo. 561; *Devers v. Howard*, 144 Mo. 671; *School Dist. v. Livers*, 147 Mo. 580.

*Nebraska.* — *Lyman v. Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Kauffmann v. Cooper*, 46 Neb. 644; *Morton v. Harvey*, 57 Neb. 304; *Fitzgerald v. McClay*, 47 Neb. 816.

*New York.* — *Hurd v. Johnson Park Invest. Co.*, (Buffalo Super. Ct. Gen. T.) 13 Misc. (N. Y.) 643; *Buffalo Cement Co. v. McNaughton*, 90 Hun (N. Y.) 74.

*North Carolina.* — *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car. 363.

*Ohio.* — *Greenless v. Shinnick*, 7 Ohio Dec. (Reprint) 385, 2 Cinc. L. Bul. 282.

*Oregon.* — *Hamilton v. Gambell*, 31 Oregon 328.

*Pennsylvania.* — *Philadelphia v. Stewart*, 195 Pa. St. 309.

*Washington.* — *Spokane, etc., Lumber Co. v. Loy*, 21 Wash. 501.

See generally the title CONTRACTS, vol. 7, p. 104 *et seq.*

2. See the title SURETYSHIP, vol. 27, p. 495 *et seq.* See also the following cases:

*England.* — *Watts v. Shuttleworth*, 5 H. & N. 235; *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 550, 95 E. C. L. 550; *Gordon v. Rae*, 8 El. & Bl. 1065, 92 E. C. L. 1065; *Kingston-upon-Hull v. Harding*, (1892) 2 Q. B. 494.

*Indiana.* — *Weir Plow Co. v. Walmsley*, 110 Ind. 242.

*Kansas.* — *McLennan v. Wellington*, 48 Kan. 756.

*Louisiana.* — *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2070.

*Minnesota.* — *Simonson v. Grant*, 36 Minn. 439; *Duluth v. Heney*, 43 Minn. 155; *Abbott v. Morrisette*, 46 Minn. 10.

*Mississippi.* — *Moore v. Fountain*, (Miss. 1891) 8 So. Rep. 509.

*Missouri.* — *Casey v. Gunn*, 29 Mo. App. 14.

*Nebraska.* — *Brennan v. Clark*, 29 Neb. 385; *Dorsey v. McGee*, 30 Neb. 657; *Hayden v. Cook*, 34 Neb. 670.

*Nevada.* — *Truckee Lodge v. Wood*, 14 Nev. 293.

*New York.* — *Henricus v. Englert*, 63 Hun (N. Y.) 625, 17 N. Y. Supp. 235, 237.

*Pennsylvania.* — *Berks County v. Ross*, 3 Binn. (Pa.) 520.

**Extension of Time for Performance.** — The act of the owner extending the time for the completion of the building does not affect the obligation of the sureties. *Steffes v. Lemke*, 40 Minn. 27.

3. **Workman.** — *In re Scanlan*, 97 Fed. Rep. 27.



to do business for another; a worker; one who is employed in labor.<sup>1</sup> A workman is one who works; one employed in any labor, especially manual labor.<sup>2</sup>

**WORKMANLIKE MANNER.** — See note 3.

**WORK OF NECESSITY.** — See the title SUNDAYS AND HOLIDAYS, vol. 27, p. 399.

**WORK PLACE.** — See note 4.

**WORKS.** (See also PUBLIC WORKS, vol. 23, p. 419.) — “Works” has been defined as an establishment for manufacturing or for the performance of industrial labor of any sort, including all the buildings, machinery, etc.<sup>5</sup>

1. *In re Grubbs-Wiley Grocery Co.*, 96 Fed. Rep. 183.

2. *Worc. Dict.*, followed in Pennsylvania, etc., *R. Co. v. Leuffer*, 84 Pa. St. 171.

**Architect Held a Workman.** — *State Bank v. Gries*, 35 Pa. St. 423; *Arnoldi v. Gouin*, 22 Grant. Ch. (U. S.) 314; *Mulligan v. Mulligan*, 18 La. Ann. 21. But see *Raeder v. Bensberg*, 6 Mo. App. 445.

**Civil Engineers.** — In Pennsylvania, etc., *R. Co. v. Leuffer*, 84 Pa. St. 168, a civil engineer was held not to be a *workman* within the Mechanic's Lien Law. The court said: “When we speak of the laboring or working classes we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their physical ability. We thereby intend those who are engaged, not in head but in hand work, and who depend upon such hand work for their living.”

**Driver of a Tram Car** held not to be a *workman* within the English Employers' Liability Act of 1880. *Cook v. North Metropolitan Tramways Co.*, 18 Q. B. D. 683. Compare *Yarmouth v. France*, 19 Q. B. D. 647.

**An Omnibus Conductor** has been held not to be a *workman* within the English Employers' Liability Act. *Morgan v. London Gen. Omnibus Co.*, 12 Q. B. D. 206.

**Conductor.** — A guard of a goods train was held not to be a *workman*. See *Hunt v. Great Northern R. Co.*, (1891) 1 Q. B. 601.

**A Designer** of patterns is not a *workman*. *Jackson v. Hill*, 13 Q. B. D. 618.

**The General Manager** of a mercantile corporation has been held not to be a *workman* within the meaning of a bankruptcy act giving priority of payment out of the bankrupt's estate to wages due to *workmen*. *In re Grubbs-Wiley Grocery Co.*, 96 Fed. Rep. 183.

**A Hairdresser** was held not to be a *workman*. *Reg. v. Louth Justices*, (1900) 2 Ir. 714.

**Independent Contractor.** — *Workman* held not to include an independent contractor. *Marrow v. Flimby, etc., Coal, etc., Co.*, (1898) 2 Q. B. 596.

But one who has to labor manually is not less a *workman* because he has to employ other manual laborers to assist him. *Grainger v. Aynsley*, 6 Q. B. D. 182. And so one, a substantial part of whose time is taken up in manual labor, is a *workman* within the act mentioned, although he is an overlooker of others. *Leech v. Gartside*, 1 Times Rep. 391. So is a miner *working* for a “buttyman.” *Brown v. Butterley Co.*, 53 L. T. N. S. 964.

**Piecework — Member of Squad.** — See *M'Cready v. Dunlop*, 2 F. Ct. of Sess. Cas. 1027.

**Traveling Salesman.** — A traveling salesman has been held not to be a *workman* within a statute giving preference to the wages of *workmen*. *In re Scanlan*, 97 Fed. Rep. 27.

**Eight-hour Law.** (See also the title EIGHT-HOUR LAWS, vol. 10, p. 462.) — The term *workman* has been held not to embrace any officer or employee for whom an annual salary has been specifically named and appropriated by the legislature. *Billingsley v. Marshall County*, 5 Kan. App. 435.

3. **Workmanlike Manner.** — A clause in a lease provided that the lessee should cultivate the farm in a *workmanlike manner*. This was held to mean in a “farmerlike manner.” The court said: “This expression was undoubtedly intended to mean in a ‘farmerlike manner,’ or as good farmers usually do, and so we construe it. If it was required by this test that lime should be spread the autumn before putting in spring crops, as contended for by the defendant below, then the work performed by the plaintiff in spreading the lime hauled upon the ground might and ought to be presumed to have been for the tenant's own benefit, and he should not charge for it. His lease was dated in September preceding the commencement of his term, and there being no obstacle to his entering to spread the lime in the fall, whether he did it or omitted it must enter into the consideration of what would be good husbandry under these circumstances. Of course, if it had been a case in which he could not have entered without being a trespasser, it could not be presumed that it was within the meaning of the clause that he must enter. *Workmanlike*, ‘farmerlike,’ and such like expressions, necessarily have relation to the circumstances of the thing to be done as indicated.” *Aughinbaugh v. Coppenheffer*, 55 Pa. St. 349.

**Contract for Sawing Lumber.** — See the title LOGS AND LUMBER, vol. 19, p. 524.

4. **Work Place.** — A stable-yard and stables at which a large number of cabmen were daily in attendance for the purpose of hiring cabs was held to be a *work place* within section 38 of the English Public Health Act of 1891. *Bennett v. Harding*, (1900) 2 Q. B. 397.

5. **Works.** — *South St. Joseph Land Co. v. Pitt*, 114 Mo. 140.

**Works, Mines, Manufactory.** — A statute declared its purpose to secure money due “for labor and services rendered by any miner, mechanic, laborer, or clerk, from any person or persons or chartered company employing clerks,

**Ways, Works, or Machinery.** — In the notes will be found cases construing the term “ways, works, or machinery” as used in the “Employers’ Liability Acts,” extending and regulating the liability of employers to make compensation for personal injuries suffered by employees “by reason of any defect in the condition of the ways, works, or machinery connected with, or used in, the business of the employer.”<sup>1</sup>

miners, mechanics, or laborers, either as owners, lessees, contractors, or underowners of any *works*, mines, manufactory, or other business where clerks, miners, or mechanics are employed.” It was held that the statute contemplated a business complete and independent and of a fixed and permanent character, as opposed to a temporary employment, cutting sawlogs for example. The court said: “The words ‘*works*, mines, manufactory,’ thus employed in the act, have a definite signification, well understood in their general and popular acceptance. *Ex vi termini* the branches of business intended to be described by them are, in a certain sense, complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. It will scarcely be pretended that either of these words fitly describes the business in which appellant was employed.” *Pardee’s Appeal*, 100 Pa. St. 412.

**Works Required.** — A provision in the charter of a railway company providing that the “*works* hereby required” should be finished within ten years, does not restrict the right, also contained in the charter, to construct branch roads, after the expiration of ten years; the “*works* required” were the building and equipping of the main stem. *Blanton v. Richmond, etc., R. Co.*, 86 Va. 618, 43 Am. & Eng. R. Cas. 617.

**Stipulation in Conveyance.** — In *South St. Joseph Land Co. v. Pitt*, 114 Mo. 135, it was held that a stipulation that a company should transfer its *works* to a certain place was fulfilled by the removal of the building and machinery, although the factory was not put in operation. The court said: “The word *works* is often used as meaning ‘an establishment for manufacturing, or for performing industrial labor of any sort; generally, in the plural, including all the buildings, machinery, etc., used in the required operations, as iron *works*.’ Century Dictionary. The word was, we think, used in this sense here, that is to say, meaning the buildings and machines of the Omaha plant. The parties could not have used the word in any other sense, when they say the *works* shall be transferred from Omaha; for the works at that place were not and had not been in operation for fourteen months.”

**Stove Works — Burglary.** — An allegation in an indictment charging the defendant with breaking and entering “stove *works*” is not a sufficient allegation that he broke or entered a building, the words “stove *works*” not necessarily implying an inclosure or building. The court said: “The words ‘stove *works*’ do not necessarily imply a place inclosed by a fence. Still less do they imply of necessity a building. These words are used to mean all

the grounds used by a manufacturer for the manufacture of stoves. They include the buildings, and also the grounds about the buildings, whether such grounds are fenced in or not. They are words of the most general meaning. Webster’s Dictionary, under *work*. One who entered into grounds used for the manufacture of stoves might, in the legal phrase, be said to break into the close of the owner. And plainly the allegation of the indictment does not necessarily include the breaking into any building, or even into any grounds inclosed by a fence.” *People v. Haight*, 54 Hun (N. Y.) 8.

**1. Employers’ Liability Act.** — See the titles *FELLOW SERVANTS*, vol. 12, p. 87; *MASTER AND SERVANT*, vol. 20, p. 71.

**Ownership of Ways Not Necessary — But Control of Them Is.** — In *Coffee v. New York, etc., R. Co.*, 155 Mass. 21, the court said: “The want of ownership by the defendant is not of much significance; but by the terms, ‘ways, *works*, or machinery connected with or used in the business of the employer,’ we understand something in the place, or means, appliances, or instrumentalities provided by the employer for doing or carrying on the work which is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer.” Here it was held that if a freight car which is hauled empty by a railroad company to the terminus of its road, for transfer to another line where it belongs, while being shifted there to another train upon a connecting line, occasions an injury to a brakeman employed by such company, by reason of a defect in the brake wheel, such car is not part of the “ways, *works*, or machinery connected with or used in the business of the employer,” such as will give a right of action against the company under the statute.

In *Trask v. Old Colony R. Co.*, 156 Mass. 298, it was said that it may not be necessary, in order to render an employer liable for an injury occurring to an employee through a “defect in the ways, *works*, or machinery,” within the meaning of the *Massachusetts Statute* (1887), c. 270, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business by his authority, express or implied.

In *Regan v. Donovan*, 159 Mass. 1, the plaintiff, while in the employ of the defendants, was ordered by them to carry a bar of iron down a flight of movable stairs leading into, and intended to furnish permanent means of access to, a cellar, in which the defendants were making some alterations for the owner of the building. There was nothing to show that the steps were not suitable to be placed as they were, or reasonably expected to be in such



**WORKSHOP.** — See note 1.

**WORKS OF ART.** — See note 2.

position, or that the defendants had reason to suppose that they were insecurely fastened. As the plaintiff stepped upon the stairs, they slipped from under him and he was injured. It was held that the defendants did not adopt the stairs as a way used in their business, within the meaning of the term in the statute.

A track in the yard of A, owned, maintained, and repaired by him, and used by a railroad under a contract with him for the delivery of freight in the yard, is no part of the railroad's ways, within the meaning of the statute, and if an employee of the railroad is killed by a defect in it, an action will not lie against the railroad on that statute. *Knowlton, J., dissenting. Engel v. New York, etc., R. Co., 160 Mass. 260.*

**Ways or Works Must Be of a Permanent Character.** — The statute has reference to ways and *works* of a permanent character, such as are connected with or used in the business of an employer. Thus, the liability of a bank of earth, upon which laborers employed by a person are at work, to fall when undermined, if not shored up, is not a defect in the condition of the ways, *works*, etc., when the work on the bank is simply the leveling of it for the purpose of grading the land of a third person. *Lynch v. Allyn, 160 Mass. 248.*

And in *Howe v. Finch, 17 Q. B. D. 187*, it was held that the statute did not apply to ways or *works* in process of construction.

In *McGiffin v. Palmer's Shipbuilding, etc., Co., 10 Q. B. D. 5*, a workman was employed in the defendant's iron works, and part of his duty was to take iron in balls, by means of a two-wheeled car, along a roadway of iron plates. While he was so engaged, the car struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway, and a ball fell on him, causing personal injuries which resulted in his death. In an action against the employers, it was held that the obstruction caused by the substance projecting into the roadway was not a defect in the condition of the way, within the meaning of the act, and the defendants were not liable. *Compare Brannigan v. Robinson, (1892) 1 Q. B. 344.*

In *Willets v. Watt, (1892) 2 Q. B. 92*, where a workman was injured by falling into a catchpit in the floor of a workshop, which was generally kept covered, but the cover of which was off at the time of the accident, for a temporary purpose, it was held by the Court of Appeal that there could not be said to be a defect in the condition of the way, and Lord Justice Fry said that the language of this section pointed to a defect of a chronic character. All the members of the court concurred in saying that there was no defect in the condition of the way, but merely a negligent user of it by allowing the way to be used when the lid was off without giving warning.

So in *Burns v. Washburn, 160 Mass. 457*, a temporary staging, put up by masons in the employ of a contractor, for the purpose of erecting a building on the land of a third person, was held to be not a part of the employer's

ways or *works*. See also *O'Connor v. Neal, 153 Mass. 281*; *May v. Whittier Mach. Co., 154 Mass. 29*; *Lynch v. Allyn, 160 Mass. 248*; *Burns v. Washburn, 160 Mass. 457*; *Carroll v. Willcutt, 163 Mass. 221*; *Adasken v. Gilbert, 165 Mass. 443*; *Reynolds v. Barnard, 168 Mass. 226*; *Beique v. Hosmer, 169 Mass. 541*; *Morris v. Walworth Mfg. Co., 181 Mass. 326.*

**Same.** — **A Staging Fifteen Feet High, Twenty Feet Long**, and five feet wide, erected in the front of a sawmill, by the side of a woodpile, for the purpose of enabling the workmen to pile the wood higher, and which is taken down and put up from time to time in different places, and intended to be used from four days to a week at a time in each place where it is erected, has been held to constitute a part of the "ways, *works*, or machinery" of the mill. *Prendible v. Connecticut River Mfg. Co., 160 Mass. 131.*

**Consumed in Use — Exploder.** — Exploders used to explode dynamite, which are instantly consumed in use, are not "ways, *works*, or machinery." *Shea v. Wellington, 163 Mass. 364.*

**Adits and Levels.** — In *Martyn v. Williams, 1 H. & N. 817, 26 L. J. Exch. 117*, adits and levels belonging to a clay mine were held to be *works*.

**A Pipe Projecting from a Water Tank**, whereby a brakeman is knocked off a railroad train and killed, has been held to be a part of the "ways, *works*, machinery," etc., of a railroad company, within the meaning of the *Alabama Code*, § 2590. *East Tennessee, etc., R. Co. v. Thompson, 94 Ala. 636.*

**Plank.** — In *U. S. Rolling Stock Co. v. Weir, 96 Ala. 396*, the complaint alleged that a plank upon which the deceased was required to walk, in the discharge of his duties as a watchman at the defendant's *works*, was eight inches broad, and was laid upon rafters three feet apart and about thirty feet from the floor of a building, and that this was "an unsafe and dangerous appliance for the purpose." It was held that the complaint alleged a defect in the condition of the "ways" connected with or used in the business of the employer, within the meaning of section 2590 of the *Alabama Code*.

In *Caldwell v. Mills, 14 Can. L. T. 171*, it was held that a plank was a "way" within the meaning of the Workman's Compensation for Injuries Act, Revised Statutes of Ontario, c. 141, § 3, subsec. 1.

A railway line has been held to be *works*. *Reg. v. Midland R. Co., 4 El. & Bl. 958, 82 E. C. L. 958.*

**Shafting.** — In *Copithorne v. Hardy, 173 Mass. 400*, where shafting fell and injured an employee, it was held that the defect was a defect in the "ways, *works*, or machinery."

**Walls.** — In *Brannigan v. Robinson, (1892) 1 Q. B. 344*, walls remaining in place during the taking down of a building were held to be *works*.

**1. Workshop — Eight-hour Law.** — See *Ritchie v. People, 155 Ill. 98*, and see the title EIGHT-HOUR LAWS, vol. 10, p. 462.

**2. Works of Art — Revenue Law.** — See *Morris*



**WORK, WORKING, ETC.**—See note 1.

European, etc., *Express Co. v. U. S.*, 85 Fed. Rep. 965; *In re Hempstead*, 95 Fed. Rep. 969.

1. **Work in the Sense of Duty.**—In *Chicago, etc., R. Co. v. Bragonier*, 119 Ill. 63, it was held that in an action involving the question of a brakeman's negligence, either party has the right to prove what were the customary and usual duties of brakemen. And where counsel proved what was termed the *work* of brakemen, the court said: "It may also be further remarked, in this same connection, that while plaintiff's counsel disclaimed any purpose to prove what were the customary or usual duties of brakemen on defendant's road, he was permitted to and did prove what was termed the *work* of brakemen. The word *work*, in the sense used, could mean nothing else than 'duty.' As used, the words are convertible terms, and obviously mean the same thing. Either party had the right to prove what were the customary and usual duties of brakemen, as to the inspection of the brakes, but that privilege was denied, by the rulings of the court, to defendant. In this there was error."

**Hard Labor.**—In *Screen v. State*, 107 Ga. 718, it was said: "The section of the code under which the sentence was imposed simply provides that the convict shall *work*, and this does not necessarily mean 'hard labor.'"

**Commencement of Work.**—A statute provided that the lien of a special assessment for paving should attach from the commencement of the *work*. It was held that commencement of the *work* meant the time when labor was first commenced, and not the time of the letting of the contract. The court said: "The word *work* is used to designate labor, or the product of labor and material combined, required to make the improvement, as separate and distinct from the acts of the agents of the city preliminary to, and which terminate in, the formal execution of the contract." *Eagle Mfg. Co. v. Davenport*, 101 Iowa 493.

**Resuming Work.**—See *Honaker v. Martin*, 11 Mont. 91; *Hirschler v. McKendricks*, 16 Mont. 211. And see the title MINES AND MINING CLAIMS, vol. 20, p. 738.

**Work as Applied to a Mine.**—In *Bailey v. Bond*, (C. C. A.) 77 Fed. Rep. 409, it is said: "The term *work*, as applied to a mine, means the exploring or digging for ores, and the appropriation of the same when found. The attorneys for the defendant have collected and cited in their brief a number of cases in which the word *work* is used in the same sense." See also *Bicknell v. Austin Min. Co.*, 62 Fed. Rep. 432; *Denver First Nat. Bank v. Bissell*, 4 Fed. Rep. 701; *Real del Monte Consol. Gold, etc., Min. Co. v. Pond Gold, etc., Min. Co.*, 23 Cal. 83; *Buck v. Lodge*, 14 Mor. Min. Rep. 623. And see the title MINES AND MINING CLAIMS, vol. 20, pp. 734, 738.

**Same Improvements.**—In *Power v. Sla*, 24 Mont. 243, it is said: "The terms *work* and 'labor' are not synonymous with the term 'improvements.' The former have reference to prospecting and excavating for the purpose of development; while the latter, though comprehensive enough to include everything signified by the former, has reference also to tangible,

material additions to the claim in the way of machinery, buildings, and other structures put in place or erected for the purpose of developing the property and extracting minerals contained in it."

**Mechanics' Liens.** (See also the title MECHANICS' LIENS, vol. 20, pp. 339, 340.)—The superintendence of the construction of a building has been held to be *work* within the Mechanic's Lien Law. *Fischer v. Hanna*, 8 Colo. App. 471.

Persons who occupy the positions of managing agent and superintendent of trains, but who also, on occasion, run trains, clean cars, repair track, and act as "general utility" men, must be considered as performing "*work* or labor," within the *Montana Railroad Lien Law* (Comp. Stat. Montana, c. 25, § 707); but it is not so with one who merely has charge of the office and of the receipts, and keeps in a book the time of the workmen as handed in to him. *Flagstaff Silver Min. Co. v. Cullins*, 104 U. S. 176.

Loss of time for men was held, in *Lee v. Brayton*, 18 R. I. 232, not to be subject to a mechanic's lien, as it is not *work* or material.

In *Price v. Kirk*, 13 Phila. (Pa.) 497, 35 Leg. Int. (Pa.) 325, it was held that a claim by an architect, for preparing drawings and specifications for a house, was not subject to a mechanic's lien. The drawing of plans and specifications, of itself, is not *work* within the meaning of the statute. See *Hughes v. Torgerson*, 96 Ala. 346; *Stryker v. Cassidy*, 76 N. Y. 50. But see *State Bank v. Gries*, 35 Pa. St. 423.

**Work or Supplies—Highest Bidder.**—In *Davies v. New York*, 83 N. Y. 207, it was held that the renting of chambers for the city recorder did not fall within the provision requiring *work* or supplies to be let by contract to the lowest bidder.

So the statute does not apply to a contract for carriage hire of aldermen or councilmen while engaged in public duties. *Smith v. New York*, (C. Pl. Gen. T.) 21 How. Pr. (N. Y.) 1.

Nor does it apply to professional services; for example, those of a surveyor in preparing a map. *People v. Flagg*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 232.

**Wagon Work.**—In *Johnson v. Seymour*, 19 Ind. 24, an action upon a note, payable in "*wagon work*," the court thus construes the term "*wagon work*:" "The appellant argues that the '*wagon work*' mentioned in the note should not be regarded in the light of specific articles, but as labor, and hence, that the plaintiff or holder of the note should have made such designation of the labor to be performed. Whether or not the conclusion would follow from the premises, we need not determine, as we cannot adopt the premises thus assumed. The terms '*wagon work*,' as used in the note, unexplained by circumstances or otherwise, evidently do not mean *labor*, as hauling or otherwise, with a wagon or wagons; nor do they mean simply labor or *work* to be performed by the maker of the note in the construction of wagons. But they do mean, as we think, wagons, or perhaps parts of wagons; wagons

**WORLDLY EMPLOYMENT, LABOR, ETC.** — See the title SUNDAY LAW, vol. 27, p. 394.

**WORLD'S FAIR.** — See the titles STATES, vol. 26, p. 474; TAXATION, vol. 27, pp. 624, 628; THEATRES AND AMUSEMENTS, vol. 28, p. 115.

**WORMGUT.** — See note 1.

**WORN.** — See note 2.

**WORRYING.** — See note 3.

either complete or incomplete, including both the materials and the labor bestowed upon them."

**English Factory and Workshop Act of 1878.** — A young person in the employment of the occupiers of a spinning mill, during the time allowed for a meal oiled part of the machinery of the mill. He stated that he did so contrary to orders, and for his own amusement. It was held that he was *working* in what he did. *Prior v. Slaithwaite Spinning Co.*, (1898) 1 Q. B. 881.

**Worked or Navigated.** — See *Elmore v. Hunter*, 3 C. P. D. 116.

**Working and Laboring.** — *Working* and laboring are convertible terms and mean the same thing. *Raines v. Watson*, 2 W. Va. 389.

**Working Shaft.** — See *Foster v. North Hendre Min. Co.*, (1891) 1 Q. B. 71.

**Working Hours — Charter-party.** — The phrase "*working hours*" in a charter-party has been held to mean those hours during which *work* was ordinarily done in the business to which the words related. *The Principia*, 34 Fed. Rep. 667.

**Working Days.** — *Working* days include all days except Sundays and legal holidays. *Wood v. Keyser*, 84 Fed. Rep. 692.

**Working the Quarry.** — The words "*working the quarry*," in a lease providing for forfeiture for "not *working* the quarry for a space of three successive months," include the *work* of removing water which has flooded the mine. *Miller v. Chester Slate Co.*, 129 Pa. St. 81.

**Exemption — Working Tools.** (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 118.) — In the eighth section of the *Rhode Island* "act prescribing the forms of writs and the manner of serving them," which exempts from attachment, in favor of the housekeeper, "the *working tools* necessary for his usual occupation," to the value of fifty dollars, and in favor of any debtor, "his *working tools*," to the same value, the same meaning is to be attached to the language in both instances, and the words should be construed to include not only such tools as are indispensably necessary to the mechanic, or even such as are in general use by individuals of the same craft, but also such as the individual in question has adopted to facilitate and diminish his labor, and not only *working tools* so called in the dictionary and by learned men, but such as are so called by the craft, such as the individual uses and has set apart as tools for the advantageous prosecution of his business. *Healy v. Bateman*, 2 R. I. 454.

1. **Wormgut — Revenue Law.** — See *Davies v. U. S.*, 115 Fed. Rep. 232.

2. **Distinction Between "Worn" and "Carried," in Revenue Law.** — In *Richardson v. Lawrence*, 1 Blatchf. (U. S.) 502, the court said: "The

evidence in this case shows that a distinction has always been recognized and acted upon, in the collection of the revenue, between articles *worn* by men, women, and children, and those carried. An article *worn* appears to have been understood, as the term properly imports in a strict philological sense, as intended to designate some article of clothing or raiment — some garment used or *worn* upon the person, as distinguished from an article carried or used about the person for convenience or ornament. A hat, coat, or shoe is an article *worn*, in the proper sense of the word; but a cane, snuffbox, or lady's fan is, properly speaking, an article not *worn* but carried."

**Worn Out.** — Upon the meaning of *worn out*, as applied to pavements, the court in *Regenstein v. Atlanta*, 98 Ga. 167, said: "To construe the Act of 1891 as meaning that the power thereby granted is to be exercised only where the entire pavement is, in a literal sense, '*worn out*,' would be to render it practically inoperative. What was meant by '*worn out*' is explained by the language which follows these words. If the legislature had meant that the power to repave should exist only where the pavement was, in a literal sense, '*worn out*,' there would have been no occasion to add, 'and no longer serviceable as a good pavement,' nor, where the phrase '*worn out*' is again used, the words 'and useless.' The act in terms leaves it to the judgment of the city council whether this condition exists or not."

3. **Worrying Domestic Animals — Dogs.** (See also the title ANIMALS, vol. 2, p. 374.) — Within a statute giving the owner of domestic animals a right to kill a dog for *worrying* them, *worry* means to run at, chase, bark at. *Johnson v. McConnell*, 80 Cal. 551; *Marshall v. Blackshire*, 44 Iowa 475.

Within an act making the owner of a dog liable for damage done by it to sheep, and permitting the killing of the dog, it was held that *worrying* did not imply tearing with the teeth, and that if a dog pursues and barks at sheep this is *worrying* under the statute. *Campbell v. Brown*, 1 Grant's Cas. (Pa.) 82.

In *Johnson v. McConnell*, 80 Cal. 545, it was held that the dog must be actually *worrying* the sheep at the time it is killed. In that case the court said that it was doubtful from the evidence whether the dogs were in fact chasing the sheep, or whether they were merely hunting in the field. The court commented upon the case of *Marshall v. Blackshire*, 44 Iowa 478, cited above, quoting the definition there given, and saying that that case fully sustained its view; but *McFarland, J.*, *dissenting*, claimed that the facts showed that the dogs were *worrying* the sheep within the definition given in that case.



**WORSHIP.** (See also the titles *DISTURBING MEETINGS*, vol. 9, p. 664; *RELIGIOUS SOCIETIES*, vol. 24, p. 325; *SCHOOLS*, vol. 25, p. 30; and see *RELIGIOUS—RELIGION*, vol. 24, p. 321.)—No definition of this word as used in “divine worship,” “religious worship,” “place of worship,” and similar expressions, applicable to all cases, has seemingly been framed by any court. The word has no technical or legal signification; the cases in which its meaning has been the subject of contention have been decided upon their own merits.<sup>1</sup>

**WORSTED.**—Worsted as a noun is defined as “a variety of woollen yarn or thread, spun from long-staple wool which has been combed, and in the spinning is twisted harder than is usual;” and as an adjective, “consisting of worsted; made of worsted yarn; as, worsted stockings.”<sup>2</sup>

**WORTH.**—See note 3.

1. **Religious Worship.**—*And. Law Dict.*; *State v. Norris*, 59 N. H. 536.

**Worship of God.**—See *Atty.-Gen. v. Pearson*, 3 Meriv. 409.

**Business Meeting.**—A prosecution for disturbing a congregation assembled for religious *worship* will not be sustained by proof that the congregation, though disturbed, was assembled exclusively for business purposes, even though the proceedings were opened with religious exercises. *Wood v. State*, 11 Tex. App. 318. See also the title *DISTURBING MEETINGS*, vol. 9, p. 669.

**Sunday School.**—A Sunday school was held not to come within the term “divine *worship*” in an agreement between two congregations to use a church jointly for that purpose. The court said: “These congregations never so understood or acted upon their agreement of union. They built their church for divine *worship* by prayer, praise, and the preaching of God’s word. Its use was to be congregational *worship*, not school instruction. Their *worship* was to be led by pastors, who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by individual laymen. There are reasons, also, why a chamber or audience room dedicated to public congregational *worship* should not be thrown open to thoughtless, giddy, sometimes vicious youths, to deface and soil it. We think the court erred in deciding the case according to the general meaning of the words ‘divine service,’ as testified to by some of the witnesses, instead of confining their signification to the sense in which the congregations understood it when they entered into the agreement, and afterwards practiced upon it.” *Gass’s Appeal*, 73 Pa. St. 46, 13 Am. Rep. 726. See also the title *DISTURBING MEETINGS*, vol. 9, p. 668.

**Camp Meeting—Question of Fact.**—In *State v. Norris*, 59 N. H. 536, it was held to be a question of fact whether a temperance camp meeting was an assembly for the purpose of *worship*. The court said: “The case presents no question of law. The question of fact is, Was the State Temperance Camp Meeting, in this case, a public ‘assembly convened for the purpose of religious *worship*’? G. L., c. 273, § 9. The term ‘religious *worship*’ having no technical meaning in a legal sense, the determination of this question is within the

province of a jury.” *Compare Summit Grove Camp Meeting Assoc. v. School Dist.*, 12 W. N. C. (Pa.) 103, where it was held that if the camp-meeting grounds belonged to an association, and profit was derived from them, it was not a place of *worship*. And see *Com. v. Weidner*, 4 Pa. Co. Ct. 437.

**Residence of Priest or Clergyman.**—In *St. Joseph’s Church v. Tax Assessors*, 12 R. I. 19, 34 Am. Rep. 597, it was held that the residence of a priest or clergyman is not exempt from taxation “as a building for religious *worship*,” although it contains one room set apart as a chapel for religious *worship*. See *Gerke v. Purcell*, 25 Ohio St. 229. See also the title *DISTURBING MEETINGS*, vol. 9, p. 668.

**Place of Worship.** (See also the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 328.)—“A place of *worship*” is constituted by the congregating of numerous *worshippers* thereat. *State v. Swink*, 4 Dev. & B. L. (20 N. Car.) 359.

A statute exempted from taxation churches, meeting-houses, or other places of stated *worship*. It was held that this did not extend to land upon which a church was being erected. The court said: “The word ‘place’ expresses simply locality, not kind, and hence qualifying words were necessary to denote the kind of place; therefore the convention said, ‘of religious *worship*.’ And not content with a single qualifying expression, it prefixed the word ‘actual’—‘an actual place of religious *worship*.’ Without religious *worship* held in it the place has no character.” *Mullem v. Erie County*, 85 Pa. St. 291.

In *Enaut v. McGuire*, 36 La. Ann. 804, it was held that vacant property held in private ownership by the authorities of a church, who had bought it in anticipation of an increase in size and population of the city, in order that the church might have room for improvements in case of such increase, and with the intention of erecting thereon a church, school, or hospital when needed, was not a place of religious *worship*.

2. **Worsted.**—*U. S. v. Klumpp*, 169 U. S. 209 (this case was based upon the construction of a tariff act). See also *Cohn v. Seeburger*, 30 Fed. Rep. 426, *affirmed* 137 U. S. 96.

3. **Worth.**—An instruction to the jury was, in substance, that if they believed from the evidence that the plaintiff owned the insured property at the time of the destruction thereof



**WOULD.** — See also *DID*, vol. 9, p. 454; *MIGHT*, vol. 20, p. 612; *SHOULD*, vol. 25, p. 1061.

**WOUND.** (See also *STAB*, vol. 26, p. 154; and see the titles *ASSAULT AND BATTERY*, vol. 2, p. 952; *MAYHEM*, vol. 20, p. 246.) — A wound is an injury to the person, by which the skin is broken or cut.<sup>1</sup>

by fire, and that the various items thereof "were each *worth* the amount of the insurance thereon," etc., the verdict should be for the plaintiff. In sustaining this instruction the court said: "This, we think, was equivalent to telling the jury that if they believed that the cash value of the property at the time of the loss was equal to the amount of insurance placed thereon, to find for plaintiff. When one asserts in common parlance that a piece of property is *worth* a certain sum he is thereby understood to mean and refer to the cash value." *Sappington v. St. Joseph Town Mut. F. Ins. Co.*, 77 Mo. App. 270.

**Worth and Value.** — See *Rex v. Hull Dock Co.*, 3 B. & C. 516, 10 E. C. L. 171.

1. **Wound.** — *Rex v. Withers*, 4 C. & P. 446, 19 E. C. L. 466; *Moriarty v. Brooks*, 6 C. & P. 684, 25 E. C. L. 597.

A *wound* is a solution of continuity in the soft parts, suddenly occasioned by external causes, and generally attended at first with hemorrhage. *Rex v. Wood*, 4 C. & P. 381, note, 19 E. C. L. 430.

To *wound* means to divide the surface of the body, whether it be an internal—*e. g.*, the inside of the mouth—or an external surface. *Stephen's Criminal Law* 171, citing *Reg. v. Smith*, 8 C. & P. 173, 34 E. C. L. 341.

**Scar.** — In *State v. Leonard*, 22 Mo. 449, it is said: "We may suppose from the evidence that the prosecutrix was *wounded* in the legal sense of the term, for she says that 'there is a scar left still made by the *wound*.'" See also *Shadock v. Alpine Plank-Road Co.*, 79 Mich. 11.

**With the Hand.** — *Wounding* may be done with the hand. *Reg. v. Bullock*, L. R. 1 C. C. 115.

**Breaking a Bone.** — It seems that to break a bone without breaking the skin is not a *wound*. *Rex v. Wood*, 4 C. & P. 381, 19 E. C. L. 430; *Rex v. Owens*, 1 Moody 205; *Rex v. Hughes*, 2 C. & P. 420, 12 E. C. L. 200.

**Stab, Cut, or Wound.** — Where these words were used together in a statute it was held that a *wound* must be accomplished by an instrument, because *wounding* is associated with stabbing and cutting, and a stab and cut must be made by an instrument. *Jennings' Case*, 2 Lewin C. C. 130. See also *Rex v. Stevens*, 1 Moody 409; *Rex v. Harris*, 7 C. & P. 446, 32 E. C. L. 578.

**Where the Whole Skin Is Not Separated.** — A scratch on the face by rupturing the cuticle only, without separating the whole skin, is not a *wound*. *Reg. v. McLoughlin*, 8 C. & P. 635, 34 E. C. L. 561; *Rex v. Wood*, 4 C. & P. 381, 19 E. C. L. 430; *Com. v. Gallagher*, 6 Met. (Mass.) 568; *State v. Leonard*, 22 Mo. 450.

**How Substituted for Wound.** — "It remains for us to inquire whether the substitution of the word 'blow' for the word *wound*, in the indictment now before us, is such an informality as is cured by the statute. The counsel for the prisoner contends that it is not—that, on

the contrary, it is a defect in the substance of the averment of the means whereby the deceased came to his death, and therefore fatal; that the word 'blow' signifies the cause only of the *wound*, which is the effect of the blow, from which effect the death ensues, and that such *wound*, being the immediate cause of the death, must be stated, instead of the remote cause, which is the blow. The language of the court in the case of *State v. Martin*, 3 Dev. L. (14 N. Car.) 329, to which we have referred particularly in *State v. Tom*, 2 Jones L. (47 N. Car.) 414 (*decided* at the present term), goes far to support this argument. But it is to be remarked that the Act of 1811 is not at all alluded to in that case, and the decision seems to have been put upon the strict principles of the common law. We admit the force of the argument, provided the premises be true, that the word 'blow,' in the connection in which it is used, does not convey 'the whole requisite legal idea' of the means whereby the deceased was killed. The charge is that the prisoner, 'with a certain club, which he the said Alfred W. Noblett in both his hands then and there had and held, the said John Davis, in and upon the left side of the head, cutting the left ear and mashing the nose and left cheek bone of him the said John Davis, then and there feloniously, etc., did strike, giving to the said John Davis, then and there, with the club aforesaid, in and upon the left side of the head, cutting the left ear and mashing the nose and left cheek bone of him the said John Davis, one mortal blow, of which said mortal blow the said John Davis on, etc., instantly died.' Mr. Walker defines the word 'blow' to mean a 'stroke,' and the verb 'to mash,' of which 'mashing' is a participle, to mean 'to beat into a confused mass.' Now it seems to us that a blow or stroke with a club, which has the effect of cutting the left ear and mashing, or beating into a confused mass, the nose and left cheek bone of the deceased, shows to the court as clearly the means whereby the deceased was killed as if the word *wound* had been used. The case of *State v. Moses*, 2 Dev. L. (13 N. Car.) 452, decides that the Act of 1811 dispenses with the necessity of stating the dimensions of a *wound*, and we think that it is equally effectual to dispense with the necessity of using the word *wound*, when other terms of equivalent meaning are employed." *State v. Noblett*, 2 Jones L. (47 N. Car.) 433.

**Wound and Bruise** — "*Wound* is a hurt given by violence, no matter with what kind of weapon. 'Bruise' is a hurt with something blunt and heavy. *Wound* includes a bruise. As, therefore, the present charge is of *wounds* with a stick, they must be taken to be such *wounds* as a stick commonly inflicts. Is it competent for the prisoner to object to the use of a word in one of its proper significations? It is admitted, on his behalf, that if the word 'bruises' had been used in this indictment,

**WOVEN FABRICS.** — See note 1.

instead of the word *wounds*, no description would be required; but if every *wound* includes a bruise, why shall that word, in this indictment, be stripped of its ordinary extent of meaning? The word *wound* is not a technical word; it is one of common parlance. If this word, *ex vi termini*, imported a separation of the skin, and was confined in its signification to injuries of that character, then it might be alleged that it always differed from a bruise and did not include it. But it is clear that in common parlance, and also in judicial decisions, *wound* and bruise are used as synonymous." *State v. Owen*, 1 *Murph.* (5 N. Car.) 456, 4 *Am. Dec.* 571.

**Wound and Shoot.**—In *State v. Hammerli*, 60 *Kan.* 860, 58 *Pac. Rep.* 560, it is said: "We think a wounding is charged. It is charged in the averment 'did shoot.' To shoot with a loaded firearm is necessarily to *wound*, and this whether the effect of the shot was to penetrate the flesh or draw blood. Some courts have held that an injury inflicted by one upon

another which did not break the skin or draw blood was not, in the legal sense, a *wound*. If this were correct it might be that the term 'shoot' would not be equivalent in meaning to *wound*, because all shots do not penetrate the flesh, but it is not correct in medical jurisprudence *Bouv. L. Dict.*; *Stand. Dict.*, tit. 'Wound.'"

**Insurance.**—The term *wound*, as used in a question to an applicant for insurance, has been held to mean an injury to the body causing an impairment of health or strength, or rendering the person more liable to contract disease or less able to resist its effects. The court said: "A cut on the face, finger, or on any part of the body from which blood flows, though healing in a few days and leaving no evil consequences, is a hurt or *wound*, but not within the meaning of the contract under consideration." *Bancroft v. Home Ben. Assoc.*, 120 *N. Y.* 21. See also the title *LIFE INSURANCE*, vol. 19, p. 62.

**1. Woven Fabrics — Revenue Law.** — See *McBratney v. U. S.*, 99 *Fed. Rep.* 424.

# WRECKS (OF THE SEA).

By H. O'B. COOPER.

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## CROSS-REFERENCES.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ABANDONMENT AND TOTAL LOSS, vol. 1, p. 4; FLOODS, vol. 13, p. 685; JETTISON, vol. 17, p. 610; LOST PROPERTY, vol. 19, p. 579; MASTERS OF VESSELS, vol. 20, p. 193; NAVIGABLE WATERS, vol. 21, p. 424; SALVAGE, vol. 24, p. 1179; TOWAGE, TUGS, AND TOWS, vol. 28, p. 260. See also DERELICT, vol. 9, p. 395; FLOTSAM, vol. 13, p. 724; JETSAM, vol. 17, p. 609; LIGAN, vol. 19, p. 111.*

**I. DEFINITION.** — Although in its ordinary and popular sense the word “wreck” is used to signify the partial or total destruction of any object,<sup>1</sup> yet in a legal sense it is strictly confined to ships, or parts thereof, or goods therefrom, which have been cast on shore by the sea, and is never extended to such things while afloat.<sup>2</sup> Thus, goods taken from the body of a stranded

### 1. Popular Meaning. — Cent. Dict.

The word “wreck” may be used in the sense which includes goods derelict, or jetsam, or flotsam. *Legge v. Boyd*, 1 C. B. 92, 50 E. C. L. 92, 9 Jur. 307.

**2. Legal Definition — England.** — *Sheppard v. Gosnold*, Vaugh. 168; *Cargo Ex Schiller*, 2 P. D. 145; *Gas Float Whitton*, No. 2, (1895) P. 301; *Palmer v. Rouse*, 3 H. & N. 505; *Constable's Case*, 5 Coke 106; *Legge v. Boyd*, 1 C. B. 92, 50 E. C. L. 92, 9 Jur. 307; 1 Black. Com. 290.

*United States.* — *Murphy v. Dunham*, 38 Fed. Rep. 503.

*Massachusetts.* — *Chase v. Corcoran*, 106 Mass. 286; *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500.

*New York.* — *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431.

*Pennsylvania.* — *Lacaze v. State*, Add. (Pa.) 58; *Respublica v. Le Caze*, 1 Yeates (Pa.) 59.

*Virginia.* — *Com. v. Garner*, 3 Gratt. (Va.) 724.

**Owner or Servants Retaining Possession — No Wreck.** — *Dunwich v. Sterry*, 1 B. & Ad. 831,

20 E. C. L. 492; *Sutton v. Buck*, 2 Taunt. 302; *McKinney v. Bright*, 16 Pa. St. 399, 55 Am. Dec. 512.

**Goods in Vessel Sunk in Tide Water Not Wreck.** — *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431.

**Cargo of Vessel Sunk in Forty Feet of Water Not Wreck.** — *Murphy v. Dunham*, 38 Fed. Rep. 503.

**Specie Raised from a Sunken Cargo** at sea is not a wreck in the common-law meaning of the word. *Cargo Ex Schiller*, 2 P. D. 147.

**Goods Need Not Be Left Dry.** — To constitute a wreck of the sea, goods must have touched the ground, though they need not have been left dry. *Rex v. Forty-nine Casks Brandy*, 3 Hag. Adm. 257.

**Floating Property.** — Things floating, though between high and low water mark, not having touched the ground, cannot be *wreccum maris*; if fixed to the land between high and low water mark, though with some water around them, they are *wreccum maris*. If after having once touched the land between high and low water mark they are again afloat, they are not necessarily *wreccum maris*, but their legal character



ship and brought ashore are not within the definition,<sup>1</sup> nor is the stranded ship itself, where it is afterwards repaired and floated.<sup>2</sup>

In **Marine Insurance** a ship becomes a wreck when, in consequence of an injury she has received, she is rendered absolutely unnavigable or unable to pursue her voyage without repairs exceeding the half of her value.<sup>3</sup>

**II. JURISDICTION OF COURTS.** — The definition of the term "wreck" necessarily determines the jurisdiction of courts, for as long as the goods remain at sea, or afloat, admiralty retains jurisdiction. Hence, it follows that admiralty has no jurisdiction over wrecks.<sup>4</sup> But it seems that if the wreck is surrounded by water at high tide admiralty has jurisdiction, which it loses when the tide recedes and leaves the wreck upon dry land.<sup>5</sup>

**III. TITLE TO WRECKS** — 1. In General. — By the Common Law title in a wreck was vested in the crown until the owner claimed it.<sup>6</sup> This claim, however, had to be made within a year and a day,<sup>7</sup> which dated from the day on

will depend on the particular circumstances. *Rex v. Two Casks Tallow*, 3 Hag. Adm. 294.

The term cannot be extended to a boat or other property afloat, not appearing to have ever been cast overboard or lost from a vessel in distress. *Sheppard v. Gosnold*, Vaugh. 159; *The Zeta*, L. R. 4 A. & E. 460; *Palmer v. Rouse*, 3 H. & N. 505; *Barry v. Arnaud*, 10 Ad. & El. 646, 37 E. C. L. 206; *Legge v. Boyd*, 1 C. B. 92, 50 E. C. L. 92, 14 L. J. C. Pl. 138; *Chase v. Corcoran*, 106 Mass. 288; *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431.

**Dististinguished from Flotsam, Jetsam, and Ligan.** — "Flotsam is when a ship is sunk or otherwise perishes and the goods float upon the sea. Jetsam is when a ship is in danger of being sunk and to lighten the vessel the goods are cast into the sea. Ligan is where the goods so cast into the sea are so heavy that they sink and the mariners tie a buoy or something to them so that they may find them again. No goods of the three last descriptions, that is, flotsam, jetsam, and ligan, can be called or deemed wreck so long as they remain on the sea, but if they are cast on the land by the sea they then, and not till then, become wreck." *Lacaze v. State*, Add. (Pa.) 58.

By the Statute 17 & 18 Vict., c. 104, § 2, "wreck shall include jetsam, flotsam, ligan, and derelict found in or on the shores of the sea or any tidal water." *Cargo Ex Schiller*, 2 P. D. 147.

In 3 & 4 Wm. IV., c. 52, § 50, the word was used in its legal sense. *Legge v. Boyd*, 1 C. B. 92, 50 E. C. L. 92, 9 Jur. 307.

Goods being partly thrown upon shore and partly found floating on the sea, and landed were conveyed to a warehouse of the lord of the manor. They were held to be chargeable with duty as "wreck," brought or coming into the kingdom, within the statute 3 & 4 Wm. IV., c. 52, § 50. *Barry v. Arnaud*, 10 Ad. & El. 646, 37 E. C. L. 206.

**1. Goods Brought Ashore.** — *Legge v. Boyd*, 1 C. B. 92, 50 E. C. L. 92, 9 Jur. 307.

**2. Stranded Ship Repaired and Floated.** — *Legge v. Boyd*, 1 C. B. 92, 50 E. C. L. 92, 9 Jur. 307.

**3. In Marine Insurance.** — *Wood v. Lincoln*, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163.

**4. Admiralty Has No Jurisdiction.** — *The Two Friends*, 1 C. Rob. 271; *Baker v. Hoag*, 7 N. Y. 555; *Lacaze v. State*, Add. (Pa.) 59.

**Jurisdiction of United States Courts.** — Where property abandoned by the officers of a ves-

sel lies under the water within one hundred and fifty feet of the Mexican shore, the federal courts of the United States have no jurisdiction. *U. S. v. Smiley*, 6 Sawy. (U. S.) 640.

**5. Wreck Between High-water and Low-water Marks.** — *The Pauline*, 2 W. Rob. 358.

**6. Title to Wreck — At Common Law.** — *The Augusta*, 1 Hag. Adm. 16; *Woodward v. Fox*, 2 Vent. 188; *Rex v. Two Casks Tallow*, 3 Hag. Adm. 294; *Constable's Case*, 5 Coke 107; *Hamilton v. Davis*, 5 Burr. 2732. See *Talbot v. Lewis*, 6 C. & P. 603, 25 E. C. L. 558; *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431.

**Historical.** — "What shall be treated as wreck of the sea, and to whom such wreck shall be considered as belonging, has been a fruitful subject of discussion from the earliest historical period to the present day; and the disposition of goods found on or beneath the sea, or thrown upon the shore, is usually a fair index of the degree of civilization reached by the people within whose domain such property is found. In a barbarous state of society wrecks were treated as the lawful plunder of the first comer, or the lord of the soil, and the crews were either put to death or seized and sold as slaves. By the laws of the ancient Rhodians, both ship and goods were seizable by the lord of the place, though all the persons were saved and alive; while the Romans, with greater humanity and regard for private rights, were particular and express in forbidding any man to meddle with such goods as were wrecked; in making the plunderer return four-fold, and in declaring that they remained the property of the original owner without escheating to anybody, unless for want of claim within a year and a day (whence the common-law period seems to have originated), in which case they escheated to the exchequer. 1 Browne Civil and Adm. Law 238. These enlightened provisions, however, did not long survive the fall of the Roman empire. We have abundant evidence to show that during the middle ages it was a common practice to confiscate the cargoes of shipwrecked vessels as the property of the lord upon whose manor they were thrown. Not only this, but by the exhibition of false lights and collusion with pilots ships were lured or steered upon rocks, that the harvests of the sea might be made more abundant." *Murphy v. Dunham*, 38 Fed. Rep. 503.

**7. Property Must Be Claimed in a Year and a Day.** — 3 Edw. I., c. 4; 2 Kent's Com., p. 359;

which the wreck was actually seized and taken by the finder,<sup>1</sup> and after the lapse of that period the right of the crown became absolute.<sup>2</sup>

**By Statute.** — Several of the *United States* bordering on the sea have enacted statutes providing for a similar disposition of such property. They declare that nothing cast by the sea upon the land shall be adjudged a wreck until it has been kept safely for the space of a year for the true owner, to whom it is to be delivered on his paying reasonable salvage; and if the goods be not claimed within that time, they shall be sold and the proceeds accounted for to the state.<sup>3</sup>

**2. Of Grantee — Of Sovereign.** — The rights of the crown in wrecks could only be, and frequently were, granted to the lords of the manor by the crown or state.<sup>4</sup> The rights of such grantee are similar to those of the grantor, in that he has a special property or a title to the intermediate possession until the true owner appears and makes good his claim within a year and a day,<sup>5</sup> and as a necessary consequence of this right the grantee is entitled to a right of way over the adjacent land to take it.<sup>6</sup>

**Of Owner.** — The possession of a wreck under a transfer that is void for non-compliance with the registry acts is a sufficient title in trover against a stranger.<sup>7</sup>

**3. Of Owner of Shore.** — The owner of shore land upon which a wreck is cast has right to title and possession in preference to a stranger, and may bring trespass against him for entering on the land and removing the wreck,<sup>8</sup> the measure of damages being the value of the property taken.<sup>9</sup>

**4. Of Finder.** — As against the claim of the true owner the finder of a wreck has no title,<sup>10</sup> but he is protected in his rights against the interference of third persons.<sup>11</sup>

Gould on Waters, § 192; Sheppard *v.* Gosnold, Vaugh. 168; Dunwich *v.* Sterry, 1 B. & Ad. 831, 20 E. C. L. 492; The Augusta, 1 Hag. Adm. 16; Reg. *v.* Thurborn, 1 Den. C. C. 387; Sutton *v.* Buck, 2 Taunt. 302; Constable's Case, 5 Coke 106; Hamilton *v.* Davis, 5 Burr. 2732; U. S. *v.* Stone, 8 Fed. Rep. 232; Murphy *v.* Dunham, 38 Fed. Rep. 503; Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431; Hetfield *v.* Bam, 13 Ired. L. (35 N. Car.) 394, 57 Am. Dec. 563.

**1. Time Dates from Possession Taken.** — Dunwich *v.* Sterry, 1 B. & Ad. 831, 20 E. C. L. 492; Constable's Case, 5 Coke 106; Murphy *v.* Dunham, 38 Fed. Rep. 503.

"In the case of Dunwich *v.* Sterry, 1 B. & Ad. 831, 20 E. C. L. 492, it is said that this year and a day dates from the seizure and actual possession of the lord; 'for, until then,' says Lord Coke, 'it is not notorious who claims the wreck, or to whom the owner shall repair to make his claim, and show him his proofs.' This also corresponds to the modern English statute upon the subject of wrecks (17 & 18 Vict., c. 104)." Murphy *v.* Dunham, 38 Fed. Rep. 503.

**2. When Right of Crown Absolute.** — The Augusta, 1 Hag. Adm. 18; Hamilton *v.* Davis, 5 Burr. 2732. See also cases in notes *supra*.

**3. By Statute.** — Town Law N. Y. (1890), Gen. Laws N. Y., c. 20, §§ 137-150; Rev. Laws Mass. (1902), c. 97, §§ 11, 12. See also Chase *v.* Corcoran, 106 Mass. 286.

**4. Title of Grantee — Of Sovereign.** — Palmer *v.* Rouse, 3 H. & N. 505; Watson *v.* Knowles, 13 R. I. 639.

**Wreck Appurtenant by Prescription.** — Where a manor to which wreck belonged by prescription came to the king's hands, who granted to A

"the office of admiral, with all wrecks at sea, and all profits to the said office belonging," it was held that this did not pass the wreck appurtenant to the manor. Wiggan *v.* Branthwaite, 12 Mod. 259.

**5. Grantee Has Special Property.** — Dunwich *v.* Sterry, 1 B. & Ad. 831, 20 E. C. L. 492.

**Owner Remaining in Possession.** — If the owner or his servants or mariners continue in the possession of the goods to which the misfortune of shipwreck has occurred, such goods are not in any sense "wreck," for they are not "*bona vacantia*," and therefore do not belong to the crown or its grantee by virtue of its prerogative. Dunwich *v.* Sterry, 1 B. & Ad. 831, 20 E. C. L. 492.

**6. Grantee Entitled to Right of Way.** — Anonymous, 6 Mod. 149.

**Right of Grantee at Wreck Sale.** — A person who purchases goods at a wreck sale has a right to take off his goods by the most convenient route, though in doing so he has to pass over the land of another who has forbidden him to enter on or cross his land for that purpose. Hetfield *v.* Baum, 13 Ired. L. (35 N. Car.) 394, 57 Am. Dec. 563.

**7. Grantee of Owner — Trover Against Stranger.** — Sutton *v.* Buck, 2 Taunt. 302.

**8. Title of Shore Owner.** — Barker *v.* Bates, 13 Pick. (Mass.) 255, 23 Am. Dec. 678; Proctor *v.* Adams, 113 Mass. 376, 18 Am. Rep. 500.

**9. Measure of Damages.** — Barker *v.* Bates, 13 Pick. (Mass.) 255, 23 Am. Dec. 678.

**10. Title of Finder.** — Proctor *v.* Adams, 113 Mass. 376, 18 Am. Rep. 500.

**11. Title Good Against Third Person.** — Eads *v.* Brazelton, 22 Ark. 499, 79 Am. Dec. 88. See the title LOST PROPERTY, vol. 19, p. 579.



**IV. PROTECTION AND DISPOSITION — 1. Statutory Provisions.** — The states have different provisions respecting the protection and disposition of wrecks; they are, however, the same in their general features, providing for the appointment of officers whose duty it shall be to save and secure such property, appraise its value, and keep it in a safe place to await the claim of persons who may thereafter appear entitled to it. There are also provisions as to advertising and sale.<sup>1</sup> Congress has also made provisions for the protection and disposition of wreckage, requiring a license from vessels engaged in carrying property from a wreck.<sup>2</sup> It is also provided by statute that if any person shall steal or destroy any goods or other effects from, or belonging to, any vessel in distress, wrecked, lost, stranded, or cast away, within the admiralty or maritime jurisdiction of the United States, he shall be guilty of a felony.<sup>3</sup> The same statute provides for the punishment of parties using false lights to decoy and wreck ships.<sup>4</sup>

**2. By Landowner.** — The owner of land upon which a wreck is cast is under no duty to save it for the owner,<sup>5</sup> and may remove it from his land, but in so

**1. Protection and Disposition of Wrecks.** — Town Law N. Y. (1890), Gen. Laws N. Y., c. 20, § 144 *et seq.*; Code N. Car., (1883), § 3851 *et seq.*; *Etheridge v. Jones*, 8 Ired. L. (30 N. Car.) 100; *Hetfield v. Baum*, 13 Ired. L. (35 N. Car.) 394, 57 Am. Dec. 563.

"They [the statutes of North Carolina] provide for the appointment of wreck commissioners in certain maritime districts, to assist vessels stranded, or in danger of being stranded. Where any vessel or other property is cast ashore, 'without any person present to claim the same as owner,' the commissioner is authorized to take possession of them and, under certain circumstances, to advertise them, and, if not claimed within twelve months, then to sell them. But if perishable, the same may be sold after public advertisement for a period not less than ten nor more than twenty days. The commissioners are punishable for any fraud or neglect of duty, and are required to give bonds for the faithful discharge of their duty. Provision is also made that the commissioners shall be deemed proper officers to advertise and sell at public auction any cargoes which may be stranded or cast on shore in their respective districts, 'except the captain, owner, merchant, or consignee shall choose to superintend such sale himself, or to remove the property without selling it.' This latter provision presupposes the presence of the owner or his agent, and does not impart an original authority to the commissioners to sell *in invitum*; but clothes him with authority to act as auctioneer in cases of an implied or express assent of the owner or his agent." *The Schooner Tilton*, 5 Mason (U. S.) 465.

**The Master, Owner, Merchant, or Consignee of Wrecked Vessels** or other property has a right under the *North Carolina* laws to take possession of them and dispose of them as he may think proper, without any responsibility to the wreckmaster for commissions or in any other respect. *Etheridge v. Jones*, 8 Ired. L. (30 N. Car.) 100.

**2.** U. S. Rev. Stat., § 4240.

**3. Stealing or Destroying Wrecks.** — Act Cong. March 3, 1825, 4 U. S. Stat. at L. 116, § 9; *U. S. v. Pitman*, 1 Sprague (U. S.) 196.

**The Punishment Inflicted by the Statute** is a fine not exceeding five thousand dollars, and

imprisonment with hard labor not exceeding ten years, according to the aggravation of the offense. *U. S. v. Stone*, 8 Fed. Rep. 237; *U. S. v. Smiley*, 6 Sawy. (U. S.) 640.

**Extent of Statute.** — It is not larceny alone which is punishable under this section, but any act of depredation, whether it be of the character that would be piracy if committed upon the high seas, robbery or other forcible taking, theft, trespass, or other malicious mischief, or any fraudulent and criminal breach of trust if committed on land, whether the common or statute law prevail. No specific intent is necessary to constitute the offense. The value of the goods is immaterial. *U. S. v. Stone*, 8 Fed. Rep. 232.

Until goods are removed from the place where landed or thrown ashore from the stranded or wrecked vessel, or cease to be under the charge of the officers or other parties interested, the act will apply if a larceny of them is committed, even though the vessel may in the meantime have gone entirely to pieces and disappeared from the sea. But the act is not intended to reach cases where the property abandoned by the officers or other parties interested is recovered by third persons. *U. S. v. Smiley*, 6 Sawy. (U. S.) 640.

**Indictment.** — An indictment which alleged that the defendant "furnished and loaned" a skiff to be used by others in plundering a wrecked vessel was held to be good. *U. S. v. Sanche*, 7 Fed. Rep. 715.

The indictment need not distinguish between acts supposed to be characterized as "plundering" and other acts supposed to be properly designated as "stealing" or "destroying," nor between acts of depredation committed on the wreck and such acts committed on property belonging to but separated from it. *U. S. v. Stone*, 8 Fed. Rep. 232.

**Property Separated from Vessel.** — Under this statute the court was held to have jurisdiction although the vessel was lying upon the shore and the property was plundered after it had been separated from the vessel. *U. S. v. Pitman*, 1 Sprague (U. S.) 196.

**4.** U. S. Rev. Stat., § 5358. This statute has been held constitutional. *U. S. v. Coombs*, 12 Pet. (U. S.) 72.

**5. By Landowner.** — *Proctor v. Adams*, 113



doing must cause as little injury as possible.<sup>1</sup> If he does take the wreck it is his duty to deliver it to the owner if he is present, and to protect it for him if he is absent.<sup>2</sup>

**3. By Third Person.**—If a wreck is in danger of being carried off by the sea, one who enters upon the land and removes the wreck for the purpose of restoring it to its lawful owner is not a trespasser.<sup>3</sup>

**V. LIABILITY OF OWNER OF WRECK IN NAVIGABLE WATERS.**—If the owner of a vessel, sunk by unavoidable accident in navigable waters, abandons possession and control, he is under no obligation to remove it, and is not liable in damages for injuries it may cause to others, nor indictable for nuisance in obstructing navigation. But if he remains in possession and control he is under an obligation to protect other vessels from injury by giving proper warnings, and this duty passes with the transfer of the wreck.<sup>4</sup> And if the vessel is sunk by the negligence of the owner, or if he neglects while engaged in raising it to take proper precautions to warn the public, he will be liable for injuries to other vessels resulting from such negligence.<sup>5</sup>

**WRIT.** (See also *PROCESS*, vol. 23, p. 159; *NOTICE*, vol. 21, p. 580; and see 19 *ENCYC. OF PL. AND PR.* 567, title *SERVICE OF PROCESS AND PAPERS*; 20 *ENCYC. OF PL. AND PR.* 1099, title *SUMMONS AND PROCESS*.)—A writ is defined to be a judicial instrument by which the court commands some act to be done by the person to whom it is directed. It is issued either at the commencement of an action or during its progress, directed to a sheriff or other ministerial officer or to the party intended to be bound by it, and commanding some act therein mentioned to be done at or within a certain time specified.<sup>6</sup>

Mass. 376, 18 Am. Rep. 500. See *Sutton v. Buck*, 2 Taunt. 312.

**1. Removal by Landowner.**—*Berry v. Carle*, 3 Me. 269.

**2. Duty of Landowner Taking Wreck.**—*Watson v. Knowles*, 13 R. I. 639.

**3. By Third Person.**—*Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500.

**4. Liability of Owner of Wreck in Navigable Waters—England.**—*The Snark*, (1900) P. 105; *Rex v. Morris*, 1 B. & Ad. 441, 20 E. C. L. 421; *Rex v. Watts*, 2 Esp. 675; *Rex v. Ward*, 4 Ad. & El. 384, 31 E. C. L. 92; *Brown v. Mallett*, 5 C. B. 599, 57 E. C. L. 599; *Rex v. Tindall*, 6 Ad. & El. 143, 33 E. C. L. 26; *The Douglas*, 7 P. D. 151; *Rex v. Russell*, 9 Dowl. & R. 566, 6 B. & C. 566, 13 E. C. L. 254; *Hancock v. York*, etc., R. Co., 10 C. B. 348, 70 E. C. L. 348; *White v. Crisp*, 10 Exch. 312; *Harmond v. Pearson*, 1 Campb. 515; *Dormont v. Furness R. Co.*, 11 Q. B. D. 496; *The Edith*, L. R. 11 Ir. 270.

*United States.*—*The Swan*, 3 Blatchf. (U. S.) 285; *The Modoc*, 26 Fed. Rep. 718; *The Mary S. Lewis*, 126 Fed. Rep. 848.

*Arkansas.*—*Eads v. Brazelton*, 22 Ark. 499, 79 Am. Dec. 88.

*Massachusetts.*—*Boston*, etc., *Steamboat Co. v. Munson*, 117 Mass. 34.

*New York.*—*Sheldon v. Sherman*, 42 N. Y. 484, 1 Am. Rep. 569.

*Pennsylvania.*—*Winpenny v. Philadelphia*, 65 Pa. St. 138.

See also the title *NAVIGABLE WATERS*, vol. 21, p. 443 *et seq.*, where the subject is fully treated.

**5. Negligence of Owner.**—*Boston*, etc., *Steamboat Co. v. Munson*, 117 Mass. 34.

**6. Writ.**—*Burr. L. Dict.*, quoted in *In re Damon*, 104 Fed. Rep. 776.

In *Moore v. Fedewa*, 13 Neb. 381, it is said: "A *writ* is defined to be a mandatory precept issued by the authority and in the name of the sovereign or the state for the purpose of compelling the defendant to do something therein mentioned. It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under the seal and attested by the proper officer, and is directed to the sheriff or other officer lawfully authorized to execute the same. 2 Bouv. L. Dict. 680." See also *Baird v. Pridmore*, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 362.

A *writ* is defined to be an order or precept in writing issued by a court, clerk, or judicial officer. *Gowdy v. Sanders*, 88 Ky. 347.

**Seal.**—The common-law definition of *writ* requires a seal. *Baird v. Pridmore*, (County Ct.) 29 How. Pr. (N. Y.) 253.

**Affidavit.**—*Writ* held not to include an affidavit. *In re Damon*, 104 Fed. Rep. 776.

**Alias Writ.**—See *ALIAS WRIT*, vol. 2, p. 52.

**Complaint Distinguished From.**—See *Wilson v. Winchester*, etc., R. Co., 82 Fed. Rep. 17.

**The Copy of the Appointment of an Overseer of a Road**, which by statute the sheriff is to deliver to the overseer, is not a *writ*. *Thomas v. Hinds County*, 69 Miss. 665.

**Declaration.**—*Writ* and declaration blended in one instrument by statute, see *Moulthrop v. School Dist.*, 59 Vt. 381.

**Declaration Distinguished From.**—See *Wilson v. Winchester*, etc., R. Co., 82 Fed. Rep. 17.

**Execution.**—The words "*writ* or other process" include an execution. *Lewis v. Norton*, 159 Mass. 432.

**WRITE, WRITING, ETC.** (See also the titles **FORGERY**, vol. 13, pp. 1086, 1093; **HANDWRITING**, vol. 15, p. 252; **LETTERS**, vol. 18, p. 829; **SIGN — SIGNATURE**, vol. 25, p. 1064; **VERBAL AGREEMENTS**, vol. 29, p. 795; **WILLS**, *ante*.) — To write is to express by means of letters, to compose.<sup>1</sup> Writing is the expression of ideas by visible letters. It may be on paper, parchment, wood, stone, or other material.<sup>2</sup> Writing is defined to mean words, or characters that stand for words or ideas, traced on some substance, as paper, wood, or stone, with an implement, as a pen, pencil, or brush, or by some other device, as stamping, printing, or engraving.<sup>3</sup>

**Petition.** — *Writ* held not to include a petition. *In re Damon*, 104 Fed. Rep. 776.

**Summons.** — In *Porter v. Vandercook*, 11 Wis. 70, it was held that a summons was not a *writ* or process within the meaning of a constitutional provision requiring *writs* or process to run in the name of the state. See also *Baird v. Pridmore*, (County Ct.) 29 How. Pr. (N. Y.) 253.

1. **Write.** — Walker's Dict., followed in *Henshaw v. Foster*, 9 Pick. (Mass.) 318.

**Ability to Write.** — The ability to *write* is the ability to express one's thoughts in *writing* legible to others. *Matter of Paikuli*, 8 Hawaii 682. This case arose upon the construction of a provision defining the legal qualifications of a voter.

2. **Writing.** — *Myers v. Vanderbelt*, 84 Pa. St. 510, 24 Am. Rep. 227.

3. *Adler v. Todd*, (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 798.

The word *writing* in law not only means words traced with a pen or stamp, but printed or engraved or made legible by any other device. *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 291.

**Lead Pencil.** — In *State v. Anderson*, 45 La. Ann. 651, it was held that it was not necessary that a verdict in a criminal case should be *written* in ink.

In *Myers v. Vanderbelt*, 84 Pa. St. 510, it was held that where a statute provided that every will should be in *writing*, a will written and signed with a lead pencil was valid. *Goods of Dyer*, 1 Hagg. Ecc. 219; *Rymes v. Clarkson*, 1 Phil. Ecc. 22; *Dickenson v. Dickenson*, 2 Phil. Ecc. 173; *Main v. Ryder*, 84 Pa. St. 217. See also **WILLS**, *ante*.

So contracts in lead pencil have been held sufficient. *Jeffery v. Walton*, 1 Stark. 267, 2 E. C. L. 108; *Geary v. Physic*, 5 B. & C. 234, 11 E. C. L. 213; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Clason v. Bailey*, 14 Johns. (N. Y.) 490.

So of promissory notes in lead pencil. *Geary v. Physic*, 5 B. & C. 234, 11 E. C. L. 213; *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245; *Partridge v. Davis*, 20 Vt. 499; *Brown v. Butchers, etc., Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

So a book account made in pencil was held admissible in evidence as a book of original entries. *Hill v. Scott*, 12 Pa. St. 169.

Alterations and cancellations in pencil, of a will *written* in ink, have been held valid. *Tomlinson's Estate*, 133 Pa. St. 245, 19 Am. St. Rep. 637.

**Print.** (See also the title **SIGN — SIGNATURE**, vol. 25, p. 1066.) — A printed business card was

held a *writing* within the statute against false pretenses. *Jones v. State*, 50 Ind. 476.

And that *writing* includes printed words, see *Schneider v. Norris*, 2 M. & S. 286; *U. S. v. Huggett*, 40 Fed. Rep. 642; *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 291; *Adler v. Todd*, (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 798; *Mezchen v. More*, 54 Wis. 214; *Potts v. Cooley*, 56 Wis. 45.

In *O'Bryan v. State*, 27 Tex. App. 340, it was held that an indictment partly *written* and partly printed was valid. The court said: "Whilst it is declared by statute that 'an indictment is the *written* statement of a grand jury accusing a person therein named of some act or omission which by law is declared to be an offense' (Code Crim. Pro., art. 419), still it is no objection to its validity that it is in form partly printed and partly *written*. The word *writing* or *written* under our statutes, civil as well as criminal, includes 'printing' (*Texas Rev. Stat.*, art. 3140, subd. 3; *Texas Penal Code*, art. 30; *Winn v. State*, 5 Tex. App. 621)."

But in *Robertson's Succession*, 49 La. Ann. 868, the court said: "Appellant also quotes the definitions from a number of dictionaries as evidence that *writing* not only means words traced with the pen or stamped, but printed or engraved words. The argument would lead to the conclusion that it would be possible for a printer or engraver to print or engrave a portion of his testament. *Writing* must be taken in its ordinary sense, — to set down legible characters with pen and ink. The *writing* essential to a deed may include printed words without violating a prohibitory law. But in the matter of an olographic testament it must be written, or the pain of nullity is inevitable." See also the title **WILLS**, *ante*.

**Printed Ballots.** — In *Henshaw v. Foster*, 9 Pick. (Mass.) 312, it was held that printed ballots are a compliance with the constitutional requirement that representatives shall be chosen by *written* votes. To the same effect, see *Temple v. Mead*, 4 Vt. 535.

**A Printed Theatre Ticket** in the usual form and stamped upon its face with an inscription in the style of a seal is a *writing* subject to forgery. *In re Benson*, 34 Fed. Rep. 649, 10 Crim. L. Mag. 682.

**Same — Notice in Writing.** — Under a statute requiring the posting of notices in *writing* of any application to detach territory from a township, it was held that not only might the notice be printed but the names thereto attached might also be printed. *Pelton v. Ottawa County*, 52 Mich. 520.

**Stamping.** (See also the title **SIGN — SIGNATURE**.)



**WRITING OBLIGATORY.** — See OBLIGATORY WRITING, vol. 21, p. 758. OBLIGATION, vol. 21, p. 756, and the references there given.

**PURE**, vol. 25, p. 1066.) — Where a statute provided that stamp certificates might be assigned by the proper official *writing* his name upon the back, it was held that such certificate might be assigned by the officer stamping his name and official character upon them with intent to assign. The court said: "We are clearly of opinion that such stamping the name is *writing* the same within the meaning of the statute; and we are more strongly convinced of the propriety of so holding, from the fact that the same statute declares that the words *written* and in *writing* may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters. It is true this definition does not in express terms define the words 'by *writing*,' and so it may be said it is not applicable and has no force in defining the words 'by *writing*.' We may, however, we think, consider the definition given by the statute to the words '*written*' and in *writing* as showing the liberal construction which should be given to all words or terms of a like character where used in the statute." *Dreutzer v. Smith*, 56 Wis. 297. See also *Hubert v. Turner*, 11 L. J. C. Pl. 78; *Johnson v. Dodgson*, 6 L. J. Exch. 185; *Lobb v. Stanley*, 13 L. J. Q. B. 117.

**Writing** includes the stamp of a name on paper with a rubber stamp. *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 291.

**Stenography.** — Stenography has been held to be *writing* within a provision that a witness's oral testimony shall be taken in *writing*. *Nichols v. Harris*, 32 La. Ann. 646. The court said: "We are of opinion that the notes of the stenographer, taken when the witness gives his oral testimony in court, is a 'taking in *writing*,' as contemplated by article 602. It is true this shorthand report may be illegible or unintelligible to others than the reporter himself, but it is the *writing*, the taking down, word for word, of the oral testimony, under the eye and within the hearing of the court, by a sworn officer, and when transcribed is to be filed in the record. It cannot be transcribed unless previously taken down in *writing*, and when thus transcribed and filed, it is only an intelligible translation of written testimony, taken in shorthand or phonetic characters, into characters generally understood."

**Telephone Message.** — Where a notice was required to be in *writing* a notice by telephone is insufficient. The court said: "Telephone messages cannot be regarded as anything more than verbal notices." *Ex p. Apeler*, 35 S. Car. 417.

**Telegraphs.** — A telegram from a judge to the clerk of court, ordering an adjournment, was held a *written* order. The court said: "Contracts may be made by telegram even where it is required they must be in *writing*, and it has been said it makes no difference if the *writing* is done with a steel pen an inch long attached to an ordinary penholder, or whether the pen be a copper wire one thousand miles long. *Howley v. Whipple*, 48 N. H. 487; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 411. The telegraph operator was the agent of

the judge, and by means of the wire and instruments attached thereto, and the operator, the judge wrote the telegram which was delivered to the clerk. We think it was a *written* order within the meaning of the statute." *State v. Holmes*, 56 Iowa 590, 41 Am Rep. 121.

**Copyright Law — Photograph.** — In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, it was held to be within the constitutional power of Congress to confer a copyright upon the author, inventor, designer, or proprietor of a photograph. The court said: "So, also, no one would now claim that the word *writing* in this clause of the constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By *writings* in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of *writing*, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the Act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests and the chemicals and machinery by which it is operated have all been discovered long since that statute was enacted." See also the title COPYRIGHT, vol. 7, p. 508.

**Designs and Engraving.** — In *Trade-Mark Cases*, 100 U. S. 94, it is said: "While the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original, and are founded in the creative powers of the mind. The *writings* which are to be protected are the fruits of intellectual labor embodied in the form of books, prints, engravings, and the like." This was a trademark case. See generally the title TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION, vol. 28, p. 342.

**Handwriting — Pen Marks.** — A statute provided that a disputed *writing* might be compared with any proved genuine *writing*. It was held that *writing* included pen marks drawn through the signature to a will. *In re Hopkins*, 73 N. Y. App. Div. 559.

**Offer in Writing — Entry in Docket.** — A statute provided that at the time of joining issue in an action for the recovery of damages for an involuntary trespass the defendant might offer in *writing* to permit the plaintiff to take judgment against him, etc. It was held that an entry in a justice's docket of the defendant's oral answer that he "tenders judgment for six cents and costs" was an offer in *writing* within this provision. *Williams v. Ready*, 72 Wis. 408.

**Written Consent — Signature.** — In *Waterman v. Waterman*, (Supm. Ct. Spec. T.) 37 How. Pr. (N. Y.) 36, it is said: "But does the section require the *written* consent to be subscribed by the parties or their attorneys? There is nothing in its language making such signature indispensable. It must be in *writing*, but that



**WRITTEN INSTRUMENT.** — See WRITE, WRITING, ETC., *ante*.

does not necessarily imply that it is to be either signed or subscribed."

**Signature by Hand of Another.** (See also the title SIGN — SIGNATURE, vol. 25, p. 1066.) — A statute provided as follows: "The words *written* and 'in *writing*' shall include printing, lithographing, or other mode of representing words and letters. But in all cases where the *written* signature of any person is required the proper handwriting of such person or his mark shall be intended." It was held under this statute that it was not necessary that the grantor *write* his own signature or make his mark. It might be done by another at his request. *Nye v. Lowry*, 82 Ind. 319. See also *Croy v. Busenbark*, 72 Ind. 50; *Brown v. McCormick*, 28 Mich. 217; *Sheehan v. Kearney*, (Miss. 1896) 21 So. Rep. 41.

The signature by an orally authorized agent has been held sufficient where consent was required in *writing*. *Simmons v. Toledo*, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535.

**Written Demand.** — In *Field v. Field*, L. R. 14 P. D. 26, it was held that in a suit for restitution of conjugal rights a written demand for cohabitation and restitution of conjugal rights need not necessarily be made by the petitioner, but might be made by a solicitor on behalf of the petitioner.

**Writing — Protest in Writing.** — See PROTEST, vol. 23, p. 288.

**Some Writing.** — See SOME, vol. 25, p. 1157.

**Written Instrument.** (See also INSTRUMENT, vol. 16, p. 824.) — "It is not every sheet of paper which has *writing* upon it that is a written instrument." *Patterson v. Churchman*, 122 Ind. 379.

Within the rule that a *written* instrument cannot be varied by parol, the term *written* instrument includes not only records, deeds, wills, and other instruments required by statute or common law to be in *writing*, but every document which contains the terms of a contract between different persons and is designed to be the repository of evidence of their final intentions. 2 Taylor on Evidence, 1132, 1133; *Reid v. Diamond Plate-Glass Co.*, (C. C. A.) 85 Fed. Rep. 196. See the titles PAROL EVIDENCE, vol. 21, p. 1077; VERBAL AGREEMENTS, vol. 29, p. 795.

**Writing in the Sense of Instrument in Writing — False Pretenses.** — "*Writing*, as used in the statute, must mean some instrument, or at least letter — something in *writing*, purporting to be the act of another, or certainly of some person; but the paper presented in this case does not answer any such description; it was no *writing* at all, because it did not purport to be the act of any person. *Writing*, as used in the statute, cannot mean anything *written* upon paper, not purporting to be of any force or efficacy, but some instrument in *writing*, or *written* paper, purporting to have been signed by some person; and such *writing* must be false." *People v. Gates*, 13 Wend. (N. Y.) 320.

**Same — Forgery.** — The terms *writing*, instrument, and *written* instrument are used indiscriminately in defining forgery at common law. *State v. Young*, 46 N. H. 268.

**Same — Judgment.** — A judgment is not a *written* instrument. *Smith v. Mulligen*, 2 Minn. 319. See also INSTRUMENTS, vol. 16, p. 825.

**Same — Memorandum Books.** — A statute provided that a shipper of notes or securities for the payment of money, stamps, maps, *writings*, etc., should give notice of the true character and value thereof. It was held that memorandum books containing results of a fur-dealer's traveling experience and his observations as respects the quality, quantity, use, and combination of the furs to be found in numerous different localities were recognized within this statute. *The St. Cuthbert*, 97 Fed. Rep. 340.

Memoranda of the receipt of taxes, made in the margin of the assessment books, with the name of the defendant signed to them, are not admissible to charge him with such taxes unless in some way authenticated as his entries. They are not "*written* instruments" within the meaning of Laws of Minnesota 1867, c. 64. *Mower County v. Smith*, 22 Minn. 97.

**Writing Distinguished from Letter.** — A *United States* statute provided that it would be a misdemeanor to deposit any obscene *writings* in the mails. In *U. S. v. Chase*, 135 U. S. 258, the court said: "The contention on the part of the United States is, that the term *writing*, as used in this statute, is comprehensive enough to include, and does include, the term 'letter,' as used in the indictment; and it is insisted, therefore, that the offense charged is that of unlawfully and knowingly depositing in the mails of the United States an obscene, lewd, and lascivious *writing*, etc., etc. We do not concur in this construction of the statute. The word *writing*, when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments, nor in common intercourse, are the two terms 'letter' and *writing* equivalent expressions. When, in ordinary intercourse, men speak of mailing a 'letter,' or receiving by mail a 'letter,' they do not say mail a *writing* or receive by mail a *writing*. In law the term *writing* is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds, notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. And in the many discussions to which this statute has given rise these instruments are referred to as 'the *writing*' or 'some *writing*.' But in its most frequent and most familiar sense the term *writing* is applied to books, pamphlets, and the literary and scientific productions of authors, as, for instance, in that clause in the United States Constitution which provides that Congress shall have power 'to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective *writings* and discoveries.' In the statute under consideration the word *writing* is used as one of a group or class of words — book, pamphlet, picture, paper, *writing*, print — each of which is ordinarily and *prima facie* understood to be

**WRONG.** (See also the title TORTS, vol. 28, p. 253. And see RIGHT, vol. 21, p. 466.) — A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental capacity of the person or agent doing it. It may or may not have been with bad motive. The question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of a party injured, and the extent of his injury, and makes what he suffers the measure of compensation.<sup>1</sup> Wrong, in its broadest sense, includes every injury to another, independent of the motives causing the injury.<sup>2</sup>

**WRONGFUL — WRONGFULLY.** — The term "wrongful" imports infringement of some right.<sup>3</sup> Wrongfully means in a wrongful manner, unjustly, in a manner contrary to the moral law or to justice.<sup>4</sup>

a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is *written*." See also the title POSTAL LAWS, vol. 22, p. 1076.

**Written Contract.** — A *written* contract is one which in all its terms is in *writing*. A contract partly in *writing* and partly oral is in legal effect an oral contract. Bishop on Contracts, §§ 163, 164. Railway Pass., etc., Mut. Aid, etc., Assoc. v. Loomis, 142 Ill. 567; Ames v. Moir, 130 Ill. 582.

**Written Law — Charter Held a Written Law.** (See also the title STATUTES, vol. 26, p. 520.) — In Frick v. Los Angeles, 115 Cal. 512, it is said: "The constitution declares it to be the organic law of the city. Art. 11, § 8. It is of course a *written* law, and for very many purposes the terms 'statute' and '*written* law' are used indifferently. See And. Law Dict., tit. 'Statute;' 1 Bl. Com. 85, 475."

**Written Power — Blank.** — A power of attorney signed in blank is a *written* power of attorney within Mass. Stat. of 1884, c. 229. Andrews v. Worcester, etc., R. Co., 159 Mass. 64.

**Paper.** — A paper is a *writing*. U. S. v. Gaylord, 17 Fed. Rep. 438.

A *writing* means anything *written*, a *written* paper of any kind. Thomas v. State, 103 Ind. 425.

**Writings — Forgery.** — In State v. Bullock, 54 S. Car. 313, it is said: "The truth of the whole matter is that the wisdom of the legislature of this state, in avoiding the enumeration of the different papers which might be forged, and in using the words '*writings* or paper *writing*,' is abundantly manifest. These words are sufficiently broad and comprehensive to cover any paper *writing* or *writings*." The paper in that case was a witness's paper certificate provided for by statute after the enactment of the statute under which the indictment for forgery was brought.

1. **Wrong.** — Cooley on Torts, p. 98; McDonald v. Brown, 23 R. I. 546; Williams v. Hays, 143 N. Y. 447.

2. **Union Pac. R. Co. v. Henry**, 36 Kan. 570. But in that case it was held that, as used in an instruction as to negligence, "it means and

could mean nothing but that kind of *wrong* the court was defining to the jury in defining negligence; that it was the failure to exercise great or extraordinary care, or a want of that care which an ordinarily prudent man would ordinarily exercise, or it is the want of slight diligence; and that the failure to take this kind of care where others are liable to injury was the *wrong* as to which the court was charging the jury that an injury caused thereby was a *prima facie* case of compensation made out."

In the saying that for every *wrong* there should be a remedy, by *wrong* is meant a violation of the municipal law, the law of civil conduct, not a transgression of the divine law, as such, nor a breach of etiquette. Western Union Tel. Co. v. Ferguson, 157 Ind. 64.

In Manchester v. Furnald, 71 N. H. 153, it is said: "A *wrong* being merely the infringement of a right (1 Bl. Com. 122), where there is no right there can be no *wrong*, and the question of the existence of a remedy does not arise."

**Private Wrong.** — See PRIVATE, vol. 22, p. 1313.

3. **Wrongful.** — Mogul Steamship Co. v. McGregor, 23 Q. B. D. 612; Allen v. Flood, (1898) A. C. 94.

4. **Wrongfully.** — Howard County v. Armstrong, 91 Ind. 528.

**Wrongfully Means Injurious and Tortiously.** — See Raver v. Webster, 3 Iowa 505.

**Wrongful Includes Negligence.** — See Wells v. Sibley, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 343; Jeffersonville, etc., R. Co. v. Riley, 39 Ind. 587.

**Wrongful Distinguished from Malicious.** — See McLean v. Burbank, 12 Minn. 530.

**Wrongful Distinguished from Wilful.** — See McLean v. Burbank, 12 Minn. 530.

**Wrongfully Distinguished from Wilfully.** — See Raver v. Webster, 3 Iowa 505.

**Wrongfully Distinguished from Wantonly and Wilfully.** — In an action for personal injuries, where the plaintiff alleged that the defendant did certain acts *wrongfully*, it was held that the word *wrongfully* as used in the complaint did not mean wantonly or wilfully. Green v. Eden, 24 Ind. App. 583.

**Wrongfully Distinguished from Unlawfully.** — The words *wrongfully* and *unlawfully* are not convertible terms. Louisville, etc., R. Co. v. Payne, 103 Ind. 183; Howard County v. Armstrong, 91 Ind. 528; Durham v. Montgomery County, 95 Ind. 182; Henry County v. Murphy, 100 Ind. 570. But they are sometimes used



**WRONGFUL ACT.**—See the title **DEATH BY WRONGFUL ACT**, vol. 8, p. 851.

**WRONGFUL ATTACHMENT.**—See the title **ATTACHMENTS**, vol. 3, p. 181.

**WRONGFUL DETENTION.**—See the title **FORCIBLE ENTRY AND DETAINER**, vol. 13, p. 742; and see 6 **ENCYC. OF PL. AND PR.** 643, title **DETINUE**.

**WROUGHT.**—See note 1.

**X-RAYS.**—See the title **PHOTOGRAPHS**, vol. 22, p. 775.

**YARD.**—See note 2.

**YARN.**—See note 3.

**YEAR.** (See the titles **ESTATES**, vol. 11, pp. 380, 381; **LANDLORD AND TENANT**, vol. 18, p. 149; **LEASES**, vol. 18, p. 593; and as to the computation of time, see **TIME (COMPUTATION OF)**, vol. 28, pp. 209, 213.)—The period in which the revolution of the earth around the sun, and the accompanying changes in the order of nature, are completed. Generally when a statute speaks of a year, twelve calendar and not lunar months are intended. The

synonymously. *Wells v. Sibley*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 343.

**Wrongful Use — Embezzlement.**—In *State v. Smith*, 47 La. Ann. 432, it was held that if it be shown by the evidence that the defendant believed that his client had consented that he might use the money which had been entrusted to him as a loan on interest, notwithstanding that his belief was erroneous, the subsequent appropriation by the defendant did not constitute a *wrongful* and felonious appropriation in the sense of the *Louisiana* statute denouncing the crime of embezzlement against an attorney.

**Mistake.**—An act may be *wrongful* although done by mistake. *Webber v. Quaw*, 46 Wis. 118.

1. **Wrought — Revenue Law.**—See *Robertson v. Perkins*, 129 U. S. 237; *Gary v. Cockley*, (C. C. A.) 65 Fed. Rep. 500.

**Wrought and Unwrought.**—In *Bancroft v. Peters*, 4 Mich. 619, it was held that the court properly charged the jury "that the terms *wrought* and *unwrought*, as applied to marble, were of doubtful signification; and that it was competent for the owner to show what meaning was given them by custom and usage; that such custom, in order to bind the carrier, need not be universal, settled, or uniform among dealers or carriers; and that if the jury believed from the evidence that the generally prevailing usage among manufacturers, dealers, and carriers was to class marble in slabs as *unwrought*, then the carrier could only claim freight on it as of that class, to wit, *unwrought*."

2. **Cubic Yard.** (See also the title **WEIGHTS AND MEASURES**, *ante*.)—A cubic *yard* is a term well known to every one. It means twenty-seven cubic feet. *Corcoran v. Chess*, 131 Pa. St. 356. And in that case it was held that where parties used the term in their contracts they used it in its ordinary and proper meaning, and that, therefore, there was no ambiguity.

In a *Yard*.—Where an indictment charged the use of abusive and profane language in a *yard*, it was held not to be sustained by proof of the use of such language near the *yard*. *Quin v. State*, 65 Miss. 479.

**Courthouse Yard.**—A statute prohibited the summoning of jurors within the courthouse *yard*. In a trial for murder the sheriff summoned the jurors within twenty feet of the

courthouse, which was situated in an uninclosed public square used as an open market and public resort. It was held that the uninclosed square was not the courthouse *yard*. *Matthews v. State*, 6 Tex. App. 23.

**English Statute.**—A *yard* for bonding foreign timber, in which there were a deal shed and two buildings, with saw pits, is held not to be a *yard* within the English Commercial Ry. Act (*Stone v. Commercial R. Co.*, 9 Sim. 621).

**Conveyance.**—The parcels in a conveyance were described by reference to colored parts of a plan. A *yard* delineated but not colored in the plan was held to pass under the general word *yards*. *Willis v. Watney*, 51 L. J. Ch. 181.

**Railroad Yard.**—"The *yard* of the company, as the court may know from its general knowledge of the methods and appliances of railroad companies, as well as from the evidence in this case, consists of side tracks upon either side of the main tracks, and adjacent to some principal station or depot grounds where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure." *Harley v. Louisville, etc., R. Co.*, 57 Fed. Rep. 145.

**Railroad Yard — Switch Yard.**—See **SWITCH**, vol. 27, p. 562.

**Yard Limits.**—In *Rabidon v. Chicago, etc., R. Co.*, 115 Mich. 393, it is said: "Distance from depots is not the controlling consideration in determining 'depot grounds' or '*yard* limits,' which are synonymous terms. It is well known that in large cities these grounds extend for several miles. Neither does the question of frequent or infrequent use for switching purposes control. The question is, Are they reasonably necessary for that purpose, or liable to become so? It is not necessary to go outside our own decisions in determining this question. *McGrath v. Detroit, etc., R. Co.*, 57 Mich. 555; *Grondin v. Duluth, etc., R. Co.*, 100 Mich. 598; *Wilder v. Chicago, etc., R. Co.*, 70 Mich. 382; *Rinear v. Grand Rapids, etc., R. Co.*, 70 Mich. 620; *Schneekloth v. Chicago, etc., R. Co.*, 108 Mich. 1."

3. **Yarn — Tariff Act.**—See *Walker v. Seeburger*, 38 Fed. Rep. 725.



year is either astronomical, ecclesiastical, or regular, beginning on the first of January, or the 25th of March, or the day of the sovereign's accession.<sup>1</sup>

**Year Means Calendar Year.** — Unless from the context or otherwise a different intent is gathered, the word "year" when used in a statute is construed to mean a calendar year.<sup>2</sup> The meaning of the term, however, must be deter-

**1. Year.** — Whart. L. Dict., citing *Peterborough v. Catesby*, Cro. Jac. 166.

**Statutory Definition.** — "The term *year* in a statute, contract, or any public or private instrument means three hundred and sixty-five days. \* \* \* In a statute, contract, or public or private instrument the term *year* means twelve months." Section 25, c. 447, Laws of *New York* 1894. Aultman, etc., Co. v. Syme, 163 N. Y. 54. See also *Hall v. Brennan*, 140 N. Y. 409.

**Omission.** — In *State v. Munch*, 22 Minn. 67, it was held that the words "one thousand eight hundred and seventy-one," immediately after the month and day of the month in an indictment, sufficiently indicate the time of the commission of the offense, though the word *year* be not used.

**Whether Year Is Equivalent to Year of Our Lord.** — In *Com. v. McLoon*, 5 Gray (Mass.) 91, 66 Am. Dec. 354, it was held that an indictment which stated the *year* of the commission of the offense in figures only, without prefixing the letters "A. D.," was insufficient.

But this rule has been changed by statute in many states. Thus, in *State v. Bartlett*, 47 Me. 392, it is said: "It is objected that the complaint, which described the offense as having been committed in the *year* 'eighteen hundred and fifty-nine,' is defective, in that it does not state in what era this year occurred. Under the authority cited by the defendant, *Com. v. McLoon*, 5 Gray (Mass.) 91, 66 Am. Dec. 354, this defect would be deemed fatal. But by chapter 1, section 4, clause 11, Rev. Stat., it is provided that the word *year*, used for a date, means the *year* of our Lord. This cures that defect." And see *Stimson's American Statute Law*, vol. 1, p. 139; *Com. v. Doran*, 14 Gray (Mass.) 37; *Com. v. Sullivan*, 14 Gray (Mass.) 97; *Matter of Liquor Tax*, 104 Iowa 204.

**Contract to Be Performed Within a Year.** — See the title VERBAL AGREEMENTS, vol. 29, p. 795.

**Each Year.** — See EACH, vol. 10, p. 394.

**End of the Year.** — A statute provided that if within or at the end of the *year* of assessment any person charged with income tax should prove to the commissioners that his profits fell short of the sum for which he was assessed, the commissioners might amend the assessment. It was held that the expression "at the end of the *year*" in the above section does not mean at any time after the end of the *year*, or, on the other hand, within any limit of time generally applicable, but as soon after the end of the *year* as, having regard to the particular circumstances of the particular case, is practicable by the use of due exertions. *Reg. v. Income Tax Com'rs*, 21 Q. B. D. 314.

**One Year After Date.** — In *Smith v. Davis*, 48 Ill. App. 201, it is said: "The language 'one year after date' naturally and plainly means one *year* from the date of the contract, and it is a perversion to say that it means one *year*

from the completion of the building and the commencement of the operations of the factory." One hundred dollars was to be paid at or before the selection of the lot, one hundred dollars when the factory building was erected, and fifty dollars one *year* after date.

**Year to Year.** — In *Rosenblat v. Perkins*, 18 Oregon 156, it is said: "Estates from *year* to *year* continue for an uncertain number of fixed periods of time. Originally the fixed period of time was one *year*; but the term *year*, as now used, is merely descriptive, and the estate includes tenancies from month to month, etc."

An act authorized the mayor and board of aldermen of a city to contract for supplying the city with water and electric or gas light from *year* to *year*. It was held that under this authority the mayor and board of aldermen might make a water contract for twenty *years*. *Light, etc., Water Co. v. Jackson*, 73 Miss. 598.

**Estate for Years—Estate for Months.** — In *Hutcheson v. Hodnett*, 115 Ga. 990, it is said: "An estate for *years* is a contract for the possession of lands or tenements for some determinate period, and this period may be less than a *year*, as a certain number of months, or even weeks."

**Term of Years.** (See also title LANDLORD AND TENANT, vol. 18, p. 593; and see TERM, vol. 28, p. 51.) — Where a statute imposes additional punishment upon a second conviction and sentence for a term of *years*, that expression includes sentences for life. *Com. v. Evans*, 16 Pick. (Mass.) 448.

**2. Year Means Calendar Year—England.** — *Peterborough v. Catesby*, Cro. Jac. 166; *Gibson v. Barton*, L. R. 10 Q. B. 329.

*Canada.* — In *re Humphries*, 14 Can. L. T. 87; In *re Goulden*, 17 Can. L. T. 190.

*United States.* — *U. S. v. Dickson*, 15 Pet. (U. S.) 162.

*Alabama.* — *Owen v. Slatter*, 26 Ala. 549, 62 Am. Dec. 745; *Fretwell v. McLemore*, 52 Ala. 145.

*Georgia.* — *King v. Johnson*, 96 Ga. 497.

*Indiana.* — *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494.

*Iowa.* — *Matter of Liquor Tax*, 104 Iowa 204; *Engelthaler v. Linn County*, 104 Iowa 293.

*Kansas.* — *Garfield Tp. v. Dodsworth Book Co.*, 9 Kan. App. 752; *Garfield Tp. v. Hubbell*, 9 Kan. App. 785.

*Missouri.* — *Glasgow v. Rowse*, 43 Mo. 479; *Andrew County v. Schell*, 135 Mo. 31; *State v. Allison*, 155 Mo. 325.

*South Dakota.* — *Meade County Bank v. Reeves*, 13 S. Dak. 193.

*Wisconsin.* — *Bast v. Byrne*, 51 Wis. 534.

**License Year.** — In *In re Goulden*, 28 Ont. 387, it was held that *year* in section 20, Revised Statutes of Ontario, chapter 104, meant calendar *year* and not license *year*. But see *Crothers v. Monteith*, 11 Manitoba 378.

mined from the connection in which it is used.<sup>1</sup> Thus it is said, "A year is a period of time; and it does not necessarily mean the period commencing with the 1st day of January and ending with the 31st day of the succeeding December. When the term is used in a contract its meaning is to be determined from the connection in which it is used and the subject-matter of the contract."<sup>2</sup>

**YEARLING.**—See note 3.

**YEARLY.**—See note 4.

**YEAS AND NAYS.**—See the title **STATUTES**, vol. 26, p. 543.

**YELLOW BUTTER.**—See note 5.

1. **Context.**—*Knode v. Baldrige*, 73 Ind. 54; *Thornton v. Boyd*, 25 Miss. 598.

2. **Calendar Year Not Meant.**—*Brown v. Anderson*, 77 Cal. 236; *Knode v. Baldrige*, 73 Ind. 54; *Ward v. Sweeney*, 106 Wis. 54.

Thus, where there was a contract to sell all fruits which might be raised during a certain year on a certain farm, and a portion of the purchase price was to be paid "when the crop is taken off at the end of the year," it was held that by the end of the year was meant end of the fruit season. *Brown v. Anderson*, 77 Cal. 238.

And so, where an officer is elected to fill the term of one year, this has been held to mean from the time the officer is chosen until the next election. *Paris v. Hiram*, 12 Mass. 262.

**Fiscal Year.** (See also **FISCAL**, vol. 13, p. 553.)—Where applied to matters of revenue the presumption is in favor of year referring to fiscal year. *Glasgow v. Rowse*, 43 Mo. 479.

In *Meade County Bank v. Reeves*, 13 S. Dak. 193, it is said: "Ordinarily, when the term year is used in the statute, the calendar year would be intended; yet, when the legislature is making the appropriations for any year, or part of a year, we must presume that it intends the fiscal year as defined by the law of 1891."

A statute enacted that the assessment upon salaries and incomes should be based upon the amount of such salary or income received by the person assessed in "the year next preceding the time of the assessment." It was held that the word year as here used referred to a fiscal year. *Glasgow v. Rowse*, 43 Mo. 479.

But in *Garfield Tp. v. Dodsworth Book Co.*, 9 Kan. App. 752, year was held not to mean fiscal year. And see the cases cited *supra*.

**Application of Fiscal Year to County.**—A statute provided that a fiscal year should commence, etc. In construing this the court, in *State v. Allison*, 155 Mo. 325, said: "While the legislature was dealing with the subject of the fiscal year, if it intended to give it one limit for the state and another for the county, it would very naturally have given expression to that intention at that time. \* \* \* The natural meaning of the words would include a county as a part of the state."

**Twelve Months.**—In *Hopkins v. Chambers*, 7 T. B. Mon. (Ky.) 257, twenty-four months in the time of payment of a replevin bond was held to be equivalent to the two years directed by the statute.

3. **Yearling.**—A description, in an indictment for larceny, of the property stolen as a

yearling was held insufficient in *Stollenwerk v. State*, 55 Ala. 142. The court said: "Any animal in the second year of its growth is a yearling. The description in the present indictment is too indefinite. It may include many animals, for the stealing of which the Act of February 20, 1875, does not provide. If the indictment had charged that the animal stolen, describing it, was 'an animal of the cow kind,' it would have been sufficient. Nor is the indictment a sufficient charge of petit larceny. The animal may have been one which had no recognized money value. The motion in arrest of judgment should have been sustained."

But in *Berryman v. State*, 45 Tex. 1, it was held an indictment for theft of "a bull yearling" is sufficient under the statutes for theft of cattle. The court said: "As understood in common language a yearling comes under the denomination of cattle, and is so classed in other statutes for the protection of cattle."

In *Vassau v. Campbell*, 79 Minn. 167, it is said: "It was shown by the evidence that among dealers in cattle in that vicinity the term yearling had a well-defined meaning, viz., cattle from ten months to eighteen months of age. It must be held that the parties contracted with reference to this term as generally understood."

4. **Yearly Interest.**—In *Goslings v. Blake*, 23 Q. B. D. 324, reversing 22 Q. B. D. 153, and distinguishing *Bebb v. Bunny*, 1 Kay & J. 216, it was held that interest upon a loan by a banker to a customer for a period of less than a year is not within the words "any yearly interest of money or any annuity or other annual payment," in 16 & 17 Vict., c. 34, § 40, and therefore the customer is not entitled to deduct income tax from such interest.

**Yearly Lease.**—See *Doe v. Wilson*, 5 B. & Ald. 363, 7 E. C. L. 137.

**Yearly Payments—Lease.**—See *Worcester's Case*, 6 Coke 37; *Mountjoye's Case*, 5 Coke 36; *Doe v. Lock*, 2 Ad. & El. 724, 29 E. C. L. 197; *Doe v. Morse*, 4 Tyrw. 185. See also the title **LANDLORD AND TENANT**, vol. 18, p. 270.

**Yearly Proportions.**—A paper was as follows: "For value received I promise to pay to James McQueen and Jacob McQueen, or their order, the sum of 102l. 15s. c'y, to be paid in yearly proportions." It was held that the effect of this was to give two years for payment. *McQueen v. McQueen*, 9 U. C. Q. B. 536.

5. **Yellow Butter.**—A statute made it an offense to sell oleomargarine colored to imitate yellow butter. In construing this provision the court, in *People v. Phillips*, 131 Mich. 395, said: "Yellow butter I define to be any

**YIELD.** — See note 1.

**YIELDING AND PAYING.** — These are the words used at the beginning of the *reddendum* clause of a lease in reference to the rent payable under the lease. No special form of words is, however, essential.<sup>2</sup>

**YOKE.** — See the title EXEMPTIONS (FROM EXECUTION) vol. 12, p. 126.

**YOUNG.** — See note 3.

**YOUNGER — YOUNGEST.** — See note 4.

**YOUR ACCOUNT.** — See note 5.

**YOUTHS.** — See note 6.

**ZINC.** — See note 7.

butter produced from pure, unadulterated milk or cream of the same having a yellow color. It is necessary, in order for the jury to convict the respondent, for you to find beyond all reasonable doubt that the article in the package sold was colored in imitation of *yellow butter* produced from pure, unadulterated milk or cream of the same." See also OLEOMARGARINE, vol. 21, p. 916, and see the title ADULTERATION, vol. 1, p. 740.

1. **Yield.** — In *Struthers v. Clark*, 30 Pa. St. 213, it was said that the word *yield* implies a natural accretion from the business of a company.

2. **Yielding and Paying.** — Abbott's L. Dict. See generally the title LEASES, vol. 18, p. 593.

The words *yielding* and *paying* make an implied covenant only, and the lessee is not liable, therefore, for rent after he has assigned his term. *Kimpton v. Walker*, 9 Vt. 191.

3. **Young Lobsters.** — See the title FISH AND FISHERIES, vol. 13, p. 572. And see *Thompson v. Smith*, 79 Me. 160.

4. **Younger Branches.** — See *Doe v. Fleming*, 2 C. M. & R. 638.

**Younger Children.** — See *In re Prytherch*, 42 Ch. D. 590.

In *Beale v. Beale*, 1 P. Wms. 244, it was held that in a family settlement where primogeniture prevails a daughter, though first born, was within the term *younger* children, if there was a son. See also *Heneage v. Hunloke*, 2 Atk. 457.

**Younger Child — Eldest.** — An only surviving *younger* child may take under a bequest to *younger* children; and the second child having become the eldest by the death of the first is excluded. *Lincoln v. Pelham*, 10 Ves. Jr. 166.

**Youngest Child.** — The *youngest* child in a will was held to mean *youngest* child at the time of the testator's decease, and not at the time of the execution of the will. *Matter of Sands*, 1 Connolly (N. Y.) 259.

A testator, who died leaving five minor children, devised his real estate in trust to collect the rents and profits and apply them to the support of his widow, and the support and education of his children, with power in the trustee to sell a designed part. The will containing these clauses: "It is my desire that no division of the balance of my real estate shall be made amongst my children until the *youngest* child shall become of lawful age.

\* \* \* When my *youngest* child shall become of lawful age all the rest and residue of my real and personal property, wheresoever situate, shall be equally divided between my said wife and our children, share and share alike," etc. It was held that by the words *youngest* child was meant not the *youngest* child which shall live to majority, but the *youngest* child living when the will took effect at the death of the testator; that the suspension of the power of alienation depended on the minority of such child, and would terminate on such child coming of age, or at his death before coming of age, and that such suspension was valid. *Simpson v. Cook*, 24 Minn. 180.

**Youngest Grandchild.** — So *youngest* grandchild in a trust has been held to mean the *youngest* grandchild then living, to avoid an unlawful suspension of the power of alienation. *Roe v. Vingut*, 117 N. Y. 204.

**Youngest Child — Eldest Child.** — A bequest was to the *youngest* child of A if she should have any child or children within a certain period. It was held that the eldest child of A, being the only one born within the period described, was the only one entitled to take under this bequest. *Emery v. England*, 3 Ves. Jr. 232.

5. **Your Account.** — Where a guaranty was in the form of a letter from the defendant to the plaintiff, thus: "As there was no time set for the payment of *your account*, and Mr. J. thought it would be an accommodation to him to have you wait until, etc.; if that will answer your purpose I will be surety for the payment," etc., it was held that the words *your account* were ambiguous, and that parol evidence was admissible for the purpose of applying them to an account of J., not existing when the letter was written, but contracted afterwards on the faith of it. *Walrath v. Thompson*, 4 Hill (N. Y.) 200.

6. **Youths.** — When a fund is left in trust to support a school for *youths*, the proceeds may be spent to support a school for both sexes, and the trustees are not bound to carry on the school for boys alone. *Nelson v. Cushing*, 2 Cush. (Mass.) 519.

7. **Zinc.** — See *Lehigh Zinc, etc., Co. v. New Jersey Zinc, etc., Co.*, 55 N. J. L. 350; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322, 15 N. J. Eq. 419.



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